IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY

Claim No. 1BM30254

Priory Courts
33 Bull Street
Birmingham

Thursday, 30th January 2014

Before:

HIS HONOUR JUDGE COOKE

Between:

MR. MARK JONATHAN LYNN

Claimant

-v-

BORNEOS LLP T/A BORNEO LINNELS

Defendant

Counsel for the Claimant: MR. CLIFFORD DARTON

Counsel for the Defendant: MR. FRANCES BACON

JUDGMENT APPROVED BY THE COURT

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JUDGMENT

1. THE JUDGE: This is a professional negligence claim brought by the claimant, Mr Mark Lynn, against an LLP which is the successor to the firm of solicitors who advised him in relation to drafting an agreement for the sale of his 75 per cent shareholding in a limited company, Punta Perla Sales Limited ("PPS") which is a UK registered company the business of which was acting as a selling agent in respect of off plan sales of residential properties at a resort called Punta Perla in the Dominican Republic.

2. The sale and purchase agreement in question was entered into on or about 22nd December 2006and provided that Mr Lynn sold his shareholding to two individuals, a Mr Andrew and a Mr Greatwood, who were at that time already minority shareholders in the company and directors of it. They were active in the operations of that company involved in selling properties at the Punta Perla resort. The agreement provided for a stated consideration of $200,000 payable at completion, and then various contingent payments thereafter, conditional on the sales of properties being made by the company, which of course would generate commission for it. Those were described as "commission payments" to Mr Lynn.

3. There was provision for a minimum payment of US$30,000 per month for the first twelve months so that, if sales were not sufficient to generate that amount of commission any month, a minimum of $30,000 would be payable anyway. Otherwise, the commissions payable were dependent on sales and there was a table setting out the rate of commission for various levels of sales, being a minimum of US$5,000 per sale transaction and up to $6,334 per sale. The total maximum consideration payable under the agreement, if the maximum number of sales had been made, was, I am told, $4,460,250.

4. It is now admitted that the sale and purchase agreement, on its true construction, provided that most – if not all – of the payments expressed as the consideration would be made by the company itself. That constituted unlawful financial assistance by the company in connection with the purchase of the company's own shares contrary to the prohibition that was then in force under section 151 of the Companies Act 1985. Furthermore, it is admitted by the defence that this agreement was not, and could not have been, authorised by the use of the whitewash procedure provided in the 1985 Act. In consequence of that illegality, the whole agreement is now accepted to be unenforceable, including any obligations which, on their true construction, are expressed to be undertaken by the buyers personally as distinct from the company.

5. Mr Lynn did in fact receive the $200,000 expressed to be payable at completion. He accepted in his evidence that this was probably paid by the company. There is no actual evidence from Mr Lynn or from anybody else as to the source of that payment or, indeed, the mechanism by which it was paid. There were then payments made for seven months – between January and July of 2007 – and Mr Lynn accepts that he received a total of $525,336 from those payments and, furthermore that they too probably came from the company, although there is no actual evidence as to the source of the payments or, indeed, when and how they were made. His case is that payments stopped after July 2007 or, at least, stopped after a payment which may have been made in early August in respect of sales in July, and that the buyers – Mr Andrew and Mr Greatwood – then made allegations through a firm of solicitors of various fraudulent misrepresentations

said to have been made by Mr Lynn in connection with the sale and other allegations of breach of fiduciary duty on his part when acting as a director of the company. The thrust of what they said was that these alleged faults discharged them from further performance of the obligations under the sale agreement.

6. Mr Lynn refuted those allegations against him – not in detail but in general terms. His contention is that they are mere pretexts to avoid payment due to him. After a number of letters written by the defendant solicitors, who at the time were still acting for him, he changed to his present solicitors, who advised him that the agreement was unenforceable by reason of the breach of section 151, notwithstanding that that was a point that the buyers themselves had not, and still have not, at any time raised. Mr Lynn did not proceed with a possibility of claiming the amounts due under the agreement either from the company or the buyers and instead has brought this claim against the solicitors, alleging that he suffered loss in consequence of the unlawful nature of the agreement.

7. Given the admissions that have been made, the essential issues in the case are only of causation and quantification of loss. There were originally three pleaded bases upon which it was said that loss could be computed. Firstly, it was said that Mr Lynn had lost the opportunity of recovering the balance expressed to be payable under the contract. That, of course, could only have been the case if the contract could have been lawfully drafted so that those sums were lawfully payable. Secondly, it is said that he lost the opportunity to negotiate an alternative but lawful agreement under which the consideration expressed to be payable by the company would have been paid by the buyers instead. In that respect, his pleaded case is that he would have insisted on a minimum payment of at least $750,000 up front by the buyers, as set out in paragraphs 32(1) to (4) of the particulars of claim. The third alternative was that, if there had been no sale of the company, he would have remained the owner of the majority of the shares, which were valuable, and he would have continued to receive a salary and benefits – particularly dividends- paid out by that company. The company has subsequently gone into insolvent liquidation but the claimant's case is that this would not have happened if he had remained the owner of it and had been managing its affairs.

8. At the close of Mr Lynn's evidence, however, it was accepted that only the third alternative scenario was now pursued. There was no way to redraft the agreement so that it would have been enforceable as against the company and, upon Mr Lynn's own evidence, Mr Andrew and Mr Greatwood would not have been prepared to offer from their own resources the $750,000 that Mr Lynn regarded as the minimum acceptable initial payment. Accordingly, he would not have reached any agreement to sell to them on the basis that they were to provide the consideration in some manner other than taking it out of the company. Thus the only basis upon which loss is now pursued is the benefits that Mr Lynn would have realised had he not sold the shares to Mr Andrew and Mr Greatwood and remained the owner of his 75 per cent holding and effective controller of the company.

9. Furthermore, it is accepted on his behalf that there was no other likely buyer of the shares in the company and, therefore, the return to Mr Lynn would be only what he could have realised and paid to himself out of the company. Further still, it is not suggested that the horizon during which the company's business could have continued to trade and pay him benefits extends beyond the end of December 2008. On the evidence, it appears that there is no evidence that any sales were made after that time of properties at the Punta Perla resort. Shortly after that, the company itself went into

insolvent liquidation. Accordingly, the case is now put on the basis of what Mr Lynn could have extracted from the company in that period and on the basis that his shares are assumed to have no residual value at the end of that period of time.

10. The live evidence in the case has been, essentially, limited to that of Mr Lynn himself. The defendants called no evidence. There was, at one stage, an indication that they might call Mr Greatwood but, as I understand it, they had no witness statement from him and would not have been aware of what he would have said. In the light of the admissions made, it was decided not to call him. I also received live evidence from an expert witness, Mr Swinson, instructed by the claimant, who gave evidence as to a number of matters in connection with the calculation of loss and the affairs of the company. I will need to come on to that in due course. The only evidence as to the affairs of the company itself, to what had happened at the time of negotiation of the sale and what had happened, or might have happened, in relation to the company's business after the time of sale came from Mr Lynn himself. There were, in addition, a number of documents relating to Punta Perla Sales Limited and various other entities that are relevant to the circumstances. Those have been provided by the claimant himself. They are, as it will appear, not a complete record of all the transactions that went on in this period of time.

11. Mr Lynn has given an account of the background leading up to the formation of PPS and the business that it conducted. He was, of course, cross-examined on that. As a general remark before I go on to deal with that background, I would say that my assessment of all his evidence is coloured to a certain extent by what appears to be the fairly murky world in which the relevant companies, including Punta Perla Sales Limited, have operated. There is a considerable indication that there has been, at the very least, unsavoury business practices involved which have led to a lot of people investing in properties in the resorts in which these companies dealt and others in which parties involved dealt, which have led to those invested not receiving the properties they expected to and, presumably, suffering considerable losses. There were fairly oblique references to allegations of fraud in connection with a number of those developments.

12. Mr Lynn's account of the background is that he was introduced to the sale of properties in the Dominican Republic by a Mr Sean Woodhall. Mr Woodhall, he said, is a person that he knew socially because they lived in the same area in this country. Mr Woodhall was involved in the sale of various Spanish properties and introduced Mr Lynn to a property, which he eventually bought, in Spain. At some point in about 2004, Mr Lynn was taken by Mr Woodhall to see a development in the Dominican Republic called Cap Cana. My Lynn says he was told that that development was owned by a Mr Hazouri and that some parcels of land on what was a very big potential development were "sublet" – that was the phrase that was used – to a Spanish lawyer by the name of Mr Miranda. Mr Woodhall was said to have been appointed as what was referred to as a "master agent" for Mr Miranda with, apparently, exclusive rights to sell properties on the parcels of land that were sublet to Mr Miranda. These rights were said to be worldwide sales rights.

13. The idea that was proposed to Mr Lynn was that he would sell those properties to buyers in the UK as a subagent for Mr Woodhall. The general arrangement would be that buyers would be asked to pay a deposit of between 15 and 20 per cent of the eventual price of their property at a stage when it had not been built – so it was an off plan purchase or sometimes it is referred to as a "pre-build purchase" – from which the

developer would pay a commission of 15 per cent to Mr Woodhall and Mr Woodhall would, in turn, pay a commission of ten per cent to Mr Lynn. In connection with that, and to exploit that opportunity, Mr Lynn incorporated a UK company called Cap Cana Sales Limited. Mr Woodhall, at the same time, incorporated a company called Cap Cana Limited. Mr Miranda's company, which was, apparently, carrying on the development on those parts of the property that were to be operated by him, was called Paraiso Tropical SA.

14. I should say at this point that I will refer to Cap Cana Sales Limited as "CCS". It later changed its name, rather oddly, to Property and Properties Limited but, for consistency, I am going to call it CCS at all times. Mr Lynn was interested in that opportunity. He set up CCS, as I say, to exploit it. He recruited a group of individuals who would act as subagents for him and he said that, at one stage, there were 50, 60 or 70 of those agents, who presumably would find buyers for individual properties, and those agents would be paid a commission of five per cent of the eventual sale price out of the ten per cent that CSS expected to receive.

15. All of these sales were, as I say, made on a pre-build basis, which clearly exposed the buyer to risks that something would go wrong in the process, which might mean that, in due course, the property they had contracted to buy would not be built or would not be as they expected it to be. Nevertheless, on Mr Lynn's evidence, people were keen to buy. He says he sold many to sophisticated buyers who regarded it as an investment – an opportunity to purchase properties at a lower price, which they might subsequently be able either to sell on or to let and earn income on an investment basis. CCS, according to Mr Lynn, took on about five employees. At some point in about 2005, he said that he had negotiated sales of 600 properties on the Cap Cana site. However, he had not, up to that point, received any commission at all from Mr Woodhall's company. Presumably, Mr Woodhall had not received any commission from Mr Miranda.

16. On Mr Lynn's evidence, there was something between $3million and $3.5million expected or anticipated in respect of the commission on the sales that had been negotiated. At some point, he set up a second entity – an LLP called Cap Cana Sales LLP – which appears to have carried on a very similar business – again, finding buyers for properties on the Cap Cana development. It was not made clear exactly why it was necessary to have a second entity doing the same as the first one was. However, it may have been connected, I speculate, with the fact that expenses had been incurred in the first entity but nothing had been received by way of income. Again, at some point in 2005, Mr Lynn said that he was told by Mr Miranda that Mr Hazouri had, in some way, revoked Mr Miranda's interest in the sublease, as it was referred to, of various parcels of land in the Cap Cana development and that Mr Hazouri would not honour any of the sales that had been made through Mr Miranda or on his behalf by agencies including, of course, CCS.

17. Mr Lynn's evidence is that Mr Miranda offered buyers a full refund of the deposit that they paid or, alternatively, offered them that they could transfer their deposit so that it would form a deposit on an alternative property in a nearby resort (ie Punta Perla) in the Dominican Republic that Mr Miranda owned and intended to develop himself. Mr Lynn says that that came as a surprise to him and he was not aware that there was any possibility that Mr Miranda's interest could be dispensed with in this way. From the fact that it happened, it appears that Mr Miranda cannot have had any actual interest in the Cap Cana resort properties that he was intending to sell through Mr Woodhall and

subagents, nor can he have had any binding authority on behalf of Mr Hazouri to engage in that activity. It has not been suggested in this case, however, that Mr Lynn knew that that was the case, although it was put to him – and it must, indeed, be the case – that he cannot have investigated the legal status of the authority under which he was acting beyond accepting Mr Woodhall's and Mr Miranda's word for the rights that they said they possessed. Mr Lynn did say that he had met Mr Hazouri with Mr Miranda and Mr Hazouri had done nothing to disabuse him of the impression that Mr Miranda had the authority to negotiate sales of these properties. That may very well be the case. However, although that suggests questionable ethics by Mr Hazouri, it does not deal with the point that Mr Miranda had no enforceable interest that enabled him to sell any properties and Mr Lynn did not undertake any sufficient research to establish what he might have had.

18. Mr Lynn's evidence is that buyers of 106 of the properties for which sales had been negotiated agreed that the deposits paid could be transferred to alternative purchases in the Punta Perla resort. I have the impression that that does not mean 106 individual buyers because some buyers bought, or agreed to buy, more than one property. According to Mr Lynn, the potential purchasers of the other properties were repaid their deposits in full by Mr Miranda. There is nothing to suggest that that is not correct, although I observe that there is no documentary evidence, even of an indirect nature, to support that contention. Given the well known difficulties that are faced in respect of the number of these resorts, it would not be altogether surprising if the funds held had, in some way, not been kept intact and the buyers did not in fact receive all that they expected to. Nevertheless, that is not a matter which is in evidence and I am not going to assume that that was the case; I simply observe that it would be, perhaps, optimistic and not what one might have expected in these sort of matters for the buyers to be repaid in full.

19. On Mr Lynn's account, Mr Woodhall's company, Cap Cana Limited, agreed to pay a fixed commission of $2.5million in respect of all the sales that were to be transferred to Punta Perla. That was to be accepted, and he said that he had to agree to accept it, in lieu of the $3million to $3.5million that he had originally expected to receive. He said it was payable to CCS. Mr Lynn at that time set up PPS in order to handle sales at the Punta Perla resort. He did so again on the basis that he would be acting as a subagent for Mr Woodhall, who incorporated a company called Punta Perla Limited to act as the main agent. According to Mr Lynn, Mr Woodhall had exclusive rights to sell properties at the Punta Perla resort. PPS operated on a similar business model – there were liabilities that had been incurred to the subagents dealing with the sales at Cap Cana and he said that some of them were paid by CCS, as were other creditors. CCS then wound up its affairs and paid over a balance, which he referred to as "the profit made in CCS", of £349,000 to PPS.

20. On Mr Lynn's evidence, some of the payments of the $2.5million were paid not to CCS itself but were paid to CCS LLP and some were made direct to PPS. PPS, he said, had paid some of the subagents who had originally made sales on behalf of CCS. Mr Lynn said that it was he who had decided where the $2.5million was paid – i.e. to which of the three entities it was paid – and he did that according to what they needed. In doing that, I am bound to say that it seems to me that he had little apparent regard for the separate corporate identity of each of those three corporations. He appears simply to have treated it as a matter of convenience where the money went and which entity satisfied which liabilities, whether or not that entity had incurred those liabilities.

21. PPS then commenced marketing further properties for sale at the Punta Perla resort. It operated, as I say, on a similar business model, using a number of subagents – again, Mr Lynn referred to there being, at some points, 50, 60 or 70 of such subagents. One of the people who had been a successful subagent on behalf of CCS was a Mr Mark Andrew. He had introduced a number of buyers and was instrumental in procuring the agreement of those buyers to transfer their deposits to the Punta Perla resort. Mr Andrew was, it appears, on the strength of that, given a directorship and a shareholding in PPS. It is easy to understand why the transfer of those deposits would be of importance to Mr Lynn – without it, it would appear that no commission would have been received, whether by CCS or any of the other entities, in respect of the sales that had apparently been made of properties at Cap Cana. I say that because, if the deposits had not been transferred, presumably, Mr Miranda would have had to pay them all back to the potential purchasers and would have had no funds with which to pay Mr Woodhall, let alone Mr Lynn or any of the companies that he operated through.

22. In relation to the Punta Perla resort, Mr Woodhall, it appears, had a company called Punta Perla Caribbean Limited, which may have acted as the master agent. I am not clear whether there was a separate company called Punta Perla Limited, though that name was also referred to. At one point, there was also a reference to Punta Perla PLC. However, it appears that, for most of the time at least, Punta Perla Caribbean Limited was the company through which he operated. Business went well, Mr Lynn said, and PPS took on ten further staff. Therefore, it would appear, at this stage, to have had about five staff that it transferred from CCS and ten further staff that it employed itself in addition to the network of agents. I say "it would appear" because there is no hard information from which those figures can be ascertained.

23. At some point in about September 2005, Mr Greatwood came on the scene. He, apparently, was originally a client of Mr Andrew's. He became a director and a ten per cent shareholder in PPS on the strength of his agreeing to make an unsecured loan of £160,000 to PPS. That money, according to Mr Lynn, was used to fund the purchase of assets from CCS LLP and to repay a loan that had been made to that entity by a Mr Youngman. In June, approximately, of 2006, on Mr Lynn's evidence, Mr Miranda fell out with Mr Woodhall. At that point, Mr Lynn said, Mr Miranda cut PPC (Punta Perla Caribbean) out of the deal at the Punta Perla resort. From then on, Mr Miranda's company, Paraiso Tropical, ceased to pay commissions to PPC and, instead, agreed to pay a ten per cent commission on sales directly to PPS. The business continued on that footing until the sale and purchase agreement was negotiated with Mr Andrew and Mr Greatwood in December. By that point, Mr Lynn said that he had, effectively, ceased to be involved directly in the selling process which was being run by Mr Andrew and Mr Greatwood – particularly by Mr Andrew – and it appears that he was beginning to develop other interests in other parts of the world. After the sale, Mr Greatwood and Mr Andrew continued to run PPS. As I said earlier, for a time being, they made some payments under the sale and purchase agreement to Mr Lynn. However, they stopped paying from some point in early August 2007.

24. PPS itself appears, effectively, to have stopped trading in about March of 2008. From the documents received, it appears that it ceased to make sales at the Punta Perla resort in March of 2008, except for one that was made and invoiced in May of that year. From May onwards, there is no evidence of any trading activity in PPS. At that point, Mr Greatwood and Mr Andrew set up another company called Emerging Earth Limited. Mr Lynn says that this was a mechanism to divert business away from PPS since, at that

time, Mr Andrew and Mr Greatwood were subject to the threat of litigation from Mr Lynn in respect of their having ceased to pay him under the sale and purchase agreement. Business, he says, was, therefore, diverted away into their own company in order to isolate it from any claims that he might have. That company appears to have traded between May and December 2008 but there does not appear to be any evidence of it having traded after that.

25. Looked at overall, one cannot ignore the fact that, of all the clients that Mr Lynn's companies dealt with, whether at the Cap Cana resort or at Punta Perla, none of them has to date received any of the properties for which they have put down a deposit. No properties at all were allocated to any of them at Cap Cana. Some of them – the majority of them - if Mr Lynn is right, received their deposits back in full. No properties, it appears, have yet been built at Punta Perla resort. There are a number of communications in the documents that I have that have been sent to buyers at Punta Perla explaining what is going on there, the most recent of which is from an entity which, it is said, holds plots of hand in escrow in some form, which is intended to represent security for the potential buyers, proposing that they should agree that the land which is held may be sold. There does not appear to be any indication as to what it might be sold for or what return they might expect if they agree to this. Alternatively, it is said, they have the opportunity to retain their deposits and their contracts in the hope that a property may be built at some stage in the future. However, there is no indication as to how likely that is or when it might happen.

26. At the start of his evidence, Mr Lynn accepted that Mr Woodhall has been pursued by investors or purchasers in respect of their purchases in various Spanish developments with which he has been involved and also in respect of sales made through him in respect of resorts in other parts of the world – including, I assume, the Dominican Republic. He accepted that Mr Woodhall is the same person who is reported to have died in a mysterious plane crash in the Amazon jungle in 2008 – there being, it appears, a suspicion that this was a staged accident in order to escape Mr Woodhall's creditors. There is a strong suggestion that Mr Woodhall's affairs, at least, involve matters of fraud. It is not the case, however – and I should not be taken to the approaching the matter on the basis that it is alleged – that Mr Lynn's business was conducted on a fraudulent basis. It is not suggested that Mr Lynn was a participant in any fraud there may have been or that he was conscious of any lack of substance in the rights of Mr Woodhall or Mr Miranda, pursuant to which he was selling. I approach the matter, therefore, on the footing that the activities of these companies were conducted on a *bona fide* basis and nothing I say as to anything else should be taken as implying to the contrary.

27. There is, however, substantial doubt cast on the reliability of Mr Lynn's evidence, notwithstanding that no fraud is alleged against him. Mr Bacon points to a considerable number of matters in support of that. He referred me to what he says – and, I think, with justification – is a fairly sketchy account of the background leading up to the establishment and the running of the business of PPS, the fact that Mr Lynn's account, although it made several references to Mr Woodhall, did not disclose the extent of the accusations against Mr Woodhall or the mysterious circumstances of his death. It is apparent from what Mr Lynn did say that he must have worked fairly closely with Mr Woodhall throughout his engagement. He, clearly, operated as a subagent on behalf of Mr Woodhall and Mr Woodhall's company. He said that his arrangement with Mr Woodhall included employing Mr Woodhall's mother at his insistence and paying

her through Mr Lynn's companies, notwithstanding that she was working for most of the time, it appears, on matters relating to Mr Woodhall's companies.

28. After he sold his interests in PPS, Mr Lynn said that he went on to work in various projects in Egypt, Dubai and Malaysia – some of which, at least, were matters in which Mr Woodhall was also concerned. That is put forward as a matter which suggests that Mr Lynn has not given a full and candid account of those matters and his evidence should be, therefore, approached with some caution. There is further criticism in general about the lack of contemporaneous documentation relating to the establishment of this business. There has, for instance, been no documentation produced, as I say, of any actual granted rights of an exclusive nature to sell, nor any explanation as to how the rights that Mr Lynn thought Mr Miranda or Mr Woodhall had and which he relied on were, apparently, easily revoked. The point is made that the case relies very heavily – if not absolutely exclusively – on Mr Lynn's own evidence. He was questioned at considerable length about transactions in which funds moved, apparently at will, between the various entities that he controlled, apparently without regard to who was actually entitled to them. Furthermore, he was questioned about the extent to which he had accurately disclosed his own affairs, particularly in connection with PPS and its predecessor companies.

29. Having heard Mr Lynn's answers to those questions and his evidence in general, I am sorry to say that I have come to the conclusion that Mr Lynn's evidence is wholly unreliable unless it is supported by credible and independent evidence. This is a case in which there is very little, if any, credible independent evidence to support what Mr Lynn has to say. There are a considerable number of matters that have led me to that conclusion. The first – and, I think, most obvious – is that Mr Lynn has not, in my view, been honest or candid in the way that he has pleaded his case or put forward his evidence in support of it.

30. His pleaded case, as set out in his amended particulars of claim, is that he received no payment at all after the initial $200,000 paid at completion. There has at no stage been any amendment of that pleading. He served a first witness statement, which but for late developments would have been the written evidence on which he would have gone to trial, in which he said that he had in fact received seven payments between January and July of 2007 which were around $30,000 each. That would have corresponded with the minimum payments due under the agreement. He did not explain why he had changed his pleaded position. It may have had something to do – I cannot say because this was not put to him – with the fact that I have seen in the correspondence passed between the defendants acting as his solicitors and Mr Greatwood and Mr Andrew at that time reference to payments having been made up to July but having stopped thereafter. No basis was given on which he said that these payments were around the minimum of $30,000 each.

31. Mr Lynn has never produced any schedule of the payments that he actually received or any documentary evidence of the making or receipt of those payments with the exception of one payment, which is referred to on two pages of bank statements that he provided in respect of one bank account dealing with certain dates in July and August of 2007. Mr Lynn has not given any credible explanation, at any stage, as to why he was not able to produce statements for any of the other months on that account, why the statements he did produce on that account were not even all the pages of the statements

that he had copies of or why he has not been able to produce statements on any other account into which payments may have been made.

32. Mr Lynn has, as I say, engaged an expert in this case, Mr Swinson, who looked at the documentary records from PPS that were provided to him and found among them a schedule which appears to be a schedule of client invoices rendered by PPS. From that, he identified a number of transactions in which it appears that invoices have been raised to Paraiso Tropical SA. By looking at those transactions that fell into the period after the making of the sale and purchase agreement and up to the end of July, when it was said the last payment had been made, he identified something over 100 transactions on which, if commission had been paid at the rate set out in the sale and purchase agreement, Mr Lynn would have been paid a total of $525,000. Given that evidence, Mr Lynn changed his evidence at the start of the trial to accept that he had received that amount – $525,000. He have no good explanation as to why he had made a change from either of his previous positions or why he can give no account of his own as to the monies that he has actually received.

33. I am driven to the conclusion that Mr Lynn was not being honest or candid in the position that he presented in his particulars of claim or in his first witness statement. I conclude, from the fact that Mr Lynn accepts the figures produced by the expert without, it appears, being able to give any detail of the way in which these amounts were received, that the concession that he has now given is simply that he feels forced to concede that which appears to be the inevitable minimum to be established from his own disclosure document. I have absolutely no confidence, given the history of his previous positions, that this represents a complete picture rather than simply bowing to the inevitable in terms of the evidence before the court. When this was put to him, Mr Lynn, in my view, expressed no sincere regret and made no significant attempt to explain the evidence he had previously put forward. He sought, it seemed to me, to pass off in a rather glib manner the particulars of claim as having been mere inattention on his part and he gave no explanation at all as to how he might have thought that the payments he had previously received were of about $30,000 each when he now accepts that they must have been substantially more than that.

34. Secondly, Mr Lynn was questioned at some length about the accounts that have been disclosed in respect of CCS and certain payments that it made and in relation to his own tax returns which have been disclosed in this action. I should say, generally, in relation to those documents, that it appears that the accounts of all the companies with which Mr Lynn has been involved have been prepared by a Mr Keith Allen who is also Mr Lynn's personal tax accountant. He seems to have been employed by all of these companies and to have acted as their accountant, not in the sense of being the day to day bookkeeper but certainly the person who turned the day to day records into accounts at the end of any particular period. I have not received any evidence from him; Mr Allen is, apparently, very seriously ill. I have no reason to doubt that that is the case. The accounts that he prepared were, of course, the responsibility of the directors and, principally, it seems to me, in respect of all these entities, the responsibility of Mr Lynn. None of them seem to have been audited. The content of them is, therefore, entirely dependent on information provided on the responsibility of Mr Lynn and a presentation that may be a joint responsibility of the directors – principally Mr Lynn- and Mr Allen.

35. It was pointed out that there are a number of liabilities and payments that have been referred to in Mr Lynn's evidence which are not apparent on the face of any of the

accounts that are produced. One example was the £349,000 that was said by Mr Lynn to have been paid as being the profit generated in CCS and paid to PPS. The accounts for the relevant period of CCS show no reference to any such payment. There appears to have been no business justification for any payment from CCS to PPS, unless it was to be a loan. However, there is no reference to any loan or any liability from PPS to CCS. There was, in fact, a schedule of payments made by CCS in the period of 2005 and, I think, 2006 produced. It is not part of the accounts; it appears to be a list of actual payments made. That shows a considerable number of payments which were in fact made to PPS. Those payments do not appear on the face of the annual accounts as drawn up. There is a global figure, which is said to be "direct costs", and then a smaller figure, which is said to be "administrative expenses", which is broken down into a number of subcategories. The amount paid to PPS cannot be within the administrative expenses figure. If it is accounted for at all, it must be in the global figure for direct costs, which is not broken down. That figure is expressed to be a deduction from profits but it seems evident that any payments made to PPS cannot have been generally business expenses and, therefore, should not have been accounted for as a deduction from profits. Therefore, if those figures are in that direct costs figure, they appear to have been wrongly accounted for.

36. Amongst the schedule of payments made by CCS are amounts in total considerably more than £100,000 paid for Mr Lynn's benefit and that of his father – Mr Lynn's father, I should say, was also a director of CCS. Something very nearly £100,000 was paid to lawyers who were acting on the purchase of Mr Lynn's private house. Other amounts were paid either to settle hire purchase liabilities on a car which was personally owned by Mr Lynn and as the deposit and other payments on a new hire purchase arrangement which was being entered into in respect of a car which does not appear as an asset of the company and which Mr Lynn accepted was his personal property. Some £4,000 was paid to what appears to have been a builders merchant near Mr Lynn's property – presumably, therefore, in connection with materials for Mr Lynn's house. Another payment of about £1,100 was made in respect of a property which was owned by Mr Lynn's father, being apparently a holiday property at a marina. None of those payments were apparently business expenses. According to the accounts, no remuneration or emoluments were paid to either of the directors. I conclude, therefore, that, if these figures are represented at all in the accounts, they must be wrongly presented as being costs of sales and they have been concealed, on the face of it dishonestly, from the statement of emoluments paid to directors.

37. Mr Lynn was referred to his tax returns for the relevant period and had to accept that none of the payments made for his benefit appeared, in any respect, in those tax returns. In those tax returns, Mr Lynn made no return of any income or benefits received as director or employee from any company, although he was, at the time, apparently, a director of several companies and he was certainly employed by, and remunerated as an employee or director for, CCS and PPS during the relevant periods. The accounts did disclose an amount of £22,500, which elsewhere in his witness statement Mr Lynn had said was the amount that he had drawn as salary from PPS, but in his tax return was described as income that he received on a self-employed basis as a property consultant. Mr Lynn was at a loss to say what property consultancy he might have been engaged in or how, if at all, this could have related to the payments that he acknowledged he had received from CCS and PPS. Of course, if Mr Lynn had been paid a salary by PPS, that would have been an amount taxable under schedule E, which he ought to have reported in his tax return as income as an employee or director, not self-employed earnings.

38. Furthermore, Mr Lynn had to accept that none of his tax returns made any disclosure of the $200,000 that he said he had received on the sale of PPS or of the subsequent commission payments which he now admits amount to $525,000, whether shown as commission income or as proceeds of sale of shares in PPS. His only answer in respect of that was that he said he was under the impression that these amounts would not be treated as his income or as reportable by him in his tax return if they were paid into another business and that some or all of those amounts had been paid to another business, although he did not say what that business was. He gave no explanation as to why he was under that belief. I do not accept that it is something that he reasonably could have believed. I conclude that Mr Lynn's tax returns for these periods were works of fiction created by him in conjunction with Mr Allen.

39. Thirdly, Mr Lynn said that Mr Greatwood's £160,000 had been used to buy assets of CCS LLP and by that means provide funds to pay out of the loan that Mr Youngman had made to that company. He said that, if this had not been done, Mr Youngman's loan would have had to have been treated as a liability of PPS – not so, of course, as a matter of law. It would appear that Mr Lynn felt an obligation to pay off Mr Youngman and may not have thought that Mr Youngman would let the matter drop if CCS LLP became insolvent without paying him off. The accounts of PPS show that it purchased a business (not named) in 2005 and they show an asset of goodwill of £160,000, which is said to have been acquired at some point in the year 2005 to 2006 and which was thereafter being depreciated. Given that Mr Lynn's witness statement says that PPS bought the assets of CCS LLP, and given that the accounts of CCS LLP show in that year a disposal of all of the tangible assets that it had, it seems clear in the context that this goodwill must be represented as arising from the transaction in which the assets of CCS LLP were bought. I have to say that Mr Lynn was not asked about that directly, so that is a matter of inference that I draw from the documents. It is a matter that was discussed somewhat in argument but I do not say that it is a matter that Mr Lynn was able to give any evidence of himself beyond what was said in his witness statement.

40. Insofar as PPS has accounted for an asset of goodwill acquired, it seems to me that it cannot have been proper to do so on the basis that it acquired any goodwill from CCS LLP. I say that also for a number of reasons. Firstly, CCS LLP did not have in its accounts, at that time, any goodwill. When CCS disposed of its assets, it has not accounted for any profit realised on the sale of intangible assets such as it would have done if it had sold goodwill and realised an amount, even if it did not have goodwill shown as an asset in its own accounts. Even if CCS LLP was thought to have had any goodwill, there cannot have been any proper basis on which that could be regarded as being an asset acquired by PPS. Taken at its very highest, it seems to me, CCS LLP might have had the names or introductions to a number of individuals who might have been interested in buying properties at Cap Cana and who might be approached as potential buyers of properties at Punta Perla. It seems to me that it is not credible to suppose that the transfer of that information would be sufficient to justify presentation upon acquisition of an asset of goodwill of £160,000. There must have been similar names, for instance, available to CCS or that have been generated through the business that CCS had been running but no payment was made to it.

41. The accounts of CCS show that, in the year 2005/2006, it sold all of its assets, apparently, for the sum of about £80,000, since those assets were previously in the books at a value of £78,000, and were said to have made a profit on resale of about £2,000. At the end of the year, CCS LLP reported a loss of £80,000. If those

transactions were genuine at all, if tangible assets had been sold to PPS for £80,000, if PPS had in fact paid £160,000 on top of that for goodwill, it would either have had to have been on top of the £80,000 or PPS would have to be representing this as an acquisition of intangible assets, whereas CCS was representing it as a sale of tangible assets. Those accounts seem to me to be, on the face of it, irreconcilable. I accept that the claimant was not asked about them. It is conceivable that he might have had an explanation to offer. I cannot envisage, however, what that explanation might have been and, on the face of it, it seems to me that the documents produced show that there are irreconcilable accounting transactions and that the presentation of the acquisition of an asset of £160,000 of goodwill in the accounts of PPS is, again, a matter which is an accounting fiction. That is a fiction for which Mr Allen and Mr Lynn must be regarded as being responsible.

42. Mr Bacon has made the point with some force that the contemporaneous documents produced from PPS in relation to its affairs are very limited. Mr Lynn says that he has no such documents himself, having been obliged to leave all of them behind when he sold his shares. Those that have been disclosed, he said, were obtained from Mr Allen and he says he was told by Mr Allen that these were all the documents that Mr Allen had. It could not be said that Mr Lynn himself had made any failure of disclosure because any documents held by Mr Allen could not be regarded as under his possession or control. I accept there is no evidence that Mr Allen's documents were under his possession or control. It is apparent that Mr Lynn has had a fairly long relationship with Mr Allen and that he was, and continued to be, on friendly business terms with him, at least as far as the preparation of his personal tax returns is concerned, until relatively recently and that he has had some cooperation at least from Mr Allen in disclosing some documents. Given that Mr Allen was cooperating to that extent, it is hard to see why Mr Allen could not have disclosed all the documents that were available to him if he wished to do so.

43. I find it rather hard to believe that Mr Allen had no more relevant documents than those that have actually been disclosed in this case. He was, as I have said, the accountant to all relevant companies and prepared their annual accounts. The companies, clearly, kept records on a computerised basis. I have no way of knowing whether Mr Allen had direct access to the computer records. However, if he did not have the computer reports available directly, he plainly had had access at some stage in the past and there seems no particular reason why, if he had only kept paper records, he would have kept the rather limited paper records that are now disclosed and not the fuller records that he might have done.

44. Mr Bacon remarked, for instance, that there were curious gaps in the information presented. Much of the information is on sheets headed "nominal activity statements". Those, apparently, show expenditure by PPS under various accounting codes. They are evidently not a complete record of payments made and, in particular, they do not appear to show any of the payments that are accepted to have been made to the claimant between December 2006 and July or August of 2007. Given that there are records of payments both before that period and after that period, and there are payments under other accounting codes during that period, it is not at all obvious why Mr Allen did not have available to him records which would have shown the actual payments made to Mr Lynn.

45. It seems highly likely that a selection must have been made in respect of the documents to be disclosed. If that is so, it must be recognised that some of the documents disclosed have been damaging to Mr Lynn's case. Therefore, if anybody was consciously selecting for the benefit of this case, then it cannot be said that they have made a perfect selection. However, it is clear that the documents disclosed do not show the whole picture and, given that the claimant has had, as I say, cooperation from Mr Allen and there is no good reason to think that Mr Allen would not have had available to him more documents than he has in fact disclosed, I think it is a strong possibility that any gaps in the evidence can be accounted for on the basis that Mr Lynn has not in fact exercised whatever influence he had over Mr Allen to require him to disclose all the documents that might have been provided.

46. Lastly in relation to Mr Lynn's credibility is the general manner in which he gave his evidence. I found his answers on a considerable number of points to be glib and evasive. The explanations he gave me seemed to me to be self-evidently incomplete. When he was shown accounts and tax returns with content that could not be regarded as truthful, he attempted to pass off the inexplicable discrepancies as matters outside his knowledge that must all be the responsibility of Mr Allen. I do not accept that that is a full explanation. Those documents, in my view, were fraudulently prepared, at least for tax purposes. Mr Lynn was the person who was in control of all of these businesses. He must have known, in general terms, the true picture in relation to them. Insofar as accounts were prepared that did not show that true picture and, for instance, described personal payments to Mr Lynn, if at all, as being deductible business expenses – and not taxable emoluments – it seems inconceivable to me that Mr Lynn was not aware that that was being done. Insofar as admissions were given in relation to questions that were put to him, Mr Lynn had not been sufficiently candid and honest to give those affirmations himself and it seemed to me that he only admitted the minimum amount that could be proved against him on the documents. I have no confidence that he would, in the absence of those documents, have made any such admissions.

47. Another aspect of his evidence that seemed to me to be remarkable was that, in his first witness statement, he had given an account of business ventures that he had gone on to be involved with, having sold his shares in PPS. These included sales projects in Egypt and elsewhere in the Middle East, and I think also in Malaysia. That account was put forward to give the impression that these were matters in which he was engaged as a replacement for his activity in PPS and something which he had moved on to having sold a very lucrative business in PPS. However, when the defendant sought to amend its defence to seek a credit against any loss that Mr Lynn might establish for any earnings that he had made through these other projects, he introduced evidence at the start of the trial saying that he had not earned anything from any of the projects that he had been involved with in any relevant period.

48. I am bound to say I found that to be highly unlikely, to be completely inconsistent with the manner in which he presented these opportunities in projects previously and particularly unbelievable given that he gave no explanation as to what he has done since the sale of PPS to provide his source of income. I came to the conclusion that Mr Lynn made that denial, which seemed to me to be a considerable change of position on his part, because he was potentially facing an argument that he might have to give credit for income and that he made it safe in the knowledge that the defendants had no evidence available to them from which they could gainsay his denial. It was consistent, in my view, with the approach that Mr Lynn had taken to this other evidence.

49. Before I come on to deal with the way in which the case is now put and to reach some findings on it, I must say a little bit about the records that Mr Swinson relied on. Mr Swinson was asked a number of questions in relation to the affairs of PPS and the way in which the claim was put – particularly, he was asked to calculate what, or to estimate what, commission might have been paid under the sale and purchase agreement. He did that by looking at one of the nominal activity sheets which appears to be a record of customer invoices. It is in the form of a computer ledger in a number of columns with headings and he made inferences, which I am content to accept were reasonable, as to what those headings meant and what was the information conveyed in the columns.

50. The pages dealing with the period relevant to the sale and purchase agreement begin at page 518 of the bundle. They show a considerable number of invoices raised during that period, many of which appear to have been invoices delivered to what is described as "Paraiso", assumed by Mr Swinson – I think, reasonably – to be Paraiso Tropical. Those, Mr Swinson assumed – again, I think, reasonably – to be transactions which potentially triggered a commission payment under the sale and purchase agreement. That was the source of his calculation that commission totalling $525,000 should have fallen due. The records do not, however, include any actual invoices in respect of those transactions. They are clearly substantial transactions – the stated value of the invoices is typically between $10,000 and $30,000, some of them go as high as $45,000. That appears to be consistent with an entitlement by PPS to a ten per cent commission on the eventual sale price of a property which a buyer committed to buy from Paraiso Tropical.

51. There were a number of matters that Mr Swinson could not explain or could not make any inference about from the documents in front of him. There is a period beginning on 26th March 2007 in which a series of invoices are made not to Paraiso but to what is described as "PPP". In this respect, there are invoices which were provided in the bundle – they begin at page 637. From those invoices, it appears that PPP stands for Punta Perla Properties. However, there is no evidence or no explanation as to what entity that might be. I have not seen any reference in the documents to a limited company, for instance, with the name Punta Perla Properties Limited or, indeed, any similar name perhaps incorporated outside this country. Those invoices appear to be for one per cent of the contracted sale price, rather than ten per cent. There is no explanation as to what those invoices represent or why it should be that PPS is receiving a commission at one per cent. Mr Swinson treated those as not being sales generating commission under the sale and purchase agreement. He did not offer an explanation for them himself. He had not asked Mr Lynn for one and, of course, he has no opportunity of asking anyone else.

52. That raises the question in my mind, I must say, as to whether those represent transactions in which a sale has been made and the bulk of the commission has been invoiced through some separate entity known as Punta Perla Properties with a one per cent being treated as being earned by PPS and, presumably, nine per cent retained outside PPS by some other entity. No questions about that were put to Mr Lynn. I cannot tell what he might have answered in respect of it. I cannot tell whether he would be likely to have known if this was the case. Given that he has seen these schedules himself, if he thought that Mr Greatwood was diverting commission elsewhere, then I would have thought that would be an allegation that he would be likely to have raised, but he has not done so. That remains a mystery.

53. If it was not a diversion of commission by Mr Greatwood, it may suggest, as Mr Bacon said, that PPP was in fact another agency and that, in some way, PPS was earning a commission of one per cent in respect of sales made by PPP. If so, PPS would not appear to have been operating as an exclusive agent. I do notice that, in those lists of invoices, one of the columns is headed "N/C" – presumably meaning nominal code. All of the invoices to Paraiso are given a nominal code of 4,000, so are those invoices addressed to PPP. That may suggest that there is, in fact, some connection between PPP and Paraiso but, again, I cannot say whether that is the case or not because nobody is available to answer that question.

54. The series of invoices to PPP ends on 4th April 2007, so that is after a very short period. Thereafter, invoices in the name of Paraiso resume. The volume of transactions falls off, however; whereas there were between ten and 18 transactions per month between January and December 2007, thereafter, the number of transactions drops to five or six per month with the exception of one month – February 2008 – when there were 22. I do notice that, in a period from July onwards, there were a considerable number of invoices apparently addressed to "PPS & M", which appears to stand for Punta Perla Sales and Marketing. However, again, we have no indication in the documents whether there was a limited company in that name and, if so, whether it was related to, or controlled by, Mr Lynn, Mr Woodhall or Mr Miranda or, indeed, anybody else. Those also appear to be invoices for one per cent and not ten per cent. Again, Mr Lynn was not asked any questions about them; I cannot, it seems to me, draw any inferences as to what they represent, save to make the same remarks that it may be consistent with a diversion of commission to another entity or it may be an indication that there was a further entity – PPS & M, whatever it was – which was also acting as an agent and paying a sub-agency commission of some form to PPS. All those invoices, again, have the same nominal code entry of 4000.

55. All of the invoices in respect of Paraiso and, if they are in one way or another similar, PPS & M, effectively end after March 2008. There is a single invoice to Paraiso in May of 2008, which may have been a transaction that, for some reason, took a while to complete. After that date, there is, effectively, no invoicing at all on the documents shown from PPS. According to its accounts, the company Emerging Earth Limited began trading on 1st May 2008. It was controlled by Mr Greatwood and Mr Andrew and, according to its accounts up to December of that year, it had a turnover of some £254,000. Mr Lynn, as I say, suggests that this was a vehicle to divert further sales from Punta Perla. There is, however, no evidence that that is the case. There is nothing in the accounts of Emerging Earth Limited to indicate whether it was dealing with Punta Perla sales and no other documents which might show that that is the case.

56. Mr Lynn referred to a printed copy of a profile on the LinkedIn network, put up by Mr Andrew. In that, Mr Andrew makes a number of statements which are demonstrably completely false. However, some matters were relied on as supporting Mr Lynn's case. Mr Andrew describes himself as having worked from 2005 to 2009 in Emerging Earth. Emerging Earth was not incorporated until much later on in that period and it is obvious that what he is describing in that profile as being the activities of Emerging Earth is, in fact, elided with what he was doing through PPS. He says that he has been selling properties at Punta Perla but also at another resort called Isla Margarita. It cannot be established from that profile, even if what was said on there could be relied on, when those sales started or to what extent they overlapped with sales at Punta Perla. It seems to me that the most it can be said from that is that, if Mr Andrew was selling properties

at Isla Margarita, then some or all of the sales and transactions through Emerging Earth could just as well be at Isla Margarita as at Punta Perla.

57. Mr Lynn has not said that he has any direct evidence himself as to what was happening in PPS after he sold his shares. He must have been in communication of some sort with Mr Greatwood and Mr Andrew but anything he could say about that would be a matter of hearsay. It appears, from what he did say as to his disagreement with matters contained in their accounts, that Mr Lynn disagrees fundamentally with what appears to have been done, but he did not have, or seem to have, a great deal of direct knowledge as to what it was. The result is that we have no clear picture, either from the accounts or other documentary records or from direct evidence of any witness who could speak to what had happened, as to what has gone on in PPS since the sale and purchase agreement. Whatever Mr Lynn has said to me is at best hearsay and, in many cases, speculation. In my view, I can place very little, if any, weight on it by reason of the general findings that I have made about Mr Lynn's credibility.

58. I come then to how the case is now put – that is as to the benefits that Mr Lynn could have obtained if he had continued to own and to manage PPS. Mr Swinson was asked to address this in his first report and he dealt with it at section 7. In that section, he noted that, on the assumption that the sale and purchase agreement had not been entered into, the payments that he found or assumed to have been made to Mr Lynn would, instead, have been monies retained in the company. He made the assumption also that, if those transactions had not been made, the amounts paid to Mr Lynn would be added back to the profit of the company. He did not say this expressly but it seems to me that that necessarily involves the assumption that, to the extent that they were represented in the accounts subsequently produced, they must have been shown as costs of sales and, therefore, deductions from profits. Having regard to the general way in which these companies were run both by Mr Lynn and, as far as one can tell, by Mr Greatwood and Mr Andrew after the sale, I think that is probably a realistic assumption, although there can be little doubt that it would be incorrect as a matter of law and accounting treatment to have done so. It suggests, I think, that, if he is right – and I believe that he probably is right – that Mr Andrew and Mr Greatwood may have had a similar, very cavalier approach to company accounting and been disposed, as Mr Lynn was, to treat any payment as being a deductible expense, whether it properly was or not.

59. Mr Swinson's conclusion in his first report was that it was impossible to say what remuneration or dividends Mr Lynn could in fact have received because he – Mr Swinson – could only speculate as to what the variations in the costs and the income of the business might have been in that scenario. Mr Swinson produced a second report, however, at the start of the trial, which was said to have been predicated on documents disclosed by the defendant, although it seemed to me that, insofar as he revisited this position, it was not so much premised on the documents that the defendants had produced as being an attempt to go further on matters which he had left on an inconclusive basis in his first report. He was still very cautious as to what he said. He set out a table in which he produced various figures which might have been taken as adjustments to the subsequent accounts of PPS, which he described as being an analysis of factors that should be taken into account. He was somewhat more positive when asked about these matters in the witness box. However, again, it seemed to me that he did not offer them as his own opinions, still less did he say he had come to any conclusion as to what Mr Lynn might have paid himself. Insofar as he dealt with these

particular matters, he relied, it seemed to me, effectively, entirely on what Mr Lynn had said to him.

60. Mr Darton's closing submission put that case to me and quantified it. In summary, the basis on which he arrived at the figure he put forward was by way of taking the reported profits of PPS in the financial years 2007 and 2008, making the various adjustments discussed by Mr Swinson in the table in his report and concluding that, if those adjustments had been made, the company would have had a profit available for distribution over those two years of £1,051,766. In addition to that, he said it should be assumed that half of the turnover that had been made in Emerging Earth could have been treated as additional income of PPS because, in the scenario in which Mr Lynn had not sold the shares, Emerging Earth would not have been set up and any business diverted to it would have been earned through PPS. He did not, however, allocate to PPS any part of the costs shown in the accounts of Emerging Earth.

61. He thereby arrived at a total, which he said would have been available for distribution in one form or another, of £1,178,766. From that, he said it should be assumed that Mr Lynn would have paid himself two amounts of salary of £125,000 each, which was the amount that he said he was entitled to when he was a director of that company and that the rest would have been distributed as dividend of which Mr Lynn would have been entitled to three quarters. On that basis, he would have received £250,000 of salary and a dividend of £696,074 – a total of £946,574. Against that, credit was given for £444,269, which is the sterling equivalent of the $725,000 that Mr Lynn accepts that he has received, the difference being £502,305, which he said was the loss suffered by having disposed of the shares under the unenforceable agreement. All of those figures, it is accepted, are stated before any tax payable in Mr Lynn's hands.

62. Mr Bacon submits – in my view, compellingly – that this calculation is wholly speculative and insufficient, particularly given the unreliability of Mr Lynn's evidence to establish that any loss has been suffered at all. The first point he made is that the pleaded case is that, in the scenario which is now relied on, Mr Lynn has lost the opportunity to continue to pay himself a salary of £125,000 and dividends of £125,000 a year. If that pleaded case were applied to the two year period now under consideration, that would produce a total received by him of £500,000 before tax. However, I accept Mr Darton's submission that this is a case in which the claim is made for general damages and the claimant is not limited to the specific amount of those damages set out in his pleading. It is desirable practice, of course, to state what damages are being claimed and, indeed, to provide a schedule of them. However, it is not a formal requirement and it is not a restriction in the rules, nor can one be derived, I think, from any of the directions given in this case limiting Mr Lynn to a claim of the amount set out in his particulars of claim in quantum terms.

63. The second point made was that the court could not safely rely on Mr Lynn's evidence as being evidence that the only receipts that had come to him were those that he now admits. I accept the point in general about the unreliability of Mr Lynn's evidence. I have made some remarks already about the circumstances in which he came to admit those quantities. However, it seems to me that that in itself would not be sufficient for me to conclude that no loss had been proved. Although I am not satisfied that Mr Lynn's evidence of what he received is accurate, it seems to me that I cannot say, on the evidence available to me, that I can infer that he has in fact received more and, particularly, any specific amount more.

64. So far as the accounts and the adjustments to the accounts are concerned, Mr Bacon submits that the presentation that is now made involves unrealistic assumptions as to the effect on the business of Mr Andrew and Mr Greatwood not being as involved in it. Mr Darton puts the case on behalf of Mr Lynn on the assumption, which I think is also one that Mr Swinson adopted, that, if no deal had been done, Mr Andrew and Mr Greatwood would have departed PPS immediately. On that basis, it was said that PPS would cease paying their salaries and dividends so that those amounts would, again, be available within the company. However, the way in which Mr Darton puts it and the way in which Mr Swinson had to present it in his table assumes that PPS would continue to receive the same amount of income as it reported having received in 2007 and 2008. The case, as now put, also assumes that any compensation payable to Mr Andrew and Mr Greatwood could be limited to 25 per cent of the amount which Mr Lynn left available for distribution after payment of a salary of £250,000 to himself. That was criticised as being unreasonable.

65. There are various points, it seems to me, wrapped up in that submission. Firstly, the assumption was made that the salary shown in the accounts for the 2007 period of £185,000 payable to Mr Andrew and Mr Greatwood could be handed back in full. Even on the basis on which the calculation is put forward, that must be wrong because the period reported on was a 16 month period commencing in September 2006. Therefore, Mr Greatwood and Mr Andrew, on any basis, would have continued to be paid up until the end of December 2006. The maximum amount that could be deducted, even if all the premises of this calculation were accepted, that would be £127,000 and not £185,000. I accept the submission that it cannot be assumed that sales would have continued at the level that was in fact achieved in 2007. By the end of 2006, on his own evidence, Mr Lynn was not directly involved in selling these properties. Most of the sales, it seems, were being achieved through subagents but it seems clear that Mr Andrew was still involved, to some extent, in direct selling. He was also involved, as Mr Lynn said, in running the subagents. In those circumstances, if Mr Andrew departed in what were bound to be circumstances of some acrimony, it could not, it seems to me, be assumed that Mr Lynn would be able to step straight back into the breach, and generate all the sales that Mr Andrew in fact made – I have no indication and no information as to exactly how many those might have been, so it seems to me a particularly unreliable assumption to make that, whatever they were, Mr Lynn could have replaced them – or that Mr Lynn could have taken over the running of the network of subagents such that no sales would have been lost. It is, in my view, impossible to say, in these circumstances, what the level of sales would have been.

66. It seems to me highly unrealistic to assume that Mr Andrew and Mr Greatwood would, in effect, go quietly. They showed, in my view, by the nature of the allegations they were prepared to make against Mr Lynn – i.e. of fraud on his behalf and, on his accounts, spurious allegations in relation to transactions the substance of which they were fully aware of – that they are individuals who are prepared to fight for their own position and financial advantage. It seems to me impossible to believe that they would accept being removed from the company in which they have made a considerable financial investment, as Mr Greatwood had, and to which they had committed a lot of their energy and resource and from which they earned, apparently, substantial amounts of money without taking any opportunity that they could to minimise their own losses. It must be assumed, I think, that they would, at the very least, have made claims for wrongful dismissal from their directorships and, in all probability, if matters were then

conducted by Mr Lynn on the basis that he now proposes, that this amounted to unfair prejudice to their position as shareholders.

67. It seems to me that, on the evidence I have, it is highly likely that Mr Andrew and Mr Greatwood would have been free to compete against PPS in relation to the Punta Perla business. Mr Lynn's case, of course, is that PPS had the exclusive rights to sell properties at Punta Perla. However, given that there is no documentary evidence to support that and that the apparent previous exclusive arrangements with Mr Miranda and Mr Woodhall were easily set aside without any adverse consequence, it seems to me that the position, in fact, is likely to be that the apparent exclusivity was a matter that depended on the whim, from time to time, of the developer. Accordingly, if he had been so minded, Mr Miranda could have agreed that some or all of the sales business that PPS had been carrying on could have been transferred to some other entity.

68. There are matters which may indicate that there were already other entities selling properties at that time. If PPP or PPS & M, which are referred to in the sales invoices lists, are other entities from which PPS was earning a sub-commission, then they already had part of the business that was said to be exclusive to PPS. There is also a document, which Mr Bacon pointed to, which was an email at the time indicating that, as far as Paraiso Tropical was concerned, some commissions were payable in respect of sales made by one of the "Worldwide Destinations" companies, which is the name of a company operated by Mr Woodhall.

69. It seems to me that Mr Andrew and Mr Greatwood would have been in a position to present themselves to Mr Miranda as being available and able to make sales on his behalf and that, given that they had been doing it in effective control of PPS for some months and they had the day to day relationship with the subagents, that they must have, by that time, December, at least, had a substantial relationship themselves directly with Mr Miranda and his company. Mr Lynn was, obviously, involved in that to some extent but it is not as if Mr Andrew and Mr Greatwood would have been coming along as outsiders and seeking to obtain for themselves business which they had not previously had a part in when Mr Miranda was committed to a relationship personal to Mr Lynn. They would have every opportunity to compete. It is accepted that they would not be legally prevented by any obligation to PPS from doing so. It seems to me impossible to believe that they would not have attempted to exploit that opportunity if they possibly could.

70. The totality of these uncertainties means, it seems to me, that it is impossible to say what effect the departure of Mr Greatwood and Mr Andrew would have had on the business of PPS. It is not, I think, a safe way of proceeding to start with what they reported themselves for 2007 and deduct some arbitrary percentage from that. The percentage would necessarily be arbitrary; there is absolutely nothing firm upon which it could be based. The potential variations in the situation, it seems to me, are simply too great to make it possible to settle on any figure which can be said to have been established on the balance of probabilities. That, I think, was the conclusion Mr Swinson first came to and from which he was, apparently, persuaded to retreat to some extent in his second report. The range of uncertainties and the difficulty of making any reliable estimate from them, it seems to me, is exacerbated by the conclusions that I have come to about the honesty and fairness of Mr Lynn's evidence. A number of the adjustments that he relies on depend on his unsupported assertion as to what he would have done or would

not have done. That seems to me to be something that I simply cannot safely rely on as evidence of what would have actually happened.

71. If it is impossible to determine what the income of the company might have been, or what it might have had to pay or forego in order to get rid of Mr Andrew and Mr Greatwood, can anything be said about the expenses that it incurred? In a sense, it matters little whether I can deal with these items since, if it is not possible to say what the income is, one cannot say what would have remained, at the end of the year, available for distribution, whatever the expenses were. However, there were strong points made about the adjustments proposed in respect of the expenses, which I ought to refer to. The first one, set out in Mr Swinson's table, which Mr Darton has reproduced in his closing submission, was adding back increased rent which the company incurred, apparently, by moving from premises that it had occupied when Mr Lynn was in control to new premises which he said were taken, at least partly, because they were closer to where Mr Greatwood lived. That is the sum of some £26,500 in 2007 and nearly £18,000 in 2008.

72. What Mr Lynn said was that the former premises were rented from Mr Woodhall and there was absolutely no reason to give them up and take on more expensive premises, and he would not have done so and, therefore, this amount ought to be added back. The difficulty with that is that there is no direct evidence as to why the company moved from the premises that Mr Woodhall was providing. What Mr Lynn said about it is, at best, hearsay, and it is subject to the reliability doubts that I have about his evidence in any event. I do not know, for instance, whether Mr Woodhall may have given notice to the company to leave its premises. He might have had an incentive to do that, given that his personal relationship seems to have been with Mr Lynn rather than Mr Andrew or Mr Greatwood. He appears to have been separating himself from PPS at that time in that he is said to have insisted that his mother should have her employment transferred from PPS to a company controlled by Mr Lynn when PPS was sold. It is not impossible to think that he might not have been prepared to continue some favourable arrangement in respect of the rent of premises and, therefore, not impossible that there could be a genuine business reason why those premises could not still have been operated.

73. Furthermore, given that Mr Woodhall was not, apparently, on good terms with Mr Miranda, there may have been reasons deriving from that relationship why PPS should separate itself from Mr Woodhall, quite apart from any personal preference on Mr Andrew's and Mr Greatwood's part. I cannot say safely that the company could, or would, have avoided that increase. It also seems that its sales efforts were moving in a different direction. They may have been reasons to change premises, even if Mr Lynn had remained in control.

74. Next, it was said that there should be an adding back of pension contributions of some £36,750 made in 2007. Mr Swinson assumed that these were probably pension contributions for directors rather than staff. He said that on the basis that they were shown separately in the accounts and not included in the line for salaries and remuneration paid to staff. I accept that that is a possible inference. It may even be the more likely inference but it seems to me that it is not an inference that has any great strength about it, particularly since, if this was a director's remuneration, there is a specific statement in the accounts as of the salaries and other benefits paid to directors which includes only the amount paid for salary of £185,000. If this had been a director's pension, one would have expected it to be included in the total given in that

line. Given the general doubts I have about the presentation of the accounts of these companies, it seems to me that I cannot confidently assume that any entries were made correctly in these accounts. However, equally, it seems to me that it is not clear that the assumption Mr Swinson has made is the correct. That seems to me to be insufficient on its own to make an assumption that this was not an amount which was genuinely paid in respect of a business expense.

75. It was then said that staff recruitment costs of nearly £51,000 in 2007 should be added back on the grounds that Mr Lynn would not have incurred any such costs in recruiting staff. However, again, given that there is no evidence available as to what staff were recruited, for what purpose, on what terms or whether they could have been recruited, if necessary, by some means that would not have involved the incurring of recruitment expenses, it seems to me that it is entirely impossible to say that this was an improperly incurred business expense. Nor can it be said, it seems to me, that, if Mr Lynn were running the business, he would necessarily have been able to do so without incurring that expense. In 2007, for instance, it may be the case that the company was having to devote increased sales effort to generate the level of sales that it wanted in the market. It is a matter of general knowledge that, by 2007, there was beginning to be the start of a downturn in the market which led to the crash, which hit in full at some stage during 2008. I simply do not know whether that is a matter which might have affected this business, requiring it to incur an additional sales effort in order to continue producing the sales that it expected.

76. The same goes for additional staff salary costs of £30,000. Mr Lynn says he would not have incurred them but, so far as the evidence goes, it seems to me that it is impossible to say whether that assertion is one which can be taken properly to represent what the business could, in fact, have done if Mr Lynn had been at the helm. All of those matters, it seems to me, at the end, rely on Mr Lynn's unsupported assertion that he would not have spent those particular amounts. Given that that assertion is made in circumstances where Mr Lynn cannot produce any reliable evidence as to what the shape of the business would have been, what requirements it would have had for staff, what, if anything, it would have been achieving in terms of sales and, therefore, what agents or other staff he might have been required to provide to deal with them, it seems to me that those assertions simply cannot be regarded as safe. All that can be said is that one cannot form any firm conclusion as to what the income or costs of this business would have been in that period.

77. Lastly, there were two items which were provisions in the accounts made in 2008, which is said would not have been required if Mr Lynn had still been running the business. The first was to write off the net book figure for goodwill which had been acquired, apparently, from CCS LLP in 2005. That was £103,000. According to the accounts, that was a write off on disposal. There is no indication that goodwill was, in fact, sold to anybody during that period or at any time. The assumption that this amount would not have had to be written on, it seems to me, is fatally flawed in a number of respects. If the working assumption is, as it must be on the case that is now presented, that the trading of the company came to an end at the end of 2008, there is no evidence whatsoever that the company would have had any prospect of realising any goodwill that it retained in its balance sheet at that stage. Accordingly, even if there was a genuine asset in respect of goodwill, it seems to me that, on the evidence I have and the basis on which these assumptions are being made, it would have had to have been written off at the end of that period.

78. For the reasons that I gave earlier, in my view, it is more likely than not that this supposed asset of goodwill was entirely fictitious from the start. If that is the case, then it would have been necessary, at some point, to recognise that the asset did not exist and to write it off and to deal with those liabilities of the company that were balanced by that asset in some other way. Therefore, I do not accept, even if one were doing this calculation, that one would add back any amount in respect of the goodwill.

79. For similar reasons, I do not accept that it would have been proper to add back the apparent loss on the sale of tangible fixed assets – £101,368 in 2008. The basis on which that is put is that Mr Lynn would not have disposed of those assets. However, no case is put as to what else he would have done with them if trade had ceased at the end of 2008, nor is there any evidence that those assets were worth more than they were apparently sold for, if they were sold at all. Therefore, there is no basis on which I can conclude that this company could have realised £101,368 for those assets if it had continued in business down to the end of 2008.

80. It was accepted that the final line in the table, in respect of dividends declared to Mr Andrew and Mr Greatwood would not have been declared in their absence and, therefore, would have been assumed to go back in the pot if one were doing this calculation.

81. Mr Bacon also submitted – again, with considerable force – that no account had been taken in this calculation for any tax that might have been payable within the company. If salaries were to be paid to Mr Lynn and if profit were to be realised form which dividends would be declared, then there would, at least, be corporation tax and national insurance payable by the company. No doubt, also, of course, all the figures that eventually arrived in Mr Lynn's hands would be subject to tax on one basis or another on him. I do not suggest for the moment that that personal tax should be taken into account in calculating whether he suffered any loss at this stage. I think one can equally well calculate whether he suffered any loss at all by comparing his gross receipts in the actual scenario to the gross receipts he is able to prove in the hypothetical scenario. The net loss, of course, would be the net loss after tax on both bases. However, so far as concerns amounts available to pay to Mr Lynn, one has to take account of any tax impact within the company of the scenario that he proposes. No attempt has been made to calculate what that should be.

82. Mr Darton seemed to be suggesting – I think, rather faintly – that this was a matter that could be ignored on the basis that some means would have been found – unspecified – by which the impact of taxation could be avoided or mitigated. That seems to me to be entirely speculative. If I were disposed to perform the sort of calculation that Mr Darton is inviting me to, it seems to me that I would have to make an allowance for tax in the company's hands and that, given that no evidence has been provided of any possible mitigation of that tax, it would have to be on the maximum basis – that is to say that any profits available for distribution would have to be assessed as being subject to corporation tax.

83. I also express a general doubt, which, again, cannot be taken much further, it seems to me, in view of the lack of evidence, as to whether a calculation could be properly performed of the company's liability to taxation without an investigation into its past affairs. Given that it appears that the company has, in the past, paid amounts which have been wrongly claimed as deductions from its income for the purposes of taxation,

if one were to calculate what might properly now be distributed to Mr Lynn, one would have to, potentially, go back and revisit previous periods and establish whether the company had any undisclosed liabilities for tax by reason, for instance, of having paid personal expenses in the same manner that CCS appears to have done, and claimed them as business expenses. The unavailability of that calculation adds to the difficulty of coming to any firm conclusion about what, in the end, could have been realised from this company.

84. An observation that I made to Mr Darton – it is not a point taken by Mr Bacon – was that there is no apparent provision in these accounts for any additional liabilities or losses that the company might have incurred by virtue of its having closed. It is a common experience, of course, that additional liabilities are triggered or realised or have to be recognised when a company ceases to trade, that it would not have put in its accounts on a going concern basis. Mr Darton said that I could safely assume that all such liabilities were provided for in the accounts to 2008. It is true to say that those accounts appear to show that the company had disposed of all its tangible and intangible assets by the end of 2008 and had, therefore, presumably – although it does not expressly say so – ceased trading. I am bound to say that that does not appear to me to be a safe assumption to make either. It is very curious how these accounts appear to have been prepared up to the end of 2008, given that, as was shown in the evidence, an advertisement was placed in the London Gazette in September of 2008 indicating an intention to call a meeting with creditors and go into creditors' voluntary liquidation. That does not appear to have been proceeded with until May of 2009. Therefore, presumably, for some reason, the directors stopped that process, concluded a set of accounts for that financial year and then started again in 2009.

85. I cannot tell whether the accounts at the end of 2008 were prepared on the footing that any closure liabilities were recognised. Those accounts were not audited. Given the doubts I have about the way in which accounts were prepared for these companies in prior years, it seems to me that it would be optimistic to assume that they were accurately made on the basis of a full closure at the end of 2008. According to those accounts, the company was marginally solvent at that time. If it were true that it had no further liabilities, it would be surprising that it then went into insolvent liquidation in May 2009. I have no documents from the insolvency so it is impossible to say what, if any, un-provided liabilities were alleged at the time of that insolvency. I have to presume that there must have been some since, otherwise, the company would not have been insolvent according to the accounts that I am being asked to rely on. I cannot say, of course, what, if anything, those liabilities might be. However, the fact that there was an insolvent liquidation seems to me to be a further reason to be unable to accept that that position is accurately stated in such accounts as I have.

86. Lastly in relation to the assumption that half of the turnover of Emerging Earth Limited could be attributed to PPS without any additional costs, there is nothing on the evidence before me from which it could, it seems to me, safely be inferred that any of the sales made by Emerging Earth were sales of properties at Punta Perla. They may very well have been, given that Mr Andrew and Mr Greatwood were involved in that business actively, at least up until March, and may have had an incentive to divert any remaining business to a company that was insulated, to some extent, from Mr Lynn. However, there is no hard evidence that they in fact did so. It is possible to envisage that the apparent drying up of business in March 2008 might have been because business was

being held back in order to be diverted into Emerging Earth. However, again, there is no evidence to support that inference.

87. Mr Darton submits that the costs shown in the accounts of PPS for the year 2008 are unaccountably high, given that it only appears to have been trading, or at least invoicing, for the first quarter of that year, effectively. That might indicate a number of things. It may indicate that matters have been improperly included in those accounts which are not, in truth, expenses of the business at all. It might indicate that item must have been included in those accounts which represent the incurring of costs by PPS in respect of business that was going to flow to the benefit of the separate entity, Emerging Earth. However, it might equally indicate that sales efforts were being increased in that year and expenditure was being incurred in an effort to maintain the level of sales at Punta Perla but to no avail for one of any number of reasons. I simply have no evidence upon which I can safely make any such inference.

88. Even if there were evidence on which it could be inferred that part of the turnover could be attributed to PPS, it seems to me to be completely unwarranted to assume that that could have been done without incurring any additional costs. There is a complete absence of information as to what costs were incurred by both of these parties, as a result of which, it seems to me, it is completely impossible to say that there would have been any opportunity for PPS – whoever controlled it – either to earn the amount of turnover that is being projected for it or that it could have done so without incurring any of the costs that are said to have been incurred by it and by Emerging Earth.

89. I have gone into all those matters in relation to calculation in some considerable detail. The totality of the position is that the onus is on the claimant to prove the loss that he says he has suffered by evidence that shows that he has incurred that loss on the balance of probabilities. What he has in fact attempted to do, by means of the calculation that Mr Darton has put forward, is, it seems to me, a somewhat speculative back of the envelope calculation which has been produced, in effect, at the trial itself, not presaged by any evidence that the claimants might have had an opportunity to challenge. It starts from sets of accounts, which, in my view, must be regarded as highly dubious in terms of their own integrity, and then proceeds by alterations made to those accounts that rely fundamentally on Mr Lynn's necessarily self-serving assertions, which are entirely unsupported, as to the continuity of the income he says he would have made and the reduction of the expenses he says it would have made. Not only is that unreliable in terms of his own evidence, it seems to me there are very good reasons, even if it had been given by somebody carrying more weight than Mr Lynn, why it should not have been regarded as reliable.

90. The position, therefore, is that Mr Lynn now accepts that he received $725,000 from the sale that was made. I am not satisfied that he has produced evidence that he would have received more in the only alternative scenario that he now advances. Accordingly, he has not established any loss under that head.

91. There was a second head of loss alleged. Mr Bacon suggested this might have been abandoned. In case it is not, I deal with it now. It is in respect of the fees charged by the defendant firm for the advice that they gave of a little over £1,100. Although this was originally invoiced to Mr Lynn, at the request of his father the fees were re-invoiced to PPS. There is no evidence to suggest that PPS did not pay them or that any amount was recharged in any way to Mr Lynn. His father suggested that it was the intention to

do so but there is absolutely no evidence to show that that intention was followed through. In my view, given the history of operation of these companies, it is highly unlikely that any amount actually paid for the personal benefit of one of the directors, even a former director, would have been reimbursed by him in any way. That head of loss also, therefore, is not, in my judgment, proved.

92. The consequence is that no loss has been established. The claim of negligence must fail. Their claim for breach of contract, technically, succeeds but only in respect of nominal damages of £1.

(Discussions as to costs follow)

93. In my view, the correct starting point in this case is that it is the defendant which is, effectively, the successful party. The claimant has nominally succeeded in recovering £1 in damages for breach of contract but it cannot be said that there would be any realistic justification for commencing an action or pursuing it to this stage to achieve that satisfaction. At all times, this was a claim for a very substantial amount of money which has, effectively, been lost. It is a matter of pure technicality that the claimant has won £1 rather than having its claim dismissed entirely. Therefore, I have no hesitation in saying that the starting point is that one would ordinarily expect the defendants to be awarded their costs of the claim.

94. There are two matters, effectively, which are put in the balance against that. One is that the defendants have changed their case and, in particular, they maintained a number of bases on which a breach of duty was denied until a very late stage in the claim – only being formally abandoned at the start of the trial. There is, on the face of it, no reason why those concessions could not have been made earlier and the fact that they were not, one is bound to infer, I think, means that the defendants were anxious to hang on to any point that might conceivably prove successful rather than to consider and make realistic concessions when they might have done. On the other hand, I do accept that the extent to which the fact those arguments were being maintained could realistically be said to have added to the costs of running the action is relatively limited.

95. The second is that the claimants have, throughout, urged the defendants to go to mediation. I have been shown correspondence going back to a date in 2012 in which that idea was floated. At every stage, there has either been no response to that or there has been a refusal. The defendants' position, as Mr Bacon set out today, is that it regards this claim as having been a try-on. It explored the possibility of making allegations of fraud or discreditable conduct against the claimant which, ultimately, it did not pursue. As I made clear in my judgment, although there were hints of murky background, there was no allegation that the claimant's business was conducted on a fraudulent or unlawful basis, save in the respect that he did not account for tax or prepare the corporate accounts properly. It may be, therefore, that the refusal to go to mediation was maintained, at least to some extent, in the belief or hope that those concerns about the background would mature into something which would have the effect of defeating the claim entirely. If so, that was disappointed.

96. There does not appear to have been any reasoned refusal to go to mediation, at least on any detailed basis, at any point. The defendants simply did not respond or made a fairly bland refusal to all the invitations to mediate. The effect of authority is now, in my view, that the court should regard a refusal or a failure to engage a mediation in those circumstances as unreasonable. It is something which is, in principle, unreasonable no

matter what the strength of a party's case is felt to be. There is an advantage, which is recognised in policy terms by the court, in encouraging the parties to explore the possibility of settlement at a mediation. The sanction for not doing so is something which is in the discretion of the court. It is not, in my view, a matter in which one can automatically say that the sanction should invariably or even presumptively be that a party should be denied the whole of the costs to which it would otherwise be entitled from a particular point in time. That, it seems to me, would go too far; it would, in effect, attribute magical properties to mediation and indicate that no costs would have been incurred if a mediation had been engaged in at the first point at which it was offered. That, I think, would be just as unreasonable and unrealistic as assuming that there is no point in going to mediation at any point until the parties' positions, as they will be presented at trial, have been fully expounded and are available in the evidence. It is a matter which, in my view, ought to be recognised by a sanction of some sort. However, it is a sanction that, I think, ought to be proportionate, and proportionate to the degree to which the court can realistically infer that there was actually an opportunity to save costs.

97. In this case, I am bound to say that nothing I have seen suggests to me that there would have been any realistic hope that the matter would have settled at mediation. Not only was the defendants' stance doggedly maintained to trial – ultimately successfully – but it seems equally clear from the correspondence that the claimant has doggedly maintained his position that he is entitled, on one of any of a number of bases several of which were only abandoned after he had given his oral evidence at trial, to damages which might have exceeded £1million by a very substantial amount. I think, realistically, I must approach this on the footing that, whilst it cannot be said there was no value in going to mediation, I cannot assume that there was a high possibility that there would have been a settlement achieved at any recognisable point in time which would have saved a significant amount of costs in preparation for the trial. Taking all that in the round, it seems to me that a proportionate sanction to recognise both of those factors would be to reduce the costs allowed to the defendant by 40 per cent and order that they be entitled to 60 per cent of their costs.

(End of judgment)

(Discussions as to the order follow)
