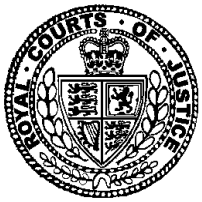

Neutral Citation Number: [2022] EWHC 207 (Ch)

BL-2018-002028

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

Thursday 3rd February 2022

Before:

MR JUSTICE LEECH

- -

B E T W E E N:

BARROWFEN PROPERTIES LIMITED **Claimant**

- and –

(1) GIRISH DAHYABHAI PATEL **Defendants**
(2) STEVENS & BOLTON LLP
(3) BARROWFEN PROPERTIES II LIMITED

- -

MR JONATHAN DAWID (instructed by **Withers LLP**) appeared on behalf of the Claimant.

THE FIRST DEFENDANT appeared in person.

MR ROGER STEWART QC and **MR JOSHUA FOLKARD** (instructed by **Reynolds Porter Chamberlain LLP**) appeared on behalf of the Second Defendant.

APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

I. Introduction

1. In this judgment I refer in some detail to the judgment on liability, causation and quantum which I handed down on 21 July 2021 ([2021] EWHC 2055 (Ch)). In this decision I will use the term the "**Judgment**" to refer to it. It will also be necessary for me to refer to an earlier judgment dated 15 March 2021 ([2021] EWHC 690 (Ch)) in the same proceedings dealing with the Second Defendant's application for permission to Re-Amend. I will use the term the "**Amendment Judgment**" to distinguish it from the Judgment itself (which I handed down later). I also adopt the defined terms and abbreviations which I used in the Judgment and will therefore refer to the Second Defendant as "**S&B**" for the remainder of this decision.

2. Mr Roger Stewart and Mr Joshua Folkard appeared on behalf of S&B (as they had done at trial). Mr Jonathan Dawid, who had not appeared at the trial, represented Barrowfen, the Claimant, on this occasion. Girish, the First Defendant, was present throughout both applications but did not ask to address me on any of the issues.

3. By Application Notice dated 7 January 2022 S&B seeks an order declaring that certain sections of the evidence served by Barrowfen on 28 October 2021 fall outside of the scope of the permission to adduce further evidence which I granted in the Judgment. In the Application Notice S&B advanced three grounds: (i) the evidence was irrelevant or sought to re-open matters which I had finally decided; (ii) Barrowfen was seeking to advance a new case on loss which it had decided not to pursue before trial and (iii) the admission of that evidence would cause undue delay, expense or oppression to S&B.

4. The evidence which S&B seeks to exclude included paragraphs 10, 11, 16 and 17 of the sixth witness statement of Mr Prashant Patel dated 28 October 2021 ("**Prashant 6**"). S&B also seeks to exclude paragraphs 26 to 48 and 64 to 74 of the expert report of Mr Nick Powell dated 28 October 2021 ("**Powell 1**"). S&B also objected to the scope of Mr Powell's instructions. I will use Mr Stewart's term "**Disputed Paragraphs**" to refer collectively to the disputed parts of both Prashant 6 and Powell 1.

5. The evidence of Prashant and Mr Powell is relevant to an issue which arose at a late stage of the proceedings, namely, whether Barrowfen had to give credit for any additional profit which it had made by adopting and implementing the Revised Development Scheme. Based on the evidence of the expert valuers, I held that the Revised Development Scheme produced a developer's profit of £2,508,182 more than the

Amended Original Development Scheme and that this was not a collateral benefit: see the Judgment, [654] to [677]. However, Barrowfen's case is that if account is taken of the future costs of financing the Revised Development Scheme (including the additional equity finance which Barrowfen received from Asian Agri), it made no profit.

6. Barrowfen did not accept that it was necessary to amend its case to rely on this factual and expert evidence. But by Application Notice dated 24 January 2022 it applied to Re-Re-Amend the Reply to plead that the additional cost of carrying out the Revised Development Scheme included the net present value of additional equity of £2,377,271 which was advanced by Asian Agri.

II. Procedural History

7. To address the issues which arise on this application, it is necessary for me to set out a selected procedural history of this issue. In the Judgment, Appendix 3 I set out a detailed procedural chronology: see [862] to [875]. I also set out the procedural chronology relevant to S&B's application to amend in the Amendment Judgment: see [10]. In this judgment I will try to avoid covering the same ground and will attempt to limit the history which I recite to those procedural steps which are directly relevant to my determination of both applications.

8. On 10 July 2020 Barrowfen served Amended Particulars of Claim. In addition to the lost income caused by the delay in the development of the Tooting Property, it also claimed "Lost developers' profit". In answer to a request for further information, Barrowfen withdrew this claim and in the Re-Amended Particulars of Claim served on 3 November 2020 this claim was struck through.

S&B's Amendment Application

9. On 9 February 2021 S&B applied to Re-Amend to plead that Barrowfen had to give credit for the increased development value generated by the Revised Development Scheme and to adduce the supplementary report of Mr Clarke, its expert valuer. Mr Clarke had produced two development appraisals of the Tooting Property: the first on the assumption that Barrowfen had carried out and completed the Original Development Scheme by September 2016; and the second on the assumption that Barrowfen had carried out and completed the Revised Development Scheme by March 2021. Mr Clarke's evidence was that the Revised Development Scheme had generated a profit of

£9,412,531 greater than the Original Development Scheme would have done (if it had been implemented).

The Amendment Judgment

10. On 15 March 2021 (Day 11 of the trial) I heard that application and delivered the Amendment Judgment (which I later revised and corrected for publication). Although the point was raised late, I held that the delay was a relatively short one and that there was a good explanation for it. I also held that S&B had a real prospect of success on the collateral benefit issue and that any prejudice to Barrowfen could be met by giving it the opportunity to adduce further evidence (including expert accountancy evidence) if the point arose: see the Amendment Judgment, [23]. Mr Stewart placed some reliance upon the way in which I expressed my views at sub-paragraphs [23](4) and (5) and I repeat them now:

> "*(4) Expert accountancy evidence*: Ms Hilliard also submitted that it would be necessary to obtain accountancy evidence about the present value of the future interest burden of the additional borrowing which Barrowfen had to take in order to complete the Revised Development Scheme. I am not satisfied that it would be impossible for the expert valuers to provide this evidence in their development appraisals and Mr Stewart took me to the relevant parts of Mr Clarke's development appraisals in which he had included finance costs. But even if it is necessary to obtain expert accountancy on this issue, this is not in my judgment a sufficient reason to justify refusing the amendment by itself. If the experts cannot deal with this issue, then it can be dealt with as part of the consequential matters following judgment. Parties often adduce evidence of their finance costs after judgment to justify a claim for interest, whether for statutory interest or interest as damages and, if necessary, I can direct an enquiry on this issue should it arise.
>
> *(5) Factual evidence*: Finally, Ms Hilliard submitted that it would be necessary to call factual evidence on the negotiations with Barclays and in relation to the lost opportunity to re-invest. Again, I am not satisfied that this is a sufficient reason to disallow the amendment. It has been part of Barrowfen's case that it lost the opportunity to re-invest the rental income or the net rental income from the original development scheme since least 11 September 2020. If it wanted to call evidence on this issue, it should have done so to support its case. Moreover, as I have already stated above, I am not satisfied that factual evidence in relation to negotiation for Barclays has any real relevance to the capital value of the Tooting Property subject to the Revised Development Scheme. Nevertheless, if she does wish to adduce any further evidence in order to deal with these issues, I will permit her to do so."

11. Immediately after I had given judgment, the following exchange took place between Ms Hilliard and me upon which S&B also places some reliance:

> "Ms Hilliard , you've heard what I have to say about the evidence, but if you do feel it's necessary to call additional evidence or make additional disclosure, I will certainly not rule that out and I will give you benefit of the doubt…..DEPUTY JUDGE LEECH: As I said, it seems to me that the finance costs are something you may want to call −−but it seems to me it's more likely to be a calculation than a full −blown expert's report and if it is a problem about netting off, you know, the −−is what I call the marginal cost of −−the additional interest that you're going to have to pay −−MS HILLIARD: Yes. DEPUTY JUDGE LEECH: −−it's something we could deal with it seems discretely at the end of the case. MS HILLIARD: I understand, my Lord."

Barrowfen's Amendment Application

12. On 22 March 2021 Barrowfen served the supplemental report of its valuer, Mr Alford, replying to Mr Clarke's evidence and producing competing development appraisals of the Original Development Scheme, the Amended Original Development Scheme and the Revised Development Scheme at their respective completion dates. Mr Alford's evidence was that the developer's profit for the Revised Development Scheme was about the same as the profit for the Amended Original Development Scheme. (His appraisals produced a difference of no more than £84,041).

13. As I recorded in the Judgment, I was impressed by both experts and there was a large measure of agreement between them. They agreed about the methodology to be used in preparing their development appraisals and they agreed on almost all of the relevant inputs. In particular, they agreed that the developer's profit should be arrived at after deducting the costs of financing the development down to the date of completion. Mr Clarke's spreadsheet had a single line for the cost of financing. Mr Alford's spreadsheet had a separate line for equity funding and debt funding. But for convenience he treated 100% of the capital costs as funded by debt.

14. On 22 March 2021 Barrowfen also applied for permission to Re-Amend the Reply and for a direction that factual and expert evidence be dealt with as a consequential issue following judgment. Paragraph 62.A.c. of the draft provided as follows:

> "Further in relation to paragraphs 191.3.A.1 and 191.3.A.2, even if, which is denied, Barrowfen obtained an increase in "developer's profit" by completing the revised development scheme in April 2021, in comparison to completing the original development scheme in September 2016, Barrowfen has not obtained any overall increase in capital value or "developer's profit" taking into account the following:…(iii) The net present value of the future interest burden of the higher level of financing required to finance the revised development scheme (£19.379 million, after deduction of the proceeds of sale

> of the affordable housing element of the scheme from the initial £22 million loan) compared to the financing that would have been required for the original development scheme (£13.98 million)."

15. Mr Stewart placed reliance on the covering letter from Withers to RPC which was also dated 22 March 2021. Because of the importance which he attributed to it, I set out page two of the letter which dealt with the relationship between the proposed amendments and any further evidence which might be required:

> "The application notice also seeks directions for consequential evidence in relation to paragraph 62A(c) of the Re-Amended Reply, relating to the question of whether the Claimant has obtained an increase in "developer's profit" in the events that happened. The points in paragraph 62A(c) only arise if your Lordship decides against the Claimant that: (i) as a matter of principle the Claimant is required to give credit for any increase in gross development value (see the Claimant's denial of this at paragraph 62A(a) of the Re-Amended Reply); and (ii) putting to one side the points in paragraph 62A(c), there is otherwise an increase in developer's profit in completing the revised development scheme in April 2021 in comparison to completing the original development scheme in September 2016 (see the Claimant's denial of this in reliance upon the supplemental expert report of Richard Alford at paragraph 62A(b) of the Re-Amended Reply). We therefore seek a direction that the factual and expert evidence relating to the matters raised by paragraph 62A(c) of the Re-Amended Reply be addressed as a consequential issue following judgment, in so far as they remain relevant in light of the judgment.
>
> In the time available since the amendment was granted, it has not been possible for the Claimant to obtain evidence on the points in paragraph 62A(c) in that: (i) There would need to be expert accountancy calculations on the point raised in paragraph 62A(c)(iii); and (ii) The task of adducing factual evidence in relation to the points raised in paragraphs 62A(c)(i) and (ii) is complex because the Second Defendant's case on what would have happened but for the breaches of duty (and therefore the appropriate hypothetical comparison) is unclear. There are numerous permutations depending upon what is to be assumed, including (i) whether or not the hypothetical comparator assumes that the Tooting Property would have been sold or alternatively retained as an investment with an income stream; (ii) if it is to be assumed that the Tooting Property would have been sold, when, for what price and in what circumstances it would have been sold. Any factual evidence needs to address the appropriate hypothetical scenario.
>
> In the circumstances, we propose, as raised as a possibility by Your Lordship when ruling on the amendment application on 15 March 2021, that the appropriate way forward is to reserve the question of whether factual and expert evidence on the points raised in paragraph 62A(c) of the Re-Amended Reply is necessary, with this to be addressed as a consequential issue in light of Your Lordship's judgment. If Your Lordship agrees with the points made by the Claimant in paragraphs 62A(a) or 62A(b) of the Re-Amended Reply, the issues raised in paragraph 62A(c) will become academic. If, on the other

> hand, the issues raised in paragraph 62A(c) are material in light of the judgment, it will be much easier for the parties to adduce the relevant evidence as a consequential matter, directed at the particular hypothetical scenario which the judgment identifies as the relevant scenario."
>
> We therefore seek a direction that the factual and expert evidence relating to the matters raised by paragraph 62A(c) of the Re-Amended Reply be addressed as a consequential issue following judgment, in so far as they remain relevant in light of the judgment."

16. In their written Closing Submissions Ms Hilliard and Mr Matthewson argued that as a matter of principle Barrowfen was not required to give credit for any increase in the developer's profit which it had made as a result of implementing the Revised Development Scheme. They submitted as follows:

> "Firstly, even if the Revised Development Scheme has an increased developer's profit, no benefit or payment has been received in fact which can be taken into account. It is the unchallenged evidence of Prashant that Barrowfen intends to retain the Tooting Property as an investment with an income stream: paragraph 184 of Prashant's w/s [B/1/43]. Unless and until the Revised Development Scheme is sold it is impossible to determine whether or not Barrowfen will have benefitted from any increase in developer's profit from the Revised Development Scheme. It would be wrong for the Court to apply the arbitrary date of March 2021 to determine the capital value of the Revised Development Scheme when there are no plans for Barrowfen to sell the Revised Development Scheme on that date. It is equally wrong to apply the arbitrary date of September 2016 to determine the capital value of the Original Development Scheme when Barrowfen had no plans to sell the Original Development Scheme on that date. Benefits (or losses) cannot and should not be taken into account until they are realised. This principle applies whether the consideration is whether S&B's breaches of duty were the legal cause of Barrowfen's loss or whether the benefit is a collateral benefit which the court ignores in the assessment of damages. In both cases the benefit must be realised for it to be taken into account. A notional benefit calculated on an arbitrary date is no benefit at all."

17. Ms Hilliard and Mr Matthewson also submitted that I should find on the expert evidence that there was no increase in the developer's profit for the Revised Development Scheme but that if I did so, then they sought a direction for further evidence. In paragraph 295 of their Written Closing Submissions they stated as follows:

> "Finally, if contrary to the above submissions, the Court finds that (i) Barrowfen is required to give credit for any unrealised developer's profit, and (ii) Barrowfen has obtained an increased developer's profit by completing the Revised Development Scheme in comparison to completing the Amended Original Development Scheme in September 2016, Barrowfen relies upon the further points raised in paragraph 62A(c) of the Re-Amended Reply. Barrowfen's application dated 22 March 2021 seeks a direction for

> consequential evidence on these issues if the Court finds against Barrowfen on the points set out above. It has not been possible for Barrowfen to adduce evidence on these points in the time available since S&B was granted permission to amend to advance its developer's profit point on 15 March 2021."

18. On 31 March 2021 and 1 April 2021 (Day 14 and Day 15) the parties made their oral closing submissions. Ms Hilliard did not ask me to give any formal directions or make a specific order in relation to paragraph 295 (above). However, on 31 March 2021 she raised the issue of amendment at the beginning of the day. Mr Stewart did not object to the proposed amendments although he stated that they were not adequately particularised. The transcript of Day 14 records that the following exchange then took place between Ms Hilliard and me:

> "DEPUTY JUDGE LEECH: I don't think I need you to respond to that, Ms Hilliard . I 'm going to give you permission to amend. MS HILLIARD: Thank you, my Lord. DEPUTY JUDGE LEECH: I'm going to give you permission to amendment primarily because, as I see it, that's the price which Mr Stewart has to pay for getting in his late amendment. One of the amendments at least, the most significant of them, it seems to me, deals with an issue which arises directly out of his amendment, which is how one deals with the cost of borrowing. I'm not sure now, having looked at the revised expert figures, how significant it might be, but it might nevertheless be significant enough to require additional evidence, and it seems to me that that is a matter which arises out of the permission I granted to Mr Stewart last week."

The Judgment

19. On 21 July 2021 I handed down the Judgment. In the event, I had to determine the collateral benefit issue and I decided it in S&B's favour. Once I had decided all of the issues between the experts, I held that the developer's profit on the Revised Development Scheme was £2,508,182 greater than the developer's profit on the Amended Original Development Scheme. But it also became clear that there was an important issue outstanding which could have a very significant effect on the amount of damages or equitable compensation. I identified that issue and set out my provisional view at [676] and [677]:

> "I therefore hold that Barrowfen must give credit for the sum of £2,508,182. However, none of the parties addressed me on the next issue, which arises as a consequence, namely, whether Barrowfen should give credit against the full amount of the damages before I apply the "loss of a chance" percentage or whether I should apply the "loss of a chance" percentage before I set off the credit for the capital appreciation of the Revised Development Scheme. My provisional view is that I should apply the credit for capital appreciation

> before I apply the loss of a chance percentage. My reasoning for reaching that view can be stated briefly. Suresh and Prashant are entitled to damages for a lost opportunity to develop the Tooting Property and to place a value on that lost opportunity I must first assess all of the financial consequences taking into account both the potential losses and the potential benefits before applying the percentage chance which I have found. However, because this conclusion could have very significant financial consequences for the parties and I did not hear argument on it, I will give them an opportunity to make further submissions on this issue."

20. After setting out my calculation of equitable compensation both on Barrowfen's primary case and on its alternative case, I identified the following reserved matters on which it would be necessary to hear further evidence and argument at [682] and [683]:

> "I gave permission to S&B to amend the Defence to plead that it was entitled to set off the capital appreciation of the Tooting Property on terms that if I found in S&B's favour, I would give Barrowfen an opportunity to call further evidence on the additional financial costs to Barrowfen of the Revised Development Scheme. In the event, I have found in S&B's favour on this issue and I therefore grant permission to Ms Hilliard to call that evidence and argue for a reduction in the capital appreciation. Given my conclusions (above) I also give permission to both parties to argue the question whether the deduction for the capital appreciation of the Tooting Property should be made before or after the loss of a chance percentage is applied to the quantum of damages. I also give Barrowfen permission to argue whether, on the findings which I have made, any part of the alternative award of damages which I have made is cumulative rather than alternative."

The Order for Directions

21. On 6 October 2021 I made an order for directions (the "**Order**") for the hearing of the reserved matters (the "**Reserved Matters**"). Although some matters were disputed, there was no dispute between the parties that I should give the following directions:

> "2. Each party has permission to call one expert in the field of evaluation of the additional finance costs of the Revised Development Scheme (as defined in the Judgment). 3. The Claimant shall by 22 October 2021 serve and file its evidence in relation to the additional finance costs of the Revised Development Scheme. 4. The First and Second Defendants shall serve any evidence in response to the Claimant's evidence at paragraph 3 above by 10 January 2022. 5. The parties' experts shall meet to identify and try to further narrow the issues between them, and then file a joint memorandum identifying the issues which are agreed and those which are not agreed, by 7 February 2022."

22. In the event, the time for serving Barrowfen's factual and expert evidence was extended by seven days by agreement and on 28 October 2021 Withers served both Prashant 6 and

Powell 1. On 7 January 2022 S&B issued its application to exclude the parts of Barrowfen's factual and expert evidence which I have already identified. It did not serve any factual or expert evidence itself or seek an extension of time for doing so. The determination of the Reserved Matters has now been fixed for a three-day hearing commencing in a window on 9 May 2022.

The Proposed Amendments

23. Before turning to deal with the issues, I set out the principal amendments which Barrowfen seeks permission to make in the draft Re-Re-Amended Reply. In particular, Barrowfen applies for permission to amend paragraph 62A(c)(iii) (which I have already quoted) to make minor changes to the current text and then to add two sub-paragraphs:

> (iii) The additional financial costs to Barrowfen of the revised development scheme, including (1) The net present value of the future interest burden of ~~the higher level of financing~~ the additional loan finance required to finance the revised development scheme (£19.1 ~~379~~ million, after deduction of the proceeds of sale of the affordable housing element of the scheme from the initial £22 million loan) compared to the financing that would have been required for the amended original development scheme (£13.98 million) amounting to £1,579,682 as at 28 October 2021. (2) The costs to Barrowfen of providing further security to Barclays for this additional loan finance, including £426,113.01 payable by Barrowfen to Atlip House Limited ("Atlip House") as a fee for Atlip House guaranteeing the loan and providing security for it by way of a charge over its property at 2 Atlip House, Wembley; and £34,136.98 payable by Barrowfen to Asian Agri investments Limited ("Asian Agri") as a fee for Asian Agri to provide a standby letter of credit to Barclays. (3) The net present value of the opportunity cost to Barrowfen of the additional £2,377,271 equity invested in the revised development scheme compared with the equity that would have been invested in the amended original development scheme, amounting to at least £1,887,702 as at 28 October 2021."

24. As I understand the position, S&B objects to all of the amendments on the basis that they were made too late and after the Judgment had been handed down. However, S&B does not object to Prashant giving evidence about the additional costs pleaded in sub-paragraph (2) (above) which Barrowfen has incurred, or will incur, in obtaining and providing the third party guarantee or the standby letter of credit on the basis that this evidence falls (or arguably falls) within the scope of the existing permission because it forms part of the costs of the debt funding provided by Barclays.

III. The Issues

25. In their Skeleton Argument Mr Stewart and Mr Folkard submitted that the Disputed Paragraphs of Prashant 6 and Powell 1 were inadmissible because they fell outside the scope of the permission which the court had granted to call expert evidence or because they involved an attempt to re-open matters which the court had decided. They argued that no permission had been granted for them under CPR Part 35.1, they were wholly irrelevant to the pleaded issues, they sought to re-open matters which were *res judicata* between the parties and the court should exercise its case management powers to exclude them. They submitted, therefore, that the court should exercise its general power to control evidence under CPR Part 32.1 by striking out those paragraphs.

26. Mr Dawid's response to S&B's application to exclude the Disputed Paragraphs was that S&B's application involved no more than a pleading point and that, if it was necessary to do so, Barrowfen applied to Re-Re-Amend to plead the equity funding. He submitted that the amendment involved a very limited expansion of Barrowfen's case, it would not imperil the hearing date in May to grant permission and that S&B had suffered no prejudice for which it could not be compensated in costs.

27. Mr Stewart opposed the application to amend because it engaged the *Barrell* jurisdiction and argued that I should refuse to permit Barrowfen a "second bite at the cherry". In the alternative, he submitted that this was a "very late amendment" and that Barrowfen could not discharge the heavy burden of showing that it had a strong case and that justice required that it should be able to pursue it. Indeed, in oral submissions he went so far as to submit that the amendment had no real prospect of success.

28. In his oral submissions Mr Stewart helpfully submitted that I should resolve the issues between the parties by considering four issues in turn. I adopt his suggestion and those four issues were as follows:

    (1) Do the Disputed Paragraphs fall within the scope of Barrowfen's pleaded case as set out in the Re-Amended Reply for which the Court gave permission on 22 March 2021?

    (2) What was the scope of the factual and expert evidence for which the Court has given permission?

    (3) What issues has the Court decided and, in particular, has it decided the point which Barrowfen now seeks to raise?

(4) Should Barrowfen be given permission to Re-Re-Amend the Reply?

IV. Discussion

29. It was common ground between the experts at trial that the development costs of the Revised Development Scheme were significantly higher than the costs of the Amended Original Scheme. There was a marginal difference between them in relation to the costs of the Revised Development Scheme which I resolved in favour of Mr Alford and found that the total development costs were £27,585,064: see the Judgment, [663]. The experts were agreed that the total development costs of the Amended Original Development Scheme would have been £17,187,793: see [665]. As I have stated, both figures included the cost of funding the development down to completion.

30. Prashant gave evidence at trial that the Revised Development Scheme would be funded by a loan of £22m by Barclays. It is his evidence now that completion will take place later than anticipated (and that the later conversion of the loan from a construction to an investment loan will increase interest costs). It is also his evidence that by 29 July 2021 the gross development spend on the Tooting Property was £20,657,080, of which £20,551,583 was funded by the Barclays loan and £6,105,497 by shareholder funds: see Prashant 6, ¶14. Finally, it is Prashant's evidence that Barrowfen has incurred the additional costs of £34,136.98 for a standby letter of credit and £426,113.01 for a guarantee backed by security from an associated company, Atlip House Ltd ("**Atlip House**"): see Prashant 6, ¶25 to ¶32.

31. Mr Powell has calculated the debt financing costs which Barrowfen will incur in implementing the Revised Development Scheme and has compared them with the finance costs which it would have incurred if it had implemented the Amended Original Development Scheme. It is his evidence that Barrowfen will incur £11,515,981 payable over a 25 year period and that it would have incurred £7,845,181 over the same period (although the period would have come to an end earlier). He calculates that the net present value of the future debt financing costs of the Revised Development Scheme are £1,579,636: see Powell 1, ¶49 to ¶63.

32. Barrowfen also wishes to adduce factual evidence from Prashant that Barrowfen was required not only to borrow more from Barclays to fund the Revised Development Scheme but also to inject an additional £2,377,271 in shareholder's funds and that this sum was initially funded by a loan from Asian Agri, its parent, but ultimately converted

into equity: see Prashant 6, ¶16 and ¶23. It also wishes to call Mr Powell to establish that a true assessment of the finance costs of funding the Revised Development Scheme should include the future cost of additional equity as well as debt and that its net present value is £1,887,802 based on a notional dividend yield of 3.5%: see Powell 1, ¶28 to ¶41 and ¶64 to ¶72.

(1) The Pleaded Case

33. In the Re-Amended Reply Barrowfen pleaded a case that it was entitled to deduct from the developer's profit for the Revised Development Scheme the finance costs of funding the development not only up to the date of completion but also until repayment in the future (discounted to reflect their net present value): see paragraph 62A(c)(iii) (above). It is clear, however, that the pleaded case was intended to be limited to debt financing because it referred to the "future interest burden" required to finance the scheme. Moreover, it referred in terms to the £19.1m loan from Barclays (after repayment of the proceeds of the affordable housing).

34. Ms Dagli accepted in her fifth witness statement ("**Dagli 5**") that there was no express reference to the cost of equity in paragraph 62A(c)(iii) and that it only became apparent after the Judgment that Barrowfen had incurred significant additional costs in relation to both the additional security which it provided to Barclays and also the additional equity provided by Asian Agri: see Dagli 5, ¶30 and ¶31. Given those admissions, I am satisfied that paragraph 62A(c)(iii) did not extend to either of those heads of cost and that Barrowfen must obtain permission to amend if it intends to rely on them.

35. Having reached that conclusion, I would normally have gone on to consider whether to grant permission to amend on the usual principles, namely, whether the amendments had a real prospect of success and, if so, whether I should exercise my discretion to permit them at this stage of proceedings. However, Mr Stewart advances two reasons why this is not appropriate in the present case: <u>first</u>, because the scope of the permission to adduce expert evidence is limited to debt finance and not equity and, <u>secondly</u>, because I have already decided this point against Barrowfen (or it is too late to raise it). I deal with each in turn.

(2) The Scope of the Permission

36. Mr Stewart submitted that I had only granted permission to Barrowfen to adduce expert evidence limited to the case pleaded in paragraph 62A(c)(iii). He relied not only on the Re-Amended Reply itself but also on the letter dated 22 March 2021 in which Withers tied the evidence which Barrowfen intended to call back to its pleaded case. In particular, he relied on the reference to "expert accountancy calculations on the point raised in paragraph 62A(c)(iii)" and to "factual and expert evidence on the points raised in paragraph 62A(c) of the Re-Amended Reply" and to the ultimate paragraph in which Withers sought the following direction:

> "We therefore seek a direction that the factual and expert evidence relating to the matters raised by paragraph 62A(c) of the Re-Amended Reply be addressed as a consequential issue following judgment,….."

37. Mr Dawid submitted that I had granted permission in general terms to "call further evidence on the additional financial costs": see the Judgment, [682] (above). He also submitted that this was reflected in the Order dated 6 October 2021: see paragraph 3 (also above). He relied on the decision of the majority of the Court of Appeal in *SDI Retail Services Ltd v Rangers Football Club Ltd* [2021] EWCA Civ 790 as authority for the proposition that the proper interpretation of an Order is an objective exercise and that reasons given by the court for making an order are admissible if (and if only) there is an ambiguity. He relied on the judgment of Phillips LJ at [60] and [61]:

> "As the authorities cited by the Judge make plain, the interpretation of the Injunction is an objective exercise, determining what the language used conveys in the context in which the order was made. That context includes, in particular, the Judge's reserved and *ex tempore* judgments of 19 July 2019 which explain the reasons for the grant of the Injunction. As the Injunction has penal consequences if disobeyed, it must be construed strictly and restrictively.
>
> This court is in just as good a position to consider that issue as the Judge at first instance. Rangers pointed out that it was "fortunate" that the Judge was available to consider the issue, but did not rely upon the fact that the Judge was interpreting his own order in the context of his own judgments, and rightly so. Apart from the fact that the objective nature of the exercise forbids that subjective consideration (not least because the proper interpretation cannot depend in the slightest on whether or not the judge who made the order is the judge interpreting it), the wording of paragraph 6 of the Injunction was not debated at all, but was simply that proposed by SDIR, replicating the wording produced by Teare J in his order of 24 October 2018. Further, the Judge recognised that the question of what would happen if Elite defaulted on its obligations was not considered when the Injunction was granted."

38. Underhill LJ took a different approach in his dissenting judgment (which involved an analysis of the transcript of the hearing to construe the order in question) and Phillips LJ addressed that approach at [66]:

> "For my part, I would express considerable caution about placing any weight on such material in circumstances where the transcript does not contain the Judge's reasons for making the order (as is sometimes the case where the terms of an order are discussed at the end of a hearing), the Judge in this case having recorded his reasons in formal judgments. As explained by Lord Sumption in *Sans Souci*, the reasons given by the court for making an order are "an overt and authoritative statement of the circumstances which it regarded as relevant" and are admissible if (and only if) there is an ambiguity. Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in construing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities."

39. On this issue, I accept Mr Dawid's submissions. Both the reservation at [682] and paragraph 3 of the Order were in general terms and wide enough to encompass the Disputed Paragraphs. Moreover, there is no ambiguity in either of them. The reader of both the Judgment and the Order would have been in no doubt that the Reserved Matters included all additional financial costs including any additional capital costs which Barrowfen would incur. If the reader had been in any doubt (and I do not accept that she would have been), then it would only have been necessary to refer back to Mr Stewart's own submission which I recorded at [675] (below) where he argued that the court should take account of any "capital outlay and capital value".

40. I accept that the court will normally approach the question whether to permit a party to call expert evidence at, say, a CCMC or a PTR by reference to that party's pleaded case. However, this was not a normal case for the reason given by Ms Dagli in Dagli 5 at ¶30:

> "Both amendments took place in the middle of a lengthy and hard-fought trial meaning that Barrowfen and its legal team had only very limited time and resources with which to address the question of exactly what additional financial costs Barrowfen had incurred. Indeed it was precisely because Barrowfen was not in a position to obtain expert evidence on its additional financial costs during the trial that the Judge agreed to reserve it until a later date."

41. I accept this as a fair description of what took place. I am not satisfied, therefore, that it is appropriate to construe the Judgment or the Order by reference to the Re-Amended Reply and its more limited scope. But if it were necessary to have regard to the context

in which I carved out the Reserved Matters at [682] and [683], then the context was one of considerable uncertainty. Although Ms Hilliard applied for permission to amend and Withers sought permission to call further evidence by reference to the proposed amendment, both she and they made it very clear that they had not had a full opportunity to consider the issue or the full scope of the evidence which they might need to call. Moreover, I made it clear in oral argument (as I have set out above) that I was prepared to give Barrowfen considerable latitude.

42. Against this background, the reader of the Final Judgment and the Order would draw the conclusion that I intended to define the issue in broad terms to avoid any prejudice to Barrowfen caused by S&B's late amendment. Mr Dawid put the same point effectively in his oral submissions. If I denied Barrowfen the right to rely on the evidence of Prashant and Mr Powell, it would result in the very prejudice which I was trying to avoid by reserving the matter for further evidence and argument.

(3) The Scope of the Decision

43. In his Skeleton Argument Mr Stewart submitted that the question whether Barrowfen was entitled to deduct the cost of equity was *res judicata*. In oral argument he accepted that strictly speaking this was not a case in which an estoppel *per rem judicatam* arose because I had not resolved all of the issues or made a final money judgment into which Barrowfen's claim would merge. He submitted, however, that in the present case the *Barrell* jurisdiction to revoke or vary a final decision was engaged because I had reached a final decision on the issue which Barrowfen now sought to raise. He relied on *Stewart v Engel* [2000] 1 WLR 2268, in which a majority of the Court of Appeal had held that the court should only exercise the power to recall orders and reconsider judgments in exceptional circumstances.

44. Mr Stewart advanced the following reasons why I should conclude that I had already decided the issue of equity funding:

(1) Barrowfen had made but then withdrawn a claim for damages for the loss of profit on the development. By seeking to set off the dividend yield of the equity investment which it had made in the Revised Development Scheme, it was attempting to revive that claim.

(2) In deciding the collateral benefit issue in S&B's favour I rejected Barrowfen's argument that it did not have to give credit for the increased developer's profit because it was notional only and it intended to keep the Tooting Property as an investment: see the Final Judgment, [674] and [675]. Barrowfen was seeking to re-run that argument, so he said, by relying on Mr Powell's evidence to show that there was no notional developer's profit.

(3) Even if I had not finally decided the point, the claim to be entitled to set off the notional equity cost was so closely related to the point which I had decided that it would be a *Henderson v Henderson* abuse of process to permit Barrowfen to take it now.

45. Mr Dawid argued that the *Barrell* jurisdiction was not engaged because the final hearing of the Reserved Matters has not taken place and I have not reached a final decision on the collateral benefit issue. He relied on *Macleod v Mears* [2014] EWHC 3140 (QB) in which C was found to be entitled to claim a bonus from D, his former employer, although it was not an individual bonus (as he had claimed) but part of a pooled bonus. Although C had not pleaded the alternative entitlement, Hamblen J permitted him to amend. He held that the *Barrell* jurisdiction was not engaged for the following reasons (at [42] to [44]):

> "42. The present case is not one in which there is any need to invoke the *Barrell* jurisdiction. I have not made an order dismissing the claim. Indeed I have as yet made no judgment order. At the time of handing down judgment I adjourned all consideration of consequential matters. These included the issues referred to in paragraph 54 of the judgment, which I had expressly not sought in any way to resolve or pre-judge. 43. The defendant's case, founded on *Stewart v Engel*, was that the court should not grant an amendment in a case such as the present unless there was a satisfactory reason for the claimant's failure to apply before this late stage and in this case there is no such reason. 44. In my judgment, for the reasons already given, the present case is distinguishable from *Stewart v Engel* and the court's discretion to grant permission to amend is not as circumscribed as it was in that case, where the *Barrell* jurisdiction was being invoked. I would also add that in my judgment the powerful dissenting judgment of Clarke LJ provides good reason for not extending the ambit of the majority decision in Stewart v Engel further than is necessary."

46. I accept Mr Dawid's submission on this issue too. As in *Macleod v Mears*, there is no need to invoke the *Barrell* jurisdiction in the present case. I have found that the Reserved Matters extend to the cost of equity funding on issue (2) and I have adjourned those

matters for final determination in May 2022. Moreover, it is clear from *Macleod* that the question of whether the *Barrell* jurisdiction is engaged does not depend on the current state of the pleadings. In that case, Mr Macleod had not pleaded a claim to a share of the pooled bonus but Hamblen J granted him permission to amend on the usual principles governing late applications.

47. I am fortified in this conclusion by the fact that there was no reasonable basis for S&B to object to Barrowfen's application for permission to plead the additional costs of providing the guarantee from Atlip House and the standby letter of credit (and Mr Stewart wisely chose not to press this point). But if the *Barrell* jurisdiction had been engaged and Barrowfen had been bound by its pleaded case, then it would not have been possible to Re-Amend or to plead these costs.

48. It is unnecessary, therefore, for me to deal with Mr Stewart's detailed submissions about the overlap (if any) between the issues which I have already decided and the issue which Barrowfen now seeks to raise. But because these points were fully argued, I do so briefly:

    (1) On 3 November 2020 Barrowfen withdrew its claim for the lost profits of the development and I have found that the Revised Development Scheme was more profitable than the Amended Original Scheme. But there was no dispute between the parties that the Revised Development Scheme involved increased costs of approximately £10m. In my judgment, there is no inconsistency between Barrowfen's case or the finding which I made and the argument which it now advances that the increased profit (as found) involved additional costs of both debt and equity and that the court should take them both into account in fixing the final profit figure.

    (2) I rejected Barrowfen's argument on the issue of principle and held that it had to give credit for the increased developer's profit on the Revised Development Scheme even though S&B did not challenge Prashant's evidence that Barrowfen intended to keep the Tooting Property as an investment rather than sell it immediately. Again, in my judgment there is no inconsistency between that finding and the argument that the court should set off the notional cost of the equity required to fund the project (as calculated by Mr Powell) against the notional developer's profit at the date of trial or judgment.

(3) Finally, in my judgment it is no abuse of process to permit Barrowfen to take this point now. If Barrowfen had asked for permission to amend to plead the future cost of equity as well as the future cost of debt on 22 March 2021, I am satisfied that I would have granted permission as the price of allowing S&B to take the collateral benefit point. Moreover, if Withers or Ms Hilliard had expressly reserved Barrowfen's position in relation to further amendments either in the letter dated 21 March 2021 or during the hearing on 22 March 2022, Mr Stewart could have raised no objection either. Indeed, as Mr Dawid tactfully argued, the position which S&B has taken on this application calls into question whether I should have granted permission to S&B to amend to take the collateral benefit issue at all.

49. For these reasons, therefore, I am not satisfied that the *Barrell* jurisdiction is engaged or that I need to address the scope of the jurisdiction and the circumstances in which the Court may permit an amendment after judgment but before a final order is made. I am not satisfied that it is engaged both because I have not determined the Reserved Matters and because I am not satisfied that I have decided the point which Barrowfen now seeks to raise or that it would be an abuse of process to permit it to do so. By way of postscript, I add that the majority position in *Stewart v Engel* is no longer the last word on the scope of the jurisdiction and if I had considered the jurisdiction to be engaged, it might well have been necessary to hear further argument.

(4) The Amendment

50. I turn, therefore, to consider Barrowfen's application to Re-Re-Amend the Reply. For the reasons which I have given, I have to determine this application on the normal principles applicable to late amendments. Mr Stewart and Mr Folkard relied on the decision Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]. Mr Dawid did not challenge any of those principles and I therefore set them out and apply them:

> "Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

(a) The Balance

51. In my judgment, the balance between the injustice to Barrowfen if the amendment is refused and the injustice to S&B if the amendment is allowed favours the grant of permission. It is only necessary for Barrowfen to apply for permission to amend because I allowed the late amendment by S&B to plead the collateral benefit issue during the course of the trial and because it did not have a full opportunity to consider and take advice on what evidence to adduce before closing submissions.

52. S&B argue that if I permit Barrowfen to Re-Re-Amend the Reply and adduce the Disputed Paragraphs, it will be necessary for S&B to instruct an expert in a different discipline and that Mr Clarke has now retired through ill-health. S&B also emphasises that it will be necessary for the new expert to carry out an entirely new analysis and check

the relevant inputs in Powell 1. I am not satisfied that the prejudice caused to S&B by the additional time and costs involved in dealing with the Disputed Paragraphs outweigh the prejudice to Barrowfen if I refuse to grant permission. S&B does not suggest that it cannot be ready to deal with the issue by the hearing in May or that it cannot be fully compensated in costs.

(b) The Strength of the Case

53. Mr Stewart submitted that Barrowfen had no real prospect of success on the amendments. I disagree. I am satisfied that Barrowfen has a real prospect of persuading the court to make allowance for the cost of equity funding for the following reasons:

(1) The question whether the court should make allowance for equity funding is closely related to the question whether it should make allowance for debt funding and although S&B disputes Barrowfen's entitlement to set off the future costs of the debt funding, it did not argue that Barrowfen case had no real prospect of success on that issue or that I should strike out paragraph 62A(c)(iii) (as currently pleaded).

(2) Both Mr Alford and Mr Clarke included the entire costs of funding (both debt and equity) in their development appraisals. Their approach supports the conclusion that any assessment of the profit on the development should include the costs of both debt and equity.

(3) Barrowfen's case is supported by both factual and expert evidence and Mr Stewart did not submit that it was either incredible or that I could reject it at this stage. Mr Dawid put his case very simply by saying that it was common sense that if Barrowfen had not put the £2,377,271 of additional equity into the Revised Development Scheme, it would have put that money into something else and, for that reason, allowance should be made for the opportunity to invest that sum elsewhere. In my judgment, it is not possible to reject that argument as having no real prospect of success at the amendment stage.

(c) The Hearing Date

54. There is no suggestion that the hearing date will be lost if I permit Barrowfen to Re-Re-Amend. It follows that the proposed amendments do not fall into the "very late" category which would disturb the legitimate expectation of the parties.

(d) Lateness

55. I deal with factors (d) to (g) together. I am satisfied that there is a good and sufficient explanation for the delay by Barrowfen in applying for permission to Re-Re-Amend and that the short period of delay for which it could be criticised does not justify the court in refusing permission. I say that for the following reasons:

(1) The collateral benefit issue did not arise until trial and it was not clear to the parties whether the future finance costs would be a live issue until after I had handed down the Judgment on 21 July 2021. Barrowfen cannot be criticised for any delay before that date or for a reasonable period of reflection thereafter.

(2) On 28 October 2021 Withers served Prashant 6 and Powell 1 in accordance with the Order (as extended by agreement by 7 days). I have found that this evidence fell within the Reserved Matters and the permission which I granted as reflected in paragraph 3. With the benefit of hindsight it might have been prudent for Withers to raise the scope of the pleaded issue proactively with RPC but I am not prepared to criticise or penalise Barrowfen for failing to do so before S&B took the pleading point or objected to the evidence. Withers could be forgiven for assuming that there was no dispute about the Reserved Matters because RPC agreed to the relevant provisions of the Order.

(3) On 10 December 2021 RPC took objection to the Disputed Paragraphs for the first time and after detailed correspondence RPC issued the application to exclude that evidence on 7 January 2021. I am satisfied that Barrowfen cannot be criticised for the six week delay between 28 October 2021 and 10 December 2021 or for a short period to explore the nature of the objections and whether S&B would maintain them.

(4) On 24 January 2021 Barrowfen issued the application for permission to amend. Again, with the benefit of hindsight it might have been prudent to issue the application earlier. But I am satisfied that S&B has suffered no prejudice as a consequence of any delay for which Barrowfen can be held culpable. After 10

December 2021 it became clear fairly soon that it was always going to be necessary for the court to rule on S&B's application to exclude the Disputed Paragraphs and the obvious time for the court to consider the amendment application was at the same time.

V. Disposal

56. For these reasons I dismiss S&B's application to exclude the Disputed Paragraphs and allow Barrowfen's application for permission to Re-Re-Amend the Reply and I will hear the parties on consequential directions and costs. I stress that I have done no more than decide that the Disputed Paragraphs fall within the Reserved Matters and that the proposed amendments have a real prospect of success.