Neutral Citation Number: [2021] EWHC 1324 (Ch)

Case No: BL-2019-001408

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

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

Date: 19 May 2021

Before :

ELIZABETH JONES Q.C.
sitting as a Deputy Judge of the High Court

- -

Between :

VINCENT MALONEY	**Claimant**
- and -	
MUNDAYS LLP	**Defendant**

- -
- -

Helen Galley (instructed by **Gordons Solicitors Limited**) for the **Claimant**
Richard Liddell Q.C. (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: 26-29 April 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 19/5/2021 at 10.30am.

Elizabeth Jones Q.C. :

1. On 29 July 2019 the Claimant, whom I will call Mr Maloney, issued proceedings against the Defendant firm of solicitors, which I will call Mundays, seeking damages for negligence and breach of contract in relation to the purchase of a business and property in 2006.

2. Very shortly before trial, Mundays admitted liability in relation to breaches of duty in tort, in terms which I shall record below. The trial therefore proceeded on the issues of causation and loss only. It was common ground that the contract claims were statute barred. As a result of the admission, Mr Harris and Ms Moss of Mundays were not cross examined, but their witness statements were tendered in evidence.

3. Mr Maloney brought his claim as assignee of a company called Maloneys Retail Stores Limited, which I shall call Maloneys. Until 30 November 2018 Mr Maloney was the sole shareholder in Maloneys. The Deed of Assignment from Maloneys to Mr Maloney is also dated 30 November 2018.

The facts

4. From around 1997 until 2006 Mr Maloney was employed by Budgens Stores Limited ("Budgens"). Until 2002, Budgens operated as a retailer and owned and operated a number of stores under the Budgens and 7-11 brand names. In 2000, Mr Maloney was appointed Sales Director for the stores operating under the Budgens name. In 2002, Budgens was acquired by Musgrave Limited ("Musgrave"). Musgrave decided that Budgens would become purely a wholesale business, and to close certain stores and divest themselves of some 230 stores. Some 20 of those stores were sold to large supermarket operators,

and the rest to independent retailers. The first such store was sold in 2003, and the balance from 2004 onwards. The plan was to sell the stores by the end of 2006 and in fact the divestment plan was complete by the end of March 2008. Mr Maloney continued in his role managing the Budgens stores until all the stores were sold. Although Musgrave were now making the decisions, the various relevant Budgens companies continued in existence and were the parties to the contracts the subject matter of this action. I shall therefore refer either to Budgens or Musgrave as appropriate.

5. Companies associated with Mr Maloney purchased a number of the divested stores. First, Maloneys purchased the Budgens store in Ascot in September 2006; then separate companies purchased the Shepperton store in November 2007 and a store in Wentworth in March 2008. Budgens had recommended banks and solicitors for the purchasers of stores to use. Mundays acted for a number of the purchasers. Budgens provided the purchasers with a business plan and set the price for the relevant property. There was then a fairly standard suite of documentation for purchasers, namely a business purchase agreement, an option and pre-emption deed, a retailer agreement, and an occupation charge agreement, with limited scope for negotiation.

6. However in the case of the Ascot store, there was in existence in 2006 a planning permission for the development of part of the car park at the rear of the store ("the Development Land"). Mr Maloney's evidence was that the existence of that planning permission was not taken into account when Budgens set the purchase price for the Ascot store, and that he was not interested in developing the Development Land at that time because the parking spaces were needed for

the supermarket. Because Mr Maloney was Budgens' Sales Director, particular care was taken to ensure that the sale was on arms' length terms. This resulted in a deed of overage also being required in relation to the Development Land.

7. Maloneys and Budgens reached heads of terms by around December 2005 for the purchase of the Ascot store. The Heads of Terms provided for the sale of *"the Business, Goodwill, Property and all Fixtures and Fittings found at the Property and Stock and to transfer the liquor licence and all the employees employed in the Business*". The property was described as the land and buildings at Budgens Store, The Hermitage, High Street, Ascot, Berkshire SL5 7HD. The purchase price (which as explained above had been set by Budgens) was £2,140,000, to be apportioned as to £1,642,700 to the property, £497,299 to the fixtures and fittings and no value to goodwill. The apportionment was also dictated by Budgens. The purchaser was required to enter into a 10 year standard Budgens retailer agreement on the completion date. The Heads of Terms also provided for an option deed, described as follows:

> *"The Purchaser will be required to enter into a standard Option deed on the Completion Date whereby Purchaser to grant Vendor a 20 year option permitting Vendor to purchase the Business, Goodwill, Property and the Fixtures and Fittings if the Purchaser agrees to sell the Business or terminates or breaches the Budgens Retailer Agreement at the following price:*
>
> *(a) in the first to ninth years of the Option Period (provided the Purchaser has complied with the terms of the Budgens Retailer Agreement) at a price determined by the formula in the Option Deed;*
>
> *(b) in the tenth to twentieth years of the Option period, at the open market value."*

8. Finally, the Heads of Terms provided that development of the land at the rear of the store was not permitted without the written permission of Musgrave during the 20 year period, and that if permission was granted, 50% of the net

proceeds of the development would be payable to Musgrave. Mr Maloney subsequently negotiated the period of the overage restrictions to 15 years (or so he thought).

9. Mundays were instructed to act for Maloneys in January 2006 and the letter of engagement was dated 18 January 2006.

10. In January 2006, Barclays, who were to and did lend to Maloneys, obtained a valuation from Jones Lang LaSalle ("the JLL valuation"). Barclays asked for a business valuation and a "bricks and mortar" valuation. JLL valued the business on the basis of a Fair Maintainable Operating Profit ("FMOP") of £380,000 and a multiplier of 6, of which 0.5 was to account for the value of the Budgens franchise. This gave a value of £2.3m. JLL also gave what they described as a valuation on the assumption of vacant possession (i.e. the "bricks and mortar" valuation requested for the property unrestricted by the contracts to be entered into). They considered that the available rental of £210,000 per annum, which they capitalised at 5.5% (but with various assumptions as to voids and tenant's incentive). This gave a value of £3.4m. However, on the basis of JLL's understanding that Budgens would have a first right of refusal to purchase the property at the current purchase price of £2.2m for a period of 10 years, so that the £3.4m vacant possession value would not be realisable for a period of 10 years, they discounted the £3.4m at the same rate of 5.5% over the 10 years, giving a vacant possession valuation of £2m. Thus, the business value was lower than the unrestricted vacant possession value, but the vacant possession value had to be discounted because it could not be realised for 10 years.

11. The Ascot store was registered under title no BK281482. That title number comprised a store with a car park behind and part of the accessway from the car park to the public highway. On 30 January 2006 Mundays sent Mr Maloney a letter enclosing a copy plan, asking Mr Maloney to confirm that as far as he was aware this plan accurately showed the extent of the property which he was purchasing. The plan which it appears Mr Maloney was sent on that date was a copy of the Land Registry plan for title no BK281482 at that time. Mr Maloney gave that confirmation, and his evidence was that he had visited the Ascot store – which indeed he was responsible for as Sales Director – with one of the Budgens divestment team. Thus Mr Maloney's expectation was that Maloneys was purchasing the whole of the property comprised in title no BK281482.

12. Mundays then provided a report on title to Mr Maloney at a meeting between Mr Harris of Mundays and Mr Maloney on 15 June 2006. Contracts were exchanged on 16 June 2006, being a business sale agreement ("the Business Sale Agreement") incorporating the contract for sale of the Ascot store.

13. The transaction was completed on 6 September 2006. On that date Maloneys entered into a number of documents of which the following are relevant:

    i) an option deed containing an option and a right of pre-emption ("the Option Deed");

    ii) an overage deed ("the Overage Deed");

    iii) a retailer agreement ("the Retailer Agreement") which required Maloneys to operate a Budgens store at the Ascot store for at least 10

years and provided for Budgens to provide certain services including the provision of wholesale stock for the store;

iv) a TP1 transfer of part of title no BK281482 ("the TP1").

I shall call this suite of documents the "Budgens Agreements".

14. The TP1 contained a plan ("the Transfer Plan") which showed that instead of transferring the whole of title no BK281482, Budgens retained a small part, which was coloured blue on the Transfer Plan ("the Retained Land"). The Retained Land is situated at the point where the exit lane of the accessway from the rear car park joined Ascot High Street and extends across the whole of the exit lane. The Development Land was shown edged in green. Clause 13 of the TP1 relevantly provided as follows:

"13.1 In this Transfer unless the context otherwise requires:

"Budgens Store" means the Budgens supermarket at The Hermitage, High Street, Ascot, Berkshire, SL5 7HD

.....

13.3 The Property is transferred together with a right of access in common with the Transferor over the Retained Land with or without vehicles to obtain access to or egress from the Budgens Store situated on the Property.

13.4. The parties hereby agree and declare that the Transferor is not entitled to any right or easement over the Retained Land other than those specifically granted by this Transfer and accordingly section 62 of the Law of Property Act 1925 does not apply to this Transfer.

13.5 The Transferee with intent to bind the Property and each and every part of it covenants on behalf of itself and the Transferee's Successors with the Transferor for the benefit of the Retained Land and each and every part of it not to commence any development of the Car Park unless the conditions below have been complied with:

13.5.1 the turnover of the Budgens Store had declined by 35 per cent as evidenced by comparing the business plan of the Budgens Store at the date of

this Transfer and the business plan of the Budgens Store at the date of the proposed development; and

13.5.2 the Transferor or the Transferor' Successors have given their prior consent to the development."

15. The TP1 also provided for a restriction requiring a certificate that the provisions of the Overage Deed had been complied with.

16. Eventually, the property transferred to Maloneys was registered under a new title, while the Retained Land continued to be registered under title no BK281482. I say eventually because there was a great deal of later activity before the TP1 was properly registered, but since nothing turns on this and it is common ground that Mr Maloney and Maloneys knew nothing of this, I say no more about these matters.

17. It is now common ground that Mr Maloney and Maloneys did not know until 2017 that Maloneys had not purchased the whole of the land which was formerly comprised in title no BK281482.

18. It is worth also recording here that only half of the accessway between the main road and the car park at the rear of the supermarket, that half used for the exit, was ever owned by Budgens and included in title no BK281482. The other half, the half used for vehicles to enter, was unregistered land which had been used for many years without objection, and there existed some form of insurance to cover contingencies in relation to the unregistered accessway.

19. Following completion, Mundays submitted to HMRC a form SDLT1 which incorrectly recorded the purchase price of the property as £642,700 rather than £1,642,700. The stamp duty paid at the time was therefore £25,708, rather than the £65,708 due on the basis of the true price.

20. Maloneys then ran the Ascot store for some years. In March 2015 there was an approach from a third party to purchase the Ascot store, but since the 10 year period under the Retailer Agreement had not expired, it was not progressed. By mid 2015, sales at the Ascot, Shepperton and Wentworth stores were all declining. The Shepperton store had a particularly uncertain economic future and Musgrave agreed that Mr Maloney could market it. Discussions took place about an early release of the Shepperton store from the relevant retailer agreement in exchange for the payment of money, and an extension of the retailer agreements for the Ascot and Wentworth stores. The payment was not acceptable to Mr Maloney. However, Musgrave was then acquired by Booker Group PLC ("Booker"). Further discussions took place, leading to a series of heads of terms between Booker and Mr Maloney relating to the three stores. Mundays were instructed to act for the relevant companies in relation to the proposed heads of terms.

21. By December 2016, there were in existence heads of terms for an arrangement whereby on the one hand new retailer agreements would be entered into in respect of the Ascot store, extending the period by 18 months to May 2018, and the Wentworth store, extending the period by 2 years to March 2020, and on the other hand the Wentworth and Ascot stores would be released from all other agreements including the Overage Deed and the Option Deed. Separately, the same heads of terms provided for the sale of the Shepperton store. Drafts of a deed of termination for the Option Deed and the Overage Deed for the Ascot store were received on 23 February 2017. On 1 June 2017 Booker told Mr Maloney that Budgens had retained the Retained Land and that the Shepperton sale could not go ahead until this was sorted out. Mr Maloney's unchallenged

evidence was that by this time he had lost touch with any Musgrave board members and remaining Musgrave employees had left Booker, so that he could not go back to anyone he had known within Musgrave to clarify what had happened in 2006. Mr Maloney's companies were by now under serious financial pressure. Mr Maloney and the Maloneys finance director, Rob Wicks, tried to work out what had happened. On 6 June 2017 Mr Mark Chappell, the property director of Booker, told Mr Maloney and Mr Wicks that there was value in the Retained Land to Booker, and while the Ascot store was a Budgens store, Booker would let Maloneys pass over the Retained Land. Booker sent Mr Maloney a copy of the TP1 on 7 June 2017.

22. On 7 June 2017 Mr Maloney met Mundays. Following that meeting, Mr Partridge of Mundays wrote to Mr Maloney saying that he was not in a position to comment any further about the Retained Land or the 2006 transaction relating to Ascot, and suggesting that Maloneys take separate legal advice.

23. On 9 June 2017 Mr Maloney agreed by telephone with Booker that the Shepperton sale and the extension of the Wentworth retail agreement could proceed, and that Ascot would be left to one side for the time being. Mr Maloney's evidence was that Maloneys continued to trade at Ascot in the spirit of the draft extension agreement. The contracts for the sale of the Shepperton store and the new contractual arrangements for Wentworth (i.e. an extension to the retailer agreement in exchange for terminating the option deed in relation to that store) were exchanged on 20 June 2017. The sale of the Shepperton store completed in October 2017.

24. In December 2017 Mr Maloney received an offer of £5.3m for the shares in Maloneys and £1.5m for the Wentworth store, with a contingency to cover arrangements with Booker up to £1m for purchase of the Retained Land and the early determination of the retailer agreement for the Wentworth store, plus an additional £200,000 if Mundays were liable for the Retained Land so that the cost of purchasing it did not fall to the purchaser. Mr Maloney also received other offers from Sainsbury's and Marks and Spencer, and told Booker in December 2017 that all offers were conditional on the Retained Land being included in the sale.

25. In January 2018 Booker informed Maloneys that they required £1.25m for the Retained Land, and Mr Maloney then instructed Gordons Solicitors Limited to act for him.

26. In May 2018 the incorrect payment to HMRC in respect of stamp duty was discovered, and Maloneys duly reported the mistake to HMRC.

27. Negotiations then continued between Maloneys and Booker. Booker reduced the price for the Retained Land from £1.25m to £800,000. However in the course of that negotiation Booker initially demanded additional consideration for the Retained Land on top of the £800,000, either part of any damages obtained from Mundays, or an increased price if the onward sale of the Ascot Store was for more than £5m. Eventually Booker dropped their price for the Retained Land to a single payment of £800,000 even if a price above £5m was obtained for the Ascot store or damages were obtained from Mundays.

28. Mr Maloney received an offer in March 2018 from one party (not the eventual purchaser) for the purchase of the Ascot store for £4.6m plus £800,000 if the

deal included a release from the overage obligations and an option to acquire the Retained Land. Eventually the Ascot store was sold, not by a property transfer but by the sale of the shares in Maloneys, for the sum of £4.6m to Havenhill Ltd, which went on to lease part of the property to Sainsburys. The Retained Land was transferred by Budgens Property Investments Ltd to Maloneys on 30 November 2018 for a consideration of £800,000. A deed of termination ("the Deed of Termination") was entered into between Booker Retail Partners (GB) Ltd, Budgens Stores Ltd, Maloneys, Mr Maloney and Budgens Property Investments Ltd for the termination of the Retailer Agreement, the Option Deed, the Overage Deed and other agreements in consideration of (1) covenants by Maloneys and Mr Maloney (a) to pay outstanding debts to Booker, including out of a retention from the sale monies from Havenhill Ltd, and (b) to comply with obligations in the released agreements which were expressed to continue following termination; and (2) releases from Maloneys and Mr Maloney and (3) certain warranties.

29. Also on 30 November 2018, Maloneys assigned its claims against Mundays to Mr Maloney.

30. The underpayment of SDLT from 2006 in the sum of £40,000 and interest of £18,440.79 in respect of the late payment were paid to HMRC on 4 January 2019.

The admission of liability

31. On 19 April 2021, a few day before trial, Reynolds Porter Chamberlain on behalf of Mundays wrote to Gordons on behalf of Mr Maloney admitting liability. The admission, made for the purpose of these proceedings only, was

helpfully set out in an agreed list of issues provided by Counsel before closing submissions, namely that in breach of its tortious duty of care:

> *"A. The Defendant failed to advise [Maloneys] prior to its exchange (or completion) of contracts with Budgens that an area of land was to be retained from that included in title BK281482 (the Retained Land) and of the location of the Retained Land; and that Maloneys did not discover the fact that the land had been retained until 2017 ("**the Retained Land Breach**");*
>
> *B. The Defendant submitted the SDLT1 with the purchase price understated by £1,000,000 ("**the SDLT Breach**)."*

32. It was also admitted that in relation to both breaches the tortious claim was not statute barred because Maloneys could avail themselves of section 14A of the Limitation Act 1980.

The Budgens Agreements and the TP1

33. There were both agreements and disputes between the parties about the meaning of the Budgens Agreements and the TP1.

34. It was common ground that:

i) The Business Sale Agreement prevented the development of the Development Land for a period of 20 years, while the Overage Deed prevented such development for a period of 15 years.

ii) The TP1 did not provide a right of way over the Retained Land for the development or use of the Development Land, such that the effect of the TP1 was that the Development Land could never be developed without Budgens' consent.

iii) The TP1 granted a right of way over the Retained Land which could be used for the purpose of a Budgens Supermarket.

iv) The Retailer Agreement could be terminated in the first 10 years only by Budgens, and after 10 years could be terminated by either party on giving 3 months' notice.

v) The term of the Option Deed was 20 years and provided Budgens with both an option to purchase and a right of pre-emption.

vi) In the first 10 years of the Option Deed, whether it was the right of pre-emption or the option which was exercised, the price at which Budgens could purchase was determined by a formula set out in the Option Deed.

35. The disputes were:

i) as to the price at which Budgens could exercise their option or their right of pre-emption in the second 10 years of the term of the Option Deed if the Retailer Agreement had been terminated (and perhaps an issue about whether the right of pre-emption survived the termination of the Retailer Agreement); Maloneys contended that if the Retailer Agreement had been terminated, the price was the open market value for the property with vacant possession value (i.e. without the benefit and burden of the Budgens retailer agreement), whereas Mundays contended that the price was the open market value for the property operated as a Budgens store with the benefit and burden of the Budgens retailer agreement;

ii) as to whether the TP1 granted a right of way over the Retained Land for the purpose of access to the store situated on the property whether or not it was being used as a Budgens supermarket. I shall call the right of way granted by clause 13.2 of the TP1 the "Right of Way".

36. These issues were not identified on the pleadings but they affect the valuation evidence. Accordingly, both parties agreed that I needed to determine these issues.

37. I also heard argument about whether the restrictive covenant contained in the TP1 which provided for yet another different restriction on the development of the Development Land ("the Restrictive Covenant") was enforceable against successors in title to Maloneys. However, since it was agreed by both parties that the Right of Way did not permit access to the Development Land, an additional restriction on development of the Development Land would make no difference to the value of the property. Moreover, by the end of the hearing, the parties and the experts were in agreement that the hope value of the Development Land was not relevant to the issues in these proceedings. Accordingly I do not consider it necessary for me to decide whether the Restrictive Covenant would be binding on a successor in title to Maloneys.

38. I was referred to a judgment of Professor Andrew Burrows Q.C., sitting as a deputy Judge of the High Court, in Federal Republic of Nigeria v JP Morgan Chase Bank [2019] EWHC 347, which set out the well known principles relating to construction of documents at paragraph 32:

> " *I have elsewhere summarised the modern approach in English law to contractual interpretation: see, eg, Greenhouse v Paysafe Financial Services Ltd [2018] EWHC 3296 (Comm) at [11]. The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so*

> *that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain. Important cases of the House of Lords and Supreme Court articulating the modern approach include Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL, especially at 912-913 (per Lord Hoffmann giving the leading speech), Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900, Arnold v Britton [2015] UKSC 36, [2015] AC 1619, and Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173."*

39. The Option Deed relevantly provides as follows:

i) "The Premises" is defined as "*the retail premises situate at and known as The Hermitage, High Street, Ascot, Berkshire, SL5 7HD*" and with a reference to title no BK281482.

ii) "The Business" is defined as "*the retail supermarket business operated to be operated or which has previously been operated by[Maloneys] from the Premises pursuant to the Retailer Agreement (or any retailer agreement entered into between (1) [Budgens] (2) [Maloneys] and (3) the Guarantors in substitution therefor from time to time*".

iii) The "Assets" are defined as the assets (other than the Premises) which are owned by Maloneys and used for the purposes of the Business from time to time.

iv) "Market Value" is defined as "*the open market value of the Business, the Assets and the Premises assuming that the same are sold" in the open market, with vacant possession and at arm's length between a willing buyer and a willing seller*."

v) "Major Interest" is defined as *"the sale, transfer assignment or other disposition of any interest in the Business or Premises by [Maloneys] or*

the sale or other disposition of any share capital of [Maloneys] or the grant of an occupational lease or licence of the whole or any material part or parts of the Premises by [Maloneys]".

vi) The "Option Period" is defined as a period of 20 years from 6 September 2006.

vii) Clause 2.1.1 provides that Maloneys agrees not to sell or otherwise dispose of any or all of the Business, the Assets or the Premises or a Major Interest during the Option Period without first offering to sell the same to Budgens upon the terms of the Option Deed, thus creating the right of pre-emption.

viii) Clause 2.1.2 relevantly provides that if Maloneys terminates the Retailer Agreement during the Option Period, Maloneys grants Budgens a first option to purchase the Business the Assets and the Premises on the terms of the Option Deed ("the Option").

ix) Clause 3 provides for the mechanics of the right of pre-emption. Maloneys is obliged to give notice of an acceptable bona fide offer from a third party to purchase any of the Business, the Premises and the Assets or a Major Interest, and full written details of the price offered by the third party. If Budgens wishes to exercise the right of pre-emption in the second 10 year period of the Option Deed, clause 4.3 provides that the price shall be the price offered by the third party <u>unless</u> the consideration offered by the third party is not in cash, or if Maloneys is proposing to sell only a Major Interest or the Premises or the Assets, in which case the value is the Market Value of the Premises, the Business and the

> Assets. Moreover, if Budgens does not wish to exercise its right of pre-emption, then Maloneys is free to sell to the third party purchaser, but by clause 5.2.2 Budgens is entitled, among other rights, to require the purchaser to enter into a new retailer agreement in such form as is then offered by Budgens to new retailers, and a new option and pre-emption deed in materially the same form as the Option Deed. It should also be pointed out that clause 3.1 prevents Maloneys from even advertising the Business, the Premises, the Assets or a Major Interest or negotiating or entering into discussions with a third party or seeking to enter into a contract in relation to the same without first giving Budgens 5 days' notice.

40. It is fair to say that the Budgens Agreements are difficult to understand, and that they do not hang well together – for example there is a 15 year period for the restrictions on development of the Development Land applied by the Overage Agreement, while there is a 20 year restriction on development of the Development Land in the Business Sale Agreement.

41. Applying the principles set out above, I first consider the price at which Budgens could acquire the property. In my view the clear words of the Option Deed provide that Budgens can acquire the property at the price for the Business, which is defined by reference to the Retailer Agreement, including the Premises and the Assets, and not the price of the Premises without the Retailer Agreement. That is what the definition of Market Value taken together with the definition of Business says. It is only if the offer is for the Business – i.e. for a Budgens supermarket subject to and with the benefit of the Retailer

Agreement – that the price is the price offered by the third party. If the third party offer is just for the Premises, or for the shares in Maloneys, then Budgens can purchase at the price at which the Business, carried on at the Premises with the benefit of the Assets, is valued. As can be seen from the discussion of the JLL valuation above, that value was likely to be lower than the value of the Premises alone.

42. Mrs Galley was not able to offer any compelling argument by reference to any of the matters referred to in Nigeria v JP Morgan as to why the Option Deed permitted Maloneys to require Budgens to acquire the Business, Premises and Assets at the open market price for the Premises without the Business after the end of the Retailer Agreement. She referred to the construction put forward by Mr Liddell being exceptionally unfair. She also submitted that it was absurd for the Market Value to be determined by reference to the store's value as a Budgens business after the Retailer Agreement had been terminated. However, the background to the Option Deed included the significant investment in the Business, the Premises and the Assets by Budgens and the significant financial, trading and commercial assistance provided by Budgens to Maloneys (as specifically referred to in clause 2.1). Both Budgens and Maloneys knew that Budgens was intending to switch to a wholesale role and therefore had a strong interest in retaining the property as a Budgens store. The business plan which was prepared by Budgens included a 25 year forecast. Further, the Option Deed permitted Budgens to require any purchaser from Maloneys to enter into a new Retailer Agreement and a new Option Deed, so that again the store would continue to operate as a Budgens even after a sale to a third party. There were competing interests of Budgens and Maloneys in relation to the price at which

the Business could be purchased by Budgens if it wished to exercise its rights. Moreover, in my view the agreement expressly contemplates that the Retailer Agreement might have been terminated by the time of the exercise of the right of pre-emption or the Option. The definition of the Business specifically caters for that contingency by referring to the business which "*has previously been operated*" from the Premises.

43. Taking all these factors and the words of the agreement together, I therefore find that in fact the right of pre-emption allowed Budgens to purchase the Business, Assets and Premises for the market value of the Business, Assets and Premises in the second 10 year period of the Option Deed if the Retailer Agreement had been terminated.

44. In relation to the Option, clause 6.1 provided that the Option could be exercised by Budgens at any time after the Retailer Agreement had been terminated, provided that it could only be exercised once in the Option Period. Mrs Galley submitted that no period was provided for the exercise of the Option, but that is not correct; the period is expressed to be any time after the Retailer Agreement had ended, provided it was within the Option Period. Mrs Galley also submitted that this would permit Budgens to exercise the Option up to10 years after the Retailer Agreement ended, and that that was far too long and not permissible. She suggested that there should be an implied term that the Option should be exercised within a reasonable time. I was not addressed on the relevant law or on any factors which would permit the implication of such a term and so I decline to find that there was such an implied term. Accordingly I find that the

Option could be exercised at any time within the Option Period after the Retailer Agreement had been terminated.

45. As to the price at which the Option could be exercised, in the second 10 years of the Option Period, the Option Deed provides that the price would be the price agreed between the parties or in default of agreement, the price determined by an expert on the basis that the Business, the Assets and the Premises are sold at Market Value. For the same reasons as set out above, I find that this again permitted Budgens to purchase the Business, the Premises and the Assets at the market value for a Budgens supermarket with the benefit and burden of the Retailer Agreement.

46. In relation to the Right of Way, the relevant provisions are set out in paragraph 14 above. The essential dispute between the parties was whether "*to obtain access to or egress from the Budgens Store situated on the Property"* meant access or egress to the store which happened to be a Budgens supermarket at the time of the TP1, or whether it meant access or egress to the Budgens store only while it was a Budgens store.

47. In my view the Right of Way permitted access and egress to and from the store while it was used as a Budgens store and not otherwise. Mr Liddell submitted that "*Budgens store*" is merely convenient shorthand for "*the store which is where Budgens is at the date of this transfer*". But "*Budgens store*" is defined as "*the Budgens supermarket at The Hermitage, High Street, Ascot*". "*Budgens Store*" is referred to not only in the context of the Right of Way, but also in the context of the restrictive covenant contained in paragraph 13.5, which refers to a 35% decrease in the turnover of the Budgens store. So there is clearly

significance in its designation as a Budgens store; if it were another non-Budgens store, why would Budgens be interested in whether it had a diminished turnover? Mr Liddell submitted that if the Right of Way were only for the purpose of a Budgens supermarket and not another supermarket (or indeed another retailer) it could be more clearly expressed; but equally it could have been more clearly expressed if it was intended that the Right of Way should permit access and egress for any store whether Budgens or not. Mr Liddell also submitted that Budgens knew that the Retailer Agreement would end after 10 years, but given the extensive restrictions which it is Mr Liddell's case, and which I have found, effectively permitted Budgens to restrict the use to a Budgens store in the hands of others even after the end of the Retailer Agreement, not least by using clause 5.2.2 of the Option Deed, I do not think that this submission assists Mr Liddell.

48. At the very least, a purchaser of the property from Maloneys was likely to consider that there was an argument that the Right of Way was only for the purpose of use of the store as a Budgens supermarket. Indeed, Mr Liddell accepted that a properly advised purchaser would be told that it might be argued that the Right of Way was restricted to use as a Budgens supermarket (although he also submitted that the right advice would be that the point was unlikely to arise and in any event did not affect the property for at least the first 10 years while it was being used as a Budgens store).

The first issue: what would have happened but for the Retained Land Breach?

49. The first agreed issue was whether, but for the Retained Land Breach, Maloneys would have (i) completed in any event at the agreed price of £2,140,000, or (ii)

refused to do so unless Budgens agreed to include the Retained Land or to reduce the price.

50. Neither party contended that Maloneys would have withdrawn wholly from the transaction.

51. Mr Liddell submitted that Mr Maloney's expertise was in food retailing and not in property investment or development. He pointed out that Mr Maloney had worked for Budgens since 1997, and was in 2006 their Sales Director, and that Mr Maloney obviously felt confident in the Budgens brand and business because he purchased a number of stores. Accordingly, he said, if Mr Maloney had been informed, prior to exchange (or completion) of contracts with Budgens, that the Retained Land was to be retained out of title BK28142 and of the location of the Retained Land, Mr Maloney would have gone ahead in any event.

52. Mr Maloney's firm evidence under cross examination was that if he had been told about the Retained Land before contract, he would have insisted either on the Retained Land being included, or on a reduction in price. I accept that evidence. In my judgment Mr Maloney was a straightforward and honest witness who did his best to assist the court, and Mr Liddell expressly disavowed any suggestion that Mr Maloney was misleading the court. Mr Maloney's evidence was that he was particularly interested in Ascot because it was a freehold site. He accepted that he was not interested in the Development Land at the time because the store was doing well on turnover, but on the other hand he did negotiate the Overage Deed down to 15 years. He explained that his understanding at the time, based on Mundays' advice in the report on title, was

that if the Retailer Agreement was ended after 10 years, he could not operate as an independent retailer, but would be able to sell to a third party – for example Sainsburys - if Budgens did not want to exercise their rights under the Option Deed. In my judgment, Mr Maloney's firm evidence is also in accordance with the inherent probabilities. Having thought that he was purchasing a straightforward freehold, any properly advised purchaser, no matter how confident in the Budgens brand, who was told of the effect of the TP1 would have been very concerned about the existence of the Retained Land, the fact that it completely blocked any future development of the Development Land, and the fact that it was at least possible that the Right of Way would not permit the realisation of the future bricks and mortar value, even if that future value could not be realised for 20 years. That was the evidence of Mr Palos, who gave expert evidence on behalf of Maloneys. Mr Clarke, who gave evidence on behalf of Mundays, also accepted in cross examination that in principle in such a situation he would have advised that the price be reduced or better still that the Retained Land be included.

53. Accordingly I find that Maloneys would have insisted that the Retained Land be included in the sale to them. Indeed, Mr Liddell accepted that he could not discount the fact that Mr Maloney would have questioned the exclusion if it had been brought to his attention.

54. But would Budgens have included the Retained Land, or reduced the price? No evidence was called from a witness who was a decision maker in 2006 for Budgens, unsurprisingly given the length of time which has elapsed. Nonetheless I find on the balance of probability that Budgens would have

included the Retained Land if Mr Maloney had insisted, but would not have retained the Retained Land and reduced the price. My reasons for so finding are as follows:

i) Budgens had set the price of £2.14m. They benefitted not only from the capital sum, but from substantial anticipated profits on the wholesale business which Maloneys was tied into for at least 10 years. Mr Maloney's evidence was that there would have been a turnover to Budgens of about £40m and profit of £4m over the 10 year period, plus another 6% on deliveries. Budgens' financial interests going forward would be served by having an experienced operator who was paying the price they had set themselves.

ii) According to the witness statement of Mr Harris of Mundays, at this time, Budgens had some 180 stores to sell. Mr Maloney was a known quantity to Budgens, being their Sales Director, and had also previously been a store manager. The negotiations for the sale of Ascot had been going on for at least 5-6 months by the time there was any mention of retaining the Retained Land (which seems to have first arisen in mid-May 2006). It is highly unlikely that Mr Maloney would have agreed to pay a higher price since the price had been set by Budgens on the basis of the business plan and on the assumption that the Retained Land was included.

iii) That Budgens were looking to the profit arising from their wholesale business under the Retailer Agreement, and therefore being realistic about the price to the purchaser, is also suggested by the fact that they

did not include any element of the value for the Development Land in the purchase price. Although Budgens did seek a payment for the Retained land when the matter came to light later, Mr Clarke's evidence in cross examination was that the situation would be different as between the pre-sale situation in 2006, when the matter was up for negotiation, and the post-sale situation, when Budgens had the benefit of a ransom strip.

iv) It is unclear why the Retained Land was retained, but on the face of the TP1 it was to anchor the restrictions relating to the Development Land which were contained in the TP1. It was common ground that the Overage Deed could have been successfully protected by a restriction, and so there would have been no disincentive to including the Retained Land in the sale. There is some small support for the proposition that the purpose of the Retained Land was to support the Overage Deed in that Mr Maloney was told in 2018 by Mark Chappell of Booker that while Mr Chappell had not been at Musgrave at the time his understanding was that the Retained Land had been retained to enforce the Overage Deed.

v) On the other hand there was no obvious commercial reason for Budgens to retain the Retained Land at that time and accept a lower price.

55. Accordingly I find that but for the Retained Land Breach, Maloneys would have insisted on the Retained Land being included and the Retained Land would have been included in the transfer to Maloneys.

Issue 2: the basis on which loss should be assessed.

56. The next issue is the basis on which any loss should be assessed.

57. The agreed list of issues read as follows:

> *"1(b)(i) What loss, if any, has been caused to Maloneys and what loss, if any is [Maloneys] entitled to recover; and should it be assessed:*
>
> *(i) as the difference in value, if any, between the price paid by Maloneys for the Business Property and Assets (£2,140,000) and the value of the same without the Retained Land as at 2006; or*
>
> *(ii) [Claimant' proposed wording]: as the cost to [Maloneys] of putting itself in the position it would have been in had the Retained land been transferred to it][Defendant's proposed wording]: as the cost incurred to acquire the Retained land in 2018".*
>
> A footnote stated: *"NOTE: for the avoidance of doubt, the Defendants' position is that it is not open to the Claimant to contend that the correct measure of any loss is anything other than its pleaded position at Issue 1(b)(i) above."*

58. Mrs Galley referred me to County Personnel v Pulver [1987] 1 W.L.R. 916. In that case, the plaintiffs had entered into a lease in 1979 at a rack rent for premises which they intended to use for their business. The rent review clause was subject to an uncertainty about which the claimants were not advised by the defendant solicitors. In 1983 the plaintiffs attempted to sell the underlease and the goodwill of the business and received an offer for £17,000 but the sale fell through partly because of the uncertainty in the rent review clause. In 1984 the rent review provisions were exercised, leading to the rent being set at £9,000 odd when the rental value of the premises was some £2,600. The plaintiffs eventually surrendered the underlease but had to pay £16,000 plus a sum representing the increased rent from the date of the rent review. The plaintiffs claimed the sums paid on surrendering the underlease and the £17,000 lost on the prospective sale. The judge at first instance found that there was no negligence by the solicitor and dismissed the claim.

59. At page 925 of the report Bingham LJ, with whom Stephen Brown LJ agreed, said the following:

"*The principles to be applied in assessing damages in this case are, in my judgment, these:*

(1) The overriding rule was stated by Lord Blackburn in Livingstone v. Rawyards Coal Co. (1880) 5 App.Cas. 25, 39, and has been repeated on countless occasions since: the measure of damages is "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." As Megaw L.J. added in Dodd Properties (Kent) Ltd. v. Canterbury City Council [1980] 1 W.L.R. 433, 451: "In any case of doubt, it is desirable that the judge, having decided provisionally as to the amount of damages, should, before finally deciding, consider whether the amount conforms with the requirement of Lord Blackburn's fundamental principle. If it appears not to conform, the judge should examine the question again to see whether the particular case falls within one of the exceptions of which Lord Blackburn gave examples, or whether he is obliged by some binding authority to arrive at a result which is inconsistent with the fundamental principle."

(2) On the authorities as they stand the diminution in value rule appears almost always, if not always, to be appropriate where property is acquired following negligent advice by surveyors. Such cases as Philips v. Ward [1956] 1 W.L.R. 471; Pilkington v. Wood [1953] Ch. 770; Ford v. White & Co. [1964] 1 W.L.R. 885 and Perry v. Sidney Phillips & Son [1982] 1 W.L.R. 1297, lay down that rule and illustrate its application in cases involving both surveyors and solicitors.

(3) That is not, however, an invariable approach, at least in claims against solicitors, and should not be mechanistically applied in circumstances where it may appear inappropriate. In Simple Simon Catering Ltd. v. Binstock Miller & Co. (1973) 228 E.G. 527 the Court of Appeal favoured a more general assessment, taking account of the "general expectation of loss." In other cases the cost of repair or reinstatement may provide the appropriate measure: the Dodd Properties case [1980] 1 W.L.R. 433, 456, per Donaldson L.J. In other cases the measure of damage may properly include the cost of making good the error of a negligent adviser: examples are found in Braid v. W. L. Highway & Sons (1964) 191 E.G. 433, and G. + K. Ladenbau (U.K.) Ltd. v. Crawley de Reya [1978] 1 W.L.R. 266.

(4) While the general rule undoubtedly is that damages for tort or breach of contract are assessed as at the date of the breach (see, for example, Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443, 468, per Lord Wilberforce), this rule also should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule. The Dodd Properties case [1980] 1 W.L.R. 433, both affirms this principle and illustrates its application.

(5) On the facts of the present case the diminution in value rule would involve a somewhat speculative and unreal valuation exercise intended to reflect the substantial negative value of this underlease. It would also seem likely to lead to a total claim well above the figure the plaintiffs claim. By contrast, there is firm evidence that £18,761 is what it actually cost the plaintiffs, as a result of an arm's length negotiation after expiry of the first five years of the underlease, to extricate themselves from the consequences of the negligent advice they had received. Unless (which seems unlikely) it can be shown that payment of this sum did not represent a reasonable attempt by the plaintiffs to mitigate the loss they had suffered, this figure would represent a fair assessment of one head of the loss.

(6) Even after an appropriate measure has been found to reflect damage recoverable under the first limb of the rule in Hadley v. Baxendale (1854) 9 Exch. 341, there will be cases in which a plaintiff will not be adequately compensated unless he receives damages to reflect his loss under the second limb also. In claiming £17,000 for loss of its prospective sale of the lease and the goodwill of the business the plaintiffs advance the present as such a case. It must, however, be accepted on the findings of the deputy judge that if they had not been negligently advised the plaintiffs would not have entered into this underlease at all. This being so, damage cannot be assessed with reference to a specific gain which the plaintiffs could only have made if they had entered into this underlease, unless it be proper on the facts to conclude that properly advised, the plaintiffs would probably have been able to negotiate the grant of this underlease but without the offending clause. Even then the offer of £17,000 would call for closer scrutiny.

(7) It may alternatively be proper to conclude when the facts are investigated that even if the plaintiffs, properly advised, would not have taken an underlease of 109, Queen Street, they would nonetheless have taken a lease of other premises from which to conduct their employment agency business. On their initial introduction to Mr. Cook, Mrs. Feldman and Mrs. Balfe were shown other premises in Maidenhead and it may be that they would have accepted the other premises had the Queen Street transaction fallen through. Had they done so and had the plaintiffs conducted their business from the other premises, it may be correct to infer that goodwill would have been established and (perhaps) a saleable lease obtained. But it would be proper to approach this assessment in a cautious and conservative manner: the premises chosen were clearly thought to be the more promising for purposes of the business it was proposed to conduct; it does not follow that the business could have been conducted as successfully from other premises; the value of the plaintiff company's potential goodwill would have to be looked at in the light of its accounts; there might be no prospect of obtaining a significant premium on sale of a lease at open market rent; and the speculative nature of the assessment should be borne in mind.

(8) Any damages awarded would no doubt attract an award of interest in the usual way."

60. Both Mrs Galley and Mr Liddell referred me to the judgment of Sir Nicholas Browne Wilkinson V-C at page 927 of the report:

"As to measure of damages, in my judgment the diminution in value rule is wholly inappropriate to the quantification of damages in this case. The diminution in value rule is concerned with a case where the client has purchased for a capital sum a property having a capital value. Such client thinks that it has certain features which render it more valuable. Due to the shortcomings of his professional adviser he is not aware of the fact that it lacked; these features. The measure of damage is the difference, put broadly, between its actual value and the value it would have had had it possessed the features which he thought it had. The essence of such a rule is to compare two actual values. In the present case the plaintiffs were buying an asset which, as they thought, could have no capital value; they were buying an underlease at a rack market rent which would have no capital value. As a result of the negligence by the solicitors the plaintiffs have exposed themselves to a long-standing liability requiring them to pay substantial sums out of pocket. To apply any test of capital diminution in such circumstances would be wholly artificial. The loss suffered is the liability to pay a sum over a period of time. The plaintiffs managed to extricate themselves from such liability by the down payment of a capital sum. In my judgment, the capital sum they had to pay is the true measure of damage under that head. I agree with Bingham L.J. in saying that the price paid to the landlord to accept a surrender is the right measure of damage under that head."

61. Mrs Galley and Mr Liddell both also referred me to a number of paragraphs from Jackson and Powell on Professional Liability, 8th edition. Paragraph 11-285 reads as follows:

"Where the purchaser's solicitor errs in his advice he gives or in the investigations which he makes on the client's behalf, the property purchased may prove to be less valuable than was assumed at the time of purchase. The normal measure of damages in such circumstances, as in the cases on surveyors' negligence, is the amount by which the sum paid by the client exceeds the true value of the property at the date of purchase. For instance, in Wapshott v Davies Donovan & Co the Court of Appeal upheld an assessment of damages in relation to defective leases as the difference in value at purchase in 1986, and not when defects first became apparent in March 1988 when the plaintiffs tried to sell the premises. In the majority of cases, the courts are ready to accept that the purchase price represents the value of the property in the condition described by the solicitor. Where, however, the purchase price corresponds with the value of the property in its actual condition, then the purchaser suffers no loss and will be entitled to no more than nominal damages……"

62. Paragraph 11-286 is headed "Exceptions to the rule, general statements" and reads as follows:

"*The principle is not an invariable one. In County Personnel (Employment Agency) Ltd v Alan R Pulver & Co1268 Bingham LJ stated: "On the authorities as they stand the diminution in value rule appears almost always, if not always,*

to be appropriate where property is acquired following negligent advice by surveyors … That is not, however, an invariable approach, at least in claims against solicitors, and should not be mechanistically applied in circumstances where it may appear inappropriate." Two further Court of Appeal cases discuss the general approach to be adopted. In Reeves v Thrings & Long the plaintiff purchased a hotel where access to the hotel car park was by licence only, and he spent some money rectifying this when the problem came to light four years later. The defendant solicitors were not found to be liable. Sir Thomas Bingham MR, with whom Simon Brown LJ agreed, considered, obiter, three approaches on damages, if it had been established that the plaintiff would not have entered into the transaction. First, damages might be the plaintiff's entire outlay on the purchase and refurbishment of the hotel, which the judge considered would probably have overcompensated the plaintiff, because whatever he had invested in might have led to loss in the recession at that time. Secondly, it may have been preferable to apply the difference in value test at the date when the problem came to light rather than at the date of breach, although there might be additional claims too. Thirdly, the loss may have been calculated as the costs of rectifying the defect when the problem came to light. The Master of the Rolls concluded that it was undesirable to rule on the proper approach to damages in principle, because assessment of damages is ultimately a factual exercise. He stated that this "is an area in which legal rules may have to bow to the particular facts of the case". In Oates v Anthony Pitman & Co, the Court of Appeal suggested that there were at least three possible approaches to the assessment of damages. First, there was the difference in value rule, which was applied by considering evidence of the value of comparable properties. Secondly, where the property was unusual, or was being purchased for a particular purpose to the knowledge of the solicitor, or there had been a substantial interval before the defect came to light, the estimated cost of correcting the defect might be the most reliable guide to the difference in value. There may be no satisfactory evidence to decide the market value. Thirdly, where the plaintiff has extracted himself from a transaction he would not have entered but for the negligence of the solicitor, damages should be assessed on the basis of the cost of extraction".

63. I was not taken to Reeves v Thrings & Long [1996] PNLR 265, or Oates v Anthony Pitman & Co [1998] PNLR 683 during the hearing, but I considered them following the hearing. I shall not burden this judgment further with citation from those two cases, which are accurately described in the extract from *Jackson & Powell*, supra.

64. Mr Liddell's submission on behalf of the Defendant was that the immediate reaction of a non-lawyer if there was a breach was that if Maloneys thought it had the Retained Land but didn't, then there must be a claim for damages; but

that was not so, because the only available measure of damages on the pleadings was the difference in value between what was actually purchased, subject to all the restrictions and benefits provided by the Budgens Agreements, with and without the Retained Land, assessed as at 2006, and that the expert evidence that I should accept was that there was no such difference. Mr Liddell submitted that Maloneys had run a case that the measure of loss was the difference in value between the price paid by Maloneys and the value of what they had purchased without the Retained Land; that they had called expert evidence directed at the difference in value in 2006, and that it was not open to the Claimant to run what he called an alternative case that the true measure of loss was the "cost of cure", or a claim for loss of profit under the second limb of Hadley v Baxendale (1854) 9 Ex. 341, namely the £800,000 paid in 2018. (Mr Liddell also did not accept that the £800,000 related only to the Retained Land and I will return to this below). He pointed to the skeleton argument for the Claimant, exchanged a few days before trial (and after the last minute admission on liability), which says at paragraph 37 "*MR paid £800,000 for the ransom strip having negotiated the price down from £1.2m. That is one measure of damage"* and then continues at paragraph 38 *"if the correct measure of damage is the difference in value then it is the difference between the price paid for the business assets and property including the ransom strip and the value of what was in fact transferred….each party has instructed experts to give their opinion evidence in that regard…".* He pointed out that the Particulars of Claim allege at paragraph 34(a) that the loss and damage was the difference between the price paid by Maloneys for the Business, Property and Assets and the value of the same without the Retained Land, and that the expert evidence, which had taken up a significant part of this

trial, was all directed at the difference in market value in 2006. Accordingly, he submitted, the only case open to Mr Maloney was the difference in value assessed in 2006.

65. However, it is necessary to look at the whole of the pleadings, and indeed what was submitted for Mr Maloney. Having pleaded that the loss and damage suffered by Maloneys was the difference in value, paragraph 34(a) of the Particulars of Claim continues "*Maloneys' case is that the best evidence of the difference in value is the sum of £800,000 they have been required to pay in order to acquire*" the Retained Land. Particulars of paragraph 34(a) are then given as follows:

(A) It proved impossible to sell the business including the Property without acquiring the Retained Land.

(B) in 2018 [Budgens] agreed to transfer the [Retained Land] only on payment of £800,000. Maloneys tried to negotiate a lower price but were unsuccessful and so purchased the [Retained Land] land on 30 November 2018 for £800,000 and were required to pay SDLT of £37,500.

(C) a sale of the shares in Maloneys was completed on 30 November 2018 following acquisition of the [Retained Land] resulting in the net sum payable to the shareholders being reduced by £800,000 from what they would have received had the Purchase included the [Retained Land].

66. The Defence then pleaded at paragraph 30 to paragraph 34(a) and the particulars thereof as follows:

(d) Further and in any event the measure of any loss suffered by Maloneys is the difference (if any) between the purchase price of £1,642,700 (or the actual market value of the Property if lower) and the market value of the land transferred;

(e) It is admitted that Maloneys paid £800,000 to purchase the Retained Land on 30 November 2018 but denied that that sum is any evidence of [Maloneys]' loss. The foregoing sub-paragraph is repeated. Further and in any event:

(i) [Maloneys] paid £800,000 for the Retained Land in circumstances where [Budgens] was giving up its rights of overage and 50% of any profit from developing the car park at the rear of the Premises;

(ii) the sum demanded by [Budgens] for the Retained Land will have reflected the fact that the purchaser of the Ascot Store from [Maloneys] was going to turn it into a Sainsbury's store;

(iii) the Overage Deed – which Maloneys willingly agreed to – applies until 6 September 2021 and would by itself have depressed the market value of the Premises and/or the Business compared to the market value without the Overage Deed;

(iv) Given the value to Maloneys in removing the Overage Deed, the apportionment of the whole of the sum of £800,000 to the purchase of the Retained Land and nothing to the release of the Overage Deed is artificial;

(v) It is not admitted that Maloneys attempted to negotiate a lower price for the Retained Land. In any event, Maloneys weakened its bargaining position in relation to the Retained Land by proceeding with the sale of the Shepperton store separately.

(f) Further and in any event it is not admitted that it was impossible to sell the Ascot Store without acquiring the Retained Land. The Claimant has not provided full disclosure of his dealings with potential purchasers of the Ascot Store between 2016 and 2018.

(g) It is denied that the price paid by Maloneys for the Business and the Assets is relevant to the assessment of any loss. The amount paid by Maloneys for the Business and the Assets was a commercial decision in relation to which it did not rely on any advice from Mundays and any overpayment in relation to the same is outside the scope of the duties owed by Maloneys.

(h) It is admitted/averred that the Claimant sold the shares in Maloneys for £5.4m less £800,000 (being the cost of the Retained Land) on 30 November 2018. That fact is of no relevance to these proceedings given that the Claimant claims only as assignee of Maloneys' cause of action. Further and in any event, sub-paragraph (e) above is repeated."

67. Mundays also sought further information from Mr Maloney in relation to paragraph 34 of the Particulars of Claim, asking in particular about the negotiations for the purchase of the Retained Land, how much of the £800,000 was ascribed to the release of the Overage Deed, and all attempts by Maloneys to purchase the Retained Land for less than £800,000.

68. It seems to me that the case that the difference in value is best evidenced by the £800,000 paid in 2018 is fairly pleaded by Maloneys, and was fully pleaded to by Mundays, and that it is open to Mr Maloney to run that case. Of course, since Mundays had taken issue with the pleaded case, it was entirely sensible to call additional evidence in case the court determined that the loss had to be determined in 2006 rather than 2018, the date of purchase being the usual date at which damages are assessed. The order for expert evidence does not assist, being simply a permission to call expert evidence in the field of commercial/retail property to address issues relating to damages for breach of duty without specifying a date.

69. Mr Liddell suggested that Mundays were disadvantaged because had they appreciated that Mr Maloney was running a case that £800,000 was the difference in value Mundays might have wanted to call evidence from Booker. I cannot accept that Mundays were disadvantaged. The case being run was apparent on the pleadings as set out above, and even the expert evidence for Mr Maloney was suggesting a difference in value in 2006 of some £600,000, which with interest is likely to at least reach the same financial outcome as an award of £800,000 in 2018. Although Mr Liddell pointed to passages in Mrs Galley's skeleton argument, that cannot possibly have affected a decision to call a witness from Booker. Moreover, Mr Liddell cross examined Mr Maloney on all the matters set out in paragraph 30 of the Defence, going to whether the £800,000 was evidence of difference in value.

70. Eventually Mr Liddell accepted in closing submissions that it was open to Mr Maloney to run the case pleaded. On that basis however he made submissions

about whether the £800,000 was indeed the best evidence of value, to which I shall return below.

71. I shall turn therefore to consider the loss suffered by Maloneys on the basis that it is open to Mr Maloney to seek to establish that the best evidence of the difference in value between the value of the assets he purchased in 2006 with and without the Retained Land is the £800,000 paid by Maloneys in 2018.

Issue 3: what damages, if any, should be awarded as a result of the Retained Land Breach

72. Before considering the parties' submissions, it is first necessary to consider the expert evidence.

73. The expert evidence was, as explained above, directed at the difference in value in 2006. The experts, as is so often the case, seemed somewhat at cross purposes in their reports, and made different assumptions. Mr Palos produced one report, and Mr Clarke produced a report and a supplemental report. There was also a joint statement setting out areas of agreement and disagreement. Both Mr Palos and Mr Clarke have substantial experience in the relevant fields, although Mrs Galley submitted that Mr Palos had the greater experience both in valuing businesses and in giving expert evidence. Mr Clarke accepted that valuing businesses has not been a major proportion of his work over the last few years, but said that he had done some valuing of businesses at the relevant period and throughout his career and knew what would concern people.

74. Mr Palos assumed that the Retained Land taken together with the Right of Way and the Restrictive Covenants prevented the development of the Development

Land in perpetuity, and that there was at least an argument as to whether the Right of Way could be used for a supermarket other than Budgens, or indeed any other purpose. He pointed out that Budgens indeed argued in 2017-18 that the Right of Way was restricted. He took the view that as a result of the retention of the Retained Land, the bar to development of the Development Land and the perception of prospective purchasers as to the risk relating to the extent of the Right of Way, there was no fallback position for a purchaser, and accordingly a purchaser was tied into a Budgens franchise and could only realise his asset by a sale as a Budgens supermarket or by acquiring the Retained Land at a price.

75. Mr Palos then approached the question of the difference in value in three different ways in his report:

i) first at paragraphs 135-149, he considered the difference in value on the basis of the price that Budgens was likely to require for the Retained Land, based on the approach in Stokes v Cambridge (1962) 13 P&CR 77. This takes the price of a ransom strip as a portion of the profit which the purchaser of the strip can realise. Mr Palos took the profit to be the difference between the future realisable value at the £3.4m valued by JLL and the purchase price of the property at the £1,642,700 which was the apportioned price of the property; on this basis he took the ransom price to be 1/3 of the profit or £585,767. Mr Liddell suggested in cross examination that a more appropriate measure of diminution in value on this basis would be a percentage of the difference between the £3.4m and the £2.14m; applying the same percentage Mr Liddell suggested in cross examination that this would be of the order of £400,000, though in

closing submissions Mr Liddell submitted that the ransom price on this basis would be more like £420,000, and I agree that that is the more accurate calculation. Mr Palos said that was a matter for the court.

ii) next at paragraphs 150 to 157 he considered the difference in value on a property investment value basis (the same as JLL's vacant possession valuation), considering the rental available on the basis of the assumptions set out in paragraph 74 above, but assuming that the effect of the Budgens Agreements was that the property investment value could be realised in 10 years from 2006, rather than the 20 years which I have found is the effect of the Option Deed. He considered a number of different potential rent reductions and appropriate yields, and considered that £622,000 best represented the difference in value on that basis.

iii) next at paragraphs 163 to 183 Mr Palos considered the difference in value on the basis of the value as a business, tied to Budgens. He considered the JLL business valuation of £2.3m which was based on an FMOP of £380,000 and adjusted it for the risks, giving a value of £1.71m, which he said was still a substantial amount to pay for a building and business with significant problems. Mr Palos calculated that this was £590,000 less than the JLL valuation, but Mr Liddell pointed out in cross examination that the price paid was £2.14m, not the £2.3m at which JLL valued the business, so that the real difference on this basis was £430,000. Since he felt that £1.71m was too high, alternatively, Mr Palos took his preferred starting FMOP of £305,000, which was (roughly) the actual EBITDA for the first year, and considered what he

would have valued the business at on the basis of that FMOP and the inclusion of the Retained Land. His evidence was that he would have used a 7 x multiplier to value the freehold business in 2006 with the Retained Land included, and a 5 x multiplier given the retention of the Retained Land, together with the Right of Way. This 5x multiplier gave a business valuation of £1.525m. On this basis Mr Palos considered that the difference in value was £617,000. This was Mr Palos' preferred measure of the difference in value, because, as he explained in paragraph 187, it is derived from a valuation calculation which most accurately reflects what he believed the advice in the market would have been at the time, and reflected an acceptable return to a bidder for the issues they faced without being so cheap that new participants would enter the market pushing the price up. In the joint statement, the experts agreed at paragraph 3.1, on the assumption the Retained Land was included, that 6 x the projected FMOP of £380,000 or 7 x the actual EBITDA was an appropriate basis of valuation, both of which (they say) accord with the actual purchase price after rounding of figures.

iv) In the joint statement, Mr Palos also considered a slightly different approach, which was to take the available profit realisable after the end of the period of the restrictions contained in the Budgens Agreements; this he took as the difference between the £2.14m paid and the £3.4m value of the underlying asset, and discounting this at 5.5% over either 10 or 20 years. This gave a figure of £737,500 for a discounted period of 10 years and £432,000 for a discounted period of 20 years. Accordingly, Mr Palos' final conclusion in the joint statement was that

> in his opinion the diminution in value in 2006 arising from the exclusion of the Retained Land if the restrictions contained in the Budgens Agreements prevented a sale at market price for 10 years was in the range of £585,000 to £622,000, with a preferred figure of £617,000, and was £432,000 if the restrictions lasted for 20 years.

76. Mr Clarke took a different approach in his report. He assumed that the Right of Way was unrestricted. He considered that the appropriate multiplier for a food business in 2006 would have been in the range of 4-7. He considered that the JLL valuation based on a FMOP of £380,000 and a multiplier of 6 was appropriate on the basis of JLL's assumptions, but also considered that in fact the restrictions in the Budgens Agreements were more restrictive than assumed by JLL, so that the actual purchase price of £2.14m was fair and reasonable given the extensive tie ins to Budgens, the control that Budgens had over the business and the property and the pre-emption rights. He pointed out that a key effect of the Budgens Agreements was that they enabled the property to be acquired by Maloneys at a price that was considerably less than the market value of the property in isolation and free from those considerations. Mr Clarke also considered that the JLL valuation of £3.4m for the property with vacant possession and free from the Budgens Agreements and excluding hope value for the development land was correct. He continues in paragraph 5.03.05 of his report *"Therefore this figure of £3.4m is unaffected by the existence of the [Retained Land]"*. This is because Mr Clarke was assuming that the only future use impeded by the Retained Land coupled with the Right of Way was the development of the Development Land.

77. Mr Clarke then went on in his report to consider the effect of hope value arising from the potential for residential development on the Development Land. Mr Clarke considered that in June 2006 the vacant possession value of the property unfettered by the Budgens Agreements was, as a result of that hope value, £3.88m if the Retained Land were included and £3.5m if the Retained Land were not included. This gives an uplift in value for the hope value of £480,000 over the £3.4m for the vacant possession value of the property if it included the Retained Land. He considered the value of the Retained Land as a ransom strip and concluded that it was not a perfect ransom strip in relation to the Development Land because it might be possible to purchase a small plot of land, similar in size to the Retained Land, on either side of the existing driveway and then to re-route the access around the Retained Land. Mr Clarke said that while it was not possible for him to evaluate the likelihood of a successful solution to the issues caused by the Retained Land, the possibility of such solution would tend to reduce the effect of those issues and strengthen the position of the purchaser in any future negotiation with Budgens. He also suggested that a ransom strip in compulsory purchase is usually valued between 33% and 50% of the uplift, but because the Retained Land was far from a perfect ransom strip, he would suggest it was worth no more than 20% of the uplift in value, or £96,000, which Mr Clarke rounded up to £100,000. However, he concluded that the effect of the Budgens Agreements was such that that they completely excluded any uplift for the development potential of the Development Land. Accordingly, he concluded that there was no difference in value whether the Retained Land was included or not.

78. It will be seen that Mr Clarke and Mr Palos approached the task of valuation on completely different bases, primarily because Mr Clarke was not considering the possibility that the Right of Way was limited to access and egress for a Budgens store only, but also because Mr Palos did not consider that the ability to develop the Development Land had a significant effect on value in 2006.

79. Mr Clarke then provided a supplemental report on the basis of an assumption that the Right of Way was limited to access and egress from the store while it was a Budgens store only. Mr Clarke's opinion as set out in the supplemental report was that:

i) a purchaser of the business in 2006 subject to the Budgens Agreements would be someone who wanted to own and run a supermarket business and trade it for many years, and a purchaser who was interested in the long-term property value would not be interested in the property because of the effect of the Budgens Agreements. Accordingly, he thought it more likely than not that a purchaser of the business would not have made any adjustment to their bid to reflect the relatively minor inconvenience that would emerge if the right of way over the Retained Land was lost in the future, at a time when the purchaser wished to contemplate closing the business and selling the property, though he accepted in cross examination that even a potential difficulty over the right of way would be a material fact for a valuation, and could potentially have an effect on a purchaser. Mr Clarke went on in his report to say that standing back, he is mindful that a hypothetical purchaser offered two identical Budgens businesses, one with and one without the

Retained Land together with the restricted right of way, would naturally choose the one without the potential loss of the right of way and that there might be a modest impairment of value.

ii) Mr Clarke then considered the nature of the impairment, and opined that it would be possible for vehicles to wait to enter and exit the car park at the rear, over the unregistered land; that lorries up to a certain weight could enter the roadway without using the Retained Land, but larger lorries would be able to reverse in, which he accepted would involve momentarily closing both lanes of the main road (Ascot High Street) upon which the property was situate. He concluded that the inability to use the Retained Land, even if the Right of Way extended only to a Budgens store, was no more than a minor inconvenience to staff, customers and delivery drivers, and that the difference in value would be very modest, no more than 5% of the bricks and mortar valuation of £3.4m, which then had to be discounted at a rate of 14.29% per annum to give a net present value as at 2006 of £11,750 if the Option Agreement prevented a sale at the bricks and mortar value for 20 years, or £44,750 if the relevant period was 10 years.

80. Both experts agreed that the property market (but not the business market) was buoyant in 2006.

81. I now return to Mr Liddell's arguments as to why I should find that there was no loss.

82. First, he says that the appropriate date for the assessment of the diminution in value is 2006. He says that the date of purchase is the usual rule, and that Pulver

does not assist Mr Maloney because the facts there were very different. He points in particular to the judgment of Browne-Wilkinson L.J. However, while I agree that the facts in Pulver were very different, it is for the statement of principle that it is valuable, and each of Pulver, Reeves v Thrings & Long and Oates v Anthony Pitman & Co make it clear that assessment of damages is to be approached on the basis of the particular facts of each case, and that in some cases the appropriate date of assessment may be a later date than the date of purchase of the property. Here, Maloneys did not have the opportunity to rectify the situation in 2006. Had the facts been that Maloneys knew of the problem in 2006 and decided not to deal with it until they wished to sell in 2017, I would have had considerable sympathy with the proposition that the diminution in value should be assessed in 2006. But in fact, as is now accepted, Maloneys did not know about the defect until 2017. In this case, it seems to me that the facts require that the diminution in value should be assessed at the time when Maloneys were able to and needed to rectify the situation. This is a case in which the significant period of time which elapsed, and the change of circumstances in the meantime, requires that the diminution in value is assessed at a different date. To award damages assessed in 2006 would be an artificial exercise and would not in my view satisfy the basic rule referred to in Pulver. It is not suggested that there is any difference in value as between 2017 when the problem was discovered and 2018 when the Retained Land was purchased from Budgens.

83. Second, he says that the claim for the £800,000 is in reality a claim for a Hadley v Baxendale type 2 claim for loss of profits. I do not consider that the £800,000 is a profit of the sort which was sought by the claimant in Pulver as referred to

in sub-paragraph (6) set out in paragraph 59 above. That was a sum effectively for goodwill of the business which was run at the premises. Here, the sum is put forward as the best evidence of the diminution in the value of the property, which is agreed to be the correct measure of damages.

84. Third, he says that £800,000 is not the best evidence of the diminution in value. He says that:

i) the £800,000 was not simply for the Retained Land but was also for the release of the Overage Deed and the Option Deed;

ii) I should approach with caution a case that the best evidence of diminution in value is £800,000 when the experts say that there is no, or at least a lesser, diminution in value;

iii) a purchaser would have been comforted by the existence of certain rights which appear on the title of the property and there was no reference by Budgens to the Right of Way in the negotiations in 2017;

iv) in any event I should consider the scope of the duty owed by Mundays.

85. As to the first of these points, I have no hesitation in finding that the £800,000 was paid for the transfer of the Retained Land, and that no part of it related to the release of the Overage Deed and the Option Deed. The starting point is that that is what the relevant documents say. The transfer of the Retained Land states that the purchase price was £800,000, and the Deed of Termination states that the consideration for the release of the Overage Deed and the Option Deed was as set out in paragraph 28 above. Second, it is clear that Budgens and Maloneys agreed the release of the Option Deed and Overage Deed in exchange for an

extension of the Retailer Agreement in relation to the Ascot Store in late 2016, and Maloneys, as Mr Maloney put it, honoured the spirit of that agreement by continuing to trade the Ascot Store as a Budgens until the termination of the Retail Agreement in the latter part of 2018. There is no evidence that any part of the £800,000 was attributable to the release of the Option Deed or the Overage Deed.

86. As to the second of Mr Liddell's points, in my view the price paid for the acquisition of the Retained Land in 2018 is good evidence of the diminution in value assessed in 2018 arising from the exclusion of the Retained Land. First, there was evidence that a number of purchasers were not prepared to proceed without the Retained Land being included, as Mr Maloney informed Booker in a document he provided to them in late 2017. Second there were offers from two different purchasers for the property in 2018 at the same price of £5.4m less the price of obtaining the Retained Land (in one case with an additional "contingency" for the release from the Overage and Option Deeds.) Third, although the transaction which went ahead was structured as a share purchase rather than a property purchase, it is clear that effectively it was the property which was being acquired and £800,000 was taken off the purchase price in order to obtain the Retained Land. The document which Mr Maloney sent Booker on 12 December 2017 showed a calculation of the commercial result if the transaction were structured as a property sale or a share sale – the share sale was more advantageous from a tax perspective. Fourth, both the experts in their reports considered the price of obtaining the Retained Land as a ransom strip as a measure of the diminution in value of the property as a result of the retention of the Retained Land, and it was not suggested to Mr Palos in cross examination

that this was not in principle an appropriate way of valuing the diminution in value. Accordingly, it appears to me that it is perfectly appropriate to take the £800,000, being the price paid to acquire the Retained Land, as the best evidence of the diminution in value arising from the exclusion of the Retained Land. Fifth, Mr Maloney clearly did his best to negotiate Budgens down over a period of at least 6 months, so that there is no evidence that he overpaid. Sixth, even if the assessment of the diminution in value in 2006 would produce a lower sum, that is not in my view a constraint in assessing what the actual diminution in value was in 2018. However, I shall go on to consider the evidence of diminution in value assessed as at 2006.

87. I prefer Mr Palos' evidence to that of Mr Clarke for the following reasons:

i) Each of the bases of valuation put forward by Mr Palos in his report seems to me well founded, and Mr Palos made appropriate adjustments in the joint statement and in cross examination where assumptions changed.

ii) Mr Clarke also gave consideration to valuing the difference in value based on the value of the Retained Land as a ransom strip and on the basis of the discounted difference in the vacant possession value in 20 years' time (Mr Palos' methods 1 and 2), so that there was some meeting of minds on methodology.

iii) However, Mr Clarke's suggestions that even if the Right of Way was restricted to a Budgens supermarket the Retained Land together with the Right of Way did not really cause more than a minor inconvenience because there could be a waiting system for vehicles to get around the

Retained Land, large lorries could reverse in (despite the fact that the Ascot store is situated on a busy A road, Ascot High Street), or land might be purchased on either side of the Retained Land, appeared to me to be far from realistic. In particular, the suggestion that land which was being used as a car park for other businesses on either side of the access/egress road would be available for sale, and putting this suggestion forward without any thought of the availability for the necessary planning permission or taking into account the fact that the seller of any such land would themselves be likely to demand a ransom price very much undermined Mr Clarke's credibility. Indeed, in cross examination, he accepted that in reality these matters were no more than matters which would be used by a purchaser to seek to drive down the price sought by Budgens for the Retained Land.

iv) Moreover, I find his overall conclusion (at paragraphs 2.01.03-2.01.06 of his report) that a purchaser of the Ascot Store with the benefit and burden of the Budgens Agreements in 2006 would not have been concerned because he would have anticipated running the store as a Budgens store for many years unrealistic, and consider that Mr Palos' view that a purchaser would have been very concerned about the lack of other options if the Budgens business did not thrive is more realistic. I take into account the fact that while the property market was very buoyant in 2006, the business environment was not buoyant.

v) Although Mr Liddell attacked Mr Palos' approach to the business valuation on the basis that the JLL report showed how the business and

the vacant possession value was actually valued in 2006, the JLL valuation was based on two misapprehensions. First, JLL believed that after 10 years the property could be sold without any restrictions arising from the Budgens Agreements; that was why they discounted the bricks and mortar valuation to reflect the fact that (as they thought) such a value could not be realised for 10 years. Secondly, they thought that the Retained Land was included. Although Mr Palos' preferred valuation was based on taking a different starting point (the most recent EBITDA rather than an adjusted figure for the FMOP to take into account matters brought to the attention of JLL by Mr Maloney), his evidence was also that with the Retained Land included, he would have used a higher multiplier in 2006. Moreover, when pressed on this point in cross examination, his criticisms of JLL for selecting the higher FMOP was in my view entirely convincing. He did also consider a valuation on the basis of the £380,000 FMOP used by JLL. I note that as set out above, in the Joint Statement both experts agreed that on the assumption the Retained Land was included, that 6 x the projected FMOP of £380,000 or 7 x the actual EBITDA was an appropriate basis of valuation and came to approximately the same figure, very close to the actual sale price.

vi) In relation to Mr Palos' figure of £432,000 if the restrictions lasted for 20 years, Mr Clarke criticised Mr Palos' conclusion on the basis that because it was a business valuation the future realisable profit should have been discounted by a business rate of 14.29% rather than a property investment rate of 5.5% but I prefer Mr Palos' evidence. Mr Palos made

it clear that he was approaching this methodology as the loss of future property value.

88. Accordingly, if it is relevant, then since I have found that the Budgens Agreements did affect the sale of the property for 20 years rather than 10 years, I would assess the diminution in value as at 2006 at £426,000, being halfway between the £432,000 figure given by Mr Palos in the joint statement on the basis of a 20 year restriction in the Option Deed and the £420,000 assessed on the ransom strip basis by Mr Palos, but deducting the purchase price for the business rather than the notionally allocated price for the property in 2006, as explained in paragraph 75(i) above.

89. Neither am I persuaded, as suggested by Mr Liddell, that the fact that I have found that the diminution in value assessed as at 2006 was lower than the diminution in value assessed as at 2017-18, should lead me to find that the evidence of what was actually paid in 2018 is not the best evidence of the diminution in value assessed in 2018. Maloneys were not given the opportunity to put things right in 2006; that is why I consider that it is necessary to assess damages as at 2018. It is not surprising that the figures are different at the different times; many things had changed, including the fact that in 2018 it was known that Budgens would not in fact exercise its option or right of pre-emption, whereas in 2006 that was a possibility but not a certainty.

90. Accordingly, taking into account all of Mr Liddell's submissions, I am satisfied that £800,000 is an appropriate figure for the diminution in the value of what had been purchased arising from the Retained Land Breach.

91. As to the third of Mr Liddell's points, these rights on the title are not pleaded, and clearly they were not of comfort to purchasers because as I have set out above, the purchasers in 2017-18 did indeed want the Retained Land included. Moreover Budgens did in my view raise the issue of the extent of the Right of Way in 2017; and even if they had not, any purchaser looking at the registered title would see that there was an issue.

92. In relation to the fourth point raised by Mr Liddell, the scope of the duty owed by Mundays, this is raised on the pleadings but was no more than mentioned in closing submissions. I was not referred to any authority, though I have reminded myself of the leading authority of Hughes Holland v BPE Solicitors [2018] AC 599. The only matter put forward by Mr Liddell was a submission that there was no evidence that Mundays were told that Maloneys would sell on after 10 years. In my view Mundays are not assisted by any argument in relation to scope of duty. The parties have agreed that diminution in value was the appropriate measure of loss, and I have found above that the diminution in value should be assessed at £800,000 in 2018. This seems to me to be the end of the matter. However, if I consider Mr Liddell's submissions on scope of duty, Mundays had advised Mr Maloney of the nature of the Budgens Agreements and had produced a flow chart which specifically addressed the situation (a) where the Retailer Agreement was subsisting and (b) where the Retailer Agreement had been ended. The flow chart showed the effect of the ending of the Retailer Agreement before and after the expiry of 10 years, including the effect on Mr Maloney's ability to sell. Mr Maloney gave evidence that he had gone through this flow chart with Mr Harris of Mundays at the meeting on 15 June 2006 when the report on title was considered. Mundays plainly did know that the rights

available to Maloneys after the 10 year period of the Retail Agreement were important because they took the trouble to advise on them. They were well aware therefore that one possibility was that the Retail Agreement might be terminated after 10 years and that Maloneys might seek to sell the property at that time, when a fortiori it would not be operated as a Budgens business. Moreover, Mundays were also aware, and set out in their advice, that the Budgens Agreements gave Budgens a right, not an obligation, to purchase at the price set out in the Option Agreement, and that if Maloneys wished to sell after the Retail Agreement had expired, Budgens might or might not exercise their rights, and that if they did not then Maloneys would be free to sell the property. Finally, in this case, unlike the Hughes-Holland case, Maloneys would not have suffered a loss if the transaction had proceeded as they had been led to expect.

93. The particulars of claim also claim as damages arising out of the Retained Land Breach the £37,500 in SDLT which was paid on the purchase of the Retained Land in 2018. This sum is mentioned in the particulars of the allegation that the best evidence of the diminution in value was £800,000. I am not satisfied that the additional SDLT represents an additional diminution in value and so I do not award that sum in damages. Similarly, mention was made in opening of additional legal costs, but as Mr Liddell pointed out those are not pleaded and are not quantified. I do not therefore include such legal costs in the award of damages.

94. I therefore award damages in respect of the Retained Land Breach in the sum of £800,000.

95. In case this goes further, if it were appropriate to assess the diminution in value of the property by reason of the retention of the Retained Land as at 2006 then I would award damages in the sum of £426,000 for the reasons set out in paragraphs 87-88 above.

Issue 4: what damages, if any, should be awarded as a result of the SDLT Breach.

96. Mr Maloney claims the interest and penalties due to HMRC arising out of the late payment of the additional £40,000 due in respect of the TP1. In fact, no penalties were levied, and the amount of interest paid was £18,440. Munday's defence is that it must have been obvious to Maloneys either when reviewing the draft SDLT1 or when reviewing the completion statement that the SDLT payable was around £40,000 less than Maloneys had been expecting, and that therefore either Maloneys were grossly negligent in failing to correct the error in the SDLT1 form either before or soon after submission of that document so as to break the chain of causation, or Maloneys contributed to or caused its own loss by its own negligence.

97. Mr Maloney was sent the SDLT1 form under cover of a letter which said "*I enclose [the SDLT1] for signature by you in box 71 where indicated with a pink sticker. Could you please ensure that your signature is in black ink only and the form returned to me unfolded otherwise it will not pass through the Revenue and Customs computer. I need to make the return within 30 days of completion and, bearing in mind that you no doubt have a million and one matters on your mind at the moment, please ensure that the form is returned to me immediately"*. The letter did not invite or ask Mr Maloney to check the SDLT form, and acknowledged that Mr Maloney was very busy. Mr Maloney's evidence is that

he did not read the SDLT1 form but just signed it and therefore he did not notice the mistake. I do not find any negligence here, either so as to break the chain of causation or to give rise to contributory negligence.

98. Mr Maloney was sent the completion statement under cover of an email dated 2 October 2006, from Mr Harris. Mr Harris said that he was sending the sum of £94,288.33 to Maloney' bank account, which had been calculated in accordance with the enclosed completion statement. Mundays were in funds prior to the purchase, having received £100,000 advanced by Mr Maloney personally, and the mortgage advance from Barclays. The completion statement sent to Mr Maloney was in fact the account between Mundays and Maloneys, and it referred to another completion statement between Maloneys and Budgens. The completion statement between Maloneys and Budgens shows the amount required to complete and does indeed refer to various matters, such as float and voucher monies, occupational charges and premises licence fees. Mr Liddell also pointed out that Mr Maloney had known what the SDLT charge would be since 31 October 2005, when the calculation was included in a funding schedule provided to Mr Maloney by Budgens.

99. Mr Maloney's evidence was that he had not checked the completion statement and had not noticed the error, and that he was expecting money back, for example because he had not opted to take certain IT equipment and there were calculations to be made in relation to various other matters such as stock. I accept Mr Maloney's evidence that he did not in fact check and did not notice the mistake; the email from Mr Harris sending the SDLT form makes it clear that Mr Maloney was very busy at the time and that Mr Harris knew that. Indeed,

there would be no reason for Maloneys not to point out the error and pay the additional SDLT if they had noticed it at the time, because it would only create a bigger liability when the problem came to light; I also take into account that as soon as it did come to light in 2018 Maloneys immediately took steps to report the mistake to HMRC. Mr Maloney was again not asked by Mundays to check the completion statement, and it was not submitted that Mr Maloney was under any duty to do so. Accordingly, again here I do not find any negligence by Maloneys.

100. Mr Liddell also submitted that there was no loss because Mr Maloney brings this action as assignee. He pointed out that the £18,440 was paid after the date of the assignment, and was funded by Mr Maloney. In my view Mr Liddell is wrong to say that there is no loss. At the date of the assignment Maloneys had suffered loss because they had a liability to HMRC. They assigned the cause of action in respect of that loss and were then paid the £18,440 after the assignment. Maloneys had a complete cause of action which they assigned, in substance for payment of the sum which could be recovered.

101. Mr Liddell also submitted in his opening submissions that Mr Maloney needed to give credit for interest which he had earned by reason of keeping the £40,000 between 2006 and 2019. Mr Maloney's evidence in cross examination was that the money he received back stayed in Maloneys and was used for general cashflow, and that the interest which Maloneys was paying to Barclays was 1.3% above base rate. Mrs Galley objected that this was not pleaded, and that accordingly no evidence had been called as to the state of the account between Maloneys and Barclays. However there was no suggestion by Mr Maloney that

Maloneys was not indebted to Barclays at any stage. I do not consider that this is a matter which Mr Maloney could not have dealt with if there were evidence to be called, and I consider that to exclude consideration of what the real loss is would be to overcompensate Mr Maloney. In my view the correct measure of damage is indeed the difference between the interest charged by HMRC and the interest saved by Maloneys on its debit account with Barclays. Mr Liddell produced a calculation showing that that amount of debit interest saved at the actual rate of 1.3% above base was £11,870. That calculation was not objected to, and so I find that the loss caused by the SDLT breach was £6,570.

Issue 5: what interest should be awarded?

102. It was accepted that interest will follow in the usual way, and on the basis that damages were assessed as at 2018 would run from the date of purchase, i.e. 30 November 2018. Mrs Galley sought interest on that basis at a rate of 4% over base rate on the basis that Maloneys had to borrow the money to pay the £800,000. Mr Liddell on the other hand suggested if damages were assessed in 2018, the rate should be 2% above base rate rather than the 4% above base rate which Mrs Galley sought.

103. Interest is sought pursuant to section 35A of the Senior Courts Act. The court's approach to such interest was set out in Carrasco v Johnson [2018] EWCA Civ 87. At paragraph 17 of the judgment, having considered a number of cases, Hamblen L.J. said as follows:

> *"17. The guidance to be derived from these cases includes the following:*
>
> *(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as*

> *compensation for damage done or to deprive defendants of profit they may have made from the use of the money.*
> *(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.*
> *(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.*
> *(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.*
> *(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."*

104. In this case, it seems to me that since Mr Maloney brings this action as assignee of Maloneys, a borrowing cost for a claimant with the general attributes of Maloneys, ie a relatively small business, is appropriate. However, in accordance with the principles set out, the relevant rate is that at which persons with the claimant's general attributes could borrow, rather than the actual rate at which the specific claimant can borrow.

105. I was provided with very little evidence or argument on interest. In opening, and before Mr Maloney's evidence as to Maloneys' actual rate of borrowing, Mr Liddell sought to set off against the SDLT damages interest at what he said was a relatively conservative rate of 2% above base rate, and this was also what he submitted was the appropriate rate if interest was awarded from 2018. In the absence of other evidence and submissions, and given the range of rates which have in recent years been awarded by the court to commercial claimants as set out in the Note on Awards of Interest in the White Book at 16AI, I consider that 2% above base rate is an appropriate rate in this case. There was no evidence on

the basis of which I could consider that 4% above base rate was an appropriate rate. Interest will therefore run at that rate from 30 November 2018.

106. If damages should be assessed in 2006 then I would award interest at the same rate from 6 September 2006.

107. I will also award interest at the rate of 2% above base rate in relation to the SDLT Breach which will run from 4 January 2019 when the amount was actually paid.