Neutral Citation Number: [2023] EWHC 855 (Ch)

Case No: BL-2020-000415

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

Rolls Building,
7 Rolls Building, Fetter Lane
London EC4A 1NL

Date: 24/04/2023

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

(1) CONNOISSEUR DEVELOPMENTS LIMITED **(2) ANTROS KOUMIS** **(3) CHRISTOPHER KOUMIS**	**Claimants**
- and –	
ANTONAKIS KOUMIS **(sued personally and as the Executor of the Estate of Koumis Kyriacou Haji Tooulia Deceased)**	**Defendant**

- -
- -

Ms Elaine Palser (instructed by **Harold Benjamin**) for the **Claimants**
Ms Marilyn Kennedy-McGregor (instructed by **YVA Solicitors LLP**) for the **Defendant**

Hearing dates: 2 March (reading), 3-4 March, 16 March, 4 April 2022. Written closing submissions received 3, 9, 13 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A 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.

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HH JUDGE DAVIS-WHITE KC (SITTING AS A JUDGE OF THE CHANCERY DIVISION)

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 24 April 2023

HH Judge Davis-White KC :

Introduction

1. This case involves consideration of a joint venture agreement dated 4 August 2006 (the "JVA") and made between members of the Koumis family and the First Claimant, Connoisseur Developments Limited (the "Company"). It concerns development of a property at 16-18 Hazelwood Lane, Palmers Green, London N13 5EX.

2. For convenience, and meaning no disrespect, I use the anglicised given names of the family members as they were used by the family and before me.

3. The Second Claimant, Antros Koumis ("Andy") (born in July 1965) and the Third Claimant, Christopher Koumis ("Chris") (born in January 1969) are brothers. The First Claimant, Connoisseur Developments Limited (the "Company"), is effectively their company, of which they are shareholders and directors. It was the developer in relation to the development.

4. The Third Defendant, Antonakis Koumis ("Tony") (born in December 1963), is another brother. Each of them gave evidence before me.

5. The remaining siblings are Evangelia Evangelou ("Angela") (born in December 1960), Kyriacon Koumis ("Jack") (born in November 1962) and Themos Koumis Haji Tooulia ("James") (born in August 1971). Angela also gave evidence before me. I refer to the children collectively as "the Siblings". In age, from oldest to youngest, the Siblings are therefore Angela, Jack, Tony, Andy, Chris and James.

6. The parents of the Siblings, now sadly deceased, were Koumis Kyriacou Haji Tooulia, also known as Koumis Kyriacou, ("Koumis") and Florentzou Koumis Kyriacou Haji Tooulia, also known as Flora Kyriacou ("Flora") (together "the Parents"). Flora was born in October 1931 and died on 15 July 2010. Koumis was born in April 1929 and died on 26 February 2014. They were married in January 1960.

7. The last will and testament of Koumis is dated 18 July 2013. By that will he appointed Tony as his executor and left him, as beneficiary, all of his estate, save for £5. The £5 was to be shared equally between Koumis' other children, Angela, Jack, Andy, Chris and James. A grant of probate was made to Tony by grant dated 22 May 2017. This followed contentious probate proceedings between the Siblings (the "Probate Proceedings"). At trial a case of undue influence of Koumis by Tony was advanced by Tony's siblings. Originally all five Siblings other than Tony were the claimants. Later some of them became defendants due to a conflict of interest between them and Andy and Chris. All five Siblings however maintained the case of undue influence. That case failed (see judgment of HH Judge Cooke dated 8 November 2016, [2016] EWHC 2598 (Ch)).

8. As I have said, the JVA was for the development of a property primarily situated at 16-18 Hazelwood Lane, Palmers Green, London N13 5EX (the "Main Property"). The Main Property, although forming one physical unit, is registered under two titles: No 16 (Title no. MX446550) and No 18 (Title No. MX430679).

9. The Main Property, with the then buildings situate upon it, had previously been run as a banqueting suite. At the time of the JVA, it was owned by the Parents. In addition, the development also involved two further parcels of land being brought into the overall development so that they formed one property. That land was land to the rear of 9, Park Avenue, Palmers Green, London N13 5PG and land to the rear of 11, Park Avenue, Palmers Green, London N13 5PG (the "Leasehold Land"), the land to the rear of No. 9 being the land with that description in the JVA. The land to the rear of No. 11 was subsequently brought into the development. These two additional parcels of land were, at the relevant times, owned by Andy and Chris as holders of long leases, although the freehold was later acquired by at least one of them.

10. The development involved the building of a small block of flats on the Main Property, initially nine in number as provided for by the JVA, though this later increased to 11, as I shall go on to explain. Unless the context otherwise requires references in this judgment to "Flats" or a "Flat" is to a flat in the development as proposed or completed. The Leasehold Land was required to enable the development as finalised to proceed and involved the Leasehold Land being used to create a garden, a ground floor terrace for one of the flats (Flat 2) and a general storage and bicycle storage area. The Leasehold Land, in particular, also brought down the occupation density figure by reference to the overall area of land so that planning approval was made easier and/or possible.

11. As built, the Flats are comprised within a building that is in part a two-storey building and in part a three-storey building. Once completed the development came to be known as "Hazeltree Lodge".

12. The parties to the JVA were (1) Koumis and Flora (as "the Freeholder"); (2) the First Defendant, Connoisseur Developments Limited, (the "Company") as the "Developer"; (3) Chris (as the "First Party") and Andy (as the "Second Party"). The JVA was drawn up by Mr Savvas Panayiodou, a solicitor at Southgate and Co solicitors. He was one of two witnesses to the signatures on the JVA. The other was his secretary. Mr Panayiodou gave evidence before me.

13. The evidence before me was that the main or a main reason why Koumis decided to enter into a JVA was to minimise disputes between the Siblings in the event of his and Flora's deaths. Unfortunately, disputes between him, Chris and Andy about the development started before his death.

14. Chris and Andy are, and have at all material times been, the shareholders and directors of the Company. The Company was incorporated on 14 October 2002.

15. The clauses in the JVA are unnumbered. To assist in the trial, clause numbers were allocated to the clauses in manuscript, and I have used those manuscript numbers in this judgment. In broad terms, and by way of summary, the JVA contains (among others) the following terms:

(1) The parties (described as the "Venturers") had agreed to enter into the JVA to establish a joint venture between them for the purposes of carrying out the "Development", defined as the demolition of the building on the Main Property and the building of a block of 9 flats in accordance with a planning permission as referred to (clause 2.1).

(2) The freeholder, Koumis and Flora, would take out the "Loan" defined as being a £600,000 loan from National Westminster Bank plc ("NatWest" or the "Bank") secured against the Main Property by a mortgage (the "Mortgage") and then lend the same to the Company (clauses 2.1 (i) and (ii)). The loan in fact seems to have come through an associated bank, Royal Bank of Scotland plc. I refer to the bank as the "Bank" or "RBS".

(3) Andy and Chris would provide the Leasehold Land (at this stage being solely land to the rear of no 9, Park Avenue) and pay one-ninth of the Development expenditure (as defined) (clauses 2.1(iii), (iv)).

(4) The Development would be carried out and (subject to the below) long leases be granted of each of the Flats, which would be disposed of. The long leases would be of "no less than 95 years". Relevant costs/liabilities would be discharged (being the Mortgage (and therefore the £600,000 Loan), the Development expenditure, the Sale expenditure and the Tax expenditure (all as defined)) (clause 2.1(v)-(ix); 3.1-3.5).

(5) Having discharged the relevant sums, from the remaining net profit, the Company would pay Flora and Koumis £800,000 in consideration of the Property. Such sum could in part be satisfied by a transfer to them of a long lease of one of the Flats created by the Development, the value of which would be deducted from the £800,000 (clauses 2.1(x) and 3.6).

(6) One Flat would be transferred to each of Andy and Chris in consideration of their having paid one-ninth of the Development expenses and having contributed the adjacent Leasehold Land to the development (clause 3.7).

(7) Any sums remaining from net profit, having paid the £800,000 to Flora and Koumis, would belong to the Company (clauses 2.1(xii) and 3.8).

(8) Andy and Chris would provide an indemnity to Flora and Koumis regarding repayment of the Loan and the payment of the £800,000 (clause 3.9).

(9) As regards the development itself, the Company was to have "sole control of the management of the Joint Venture and shall determine the policy of the Joint Venture and make decisions on matters of principle in relation to the Joint Venture." (clause 4.1). Clause 4.2 sets out a non-exhaustive list of such matters of principle.

(10) Clause 5 deals with a duty of good faith (clause 5.1); a duty of disclosure (clause 5.2) and a duty of confidentiality (clause 5.3) as between the parties.

(11) Clause 6 deals with the detail of release of the funding to the Company.

(12) Clause 7 deals with the form of leases to be granted. Although the JVA refers to a form of lease in Schedule 2, there was never a Schedule 2 or draft form of lease.

(13) Clause 8 deals with the sale of the Flats.

(14) Clause 9 is described as dealing with the position in the event of death or incapacity of any party. The substance of the clause deals with the event of death of an individual party and in broad terms gives a discretion to the personal representatives to continue with the JVA or have the deceased's interest bought out.

(15) Clause 10 is a non-alienation clause.

(16) Clause 11 is an expert determination clause.

(17) Clause 12 provides for a buy-out if a party wishes to alienate its interest.

(18) Clause 13 provides for a restriction of rights otherwise conferred on non-parties under the Contracts (Rights of Third Parties) Act 1999.

(19) Clause 14 is a "non-partnership" clause.

16. It is fair to say that the JVA is in a fairly short form (although some 8 pages long) and that the detail is fairly short. Nevertheless, the broad outline of the JVA is clear, which is that the Main Property, with the Leasehold Property, is to be developed to create a block with 9 Flats.

(1) The Main Property is to be provided by the Parents and, at the end of the day, they receive £800,000 consideration in respect of it. There is a dispute as to whether the consideration of £800,000 was, under the JVA, consideration for the transfer of ownership of the Main Property (as the Claimants assert) or consideration for what was described to me as the "use" of the Main Property during and for the purposes of the development (as Tony asserts).

(2) The parents also take out a Bank loan to fund, or help fund, the development costs. That money is on-lent to the Company which ultimately services and repays the Bank loan with an indemnity provided by Chris and Andy in favour of the Parents as regards the relevant Bank liabilities.

(3) The Company however controls the detail of and the carrying out of the development. There is a dispute as to whether or not the rights under the JVA were such as to enable the Company to change the development so that (as happened) it became a development of 11 Flats rather than 9 Flats and/or to delay immediate sale of Flats because of market conditions.

17. To understand some of the disputes arising in relation to the JVA, it is helpful to set out some of the main points that arose. First, planning permission had only been granted for 9 Flats. The claimants decided to build 11 Flats and to seek planning permission retrospectively. This was apparently under the belief that the Flats could be accommodated in what would have been roof space under the

existing roof line for which there was planning permission. Unfortunately, the definitive approved planning permission with plans attached contained in the Council's records became lost. There was a dispute between the planning authority, Enfield Council, as to the roofline for which permission had been granted. Retrospective planning permission was refused, and a planning enforcement notice issued. Appeals in relation to these matters took some years and ultimately went to the Court of Appeal. Here the Council was finally vindicated. However, a further, separate planning application, was made encompassing the actual roofline and the 11 Flats as constructed. That application was ultimately successful. As I have said, one of the disputes (of law) is whether the JVA entitled the claimants to take the course of building 11 rather than 9 flats. A related dispute is as to whether, in any event, Flora and Koumis agreed to this course.

18. The absence of planning permission, and, say the claimants, the state of the market following the property crash from late 2008 onwards, made a sale of the Flats (by way of long leaseholders) not possible and/or inadvisable. The Claimants therefore rented out some flats on short term tenancies. Two flats were rented out in the name of Koumis and he received the rents for them for a period. However, the Claimants stopped him receiving the rents when they perceived him to be in breach of the JVA, in not helping refinance the Loan and/or not agreeing with the Bank extensions to the Loan with the result that the Loan fell into default and default interest became payable. There is a dispute as to what agreement was reached in this respect. First, whether the payments of rent to Koumis were to be treated as an on-account payment in respect of the £800,000 due as consideration for the freehold of the Main Property under the JVA (as the Claimants assert) or simply compensation for the delay in receipt of the £800,000 by reason of the failure to sell Flats generally (as Tony asserts). Secondly, whether the Claimants were entitled to cause the payments to cease.

19. Further, the Claimants assert (in summary) that, in breach of the JVA, Koumis failed (a) to agree to assist in refinancing the Bank loan at a more economic rate, in particular by refusing to grant long leases of the Flats to the Company, Andy and Chris which could be mortgaged pending sale and/or (b) to sign Bank loan renewal documentation, resulting in the Bank charging higher rates of interest and (c) to sign a s106 planning agreement, thereby preventing the unconditional planning permission coming into being and delaying the sale of the Flats, all of which matters, it is said, have caused loss to the Claimants.

20. The family is no stranger to serious family disputes and family litigation. These occurred both during Koumis' lifetime and after he died. Indeed, prior to his death, Koumis was already embroiled in a dispute with Andy and Chris with regard to the JVA.

21. Other "fallings out" between members of the family that have been mentioned at various times in evidence in these proceedings or the Probate Proceedings include (but this list is not exhaustive) fallings out between Andy and Jack in about 1990; between Andy and Chris, on the one hand, and the Parents, on the other, in about January 1998; between Jack and James and their parents in about 2004, particularly following the sending of "no-holds barred letters" from James and

Jack to their parents, the letter from James accusing them of being unworthy parents and grandparents; between (at the least) Jack and Angela in about 2012 over the administration of Flora's estate in Cyprus; Cypriot proceedings regarding Flora's estate in the Limassol District Court between Chris and Andy on the one hand and Tony on the other; between Chris and his father in 2012; between Andy and his father at the start of 2013; between Jack and Tony's wife; between Tony and his parents; between Tony and Angela (arising from Tony assaulting Angela in January 2014 with a resulting conviction in September 2015). These "fallings out" were serious. They often resulted in absence of further communications between the persons involved (or minimal communications) for some years. Further detail is set out in the judgment of HHJ Cooke in the Probate Proceedings.

22. Following Koumis' death, a claim was commenced against Tony by the remaining Siblings seeking an order pronouncing against the last will on the grounds of undue influence and want of knowledge and approval.

23. On 1 October 2014, the Claimants in the Probate Proceedings issued an application seeking the appointment of an administrator to the estate of Koumis on the basis that the main asset within his estate was his interest in the joint venture and that that interest, or the value of it, was in jeopardy by reason of a failure to proceed with the development.

24. On 22 October 2014, a Ms Jane Maitland a member of Freeths LLP, was appointed administrator of the estate of Koumis with a mandate to bring the joint venture to a conclusion.

25. Subsequently, a dispute arose between Chris and Andy on the one hand and Angela, Jack and James on the other. The latter three raised a case that Koumis was entitled to all the rents from all of the Flats that had been let on short term tenancies because he was the freeholder. They applied to vary the terms of Ms Maitland's appointment and powers to encompass such rents. This attempt failed but resulted in them ceasing to be claimants in the Probate Proceedings and instead becoming defendants due to a conflict of interest.

26. Ms Maitland required a payment of £800,000 by the Company in order to bring about the transfer of the Main Property to the Company. That transfer of the freehold was as provided for by her terms of appointment. The £800,000 was paid in three instalments, the last being made on 16 February 2017. On 19 July 2018, Ms Maitland transferred the Main Property to the Company pursuant to the JVA and the order appointing her.

27. Meanwhile, the main probate claim had proceeded to trial before HH Judge Cooke. Judgment was given on 18 November 2016. Tony successfully resisted the claim. Tony then obtained a grant of probate in respect of Koumis' estate on 25 May 2017. That grant excluded certain matters falling under Ms Maitland's grant.

28. On 30 October 2019, Ms Maitland renounced the grant of probate made to her and transferred the balance of the funds that she then held (after deduction of certain tax and expenses) to Tony, as executor, in about December 2019.

29. On 3 March 2020, the claim form was issued in the current proceedings. A defence and counterclaim was filed and served on 26 October 2020. A reply and defence to counterclaim was filed and served on 12 November 2020.

Representation before me

30. Ms Palser of Counsel represented the Claimants. Ms Kennedy-McGregor of Counsel represented the Defendant. I am grateful to both of them for their helpful and full submissions, both written and oral.

The claims in outline

31. The Claimants claim a sum of just under £337,000 plus interest for alleged breaches of the JVA and/or breach of an implied duty of good faith and/or breaches of fiduciary duty and/or in respect of an over-payment regarding the £800,000 price for the Main Property to be paid under the JVA to Flora and Koumis.

32. The factual matters said to amount to relevant breaches of contractual and/or other duties can be summarised as being:

    (1) A refusal by Koumis to agree to grant any (long) leases of Flats when requested by the claimants to do so from about April 2010 onwards;

    (2) A refusal by Koumis to refinance from 2010 onwards;

    (3) A refusal by Koumis to sign bank loan renewals after 1 March 2013;

    (4) A refusal by Koumis to sign the s106 planning agreement from about January 2014. Entry into this agreement was a condition of the grant of planning permission. The s106 agreement was a unilateral undertaking under s106 of the Town and Country Planning Act 1990 (in effect) to Enfield Borough Council imposing obligations on the owners to pay an affordable housing contribution and carbon offset contribution and to maintain amenity land in perpetuity;

    (5) An overpayment in respect of the purchase by the Company of the Main Property in that there was a later agreement (in about 2009), that Flats would be rented out and that the Parents would receive the rental income from Flats 7 and 8 towards the £800,000 due under the JVA. In addition to receiving such rents, the Parents (by Koumis' estate) received full payment of £800,000 so that there was an alleged overpayment. The amount of the overpayment is calculated as being £131,491.

33. As regards quantum, the claimants seek a total of £336,939.72 plus interest. Leaving aside the alleged overpayment of approximately £131,500 (though the Reply and Defence to Counterclaim refers to the sum being £129,116: see paragraph 64(a)), the remaining sum of just under £205,450 is made up as follows and relates to all the alleged matters of complaint regarding breach:

    (1) Loan interest and charges

	because of inability to refinance or to sell leases of Flats	£72,000.00
(2)	Default loan interest as result of failure to sign Loan Agreements to cover the period after 1.3.14	£40,000.00
(3)	Lost management time in dealing with breaches	£23,400.00
(4)	Legal costs of appointing Ms Maitland	£31,428.72
(5)	Flat 6 sale costs	£ 420.00
(6)	Legal costs of dealing with breaches	£38,200.00
		£205,448.72

34. So far as the counterclaim is concerned, the Defendant claims £109,650 plus interest. The counterclaim is for rent received on Flats 7 and 8 in the sum of £109,650 (plus interest) and compound interest on the purchase price of £800,000 from September 2008 to 24 December 2019 (less rent received in respect of flats 7 and 8). There is also a claim for transfer of the freehold to the Main Property back to Koumis' estate on the basis that this was what was agreed in the JVA. The defendant says that Koumis and Flora were intended to retain the freehold and therefore to get the benefit of the ground rents from the Flats. A pleaded claim for damages for stress and anxiety was not pursued before me.

The witnesses

(a) General

35. As a general matter I treat the oral evidence, particularly of members of the family, with some considerable caution. As, for example, Mr Evangelou said:

> "*I have written this statement..without looking at any documents. I remember the events well about which I am writing, <u>because I was involved in the previous probate action and gave a witness statement and I have discussed these matters very many times with different members of the family since they occurred</u>*". (emphasis supplied).

36. The inevitable fallibility of memories over time and rehearsal of their evidence over the years, plus the process of discussing evidence or a least the facts with others, both in preparing evidence and in being cross-examined in the probate trial, all weakens the reliability of such evidence.

37. In the case of family members those factors have been strengthened by the inter-family discussions and the personal animosities and self-interests involved. Accordingly, I treat all the oral evidence with care and primarily test it against the contemporaneous documents where available as well as the inherent probabilities.

38. In this respect I have well in mind the body of case law about the court's approach to evidence. As regards the difficulty of assessing the "demeanour" of a witness as a guide to truth and accuracy and the effect on memory of a continued

re-consideration of a case and of documents over time, I would also refer briefly to the convenient summary set out in the judgment of Warby J (as he then was) in *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at paragraphs 39 to 41 where he said (with emphasis removed, and inserting sub-paragraph numbers for bullets in the extracts from the judgment in the *Kimathi* case, referred to below):

> *"[39] There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm) (Leggatt J, as he then was) and two decisions of Mostyn J: Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57 and Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136. Key aspects of this learning were distilled by Stewart J in Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB) at [96]:*
>
> *"i) Gestmin:*
>
> *(1) We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.*
>
> *(2) Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.*
>
> *(3) Events can come to be recalled as memories which did not happen at all or which happened to somebody else.*
>
> *(4) The process of civil litigation itself subjects the memories of witnesses to powerful biases.*
>
> *(5) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.*
>
> *(6) The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has*

confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) Lachaux:

(7) Mostyn J cited extensively from Gestmin and referred to two passages in earlier authorities.[45] I extract from those citations, and from Mostyn J's judgment, the following:-

(8) "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

(9) "…I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"

(10) Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) Carmarthenshire County Council:

(11) The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness. However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of Gestmin, Mostyn J said: "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

[45] The dissenting speech of Lord Pearce in Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1, 57."

[40] This is not all new thinking, as the dates of the cases cited in the footnote make clear. Armagas v Mundogas, otherwise known as The Ocean

> *Frost, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of The Business of Judging) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all.*
>
> *[41] A recent illustration of these principles at work is the decision of the High Court of Australia in Pell v The Queen [2020] HCA 12. That was a criminal case in which, exceptionally, on appeal from a jury trial, the Supreme Court of Victoria viewed video recordings of the evidence given at trial, as well as reading transcripts and visiting the Cathedral where the offences were said to have been committed. Having done so, the Supreme Court assessed the complainant's credibility. As the High Court put it at [47], "their Honours' subjective assessment, that A was a compellingly truthful witness, drove their analysis of the consistency and cogency of his evidence ..." The Supreme Court was however divided on the point, and the High Court observed that this "may be thought to underscore the highly subjective nature of demeanour-based judgments": [49]. The High Court allowed the appeal and quashed Cardinal Pell's convictions, on the basis that, assuming the witness's evidence to have been assessed by the jury as "thoroughly credible and reliable", nonetheless the objective facts "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilt": [119]."*

39. The question of the significance of the demeanour of a witness has also been addressed by Leggatt LJ (as he then was) in *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391:-

> *"[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval: "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help." "Discretion" (1973) 9 Irish Jurist (New Series) 1, 10, quoted in Devlin, The Judge (1979) p63 and Bingham, "The Judge as Juror: The Judicial*

Determination of Factual Issues" (1985) 38 Current Legal Problems 1 (reprinted in Bingham, The Business of Judging p9).

……

[39] To the contrary, empirical studies confirm that the distinguished judges from whom I have quoted were right to distrust inferences based on demeanour. The consistent findings of psychological research have been summarised in an American law journal as follows: "Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments." OG Wellborn, "Demeanor" (1991) 76 Cornell LR 1075. See further Law Commission Report No 245 (1997) "Evidence in Criminal Proceedings", paras 3.9–3.12. While the studies mentioned involved ordinary people, there is no reason to suppose that judges have any extraordinary power of perception which other people lack in this respect.

[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.

[41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including

> *evidence of what the witness has said on other occasions) and with known or probable facts.*"

40. These more recent iterations of judicial experience and scientific learning provide much of the rationale underlying the new regime governing witness statements, and best practice in relation to their preparation, in the Business and Property Courts (as from 6 April 2021). As paragraph 1.3 of the Appendix to Practice Direction 57AC sets out:

> "*1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:*
>
> *(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but*
> *(2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore*
> *(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."*

41. One particular feature of the evidence that I should mention is that the evidence of many family members turned upon what they say they were told by others (primarily Koumis and Flora). However, it is far from clear whether they are remembering what Koumis said at about the relevant time that relevant events took place or whether they are remembering things that he told them later, when battle lines had been drawn over various family falling outs and disputes. Further, though I am satisfied that they remembered being told things there is considerable doubt that there is an accurate recollection of precisely what they were told.

42. Further, both the Claimants and the Defendant took the line at various times that particular witnesses were not so much in touch with Koumis at various times, as either they said or would need to have been such that they would not have been told various things by him and that accordingly they should be disbelieved on one or more points. I reject this approach. First, it is simply impossible at this length of time and on the limited evidence before me to reach a determination as to how often individuals did nor did not see Koumis and/or Flora. Secondly, what a person may impart to another would, it seems to me, depend more on the relationship between the persons and/or the nature of the persons rather than necessarily how often the persons saw one another.

43. Reliance was also placed on evidence about a number of issues which were, at best, tangentially relevant to the substantive issues that I have to decide. As regards these matters, it was said that one or more witnesses (mainly Andy), was clearly not telling the truth and that, as regards Andy, I could not rely on his evidence at all. A good example of this was evidence about the loss of the plan from the council's planning file, whether Andy's evidence about this over time had been consistent both in terms of referring to a file rather than a plan and the timeline he relied on as well as whether he was right that a particular councillor had been hostile to the relevant application(s). I was also referred to evidence

from Mr Backory about what searches a new architect would have undertaken though I suspect that such evidence really amounts to expert evidence for which there was no permission.

44. Another example centred around the circumstances in which planning applications had been made (in 2002 and 2011) in which the Company was certified to be the sole owner of the land at the time. Andy's evidence was to the effect that he did not know how this certification had happened, it was possible that the planning agent had made an assumption or had been told the position by the Parents. This evidence was said to be knowingly false on the basis that it is "very improbable" that two separate planning agents nine years apart had been prepared to fill in the certification without asking their client who owned the property. On the limited evidence before me, I am unable to find Andy's oral evidence to be untrue and am also not prepared to infer that he lied to the planning agents at the time.

45. I have considered carefully the very detailed submissions made about the truthfulness and reliability of witnesses on all the issues raised before me. Unless I have referred to them in this judgment I did not find that their resolution (and in some cases I could not resolve the relevant issue going o credibility) would really assist me on the issues with which I have to deal and I do not propose to go through them each one by one. In summary, either the evidence was not clear cut and/or the issue was so tangential that it did not assist on the question of the truth and reliability of the witness on the issues that I do have to decide. This is particularly so given the general position that I have taken, which is that in any event the evidence of family members is to be treated with great caution and, on the whole, tested against the contemporaneous documents and other independent evidence and the inherent probabilities.

(b) Evidence and findings in the Probate Proceedings

46. Although accepting that findings in the probate trial were not binding Ms Kennedy McGregor submitted that they were "persuasive". I also note, however, that Ms Kennedy-McGregor was somewhat selective in the findings that she relied on as "persuasive" and those which she challenged. For example, in relation to the JVA, HH Judge Cooke said (see paragraph 12 of his judgment) that (as I find) the "*agreement was drawn up by a solicitor introduced by Andy and Chris but who acted for all parties*". Nevertheless a great deal of cross-examination of that solicitor before me focussed on the identity of the persons for whom he acted. Ultimately I find that nothing turns on this point in any event.

47. Ms Kennedy-McGregor also relied on evidence given in that trial by witnesses who were not called to give evidence before me and in relation to whom I did not hear cross-examination and in relation to whose evidence in their witness statement I could not readily identify whether such evidence needed to be challenged in the Probate Proceedings or not. I was not shown any relevant hearsay notices for the current proceedings. I place very limited reliance on such evidence.

48. In the Probate Proceedings, the issue was one of alleged undue influence by Tony and one of the matters relied upon by the Siblings (other than Tony) was a case

that they had good relations with their father such that he would not have wished to disinherit them unless he had been unduly influenced by Tony. Thus, HH Judge Cooke said in his judgment:

> *"[28] Many matters were mentioned as constituting differences between the deceased and his children. A great deal of evidence was devoted to them. In many respects the claimants and co-defendants disagree with what is said about them, and maintain that their father was not estranged from them and would not have freely decided to disinherit them. It should be inferred, they say, that Tony has influenced his father so that he either cut the others out of his will despite not being estranged from them, or so that he came to think, wrongly that they had behaved badly towards him."*

49. As I have said, before me issues were again raised about relations between individuals (including witnesses who were not Siblings) and Koumis. With even less evidence before me, I should record that the flavour of the history raised before me largely reflects that dealt with by Judge Cooke at paragraphs [30] to [43] of his judgment, though not all the individual matters/incidents that he refers to there were raised before me.

50. As regards Andy and Chris, Ms Kennedy-McGregor, understandably, placed great reliance on the finding of HH Judge Cooke in paragraph 43 of his judgment that:

> " *One way or the other, they are prepared to present the facts as they see will suit the case they wish to advance."*

This was said directly in relation to the dispute in Cyprus regarding evidence that I did not hear about from any witness.

51. Whilst for the reasons that I have given I have said that I will treat the evidence of all family members who gave evidence before me with caution, I do not consider that I should simply apply HH Judge Cooke's assessment of Andy and Chris, made in relation to evidence about the validity of Koumis' will, as an assessment I should apply automatically to their evidence before me in relation to the issue of the development and the JVA. Apart from anything else, I consider that I should remind myself (by way of analogy) (as I have) of the direction usually given to juries in criminal cases as set out in the case of *Re Lucas* (1981) 73 Cr. App. R. 159, CA and now summarised in the Crown Court Compendium Part 1 (June 2022) at paragraph 16-3. In short, in the present context, even if Chris and Andy's evidence was untruthful in the Probate Proceedings, it does not automatically follow that I should assume (a) that they would lie before me on different issues to that of whether Koumis' will was induced by the undue influence of Tony and (b) that they have not learned a lesson from the Probate Proceedings, namely that it is better to tell the truth. At most therefore, I consider that HH Judge Cooke's finding reinforces the need for me to treat Andy and Chris's evidence with caution, a view that I would have taken independently.

52. Similar points to those I have already made arise with respect to evidence given by Andy in the probate proceedings.

(c) Andy

53. As regards Andy, his evidence was the main evidence for the Claimants and he was clearly the main individual running the development. I have already made a number of comments about points made about his evidence and I address further points in relation to specific topics. As a generality, as was the case with the other witnesses, I found that Andy was doing his best to assist the court in giving accurate evidence. Nevertheless, his evidence was considerably weakened by the factors I have mentioned: passage of time, frequent rehearsal of his position over the years and familial animosity.

(d) Chris

54. I found Chris to be a truthful witness who was open, in cross-examination, about the extent to which he played a secondary role to Andy in the carrying out and knowledge about the development. I deal later in this judgment in more detail with his evidence on the key aspects of evidence relevant to the issues before me.

(e) Angela Evangelou

55. Angela gave evidence for the Claimants. Her overall position was she had now "seen the light" and she had previously reached wrong judgments about the claimants. She said she had been led by Jack to make a witness statement seeking to stop the interim administrator doing her job and that the evidence she gave was "*mainly hearsay from Jack as* [she] *was not aware of the detailed terms and conditions"* negotiated between the Parents and Chris and Andy regarding the development. In his context I also note a long email dated 30 March 2015 from Angela to the then solicitors acting for Ms Maitland and challenging several aspects of the JVA itself (such as why under the JVA the Freeholder got paid last rather than immediately after the Bank). Similarly, she had provided a statement for the probate trial of 2016 which was also "*heavily influenced by Jack and full of what* [she now knows to be] *inaccuracies and incorrect versions of events*".

56. Although I consider that she was telling the court what she now genuinely believes to be the truth and (so far as relevant evidence is concerned) from her own knowledge I am not satisfied that I can safely rely upon her evidence on the central issues in the case and I disregard it save where it is backed up by independent evidence or the inherent probabilities.

57. Having said that, I reject the criticisms of her evidence based upon a submission that she was not in touch with her parents when she says that she was and therefore could not then have been told relevant matters by them (such as that they were content with 11 Flats being built, and with sales of Flats being delayed and the Flats being rented out instead). This submission depended on evidence given in the probate trial by a witness who did not give evidence before me and an assertion that Angela had not personally cross-examined that witness on the issue in circumstances where she was not a lawyer and I cannot sensibly judge

whether, in the context of the probate trial, the relevance or significance of the evidence and whether cross-examination was called for.

(f) Costas Georgiou

58. Mr Costas Georgiou also gave evidence for the Claimants. He is a property developer in his own right and was friends with Koumis and is friends with Chris and Andy. He was a founding member, and since 1992, a committee member of The Green Lanes Business Association, of which he has been Chairman since 1995. When giving evidence he was 74 years old. Fastening on his inability to remember detail in the witness box, as compared with the detail in his witness statement (particularly with regard to precise dates), Ms Kennedy McGregor's position was that the only explanation that fits the facts is that he was told what to write in his witness statement by Chris and Andy and that that is what he did and that he had no recollection of what had in fact happened. I reject this inference. It is necessary to allow for the pressures of hostile and fairly aggressive cross-examination. The fact that Mr Georgiou was somewhat hazy on precise dates in the witness box did not, in my judgment, detract from the overall substance of the evidence that he gave in his witness statement as amplified by cross-examination. (In his witness statement he was much more able to identify events by reference to years whereas in oral evidence he identified events more by reference to the occurrence of other events and he was by and large accurate). I considered his evidence to be truthful and fairly reliable.

(g) Sanjay Backory

59. Mr Sanjay Backory, who had worked as the quantity surveyor on the Development, gave evidence for the Claimants. His evidence was given remotely in circumstances where his father had fairly recently died. I take those circumstances into account in evaluating his evidence.

60. Much of his cross-examination focussed on costings and datelines. I found his evidence on these points to be of little assistance. However, he also gave evidence to the effect that the Parents had been in agreement that a further two Flats, over and above the nine for which planning permission had been granted, should be applied for and the two Flats, in effect, constructed.

61. As regards this it was submitted that his evidence was unsatisfactory for a number of reasons including that (a) he could not remember details of key matters within his remit (e.g. the amount of revised costs in a new tender document); (b) because in oral evidence he said he had referred to documents for the purpose of giving evidence but such documents were not identified in his witness statement. This matter arose because he was asked how he remembered the meetings with the Parents at which, he said, they agreed to the extra two Flats. It was also submitted that his, implied, suggestion that this detail would have been included on a contemporaneous A4 summary sheet of the project was unlikely; (c) because he was inconsistent in his oral evidence as to whether he "advised" that planning permission for the extra two Flats would be obtained.

62. I was asked to draw the inference (not put to the witness) that he was told what to write about meetings with the Parents by Andy and simply wrote what he was

asked to write. I am not prepared to draw that inference. I should add that no grounds were identified as to why he would be prepared to give false evidence in this manner.

63. I do not regard a lack of memory as to detailed costings to be inconsistent with a memory of meetings about a major change to the development and memory as to the persons present and whether they agreed. As regards a failure to refer in his witness statement to documents as having been used to refresh memory that is unfortunate but his evidence on this point did not cause me to conclude that he was lying. Although the point that the A4 document probably did not contain details of any agreement was a good one, I am not satisfied that looking at it did not trigger the relevant memories. As regards the alleged inconsistency about "advice" being given, that did not impinge on his general truthfulness or reliability as a witness. Further, it seemed to me that what he said was in fact consistent. He did not formally "advise" as to the likelihood of planning permission being obtained but may well informally have confirmed his experience that planning permission had been obtained in similar situations in the past. Put another way, he may have "advised" as to his experience but not formally given advice as to whether to apply and whether it would in fact succeed.

64. I have considered his evidence with other evidence in the case. I regard his relevant evidence as truthful and reliable and, notwithstanding some of the weaknesses identified, to be evidence that should be taken into account in favour of the Claimants' case.

(h) Tony

65. I consider Tony to be a truthful witness, doing his best to assist the court. His evidence was of limited relevance because, as he fairly accepted and asserted, he had fallen out with his Parents between about 2000 and 2005 and only became relevantly involved in his father's affairs regarding the JVA and the development from about Christmas 2012/January 2013. This meant that necessarily much of his evidence about what had happened in relation to the JVA and development prior to that date was primarily based on what he had been told. Where I found his evidence on the main issues before me to be unreliable, it is unclear whether the source of the unreliability was Koumis (in what he told Tony) or Tony (in inaccurately giving evidence of what he had been told).

66. As regards dates and timelines, and as was the case with many witnesses, he was, not surprisingly, not accurate in many respects (for example, he suggested construction works had commenced at the Main Property by the time 9B Park Avenue was purchased, but that purchase was in May 2004 and demolition at the Main Property was being dealt with in 2005, as the documents show). He also put forward inaccurate facts regarding how the banqueting suite business operated in the late 1990s.

67. I did find that he would tend impetuously to say things that were inconsistent with what he had said previously, a tendency I also noted in a transcript of a meeting with the Bank in July 2013. Thus, he suggested in his witness statement that an extra loan of £200,000 taken out with the Bank by Flora and Koumis (in

connection with the development) was taken out by them because they felt that they had no choice and it was needed to finish the 9 Flats for which planning permission was sought (in fact the extra loan documentation made clear on its face that it was to complete a development of eleven flats). However, in cross-examination he suggested that they did not know that they had borrowed the extra £200,000. As Ms Palser pointed out, if they did not know they had borrowed the money then how could they have thought that it was to be used to complete only nine rather than eleven Flats?

68. This last example simply confirms me in my view that I should treat his evidence, as the evidence of all family members, with extreme caution for the reasons that I have previously referred to, including (without limitation) the dangers flowing from repeated rehearsal of evidence and seriously entrenched positions and that much of his evidence was second hand.

(i) Evangelos Evangelou ("Vange")

69. Mr Evangelos Evangelou gave evidence for the Defendant. His mother was first cousin of Koumis and, as he said, "*in our family that made him my uncle*". I found his evidence to be unreliable. He stated various facts very positively in his witness statement but in cross-examination it emerged that in most cases what he said in his witness statement that was of immediate relevance as to what had been agreed between Chris and Andy and Koumis was what he said, in cross-examination, was based on what he had always been told by members of the family. A classic example was his assertion that at about the time of his niece's christening (Valentina) in April 2004, he found out that Chris and Andy had got planning permission to convert the restaurant into 7 Flats; that they would pay Koumis either £750,0000 or £800,000; Koumis would sign long leases on the Flats and Koumis would keep the freehold and get the ground rent. Although he said he "vividly" remembered being told about the alleged arrangement about the freehold retained by Koumis, he was totally unable to remember any details about being told the same.

70. Furthermore, his explanations about an earlier alleged proposal whereby in about 1999 he and Chris were going to buy the restaurant for £750,000, but he, Evangelos, would pay immediately only what he had (£70,000) for his half share of the purchase price made little sense. Among other things, first, he insisted that the business was a restaurant rather than, as the contemporaneous documents make clear, a banqueting centre. Secondly, it was unclear why Chris would pay half of £750,000 which, as well as being for the freehold, must have been for the business that he owned and was then running. Evangelos' unconvincing argument was that, despite the relevant accounts being in Chris' name and Chris paying rent to the Parents, the truth was that the Parents owned the business. Thirdly, it was unclear how and over what period Evangelos could possibly have paid the Parents the remaining balance of his share (£305,000) from his share of the profits of the business when Chris's accounts for a six-month period September 1998 to March 1999 show a profit of only £12,000. Assuming the profit could be assumed to be £24,000 a year and that Evangelos might receive one half, the payments would have had to have been over many years to clear the debt. His response to this was to suggest that the accounts were false and/or that

he, a lorry driver, could with Chris have massively increased the profits of the business, though he confirmed he had not even looked at the books and records for the business.

71. Another example of an unconvincing answer was that given in response to a question regarding his statement in his witness statement that he had been told by Tony's lawyers that Andy and Chris were saying that they had never received their inheritance from their mother but "*That's wrong. They all got their inheritance. They all go their inheritance from their mother*". When asked about this he said that that was what Koumis had told him.

72. Another example of somewhat glib evidence was his assertion that Koumis had lent (rather than given) Chris some £30,000 to buy a café. In cross-examination it emerged that his conclusion had been reached from having been told by Koumis that Koumis was "*just helping Chris*" and had therefore concluded that the transaction must have been a loan rather than a gift. I find difficulty in seeing how that conclusion could be reached from the phrase attributed to Koumis, which seems to me consistent with gift or loan. This is a useful example of how things told to a person can be developed over time by the person to whom they are told.

73. I also note that the evidence suggests that Vang had fallen out with Chris and Andy in about 2005, so it seems unlikely that they would have told him much about the development after that date, undermining his evidence that they had.

(j) Savvas Panayiodou

74. Mr Savvas Panayiodou, solicitor of Southgate & Co., involved in the drafting of the JVA gave evidence for the Defendants, having been the subject of a witness summons to do so. Over many years he had taken the consistent position in correspondence that his files had been destroyed and that he had no relevant detailed memory of events. He was examined in chief and was then subject to cross-examination and re-examination in the normal way. In my assessment he was an honest witness doing the best that he could to give accurate evidence. I consider that his evidence was reliable and truthful. As I explain, I do not consider that it took matters much further forward. Ms Kennedy McGregor made a number of points that his evidence was inconsistent with, and therefore undermined, that of Andy: for example, regarding the identify of the persons for whom Mr Panayiodou was acing and the circumstances as to how he became involved in the JVA and whether he had been involved in the Lodge Drive matter before or after the JVA. I am unable to draw any conclusions as sought in that respect.

The documents

75. The following history is either uncontroversial and/or taken from the documents (including the judgment of HH Judge Cooke in the Probate Proceedings). I make clear where I interpose specific further findings.

(1) The period prior to entry into the JVA

76. The Parents married in about 1959. Thereafter they owned and managed a number of fish and chip shops over a number of years.

77. In about 1982, the Parents purchased 1, Lodge Drive, a property in Palmers Green. The property was renovated and rented out for a period but eventually different members of the family moved in at various times between about 1984 and 1985.

78. In about 1985, the Parents sold a fish and chip shop in Leytonstone that they had owned and run for many years.

79. In 1985, the Parents purchased the Main Property which, at that time, had a restaurant situated on it called "The Pilgrim's Rest". Members of the family assisted in the running of this restaurant over a number of years.

80. In 1993, there was a fire at the Pilgrim's Rest. After refurbishment the Pilgrim's Rest was opened as a 240-seater banqueting suite. Given the particulars of sale prepared in about 2001, referred to later in this judgment, it appears that the banqueting suite was opened in about 1995.

(2) 1999

81. Accounts for "Mr C Koumis T/A Pilgrim Suite" for the period from 1 September 1998 to 31 March 1999, show a net profit of just over £12,300. The accounts were prepared by G Teoli & co accountants from books, records, information and explanations provided by Chris. Among other entries, the profit and loss account includes, as overheads, rent and rates of £14,606 and depreciation for plant and machinery of just over £1,000.

82. In his witness statement in the Probate Proceedings, Tony asserted that in about 2000, Andy and Chris took over the restaurant and paid Mum and Dad rent for it. My conclusion is that Tony is mistaken in the date and that Chris took over the business at least by late 1998, as confirmed by accounts in his name. I also find that the business was by then a banqueting suite, not a restaurant, as confirmed by later sale particulars.

(3) 2001

83. Particulars of sale for 16/18 Hazelwood Lane show the property to have been a Banqueting Hall, established since 1995, with a floor area of some 5,500 sq. ft. (510.95m^2) which was marketed in about 2001 at a price of £745,000.

84. An email from G Teoli & Co to Chris, dated 31 August 2001, refers to a telephone conversation earlier that morning and the writer's understanding that Chris's parents had agreed to sell the freehold premises known as the Pilgrim Suite at an agreed price of £625,000. The writer went on to suggest that the sale price be split as to £575,000 for the freehold property and £50,000 for the fixtures and fittings.

85. The solicitors' correspondence available to me suggests that the relevant sale went off because the buyers required a full entertainment licence whereas only an

occasional licence was held. Flora and Koumis were billed by their solicitors for the abortive costs by invoice dated 27 November 2001.

(4) 2002

86. On or about 9 December 2002, a planning application was submitted to Enfield Council for the redevelopment of the Main Property. This involved the erection of 2 x two-storey blocks to provide a total of 9 Flats (5 x two- bed flats and 4 x one-bed Flats).

(5) 2003

87. In about 2003, the Parents agreed with Andy and Chris that the latter would convert 1 Lodge Drive into 3 flats. Other than the sums allegedly paid by Chris and Andy for their flats (I did not hear detailed evidence on the point), I agree with the description of HH Judge Cooke:

> "[*11] In the early 2000s Chris and Andy suggested, and their parents agreed, that the house at Lodge Rd should be converted into 3 flats. The deceased and Flora would live in one on the ground floor and the two sons would take one of the others each. This work was done by the two sons but took a long time to complete but was done by about 2005. At that point Andy says he paid his parents £100,000 for his flat and Chris paid £80,000 for his. The flats are presumably worth much more on the open market*."

(6) 2004

88. On 24 March 2004, planning permission was granted for the buildings on the Main Property, involving the creation of 7 flats.

89. In May 2004, Chris became the registered proprietor of a lease granted in August 1983 for 125 years of 9B Park Avenue, Palmers Green.

90. On 15 June 2004, a planning application was submitted for the erection on the Main Property of a part single, part two, part three storey block to provide 8 Flats.

91. On 9 August 2004, the planning application for 8 Flats was refused.

(7) 2005

92. On 4 January 2005, planning permission for the development of the Main Property was sought to enable 9 Flats to be built.

93. In July 2005, the Company applied for planning permission to demolish the existing single storey brick buildings on the Main Property. The proposed contractor was Herts Demolition & Site Clearance. An undated invoice for £9,987.50 from that firm with a manuscript annotation "Paid Cash 03/08.05" suggests that the demolition works were completed at about that time.

94. Subject to conditions, planning permission for the buildings containing the 9 Flats was granted on 31 August 2005. The planning permission noted that the site now included 18 metres to the rear garden of 9 Park Avenue. (I did not hear evidence

on the point but the Reply and Defence to Counterclaim suggests that the size of the garden at 9 Park Avenue contributed to the development was some 170 square metres. This estimate appears to fit with the available plans, which suggest the extra area was some 8.75m x 18.75m or so (about 164 square metres)). It also noted that the height of the buildings with three storeys (9.5m) was only half a metre higher than the previous proposal, which had been approved, of two storeys with a height of 9m. This planning permission appears to be the "Planning Permission" as defined in the JVA, the "Development" being defined as the Demolition of the Property and building of nine flats in accordance with the planning permission granted by the London Borough (presumably of Enfield, though the JVA is silent on the identity of the London Borough in question).

95. Subsequently it became clear that although the permission sought for the 9 Flats was (with the exception of the part of the garden at the rear of 9 Park Avenue) on the same land as that to which the planning permission was refused on 9 August 2004, the Council was of the view that the plans showed a building approximately 3 metres larger than the site upon which it would be built.

96. More significantly, the approved plans had somehow become missing from the Council's planning file so that, by 2013, as recorded in the Officer's report:

> "*…there is a dispute between the applicant and the Council as to the precise form of approved development."*

Among other differences were shallow pitched roofs with eaves and ridge heights of 8 and 9.5 metres (the Council's plans) whereas the applicant's plans showed a steeper hipped roof to the rear block and a gabled roof to the front block with eaves and ridge heights of 7.8 and 10.5 metres respectively, as well as a flat roofed second floor rear projection of 3.4 metres deep by 8.4 metres wide that was not present on the council's plans.

97. As I shall come on to explain, the buildings on the Main Property, as built, were with 11 rather than 9 Flats. It was intended that retrospective planning permission for this increased number of Flats would be obtained. Matters were further complicated by the fact that at least part of the roof ridge height was built to the height to which Andy and Chris considered the planning permission extended. Eventually, in the context of proceedings regarding an enforcement notice and appeal against refusal of planning permission, it was determined that this height was higher than the height permitted by the planning permission. As I shall explain, the disputes with Enfield Council regarding planning permission effectively sterilised the ability to sell Flats on long leases.

(8) 2006

98. On 10 April 2006, Koumis and Flora, said to be carrying on business in partnership, entered into an agreement with RBS. The agreement was for a loan of up to £600,000 to assist in the development of Hazeltree Lodge. The location of the development was described as being 16-18 Hazelwood Lane and "Land to the rear" of that address (defined together as the Properties"). The loan could be drawn down in tranches. The loan had to be drawn in full by 31 March 2007,

failing which any undrawn part could be cancelled by the Bank. The agreement was subject to a number of conditions such as completion of satisfactory security and receipt by the Bank of a satisfactory professional valuation of the Properties. The loan was repayable on the earlier of 3 months after the last tranche was drawn down or the date of completion of the sale of the ninth unit sold.

99. In May 2006, a valuation report of the Property was prepared for the Royal Bank of Scotland by Mr Paul Aylott BSc MRICS IRRV of Glenny LLP. The report, dated 18 May 2006, referred to the site as being a cleared development site for the construction of 9 flats. In its then state and with the benefit of planning permission the site was valued at £800,000. Assuming satisfactory completion of the proposed development to a high specification the gross development value was valued as being in the order of £2.2 million with the current reinstatement value of the buildings to be constructed being £900,000. The property was viewed as being suitable for the intended development finance to an amount of £600,000 over a one-year term, the understanding being that the intention was that the site would be held as security for phased development finance to the amount of £600,000 over the one-year term.

100. As regards this valuation, Ms Kennedy-McGregor submitted that the valuation was only of the Main Property and not of the Main Property together with the garden land. As regards this she points to a number of factors including (among others) that the valuer refers only to the address of the Main Property, the plan referred to is a plan identifying the Main Property only and the valuer identifies the land as freehold without identifying the leasehold tenure of the 9B Park Avenue Land. I am satisfied that the valuation is not so limited in scope. The planning permission related to both the Main Property and the extra land taken from the rear of the 9b Park Avenue as a unit. The Bank eventually took security over both properties. It would need to know the value of the whole development site (i.e. including the 9B Park Avenue land). Without the 9B Park Avenue land, the planning permission would be worthless. This must have been obvious to the valuer. I also do not accept Ms Kennedy McGregor's point that the value of the extra 18 metres in length (assuming that to be the relevant area) was minimal. There would clearly be a marriage value. Without that land as part of the overall development site, it seems that planning permission for 2 fewer Flats would have been obtained. On a rough and ready basis of valuation, two ninths of £800,000 is worth some £177,000, suggesting that the value of the extra Park Avenue land was more than minimal.

101. The JVA was entered into on 4 August 2006. An invoice dated 22 January 2008 addressed to the Company gives the following narrative description of the work done:

> "*To professional charges in respect to acting on your behalf. Instructions to prepare joint venture agreement between Connoisseur Developments Limited and Koumis Kyriacou and Flora Kyriacou and Christopher Koumis and Antros Koumis. Taking instructions in respect to proposed joint venture agreement. Drafting agreement and undertaking further instructions amending agreement and further conference. To finalising a agreement and to execution of agreement.*"

102. As regards the involvement of Mr Panayiodou, he explained that he was a long-standing friend of Mr Evangelou. He vaguely remembered acting for Koumis and Flora with respect to the Lodge Drive development and drafting leases in that respect. He had met with Koumis and Flora with respect to the JVA and had suggested that they obtain independent legal advice. He said that their position had been that they did not wish to do so because they didn't wish to spend money when Mr Panayiodou could explain the agreement to them.

103. His evidence was consistent with correspondence from YVA LLP ("YVA"), then acting for Koumis, in 2013. By letter dated 7 June 2013, YVA wrote to Mr Panayiodou as follows, in seeking information about the JVA:

> "*We are instructed that in 2006 you prepared a Joint Venture Agreement on behalf of our client* [Koumis], *his late wife,* [the Company, Chris and Andy]."

104. By letter dated 30 October 2013, YVA wrote to the Claimant's then solicitors, Kingsley Smith, as follows:

> "*Our client accepts that the JVA was signed before a Cypriot lawyer and that the contents of the same were explained to him*".

105. A quotation dated 20 August 2006, from Montaigne Building Services ("Montaigne"), was for a sum of £459,900 for relevant construction works. Notably, the Company was to provide various items, which Montaigne was to fit (floor and wall tiles, heating and hot water systems, sanitary fittings and electrical fittings) and was to supply and fit other items (such as kitchens and appliances, windows, external doors, wooden floors, carpets and utilities).

106. On 31 August 2006, or thereabouts, various contractual dates are on the documents before me, the Company entered into an intermediate form of building contract (IFC 98) with Montaigne. The contract was for a price of £689,950 and the construction of 9 Flats. The date for possession was given as 18 September 2006 and the completion date anticipated as being after 44 weeks.

107. In September 2006, Chris transferred the garden at the rear of 9B Park Avenue to himself and Andy. Registration took place on 30 January 2007.

(9) 2007

108. On 12 February 2007, Koumis and Flora entered into a further agreement with RBS regarding a loan of £600,000 which was similar to that entered into on 10 April 2006. Drawdowns had to be completed by 2 February 2008.

109. By letter dated 14 February 2007, Koumis and Flora confirmed to RBS their authorisation of Andy and Chris (of the Company) to draw down monies under the agreement with RBS and to transfer them to the Company's bank account.

110. On 27 February 2007, an application was made to Enfield Council to vary the planning permission in respect of proposed alterations to roof, third floor and fenestration.

111. By letter dated 12 March 2007, Enfield Council sought further information regarding the proposed amendments to the extant planning permission but made clear that if the number of dwellings would increase due the changes a full application and fee were required. The application was later deemed to be withdrawn due to a failure to provide the further information as requested.

112. On 28 June 2007, Chris became the registered proprietor of the 99 year lease (commencing in November 1998) of Flat 2, 11 Park Avenue, Palmers Green. The Proprietorship Register suggests that the price of £192,500 was paid on 18 May 2007.

113. By letter dated 13 June 2007, addressed to "Messrs Koumis", a commercial manager at commercial banking, RBS confirmed the Bank's agreement to assist with an increase in the development loan by a further £200,000 to £800,000. A loan agreement was enclosed to be signed by Koumis and Flora. A copy of that draft is not in evidence, and it is not clear whether the agreement was signed then or later. Nothing turns on the point because it is clear that in 2008 a new agreement was signed by Flora and Koumis with the Bank and that that agreement covered the same matters as in the 13 June 2007 letter.

114. By TP1 dated 16 July 2007, Chris transferred part of the rear garden of 11 Park Avenue to himself and Andy, to be held by them as joint tenants.

115. On 1 October 2007, a further planning application in relation to the Main Property (and leasehold Land) was submitted for buildings with 11 flats (10 x 2-bed and 1 x 3-bed).

116. On 23 November 2007, the estate agents, Winkworth, provided a market appraisal of the development at Hazeltree Lodge comprising 11 flats. The appraisal was on the basis of new 125 year leases on each flat. The valuations varied from £339,950 (Flat 1) to 475,00 (Penthouse, Flat 11).

117. I am told that here was an "open day" in November 2007 but that the offers received for Flats were disappointing and caused or contributed to a decision to delay sales (I infer, at that point, at least "off plan"). There was of course no duty under the JVA to sell Flats until completion of the development. This was before the market crash in the autumn of 2008. I am satisfied that this testing of the market did result in a decision not to proceed with immediate sales and that the decision to delay sales was then later confirmed or remade following the market crash. Although Andy may have attributed the decision in evidence to the market crash, I am satisfied that he was mistaken as regards he period prior to that crash but do not consider that this damages his general credibility.

(10) 2008

118. On 14 January 2008, planning permission was refused in respect of the October 2007 application, seeking permission for buildings containing 11 Flats.

119. On or about 20 May 2008, Flora and Koumis entered into a further loan agreement with RBS. The copy in evidence is not signed and dated by Flora and Koumis (it seems to be a copy for them as signed on behalf of the Bank) but I

find on the balance of probabilities that it was so signed at about that time. In that agreement the amount of the loan was stated as being £800,000 to refinance the existing indebtedness maintained with the Bank and originally utilised to assist with Development Costs and to assist with the remaining Development costs. The Development Costs were defined as the costs involved in undertaking the Development (excluding certain costs) as detailed in the Costings (being the detailed costings provided to the Bank). The Development was, tellingly, described as being "*the development of 11 residential units at the Property in accordance with the Agreed Plans*". The requirements to be able to draw down tranches differed depending on whether the tranche was part of the "Initial Sum" of £600,000 or whether it resulted in the aggregate sum borrowed exceeding £600,000. Repayment was to be made by the earlier of (i) the date 8 months after the date of drawdown of the last tranche or (ii) the sale completion date of the final unit to be sold.

120. On 17 June 2008, a planning enforcement notice was served (the "Enforcement Notice"). In the absence of an appeal it would have come into effect on 22 July 2008 and required compliance by 22 October 2008. However, appeals were made against both the refusal, in January 2008, of planning permission as applied for in October 2007 and the service of an Enforcement Notice.

121. I find that in the later part of 2008 the development was more or less complete (though later there may have been some works to carry out when, as I understand it, the overall "spec" may have been upped).

122. At that point, and/or later, it was decided not to market Flats for sale but to let them on short Assured Tenancies. I find that even if motivated in part by market prices and the desire to wait until the market improved, this was also a knock-on effect of the disputed planning permission position. Although there was talk before me about the only issue being planning permission for the extra two flats, I am satisfied that the overall uncertainty would have affected all of the Flats.

123. On 11 October 2008, Flat 6 was let for 12 months to Mr Nwodo and Ms Onyeka on assured shorthold tenancy at a monthly charge of £1,325. The landlord was the Company.

(11) 2009

124. On 10 February 2009, a Planning Inspector refused the appeals against refusal of planning permission and the service of the Enforcement Notice.

125. According to Andy, in February 2009 a tenant(s) was/were found for Flat 7. The relevant rent was, he says, paid into Koumis' bank account. The relevant bank statements of Koumis show a bank account to have been opened in his name with Nationwide Building Society on or about 16 February 2009. It shows monthly sums received, described as "Bank Credit Mr Neil O Huxham" of £1,325 per month on or about the 11th of the month from 11 March 2009 to 11 February 2010. I infer that this was rent received from Flat 7. The copy of any relevant tenancy agreement from about this time was not in evidence before me. There is a dispute about what was agreed between the Claimants and Koumis with regard to rental payments received into this account.

126. By transfer dated 4 March 2009, Flora and Koumis transferred freehold title to 1 Lodge Drive to Chris. The freehold was subject to the leases of Flat 3 (first and second floor flat) and Flat 2 (first floor flat). 125 year leases of these flats had been granted on 11 September 2006.

127. On 17 March 2009, the Commercial Manager at Commercial Banking RBS, who had been dealing with Andy, wrote to Andy confirming that RBS was agreeable to renewing the Loan for a further 12 months pending the outcome of the appeal to the planning inspector. The loan would renew on an interest only basis and would be reviewed again in March 2010. The relevant loan agreement was signed and dated by the Bank on 17 March 2009 and subsequently signed by Flora and Koumis.

128. The loan agreement is in relation to a loan of £809,800 and was stated to be to refinance existing indebtedness. The repayment date was 12 March 2020. The arrangement fee was £9,600.

129. On 9 May 2009, Flat 8 was let for 12 months to Mr and Mrs Deo on an assured shorthold tenancy at a monthly rent of £1,250. The landlord was described as being Koumis. On a monthly basis, payments of £1,250 were made into Koumis' bank account with Nationwide. The first payment/credit was made on 10 June 2009. The last was made on 10 June 2013. The credits were given a reference/description "Deo P" on the bank statements of Koumis.

130. On 27 June 2009, Flat 3 was let on for 12 months to Mr Lettice and Mrs Purnomo on an assured shorthold tenancy at a monthly rent of £1,225. The landlord was described as being the Company.

131. By TR1 dated 30 June 2009, Chris transferred the freehold to 1 Lodge Drive to Koumis.

132. Following the initiation of High Court proceedings, by consent orders dated 16 November 2009, the appeal decisions of the Inspector were set-aside. The matter was in effect referred back to the planning inspectorate.

(12) 2010

133. On 15 March 2010, Flat 7 was let for 12 months to Mr Labauda and Ms Dek on an assured shorthold tenancy at a monthly rent of £1,300. The landlord was described as being Koumis. Payments of £1,300 a month were paid into Koumis' Nationwide bank account. From 19 April 2010 to 19 November 2010 these were given the description, in his bank statements, of "cash credit" but in December 2010 and January 2011, they were given the description in his bank statements of "Bank credit Labauda MZ". Between February 2011 and 17 June 2011 they were given the description in the bank statements purely of "cash credit". Between 19 July 2011 and June 2013 they were given the description in the bank statements of "Bank Credit Labuda MZ".

134. In April 2010, there was apparently an attempt to refinance through Santander Bank, using long leases granted in relation to the Flats as security. This

refinancing did not progress as explained in the letter dated 3 February 2016 from Axis Commercial Services Limited, referred to in the next paragraph.

135. By letter dated 3 February 2016, from Mr Steven Chester of Axis Commercial Finance Ltd, Mr Chester confirmed to Andy that Axis was originally approached in April 2010 in relation to the refinance [and obviously facility] on the recently completed development known as Hazeltree Lodge. Applications were submitted and a meeting subsequently arranged with Santander Bank later in April. The bank issued indicative terms on the basis that the flats, currently held on one freehold, were split into individual long leases. Regrettably the leases were not granted and accordingly the refinance did not progress.

136. An application form is in evidence bearing out the application made by Axis. The application was for a loan of £975,000 over a 25 year term with an interest only period of one year. The stated applicants were Koumis, Flora, Andy and Chris. The "declaration" seems to have been signed and dated by each of Koumis and Flora on 28 April 2010.

137. Flora died on 15 July 2010.

138. On 1 August 2010, Flat 4 was let for 12 months to Mr Smith and Ms Henderson on an assured shorthold tenancy at a monthly rent of £1,250. The landlord was described as being the Company.

(13) 2011

139. On 19 April 2011, the Bank signed a supplemental agreement to that of 5 May 2009 referred to above for the loan of £809,600. Koumis signed on 12 April 2011. It was agreed that the repayment date would be 31 May 2011.

140. The planning and enforcement notice appeals were considered at an Inquiry held on 22 and 23 March 2011. In a decision dated 8 April 2011, the Inspector dismissed both appeals and upheld the Enforcement Notice (with corrections and variations). This was subject to a further challenge/appeal to the High Court, who dismissed all grounds of appeal on 5 October 2012. There was thereafter a further appeal to the Court of Appeal.

141. On 28 August 2011, an application for planning permission was submitted by Andy on behalf of the company seeking planning permission for the development as constructed namely for 11 flats and 11 carparking spaces.

142. In about September 2011, Andy entered into correspondence with a David Saunders of Male & Wagland Solicitors with regard to a proposed plan to complete the grant of long-term leases with Andy and/or Chris as the lessee (but holding on trust for the Company) with a view to the leases being offered as security for loans to complete the development.

143. By letter dated 14 September 2021, Male & Wagland (Mr David Saunders) wrote to Andy. The writer said that he had now read the JVA. He discussed the ability of Chris and Andy each to take a lease of one flat. He went on to discuss a scenario in which, as an alternative, the two leases could be issued to Chris and

Andy with them entering a deed of trust in favour of the Company. A further possibility of a lease of other or additional Flats being granted to Chris and Andy with the latter entering a trust deed declaring that the lease and its net value after deduction of any mortgage was held on trust for the Company was also mentioned. Tax and accountancy advice was recommended to be taken.

144. By letter dated 15 September 2011, Andy set out more about the background and thinking on Company letter headed paper:

> *"(3) The project is already completed and has been tenanted for the last 2½ + years. The purpose of registering the flats is for a variety of reasons. Firstly, at the moment, the building is just one entity and our bank has a charge on the whole site for a loan of only £810k, even though the value is approximately £3.6 million. Basically a loan-to-value of between 20 to 25%. We cannot raise any more finance and are basically stuck with the current bank. As a result of the planning issues we have on some of the flats, the bank is using the problems as an excuse to be less competitive with their loan rates and terms, and every year they have been increasing them & charging an arrangement fee annually. With the current planning problems, no other lender will consider us. By registering the flats individually there will be many benefits to the company and ourselves personally. We would be able to refinance competitively by simply taking out remortgages on individual flats to the value we require. We will need to remortgage approximately 4 flats to pay off the existing loan to our bank, RBS. We can then remortgage a couple more flats to pay off some monies to our father (as per the joint venture agreement). These remortgages would be more competitive but the main benefit is that they will be for a longer term we will not have to pay an arrangement fee every year (currently at approx £12k).*
>
> *Excluding the 2 flats with the planning issues, we will still have another 3 flats (including personal ones) that will be unencumbered and available for refinancing, if we so wish.*
>
> *Another benefit of the individual registration is that myself, my brother and the company will now have the security of leases on our names, thus having equity after having spent £1.5 million on the project."*

145. In about November 2011, as far as I can tell, a further application for planning permission was made.

146. By email dated 11 November 2011, David Saunders of Male & Wagland sent a draft lease to Andy for consideration. This trail of correspondence then dries up in the trial bundle.

(14) 2012

147. By letter dated 3 January 2012, addressed to Andy, a Senior Relationship Manager at RBS (Mr Wilmot) referred to recent discussions and advised that renewal of the existing loan of £809,600 through to 1 April 2012 had been agreed. The short-term extension was said to have been approved to allow

further time for the existing debt to be refinanced into the personal names of Chris and Andy. Ms Lisa Gorbauld of RBS Private Bank and Mr Mudhar of JSM Financial Consultants were said to be "progressing matters accordingly". The relevant loan agreement appears to have been signed by Koumis, although not until March.

148. By email of 24 January 2012, Mr Wilmot of RBS asked Andy how matters were progressing with the broker. The idea clearly was that long leases were to be granted simultaneously with the refinance so that the proposed lender would have security over the long leases that they were lending against from day 1.

149. 1 Lodge Drive was registered in the joint names of Koumis and Tony on 25 April 2012.

150. During April to May 2012, there were various email exchanges between Mr Liversidge of RBS and Andy regarding the refinancing. Andy was essentially looking for up to 12 months refinancing with RBS pending re-financing with a new lender. Mr Liversidge explained the background being refinancing after leases had been granted and the leases had been in existence for 6 months. "*As you are aware it might take some time for the properties to be refinanced. For this reason I had sought the longest possible time so it gives you peace of mind to look for the best deal rather then being under pressure to refinance quickly within 6/12 months*." Andy explained that they had been talking to brokers. Lenders for re-financing were lined up. All that was waited for was the passage of 6 months on the new leases. He and Chris were happy to take their chances on a 12 months term. They were looking to sell as soon as possible but had to have the planning permission issues resolved. If resolved soon then they could start selling and not need to refinance with other lenders. Even if they lost the appeals "and consequently the top two flats" the overall value of the nine remaining flats was very significant. All they were asking for at that stage was that RBS modify their charge (over the Main Property and Leasehold Property) and spread it over the new leases.

151. By email of 16 May 2012, Andy indicated to the Bank that the High Court hearing had concluded and that judgment had been reserved. The case had appeared to go well. If they lost then they would need to refinance in the personal names of the brothers against the security of the new leases. If on the other hand they won, then they would probably decide to sell flats to pay off the bank loan: the result of the court case was, therefore, "crucial in determining which route we take".

152. By email of 6 June 2012, Mr Liversidge suggested to Andy that it made sense to extend the current loan for a further period allowing the "two of us" to sit down and assess the best way forward. He suggested extending the loan, which had expired in April, until October and said he had sought agreement in principle for the loan now to be in the names of Chris and Andy. He put various pricing suggestions forward and said it was urgent that they speak.

153. On 8 September 2012, Koumis signed a further supplemental agreement with the Bank. This further amended the loan agreement of 8 March 2012 and provided

for a new Repayment date of 1 November 2012 as well as amending the interest provisions.

154. By order dated 9 October 2012, Walker J dismissed (1) the Appellant's application under section 288 of the Town and Country Planning Act 1990 ("the Act") to quash the decision dated 8 April 2011 of an Inspector appointed by the First Respondent to dismiss the Appellant's appeal under section 78 of the Act against the Second Respondent's refusal on 14 January 2008 to grant planning permission for the redevelopment of the site at 16-18 Hazelwood Lane, London for 11 flats and (2) the Appellant's appeal under section 289 of the Act against the Inspector's decision contained in the same decision letter to dismiss the Appellant's appeal against an enforcement notice issued by the Second Respondent on 17 June 2008 in respect of the site and to uphold the notice with a correction and variations. The judgment of Walker J is reported as [2012] EWHC 2686 (Admin).

155. On 28 November 2012, Koumis signed a further supplemental agreement with the Bank extending the Repayment Date to 1 March 2013.

156. At the end of 2012, Chris and his father fell out. I did not understand the description of the relevant evidence (and his finding) as given by HH Judge Cooke to be challenged in any material respect:

> "*[34].....The deceased however argued with Chris in 2012 over what is said to have been the theft of a small religious icon from their house by Chris's girlfriend. Chris says it was he who took the item and his father had agreed he could do so, but does not dispute there was an argument as a result of which he threw back the keys to his parents flat. According to Tony, this was the culmination of previous incidents in which the parents had established, by covert filming, that the girlfriend had stolen cash*".

(15) 2013

157. Also at Christmas 2012 or possibly January 2013, Andy fell out with Koumis. Again, I did not understand HH Judge Cooke's description to be substantively challenged (although of course I did not hear from the Maria he refers to):

> "*The fact that the deceased was unhappy at being unpaid did not cause a breakdown with Andy at least until the end of 2012. Andy continued to be a regular visitor to his father until then. Maria confirmed that he and Chris (presumably until the allegation about the icon) had been responsible for making medical appointments and taking their father to and from them and that Andy had helped his father with reading letters sent and completing forms."*

158. By email dated 29 January 2013, Andy informed Mr Liversidge that amended plans were to be submitted to the Council that week and the hope was that approval would be recommended. He said that the aim was for the matter to be considered at the February planning committee meeting. However, he asked whether it would be possible to borrow more money from the Bank if permission was granted for 11 flats and the Enforcement Notice fell away. Further security

could be offered in the form of the four Flats not currently to be encumbered and on that basis it would be possible to pay off Koumis instead of separately having to re-finance through use of the four Flats as security. It would also increase by £2,550 per month the rental as they would then receive rental from flats 7 & 8. In a further email, Andy made clear that only £700k rather than £800k would need to be borrowed.

159. On 18 March 2013, YVA sent a letter before action to the Company on behalf of Koumis. The substance of the complaint was that the development had been completed some years ago but that contrary to the JVA the properties were not sold but instead had been tenanted. As a result the Company was said to be in breach of the JVA.

160. By email dated 25 April 2013, Andy informed Mr Liversidge that the revised proposal involved giving two Flats to Koumis upon the refinancing: on that basis the refinancing would have been dealt with as would the debt owed to Koumis. He was hoping that planning permission would be granted in May 2013, thus rendering the appeal unnecessary.

161. On 13 May 2013, Andy informed Mr Liversidge that Koumis had agreed to accept flats 1 and 2 and so the RBS could have a charge on flats 3, 4, 5, 6, 9, 10 and 11.

162. Minutes of a meeting of the Planning Committee of Enfield Council held on 21 May 2013 reveal:

(1) The Main Property was subject to the Enforcement Notice.

(2) The Company's agent expressed disappointment with the conclusion of the officer's report that permission should be refused, not least after 6 months of negotiations with numerous alterations to the proposals and improvements being made during this time.

(3) The officer's recommendation for refusal of the planning application was not approved but further consideration of the proposal was deferred with officers being instructed to prepare a recommendation to grant permission with a legal agreement and schedule of conditions to secure the necessary contributions and implementation of proposed changes.

163. By email dated 22 May 2013, Mr Liversidge, having been informed of the outcome of the planning committee meeting on 21 May 2013, indicated that he would be looking to take forward the lending application on the lines discussed.

164. By email dated 11 June 2013, Mr Liversidge set out the heads of terms for the facility agreement and said he was preparing a facility letter. By email dated 13 June 2013, Andy indicated that the terms were acceptable save for the bank security fee.

165. On 3 July 2013, a meeting took place between Mr Liversidge, Koumis, Tony, Chris and Andy. Most of the meeting was recorded covertly by Tony and later transcribed. The transcription was in evidence before me. At the meeting, Mr

Liversidge attempted to identify what was in issue and to broker a settlement. Unfortunately, members of the family were unable to concentrate, avoid speaking over one another, and, in some cases, to understand and/or take a consistent line. Mr Liversidge was trying to get agreement for the Bank Loan to be taken over directly by Chris and Andy on the basis that, once planning permission had been granted and regularised, the Bank would take security over individual long leases of the majority of the Flats. Matters foundered however because Tony and Koumis wanted to retain the freehold and to receive, in addition to the £800,000 provided for by the JVA, a further sum on the basis that the Development now involved 11 rather than 9 Flats. As regards the freehold, Andy and Chris seemed to be prepared to compromise and agree to Koumis' demand but the latter was a step too far for them.

166. It is relevant to identify some of the key points emerging from the transcript. Before I do that I should comment that the conversation went round and round in circles as Tony kept raising obstacles to the reaching of any agreement. He would agree one point of principle and then later renege from that position. At times he would say that the JVA would be challenged by Koumis, at other times he said Koumis was content to rely on the JVA.

167. First, so far as Mr Liversidge was concerned, the restructuring of the Loan had been delayed because of the Enforcement Notice:

(1) (before Andy and Chris arrived):

"SL..obviously with the enforcement notice, the actual restructuring of the loan has been outstanding for some time…"

(2) (having made the point that the sale of Flats on long leases would be key to realising money)

"SL: obviously what could curtail things is the enforcement notice isn't it..that's going to delay the matters"

(3) When asked for a copy of the Lease comprising Schedule 2 of the JVA, Andy answered:

"ultimately its the freeholder who is supposed to do the lease but according to this we are acting as he freeholder's agent and we are responsible for doing the lease, and we are going to give him a copy of it for him to approve it. That's fine.
….

,,I'm going o give you that information that you want, which really the old man should have had apart from the lease because it hasnt been done yet. Unless we get approval to go ahead how can we…."

(4) Whether as lending to Andy and Chris half each or the full £800,000 or so then outstanding to Chris and Andy jointly or £800,000 or so to Koumis, the Bank was looking to refinance the existing interest only borrowing from the

Bank and replacing it with a 3 year loan repayable at about £7-8,000 per month, the bank's security being over 7 of the 9 Flats.

(5) Andy explained that what he had understood Koumis to have agreed was that he, Koumis, would get two of the Flats and the Freehold; and the Bank borrowings would be moved to Chris and Andy, so that Koumis had no further liability in respect of them.

(6) Andy however made clear that planning permission was still needed.

(7) Mr Liversidge made clear that the idea was that the s106 agreement would be negotiated with the Council, planning permission would then be granted subject to works being done and within 6 months further works required by the Council would be required to be completed. Koumis would then be given two flats worth about £700,000 which he could then sell to realise cash.

(8) Tony then raised an issue about what happened if Koumis could only sell the two flats for £600,000. Andy made the point that the Bank had had the Flats valued and that in addition Koumis was getting the freehold and he had already had £140,000 by way of rent.

(9) Andy asserted that the Development had not been completed because planning permission was outstanding.

(10) Tony suggested that Chris and Andy could borrow a further £1.6 million and repay the Bank and pay Koumis under the JVA. Andy said that no bank would lend £1.6 million. Mr Liversidge later confirmed the Bank would not be prepared to lend £1.6 million and that in his view the majority of high street banks would take the same position:

> "*because of the current issues with the properties..and the fact that there's not enough leases on them, I think you'd be very highly unlikely to be able to refinance those flats in the current marketplace".*

(11) Mr Liversidge stated that his understanding was that

"they've not been able to sell any flats because of the enforcement notice".

His understanding was not corrected by Andy or Chris.

(12) Tony then suggested his father should receive more money because there were now 11 not 9 Flats.

168. On 5 July 2013, Mr Liversidge wrote to Koumis further to the meeting on 3 July 2013. He set out the lending proposals agreed between Chris, Andy and the Bank for a 3 year loan to Chris and Andy by the Bank, with the Bank taking a charge over long leases of 7 of the 11 flats. An alternative might be for the borrowing to remain in Koumis' name with Andy and Chris transferring monthly sums to Koumis' bank account to cover the monthly payments. That would be a proposal

that would need separate credit sanction. In any event, an agreement had to be made shortly as to how the loan was to be repaid as it was no longer possible to retain the facility on an interest only basis. If no decision was made by 19 August 2013, the Bank would consider its options which might include taking possession of the block of flats.

169. On 18 July 2013, Koumis made a general power of attorney in favour of Tony.

170. By letter dated 23 August 2013, Mr Liversidge wrote to Tony explaining that due to Koumis' illness the date for a response to the Bank had been put back. The Bank had agreed to extend the current interest only facility until 9 September 2013. However, the signed facility letter had not been returned. The loan was in default. In line with clause 2.3 of the loan agreement the bank proposed increasing the margin on the loan by 2% on 30 August should the facility letter not be returned.

171. By email dated 25 August 2013, Mr Liversidge sent what he described as an overdraft agreement for Koumis and Flora but which was in fact a supplemental loan agreement for Koumis and asked for it to be signed and returned. The supplemental agreement involved extending the repayment date on the loan agreed on 8 March 2012 to 9 September 2013.

172. By email dated 31 July 2013, Mr Liversidge wrote to Andy and Tony explaining that the current facility had been extended until 9 September 2013 but that it remained in default until a facility letter was signed. He asked for mutually agreed proposals by 9 August for the repayment of the existing loan made to Koumis. (Various deadlines in August were given at about this time in a course of emails between Mr Liversidge and Andy/Chris and Mr Liversidge and Tony/Koumis).

173. By letter dated 1 August 2013, Kingsley Smith sent a letter before action to Koumis on behalf of the Company, Chris and Andy. In that letter, among other things, it was said:

(1) The letter before action to the Company dated 18 March 2013 had not been received by the Company until handed over at a meeting in May 2013. At that meeting assurances were given that the allegations in the March letter were not being pursued and that agreement had been reached that Flats 1 & 2 were to be accepted by Koumis in full settlement of his entitlement under the JVA.

(2) Retention of the freehold by Koumis would be disadvantageous to him in tax terms. Further the Bank has no security over part of the site (rear garden). Neither the Bank nor Koumis could regularise the planning permission position, the 2006 permission having expired. The Bank would therefore be unlikely to be able to dispose of the Flats as built without a vast discount.

(3) Koumis was in breach of the JVA by allowing Tony to intermeddle by directly communicating with the Bank and seeking that it call in the Loan.

(4) Koumis was attempting to cut Kingsley Smith's clients out of the agreed price for the Property and any additional profit or alternatively to ensure they suffered a loss.

(5) Although Koumis had received £131,400 between February 2009 and June 2013 towards the price, he had indicated that he would deny receipt of such payments on account of the Price.

(6) Koumis may have an intention not to sign the s106 agreement which was by then the only matter standing in the way of full planning permission, regularising the development and allowing the leases to be granted without further delay.

174. By letter dated 18 September 2013, YVA responded denying any breaches of the JVA and asserting that:

(1) Kingsley Smith's clients were in breach of it by changing the development from a block of 9 flats to a block of 11 flats. This had caused Koumis losses being interest on the £800,000 payment due to him for the property under the JVA and interest and penalties in reference to the capital gains tax he had incurred;

(2) That all 11 flats (save for those occupied by Chris and Andy personally) were rented out and as freeholder Koumis was entitled to the rents;

(3) The payments made to Koumis by way of rental income from two of the flats was as compensation for lengthy delays in the receipt of the £800,000, being payment in lieu of interest.

175. On 18 July 2013, Koumis made his last will and testament that I have already referred to.

176. On 31 July 2013, a unilateral notice was registered against the title to the Main Property in favour of the Company.

177. On 29 August 2013, the unilateral notice in favour of the Company was subject to a notice requiring it to object to an application to cancel the unilateral notice or to consent to it.

178. The application to cancel was by Koumis and dated 22 August 2013. Among other things, the following points were made:

(1) Koumis was 84 years old and had health problems (prostate cancer).

(2) Work commenced at the beginning of 2005. Planning was granted on 31 August 2005 for nine flats.

(3) The whole project was envisaged to take between 2 to 3 years to complete.

(4) The development was completed in 2008, but 11 flats were built. As at 2013 planning permission had not been obtained.

(5) Koumis had never been involved in the planning side of the project. It was "quite clear" in the JVA that the developers have "full control of all planning decisions" but Koumis had only entered into a JVA with planning granted for nine flats not 11.

(6) On 23 July 2013 Enfield Council passed a resolution to grant planning permission ~~for~~subject to various alterations to the building and a section 106 agreement. Planning permission was likely to materialise between 2014 and 2015.

(7) Koumis had been informed by the Developers that they will take three more years to pay the existing bank loan and that he would have to wait for years to get paid for his property.

(8) He explained the bank loan and mortgage position. At that stage the loan agreement was due to expire on 9 September 2013 and there was a suggestion that the bank was suggesting that they might take possession to repay the borrowing in full.

(9) He suggested that flats had been occupied and rented for approximately five years and that this was in breach of the JVA.

179. By email dated 2 September 2013, Mr Liversidge wrote to Tony saying that the facility letters had been posted on a number of occasions and he was concerned that Tony was saying that he had not received them.

180. By letter dated 17 September 2013. Kingsley Smith wrote on behalf of the Company objecting to the application for cancellation of the unilateral notice. The letter made the following points, among others:

(1) Koumis and Flora had agreed in consideration of an additional loan of £200,000, to 11 flats being built. Further loan agreements and banking material with RBS was provided. Further, an estoppel was said to "clearly arise" as considerable sums were spent by the Company in reliance upon the agreement in constructing not nine but 11 flats and associated fees etc.

(2) The estimate for completion of the project was 4 to 5 years not 2 to 3 years. The JVA did not stipulate a timeframe by when the sale of the property would occur. The good reason was uncertainty regarding the planning permission and the market. As matters turned out, there were in fact extensive planning enforcement problems, the market dipped in the relevant period and Flora died. The unavailability of planning permission meant that sales were not possible.

(3) Planning permission was granted in 2005 but actual work did not commence until October 2006.

(4) Since early 2009, £2,550 a month had been paid against the agreed price of £800,000 for the property. The total paid to date was some £132,000.

(5) Payment of the bank was irrelevant to the payment of Koumis both in terms of need and in terms of any discussions linking the two. As regards need, on re-financing and lease registrations there would be four unencumbered flats (i.e. free of bank charge) that could be sold or re-financed to pay Koumis.

(6) Until the start of 2013, the Company and Koumis were in full accord but since then Tony had begun to influence Koumis.

(7) In April-May 2013, Koumis had agreed on two occasions to accept two "safe flats" (Flats 1 and 2 not affected by the Enforcement Notice) as payment for what was otherwise due under the JVA and he had received the rents on those flats for well over 4 years up to and including June 2013.

(8) A dispute arose a week or so after the second agreement referred to in (7). Koumis refused to transfer the freehold and had also demanded more money. Koumis had not responded to the Bank nor responded to solicitor correspondence from Kingsley Smith.

(16) 2014

181. 1 Lodge Drive was subject to a transfer by Koumis and Tony into the name of Koumis dated 3 January 2014.

182. On the same date, Koumis entered into a power of attorney in favour of Tony. This appears to have been for use in Cyprus.

183. By letter dated 13 January 2014, RBS notified an event of default under the Loan Agreement being non-repayment on 12 June 2013. The Bank declared its intention not to declare all amounts immediately due and payable, as it was entitled to as a result of the event of default, but made clear that interest would now be charged at a rate of 6% above base rate. As an email of 6 February made clear, this was an increase of 2% from the previous rate charged. The new relationship Manager, Mr Simon Harrison, said in an email dated 7 February 2014 to Andy that he would "see what can be achieved!".

184. By letter dated 29 January 2014, Kingsley Smith wrote to YVA Solicitors enclosing a copy of the relevant s106 agreement signed by their clients and asked for the immediate execution of the same by Koumis.

185. By letter dated 6 February 2014 to YVA Solicitors, Kingsley Smith chased the execution of the s106 agreement.

186. By letter dated 10 February 2014, YVA wrote to Kingsley Smith to say that the latter's letter of 29 January had only just been brought to the writer's attention and that instructions were being sought.

187. By letter dated 12 February 2014, Kingsley Smith replied to YVA's letter of 10 February. Apart from dealing with the circumstances of delivery of the letter of 29 January, the letter made the point that Koumis had heard direct from their clients with the document for signature at the same time as the letter of 29 January was signed and that there was a breach of the JVA in the continued non-

execution. However, it was also noted that Koumis was "very unwell" and asking who was providing YVA Solicitors with instructions and, if it was Tony, requesting a copy of the relevant Power of Attorney.

188. By letter dated 12 February 2014, YVA Solicitors wrote to say that they had taken instructions. Koumis hoped that matters would be resolved before he died. He was terminally ill. He was prepared to sign the s106 Agreement if the outstanding issues between him and the Claimants could be resolved. Reference back was made to a without prejudice letter of 18 October 2013.

189. By letter dated 13 February 2014, Kingsley Smith made a number of points as to why execution of the s106 agreement was in everyone's interests and that such execution was the only thing holding up the grant of planning permission.

190. By text message on 27 February 2014, Tony informed his siblings of the death of Koumis.

191. On 4 March 2014, caveats in the estate of Koumis were entered on the request of Andy and Angela.

192. By letter dated 22 May 2014, Mr Theodorou of Anthony Pepe gave a drive-by valuation to Tony of the property in the sum of £2,250,000 but based upon the understanding that the development did not have the required planning permission.

193. On 13 September 2014, Flat 8 was let for 12 months on an assured shorthold tenancy at a monthly rent of £1,350. The landlord was described as being the Company.

194. On 4 October 2014, Flat 7 was let for 12 months on an assured shorthold tenancy at a monthly rent of £1,350. The landlord was described as being the Company.

195. On 2 October 2014, the claimants in the Probate Proceedings issued an application for, among other things, the appointment of an administrator of Koumis' estate.

196. On 22 October 2014, Jane Maitland of Freeths LLP was appointed by Deputy Master Cousins under s116 of the Senior Courts Act 1981 as administrator of the estate of Koumis to deal with specific aspects, in reality bringing the JVA to a conclusion. As regards her powers the order stated them to be as follows:

> *"(2) The powers of the administrator are limited to bringing to a conclusion the* [JVA] *made between the Deceased, his late wife*, [the Company], [Andy] *and* [Chris] *and dated 4 August 2006 and include but are not limited to:*
>
> *(i) granting/joining in the granting of leases;*
>
> *(ii) signing documentation necessary to satisfy the local planning authority;*

> *(iii) discharging the borrowing secured over the property; or*
>
> *(iv) transferring the Property to [the Company];*
>
> *(v) in the event of any dispute as to the administrator's powers any party may apply to the Court."*

197. On 3 December 2014, the Court of Appeal gave judgment on the appeals concerning the refusal of planning permission in January 2008 and the service of the Enforcement Notice ([2014] EWCA Civ 1723). The lead judgment, with which the two other members of the Court agreed, was that of Sullivan LJ.

198. It is easiest if I set out an extract of Sullivan LJ's judgment*:*

> *[6] In summary, the Second Respondent granted planning permission on 31 August 2005 to develop the site for 9 flats. The development as built contains 11 flats rather than 9. Although the 11 flats were therefore built without planning permission, the Second Respondent did not require the demolition of the whole of the unauthorised development. In its requirement in the enforcement notice, the Second Respondent was seeking to reduce the scale of the development on the site and in particular to reduce its ridge height to that of the development which it had approved in 2005.*
> *[7] Before the Inspector, it was the Second Respondent's contention that the ridge height of the development which had been granted planning permission in 2005 was 9.5 metres. It was the Appellant's contention that the ridge height of the development approved in 2005 was 10.5 metres.*
> *[8] The Appellant's case before the Inspector was that the 11 flats development as built was similar in scale and height to the 10.5 metre high development which had been approved in 2005. This was a material consideration which the Appellant argued should lead the Inspector to grant planning permission for the development as constructed and to allow the appeal on ground A in section 174(2) of the Act against the enforcement notice and to quash the enforcement notice accordingly.*
> *[9] It was the Second Respondent's case before the Inspector that the 9.5 metre ridge height of the development which had been permitted in 2005 was the maximum height which was acceptable in planning terms for any development on the site and the requirements in the enforcement notice were justified on planning grounds because they sought to reduce the height of the existing development to that height.*
> *[10] It is clear therefore that the ridge height of the development which had been permitted in 2005 was a, if not the, principle issue at the inquiry. [11] The planning permission granted in 2005 was a detailed planning permission. It referred to a drawing number PR/16-18/LAYOUT/A which showed inter alia the ridge height of the approved development. The problem which confronted the Inspector at the inquiry was that there were drawings both numbered PR/16-18/LAYOUT/A which showed the ridge height of the 2005 development as 9.5 metres and 10.5 metres respectively*.

199. As regards the grounds of appeal, grounds two and three related to the decision of the inspector. They were that Walker J had erred in concluding that there was ambiguity in the 2005 planning permission which enabled the Inspector to have

recourse to extrinsic evidence when deciding whether the 2005 planning permission authorised a building with a ridge height of 9.5 metres rather than 10.5 metres (ground 2). Alternatively, in concluding that, the Inspector had given adequate reasons for interpreting the 2005 planning permission as permitting a building with a ridge height of 9.5 metres rather than 10.5 metres. (ground 3).

200. Both these grounds of appeal were rejected. The consequences was that:

> "*[57] …Since these were the only grounds on which the Inspector's decision to dismiss the appeal against the Second Respondent's refusal to grant planning permission was challenged, it follows that I would dismiss the Appellant's appeal against Walker J's order insofar as it dismissed the Appellant's application to quash the Inspector's decision on the planning appeal under section 288 of the Act."*

201. The appeal regarding the enforcement notice developed into a judicial review application. That was because although the Inspector was found to have made an error of law in not having effected a change in the time by which the Enforcement Notice should be complied with (giving a 6 month period), an issue arose as to whether that was academic by the time that the matter reached Walker J by reason of a decision by the Council, after the inspector's decision, itself purporting to extend the time for compliance but the validity of which was challenged. Having considered the matter at length, and for various reasons, Sullivan LJ rejected: "*the Appellant's submission that the* [relevant Council notice] *was not effective to overcome the consequences of the only error in the Inspector's decision*."

202. Accordingly, the appeal failed.

(17) 2015

203. By application notice dated 8 July 2015, Angela, Jack, and James applied to vary the order appointing Ms Maitland so that the power to transfer the property to the Company, set out in clause (2) (iv) of the Order of 22 October 2014, be varied so as to make it subject to (a) the payment of £800,000 and (b) an account of all rent collected by Chris and Andy and payment of all such rent not yet paid to Koumis for his estate or, as an alternative to (b), (c) payment of an equivalent sum to an account in the administrator's control pending determination of the estate's entitlement to the same.

204. The basis of the application was that the JVA did not entitle Andy, Chris or the Company to grant short-term leases. The freehold remained vested in Koumis (or Koumis and Flora) and he/they were therefore entitled to the rents.

205. On 28 July 2015, Ms Maitland obtained a grant of letters of administration limited to carrying out specified tasks there set out.

206. On 7 August 2015, Flat 7 was let for 12 months on an assured shorthold tenancy at a monthly rent of £1,400. The landlord was described as being the Company.

207. By order dated 2 September 2015, the application of Angela, to vary the terms of the appointment of Ms Maitland as administrator was dismissed.

208. On 30 September 2015, Ms Maitland as personal representative of Koumis, signed a Loan Agreement with RBS for a loan of £794,600 to refinance existing indebtedness. The repayment date was 4 December 2015.

209. By letter dated 1 December 2015, RBS sent a supplemental loan agreement to extend the loan until 4 April 2016. This was signed by Ms Maitland as personal representative of Koumis on 22 February 2016.

210. By letter dated 4 December 2015, planning permission was granted, subject to conditions in respect of the application.

(18) 2016

211. By letter dated 3 February 2016 from Mr Steven Chester of Axis Commercial Finance Ltd, Mr Chester confirmed a situation in April 2010 that I have dealt with earlier in this judgment.

212. On 24 March 2016, a 125 year lease of Flat 2 (ground floor and garden flat) was granted. The lease included the land at the rear of 9 Park Avenue.

213. Also on 24 March 2016, Ms Maitland signed a supplemental agreement with the Bank extending the Loan Agreement dated 30 September 2015 so that the date for repayment became 4 August 2016.

214. On 6 June 2016, a 125 year lease of Flat 3 (first floor) was granted.

215. On 26 August 2016, a 125 year lease of Flat 10 (first floor) was granted.

216. The trial of the Probate Action took place before HH Judge David Cooke on 9-11 and 14-17 November 2016. Judgment was handed down on 18 November 2016 ([2016] EWHC 2598 (Ch)).

217. In his judgment, HH Judge Cooke said that the sole challenge pursued before him was based on undue influence. Lack of testamentary capacity, although alleged in a caveat that had been entered, had not been pleaded. The pleaded case of lack of knowledge and approval of the terms of the will had not been pursued. He decided that undue influence was not made out and the will was declared to be valid.

(19) 2017

218. On 27 January 2017, a 125 year lease of Flat 4 (first floor) was granted.

219. On 22 May 2017, letters of administration with the will attached was granted to Tony, save and except for that part of the estate forming the subject of the grant of letters of administration to Ms Maitland.

220. On 1 August 2017, a 125 year lease of Flat 6 (second floor) was granted.

(20) 2018

221. Title to the land at 16 Hazelwood Lane (title no MX446550) was registered in the Company's name on 19 July 2018.

222. On 2 October 2018, a 125 year lease of Flat 9 (first floor) was granted.

223. On 21 November 2018, a 125 year lease of flat 5 (second floor) was granted to Chris.

224. On 21 November 2018, a 125 year lease of Flat 11 (first, second and third floors) was granted.

(21) 2019

225. The letter of claim in this case, dated 16 October 2019, was sent by The London Law Practice Limited on behalf of the Claimants.

Focus on the cases of the parties

226. As a general matter it is necessary to focus narrowly on the causes of action pleaded and the facts relevant thereto. Unfortunately, if understandably given family relations and the history of this matter, both the pleadings and the evidence strayed into areas that are strictly irrelevant to a determination of the legal issues which are raised.

The JVA

227. There is no claim to rescind, set aside or rectify the JVA, or that the JVA is not a binding contract between the parties nor, for example, that it was induced by misrepresentation or undue influence or that when made it was subject to some form of collateral contract or that any relevant estoppel operates against the Claimants. Tranches of the pleadings and evidence of and for Tony and cross-examination by Ms Kennedy-McGregor, were devoted to the issues of whether the Parents had matters properly explained to them before they entered the JVA; how good their knowledge of English was; whether, at that time, they had independent legal advice; whether they were vulnerable; whether they did not realise that they should have taken independent legal advice because they trusted Andy and Chris to ensure the JVA reflected what had been agreed (though it is not alleged that the JVA did not reflect what had been agreed); the identity(ies) of those for whom the relevant solicitors were acting at the time; whether it was fair that the Parents entered into, or were asked to enter into, the JVA. All these matters are therefore neither here nor there. I should record though, that I was not persuaded on the balance of probabilities that any of the matters raised which might have impinged on the validity or content of the JVA were made out. As regards the JVA itself, most, if not all of the issues are ones purely of construction.

228. I should also mention at this point that Ms Kennedy-McGregor's approach was also to attack later decisions of Koumis and/or Flora (e.g. the extension of the Loan from £600,000 to £800,000) as having been, in effect, unscrupulously

forced upon them by Andy and/or others. Again, however, it was no part of the Defendant's legal case that any such decisions, agreements or the like should be set aside, whether for undue influence, misrepresentation or otherwise, nor that such decisions or agreements were otherwise invalid.

(a) General principles of construction

229. As regards construction of a commercial contract such as the JVA, there was no dispute over the legal principles. I was referred to the familiar catalogue of cases identifying the principles of contractual construction including, *Rainy Sky SA v Kookmin Bank SA* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance* Services Ltd [2017] UKSC 24, [2017] AC 1173.

230. For present purposes, I can rely upon the convenient and helpful summary of Carr LJ taken from her judgment in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645:

"*Relevant general legal principles*

[17] The well-known general principles of contractual construction are to be found in a series of recent cases, including Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900; Arnold v Britton and others [2015] UKSC 36; [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173. 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows: i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

231. Notwithstanding the general principle that the parties' subjective understanding or intentions with regard to a contract are irrelevant to its construction, a certain amount of cross-examination of Andy and Chris was directed at their understanding of the JVA and what it permitted them and the Company to do. I did not find their answers particularly helpful on the questions either of the construction of the JVA or of the bona fides of reasonableness of their actions after the JVA had been entered into.

(b) duties of good faith

232. As regards a duty of good faith, there is an express duty of good faith set out in the contract in quite wide terms. In those circumstances it seems to me that there is no room to imply some further or different duty of good faith, or that, at the very least, such an implication will be difficult and calling for the exercise of great care. At the end of the day, I did not identify any duty of good faith relied upon by any party which went beyond the terms of clause 5.1 of the JVA. Ms Kennedy-McGregor submitted in terms in her closing submissions that it is "unlikely" that any further clause would be implied. Ms Palser accepted that her case could be brought within clause 5.2 with reliance on some further implied duty of good faith not being necessary. Accordingly, I leave any implied duty of good faith out of account.

233. As regards express duties of good faith, the position has been considered in some detail by the Court of Appeal in *Re Compound Photonics Group Limited, Faulkner v Vollin Holdings Limited* [2022] EWCA Civ 1371. The context was an appeal against a decision of the trial judge who had approached a contractual duty of good faith on the basis that it comprised certain minimum components as identified by HH Judge Klein in *Unwin v Bond* [2020] EWHC 1768 (Comm).

234. The minimum standards so identified by HH Judge Klein in the *Unwin* case were as follows:

[230]….once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:

i) they must act honestly;

ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;

iii) they must not use their powers for an ulterior purpose;

iv) when acting they must deal fairly and openly with the claimant;

v) they can consider and take into account their own interests but they must also have regard to the claimant's interest. These minimum standards are not entirely distinct from one another. Rather, they tend to overlap."

235. In the *Compound Phototonics* case, the Court of Appeal re-iterated that the meaning of a good faith clause depends on a construction of the clause in question, applying normal principles of contractual construction. There are however, no "minimum standards" necessarily implied into every such clause. Snowden LJ, giving the lead judgment, said:

> *"[147] ….the first, and most important, point to emphasise is that like any question of interpretation of a contract, an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used. That point has been made very clearly in many*

cases, including by Jackson and Beatson LJJ in Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200 ("Compass Group") at [109] and [150]- [151].

[148] The second, and related, point is that when considering the interpretation and meaning of an express good faith clause in context, cases from other areas of law or commerce, which turn upon their own particular facts, may be of limited value and must be treated with considerable caution. That point was made very clearly by Auld LJ in Street v Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964 ("Street") at paragraph [41], which was cited with approval by Jackson LJ in Compass Group at [110],

> *"Shorn of context, the words "in good faith" have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common-law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another." (my emphasis)*

[149] Given that very clear warning, as Newey LJ observed at the hearing, apart from the very obvious point made by Auld LJ in Street that the core meaning of an obligation of good faith is an obligation to act honestly, it is very far from obvious why it is logical or appropriate to attempt to analyse other cases, decided on other facts, in order to deduce a number of further "minimum standards" of conduct that a defendant must be taken to have agreed to comply with in every case in which a good faith clause has been used in a contract.

[150] That was, however, what HHJ Klein did in paragraphs 230 to 232 of his judgment in Unwin v Bond, which formula the Judge endorsed and applied "in full" as the cornerstone of his reasoning in paragraphs 366, 367 and 400 of his Judgment in the instant case.

[151] I respectfully agree with the point made by Auld LJ in Street and the doubts expressed by Newey LJ. Whilst the concepts and ideas advanced in other cases might well be useful analytical tools in the process of interpretation of a particular contract, in my view it is not appropriate simply to apply them in a formulaic way in every case, irrespective of the context and the other terms of the agreement in issue."

(c) fiduciary duties

236. I was referred to a number of authorities but can simply refer to the most recent of these: *Glenn v Watson* [2018] EWHC 2016 (Ch). In that case, Nugee J (as he

then was) helpfully set out a summary of the principles to be gleaned from the extensive case law on the subject:

> "[*130] I will ….start with the law. I was referred by both Ms Jones and Mr McCaughran to a number of authorities on the question whether a fiduciary duty is owed by one person to another. For the most part I did not detect any significant difference between them as to the law; the authorities referred to were rather put forward as illustrations, thought to be helpful to one side or the other, of the principles. In those circumstances, I do not intend to discuss the authorities at length, but will try and summarise what I understand the principles to be.*
> *[131] Those are I think as follows:*
> *(1) There are a number of settled categories of fiduciary relationship. The paradigm example is that of trustee and beneficiary; other well-settled examples are solicitor and client, agent and principal, director and company (subject to the impact of the Companies Act 2006), and the relationship between partners: Snell's Equity (33rd edn, 2015) at §7-004.*
> *(2) Outside these settled categories, fiduciary duties may be held to arise if the particular facts warrant it. Identifying the circumstances that justify the imposition of fiduciary duties has been said to be difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship: ibid at §7-005.*
> *(3) Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings – indeed they very frequently do, as the example of agency illustrates – but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party: ibid.*
> *(4) A joint venture is not one of the settled categories of relationship giving rise to fiduciary duties between the joint venturers. Although at first sight the analogy with a partnership might suggest that it would be, it is clearly established that the phrase "joint venture" is not a term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature: Ross River Ltd v Waveley Commercial Ltd [2013] EWCA Civ 910 (**"Ross River"**) at [34] per Lloyd LJ.*
> *(5) The default position is that no such fiduciary duties arise. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers: Crossco No 4 Unlimited v Jolan Ltd [2011] EWCA Civ 1619 at [88] per Etherton LJ. Examples of cases where, exceptionally, fiduciary duties have been held to arise are the decision in Ross River itself; that of Etherton J in Murad v Al-Saraj [2004] EWHC 1235 (Ch) (**"Murad"**) (appealed, but not on this point: [2005] EWCA Civ 959 at [4]); and that of Peter Smith J in J D Wetherspoon plc v Van de Berg & Co Ltd [2009] EWHC 639 (Ch) (**"Wetherspoon"**). In Wetherspoon one director of the defendant company was found to have owed a fiduciary duty but the other two not, and it was said by Lloyd LJ in Ross River at [37] to be a good illustration of the proposition that the existence of a fiduciary duty in such a case is very fact-sensitive. With these can be contrasted two recent cases in which fiduciary duties have been held not to arise between co-venturers: Baturina v Chistyakov [2017] EWHC 1049*

*(Comm) (Sue Carr J), and Cullen Investments Ltd v Brown [2017] EWHC 1586 (Ch) (Barling J) (**"Cullen"**), a case coincidentally involving Mr Watson.*

(6) What then are the particular factual circumstances that will lead to the Court finding that fiduciary duties are owed? This can best be elucidated by a number of citations:

*(a) In his well-known classic judgment in Bristol & West Building Society v Mothew [1998] Ch 1 (**"Mothew"**) at 18A, Millett LJ said:*

"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

(b) In Arklow Investments Ltd v Maclean [2000] 1 WLR 594 at 598G, Henry J, giving the judgment of the Privy Council, said:

> *"the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."*

(c) In F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2) [2011] EWHC 1731 (Ch) at [225], Sales J said:

> *"Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another."*

(d) In another case involving Ross River Ltd, Ross River Ltd v Cambridge City Football Club [2007] EWHC 2115 (Ch) (cited by Lloyd LJ in Ross River at [56]-[58]), Briggs J referred at [198] to:

> *"well known badges or hallmarks of a fiduciary relationship, such as … [if] the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit."*

(e) In Ross River at [51]-[52] Lloyd LJ cited with approval a passage from Bean, Fiduciary Obligations and Joint Ventures (1995) (itself referring to Finn, Fiduciary Obligations (1977)), which is too long to set out in full but the essence of which is as follows:

> *"[Fiduciary] office holders are entrusted with power to act for the benefit of another, but are not under the immediate control and supervision of the beneficiary…*
>
> *Finn's rationale is that the fiduciary who has freedom to determine how the interests of the beneficiary are to be served requires the supervision of equity. Indeed, it is the fiduciary's autonomy in decision-making that requires equity's supervision and this is required whether or not the autonomy is created under a contract between the parties or is inherent in the office."*

(7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his

side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to "the single-minded loyalty of his fiduciary" (Mothew at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.

(8) This analysis also explains why fiduciary duties will not readily be found in commercial settings. In commercial dealings the relationships are (usually) primarily contractual; and it is of the essence of commercial contracts that each party is (usually) entitled, subject to the express and implied constraints of the contract, to seek to prefer his own interests, and is not obliged to put the interests of the other party first.

(9) So far as joint ventures are concerned, fiduciary duties may in particular be found to arise where one party has control of assets which are to be exploited for the joint benefit of both. Thus for example in John v James [1991] FSR 397 at 433 Nicholls J said of a publishing agreement:

> *"The copyrights were to be assigned to the publisher, and to become its property, but with the intention that they would be exploited by the publisher, which would have complete control over the method of exploitation, not for its benefit alone but for the joint benefit. Thus, commercially, the arrangement was in the nature of a joint venture, and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function."*

And in Ross River Lloyd LJ (who said at [62] that John v James was the most useful and compelling analogy) described it at [55] as:

> *"a clear and instructive example of a transaction in the nature of a joint venture where the relevant assets belong legally and beneficially to one party, whose task it is to exploit them, but they are to be exploited for the common benefit of both parties, and where fiduciary duties arose from the situation despite the fact that the operator had its own personal interest in the exploitation to which it was entitled to have regard."*

(10) Even if a party is held to have owed a fiduciary duty to another party, the nature of the fiduciary obligations owed is itself a fact-sensitive enquiry, to be determined by considering the particular relationship between the parties: Ross River at [64]. Thus for example in John v James the defendants were not disposed to dispute that the publisher owed a fiduciary obligation to account for royalties received, but it was disputed, and had to be decided, whether it owed a fiduciary obligation in respect of exploitation of the copyrights; in Ross River Morgan J had found that the defendants owed fiduciary duties in certain respects but not others, and the Court of Appeal found that the duties were more extensive.

.....

[134] I will add one further point here. The reference in the cases (such as John v James, Mothew and Longstaff v Birtles) to a relationship of "trust and confidence" does not mean that every relationship in which one party trusts the other is a fiduciary relationship. Contracting parties usually do trust each other – indeed they would be unlikely to do business with each other if they did not – but this does not mean that they owe each other the duties which are peculiar to fiduciaries. What I think is meant by a relationship of trust and confidence in this context is where one party places himself, or is placed, in the position where he trusts and confides that the other party will act

> *exclusively in the first party's interests. If the concept of trust and confidence is not confined in this way, it seems to me to cease to be of any utility in determining whether a fiduciary duty is owed: cf the recent decision of Leggatt LJ (at first instance) in Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm) (**"Al Nehayan"**) at [164]-[165]. This judgment, which contains a valuable analysis of the whole question of fiduciary duties (see at [153ff]), was not available at the time of the hearing, but it contains nothing with which I disagree, and on this particular point seems to me plainly right, and I have not thought it necessary to ask for the parties' further submissions on it*."

237. Applying these principles, I stress the following points.

238. First, the fact that the Claimants asserted in their particulars of claim that fiduciary duties were owed (which is a question of mixed fact and law but ultimately mainly a question of law) does not in my judgment prevent them from arguing to the contrary and if necessary I would permit them to withdraw that admission.

239. Secondly, for fiduciary duties to exist in the context of a contractual commercial joint venture is unusual. The key is usually not simply whether there is trust and confidence arising from the contractual (or I would add, a familial) relationship, but whether or not a party is in a position where they trust and confide that one or more other parties will act exclusively in their interests or to put the interests of that person first, above their own interests.

240. Thirdly, fiduciary duties, even if they are owed in a joint venture context, are not necessarily owed by each joint venture partner to all or any of the others. Further, even if a fiduciary duty is owed with respect to certain aspects of a joint venture it will not necessarily be owed in reference to other parts of the transaction.

241. Fourthly, as regards fiduciary duties owed in this case, the fact that there is an express good faith clause suggests, at the least, that there are no fiduciary duties owed over and above that contractual duty.

242. Fifthly, as regards the Parents, there is a limit to the extent to which the JVA can be said to be one where joint assets are to be exploited for the benefit of both. Under the JVA, the parents undoubtedly make the Main Property available to the Claimants so that the Claimants can make a profit but the Parents' interest is simply to receive £800,000 and no more from the available profits if they materialise but otherwise by way of indemnity from Chris and Andy. The JVA envisages, in effect, that the Claimants will exploit the Main Property (and the Leasehold Land) to make whatever profit they can but it seems to me clear that in so doing they are not required to give priority to the interests of the Parents.

The JVA and the "Development"

243. The first issue that I address is the issue of whether the JVA is limited to an agreement in relation to a development of nine flats and, in particular, whether or not it was possible for the Company to decide that the development project could be changed to provide from 9 to 11 Flats and/or that it could alter the height of

the roof beyond the planning permission and, if not (in either respect), whether or not this was agreed to by Koumis and Flora. As to the latter, I understood Ms Kennedy-McGregor to accept that it was open to the parties to agree subsequently to the JVA to vary ~~is~~ its terms but to deny that they had done so in this respect as regards the nature/scope of the development.

244. Related to this issue is the question of when the Development was "complete" such that, assuming sufficient overall profits, payment of the £800,000 fell due to Koumis/Flora.

245. The arguments regarding construction were stark.

246. On the one hand, Ms Kennedy-McGregor submitted that the JVA provided for the "Development" in accordance with the Planning Permission specified. The building of something which did not comply with the Planning Permission was a breach of the JVA. Accordingly, had it not been for this breach then the Development would have been completed in 2008. Flats would then have been sold and Koumis/Flora would have been entitled to receive £800,000. The breach had resulted in late receipt of the £800,000 and, in effect, Koumis/Flora were entitled to compensation reflecting loss of interest on the capital sum of £800,000. As well as breach of contract (see Defence and Counterclaim paragraph 58), the matter is put on the basis of a breach of fiduciary duty and good faith in arranging matters (such as changing what was in fact built from that for which planning permission had been obtained) or failing to arrange matters (by altering what was built to that for which planning permission had been obtained) with the effect that the £800,000 was not paid.

247. I should go on to explain that even if a relevant breach were to be established there would be questions of quantification which means that the matter would have had to be the subject of a further enquiry. The issues which might arise turn on (among other things) an identification of the correct claimant; the precise time(s) at which Flats were or would have been in a physical state to be sold; the time by which requisite sales to realise sufficient profit to trickle down to enable the £800,000 to be paid the sales might have been expected to be achieved; whether the Company could have delayed sales of Flats by reason of the state of the market, both as a matter of the JVA and on the facts; whose option it was to transfer a Flat in partial satisfaction of the £800,000 and how that option would have been exercised. These matters, which may not be exhaustive, would potentially affect the date from which damages (in the form of, or quantified on the basis of, lost interest on the £800,000 sum payable) would be calculated.

248. In response to this case, Ms Palser submitted first, that the Company had power under clauses 4.1 and 4.2 of the JVA to determine the policy and matters of principle, which included how many Flats to create, the precise dimensions of the buildings, whether to apply for retrospective planning permission and the sums to be borrowed. She submitted, secondly, that in any event and as a matter of fact the Parents had agreed to the change in the proposed Development including (a) the number of Flats; (b) the dimensions of the building (c) that there be an application for retrospective planning approval and (d) the revised funding agreed with RBS.

249. The relevant provisions of the JVA are as follows:

(1) "*3.1 On completion of the Development the units shall be disposed of and the following liabilities be discharged by the Developer*"

(2) "*4.1: The Developer shall have the sole control of the management of the Joint Venture and shall determine the policy of the Joint venture and make decisions on maters of principle in relation to the Joint Venture*."

(3) *"4.2 For the purposes of this clause maters of principle include (but not limited to):*

(a) …the sale of the Flats

…

(c) the selection and settling of the design content and quality of and materials to be used in the Development;

(d) the application for a Planning Consent or Building Regulations consent or such other consent necessitated to assist the Development (other than one of routine nature)…and the making of an appeal against a refusal to grant Consent;

(e) the acceptance of the financial appraisal of Development and budget estimates of Development Expenditure;

(f) ..approval of a Lessee and the terms of the Lease, approval of the Purchaser in terms of a Sale, the terms of any financial assistance to fund the Development Funding or Expenditure, the variation, alteration or change of or omission from a decision on a matter of principle already made by the Joint Venturers.

(g) The prosecution of claims in respect to the Joint Venture and any other act matter or thing which is not within the day-to-day management of the Joint Venture or implicit or comprehended in any decision on a matter of principle already made by the Joint Venturers."

(4) *"5.1 Each Joint Venturer will co-operate with the other and act in fairness and in good faith to enable the other to discharge his duties and the Joint Venture objects to be attained and accordingly will respond promptly to requests properly made by the other for approvals, information or assistance."*

(5) *"Sale of Flats*

8.1 On completion of the Development, the Venturers will appoint Surveyors and/or Estate Agents to market and sell them at the best market price…..

> *8.2 The Freeholder agrees to execute all Leases, contracts, deeds and such other documents to effect he granting of the Leases and Sale of the Flats and appoints the Developer to act as his agent in that respect."*

250. In my judgment, clause 4.1 taken with clause 4.2 (and especially 4.2(f)) enabled the Company to change details in the Development such as those that arose from the changes to the buildings (in dimensions of the buildings and the number of Flats) which was different to that covered by the planning permission as granted for 9 Flats and as referred to in the JVA. I accept that at some point changes might be so great that a completely different project would have been in prospect (e.g. if, instead of 9 or 11 flats a high-rise block of 40 flats was under consideration) but in this case the amendments were, in my judgment, well within what was permitted by the JVA.

251. Furthermore, although I accept that the exercise of any discretion in this respect was subject to the express duty of good faith, I do not consider that that duty was breached on the facts of this case. There was no fixed time by which the development had to be completed such that the relevant £800,000 became payable from profits. The parties must be taken to have relied upon the mutual interest in completing the development speedily and realising their respective investments.

252. Further, albeit mistakenly as matters turned out, it was believed that retrospective planning permission would not be too difficult or take too long to obtain. It was also believed, again mistakenly, that the planning permission granted covered the roof heights as built whereas, as later determined by the inspector (and upheld on appeal), the approved roof height was in fact lower. There is nothing in the evidence before me which justifies a finding that the Claimants did not bona fide believe that they were correct in the position that they took on this issue, which was also relevant to the issue of retrospective planning permission for the 11 flats, built within what the Claimants believed was the approved roofline/height.

253. Similarly, I cannot see that the change in the development from 9 to 11 flats would have amounted to any relevant breach of any applicable fiduciary duty.

254. Ms Kennedy McGregor identified three fiduciary duties that she said applied:

(a) A duty not to place himself in a position of conflict between his self-interest and duties to other joint venturers;

(b) Not to profit from his position at the expense of other joint venturers;

(c) Not to exercise his powers in his own, or in a third parties', interests.

255. I do not consider that these duties applied to the Claimants and were owed to Flora/Koumis with regard to seeking more profit from the development by creating 11 Flats rather than 9. There was no duty, contractual or otherwise, to develop and sell Flats as soon as possible and so no conflict of duties/self-interest. There was no improper profiting and the contract operates on the basis that any net profit over and above £800,000 is retained by the Company. I

consider that no relevant fiduciary duties were owed in the particular respect of the exercise of the relevant rights that I am considering.

256. If I am wrong in my conclusions regarding the powers given to the Company to alter the details of the Development or that the power was properly exercised, the next issue is whether, in any event, Koumis and Flora agreed to the relevant changes in the development.

257. As regards this, the witness statements of Andy and Chris were to the following effect.

258. In about late July 2007, the quantity surveyor, Mr Sanjay Backory of SB Building Consultants), the then new architect (Mr Ibi Ekineh of IB Design Associates) and the builder (Mr Peter Antoniou of Montaigne Building Services), Chris, Koumis and Andy met in the newly built loft area to discuss the possibility of applying for planning permission to build two more additional flats using the loft space. Everyone considered it to be a good idea. They then went to 1 Lodge Drive to continue their discussions. Flora was there and ~~then~~included in the ongoing discussions. The architect advised that a planning application for 11 flats should be made and to include part of the newly purchased garden of 11 Park Avenue as part of the property. The idea was that as what was being incorporated was 2 additional flats within the roof space and there was no change in the existing approved height, length and footprint, then he could see no reason why permission would not be granted.

259. According to Andy and Chris, a further meeting took place a few days later between Chris, Andy and their Parents. It was agreed the JVA would remain in being but there would be 11 flats instead of 9.

260. The planning application accordingly was made in October 2007. Further funding from the Bank of a further £200,000 was agreed with the Bank and the relevant Bank loan documentation was signed by the parents.

261. This evidence of agreement of the Parents to the revised Development is supported by the Bank documentation that they signed, at the latest in 2008, as outlined earlier in this judgment and which covered the additional £200,000 borrowing and in terms made clear that the borrowing was in respect of the Development of 11 flats.

262. It is also supported by the evidence of Mr Sanjay Backory. In his witness statement he confirmed in terms the meetings referred to by Andy at the Property and subsequently at 1 Lodge Drive and the Parents' agreement to the revised proposal to create 11 flats. He also confirmed the architect's advice to seek planning permission retrospectively and not hold up works pending its receipt. He also referred to "multiple meetings" at 1 Lodge Drive and a number of meetings on the development site and said that the Parents were happy for Andy and Chris to proceed to build the two additional flats. As I have already said, although there were some weaknesses in his evidence I consider it to be truthful and reliable and to be taken into account in favour of the Claimants' case.

263. It is also supported (more indirectly) by the evidence of Mr Costas Georgiou, who gave evidence that he was told by Koumis and Flora of Andy and Chris' intention to build 11 rather than 9 Flats and the Parents saying that they could see the sense in that and that they were pleased and happy about this proposal. I accept this evidence.

264. Tony was not involved at the time and so was unable to give any relevant evidence from his own knowledge. I have already adverted to the fact that his evidence that the Parents did not know about the extra bank loan at all is inconsistent with his other evidence (also unconvincing) that they considered that the bank loan was to complete 9 flats and not 11 (despite what the loan documentation said).

265. Mr Evangelou claimed in his witness statement that the extra loan of £200,000 was to complete 9 and not 11 Flats. In oral evidence he seemed to think that only 7 Flats were involved. The question was, if he thought only 7 Flats were involved in the Development, how he could have thought that an extra £200,000 was borrowed to complete 9 Flats. His answer, that Koumis so told him, was not convincing.

266. The case that Koumis (and Flora) had not agreed to the building of 11 rather than 9 Flats therefore largely depended on (a) an attack on alleged inconsistencies in the evidence given on behalf of the claimants and (b) reliance on evidence that Koumis (and Flora) were not happy about the delay that then took place, at least in part, but in my assessment in any event caused by the absence of relevant planning permission.

267. As regards alleged inconsistencies, Ms Kennedy-McGregor focussed on a submission that Chris and Andy's oral evidence was inconsistent with Mr Backory's evidence and their own written evidence to the effect that Koumis and Flora had agreed to the change to 11 Flats at two meetings, one with Koumis on site in July 2007, followed by a meeting with Flora and Koumis at their home.

(1) Her main point was that the decision to go ahead with a planning application for 11 flats cannot have been reached in July 2007 because it had already been made before that because (a) 11 Park Avenue had been purchased in May 2007; (b) the extra Bank borrowing had been agreed by 12 June 2007 (when the Bank sent a letter confirming that fact); (c) in oral evidence, Andy mentioned speaking to his parents about the possibility of building 11 Flats rather than 9 Flats in March or May 2007.

(2) I do not find any inconsistency.

(3) Andy did not at any time assert that agreement with the Parents was reached before the two meetings referred to. The fact that 11, Park Avenue was purchased in May does not mean that the Parents had agreed to 11 Flats being built at that stage nor that Andy and Chris had reached a definite decision to build 11 Flats at that stage. Similarly, the fact that a Bank Loan had been negotiated prior to the July meetings did not mean that the parents had by June agreed to the 11 Flats (there is no evidence as to when it was signed by them, assuming that it was) nor that a definite decision had then been taken.

It is not suggested that the Parents had agreed to the extra bank loan prior to the meetings in July, all correspondence with the Bank at the relevant time was by Andy. Mr Backory said, from his perspective of course, that the idea was first raised at the July meetings, but he may have been mistaken or it may have been the first time he was made aware of the possibility.

(4) In any event, the Bank loan documentation is clear and the Parents clearly had agreed to 11 Flats being built when they signed the Bank loan documents and it does not really matter precisely when or how they agreed. However, my finding is that they agreed to the 11 Flats point at the meetings in July as explained by Mr Backory and Chris and Andy.

268. The other aspect relied upon by Ms Kennedy-McGregor was evidence that Koumis was unhappy about the delay in the completion of the Development, caused by the decision to construct 11 Flats and the failure to obtain planning permission speedily.

269. In this respect, she particularly relied upon the evidence before HH Judge Cooke and what he said in his judgment:

> "*Third, there is considerable evidence that the deceased and his wife were unhappy to have been kept out of their money from the JVA since before Flora died in 2010. The deceased and Flora both told Maria that they wanted their money in order to go on a cruise. The deceased said the same to his solicitor Mr. Achillea when instructing him about the JVA. It was submitted that they did not lack money, as they were receiving the rents of two flats, and had also given various amounts to different children in the period 2006-9, but it is impossible to say without a detailed breakdown of their finances whether this meant they had sufficient for what they wanted. Whether they could in fact have funded the cruise from other resources is beside the point; they had themselves made clear they wanted to be paid under the JVA long before Tony is alleged to have influenced them, so that wish cannot have been put in their minds by Tony.*"

252. Much of the evidence heard by Judge Cooke on this issue was not presented to me as witness evidence in the trial before me. On the basis of the evidence before me, I am satisfied that at the time when they are alleged to have agreed to the construction of 11 Flats rather than 9 Flats, the Parents were happy to do so and probably believed (as did Andy and Chris) that planning permission would not be an issue and that the development would be completed fairly shortly. As time went on and the planning issues (refusal of permission and service of planning Enforcement Notice) arose and dragged on, I am satisfied that they became increasingly irritated that the development could not be completed and they receive their £800,000 under the JVA. However, no breach in relations with Chris or Andy took place until Christmas 2012/January 2013 and, at least in part, that was over personal matters rather than over the JVA.

b) The Freehold

270. I turn to whether or not the JVA provides an agreement by Koumis and Flora for the transfer of the freehold of the Main Property to the Company. The fact that

legal title to the Main Property was in fact held only by Koumis does not affect or invalidate the following analysis.

271. Ms Palser invites me to hold that Tony is estopped from raising this issue because of the circumstances in which the transfer of title took place pursuant to an unchallenged court order providing Ms Maitland with power to do the same. I will, however, consider the construction of the JVA on this matter first.

272. Tony's case is that clause 3.6 of the JVA:

"*does not say that the Freeholder (Koumis and Flora) will be paid £800,000 in consideration for the transfer of the Property; it is averred that it says that the Freeholder will be paid "in consideration of the Property", and it is further averred that on its true construction the sub-clause meant that the Freeholder was to be paid for having provided the Property for the purposes of the Development, and not for its transfer*" (see paragraph 19(2) of the Defence and Counterclaim).

273. In her written closing submissions, having set out Tony's evidence and case that the parents "*were told by the Brothers, agreed to and always believed, as Tony said in evidence, that what the JVA did was to allow the C's to build on the land and sell the flats, pay the Development's debts, including the £800,000 to their Parents and retain all the profits*", Ms Kennedy McGregor accepted in terms that "*Tony's views of what the words of the JVA meant are irrelevant*". I would add that, when considering the question of construction, the same is true of any other person's views, whether those of the Parents or, indeed, of Andy or Chris. Again, I should stress that there is no case brought for rectification, estoppel or misrepresentation as regards this matter.

274. It follows that I do not need to determine the disputed evidence as to what the Parents in fact believed or intended.

275. For completeness, however, I record that Andy and Chris were clear that the Parents always did intend to transfer title to the Property in exchange for the payment of £800,000. This receives some support from the untested witness evidence of Mr Teoli (the accountant for Flora and Koumis) in the Probate Proceedings. He, in his witness statement for those proceedings, suggested that the discussed tax effects of the JVA involving a transfer of title compared with the CGT implications of not effecting a transfer were taken into account by the Parents in determining that the transfer would take place. This position of the Parents was, say Andy and Chris, maintained at least until the dispute arose between Koumis and Chris/Andy in 2013 as fleshed out at the Bank meeting in July 2013 at which Tony on his behalf made clear that his father expected to retain title to the Property as part of any deal and Koumis himself (who was less clear) seemed to agree. Tony says the opposite was true.

276. Ms Kennedy-McGregor also submitted that clause 3.6, which deals with what happens on completion of the Development, only refers to a payment of £800,000 to the Freeholder "in consideration of the Property" but does not in terms deal

with the transfer of the freehold at that time. The inference, she says, is that the clause and JVA does not provide for any transfer of title to the Freehold to the Company.

277. The relevant clauses of the JVA in this respect are clauses 2.1, 3.1, 4 and 9. The relevant provisions are as follows:

"*2.1 The Venturers have agreed to enter into this Agreement to establish the Joint Venture between them for the carrying out of the Development:*

….

*(iii) [*Andy*] and [*Chris*] shall provide the Leasehold Land which will form part of the Property and the Development*

….

*(x) The [*Company*] shall Pay* [Koumis and Flora*] £800,000 (eight Hundred Thousand Pounds] for the Property from the Net Profit.*

…

(xii) All profits remaining after discharging (i) o 9xi) shall belong to [the Company].

3. Completion of the Development

3.1 On completion of the Development the units shall be disposed of and the following liabilities discharged by the Developer

….

3.6 [Koumis and Flora] *shall be paid £800,000 (Eight Hundred Thousand Pounds in consideration of the Property. Such payment shall take the form of one unit being granted to* [Koumis and Flora] *and the value of such unit being deducted from the £800,000 payable to* [Koumis and Flora].

……

(iii) The First and Second Party shall provide the Leasehold Land which will form part of the Property and Development"

……

4.1 The [Company] shall have sole control over the management of the Joint Venture and, shall determine the policy of the Joint venture and make decisions on matters of principle in relation to the Joint Venture.

4.2 For the purposes of this clause matter of principle include (but not limited to):

(a) the terms of acquisition of the Property and Leasehold Land and the sale of the Flats".

278. As a matter of construction it is clear to me that the JVA required the parents to transfer title to the Freehold to or at the direction of the Company and that the JVA did not provide that they were to retain title nor that the £800,000 was for the ability to build on the Property and carve out leasehold interests from the freehold title but no more.

279. First, this follows from the wording used in the JVA. In clause 2.1(x) payment "for the Property" most naturally means exactly that: a payment for something usually means that the payment is for the acquisition of the item not that it is payment for its "use". The matter is again clear from clause 3.6 providing that the £800,000 was a payment "in consideration of the Property" not in consideration of its use. Further clause 4.2 refers to the Company having control over the "terms of the acquisition of the Property". That must be a reference to the terms of acquisition of the Property other than the amount (and timing of the payment) of the consideration of £800,000. Acquisition can only refer to acquisition of title to the Property. Furthermore, in my judgment the terms of the JVA (especially 4.1, 4.2(a)) envisage the possibility that the Company would ultimately have sold the freehold to the Flat owners by way of (for example) shares in or membership of a company owning the freehold of the Property (and the relevant long leaseholds of the adjoining land). Necessarily, that would involve the Parents transferring the freehold to the Company.

280. Furthermore, there are no surrounding circumstances or bigger picture which militates against the natural meaning of the words used in the JVA. The Parents were receiving £800,000 which in effect represented no more than the value of the Property at the time that the joint venture was entered into. Indeed, the surrounding circumstances are all in favour of the JVA having the meaning contended for by the claimants.

281. Finally, clause 9, dealing with death or incapacity of "either" party provides a mechanism whereby on death of a party, that party's personal representatives can either elect to continue with the JVA on behalf of the deceased person or can dispose of that person's interest under the JVA to a surviving party or sell it to a third party. (The JVA extends this right to a proposed lifetime disposal by clause 12). The price is to be at or more than equal to the valuation of their relevant interest as determined by an expert. The expert, in ascertaining the value, is to take into account (among other things) the "value of the Property" (see clause 9.4(i)). This again indicates to me that the Property was ultimately not just to be "used" to build the flats and have carved out of it long leasehold interests for each physical flat but that it itself was to be transferred into the development as an asset of the development and not to remain in the ownership of the Parents.

282. The absence of detail in the JVA about the completion details (e.g. provision for execution of a transfer document regarding title to the Main Property) is in keeping with the limited detail set out in the JVA.

283. Two matters follow from my conclusion on the question of construction.

284. First, there can be no case of breach of contract or breach of fiduciary duty in Andy and Chris and the Company in fact being involved in the payment of £800,000 to Ms Maitland and her transfer of the title to the Company. (Indeed, there would in any event be a number of other reasons why such causes of action would not exist, not least being the fact that such arrangement was one entered into with a court appointed administrator giving effect to a court order mandating her to do exactly that).

285. Secondly, there is no need for me to determine whether or not the circumstances of the transfer by Ms Maitland of title to the Property to the Company was something that Tony is estopped from complaining about. I will simply say that in circumstances where Tony was a party to the relevant proceedings and application in which the administrator's powers were settled by the Court and specifically covered the transfer of the freehold as part of the completion of the JVA, there seems to me a strong case to say that he is prevented by the principle in *Henderson v Henderson* (1843) 3 Hare 100, based on abuse of court process, from litigating this issue in these proceedings. As the matter of construction is quite simple and clear, there is no need to consider the more difficult question as to whether the issue of construction can be raised by Tony at all.

The rent payments

286. From about February 2009 to June 2013, Koumis and Flora received between them rent totalling (according to the Claimants' latest calculations) £131,491 from Flats 7 and 8 in the Development.

287. At various times different sums have been put forward as being the amount in question. These range from £129,000 to £140,000. It is not clear to me whether the precise sum is agreed or not.

288. The first issue is the nature of the agreement in relation to such payments: were such payments (as Andy and Chris assert) simply accelerated early payments in respect of the capital sum of £800,000 that was due to the Parents as the "freeholder" for the transfer of title to the Main Property or were these payments (as asserted by Tony) pursuant to an agreement that the Parents would receive the rent from the two Flats until the Flats were sold and the £800,000 paid to the Parents, in effect by way of compensation by way of "interest" for not receiving the £800,000 under the JVA at an earlier stage (See Defence and Counterclaim paragraph 59)~~?~~

289. The next issue is: if the agreement was as asserted by Andy and Chris, then do the provisions of the Limitation Act 1980 prevent any recovery of any "overpayment" of the £800,000 due under the JVA as a result of receipt both of the £131,491 rent and (via Ms Maitland) the £800,000 purchase price?

290. Further, does the Estate have the benefit of a claim for damages in respect of non-payment of rental income from the two flats from about June 2013 to February 2017 (see counterclaim paragraph 60 claiming "at least" £109,650 as rent at

£2,550 pcm from July 2013 to February 2017, together with interest thereon from the date when each rental payment should have been made)?

291. There is very little contemporaneous evidence regarding the basis upon which Flats 7 and 8 were let on short term tenancies in Koumis' name and in relation to which he received the rents (rather than the lettings being made in the Company's name and the Company receiving the rent, which is what happened in relation to the other short lets of Flats).

292. According to Andy, it was due to the property crash caused by the "Global financial crisis" that it was agreed between him and his parents in January 2009 that it was not the right time to sell but that instead the Company would let out individual flats on short term tenancies to "ride the storm". I have doubts about the date given for the property crash but that matter was not pursued in cross examination by reference to average reported house or indeed average reported London flat prices. I also note that part of Andy's evidence was to the effect that an open day in November 2007 had not resulted in the sort of offers for the Flats (presumably being offered "off plan") hoped for in terms of the monetary consideration offered.

293. Andy asserted that building works, which included the 11 Flats, were completed in about September 2008. Flats 11 and 5 were retained by Chris and him personally. The two penthouse flats were initially left empty.

294. However, he says that in January 2008, he and Chris had discussions with their Parents. He says that it was explained that it did not look like Flat sales would happen for a number of years due to the property crash. Flora was however insistent that she did not want to receive the £800,000 fixed sale price for the freehold, due to what Andy and Chris say were her fears of Koumis' gambling habit, and instead she wanted the top two penthouse flats with any shortfall on the £800,000 being topped up in cash. Rather than creating long term leases in the names of Flora and Koumis, Andy says that Chris and he came up with the idea of the Parents letting out the flats in the short term so that they could get the rental income and that could go towards part payment of the debt of £800,000. Once the leases could be granted in the Parents' names then the shorthold tenancies could continue and, after the long-term leases were granted, then the rental from the short term tenancies would become income for them rather than instalments of the £800,000 price.

295. Andy says the claimants' case is further supported by the fact that the Parents did not treat the relevant rent payments as income but as part of the fixed sale price.

296. In this respect he relies upon a hearsay statement of Mr G Teoli, being the latter's witness statement for the probate trial dated 2 September 2016. As regards this witness statement, Mr Teoli said that:

(1) He did some accountancy work for Flora and Koumis, outside the JVA, for example in connection with the proposed sale, which fell through, of the freehold of the Main Property in about 2002-3 for a total of £625,000 (which he said was £575,000 for the property and £50,000 for Chris' business) and in

submitting applications for Flora and Koumis to be removed from the tax system, in about 2005 following the demolition of the Main Property.

(2) He advised all joint venturers regarding the tax implications of the JVA as well as introducing them to a financial tax specialist adviser.

(3) At some point, he was advised by Andy and Chris that due to the property crisis, it was not financially viable to sell the Flats so that they would be rented out until the market recovered. They told him they intended to pay Koumis a monthly amount of money as part payment of the debt and that he confirmed that this would not be classed as income and there was accordingly no need to "re-start Koumis/Flora in the tax system". He does not say in terms that he was told that rental income would be payable to Koumis as the landlord under the relevant short-term tenancies and that such rent would be part payment of the overall freehold purchase price of £800,000 but only until long leases of the relevant flats were granted to Koumis.

(4) In mid-2013, he received a telephone call from Andy explaining that he, Andy and Chris were now in dispute with Koumis and Tony regarding the terms of the JVA contract. Andy informed him his father was demanding the full £800,000 as well as wanting to retain the freehold. Mr Teoli says that he advised that if Koumis retained the freehold then that would trigger a substantial capital gains tax liability. Further, if Koumis insisted that the monies already paid to him over the last 4-5 years were in addition to the £800,000 owed (for the freehold) then it should be classed as income and income tax would be applicable accordingly.

297. I am prepared to accept the witness statement of Mr Teoli as being evidence before me. However, but as he did not give oral evidence and was not cross-examined before me, I give it limited weight. Again, I was no shown any hearsay notice in relation to the same. It does not take matters much further as on the crucial issue of the actual agreement regarding the top two floor flats it is silent. Further, it does not deal with the issue of whether his advice was passed on to Flora/Koumis nor whether they acted on it.

298. According to Chris, in early 2009 the Claimants and his Parents agreed to rent out Flats 7 and 8 in the loft space and the regular monthly payments would go to the Parents and be credited towards the £800,000 fixed price agreed under the JVA.

299. According to Tony's witness statement, Andy and Chris decided to forward one of the rentals to Koumis' account "to keep him quiet", Koumis knowing nothing about it at the time. When Koumis found out he was very cross but because Andy and Chris could not or would not sell the Flats they all agreed that Koumis should receive 2 of the rentals to compensate him somewhat for the lost interest he would have been receiving had he been paid and also because they were collecting so much money from short term rentals. His Parents, he said, told him that because they had no choice they agreed to take the rent for 2 Flats in the building as compensation for the delay in getting their money, but they were not happy about it. They wanted their £800,000 not (about) £2,500 by way of rent. Tony's evidence that the Parents did not know about the rent payments from their inception is belied by the fact that the relevant bank account appears to have been

opened (by Koumis) shortly before receipt of the first rent payment and used for little else; that Koumis signed the relevant tenancy agreements as landlord and by Tony's evidence in the Probate Proceedings that "some agreement" was reached with the Parents to rent out Flats.

300. According to Mr Evangelou, the rent from the relevant Flats was not to be deducted from the £800,000. He said: "*I absolutely know this 100% through conversations with my aunty, uncle, Chris and Andy*". Despite such 100% "certainty" derived from such conversation he accepted in cross- examination that he had not talked to Chris and Andy about this. I regard his evidence as carrying very little weight on this point.

301. According to Andy, in about March 2013, he received a phone call from Koumis' sister, Maroulla Panayi, in Cyprus. She said that Koumis was with her and that she wanted to act as intermediary to try and resolve matters. One of the issues identified by her was, says Andy, that her father no longer wanted Flats 7 and 8 but instead wanted Flats 1 and 2. This was apparently on the basis that he understood Flats 7 and 8 (the penthouse Flats) to be at risk if planning permission was not granted. Andy says that he made clear his father could have any two Flats that he liked (other than the Flats held or allocated to him and his brother Chris).

302. Andy says that, on Koumis and Maroulla coming to the UK in about May 2013, his father at one point agreed he would accept Flats 1 and 2 in full and final settlement of the payment of £800,000 under the JVA and then, at a later meeting, said that he would <u>not</u> accept Flats 1 and 2 in full and final settlement and made clear that he wished to retain the freehold.

303. I turn now to the meeting with Mr Liversidge of the Bank and Tony, Koumis, Chris and Andy on 3 July 2013.

304. The incomplete transcript of that meeting contains a number of references to the issue of rent. First, the transcript confirms that the idea at this time was that Koumis would be given long leases of Flats 1 and 2 in partial satisfaction of the debt of £800,000 under the JVA. However, Koumis, through Tony, indicated at various points that (a) he wished to retain the freehold of the entire Main Property and (b) he wished to receive just cash rather than any Flat in respect of the £800,000.

305. As regards the rent that had been paid to Koumis the following is recorded, where "SL" is a reference to Mr Liversidge; "TK" is a reference to Tony; "AK" is a reference to Andy and "CK" is a reference to Chris.

"*SL: OK, so I understand your father is owed £800,000, right?*

TK: Yes.

SL: no has any rent… obviously he's being paid rent I understand.

TK: Yes.

AK: Well he's been paid so far in the last 4 and a half years about £140,000.

AK: Yes.

TK: Yes.

SL: Is he still owed £800,000 or is the rent taken off the £800,000?

AK: Well, that's debatable. In here it doesn't say we have to pay him anything and the reason why we gave him £800,000 - it was much more than what the property was worth when we made this agreement, and he knows that-and the whole idea of what it says in here is…"

306. Later in the conversation, Mr Liversidge was making the point that the £800,000 due under the JVA to Koumis could only be realised by way of an asset sale as "*nobody has £800,000 in their pocket*". The provision of two Flats to Koumis would enable him to sell those Flats and realise cash. Tony was then asking what the value of the two Flats would be and suggested it would be less than, and could be a lot less than, £800,000. Andy countered by referring to the valuations obtained by the Bank. He also pointed out that under the proposed offer, Koumis was not just getting the two Flats:

"*TK: … alright Whatever you've agreed-you agreed you were going to give him two flats that's the £800,000 finished…..*

AK: … and the freehold… And he's already got £140,000 …

CK: …. he's been getting money all the time!

AK: … He's been getting £140,000 as well….

……

TK: …from what I understand the rent they're giving him now- the 2 ½ thousand pounds he gets every month - is coming off the £800,000 they owe him…

AK: …. well that's…. The agreement doesn't say….

SL: … the….the… no…sorry…

AK: … Doesn't say that we should give him anything. Then why did we agreed to give him £800,000? What's your response to that?"

307. At a later stage, Tony suggested that the rent received by his father could be applied against further bank borrowings to enable Andy and Chris to pay Koumis the £800,000 under the JVA. However, it was explained by Mr Liversidge and Andy that the rent being received by Koumis was nowhere near enough to service a loan of a further £800,000.

308. Towards the end of the transcript of the conversation, Mr Liversidge attempted to outline what it was that Tony and Koumis were asking for and what it was that Chris and Andy were prepared to agree to:

"SL: ...[inaudible] understand is this is - Andy and Chris will pay £800,000. OK? Are you also saying OK you want to retain the freehold?

TK: Yes. He…my father [inaudible] holding the freehold, yes.

AK: ...and they received £140,000 so far…

SL: ...OK…now am I right in thinking..does that sit outside the JV agreement?

AK: Of course it does.

SL: Right. OK.

TK: Sorry, say that again…. It

AK: Way out of it.

TK: Sorry: Is that what?

SL: I said is that…

AK: ....it's not in there what you're asking for…..

SL: ....basically by paying £800,000 and you retaining the freehold

TK: ...it doesn't mention anything….

AK: ...and after the money we've paid them."

309. The comments of Andy that the payment of rent was well outside the JVA are, in my judgment, consistent with him simply saying that the JVA did not make any provisions for such payments, which is obviously true. In terms he did not deal with the basis upon which the rents had been paid to Koumis. It is significant, in my judgment, that he did not positively assert an agreement that the sums would be deducted from the £800,000.

310. However, there is an indication that Tony understood that the rent sums were to be deducted from the £800,000 to be paid to Koumis under the JVA. It is possible that Tony's stated understanding was of the proposals then being put forward but I do not read it like that and of course at the meeting Andy is not recorded as putting forward any positive point about how the rent was to be dealt with other than that the JVA did not deal with the rent.

311. My conclusions are as follows. For present purposes I refer solely to Koumis though what I say also encompasses Flora during her lifetime.

(1) Koumis would have had to and did open the Nationwide bank account into which the rent was paid (and there was little other, if any, inwards activity in relation to it). Similarly, he signed the relevant Assured Shorthold Tenancy agreements in relation to the Flats in question. I reject Tony's version of events (as said to have been relayed to him by his father) that his father was presented with a fait accompli and was (at the time) furious (presumably that Assured Shorthold Tenancies had been entered into instead of Flats being sold, rather than fury at receiving some money).

(2) Although it was agreed that Koumis would grant the short term assured tenancies and receive the rent and this would assist his financial position, there was no express agreement as to what this money would be applied against or how it would be accounted for within the context of the JVA. Thus, I reject both Tony's version of events (said to have been relayed to him by Koumis) that the payments were compensation for late payment of the £800,000 by way of interest but also Andy and Chris's version of events that it was specifically agreed that the payments would be by way of reduction of the capital sum outstanding.

(3) The reason that I consider that no express agreement as alleged either by the claimants or Tony was reached are as follows:

(a) The JVA did not provide for a set time for payment of the £800,000 or for any interest payment. Andy was well aware of this. There was no reason for him (or the other claimants) to agree to pay interest. On the other hand, an accelerated payment of the £800,000 or simply some form of payment to help out Koumis would be understandable in the particular circumstances of Koumis being unhappy about delays, everyone's initial belief that retrospective planning permission would be easily obtained and the fact that some money by way of rent from other Flats was coming into the development.

(b) At the meeting with the Bank neither Andy, Tony nor Koumis put forward their later cases that there was an express agreement. It would have been an obvious point to make in answer to Mr Liversidge's questions: "No, the rent payments are not within the JVA but we have separately agreed….."

(c) The likelihood is that matters were dealt with informally rather than with thought being given to the legal consequences. Thus, by way of example, the JVA was not amended to deal with the bringing in of the second piece of the Leasehold Land.

(d) I consider that Andy may have had the thought processes that he describes but I find that he did not relay those to Koumis, or, if he did, they did not result in any agreement being reached as to the nature of the payments of rent so far as the JVA was concerned.

(4) The limited agreement that I find was reached was an agreement that Koumis would let the relevant flats as landlord and receive the rents therefrom but that how that was to be taken account of was left for the future. There was clearly

consideration on both sides. I do not find any term, express or implied, permitting the Claimants, or any of them, to stop the receipt by Koumis of rents from those Flats in the circumstances in which this occurred. As regards this, Andy simply said that rental payments to Koumis were stopped because Koumis was refusing to sign necessary documentation and that the claimants could not continue paying the rent to Koumis because of the consequent inability to sell Flats (on long leases) or refinance. He also relied on clause 4 of the JVA but that clause did not, in my judgment, apply to the separate agreement regarding rent which, as Andy himself said at the Bank meeting in July 2013, was outside the JVA. Chris's evidence was more in line with my finding: he said that rent would be paid until the market picked up and they (the Flats) sold.

(5) Although there was no express agreement as to how the rent payments were to be accounted for in relation to the Joint Venture, I find that they were not simply a "gift" and that the agreement was, in effect, that that was a matter to be left over to be dealt with later. In those circumstances, in my judgment, they are payments which have to be taken into account as sums for which Koumis (or his estate) have to give credit for, in effect as part payments of, or as set off against, the £800,000 sum, being the only sum due to Koumis under the JVA.

(6) However, the cesser of relevant rent payments to Koumis, being in breach of contract, gives rise to a valid claim for those instalments and the lost interest on the rent instalments that were not so paid. As regards the instalments, their ultimate recoverability has to be measured against the point that, if made, then the £800,000 paid by Ms Maitland is, to that extent, even more of an overpayment.

(7) As regards the payments received by Koumis (and/or his estate), the consequence ~~isis~~ that the payment by Ms Maitland of (in legal terms) £800,000 was an overpayment by the amount of at least £129,000. The precise sum may require further argument and/or evidence if not agreed. It may also be that further thought needs to be given to the interrelationship between the payment of the £800,000 and the payment of the sums referred to in sub-paragraph (6) above.

(8) As regards any overpayment, that took place in February 2017 so there are no limitation issues.

(9) There may be limitation issues in relation to some of the items referred to in sub-paragraph (6), but I have not found a limitation defence pleaded by the Claimants (though I may be wrong).

(10) Accordingly, I will hear further argument on the precise sum by which Ms Maitland's payment in February 2017 was an "overpayment" under the JVA, the detail of what I have dealt with under sub-paragraph (6) and any inter-relationship between the sums set out in sub-paragraphs (6) and (7). One possibility is a separate inquiry.

Refusal to grant long leases to re-finance

312. The pleaded claims are as follows. First, that in 2010 a proposed re-financing with Santander was found but not agreed to by Koumis so that the re-financing was lost (paragraph 24, Particulars of Claim) and secondly, that he failed to agree to grant long leases of Flats thereafter (paragraph 25, Particulars of Claim). In both cases these failures are said to be in breach of the terms of the JVA. As regards the Santander position, the breaches alleged are of clause 5.1 (the good faith clause) and paragraph 5.3(c) (which I shall refer to as the further assurance clause). No specific breaches are identified as regards paragraph 25. The particulars of claim go on to allege that due to the failure of Koumis and Tony to agree to grant individual (long) leases of Flats from March/April 2010, which would have enabled the First Claimant to shop around for more competitive refinancing/remortgaging deals (with at least 1-1.5% lower interest rates), the Loan had to be continued with for longer than anticipated and with interest, charges and fees creating losses of some £12,000 per quarter (as pleaded, the mathematics used suggest £12,000 per annum between the claimed dates of March/April 2010 to May/June 2016), said to be £72,000 in all (paragraph 34.1 particulars of claim~~, particulars paragraph 34.1~~).

313. As regards the alleged re-financing with Santander the evidence is limited.

314. The only contemporaneous direct documentary evidence is of the form apparently signed by Koumis and Flora seeking a loan of £975,000 over 25 years with a one year interest only period, signed on 28 April 2010. If anything the form suggests that Flora and Koumis were co-operating and were prepared to seek a loan from Santander.

315. Ms Kennedy-McGregor attacked Andy's evidence about the circumstances of the Santander proposal. In particular, she submitted that the application form was a "farrago of lies". If it was, then Koumis and Flora appear to have been a party to the same but as it happens I consider her characterisation to be unfair. By way of example, the four individuals are described as partners which , in law they were not but in layman's economic terms the description is, in my judgment, understandable. There is no reason to think that the full position would not have been revealed to Santander in time. The form also refers to a recent valuation which, in oral evidence, Andy was unable to explain and, ultimately said he did not remember. I accept his evidence regarding his memory. In short, I do not find anything in the relevant evidence causing me to conclude that Andy was lying.

316. In September through to November 2011 there is the limited correspondence with Male and Wagland over the plan to issue individual long leases to provide security to "the bank", although which bank is uncertain. The "bank" was apparently seeking a reply by October and the trail then goes cold. It does not sound as though there had been any refusal to sign any long leases as at that point, otherwise why would Andy have pursued the matter? Somewhat oddly, Andy's later position was that there was no point in providing a draft lease to Koumis for him to consider as he was not prepared to sign one. This suggests that, as at late 2011 at the very least, that position had not been reached.

317. The letter from Axis Commercial is hearsay but without actual evidence from the writer is to be accorded little weight. The indicative terms said to have been

issued by Santander are not further identified in the evidence before me.

318. It is also unclear what due diligence had been done by Santander at the stage indicative terms were issued (it is common for that to follow rather than precede indicative terms) and unclear whether at that stage they were made fully aware of the planning situation. Andy says that Santander was made fully aware but this seems unlikely. Mr Liversidge in July 2013 was very clear that borrowing against leases of the Flats (even those not immediately affected by the roof height) would not be given by most banks until the planning issues had been resolved. Andy did not disagree and recognised that continued financing by the Bank would be needed until planning permission was resolved. Ms Palser submitted that the Bank had continued to lend money even knowing of the planning permission but the Bank was already economically locked into financing the development and this is no indication that banks providing refinancing would have been content with the situation.

319. It is also unclear from the Axis Commercial letter how long the Santander indicative terms were on the table and when the matter fell away.

320. It is wholly unclear why (and when) leases were not proceeded with and there is no contemporaneous evidence assisting on that issue.

321. Ms Palser submitted that so far as lack of evidence is an issue, the Claimants should not be penalised. I do not consider that if they are unable to adduce sufficient evidence to meet the burden and standard of proof that this is unfair or that it penalises them. That is simply the consequence of the rules of civil litigation.

322. The most that can be said is that certainly by the end of November 2011 there is no indication of any problems caused by Koumis/Flora regarding refinancing from March 2010.

323. Andy says that as regards the Santander deal, although he and Chris were irritated by what he says was Koumis' not wanting to register leases for each Flat and to charge these to Santander, "we went along with his wishes for the time being."

324. There is some independent evidence from Mr Georgiou . He suggests that in 2009/10 Koumis (with Flora being present) made clear to him that they did not want to grant long leases of Flats.

325. I find that, whatever views Koumis expressed in connection with granting long leases of Flats in connection with a possible deal with Santander, matters at that stage never reached the stage of refusal and Chris and Andy did not then push the point but in effect acquiesced in the position.

326. Quite apart from Andy's own evidence, the contemporaneous evidence strongly supports the view that as at the end of 2011, Andy was still pursuing the idea of long leases of the Flats. The evidence, in the terms of the transcript of the meeting with the Bank in July 2013, is to the effect that Andy had never shared any draft long lease with Koumis for him to consider. That too suggests to me (given Andy went to the trouble of having one drafted in November 2011), that

no potential refinancing ever became a serious enough possibility for Andy to take that step.

327. By July 2013, Koumis was clearly refusing to agree to such a course but when that first occurred is not clear from the contemporaneous (or indeed other) evidence before me. I find that matters only came to a head after Andy and his father fell out in December 2012/January 2013. By that stage it is fairly clear that Andy was seeking to put a deal together with the Bank and I will come back to that time period later.

328. As regards the period between any Santander expression of "indicative terms" and 2013, Andy asserted that he and Chris were making constant attempts to re-finance but that Koumis was constantly refusing to sign long leases to enable this to happen. However, in cross-examination he admitted: "we were just looking around, we did not approach anyone."

329. Turning to the Bank meeting in July 2013, it is clear that that year Andy had been attempting to agree a further extension to the existing Bank loan but on the basis that refinancing would be arranged once planning permission had been obtained. There is also no suggestion at that meeting that specific refinancing had been lost as a result of Koumis having refused to sign long leases.

330. However, at the Bank meeting, refinancing by use of long leases of the Flats as security, was considered not to be possible until at least 6 months after planning permission was obtained. In fact, once the full planning permission was in place on execution of the s106 agreement then sales took place and the development was completed. Any relevant losses do not arise from a refusal to sign leases but, if at all, from refusal to sign the s106 agreement, which is a separate claim.

331. In summary:

(1) I find that there was no relevant factual refusal by Koumis (or Tony as executor) to execute long leases of Flats to enable such leases to be used as security for refinancing at least until 2013. If a disinclination to do this was stated then Andy and Chris went along with it and cannot complain.

(2) In any event, there is no sufficient evidence that any specific relevant refinancing opportunity was lost as a result of any such refusal either prior to 2013 or afterwards. Further, I am no satisfied that the route of offering long leases as security would have been feasible unless and until the planning situation was resolved and regularised. No loss is therefore made out.

(3) Further there are serious quantum issues: it is not enough to point to interest rates at the time. The actual interest rate and charges could depend on a number of factors.

(4) There are also difficulties as regards an alleged breach of duty (or, looked at another way, another issue of causal loss), assuming a relevant refusal to execute leases had been made out and that had been shown to have caused more favourable financing to be lost.

(5) I find that no relevant fiduciary duty was owed by Koumis in this respect and in any event any obligations were owed in contract only.

(6) Although Koumis (and Flora) were subject to the duty of good faith the only Loan that they had agreed to was that set out in the JVA (as must be assumed to be increased by £200,000 as they agreed to that increase). However, the duty of good faith would not, it seems to me, necessarily require them to enter into replacement financing on different terms, notwithstanding there might be a personal indemnity in place. The position can be tested by the Santander application form: could Flora and Koumis have been required to enter into a loan for 25 years solely on the basis of the good faith clause? In my judgment, the answer is no (or at least I am not satisfied that it is "yes"). As well as being relevant to establishing loss, the terms of any refinancing that was lost have to be identified to see whether Flora/Koumis were obliged under the JVA to enter the agreement. The creation of property over which security could be granted is only part of the picture. It would have to be shown that Flora/Koumis were required to enter into the overall available deal and that they had breached their duty in not doing so.

(7) The other breach of duty relied upon was the further assurance clause under clause 5.3(c). In my judgment no breach of such clause would be made out on the case put forward. The completion of the development did not hinge on refinancing and the JVA envisaged only the Loan there set out.

(8) There was a debate as to whether no loss was caused on a different basis to those outlined above. The argument of Ms Kennedy-McGregor was that clause 8.2, whereby the Freeholder agreed to execute all contracts and leases etc. to effect the granting of leases and sales of the flats and appointing the Company as its agent in this respect, had the legal result that the Company could have granted the long leases as agent and it did not need Koumis/Flora actually to execute long leases at all. Ms Palser submitted that (a) the clause only dealt with the drafting of relevant documents as agent and not their execution; (b) the Land Registry would not have acted on long leases executed by an agent under the JVA (although it is a Deed) and (c) the Claimants are estopped from asserting the point. In my judgment, the simpler answer is that the clause is dealing with the grant of leases for the purposes of and to enable the sale of the Flats, not for the purposes of mortgaging them for re-financing purposes.

(9) A claim was also put forward (though I do not think that it is pleaded) that the failure to grant long leases prevented the sale of the same. The inability to sell Flats was not because of any refusal to grant long leases but either because Andy did not want to sell until the market improved and/or because of the planning permission situation. Any claim in his respect therefore fails.

(10) Accordingly, the claim regarding the failure to grant long leases fails.

Default loan interest

332. It is accepted that the last loan renewal that Koumis signed was in November 2012. That extension expired on 1 March 2013 when the loan became repayable.

The Bank initially gave the family some grace period before enforcing its right to charge default interest. The meeting with the Bank in July 2013 was an occasion when the Bank explained that here was a risk of a default interest rate being applied. That was formally confirmed by letter dated 25 July 2013 from the Bank to Koumis when I was explained that the loan facility had been extended to 9 September in the hope that matters could be resolved by then but making clear the Bank's rights (including to seek possession) were reserved. By letter dated 23 August 2013 to Tony, the Bank proposed to increase the margin on the loan by 2% from 30 August if the supplemental agreement was not returned.

333. By email dated 6 February 2014, the Bank confirmed that interest was being charged at a 2% higher rate as the Loan was now in default. Such additional charge and the reason for it is accepted by the Defendant.

334. There remains a dispute as to whether default interest continued to be charged after, I think, the loan renewal was signed by Ms Maitland in September 2015. The Claimants claim loss, in terms of the extra interest charged as a result of the loan being in default, up to May/June 2016.

335. No point has been taken regarding the replacement of the original Loan by another one in 2012.

336. In my judgment, under the good faith clause in the JVA, Koumis was obliged to sign the relevant loan renewals sent to him by the Bank which simply extended the loan. If necessary, I would also hold that he was required to do so by clause 5.3(c) (though not by clause 8.2 which, as I have held, deals with the immediate sale of the Flats).

337. I do not consider that any relevant fiduciary duties over and above the contractual duties arise.

338. Ms Kennedy McGregor submits that there was no relevant obligation on Koumis to renew and extend the Loans because:-

(1) Clause 4 of the JVA did not entitle the Claimants to alter the Development to cover 11 Flats. This is an argument I have already rejected and also decided that Koumis and Flora had agreed to this change in any event.

(2) The claimants cannot rely upon the good faith clause because they were in bad faith in seeking Koumis agreement to a 3 year loan. However, the fact proposals were being put forward for agreement does not amount to bad faith. Further, as the Bank made clear, they were seeking extensions to the existing loan for a limited period which extensions were in effect without prejudice to the absence of agreement between the parties about refinancing and the rest and simply carried on the status quo.

(3) The relevant claimants are responsible for the delay (or part of the delay, being that after Koumis' death) because they (or rather Andy) placed a caveat on the will. However, I am not sure that as executor Tony needed a grant, or that the Bank would have refused to accept his signature as executor without a grant and with a caveat, or (had earlier extensions been

signed) that they would not have simply extended the loan or held off imposing default interest until the position was resolved. Although I cannot be sure which of these positions would have been taken I am satisfied that one or other would have been with the result that the caveat was not a cause of default interest being charged. Finally, not just Andy entered a caveat but others of the Siblings did too.

(4) The Claimants cannot rely on the JVA because they would be taking advantage of their own wrong. The reason they needed a loan renewal was because they had no obtained planning permission and were still renting out flats (see *Alghussein Establishment v Eton College* [1988] 1 WLR 587). However, the alleged wrongs that Ms Kennedy-McGregor relies upon are either not made out (e.g. forcing their father to take out loans "requiring" him to sign loan renewals, breaching collateral promises said to have been made to Koumis, incorrectly saying that they would "soon" get planning permission) on the evidence, not pleaded and/or not to the point. As regards the overarching points, that (a) they had not obtained planning permission and (b) were renting flats out on short term lets: (a) had been agreed to and (b) was within their powers under the JVA and not a wrong, either because they had a discretion as to when to sell and I am not satisfied they exercised it in bad faith so far as they relied upon the market improving and/or in any event I consider that in practical terms they could not sell until the planning permission issue was resolved.

(5) Ms Maitland was slow in signing the s106 Agreement. However, this was not explored in evidence, not pleaded and does not seem to bear on loan renewals.

(6) There is no loss because even had the loan extensions been signed (and the s106 agreement been signed) the Bank would have insisted on the Flats being sold whereas in fact the Claimants earned an income from the shorthold tenancies and/or the value of flats rose in the meantime. However, this does not seem to me to deal with the point that extra default interest was in fact incurred, that the s106 Agreement was not signed until much later and the Bank (as in July 2013) was envisaging a loan extension and a refinancing thereafter so the scenario of the Bank insisting on sale is not made out.

339. Accordingly, I am satisfied that this claim is made out. Unless the quantum can be agreed, there will have to be an inquiry. As I understand it, as well as the specific loss in terms of extra interest, there may also be other loss claimed in respect of management time, costs in appointing Ms Maitland and general legal expenses.

Failure to sign the s106 Agreement

340. The claim is that the s106 Agreement was not signed by Koumis (pursuant to clauses 4.1 and 5.3(c)) of the JVA) in early 2014 or thereafter. The claim of breach is pleaded at paragraphs 25 and 31 of the Particulars of Claim. The loss claim is at paragraph 34 presumably under particulars paragraphs 34.4 (lost

management time); 34.5 (costs of interim administrator) and 34.6 (legal costs). Ms Kennedy McGregor submitted no claim was made but I disagree.

341. The s106 agreement was sent in January 2014 as outlined earlier this judgment under the heading the Documents. The letter of 12 February 2014 from YVA is clearly key. On the basis of instructions which Koumis was then clearly able to give (even though being terminally ill and sadly dying a few weeks later), was that he would not sign the s106 agreement unless other demands of his were met. On its face, this is clear breach of the JVA.

342. So far as Koumis and his estate is concerned, this was, on the face of it, an ongoing breach.

343. Ms Maitland in due course did sign the s106 agreement, thus enabling the development to be completed and sufficient Flats to be sold to pay off the Bank and Koumis' estate.

344. The most that was said in closing submissions on behalf of the Defendant was that "it lies ill" in the mouths of the claimants to complain about this, referring to various matters which may or may not be true. In this respect reliance was placed on a number of matters: (a) ignoring the JVA requirement only to build 9 Flats (which I have found not to be the case or to have been relaxed by agreement); (b) building in breach of planning permission (which I have found to have been agreed and to be understandable at the time); (c) failing to apply for planning permission for another three years (not explored in cross-examination but in any event there was an application for planning permission which was refused and then ongoing appeals); (d) failing to do all that was necessary to get planning permission (again not explored in cross examination). Even if made out, none of these matters justify not signing the s106 agreement.

345. The loss claimed is in management time, legal costs and the costs incurred in connection with the appointment of Ms Maitland. It seems to me that the same heads of loss (though not necessarily the same times or costs) may also flow from and be causal loss caused by the refusal to sign the loan renewal documentation. Some of the loss may simply be part of the loss of these proceedings.

346. If losses are not agreed there will have to be an inquiry.

Costs of Flat 6 Sale costs

347. As part of the particulars of damage, flowing from the alleged breaches of the JVA, is a claim for approximately £3000 plus VAT in respect of the sale of Flat 6 sold in or around August/September 2017 which was not paid by the estate of Koumis. In the Reply and Defence to Counterclaim (paragraph 55(b)) the amount is corrected to £350 plus VAT and is said to be in respect of an invoice by Freeths for work done on the sale of Flat 6. The invoice was addressed to Ms Maitland. I am told that the Company paid these costs but that Ms Maitland should have done.

348. I am not clear why, even if Ms Maitland should have paid the costs (as between her and Freeths), these would have been borne by the Freeholder rather than

being part of the costs of the Development.

349. I was referred to clause 9.2 of the JVA providing that the costs of a professional person appointed to represent the estate of a deceased person will be borne by the estate and not be development costs but it is far from clear to me that the relevant costs properly analysed were indeed part of the estate's costs rather than part of the sale costs falling within the development costs. I can see that clause 9.2 would encompass (extra) professional costs of a person acing for the deceased's estate, but do not consider that clause 9.2 shifts costs of third parties that the deceased (if he had not died) would have incurred in carrying out obligations under the JVA and would then have been development costs, to become costs of that person (being attributed to his estate).

350. The arguments on this issue need further ventilation and on any consequentials hearing following this judgment I will hear further argument.

Interest

351. At this stage, I see no reason why anything other than simple interest should be awarded. I will hear further argument on this if necessary.

Order

352. In the period after circulation of this judgment in draft, and as invited, the parties helpfully agreed, so far as they could, a form of order to give effect to this judgment. That draft order provided for a further consequentials hearing to deal with certain issues of quantum. I have various points to raise on the draft. I will therefore adjourn all matters consequential on this judgment to a further hearing which will be remote. Arrangements for that hearing will be fixed through the usual channels.