Neutral Citation Number: [2011] EWHC 2831 (QB)

Case No: TLQ/11/0929

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2011

**Before** :

**MR JUSTICE ANDREW SMITH**

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**Between :**

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| **Asiansky Television plc and anor** | **Claimants** |
| **- and -** | |
| **Khanzada & ors** | **Defendants** |

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**Richard Lord QC** (instructed by **Blandy & Blandy**) for the **Claimants**
**Ben Patten QC** (instructed by **Mills & Reeve**) for the **1st- 4th Defendants**
**Michael Pooles QC and Spike Charlwood**
**(**instructed by **Withers**) for the **5th & 6th Defendants**
Hearing dates: 5 and 6 October 2011

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# Judgment

**Mr. Justice Andrew Smith:**

Introduction

1. The claimants are two companies controlled by Mr Sharadchandra (or "Sharad") Patel, who, it appears, is a successful businessman. They seek damages for negligence and breach of duty against their former legal advisers. Mr Khanzada, the first defendant, was a solicitor in a firm called Barker Gillette in partnership with the second and third defendants, and in 2005 the practice was transferred from the partnership to the fourth defendant, Barker Gillette LLP. The other two defendants are barristers at the English bar who were instructed by Mr Khanzada on behalf of the claimants, Mr Romie Tager QC being leading counsel, and Mr Neil Mendoza being a junior member of the bar.

2. The barrister defendants and the fourth defendant apply under CPR pt 24 for summary judgment against the claimants upon the whole claim. The other solicitor defendants apply an order striking out the main claim against them or for summary judgment on the main claim. All the defendants also apply for security for costs.

3. The claims arise from proceedings brought by the claimants for professional negligence against Bayer-Rosin, another firm of solicitors who had acted for them in relation to an investment involving the purchase of a development site of about 7.8 acres in the London Borough of Brent adjoining the North Circular Road and near to Hanger Lane ("the Site"). On 11 June 2004 Cresswell J gave judgment in those proceedings. (When I use the expression "the Judgment", I shall refer to this judgment of 11 June 2004.) He awarded the claimants damages of £300,000 (subject to a condition to which I refer below): the basis of the award was that he accepted what has been referred to as the "Price Reduction Argument", that is to say he found that, had the claimants received from Bayer-Rosin proper advice rather than the negligent advice that they were given, they would still have purchased the Site but they would have paid a reduced price for it. The claimants, who had sought damages of several million pounds, were disappointed by the Judgment. They made unsuccessful applications to Cresswell J and then the Court of Appeal for permission to appeal against it, but did not make them until 17 June 2005 and about 1 July 2005 respectively.

4. The claimants complain that the delay in making the applications for permission to appeal was the result of negligence or, in the case of the solicitor defendants, breach of contract on the part of the defendants or for which they are responsible; and they have a further argument (the "negligent presentation allegation") that the barrister defendants were negligent in that they pursued the application on grounds that "had weak prospects of success" at the cost of a more meritorious argument, the so-called "Other Terms Renegotiation Argument". The claimants say that as a result they have lost the opportunity of recovering damages from Bayer-Rosin in excess of £300,000, and also the "amount paid by [them] to [the solicitor defendants] … on account of the further costs incurred in, or in relation to, the Proposed Appeal".

5. The focus of the hearing before me was on the former head of damages, the loss of the opportunity to appeal against the Judgment and to increase their recovery from Bayer-Rosin. All the defendants argued in support of their applications that the claimants' right to apply for permission to appeal was not a valuable one because (i) they had no cogent grounds for appealing against the Judgment, and (ii) (reflecting this) such complaints as could be made about the Judgment were rejected by the Court of Appeal as being without merit when the application for permission to appeal was eventually made. In response, the claimants contend (i) that the complaint advanced to and rejected by the Court of Appeal was in essence that it was not open to Cresswell J to accept the Price Reduction Argument, but (ii) that they had another, more cogent, basis for appealing against the Judgment, which has been labelled the "Other Terms Renegotiation Argument" and (iii) that, although Mr Tager had identified the Other Terms Renegotiation Argument when he advised upon the prospects of an appeal, it was not advanced (or not properly advanced) in the application to the Court of Appeal and so its merits were never considered. This last point both provides the basis for the negligent presentation allegation and also is deployed in support of the claimants' case that the delay for which the claimants are responsible caused loss in that, had the application for permission to appeal been pursued promptly, the Other Terms Renegotiation Argument would, it is said, have been properly presented in support of it.

6. I shall have to examine the "Other Terms Renegotiation Argument" later, but should introduce it now. It was explained by Mr Jacques Smith, a partner in Blandy & Blandy, who are now the claimants' solicitors, in a witness statement dated 9 August 2011 (at para 33) as follows:

> "The crux of the appeal proposed by the Solicitors and Barristers was therefore not that the Price Reduction Argument was an impermissible one for Cresswell J., but that it was impermissible for him to conclude that any of the <u>other</u> terms of the contract with Brent LBC (i.e. other than price) would have been renegotiated. That included the renegotiation of the extent of the land being conveyed."

<u>The issues on the applications</u>

7. All the defendants bring an application under CPR part 24 for summary judgment on the claim or at least on the issue whether the claimants are entitled to damages for the loss of a valuable opportunity to appeal. The court may give summary judgment if it considers that the claimant had "no real prospect of succeeding on the claim or [a particular] issue" and that there is "no other compelling reason why the case or issue should be disposed of at a trial". Subject to the position of the fourth defendant, to which I shall refer, the issue on these applications is whether the claimants have a real prospect of success on the case that they seek to advance: as I shall explain, there is a question whether or not that case is pleaded (see paras 67-68 below). Mr Richard

Lord QC, who represented the claimants, accepted that otherwise there is no compelling reason that there should be a trial, and to my mind there is none.

8. It appears from the evidence of Mr Smith that, if this action proceeds, there might be an issue between the parties about whether the claimants gave equivocal instructions about whether they wished to appeal against the Judgment. I am not concerned with that question because the defendants accept that these applications are to be determined on the basis that the application for permission to appeal against the Judgment was made out of time and this was because of their actionable fault (or at least the actionable fault of all the defendants other than the fourth).

9. As I have indicated, the central question upon these applications is whether the claimants had a valuable chance of successfully appealing against the Judgment. When a lawyer is negligent or in breach of duty in relation to litigation and therefore his client is unable to bring or to pursue proceedings, the client does not have to show that he would have succeeded in the litigation in order to recover damages from his lawyer: he has the legal burden of showing that he has lost a claim that "had a real and substantial rather than merely a negligible prospect of success": Mount v Barker Austin (a firm), [1998] PNLR 493 at p.510D per Simon Brown LJ. It seems to me, and it was not disputed before me, that the same principle applies where the client is prevented from pursuing an appeal.

10. Hence, as Mr Lord rightly observed, the question whether the claimants had a "real prospect" of success arises at two stages of the enquiry before me, namely whether the claimants had a "real prospect" of showing that a timeous application for permission to appeal would have had a "real prospect" of success. It is for the applicants to show under CPR24.2 that the claimants have no prospect of succeeding upon their claim or the relevant issue. Further, although the claimants bear the legal burden of proving that they had a real or substantial chance of successfully appealing against the Judgment, the applicants would bear the evidential burden. As Simon Brown LJ explained in the Mount v Barker Austin case (loc cit at p.510E-G):

> "The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do to. If, of course, the solicitors *have* advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant."

(Although, as I shall explain, there is an issue about what advice the claimants were given, but the defendants all acted for the claimants in the proposed appeal.)

11. This is the only issue that I decide in this judgment, although other questions arose upon the applications and during the hearing before me. First, the barrister defendants sought to contend that the claimants have no real prospect of succeeding in the negligent presentation argument. The claimants responded that this argument is not covered by the terms of the barrister defendants' application notice and that it was not open to them to argue this point. It is, to my mind, clear that there was an unfortunate but genuine misunderstanding about the intended scope of the barrister defendants' application. The notice of application stated in general terms that they sought "summary judgment … against the claimants for the whole claim and costs as the Claimant has [sic] no real prospect of succeeding on the claim and there was no other reason why the claim should be disposed of at trial", but it also stated that the barrister defendants would rely on a witness statement of Ms Eleni Polycarpou, a solicitor employed by Messrs Withers, who act for them. In her statement, Ms Polycarpou said this (at para 5): "The [barrister] Defendants … submit that the claim against them is bound to fail. Any negligence by them had no causative effect. The appeal, even if brought in time, would have had no real prospect of success, has been assessed as such by the Court of Appeal and so cannot found a loss of a chance claim". Her statement did not refer to the negligent presentation argument.

12. There were exchanges before me about whether the application notice fails to comply with the CPR in that it does not specify the grounds of the application. Mr Lord relied upon CPR23.6 in support of his submission that, because an application notice must state "why the applicant is seeking the order", it must specify the grounds. Mr Michael Pooles QC, representing the barrister defendants, argued that in order to comply with CPR 24PD2(3) it suffices that the notice states that the application was made because the applicants believe that the respondents have no real prospect of defending the relevant claim or issue. I do not need to decide this dispute. I accept that Mr Lord and those whom he represents understood from Ms Polycarpou's statement that the application was based upon the argument that the negligence of the barrister defendants "had no causative effect", and I well understand why they did so. As a result the claimants neither served evidence nor prepared argument to meet a case that they had no real prospect of succeeding upon the negligent presentation argument. In those circumstances it would not, to my mind, be just to decide the barrister defendants' application against the claimants on the basis of that argument without giving them a proper opportunity to answer it, and I do not determine their application on this basis.

13. The fourth defendant has advanced an argument that it should have summary judgment upon the claim against it along these lines: that it did not take over the practice of Barker Gillette until 1 July 2005 and any relevant delay in pursuing an application for permission to appeal or other fault alleged against the solicitor defendants had occurred before then. The claimants responded that, even if this is so, the terms on which the fourth defendant took over the practice mean that they are liable for any earlier negligence or other fault. At the hearing before me, I suggested

that this question should be deferred until I have given this judgment and the parties agreed to this course.

14. The other solicitor defendants (the first, second and third defendants) contend that they have not validly been served with these proceedings, and they have applied for relief under CPR part 11. That application has not been heard and is not before me. Because of this outstanding jurisdictional issue, they have made applications, in the alternative to that for summary judgment, to have parts of the claim struck out or for an appropriate declaration. It is not suggested that the form of the applications by these solicitor defendants gives rise to substantially different issues from those which arise upon applications under CPR part 24, and when I deliver this judgment I shall invite submissions about the appropriate relief.

15. The defendants also have applied for orders that the claimants provide security for costs because they are limited liability companies and there is reason to believe that, if they are unsuccessful in the litigation, they will be unable to pay the defendants' costs; and for orders staying the proceedings pending the provision of security. The question of security for costs arises only if the other applications fail. I suggested that I defer consideration of this, and the parties agreed to that.

16. Finally, I record that Ms Polycarpou stated in her witness statement (at para 7) that, if their application for summary judgment is successful, the barrister defendants agree ("for reasons of proportionality and pragmatism only") that they will not seek or retain any fees incurred in relation to the application for an extension of time for the proposed appeal. Similarly, Ms Debra Kirkwood, a solicitor with Mills & Reeve LLP, who represent the solicitor defendants, stated in a witness statement (at para 73) that her clients would waive any fees for any work in relation to the application for permission to appeal, other than disbursements by way of counsels' fees. I shall consider when I deliver this judgment whether these statements should be reflected or recorded in my order.

The investment

17. It is necessary to explain the claimants' investment that gave rise to the proceedings against Bayer-Rosin. In about 1989 Mr Patel conceived the idea of developing in London an "Asia Centre" comprising (depending upon the area developed) such facilities as a new television station, specialist Indian shops, a hotel, a function hall, a disco, a private club, cinemas, restaurants and a car park. He identified the Site as possibly suitable.

18. The project was not without its difficulties. The Site (sometimes referred to as "Twyford Tip West") had been part of a waste tip called "Twyford Tip", and, although it had not been so used since about 1958, much toxic waste was still there.

19. Further, in 1988 and 1989 the Department of Transport ("the DoT") had made compulsory purchase orders ("CPOs") in relation to the North Circular Road Hanger Lane to Harrow Improvement Scheme, a major road development in the Hanger Lane

area. As I understand it, the purpose of the CPOs, at least so far as is relevant for present purposes, was not that the land should be permanently acquired for the road development or in connection therewith, but the DoT temporarily needed to use the land to enable the works to be carried out and they expected to release it once it had served that purpose. One of the CPOs, made on 2 December 1988 and described by Cresswell J as the "principal" CPO, covered about 40% of the Site. (It is not clear from the papers before me whether the "principal" CPO was the only one which covered land included in the Site or whether another CPO, or other CPOs, did so to a lesser extent. This is unimportant for present purposes: I shall assume in this judgment that the Site was affected by only one CPO. What matters is that the areas subject to a CPO or CPOs included the access road to the Site or at least part of that access road and also what was referred to as plot 97, which comprised land on the Site.) Notices to Treat and Notices to Enter in relation to the CPO were served on the Council by the DoT under cover of a letter dated 14 February 1989 (so that, as it has been put, the CPO was "implemented"). The Notice of Entry entitled the DoT to obtain a warrant for possession against anyone who refused to leave the land, or who hindered them from having possession of it. Once they had so entered into possession of the land, the DoT could not unilaterally withdraw the Notice to Treat: the landowner had a right of compensation, which first had to be satisfied. Because of this, the Council of the London Borough of Brent ("Brent LBC") could give a purchaser of the Site a good title with vacant possession of the whole of it only if they could free it of the "implemented" CPO. They could do that either by executing a deed executed with the DoT, or by obtaining an unqualified letter from the DoT confirming that they had vacated the land and that the addressee could proceed on the basis that the CPO was treated as withdrawn.

20. Mr Patel first made an offer to purchase the Site from Brent LBC in October 1989. It was not accepted, but Mr Patel remained interested in the Site. An application for outline planning permission to develop it was made in January 1992. In due course Mr Patel made another offer of £1.6 million for the Site. That was accepted, subject to contract, by letter dated 3 March 1992. For reasons immaterial for present purposes, the price was later reduced to £1.3 million.

21. On 14 May 1992 Mr Patel received through Bayer-Rosin a draft contract that named the second claimants as purchasers and stipulated that the Site was to be sold "subject … to the rights and reservations set out in the Second Schedule", which included the CPO. On 2 July 1992, Brent LBC sent Bayer-Rosin an Ordnance Survey Plan that showed the parts of the Site subject to the CPO by reference to numbered plots. Brent LBC also sent copies of the relevant Notices to Treat and to Enter. By 20 August 1992, if not earlier, Bayer-Rosin were fully informed about the extent of the CPOs and the Notices implementing them.

22. On 30 July 1992 Brent LBC wrote to the DoT seeking confirmation that part of plot 97 (which was within the Site) would not be compulsorily acquired. On 28 September 1992 they wrote to Bayer-Rosin that, "… the Council will endeavour to procure a letter of comfort from the [DoT] concerning withdrawal of the [CPO] insofar as it affects the site to be transferred to your clients." Although because of

the Notices to Treat and to Enter the DoT enjoyed an indefeasible right to exclude a purchaser from 40% of the Site, Bayer-Rosin responded on 28 September 1992 that:

> "My clients' position is that they are prepared to proceed to an exchange of Contracts without any formal withdrawal of the [CPO]. However, they will require a letter of comfort from the [DoT] confirming that it does not require any of the land which is being sold by the Council to Asian Sky Properties Limited and that it will withdraw the [CPO] insofar as it relates to the Council's site."

23. The DoT sent a letter of comfort dated 7 October 1992. Their contractors, Balfour Beatty, were still on the Site: they were entitled to occupy part of it as the DoT's agents and licensees until completion of the works and thereafter to have access for a year in order to rectify any construction defects. The letter of comfort stated that the DoT were prepared to withdraw the CPO, but observed that the land that it covered was "within the contractors' site boundary" and that they "must therefore be assured continued access during the contract period, presently due programmed to continue until Autumn 1994." Bayer-Rosin did not properly advise Mr Patel and the claimants about the effect of the CPO and the letter of comfort. On 19 October 1992 the second claimants and Brent LBC exchanged contracts for the Site under which the sale was to be subject to all the rights created by the CPO. Completion was on 3 November 1992. On 26 February 1993 the first claimants entered into a contract to purchase for £350,000 "the Pavilion", which had been used by the United Kingdom in "Expo 92" in Spain, and which Mr. Patel planned to erect on the Site.

24. The problems caused by the CPO became clear later in 1993 when the claimants' contractors were prevented from entering the Site. It became obvious not only that the claimants had no right of access to the Site, but that Balfour Beatty were in lawful occupation of some 40% of it, including the means of access. On 9 August 1993 the DoT's engineers wrote to Mr Patel indicating that Balfour Beatty would continue to occupy the Site until 14 days after issue of a completion certificate, which they could not foresee being before March 1994 (and thereafter they would be entitled to access for a year). In the event, I was told, Balfour Beatty vacated 95% of the Site by November 1993.

The proceedings against Bayer-Rosin

25. On 9 June 1995 the claimants brought proceedings against Bayer-Rosin, alleging that they had been given negligent advice about the CPO; that had they been properly advised they would not have proceeded with the transaction; and that as a result they had suffered loss and damage, principally money wasted on the project including the amounts paid for the Site (which was said to have had a negative value because of liabilities attaching to it and the need to remove the waste before any development) and the Pavilion. The claim was for several million pounds.

26. The claimants instructed first Hugh Cartwright & Amin and then, from February 1997, Simmons & Simmons to act for them in the proceedings. The action was prosecuted slowly and on 1 June 2000 Master Eyre struck it out. His decision was upheld by Steel J, but on 19 November 2001 the Court of Appeal reinstated the action. Clarke LJ, delivering the leading judgment, stated that there was an issue of causation "whether Mr Patel would have entered into the contract at a lower price, as the defendants say, or not have contracted at all, as Mr Patel says, if he had been advised correctly": [2001] EWCA (Civ) 1792 at para 71.

27. In June 2000 the claimants instructed Barker Gillette in relation to their claim against Bayer-Rosin. Until the hearing in the Court of Appeal in November 2001, Barker Gillette "shadowed" Simmons & Simmons, but in November 2001, after the action had been reinstated, Barker Gillette came on the record for the claimants. The action was tried by Hunt J in October 2002. At the end of the evidence Bayer-Rosin conceded that they had been in breach of their duties to the claimants. In the course of his oral submissions, Mr Tager said this about the issue between the parties:

> "I am addressing your Lordship now on the all-important point as to whether you accept Mr. Patel's evidence that had the true position been explained to him he would have said 'I am pulling out of this deal' or, as my learned friend suggests, he would have gone ahead, either at that price or some reduced price."

28. In a judgment delivered on 13 December 2002, Hunt J decided that, while Bayer-Rosin had been in breach of duty, this did not cause the claimants loss because Mr Patel would in any case have proceeded with the investment. He also found that there was no breach of the retainer in relation to the first claimants buying the Pavilion. He awarded nominal damages.

29. The Claimants appealed, and on 11 November 2003, the Court of Appeal allowed the appeal: [2003] EWCA (Civ) 1405. They concluded that the breach of duty and negligence on the part of Bayer-Rosin was greater than Hunt J had recognised. Laws LJ, with whom Simon Brown and Arden LJJ agreed, said (at para 27) that:

> "A competent conveyancing solicitor on studying the documents must have appreciated (a) that the DoT enjoyed rights under the CPOs extending over some 40% of the Site; (b) that since the CPOs had been implemented by service of the appropriate statutory notices those rights included the right to possession of that area without limit of time, and to bar Mr Patel and his companies from entry upon it or possession of it; and (c) that the Council were legally helpless to affect the matter. [The solicitor acting for Bayer-Rosin] should have appreciated these things. What then should he have done? Obviously he should have advised his client about all these points. He should have given the plainest warning that Mr Patel

> would not get vacant possession of a large section of the Site. He should have put Mr Patel in a position where he was able to decide what to do in the clear knowledge of all these factors..... In my judgment this was a very stark case of professional negligence."

The Court of Appeal ordered a new trial in the question "whether the negligence and/or breach of contract of [Bayer-Rosin] was causative of any loss suffered by the [claimants]".

The hearings before Cresswell J

30. Cresswell J. heard the trial about causation in May 2004. Bayer-Rosin maintained that, if they had given proper advice, the claimants would nevertheless have gone ahead with the proposed deal on the same terms. The case that the claimants had pleaded, that they advanced before Cresswell J, and in support of which Mr Patel gave evidence, was that, if they had received proper advice, they would have withdrawn from the transaction altogether. The damages that they sought were the purchase price of the Site and financing costs associated therewith, the cost of acquiring the Pavilion and financing costs associated therewith, and wasted costs relating to the design, construction and financing of the development. In 2001, pursuant to permission from the Court of Appeal, the claimants had deleted from their pleading a claim in respect of "Loss of opportunity to the Second [Claimant] to negotiate a lower purchase price for the Site …". The Court of Appeal had permitted this amendment without prejudice to the claimants' right to seek to make a further amendment to seek damages on the basis that they would have proceeded to buy the Site if properly advised, but in the event the claimants never sought to plead such a case.

31. However, Cresswell J canvassed this possibility with the parties. On the second day of the trial, he said, "Then of course there is an intermediate position, he might have gone ahead only at a reduced price but neither side is advancing that case". He referred to the "intermediate position" again on the third day of the trial: "In theory it would be open to me to take some intermediate position. It is not necessarily a yes or no question". Later he said:

> "Supposing I took the view that Mr. Patel would not have proceeded unless he obtained a substantial reduction on the price. Then I would have to answer the question to that effect. It depends how you phrase the answer, I think. I just want to draw both sides' attention to the fact that you can ask me to answer a question, but it does not necessarily follow that answer would be yes or no."

He made all these observations before Mr Patel gave evidence.

32. It appears from the evidence before me (and in particular Supplementary Closing Submissions dated 14 May 2004 submitted by Mr Tager) that in the course of closing submissions Mr Christopher Gibson QC, who represented Bayer-Rosin, argued that, if Mr Patel had received proper advice, he would have been advised that there was a good prospect that the DoT would enter into a binding commitment "within a matter of weeks" and that this would "remove the blot on title resulting from the implemented CPOs", and Mr Patel would have given instructions for negotiations with the DoT along these lines. Mr Tager objected that such an argument was not pleaded and that it was too late for Bayer-Rosin to advance it.

33. The issue for determination was refined during the trial by agreement between the parties and stated by Cresswell J in these terms at paragraph 4 of the Judgment:

> "If Mr Patel had been advised as to the effect of the implemented CPOs on the title to the Twyford Tip by a competent solicitor, would he have proceeded ... to purchase Twyford Tip on the terms of the contracts exchanged on 19 October 1992 (subject only to the possibility of a variation in price)?"

34. Cresswell J sent the parties a draft of the Judgment on 9 June 2004, and delivered the Judgment (for material purposes in the terms of the draft) on 11 June 2004. He concluded that, had the claimants been properly advised, Mr Patel would have negotiated with Brent LBC a reduction of £300,000 in the price for the Site, and bought it through the second claimant for £1 million. He adjourned the first claimants' claim in relation to the Pavilion because he considered that he should not determine it without a transcript of the argument before the Court of Appeal. Accordingly, Cresswell J awarded damages of £300,000. (Under his order of 11 June 2004, Cresswell J directed that his award of £300,000 be conditional on Bayer-Rosin not applying within 14 days, his purpose being to accommodate their concern that they had not had a proper opportunity to investigate whether £300,000 was an appropriate assessment of the reduction in price. In the event Bayer Rosin did not pursue the point and the order became unconditional on 25 June 2004.) He directed that there be "permission to apply for consequential Orders herein".

35. On 11 June 2004 Cresswell J did not determine any question of costs [or interest], and no application for permission to appeal was made to him. Mr Tager and perhaps others advising the claimants apparently understood that, by giving permission to apply for consequential orders, Cresswell J granted an indefinite extension of the time for applying for permission to appeal. There was no dispute before me that the time for filing an appellant's notice in the Court of Appeal under CPR 52.4(2)(b) (which at the relevant time was 14 days) ran from June 2004 (probably 14 June 2004, but certainly no later than 25 June 2004, when Bayer-Rosin's time for applying under the order of 11 June 2004 expired).

36. As I have indicated, the question of costs was not resolved in June 2004. There was a hearing before Cresswell J about costs on 29 April 2005 and he determined the question at a further hearing on 17 June 2005.

The Judgment

37. I return to the Judgment. Cresswell J set out in detail the background facts (at paras 10 to 95) and the parties' submissions (at paras 108 to 150). He then made an assessment of Mr Patel as a witness, describing him as "not … a satisfactory witness", and saying that he approached his evidence "with considerable caution". His core reasoning was at paragraphs 164 to 184 under the heading "Analysis and conclusions".

38. Cresswell J stated at paragraph 164 how Mr Patel should have been advised by Bayer-Rosin, and that paragraph of the Judgment has not been criticised either when permission was sought to appeal against the Judgment or before me. The advice that should have been given included:

    i) That Brent LBC were "legally helpless to assist" about the problem presented by the implemented CPO.

    ii) That Mr Patel and the claimants "would not get vacant possession of a large section of the Site on completion" and, the only access to the Site being subject to a CPO, at completion the DoT would be legally entitled to exclude Mr Patel and his companies from access to the Site.

    iii) That "there was a contract between the DoT and the contractors and that some 40% of the Site subject to CPOs was within the contractors' site boundary. The contract was programmed to continue until autumn 1994 and the contractor would probably enjoy rights of access etc in relation to some 40% of the Site by virtue of the terms of their contract with the DoT."

39. At paragraphs 166-168 Cresswell J identified three possibilities "which call for particular attention" about what would have happened had Mr Patel and the claimants been given proper advice. He did not say, or suggest, that these were the only possibilities. The first was that Mr Patel (or the claimants) would have "entered into the transaction at the same price and on the same terms". Cresswell J rejected that possibility as "wholly improbable" (at para 167). He considered (at para 168) that the "realistic choice" was between these: that Mr Patel "would have proceeded through the second claimant to purchase the [Site], but at a reduced price", or that "he would not have proceeded at all through the second claimant to purchase the [Site] (and would have withdrawn from the transaction)". When stating the first of these two possibilities, Cresswell J did not, I observe, refer to the purchase being on the same terms as those which were in fact agreed.

40. At paragraph 169 of the Judgment Cresswell J identified what he regarded as relevant considerations about which of these two possibilities was the more likely. They included these:

    i) That Mr Patel's aim in June 1992 was to achieve early completion of the purchase and he did not want to lose the Site, and that the purchase was "speculative".

    ii) That Mr Patel appreciated in October 1992 that it would take "some time" to obtain planning permission to remove the waste and to agree with Brent LBC a scheme for doing so; and that Mr Patel was keen to obtain a grant for the project and that in October 1992 he would have appreciated that that too "was likely to take some time".

    iii) That Brent LBC was "keen on the project".

41. Cresswell J said that, against this background, Mr Patel "would understandably have been concerned" to obtain the land with vacant possession, unrestricted access to the Site and the ability to sell, charge or otherwise dispose of the land with good marketable title, but that he would have weighed the risk of not achieving these objectives against the advantage of buying the Site (at paras 170-171). Cresswell J concluded (at para 181) that "Mr Patel (had he been properly advised as [he should have been]) would probably have negotiated and obtained a further reduction in the price of £300,000". Thus he rejected the claimants' case that they would have withdrawn from the transaction altogether. He accepted what he had recorded (at para 120 c) as a contention (albeit not the primary contention) of Bayer-Rosin:

> "The defendants' primary case is that the probability is that Mr. Patel would have bought the Site with no price reduction. But the defendants do contend that if it is held that Mr. Patel would have considered that the CPOs and the proviso to the letter of comfort were of some practical significance to him, he would not have withdrawn from the transaction, but the likelihood is that he would have tried to negotiate a further price reduction, and would have bought the Site at the best price that he could obtain."

I observe that this alternative contention is different from the argument to which Mr Tager referred in his Supplementary Closing Submissions and to which he objected. That argument concerned negotiations between Mr Patel and the DoT, and Cresswell J does not refer in the Judgment to Bayer-Rosin making a submission along those lines.

42. The reasoning that led Cresswell J to this conclusion was examined in some detail before me. I was particularly referred to these paragraphs of the Judgment:

"170. I find that Mr. Patel (had he been properly advised as above) would understandably have been concerned to obtain:

(a) land with vacant possession;

(b) unrestricted access to the Site; and

(c) the ability to sell, charge (for the purpose of raising finance etc) or otherwise dispose of the land with good marketable title (with vacant possession)."

"173. Mr. Patel's minimum requirements would (I find) probably have been

(1) An unqualified and unrestricted right to access to the Site; and

(2) Vacant possession of about 95% of the Site

In each case within a reasonable time of the time at which (a) planning permission could be obtained; (b) a scheme for the removal of the waste could be agreed and (c) grants could be obtained….

179. If Mr. Patel had been properly advised as set out above, the probability is that he would have concluded that his minimum requirements would be met within a reasonable time of the time at which (a) planning permission could be obtained; (b) a scheme for the removal of the waste could be agreed; and (c) grants could be obtained.

180. Mr. Patel was very keen to acquire the Site and (had he been properly advised as above) he would probably have regarded any risk of delay between (a), (b) and (c) being obtained/agreed and his minimum requirements being met as workable and a risk he was prepared to take (provided a further reduction in price was agreed). He would probably have instructed the defendants to take such additional steps as were possible to try and protect his position, for example by inserting a clause in the contract that the Council would use its best endeavours to remove the blot on the title represented by the implemented CPOs in one of the two ways referred to above as soon as practicable.

> 181. But Mr. Patel (had he been properly advised as above) would have understandably and properly insisted on a reduction in the price to reflect the fact that at completion his minimum requirements would not be met and that he had to take the additional risks that they might not be met within a reasonable time of the time at which (a) planning permission could be obtained; (b) a scheme for the removal of the waste could be agreed; and (c) grants could be obtained."

The credibility of Mr Patel's evidence

43. The claimants are, as I have said, controlled by Mr Patel and he was, as Cresswell J found, "in substance, the real claimant in the action". Mr Patel was the only witness who gave evidence before Cresswell J, and he had previously given evidence before Hunt J. At both trials Mr Patel said that, had the claimants been properly advised by Bayer-Rosin, they would not have proceeded with the investment in the Site and the Pavilion, and that evidence was rejected by both judges. Hunt J described Mr Patel as "a risk taker with grand and splendid ideas" and "idiosyncratic business methods", who took commercial risks. Cresswell J said that Mr Patel was "not, in a number of respects, a satisfactory witness" (at para 154 of the Judgment) and that he "approach[ed] Mr Patel's evidence with considerable caution" (at para 161).

44. At about the same time as the claimants were pursuing the litigation against Bayer-Rosin, Mr Patel was suing the Bank of India in proceedings in the Commercial Court in relation to losses suffered through currency trading, and he gave evidence in the trial of those proceedings before Morison J in October 2003. Morison J found that Mr Patel lied in his evidence: in his judgment given on 17 December 2003 ([2003] EWHC 3053 Comm.), Morison J said (at para 22) that:

> "Not only was [Mr Patel] prepared to lie initially, but he tried to bluff his way out of trouble by inventing other explanations which do not seem credible. Had this been a lie about an issue which did not really matter, then his credibility might have remained intact. What this sequence of events show, I think, is that he deliberately tried to lie this way out of a difficulty in the case and was persistent and inventive in the process."

45. According to the witness statement of Ms Polycarpou and a letter from Mills & Reeve dated 13 June 2008 sent on behalf of the solicitor defendants, after Morison J had given judgment, Mr Patel applied to set it aside on the grounds that he had been supplied with documents that led him to believe that the Bank of India had suppressed documents and had dishonestly conducted certain dealings on his behalf. At the trial before Cresswell J Mr Gibson sought to cross-examine Mr Patel about the judgment of Morison J but, in view of the application to set it aside, Cresswell J

"treat[ed] this matter as neutral" (para 163 of the Judgment), as the parties ultimately agreed that he should. After the Judgment had been delivered, the application to set aside the judgment of Morison J was abandoned on the basis that Mr Patel agreed to pay the costs on an indemnity basis.

46. It was suggested by Ms Polycarpou that therefore there is no prospect of a court regarding Mr Patel as a credible witness and that this is a further reason that the claimants have not suffered the loss of a chance that had any value. According to Mr Smith's witness statement, Mr Patel was at the time of these events facing very real personal difficulties and illness, and did not feel himself to be in a position to give evidence and to face cross-examination about the matters of considerable complexity involved in the litigation against the Bank of India.

47. I do not consider that the evidence about the litigation against the Bank of India assists in determining the applications before me. The conclusion of Cresswell J in the Judgment did not depend upon the evidence of Mr Patel and the claimants do not say that they were deprived of a valuable chance of overturning Cresswell J's findings about the reliability of his evidence. Their argument that they lost a valuable chance of an appeal does not depend upon Mr Patel's evidence being credible. In any case, it does not seem to me that, on these applications, I should embark upon an assessment of the findings of Morison J and evidence about Mr Patel's response to his judgment, or about their impact on Mr Patel's credibility in relation to how he would have responded to proper advice about the purchase of the Site. As Cresswell J put it, I shall treat this part of the evidence as "neutral".

The advice about an appeal

48. When a draft of the Judgment was sent to the parties on 9 June 2004, Mr Khanzada, the first defendant, questioned Cresswell J's formulation of the issue. He wrote to Mr Mendoza, "I am not at all sure that the issue for decision in the hearing was as quoted by the Judge at paragraph 4 [of the Judgment]. I cannot recall that part of the paragraph in parenthesis [that is to say, the reference to the parties proceeding to exchange of contract on the same terms "(subject only to the possibility of a variation in price)"] as being the subject of an agreed term of reference. I do recall the other side wishing to bring this in, although I do not recall it being by way of agreement. Certainly Mr Gibson QC referred to it in his outlined [sic] closing submissions …". On 10 June 2004, Mr Tager wrote an Advice on Judgment in which he considered the prospects of an appeal. At paragraph 19(1) he referred to Mr Khanzada's concern: "The issue was "fine tuned" in this way at an early stage of the hearing, having been reduced to writing and agreed by the parties".

49. In his advice Mr. Tager stated that he was "not confident about the prospect of successfully challenging the Judgment on appeal" (para 2), but that he had been "able to identify a possible basis for launching an appeal". That argument was explained at paragraph 10 of the Advice and in view of the importance that the claimants attach to it, I set that paragraph out in full:

"In my opinion the only arguable basis for an appeal against the Judgment would be along the following lines:

(i) When cross-examining Mr. Patel it was not suggested to him that, if competently advised, he would have sought to renegotiate the terms of the contract with Brent and would have made an assessment of the reasonable time to be allowed to meet the two minimum requirements as (as set out in paragraph 175 [sc. para 175 in the draft of the Judgment, corresponding to para 173 of the Judgment delivered on 11 June 2011]);

(ii) There was no evidence to support the judge's assumption that if the letter of comfort had been followed up in October 1992 the DoT would have been prepared to commit themselves to surrender vacant possession of 95% of the Site prior to the autumn of 1994;

(iii) There was no evidence that Mr. Patel, had he sought such advice, would have been advised in October 1992 that it would take up to two years to secure planning permission, arrange a scheme for the removal of the waste and obtain the hoped-for City Grant, and there is nothing in the documentation which suggests that Mr. Patel ought to have anticipated that these matters would take more than a maximum of, say, 12 months.

(iv) Surprisingly, Cresswell J has made the same error as Hunt J regarding the potential role of Brent in facilitating the removal of the blot on title; it was fundamental to the judgment of Laws LJ that there was nothing that Brent could do in this regard, and if competently advised Mr. Patel would not have given the instructions to the Defendants as suggested in the second sentence of paragraph 182 [sc. para 182 of the draft or para 180 of the Judgment]; the judge should have held that there were no additional steps that could be taken to protect Mr. Patel's position with or without the help of Brent; their "best endeavours" would have been useless.

(v) In light of the June to October 1992 delay in obtaining the letter of comfort, if competently advised Mr. Patel would have been warned that he would have to allow a similar period simply to explore the prospect of the DoT entering into a legally binding commitment, and one which would take effect in the second half of 1993, as opposed to the autumn of 1994; the judge seems to have assumed that this

> prospect would not have been explored with the DoT prior to Mr. Patel deciding to proceed on the basis of reducing the price of £1 million.
>
> (vi) The judge ignored the fact that the DoT had licensed the occupation of the 40% of the Site (including Plot 181b) to Balfour Beatty as part of the North Circular Road construction site; the DoT could have given no commitment to satisfy the two minimum requirements of Mr. Patel prior to the autumn of 1994 without first negotiating and agreeing a variation of Balfour Beatty's contract."

50. Mr Tager presented the argument in paragraph 10 as providing a single "basis for appeal", amounting to a broad submission that it was not open to Cresswell J to reach the conclusion that he did. However, as I see it, his complaints have two themes:

i) At sub-paragraphs (i) to (iii), he states that there was no (or no sufficient) evidential basis (partly because there was no relevant cross-examination of Mr Patel) for paragraph 180 of the Judgment.

ii) Secondly, it is said (at sub-paras (iv) to (vi)) that Cresswell J did not have a proper appreciation of, and did not give proper consideration to, the difficulties that the claimants would have faced (and that Mr Patel, properly advised, would have appreciated) in achieving the "minimum requirements" of an unqualified and unrestricted access to the Site and vacant possession of about 95% of it. This was because, like Hunt J, Cresswell J lost sight of the powerlessness of Brent LBC to deal with the problems created by the CPO (para 10(iv)), and the fact that they could be solved only through discussions with the DoT, which could not be expected to be speedy (para 10(v)), and with the agreement of Balfour Beatty (para 10(vi)).

As I understand Mr Tager's argument, these two themes are linked in that, it is said, because Cresswell J did not appreciate or properly consider the difficulties that the claimants faced, he did not recognise how fragile the evidential basis for his reasoning was. In his oral submissions, Mr Lord placed emphasis on Mr Tager's complaints in sub-paragraph 10(i) – (iii), but, as I see it and as I shall explain, in fact his submissions reflected all the reasoning in paragraph 10.

51. On 22 June 2004 Mr Tager and Mr Mendoza gave advice about the prospects of an appeal in a consultation attended by, among others, Mr Khanzada and Mr Patel. Mr Khanzada's attendance note is in evidence. Counsel stated that Mr Patel had not been cross-examined about the reduction of price; that the Judgment did not include consideration of what Brent LBC would have done had a lower price been offered; and that Cresswell J had reached a conclusion that had not been sought by Bayer-Rosin before their closing submissions. The attendance note records that "Counsel considered that there was, therefore, a good basis for an appeal". There followed a discussion of the prospects for an appeal on this basis, and Mr Tager is recorded as

opining that there was a "good chance" that an appeal would succeed, and a good chance that the Court of Appeal would find that the claimants, if properly advised, would not have gone ahead with the transaction, although there was "a chance" that they would direct a further re-trial.

52. The Attendance Note also reflects the understanding of the claimants' advisers about whether Cresswell J had extended the time for applying for permission to appeal: "So far as an appeal is concerned, that is not something that needs to be decided upon now. An application for permission can be made at a later stage …".

53. There was a further consultation with the barrister defendants on 12 January 2005. The Attendance Note records that the barrister defendants remained of the view that "there are good prospects on an appeal", and this observation:

> "The Judge has concluded that Sharad Patel would purchase the land on another contract varying not only the price but also other matters. The contract would not be for vacant possession on completion but would have the additional requirements of Sharad Patel as to paragraph 173 of the Judgment. Romie Tager QC stated that this was a totally different contract and was not pleaded or argued with the other side and moreover Sharad Patel was [not] cross-examined on this. Therefore he considers that there is a good prospect of persuading the Court of Appeal to set aside the Judgment…".

54. All parties accepted that, for the purposes of these applications, I should take the attendance notes of the 22 June 2004 and 12 January 2005 consultations to be accurate records (although the barrister defendants have made it clear that their case is that their views about the merits of or prospects for an appeal did not change from that given in the written Advice on Judgment). The claimants submit that, while in the Advice on Judgment Mr Tager had said that he was "not confident" about an appeal, in the consultations the barrister defendants advised as the attendance notes record, that there were good prospects for an appeal along the lines that Mr Tager had identified in paragraph 10 of his Advice. It was submitted on behalf of the applicants that the Attendance Note of the consultation of 22 June 2004 indicates that the argument that was said to provide a "good basis for an appeal" was to do with the agreed reduction in the price and not to do with the Other Terms Renegotiation Argument. I see some force in that submission, but to my mind it does not assist the applicants because for the purposes of these applications the record of the consultation on 12 January 2005 sufficiently supports the claimants' submission that they were advised that the Other Terms Renegotiation Argument had "good prospects" on an appeal.

The Application to the Court of Appeal

55. Towards the end of the hearing on 17 June 2005, after there had been lengthy exchanges about costs and Cresswell J had given judgment dealing with them, Mr

Tager applied for permission to appeal against the Judgment. The application, as it appears from the transcript, took Cresswell J by surprise. He responded, "I would have thought it far too late to raise that". He rejected the submission that on 11 June 2004 he had given "an unlimited extension of time as to permission to appeal", and concluded, "in my view, your application is seriously out of time. In any event, I refuse permission".

56. Shortly afterwards (the copy of the Notice of Appeal before me is undated) the claimants applied to the Court of Appeal for permission to appeal against the Judgment (and also the order of Cresswell J about costs). They also sought an extension of time to apply for permission to appeal "In so far as it may be necessary", on the grounds that the claimants and their legal advisers mistakenly understood that time for an appeal did not start to run on 11 June 2004 and that the mistake was "reasonable in all the circumstances".

57. Grounds of Appeal were settled by the barrister defendants. They stated that Cresswell J was wrong to find that, if properly advised, Mr Patel would have purchased the Site through the second claimants for £1 million, and that he should have found that Mr Patel would not have proceeded with the purchase at all. The Grounds included complaints that the conclusion reached in the Judgment had not been pleaded, was not suggested when Mr Patel gave evidence and was cross-examined, was not supported by evidence that Brent LBC would have agreed to a reduced price, and was outside the scope of the issue that Cresswell J was required by the order of the Court of Appeal to determine. They also included complaints that there was no proper basis for the assessment that, if there were a negotiated reduction in the price, it would have been of £300,000: in particular, at paragraph 12 of the grounds it was said that "There was no evidential basis at all for the judge finding that the reduction that Mr Patel would have sought (or that Brent would have agreed) in order to compensate the Appellants for the risks identified in paragraph 181 of his judgment would have been £300,000".

58. The barrister defendants presented a skeleton argument in support of the application to the Court of Appeal. In response to it Mr Gibson submitted to the Court of Appeal a note which stated that the skeleton argument wrongly suggested that it was not open to Cresswell J to accede to the Price Reduction Argument and demonstrated that it had been canvassed in exchanges before him. Mr Gibson pointed out that Cresswell J had raised on the second and third days of the trial the possibility of the purchase going ahead at a reduced price, and that Mr Tager had accepted that it was open to Cresswell J to find that this would have happened; and he explained that the issue set out at paragraph 4 of the Judgment reflected an agreement between the parties reached during the trial about the issue for determination.

59. The claimants complain that, in so far as the Grounds of Appeal and the skeleton argument refer to the Other Terms Renegotiation Argument, it is "not articulated with any clarity as a separate point" and was relegated to "cursory mention"; and more specifically that it does not appear in the first 16 paragraphs of the grounds of appeal. They say that their meritorious argument was "diminished in importance", and that

the documents lodged in support of the appeal promoted as the primary argument the Price Reduction Argument, which had no prospect of success and should not have been advanced at all.

60. The Grounds of Appeal and the Skeleton Argument both include the Price Reduction Argument and they present it before referring to the complaints upon which the claimants now rely in the Other Terms Renegotiation Argument. However, the claimants' submission much overstates the position. The Grounds of Appeal referred as follows to the Other Terms Renegotiation Argument or to aspects of it:

> "The contracts exchanged for the purpose of the Site provided for a completion date of the 2nd November 1992. Given that any attempt to renegotiate the price for the Site would probably have resulted in a substantial delay (which delay would have been for a period of weeks, if not months), such delay would inevitably have resulted in a completion date being agreed that was other than 2nd November 1992 if, indeed, the suggested £300,000 reduction would have been agreed by Brent. The issue that was to be determined by the Judge (as set out in paragraph 4 of his judgment of the 11th June 2004) did not permit him to answer that issue affirmatively together with an implicit finding that contracts would have been exchanged with a completion date other than the 2nd November 1992, since the only issue that was to be determined was whether contracts would have been exchanged on all of the same terms as those that were actually agreed on 19th October 1992 (subject only to the possibility of a variation in price). There was no evidence at all that any renegotiation of the price that would have resulted in a price reduction of £300,000 would nevertheless have resulted in contracts being exchanged on the 19th October 1992 with a completion date of 2nd November 1992. Again, the matter was not put to Mr. Patel, either in cross-examination or by the Judge." (at para 11).
>
> "There was no evidence that Brent would have agreed to a price reduction of £300,000 without first re-opening the tendering process for the sale of the Site and offering it for sale to all potential purchasers at a price of over £1 million. Had Brent re-opened the tendering process, and had Mr. Patel and Brent agreed for the Site to be sold to the 2nd Appellant at a price of £1 million, the consequent delay would have resulted in contracts being exchanged on a date other than the 19th October 1992. Such a contract would not have been one having the same terms as that referred to in the issue that was to be determined by the Judge." (at para 16).

"The Judge was wrong in approaching the issue that he had to determine on the basis that, had Mr Patel been properly advised, the only "realistic choice" was between (a) a purchase of the Site but at a reduced price and (b) Mr Patel causing the 2nd Appellant to withdraw from the transaction. The judge's approach wrongly ignores the precise issue that he had to determine, namely whether any contract for the purchase of the Site (whether at a price of £1.3 million, or at some other price) as the Contract, including its completion date…" (at para 17).

"The Judge's findings were wrong because they ignore the fact that-

i) Mr Patel intended that the clearance and development of the Site would be financed through borrowed funds secured upon the Site by way of mortgage, and

ii) it was agreed between the parties that good marketable title to the Site with vacant possession was not achieved before 18th March 1996 and, moreover, could not have been achieved before December 1993; and

iii) without good marketable title, the Site would not have been mortgageable on 19th October 1992 or on the completion of the Contract on 2nd November 1992.

Accordingly, the Judge was wrong to conclude that Mr. Patel's requirements would have been met within a reasonable time or at all, or (in any event) so as to allow for contracts to have been exchanged containing all the same terms (save as to price) as the contract actually exchanged on 19th October 1992." (at para 20).

"The Judge wrongly found that, had Mr. Patel been correctly advised, he probably would have dealt with the risks relating to the purchase of the Site whilst subject to the CPOs by instructing the Respondent to insert a clause in the contract between the 2nd Appellant and Brent that Brent would use its best endeavours to remove the "blot" on title represented by the CPOs.

However:-

there was no evidence at all that Brent would have agreed to the insertion of such an additional clause in the contract;

> there was nothing that Brent could actually do so as to remove the "blot" on the title to the Site prior to exchange of contracts;
>
> the Judge ignored the time that would have been taken to renegotiate the insertion of the suggested clause; and
>
> even if Brent had agreed to the insertion of such an additional clause, the consequent contract would not be one having the same terms as that exchanged on 19th October 1992." (at para 21).

As for the skeleton argument, having referred to the Price Reduction Argument, it dealt with the complaints now labelled the Other Terms Renegotiation Argument over 14 paragraphs (paras 39 to 52) and 4 pages. I do not accept that it was "buried" or overshadowed by the Price Reduction Argument so as to be easily overlooked.

61. The application was considered on paper by Mance LJ and refused on 6 September 2005. At paragraph (1) of his reasons, he decided that the application for permission to appeal was out of time, observing that he could not see how it could sensibly be suggested that time had been extended by Cresswell J. He concluded that the interests of justice did not require an extension of time, and continued that this conclusion was "reinforced by the considerations mentioned in reasons (2) and (3)". (The reference to reason (3) was a slip because that was about the application for permission to appeal about costs, for which no extension of time was required.) Mance LJ's reason (2) referred to the contention that the Cresswell J "erred in accepting an intermediate case" and the suggestion that "having rejected [Bayer-Rosin's] defence that Mr Patel would have regarded proper advice as to the CPOs as effectively immaterial, the judge was left with no option but to accept the [claimants'] only pleaded case, viz that he would have backed out of the proposed transaction altogether". He said, "I cannot see how the [claimants] can complain about the judge accepting [the intermediate case], in a sense in their favour, rather than simply finding that they failed to satisfy the burden of proving to his satisfaction that Mr Patel would have withdrawn altogether". With regard to the assessment of the price reduction and so the damages of £300,000, Mance LJ said that Cresswell J "had to do the best he could and, reading his judgment, it appears as a reasonable figure having regard to the other, admittedly differently based reductions achieved, and in light of the findings about Mr Patel's character and enthusiasm for the project and the extent to which he would have perceived the CPOs as significant if given proper advice".

62. The application was renewed and was heard orally on 22 November 2005 before Chadwick and Wilson LJJ. The claimants submitted in support of it a statement under CPR 52PD para 4.14A. It developed the case that it was not properly open to Cresswell J to find that the purchase would have gone ahead at a reduced price: see paragraph 1 of the statement, which read as follows:

> "The Appellants rely on the matters set out in their Skeleton Appeal … The essence of the Appellants' principle point is

> that prior to the Respondents' closing submissions at trial, the parties conducted their cases on the basis that there were, effectively, only 2 realistic choices for the Judge. However, Cresswell J. reached a third conclusion that was not properly based on any evidence before him – the crucial issue as to whether Mr. Patel would have caused the purchase of the Site to go ahead, but at a lower price, was not advanced by either party during the course of the trial and was not even suggested to Mr. Patel during the course of his evidence (either in cross-examination or by the Judge). "

The statement does not refer to the question whether, if the purchase had gone ahead, terms other than the price would have been amended and whether it was open to Cresswell J to find that the claimants would have bought the Site not only for a lower price but on terms that were otherwise different (although it does open with a general statement that "The Appellants rely upon the matter set out in their Skeleton …"). Thus, Mr Lord criticised the statement because it did not merely demote the Other Terms Renegotiation Argument in prominence so as to be secondary to the Price Reduction Argument, but omitted it altogether.

63. At the hearing, it soon became apparent that the Court had little sympathy for the application. It is submitted by Mr Lord that the Other Terms Renegotiation Argument "never received a proper airing" at the hearing, and that, even if it had been, "it would have been advanced in a ... hostile environment". It seems to me from the transcript of the hearing that these submissions are justified. I do not need to refer in detail to the exchanges at the hearing, but two observations illustrate that, like Mance LJ, the Court considered that, if there was no proper evidential basis for the award of £300,000, the claim should fail because then no damages were proved.

    i) When Mr Tager complained that Cresswell J's figure of £300,000 was "effectively plucked out of the air", Chadwick LJ responded: "You may well be right, but where does it take you? Supposing he had said, 'I simply can't put a figure in it.' You would have ended up with nothing."

    ii) Later Wilson LJ said: "… had Mr Gibson [for Bayer-Rosin] been here before us … complaining about the qualification [sic: as I understand the transcript, an error for quantification] of the £300,000 by reference to the arguments you have just been deploying, I think that the arguments would have deserved tense study."

64. The renewed application was refused. Chadwick LJ gave the main judgment, and Wilson LJ agreed with it: [2005] EWCA Civ 1569. Chadwick LJ explained why he considered that the application was out of time and there was "no satisfactory explanation or excuse" for the "substantial period of delay" (at para 17). He went on to consider whether the risk of injustice, if an extension of time for appeal were not granted, outweighed any prejudice to Bayer-Rosin. He set out the second reason of Mance LJ for refusing the application, and explained that the conclusion that

Cresswell J reached had been canvassed in the litigation. He identified this further difficulty that, he considered, the claimants faced (at paras 31 and 32):

> "31 … [the claimants] failed to persuade the judge that the answer for which they contended was the only answer that could be given. It was not for the defendants to satisfy the judge that Mr. Patel would have sought to proceed at a lower price, or that he would have succeeded in that endeavour. It was for the claimants to satisfy the judge that Mr. Patel would have walked away from the purchase. That is what they set out to do; and, as I have said, they failed on the basis of the only evidence which they called – the evidence of Mr. Patel.
>
> 32 For my part, I am not persuaded that there is any real prospect that an appeal in this case would have succeeded had it been brought in time. But it is necessary to weigh the prejudice to the applicants in not being able to pursue an appeal – which, if it has any prospect of success, has only a very slight prospect of success – against the waste of time and expense and the prejudice which would result from an appeal after such delay, including (as Mance LJ observed) the prejudice to the defendants of not being able to proceed on the basis that the order in June 2004 is final. It seems to me (as it seemed to Mance LJ) that the balance comes down firmly and decisively in favour of not granting an extension of the time that would be needed."

The Other Terms Renegotiation Argument was not mentioned in his judgment.

Did the claimants have a valuable chance of an appeal against the Judgment?

65. Against this background, I must consider whether the claimants had a real chance of succeeding in an appeal against the Judgment. Paragraph 22 of the particulars of claim sets out the pleaded criticisms of Cresswell J's crucial findings that, if properly advised, the claimants would have bought the Site at a reduced price, and that the reduction would have been £300,000. They are as follows:

> "…
>
> (1) he [Cresswell J] reached a conclusion and made his findings on a basis that was not pleaded in the statements of case in the Action by either the claimants or the defendants;
>
> (2) he made findings that were outside the scope of the issue that he was required to determine and as

> contemplated in the direction of the Court of Appeal …;
>
> (3) he reached those findings and determinations without the matters to which they related being put to Mr. Patel in cross-examination or by the judge himself;
>
> (4) those findings and determinations were unsupported by evidence, in particular, as to whether the vendor would agree to renegotiate the purchase price of the Twyford Tip West, whether the scheme would still have been practical and/or by how much the price would have been reduced. Accordingly, the Claimants had no opportunity of calling evidence on those issues."

The pleading does not make any other criticism of the Judgment. Mr Lord observed that it is pleaded at paragraph 31 that "on 10/6/2004 … [Mr Tager] advised the Claimants in writing as to the merits of the Proposed Appeal, in which he identified what, in his opinion, was the only arguable basis for it", but the claimants do not plead a case that Mr Tager's advice was correct in this regard or even a case that the written advice identified *a* basis of appeal that had a real chance of success.

66. The defendants submitted that the claimants have no real prospect of establishing the pleaded criticisms of the Judgment because each of them was advanced in support of the application that was made and was rejected as being without merit both by Mance LJ and by the Court of Appeal when the renewed application was refused. They accepted that it is at least arguable that the question what (if any) loss was suffered by the claimants as a result the defendants' breach of duty is to be determined as at the date of the breach, and so, at least in relation to the delay in pursuing the appeal, before the merits of any appeal were the subject of adverse comment from the Court of Appeal. Therefore, they did not argue that any right to appeal was *necessarily* of no real or substantial value *simply* because the Court of Appeal rejected the claimants' criticisms of the Judgment. Their submission was that the Court of Appeal's decision and their reasons for it provide *evidence* of what the value of the chance had been at the date of breach. Moreover, the defendants submitted that the view taken by Mance LJ and then by Chadwick and Wilson LJJ was obviously right, and therefore an application for permission to appeal on the basis of the pleaded criticism of the Judgment (or indeed an appeal, were permission to be granted) would inevitably have failed: that the claimants' prospects on an appeal on the basis of the pleaded criticisms were negligible.

67. If paragraph 22 of the particulars of claim is directed to the Price Reduction Argument and the complaint is that it was not open to Cresswell J to find that the claimants would have bought the Site on the same terms except as to the price, then I accept the defendants' submission. Indeed, I did not understand Mr Lord to argue

otherwise. However, the claimants explained and developed a different complaint in response to these applications: I have already (at para 6 above) referred to Mr Smith's summary of the Other Terms Renegotiation Argument, and in his submissions Mr Lord argued that this is essentially the argument that Mr Tager identified in paragraph 10 of his Advice on Judgment, or at least at sub-paragraphs (i) to (iii) thereof. He submitted that the criticisms of the Judgment pleaded in paragraph 22 of the particulars of claim are expressed in sufficiently general terms to cover the Other Terms Renegotiation Argument, although he acknowledged that they might need to be particularised.

68. I do not consider that paragraph 22 of the pleaded case presents Other Terms Renegotiation Argument in any recognisable form, and in my judgment the claimants' pleaded case does not cover it at all. However, if the claimants' case as presented on the applications in Mr Smith's witness statement and in Mr Lord's submissions is sufficiently arguable for the purposes of a summary judgment application, I would not consider it right to give judgment for the defendants without giving the claimants the opportunity to apply to amend their pleading (even though, on an application to amend, questions of limitation might arise). I must therefore consider the merits of the Other Terms Renegotiation Argument, despite the difficulties in doing so when the argument is not pleaded or otherwise fully and precisely formulated.

69. The starting point of the argument is that it is inherent in the reasoning of Cresswell J that not only the price but other terms of the purchase contract would probably have been different if the claimants, properly advised, had gone ahead with the purchase of the Site. In particular, it is said:

i) That the area of land conveyed would have been different. Mr Smith pointed out in his witness statement (at para 34) that Cresswell J concluded (at para 170 of the Judgment) that Mr Patel, if properly advised, would have been concerned to obtain land with vacant possession and (at para 173) that his "minimum requirements" would have included vacant possession of about 95% of the Site within a reasonable time of obtaining planning permission and grants and reaching agreement upon a scheme for the removal of waste. Thus, Mr Smith said (at para 36): "Cresswell J's finding that Mr Patel's minimum requirements were achievable proceeded on the basis of a completely different contract between the Claimants and Brent LBC. This was not about the price reduction, but about the fact that the claimants would be getting a different plot of land (95% of the original site")." I refer to this as the "different area submission".

ii) That the completion date would have been different. At paragraph 180 of the Judgment Cresswell J concluded that Mr Patel would probably have instructed Bayer-Rosin to seek protection from risks to the development arising from the CPOs. Mr Lord argued that, if in October 1992 Mr Patel had sought this through negotiations, the claimants and Brent LBC would not have concluded

a contract for completion on 3 November 1992. I refer to this as the "completion date submission".

iii) That the contract would have provided the claimants with additional protection from the risks presented by the CPO. As an example of this, Cresswell J said (at para 180) that there might have been included "a clause ... that the Council would use its best endeavours to remove the blot on the title represented by the implemented CPOs…". Therefore, it is said, he at least entertained the possibility that the sale would have been on different terms. While Cresswell J did not find that Brent LBC would probably have agreed to a best endeavours obligation of this kind, when he concluded that Mr Patel (for the claimants) would, if properly advised, probably have negotiated and obtained a reduction in the price of £300,000, he did not suppose that otherwise the sale would necessarily have been on exactly the same terms as those that were in fact agreed. I refer to this as the "best endeavours submission".

70. The different area submission is, to my mind, based upon a misunderstanding of the Judgment, and Mr Lord did not argue otherwise. When at paragraph 173 of the Judgment Cresswell J referred to Mr Patel's minimum requirements, he did not mean that Mr Patel would have insisted that the contract would provide that the requirements would be met. He was identifying what were, in Mr Patel's view, the minimum requirements for the planned development. At paragraph 179 of the Judgment Cresswell J determined that Mr Patel would have concluded that his minimum requirements would be met within a reasonable time of what Mr Lord dubbed "the three triggers"; sc. within a reasonable time of when (a) planning permission could have been obtained, (b) a scheme for the removal of the waste could have been agreed and (c) grants could have been obtained. The implication of Cresswell J's reasoning is that Mr Patel and the claimants would have run the risk that the minimum requirements would not be met (within a reasonable time or at all), extracting from Brent LBC a price reduction reflecting that they accepted this risk. As the defendants submitted, this is quite different from finding that terms other than the price would have been renegotiated. The claimants have no real prospect of succeeding in a case that an appeal based upon any other interpretation of the Judgment had any real prospect of success.

71. If the Other Terms Renegotiation Argument has any merit, it must be based upon the completion date submission or the best endeavours submission. I accept that the Judgment contemplates that the contract that would have been made by the claimants if properly advised would in these respects have differed from the contract made on 19 October 1992, albeit the supposed differences would have been relatively minor and generally the contract would have been similar to that which was concluded. At the least, this is sufficiently arguable for the claimants' purpose on these applications.

72. From this starting point, the claimants develop the Other Terms Renegotiation Argument with submissions along these lines:

i) That it was not open to Cresswell J to conclude that the claimants would have bought the Site on different terms because that was not "in the arena": it was not pleaded, and the issue for determination was defined and confined by the agreement recorded in paragraph 4 of the Judgment, which contemplated no change in the contractual terms except a different price.

ii) That it was not open to Cresswell J to decide that the claimants would have proceeded to a purchase on different terms because this case had no evidential basis, and was not put to Mr Patel when he was cross-examined.

iii) That the reasoning of Cresswell J which led him to conclude that the transaction would have proceeded is incomplete and flawed.

(I add that Cresswell J did not award the claimants damages to compensate them because, as a result of Bayer-Rosin's negligent advice, they lost any chance of obtaining protection from the risks presented by the CPO along the lines contemplated by paragraph 180 of the Judgment. Having decided that Mr Patel would have sought such protection, Cresswell J did not consider how likely he was to obtain it or the value of the chance of doing so. In these circumstances, where potential gain is "in the hands of bilateral negotiations", as Rix LJ put it in Dixon v Clement Jones, [2004] EWCA Civ 1005, [2005] PNLR 6 p.93 at para 42, the courts award damages for a lost chance. The claimants did not seek such damages before Cresswell J and they make no complaint about that in these proceedings. Indeed, in his Advice on Judgment Mr Tager said that the "best endeavours" of the Brent LBC would have been "useless", and Mr Lord did not suggest otherwise.)

73. I do not accept that the claimants ever had any prospect of appealing against the Judgment on the grounds that Cresswell J was constrained from concluding that the claimants and Brent LBC would have entered into a contract for the sale of the Site on terms broadly similar to, but not identical with, those that were agreed. (This is not an argument reflected in paragraph 10 of the Advice on Judgment but some trace of it might be reflected in the attendance note of the consultation on 12 January 2005.) First, he was not confined to a straightjacket of this kind by the order of the Court of Appeal, still less by the pleadings or an agreement between the parties. Secondly, even if the claimants could argue that Cresswell J went beyond his proper remit, this complaint would have been met by the same answer as that given by the Court of Appeal to the application based on the Price Reduction Argument: that, if so constrained, the only determination that Cresswell J could only have made upon the issue before him was that the claimants had failed "to satisfy [him] that Mr. Patel would have walked away from the purchase". After all, as I have said, the grounds of appeal made it clear (in paras 11 and 16 of the grounds, as set out para 60 above) that the contract at a reduced price would in some other ways have been different from that which was made.

74. The argument that Cresswell J had no evidential basis for his findings and determined the case on a basis not put to Mr Patel in cross-examination is an attack upon his reasoning at paragraph 180 of the Judgment. Mr Lord developed it by reference to

sub-paragraphs 10(i) to (iii) of the Advice on Judgment, submitting that the criticisms of the Judgment made there are justified and would have provided a basis for a meritorious appeal (or at least that this is sufficiently arguable for the claimants' purposes on summary judgment applications). In those sub-paragraphs, Mr Tager makes assertions about the evidence at trial and the cross-examination of Mr Patel. Nothing before me contradicts them, and I proceed on the basis that they are correct. However, I do not accept that the criticisms of the Judgment in those sub-paragraphs in themselves provide a basis for an appeal against it, or even that they arguably do so.

75. Mr Lord's submission about paragraph 10(i) of the Advice was that the Other Terms Renegotiation Argument was not put to Mr Patel, but that it reflected, or at least it developed from, the case that Mr Gibson first raised in his closing submissions and to which Mr Tager objected (see para 32 above). He argued that, in paragraph 180 of the Judgment, Cresswell J entertained an argument that was not fairly presented by Bayer-Rosin in the course of the trial and he should not have allowed them to do so. However, to my mind that argument is met by same two answers as the complaint that the Other Terms Renegotiation Argument was not within the issue before Cresswell J and was not pleaded: see paragraph 73 above. Moreover, the criticism appears to be that Cresswell J should not have made the finding in the second sentence of paragraph 180 of the Judgment that Mr Patel, if properly advised, would have instructed Bayer-Rosin to take "such additional steps as were possible to try to protect his position". That finding was not essential to Cresswell J's reasoning. As Mr Michael Pooles QC, who represented the barrister defendants, observed, paragraph 180 must be read in this context: at paragraph 179, Cresswell J made a finding about what Mr Patel, if properly advised, would have concluded about his minimum requirements being met. In paragraph 180, he explained further his finding in paragraph 179. Paragraph 181, where he made his important finding about Mr Patel negotiating a reduction in price, is introduced by the word "But" because Cresswell J concluded that, even though Mr Patel would have instructed Bayer-Rosin to *try* to protect him against the risks presented by the CPO, he would still have insisted upon a reduction in the price. Without the finding that he would have sought this additional protection, it would have followed a fortiori that he would have insisted upon consideration by way of a reduction in price for these risks.

76. The criticism in paragraph 10(ii) is that there was no evidence to support Cresswell J's "assumption" that, if there had been negotiations after the letter of comfort of 7 October 1992, the DoT would have committed themselves to surrender vacant possession of about 95% of the Site before the autumn of 1994. I do not understand why it is supposed that Cresswell J made this assumption: it would not fit with his findings about the advice that should have been given to Mr Patel and to which I have referred at paragraph 38 iii) above. He made neither an assumption nor a determination about what might have been the outcome of any attempts to secure additional protection for Mr Patel, whether from Brent LBC or from DoT or from elsewhere. As Mr Lord developed his argument, it appeared to me that his contention was that, unless it was supposed that Mr Patel obtained such a

commitment from the DoT, Mr Patel would not have gone ahead with the transaction, but that is not the criticism that Mr Tager made in paragraph 10(ii) of the Advice on Judgment (nor, as I explain below, one that I consider arguable).

77. The criticism at paragraph 10(iii) similarly, as it seems to me, attributes to Cresswell J findings or assumptions that he did not make and is unjustified for similar reasons. Cresswell J made no findings about when Mr Patel might have supposed that any of the three triggers would be achieved: he simply stated, at paragraph 169 of the Judgment, that this would take "some time". His reasoning did not depend upon an assessment of how long Mr Patel might have thought in October 1992 it would take to achieve them or how long thereafter Mr Patel might have thought his minimum requirements would have been met. Cresswell J was content to find that Mr Patel would have regarded the risk of any additional delay as "workable", and that was enough for his purposes.

78. I therefore do not accept that the Other Terms Renegotiation Argument provides any arguable basis for an appeal on the grounds that there was no evidence to support the matters referred to in paragraphs 10(ii) and 10(iii) of the Advice on Judgment. The claimants' complaint, as it seems to me, depends upon whether they had a sufficient argument that the Other Terms Renegotiation Argument provided some real or substantial prospect of appealing against the Judgment on the grounds that Cresswell J's reasoning was flawed and incomplete.

79. In some ways the submission that his reasoning is incomplete echoes the complaint that Cresswell J had no evidential basis for his findings. His conclusion was that Mr Patel would have accepted the risk about when his minimum requirements of "An unqualified and unrestricted right to access to the Site" and "Vacant possession of about 95% of the Site" would be met in consideration of a reduction in the price, which was assessed at £300,000. This conclusion was made on the basis of his findings that the minimum requirements would be met within a reasonable time of the three "triggers" (at para 173) and that Mr Patel would have regarded the risk of delay as "workable" (at para 180). He did not determine when Mr Patel would have thought the triggering events would have occurred or when he thought that the requirements would be met. He therefore did not determine how long Mr Patel might have supposed the additional delay occasioned by the problems attributable to the CPO might be. Nevertheless, he felt able to determine that the price for accepting the risk of the delay would have been agreed at £300,000.

80. The argument that the reasoning of Cresswell J is flawed is along these lines: once it was recognised that the claimants, properly advised, would have not bought the Site on the same terms as they did but, as Cresswell J rightly realised, that Mr Patel would not have proceeded without instructing Bayer-Rosin to seek further protection against the risks presented by the CPO, the conclusion that they would have proceeded with the transaction at all is unsustainable. It is said that Cresswell J reached this conclusion because, like Hunt J before him, he failed to appreciate the full effect of the CPO, and that failure is reflected in and betrayed by paragraph 180 of the Judgment: with proper advice, Mr Patel would have known that the CPO affected

some 40% of the Site, would have understood what rights Balfour Beatty had and that they had no reason to abandon them, and would have appreciated that Brent LBC had no power to mitigate the effects of the CPO. If he had been advised of all this, he would have appreciated that a best endeavours obligation in the contract with Brent LBC would provide no additional protection because in any case the Council was keen that the sale should go ahead. The only sensible conclusion was that the transaction would have fallen through.

81. Mr Lord referred to counsel's optimistic advice about what, he argued, was essentially the Other Terms Renegotiation Argument in support of his submission that the claimants had a meritorious basis for an appeal (or at least that this was sufficiently arguable for the purposes of the summary judgment applications). He invoked the principles identified by Simon Brown LJ in Mount v Barker Austin (cit sup) to which I have referred at paragraph 10 above, and relied in particular (at least against the barrister defendants and possibly especially against Mr Tager) upon the last sentence that I have set out: "If, of course, the solicitors [or in this case barristers] *have* advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant".

82. Accordingly, Mr Lord submitted that it is sufficiently arguable for the purposes of these applications that the claimants had, and lost through the defendants' fault, a real and substantial chance of appealing against the Judgment. He said that the result of a successful appeal might have been that the Court of Appeal concluded that the claimants, properly advised, would have withdrawn from the transaction, or might have remitted the case to Cresswell J, or might have ordered a further re-trial. But he submitted, and I accept, that on these applications I should not explore precisely the order that the Court of Appeal would have made if it allowed an appeal against the Judgment.

83. In answer to these submissions, the defendants argued that any application against the Judgment would have been unpromising and the claimants would have faced an uphill task in applying for permission to appeal and, even if they were granted permission, in achieving a more successful outcome to the appeal and the litigation against Bayer-Rosin. The Judgment was a re-trial after the claim had been rejected; the appeal would have been against findings of fact; Mr Patel had been an unreliable witness and his evidence had been rejected.

84. The defendants also argued that the claimants' criticisms of the Judgment are based on an over-sophisticated argument and unrealistically stark dichotomy between a reduction in price and variations of other terms in the contract of sale (or between the Price Reduction Argument and the Other Terms Renegotiation Argument). I accept that there is force in that point: it would have been obvious both to anyone involved in negotiations over the price and to anyone considering in the context of the subsequent litigation what negotiations might have taken place that, if a reduction in price were sought, there might well be other changes in the contractual terms, reflecting for example slippage in the contractual completion date or attempts to minimise the risk that provided the rationale for a price reduction (for example,

through introducing a best endeavours obligation). Such changes would be incidental to the proposed reduction in price, and would not detract from the fact that the essential contractual change was to the price.

85. However, to my mind these observations are not a sufficient answer to the claimants' submissions to justify summary determination in favour of the defendants, and if the applications are to succeed the defendants need answers that engage more directly with the claimants' arguments. I consider that they have them, and I have already referred to some of them.

86. The criticism that Cresswell J's reasoning is incomplete is, as it seems to me, based upon a misunderstanding of the Judgment similar to that which lies behind the minimum requirements submission. It was beside the point for his purposes to determine when the triggering events would have occurred, or when Mr Patel thought that they would have occurred. It was also unnecessary for the purposes of his reasoning to specify when (or how long after the triggering event) Mr Patel would have thought the minimum requirements would be met. All that he needed to decide was that Mr Patel would have considered the risk of delay "workable"; that he would have decided that the risk was not sufficient to drive him to abandon the proposed development. Once Mr Patel had decided that, then, as Cresswell J reasoned, he would have exploited his willingness to take on the risk as a basis for negotiating a price reduction.

87. Of course, because Cresswell J did not make more specific findings about the extent of the risk, his assessment of the amount of the price reduction and so of the damages was necessarily imprecise, but no complaint about the assessment was made before me and I cannot accept that this criticism would have given the claimants any basis for launching an appeal. As I have explained, the grounds of the appeal for which the claimants sought leave included in clear terms a complaint that there was no proper basis for the assessment of £300,000, and this was specifically rejected by Mance LJ. His observation that the claimants benefitted from Cresswell J's willingness nevertheless to award the claimants damages rather than simply dismiss the claim as unproven was reflected in exchanges when the application for permission to appeal was renewed: I have already referred to them at paragraph 63 above.

88. I also cannot accept that the claimants would have had any real prospect of being granted permission to appeal on the grounds that the reasoning in the judgment was flawed. In paragraph 164 of the Judgment Cresswell J described exactly the advice that Bayer-Rosin should have given Mr Patel about the difficulties created by the CPOs. Nobody considering the Judgment could have thought that Cresswell J did not recognise the problems that, properly advised, Mr Patel would have understood were created by the CPO.

89. The strength of Mr Lord's argument that the barrister defendants advised optimistically about the chances of an appeal depends upon whether the grounds of appeal about which they were optimistic differed significantly from those considered and rejected by the Court of Appeal. Mr Tager did not state in paragraph 10 of his

Advice on Judgment that Cresswell J reached a determination that was outside the issue before him. This in itself suggests that the complaint that Mr Tager considered an arguable basis of appeal was not the Other Terms Renegotiation Argument that Mr Lord developed. More importantly, I accept Mr Patten's submission that paragraph 10 of the Advice on Judgment, must be read in its context. At paragraph 8 of the Advice, Mr Tager referred to the "Price Reduction argument" (sc. "the contention that Mr Patel would have proceeded with the transaction, with a possible price reduction"), and advised that it could not "be dismissed as unrealistic or fanciful". At paragraph 12 he advised that, if it was open to Cresswell J to "proceed on the basis of a price reduction …", then an element of speculation about its amount was inevitable, and that there was no basis for an appeal against Cresswell J's conclusion that the reduction would have been £300,000 or the reasoning that led him to that conclusion. As Mr Patten submitted, the whole of the discussion between these paragraphs is also about the so-called Price Reduction Argument and in paragraph 10 Mr Tager identified the criticisms that, to his mind, might be advanced against the Cresswell J's finding in favour of it. Although the claimants could not complain that his finding was not open to him to reach or that it was fanciful, he advised that they could complain, for the reasons given in paragraph 10, that it was not fair that Cresswell J reached the conclusion that he did.

90. Mr Lord argued that this is not a correct understanding of the Advice, and in particular of the argument at paragraph 10. He argued that Mr Tager was not there considering the Price Reduction Argument, but the so-called Other Terms Renegotiation Argument: that is to say, that Mr Tager considered arguable an appeal based upon a criticism that the Judgment did not recognise that Mr Patel would have sought to negotiate not only a reduction in the price for the site but other changes in the terms upon which the second claimants were to buy the Site.

91. I am unable to accept that submission, and I agree with Mr Patten's reading of the Advice. At paragraph 1 Mr Tager referred to Mr Gibson "contending for the first time [during his closing submissions] that an unqualified letter [from the DoT confirming that it had vacated the site and the addressee could proceed on the basis that it had the CPO had been withdrawn] could have been negotiated and agreed by early 1993…", but that was not, as I understand it, an argument that the terms of the contracts exchanged by the claimants and the Brent LBC would have been different. Nor did Mr Tager elsewhere in his Advice on Judgment refer to other terms that might have been renegotiated, or identify what they might have been.

92. As for the advice given by the barrister defendants in the consultations, as I have pointed out, there is nothing in the Attendance Note (or otherwise in the evidence) that indicates that they gave advice in the June 2004 consultation about the Other Terms Renegotiation Argument. It appears from the attendance note that they gave optimistic advice about it in the January 2005 consultation, but that was based on the minimum requirements submission, upon which Mr Lord did not rely before me.

93. I therefore conclude that, as far as is relevant, the barrister defendants did not give optimistic advice about the prospects of an appeal based on the Other Terms Renegotiation Argument.

94. In my judgment, however the case that Mr Lord developed might be formulated in a pleading, like the pleaded case, it does not identify a criticism of the Judgment that stood any real prospect of founding a successful appeal. I do not consider that the claimants stand any real prospect of succeeding in showing that it does so.

95. The applicants also argued that in assessing whether the lost chance had any value it would be right to bring it into account that, if the claimants had pursued an appeal, they would have exposed themselves to the risk of a cross-appeal on the basis that, if and because it was not open to Cresswell J to reach the intermediate conclusion, then he should have decided that the claimants had not proved their pleaded case and dismissed their claims. I see no objection in principle to an argument that a collateral benefit of this kind is relevant in assessing whether a lost chance to pursue a claim or an appeal was of more than negligible value, but the applicants do not, in my judgment, need to rely upon it in this case, I am not in a position to assess the prospects for a cross-appeal on the material before me, and I decline to do so on applications of this kind.

The further argument of the solicitor defendants

96. I refer briefly to an alternative argument of the solicitor defendants that:

    i) The effective cause of the claimants being refused permission to appeal was that they presented and pursued an unmeritorious argument in support of it at the expense of an argument that stood a real chance of success, and the application so presented would have been refused even if presented in time.

    ii) It was outside the scope of the solicitor defendants' duties to be responsible for how the application was presented and pursued.

    iii) The only fault for which the solicitor defendants are said to be liable is that the application was presented out of time.

    iv) Therefore, the only fault for which the solicitor defendants might be liable did not, in law, cause the loss of the claimants' right to appeal or any loss.

97. I accept for present purposes the first and second steps in this argument. As for the third step, although Mr Lord argued that the delay created a risk that the application would be badly presented because it would diminish the barrister defendants' memory of the case, I do not reject the solicitor defendants' argument for this reason. I reject it because the claimants have at least a real chance of refuting the last step. Even if the application would have failed even if presented in time, it does not follow that the delay was not an effective cause of it being refused. The solicitor defendants' argument appeared to suppose that, for a claim to succeed, the fault has to

be *the* effective cause of the loss. It does not. It has to be *an* effective cause of it, and recoverable loss can, in law, have two or more effective causes.

98. There is another answer to the solicitor defendants' argument. The claimants' cause of action against the solicitor defendants accrued at the date of breach, and damages are measured at the date of breach unless justice requires that they be measured at some other date. It is at least arguable that the proper approach is to consider the position before the application for permission to appeal was made when deciding whether any, and if so what, loss resulted from the solicitor defendants' fault in causing or allowing the application to be out of time. At the date of breach the chance of a successful appeal was unaffected by how it was later presented: if the claimants had a real prospect of success, it was damaged by the delay in presenting it. There is no reason that the claimants should lose a claim for that damage if the application was later advanced on a wrong basis, or not advanced on the right basis.

Conclusion

99. In conclusion, I stand back from the detailed argument and, conscious that I must not conduct a mini-trial and of guidance in the authorities referred to in the White Book at CPR24.2.3, I consider whether this case is appropriate for summary determination. I conclude that the applications should succeed in principle, and shall invite submissions about the terms of the order that should reflect this.

100. I have reached this conclusion although the case is not immediately straightforward. Having decided that the claimants stand no real prospect of succeeding on the relevant claims and issues, I am encouraged that it is suitable for summary determination by four considerations:

i) The apparent complexity of the case arises in large measure because of the background facts rather than the core question for determination.

ii) There is little or no real dispute about the relevant primary facts, and no indication of further relevant questions that would be explored if the case proceeded to trial.

iii) The determination of the claimants' pleaded case is relatively straightforward. The complexity arises from the claimants' unpleaded and loosely formulated argument (not least simply because it is loosely formulated). One course might have been to determine only the pleaded case, and allow the claimants an opportunity properly to plead the case based on the Other Terms Renegotiation Argument. However, that would have meant delay and further costs. On the other hand, it would be unfair to the defendants if their applications were refused because of apparent complexity caused by deficiencies in the claimants' pleading. I therefore thought it right to examine the unpleaded allegations in some detail.

iv) Importantly, however the matter is put, the fact remains that the claimants' application for permission to appeal, presented on grounds that included some aspects of the Other Terms Renegotiation Argument, was decisively rejected by the Court of Appeal on its merits as well as because it was out of time; and this, to my mind, gives the claim the "absence of reality" (in the terminology of Lord Hobhouse in Three Rivers DC v Bank of England (No 3), [2001] UKHL 16 at para 158) that makes a case suitable for summary disposal.