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Case No: HQ08X04967

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14/02/2011

Before:

THE HONOURABLE MR. JUSTICE SPENCER

- -

Between:

XYZ	**Claimant**
- and -	
PORTSMOUTH HOSPITALS NHS TRUST	**Defendant**

- -

- -

Ms. E.A. Gumbel QC and Mr. H.J.Witcomb (instructed by Field Fisher Waterhouse) for the **Claimant**

Ms. M. Bowron QC (instructed by Beachcroft LLP) for the Defendant

Hearing dates: 1st, 2nd, 3rd, 4th, 8th, 9th and 10th November 2010

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THE HONOURABLE MR. JUSTICE SPENCER:

1. In this tragic case of clinical negligence I have to decide the outstanding issues of quantum. Liability has been admitted. Although the heads of damage in dispute are few, the sums are potentially enormous. The principal issues relate to the claim for loss of future earnings. They involve an assessment of the claimant's prospects of setting up and developing a highly profitable business and, upon retirement, selling that business. There is also an issue as to future medical expenses.

2. At the start of the hearing I acceded to an application pursuant to CPR 39.2(4) that the identity of the claimant should not be disclosed in any reporting of the case in order to protect his rights and those of his family under Article 8 ECHR, balancing those rights against the rights of the press under Article 10 ECHR. It has therefore been necessary to anonymise many of the facts of the case which might disclose the claimant's identity, but not (I trust) in such a way as to frustrate the proper reporting of the case. To the various witnesses, companies and businesses referred to in the judgment, coded letters have been assigned in order to preserve the claimant's anonymity. The court is particularly grateful to Mr Witcomb, junior counsel for the claimant, for his assistance and ingenuity in this task.

The background

3. The claimant was born in 1971, and is now aged 39. His father had for several years been undergoing kidney dialysis treatment and was suffering from renal failure. The claimant was anxious to give his father the opportunity of a better quality of life in his well earned retirement by donating his own right kidney, thus sparing his father further dialysis treatment. The operation was performed on 26th February 2008. The defendant admits that the operation was performed negligently, and to a degree recklessly. I was told that there are proceedings before the General Medical Council against the surgeon in question.

4. The consequences of the defendant's negligence have been catastrophic for the claimant and his family: physically, psychologically, emotionally and financially. Although the claimant's right kidney was successfully removed and transplanted, the claimant suffered irreversible failure of the left kidney. In fact he should never have been advised to undergo the operation at all given the grave dangers involved. That negligent advice was compounded by serial mistakes during the operation itself. The claimant's life was saved only after many hours on the operating table during which he received over 100 units of blood and fluid transfusions.

5. During the course of the operation the claimant suffered further complications which have had far reaching consequences: a minor myocardial infarction; ischaemic damage to the bundle of nerves known as the lumbo-sacral plexus, which supply the right leg and foot; a thrombosis of the inferior vena cava.

6. The claimant was left in total renal failure. He was in hospital for nearly two months, during which he started to receive haemodialysis. He developed a serious drug induced confusional disorder. There were further re-admissions to hospital in March and April 2008, following which he received dialysis treatment three times a week as an outpatient for a year. This treatment affected him profoundly. He became severely depressed, frequently contemplating suicide. He contracted serious infections, one of which necessitated a further admission to hospital for four days in October 2008.

7. The claimant's own act of altruism and family devotion in donating a kidney to his father, which cost him so dear, was reciprocated by the claimant's sister. With the same outstanding altruism and family devotion she in turn donated a kidney to the claimant, at very considerable psychological and emotional cost. That operation, performed on 27th March 2009, was successful. It released the claimant from an indefinite regime of dialysis. However, he lives with the constant fear that his body will reject the kidney and it is common ground that when he reaches his early sixties that kidney will require replacement. This uncertainty, and his experiences generally, have left him with an understandable obsession about his health.

8. Unfortunately a recurrent infection was imported with his sister's kidney, cytomegalovirus viraemia (CMV). This is a constant source of worry. So is his blood creatinine level which, if raised, can be a sign of kidney rejection.

9. The renal failure the claimant suffered increases significantly the risk that he will suffer from ischaemic heart disease and a stroke. Consequently he adopts a very careful lifestyle and diet. He has had high blood pressure and high cholesterol levels which cause him constant worry. The immuno-suppressant drugs he takes, in particular to control the CMV, greatly increase the risk of his developing other debilitating and life threatening conditions. The consequence is that he has become fastidious to the point of obsessional about personal and general hygiene, which impacts upon the whole family. He can be irritable and overbearing. He is prone to bouts of weeping.

10. There are further serious physical consequences. The nerve damage suffered during the negligent operation has resulted in altered sensation below the right knee. There is hyper-sensitivity, pain and loss of sensation in various parts of the right foot, and clawing of the first and second toes. He has had surgery on the first toe. Further surgery had been planned to straighten and fuse the toes but this drastic measure may be avoided by regular injection of botulinum toxin for life. The issue surrounding this problem with his foot has a bearing on his residual earning capacity. Currently he is unable to run, and walking on uneven ground and stairs presents some difficulty.

11. The claimant has also been much distressed by urinary difficulties. For a time self-catheterisation was attempted. He found it a dreadful experience. Urinary frequency bedevils his daily life, and results in broken nights for him and for his wife.

12. The medication he takes has had unpleasant side-effects including the profuse growth of unwanted body hair, the development of skin acneiform lesions and the deposit of facial and abdominal fat. His inability to exercise has also led to undesirable weight gain. Prior to the operation, the claimant was a healthy, fit and active 35 year old man. He took great pride in his health and fitness, running several kilometres each morning to set himself up for the working day. He had enormous energy. He was cheerful, optimistic and extrovert.

13. Now the picture is very different. At the age of 39 his daily life revolves around his health worries. He is constantly fearful of infection or changes which may increase the risk of the kidney being rejected. Any venturing from the strictly enforced hygiene of the home is fraught with anxiety. He lives with the certain knowledge that the kidney will require replacement by the time he reaches the age of 61 and that this will be preceded by symptoms of progressive renal failure. It is agreed that his life expectancy has been reduced by 10 years.

14. It is evident from him wife's evidence, which I unhesitatingly accept, that the claimant is a shadow of his former self. He is lacking in energy. He is exhausted by 9 pm and generally has to be in bed by 10 pm. He is moody and irritable. Their marriage, though very strong, is constantly under strain. The children have been affected and distressed by their father's condition and behaviour and he has bridges to build there.

The agreed heads of loss

15. Damages are agreed for the following heads of loss. The figures include, where applicable, interest to the date of trial.

16. General damages for pain, suffering and loss of amenity are agreed at **£168,000**.

17. Damages for past losses are agreed at **£287,500**. This global figure includes loss of earnings to the date of trial, and a sum in respect of adaptation work at the claimant's home to convert the garage into office accommodation with ensuite lavatory.

18. Damages for certain heads of future loss are agreed at **£432,500**. This global sum includes £190,000 for future care. It does not include any sum for future medical expenses as to which there is an issue to which I shall return shortly.

19. It follows that agreed damages amount to **£888,000**. Miss Gumbel QC on behalf of the claimant submits that this in itself is an indication of the severity of the consequences of the catastrophe the claimant suffered, which should be borne firmly in mind when considering the claim for future medical expenses on a privately paying basis, and when considering the allowance to be made for residual earning capacity in assessing loss of future earnings.

20. It has also been agreed that the uncertainties surrounding the claimant's future medical condition are such that an order for provisional damages is appropriate, in the terms of the agreed draft. The draft order recites that payment of damages for the agreed heads of loss (totalling £432,500), and payment of the damages I assess for the remaining heads of future loss, is made on the assumption that:

> "(a) The replacement kidney the claimant acquired in March 2009 will not fail before his 61st birthday [that is will not fail before May 2032] and he will not be advised by his treating consultant nephrologist that he requires kidney transplantation before that birthday.
>
> (b) On each occasion when the claimant is advised by his treating consultant nephrologist that he should undergo kidney transplantation that such transplantation is then carried out before the need for the claimant to undergo any period of dialysis or renal replacement therapy.
>
> (c) The claimant will not undergo dialysis or renal replacement therapy of any kind during his lifetime.
>
> (d) The claimant will not develop during the course of his lifetime any of the diseases and/or conditions identified in paragraph 4 below."

21. The diseases and conditions referred to are that:

a) The replacement kidney the claimant acquired in March 2009 fails before his 61st birthday such that he is advised by his treating consultant nephrologist that he requires kidney transplantation surgery before that birthday.

b) The claimant is advised by his treating consultant nephrologist that he requires dialysis or renal replacement therapy of any kind during his lifetime.

c) The claimant during his lifetime suffers from one or more of the following conditions:

i) a thrombotic stroke; and/or

ii) a myocardial infarction; and/or

iii) peripheral vascular disease resulting in occlusion of an artery or arteries causing infarction and tissue and consequent limb ischemia; and/or

iv) renal bone disease and/or osteoporosis resulting in a vascular necrosis of the shoulder and/or hip and/or knee joints; and/or a fracture of a vertebra or vertebrae causing spinal cord compression; and/or

v) diabetes causing either blindness in one or both eyes and/or partial or complete amputation of one or both of his lower limbs including amputation of the part of the foot; and/or

vi) serious systemic infection; and/or

vii) malignancy of the kidney and/or bladder and/or skin and/or stomach and/or large bowel and/or breast and/or lymphoma and/or Kaposi's sarcoma.

d) Within six months of any further transplant operation or operations the claimant suffers from psychosis.

22. The draft order provides that if the claimant at a future date develops any of the diseases or conditions referred to in the last paragraph, he is entitled to apply for further damages on a full liability basis without limit of time. The draft order also provides that if the claimant develops psychosis within six months of any further transplant operation or operations he is entitled to apply for further damages on a full liability basis.

Waiting time for a replacement kidney

23. One of the assumptions in the agreed draft order for provisional damages is that the further kidney transplant he undergoes in his early sixties will not be preceded by any period of dialysis or renal replacement therapy. In other words, the draft order envisages that he will not have to wait for any significant period of time for a kidney to become available. The risk of such a delay, albeit in the distant future, is something that has preoccupied the claimant greatly and caused him much anxiety. He naturally feels aggrieved, as a kidney donor who has found himself the victim of this life threatening catastrophe, that he may have to wait for a period of months or years for a further replacement kidney when his present kidney begins to fail.

24. In the hope of resolving this understandable anxiety, and for the benefit of any other future organ donor who might find himself or herself in a similar predicament, the

claimant has left no stone unturned in seeking to obtain from the relevant authorities a binding assurance that he will be afforded top priority for the receipt of a donor kidney when the need arises. He first raised the matter with the Kidney Advisory Group of the NHS Blood and Transplant Organ Donation and Transplantation Directorate as long ago as 26th November 2008, whilst he was still on dialysis and awaiting the replacement kidney which his sister subsequently donated. The Kidney Advisory Group formally agreed, as a matter of principle, that where a case of end stage renal failure is attributable to the episode of care itself, then the patient should receive priority on the kidney transplant list. The Group subsequently confirmed that this principle extended to any subsequent renal transplants that might be required. The claimant nevertheless remained concerned about the enforceability of this assurance, however well intended it might be.

25. Shortly before the start of the trial, the claimant obtained a letter dated 1st November 2010 from the Associate Medical Director of Organ Donation and Transplantation in the United Kingdom, NHS Blood and Transplant (NHSBT). The letter stated that NHSBT has agreed that should the claimant require a kidney graft as a direct consequence of his donation, he will receive priority in the allocation process and will also be prioritised to receive a low-risk graft. The letter made clear that NHSBT could not bind any successor, but expressed the hope that the same principle would be followed by any successor.

26. Understandably again, the claimant was disappointed that no categoric assurance was being given by the Secretary of State for Health. At that stage, agreement had not been reached as to how this issue might be dealt with in the draft order for provisional damages and its resolution was potentially important to the assessment of quantum generally. The claimant and his advisers still nursed the hope that the Secretary of State for Health, when fully seized of the matter, might be willing to give a formal undertaking in terms satisfactory to the claimant. To this end, in the early stages of the trial the claimant issued an application to join the Secretary of State for Health as a party to the action, pursuant to CPR Part 19, to assist the court in resolving all the matters in dispute in these proceedings.

27. At the close of the evidence that application came before me for determination, and I had the advantage of written and oral submissions from Mr. Buley, counsel instructed on behalf of the Secretary of State for Health. In short, although extremely sympathetic to the claimant's position, the Secretary of State was unable to give the undertaking sought, not least because it was impossible to determine in advance an issue which might arise as to priorities between deserving recipients of donor kidneys so far in the future. I should emphasise that the claimant has made it clear he would not expect or want priority over children. Mr. Buley also disputed the propriety of seeking to join the Secretary of State in circumstances such as these.

28. The claimant subsequently withdrew the application following receipt of a much fuller explanation of the stance of the NHSBT in a letter from their solicitors dated 8th November 2010. That letter confirmed:

> "NHSBT has indicated that it will give [the claimant] priority if he needs another transplant at some point in the future…..If [the claimant] reaches the stage where his consultant nephrologist considers that he requires a further kidney transplant, NHSBT would treat [the claimant's] circumstances as exceptional in the sense that they may require him to be given some additional priority beyond that which would otherwise be accorded to him".

The letter went on to emphasise that NHSBT cannot promise that the claimant would be put directly to the top of the waiting list when the time comes. Everything will depend upon the circumstances then, and the competing demands for donor kidneys. The claimant accepts that, realistically, this is as far as the Secretary of State or the NHSBT can go in meeting his concerns. It is to be hoped that, for the future, NHSBT will consider setting out in formal guidelines the approach they should adopt in cases such as this, so that anyone else finding himself or herself in the claimant's situation does not have to pursue the matter so long and hard to achieve the peace of mind to which, as far as humanly possible, he is entitled.

Underlying assumptions for quantum in the agreed medical evidence

29. I have summarised the medical history and prognosis in general terms, concentrating on the features which have a bearing on the outstanding issues of quantum. It is necessary, however, to set out the precise agreement reached between the medical experts, of various disciplines, because this forms the basis of some of the important factual assumptions crucial to the assessment of damages.

Consultant nephrologists

30. The consultant nephrologists, Dr. Peter Andrews and Dr. Martin Mansell helpfully agreed the following propositions a week or so before the trial:

a) The claimant's pre-accident condition

Prior to operation on 27th February 2008, the claimant's medical condition was reported as follows: general health extremely good; no relevant past medical history; excellent level of physical fitness; athlete participating in 20km races; active social life; successful, driven and dynamic at work.

b) The claimant's current complaints

These are agreed to be: fatigue and loss of drive and motivation; pain and dysaesthesia in his right leg and fixed flexion deformities in the first and

second toes of the right foot; elevated cholesterol levels; abnormality of the bladder; steroid related acneiform lesions; hirsuteness; CMV viraemia (up to February 2010 – medical records lacking thereafter); scarring to the right loin and right inguinal area; elevated blood pressure; mild obesity (BMI within normal range); obsessive fear of infection.

c) Kidney graft survival

The agreed best estimate is that the claimant may require a second transplant when he is aged 61. That second graft will survive for between 13 and 15 years. In view of the limitation on the claimant's life expectancy it is therefore unlikely that he will require a third graft.

d) Prognosis for current kidney graft and need for further dialysis

It is agreed that the deterioration of graft function is likely to be slow and progressive. There will be a period towards the end of current graft function when the claimant may develop problems of tiredness, anaemia and renal bone disease. These may occur during the last 2-5 years of graft function. A median estimate of 3.5 years before graft failure is reasonable. The doctors do not agree on all the symptoms of graft dysfunction or their severity but this is not so important as to be material. Nor do they agree on the extent to which the claimant's ability to work and carry out the activities of daily life will be impaired in the final period of graft function. Dr. Mansell believes this will be the case for the full 3.5 years. Dr. Andrews believes it will only apply in the final year.

e) Life expectancy

It is agreed that the claimant's life expectancy is likely to be reduced by 10 years from normal as a result of complications arising from the surgery in February 2008.

f) Employment

The consultants agree that the claimant's claim is medically unusual because he suffers from a combination of urinary dysfunction, neuropathy, anxiety and depression, and fears about his present condition and his future condition. They also agree that in comparison with the claimant's pre-morbid state: he has less energy and tires easily; his future is less certain; he is understandably unable to commit to building a new business; he experiences pain in his right lower limb; he has fears about being exposed to infection (although they disagree about the appropriateness of those fears).

31. The doctors do not agree on whether it is reasonable for the claimant to await the outcome of his foot surgery or treatment before considering a return to work. Nor do they agree on the nature and intensity of the work for which the claimant will be fit. Dr Mansell believes that any work in future is likely to be part-time and intermittent. Dr. Andrews accepts that the claimant will not be able to return to the same intensity of work. Part time work may be an option, or reduced intensity full-time work. The doctors agree that once he develops clinically significant symptoms as the date for a further transplant approaches, it is unlikely the claimant will be able to work. Dr Mansell believes this will be the position for the final 3 ½ years of graft function, i.e. from age 57 ½. Dr. Andrews thinks it will apply only from age 60, consistent with their earlier disagreement.

Consultant psychiatrists

32. The consultant psychiatrists, Dr. Paul Dedman and Dr. John Bradley, also helpfully met and reached agreement on a number of issues shortly before the trial. The relevant matters of agreement are as follows:

a) Claimant's pre-accident condition

They agree that this was reported to be: general health extremely good with happy childhood; no relevant past medical history from a psychiatric perspective; excellent level of physical fitness with good body image; athlete participating in 20 km races; active social life (good and wide circle of friends outside and inside work); successful driven and dynamic at work; enjoyed presenting and was extremely confident; positive outgoing personality deriving self-esteem from his success at work; enjoyed family and business travel.

b) Psychological symptoms following initial surgery

It is agreed that the claimant became obsessive/anxious about: the nature and availability of kidney transplants; the shortcomings in the regulatory and approval process for kidney transplantation particularly in relation to his own case; the availability of a kidney for himself when the present graft fails; the risk of infection whilst on immuno-suppressant drugs; the risk of losing his kidney as a result of infection and/or rejection; prospect of physical decline associated with renal failure and dialysis; shortened life expectancy. They also agree that his obsession with the risk of infection resulted in him expecting very high standards of cleanliness at home (and in public places). It is unnecessary to recite in full their agreement as to similar symptoms at later stages pre-trial. Suffice it to say that recurring themes have been exhaustion and mood swings, worries about re-infection, over-cautiousness, avoidance of

situations where there is risk, sleep disturbance by the need to pass urine up to 4 times per night; tearfulness, tiredness and loss of energy, moodiness and irritability.

c) Diagnosis

The psychiatrists agree that the claimant's symptoms represent an adjustment disorder with features of both anxiety and depression. They agree that the prognosis in relation to his renal condition has affected his psychological state.

d) Future prognosis

The psychiatrists agree that there is a risk of the following: a continued lack of confidence; continued worry about his health; continued lack of energy and motivation; continued lack of ability to travel which is inhibited by fears of infection. They agree that he remains vulnerable to anxiety and depression. They agree that the claimant's career and employment prospects are, and will continue to be, significantly (rather than 'sufficiently', which is an error in paragraph 7.3 of the joint statement) limited by his physical and psychological difficulties. They agree that there is a risk of future anxiety and depression which they are not prepared to express in percentage terms but is of a high degree.

Claim for future medical expenses

33. The first and most straight forward outstanding issue of quantum I have to decide is whether the claimant should recover the costs of private medical treatment and medication in relation to the monitoring of his kidney and eventual transplant surgery. The defendant has agreed that the claimant should recover the cost of private treatment for urology, neurology and psychology, in the total sum of £50,609. The cost of the disputed private treatment for nephrology is agreed on the figures: for monitoring, £42,678; for medication, £90,225; for surgery, £34,854. Total £167,757. The defendant's case is that this treatment and medication is readily available on the National Health Service.

34. There is no dispute about the legal principles which apply in resolving this issue. The starting point is Section 2(4) of the Law Reform (Personal Injuries) Act 1948 (as amended) which provides:

> "In an action for damages for personal injury…there shall be disregarded in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 2006…".

The authorities make it quite clear that the sole issue is whether the claimant has established that he will in fact use private medicine rather than the National Health Service. In Woodrup –v- Nichol [1991] PIQR 104, Russell LJ said at page Q114:

> "For my part I have no doubt whatever that if, on the balance of probabilities a plaintiff is going to use private medicine in the future as a matter of choice, the defendant cannot contend that the claim should be disallowed because National Health Service facilities are available. On the other hand, if, on the balance of probabilities, private facilities are not going to be used for whatever reason, the plaintiff is not entitled to claim for an expense which he is not going to incur."

35. Having heard the claimant's powerful evidence on this issue, I am entirely satisfied, indeed sure, that he will use private medical facilities and purchase private medication and that the sums claimed are therefore recoverable. Strictly speaking it is not necessary for the claimant to establish that it is reasonable for him to pay privately rather than using the National Health Service, but he has advanced convincing reasons to justify his choice.

36. First and foremost, against the background of such a catastrophic experience with the National Health Service for the initial transplant operation, it is entirely understandable and unsurprising that, as he sees it, the claimant does not want to risk a repetition of such an experience. For his own peace of mind he wishes to have the reassurance of private treatment at all stages of his future medical care.

37. Secondly, he wishes to be able to choose the consultant who will advise him at all stages, and to be able to choose the surgeon who will perform the further kidney transplant surgery which will eventually be necessary. Only private treatment can guarantee this. He wishes to have the best possible advice consistently from a consultant and medical team with whom he can build up a relationship of trust, rather than seeing different doctors of varying seniority as he does at present under the National Health Service.

38. Thirdly, from an important practical point of view, private treatment will avoid the frustration and strain of fitting in appointments under the National Health Service around the convenience of the medical staff. Private treatment will ensure that the claimant's convenience comes first, and will avoid the experiences he has suffered of waiting at hospital in the company of other patients who are distressingly ill with serious kidney conditions like his.

39. Fourthly, his regime of medication is, and will always be, so complex that it is extremely difficult to manage it under the constraints of the National Health Service. He explained that at present the hospital is supposed to liaise with his general practitioner who actually prescribes the drugs, but this has not worked in practice. He finds himself going between the hospital, his general practitioner and the pharmacist.

Often the drugs are not there for him when he goes to collect them. Sometimes they are the wrong drugs. He finds that if his four-weekly repeat prescription is running out he becomes very anxious in case he cannot renew it in time. By contrast, if he received all his medication as part of his private treatment, these problems and worries would disappear. The consultant he sees could prescribe, and if necessary, alter his medication directly. Most significantly of all, the claimant's own general practitioner has suggested it would be a better way of managing his medication.

40. Fifthly and finally, with his own personal experience of the pharmaceutical industry, the claimant is acutely aware that medication is constantly developing. He wishes to take advantage of any such benefits for his own treatment that such drug developments may bring, and to have the opportunity of such medication as soon as it comes onto the market. He gave as an example pioneering treatment of which he is aware in Massachusetts and Boston, which avoids immuno-suppressant medication and its side effects. There would be no guarantee that new medication would be immediately available under the National Health Service.

41. I therefore have no hesitation in finding that the claimant is entitled, by way of damages for future medical expenses, to the agreed sums for monitoring **(£42,678**), for medication **(£90,225**) and for surgery **(£34,854**), totalling **£167,757.**

Loss of future earnings

42. I turn next to the far more substantial and complex issue of loss of future earnings. The claimant's case is that when he suffered his injuries he was on the threshold of a new stage in his career in the highly specialised area of market research in the pharmaceutical industry. For some 13 years he had worked in the industry and had reached the top of his profession in the employed sector. For at least two years he had been actively planning to set up his own agency, as other former colleagues had done, for which the financial rewards would have been far greater.

43. The claimant's case is that, but for the defendant's negligence, he would have started up in that new business in September 2008. After 2 years, the turnover would have been £2 million. After 5 years the turnover would have been £5 million. After 10 years the turnover would have been £10 million. He would have continued running the agency until retirement, at which point he would have sold the business for a very substantial sum.

44. The new business venture had been planned for 2 years or so before the fateful operation in February 2008. The claimant had resigned from his very senior post with one of the leading pharmaceutical companies, Pharmaceutical Company One, at the end of 2007. The intention was that the claimant would, in effect, have a nine month sabbatical between January and September 2008. Following the donation of

his kidney to his father he would have a period of recuperation before putting the finishing touches to his preparations for starting business as Tri Ltd in September 2008.

45. The preparations he and his wife had already made included selling the family home in County One and moving to a new home in County Two, close to where the claimant's wife's parents lived, so that they would provide additional support for the claimant and his wife and their two young children once the new business got under way. This was timed to coincide with the elder child starting school in September 2008. The new business would inevitably mean very long hours for the claimant, weekend working, and a great deal of travel within the United Kingdom and abroad. His wife, who had a successful career in the property industry, planned to devote herself to the family once the new business took off, to provide the necessary support for the claimant in the exciting new venture which, they believed, would make their fortune.

46. The defendant's case is that although the claimant undoubtedly intended to start and develop his new business, the whole enterprise was fraught with uncertainty. Even if the business had commenced, it cannot confidently be asserted that it would have succeeded as quickly as claimed, or to the levels of turnover claimed. The defendant's case is that damages for loss of future earnings should be based not upon the model of the new company and its possible success, but on notional earnings either in the employed sector or as a consultant, at a far more realistic and predictable level.

47. It follows that the fundamental questions I have to decide are whether the claimant's proposed new business would have started at all and, if so, how successful it would have become, and how quickly.

48. The evidence placed before me on behalf of the claimant, in addition to that of the claimant and his wife, comes principally from a large number of former work colleagues of the claimant throughout his career. They attest to his professional standing and capability, his management qualities, and his ability to make a success of the new business venture he was planning. This evidence includes witnesses who have themselves set up in similar businesses, whose financial performance provides some useful comparison in the task I have to perform. A particularly important witness called on behalf of the claimant was OA. He developed a highly successful market research agency called Agency Two, in which the claimant worked for several years.

49. OA is, it is contended, exceptionally well placed to provide the court with a reliable objective assessment of the claimant's prospects of success in establishing and developing the proposed business. It is OA's assessments of the progress of the business which form the foundation for the claimant's case. It is his assessment that the claimant would have achieved a turnover of £2 million after 2 years, £5 million after 5 years and £10 million after 10 years. To each of these stages of development

OA attributes a percentage chance. In particular, he assesses the chance of reaching a turnover of £5 million in 5 years at 50%, and the chance of reaching a turnover of £10 million in 10 years at 20%.

50. Of the large number of witnesses relied upon by the claimant, only a handful have been required by the defendant for cross-examination. The claimant and his wife gave oral evidence. So did the proprietors of three comparator businesses, a recruitment consultant, and OA. None of these witnesses was seriously challenged in cross-examination.

51. The claimant also called a forensic accountant, Mr. Segal, who had examined the other witness evidence and financial accounts of the comparator witnesses with a view to presenting an analysis of the prospects of the new business and its likely profitability.

52. On behalf of the defendant the only witness relied upon was another forensic accountant, Mr. Barnes, who carried out a thorough critique of Mr. Segal's approach and presented an alternative model for loss of earnings as an employee or as a consultant. They helpfully provided, in a joint statement, agreed calculations on given hypotheses and both gave evidence before me and were extensively cross-examined. Because of the variety of permutations on the figures in this case, depending upon my conclusions on the central issues, Miss Gumbel QC (on behalf of the claimant) and Miss Bowron QC (on behalf of the defendant) do not invite me to produce, as part of this judgment, a set of final figures for the heads of damage in dispute, ie loss of future earnings and (if appropriate) loss of capital value of the new business upon eventual sale. Instead, they invite me to give my conclusions on a set of specific issues which have been formulated, and to which I shall return in detail later. So, for example, in relation to the proposed business the following issues arise:

1) What was the chance that the claimant would have launched Tri Ltd in the autumn of 2008?

2) If not, what would he have done instead and what would he have earned?

3) Assuming Tri Ltd had been launched in September 2008, what was the chance that it would have achieved a turnover of £2 million per annum, and, if so, by what date.

4) What was the chance that the business would have achieved a turnover of £5 million per annum and £10 million pounds per annum respectively, and if so, in each case, by what date.

5) Would the claimant, at a relevant stage, have had an equity partner? If so, what percentage would that partner have had in the business?

6) What would the net profit margin of the business have been at the relevant times?

7) Should there be any further discount for uncertainties and contingencies not already taken into account?

8) What is the chance that the claimant would have chosen to work after selling the business on retirement, and if so, for how long would he have worked and what is the appropriate multiplicand?

53. I am invited to make findings on an equivalent list of issues in relation to the eventual sale of the business, and its value on sale, which similarly involves the assessment of the chance of events happening (if at all) far into the future.

The relevant principles of law

54. It is common ground that in a case such as this, where there cannot be certainty as to the way in which the claimant's business would have developed, the court can properly assess damages by evaluating the chance that particular events would have happened at particular times. A valuable reminder of the underlying principles is the decision of the House of Lords in *Davies -v- Taylor* [1974] AC 207, where Lord Reid said (at page 212D):

> "To my mind the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than 'substantial', on the one hand, or 'speculative' on the other. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on the consideration of all the facts in proper perspective".

55. Thus it is axiomatic that even where the chance of a certain event is well below 50%, it can still provide the basis for a claim in damages for that lost chance. As it was pithily put by Mr Roger Bell QC (now Bell J) in *Anderson -v- Davis* [1992] PIQR Q91, at Q98:

> "Where the question for the judge is one of past facts, then mere balance of probability wins the day. Where the question is one of what might have been the situation in a hypothetical state of facts, then, to the extent that a chance of the event necessary to an award of damages falls significantly below 100%, the award should be discounted …".

56. It is also common ground that helpful guidance for the present case was given by the Court of Appeal in *Langford v Hebran* [2001] PIQR Q13, a case which involved the

assessment of multiple chances affecting the claimant's career opportunities. Prior to the accident the claimant had enjoyed a successful career as an amateur kick-boxer. He had turned professional, but had won only one professional fight before the accident. He contended that his professional career would have developed through four alternative scenarios, based upon escalating success in the ring. The first assumed he would win at least one national or European title. The second assumed he would win American state titles. The third assumed he would be world champion for a year. The fourth assumed he would be world champion for 2 years and remain in America working as an instructor. The Court of Appeal upheld the judge's approach of valuing the chance in each of these four scenarios in percentage terms, and calculating the differential earnings accordingly. Revising the judge's assessments for reasons of logic and mathematics, the Court of Appeal concluded that the respective chances of the four scenarios were 80%, 66%, 40% and 20%. The Court rejected the submission that such an approach was appropriate only where the judge had to consider a single lost opportunity.

57. However, in ***Langford -v- Hebran*** the Court of Appeal also held that the whole claim for future loss of earnings should be discounted to reflect the many contingencies attendant on each scenario and the fact that none of them might have occurred. At paragraph 33, Ward LJ said:

> "Starting as we do with the fact that the basic claim itself contained a number of assumptions in favour of the claimant, we do not think it was right to add to that claim the claim for loss of opportunity on the basis that one or more of the alternative scenarios would actually have happened. Some discount was necessary at this stage of the assessment to reflect the fact that none of them might have happened. What this discount should be is a matter of judgment rather than mathematics. In our view, this discount should be applied to the future loss of earnings only. We must not overlook the fact that we have already discounted the loss significantly and, in assessing the chance of his achieving the high earnings postulated for scenario four we have already taken into account all the uncertainties about the claimant remaining in the United States. On the other hand one must do justice to the very impressive evidence which the judge heard and accepted about the claimant's prospects as a fighter. This is, therefore, very much a matter of feel and, doing our best we have agreed that it would be right in all the circumstances to reduce the damages for future loss of earnings by a further 20%".

58. I have also been assisted by the approach of Swift J to the assessment of career chances for a claimant who was an aspiring Premiership footballer in ***Collett -v- Smith*** [2008] EWHC 1962, upheld by the Court of Appeal [2009] EWCA Civ. 583. In that case the judge was satisfied that the claimant was assured of a career at Championship level. She had to assess his prospects of playing in the Premiership. She concluded that he had a 60% chance of playing in the Premiership for one third of his playing career, and assessed loss of future earnings accordingly. However, to the loss of earnings at both Championship and Premiership level the judge applied a discount to reflect the risk of injury and other contingencies over the whole of his playing career.

In doing so she bore in mind the possibility that he might have had an even more successful career than that on which she based her findings. Balancing the various relevant factors, she applied a discount of 15% to the award of future loss of earnings.

59. The Court of Appeal in *Collett -v- Smith* upheld the trial judge's approach, saying of the 15% discount:

> "... The judge has put into the balance the possibility that the respondent might have done better than she had predicted. She was entitled to take that view ... The arithmetic is such that a small possibility of a longer period in the Premiership would have quite a marked effect on the lost earnings. The respondent's Premiership earnings would have been about four times his earnings in the Championship. So a 1% increase in his chances of playing in the Premiership would counterbalance a 4% chance of his not achieving a career in the Championship League. Once that is appreciated ... it is clear that the 15% overall reduction is entirely reasonable ...".

60. It should also be noted that in *Collett -v- Smith* the trial judge rejected the claim for the chance of becoming a football manager or coach after retirement as a player. Although it would have been a possibility, the judge regarded it as too speculative to form a basis for an award of damages.

61. A very recent further example of an assessment of "multiple chances" in a loss of earnings claim is the decision of Owen J in *Clarke -v- Maltby* [2010] EWHC 1201 (QB). In that case the claimant was a solicitor, and the issue was the extent to which her career would have progressed through promotions to the attaining of a partnership. The judge accepted the evidence on behalf of the claimant that there was an 85% chance she would have achieved a partnership in a medium sized city or central law firm, and a 30% chance of joining a large/medium sized city or central law firm as a partner. The judge did not apply any further overall discount for contingencies (as in *Langford -v- Hebran* and *Smith -v- Collett*). However, he reflected contingencies such as "the fluctuation in partnership share of profits due to fluctuations in the market for legal services" by choosing, from within the salary range for each of the two scenarios, a salary at the lower end of the bracket in each case.

62. One important principle emerging from the authorities to which I have been referred is the need to identify a baseline level of earnings, to which there is then applied the differential earnings based on the percentage chance of the relevant scenario or scenarios occurring. Thus in *Collett v Smith*, the baseline earnings were the claimant's earnings in the Championship League. In *Langford -v- Hebran* the baseline earnings were his earnings (for 26 weeks a year) as a bricklayer and his earnings from five professional fights each year. In *Clarke -v- Maltby* the baseline was the earnings which the claimant would have achieved (and had by the date of trial achieved) as a fixed share equity partner in a regional law firm.

63. Two other authorities which touch upon "discounting" for uncertainties should be noted. In *Herring -v- Ministry of Defence* [2003] EWCA Civ. 528 the claimant's case was that, but for the accident, he would have joined the police force. The trial judge found that it was a virtual certainty he would have done so and attained the level of sergeant. There was no need, therefore, to adopt a "chances" approach. However, the judge reduced the multiplier by 25% for the normal contingencies of life. The Court of Appeal held, at paragraph 30, that:

> "... A figure of 25% is a gross departure from that appropriate simply in respect of future illness and unemployment. In order to justify a substantially higher discount by reason of additional future contingencies, there should in my view be tangible reasons relating to the personality or likely future circumstances of the claimant going beyond the purely speculative".

The Court of Appeal therefore adjusted the multiplier to a figure which represented a reduction of only approximately 10% rather than 25%. Potter LJ quoted, with approval, the observations of Windeyer J in the Australian case *Bresatz -v- Przibilla* (1962) 36 ALJR 212:

> "Moreover the generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: all 'vicissitudes' are not harmful. A particular claimant might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends on its own facts".

64. In *Dixon -v- Were* [2004] EWHC 2273 Gross J rejected a 'chances' approach as being too speculative on the facts. But in reviewing the relevant authorities he said, at paragraph 21:

> "As it seems to me, in the light of this guidance, the 'percentage chance approach' ... should not be adopted when considering the baseline claim ..."

To the extent that this was merely underlining the importance of establishing a baseline figure at 100%, it is common ground that his approach is correct. However, I do not regard that expression of the principle as precluding an overall discount for general uncertainties in a "chances" case. Indeed, as already explained, this was precisely the approach which Swift J adopted in *Collett -v- Smith*, upheld in the Court of Appeal. The baseline claim was his Championship League earnings, but the 15% discount was applied both to the baseline claim and the differential claim for Premiership earnings.

65. *Dixon -v- Were* also provides a valuable example of a "chances" case rejected on the facts as entirely speculative. The claimant was still a student at university. He

claimed that, but for the accident, he would have had a successful career as an accountant. Beyond the baseline claim for loss of future earnings (which the judge accepted) he also advanced a "chances" claim for very high earnings. The judge rejected this claim as "entirely speculative". The achieving of such high earnings would depend upon a combination of ability, application and luck. There was nothing in the claimant's academic record to support the suggestion of a real chance of very high earnings. He was not a "high-flyer". As to application, the weight of the evidence did not paint a picture of a young man driven to succeed. Indeed, part of his charm may well have flowed from the fact that he was not dedicated in such a fashion. All the judge was left with (at paragraph 34) was:

> "... A young man with a attractive personality working in the financial services sector where both high earnings and the risk of failure are distinct possibilities. As it seems to me, in these circumstances, the claimant's chance of very high earnings cannot properly be described as anything other than speculative. This conclusion is fatal to this head of claim".

For reasons which will become apparent, the picture of the claimant's potential in the present case, as it has emerged from the evidence, is very different.

66. I turn next to that evidence of the claimant's work history and the prospects for the successful development of his own business. It is important to bear in mind that this evidence was almost entirely unchallenged. It is, however, necessary to set it out in some detail in order to explain the findings which flow from it.

The claimant's career and work history

67. In 1993 the claimant began to study for a Bachelor of Science degree in applied sociology at the University of County One. In his second year he studied, on an international exchange scholarship, at the University of State One in the United States of America. This included a placement as a research assistant with a health and nutritional examination survey research company. He completed his university studies in 1993, graduating with honours and achieving a good 2:1 degree.

68. In January 1994 he joined a pharmaceutical market research agency, Agency One, on a graduate trainee programme. He remained there for two years. A senior manager, OO, spotted the claimant's potential early on. His skills of analysis and presenting to clients were extremely strong and he was very good at building relationships with clients. This is confirmed by one of those clients, OAR, an experienced market research analyst working for Pharmaceutical Company Two. He was struck by how confident and assured the claimant was as a presenter, for one so young. He was always well prepared, thorough and professional. He was also personable and charismatic. He liked the claimant's enthusiasm and fresh ideas.

69. In January 1996 the claimant was recruited by one of the leading pharmaceutical market research agencies, Agency Two. It proved to be a life changing experience. The owner and founder of Agency Two was OA, who gave evidence before me and was a most impressive witness. I shall return to his evidence in far more detail later, because of its crucial importance. OA started working in the pharmaceutical market research industry in 1973. He built up Agency Two into a highly successful international agency, with 400-500 employees. He sold the business in 2003 for around £24 million. OA was, it is clear on the evidence, an inspirational employer and manager. He would recruit bright young graduates, would give them plenty of responsibility if they showed promise, and he rewarded them well financially. Part of the importance of OA's evidence in this case is the way in which it enables the court to trace the progress of others who worked for him at Agency Two, whose potential he correctly gauged, and who have gone on to run successful agencies of their own.

70. OA describes the claimant as a very good researcher, deserving of the responsibility he gave him. He worked very hard and was an excellent manager and leader. Equally important in OA's book, the claimant was a very pleasant person to work with, a vital quality in building good client relationships. For two years the claimant worked for Agency Two on their international therapy monitor study for the treatment of cancer in Europe, and on the treatment of HIV worldwide. This work involved presenting the results of studies to pharmaceutical clients and training research analysts and product managers in the use of data bases, both in Europe and in the United States.

71. There is a wealth of unchallenged evidence from colleagues and clients at Agency Two which demonstrates the exceptional quality and potential of the claimant even at this comparatively early stage of his career. One of those colleagues who worked with him for several years at Agency Two was OE. She describes him as very driven, a hard worker with great determination and fantastically strong ideas. He commanded loyalty from his team of researchers - up to seven at one stage - and they were very committed to him.

72. Another colleague at Agency Two, five years senior to the claimant, who has gone on to own and manage a highly successful agency (Agency Three) is AS. They overlapped for a year or so at Agency Two. She describes him then as bright, charismatic, energetic, enthusiastic, competent and capable.

73. A colleague three or four years junior to the claimant at Agency Two, who was particularly well placed to comment upon the claimant's qualities, is NO. They both moved from Agency Two to Pharmaceutical Company Three, to work on the client side of the industry. Subsequently she worked as a consultant when he was employed at Pharmaceutical Company One, he commissioning research from her. Drawing on the range of her experience of him over the years she describes the claimant as a brilliant person to work with, and a person with particularly good people skills. His ability to manage people is what really sets him apart from others, in her view. He engendered a good team spirit. He led by example, welcoming and encouraging newcomers, and getting senior management on side for his team. He was a good salesman too, not a universal quality in market researchers.

74. One member of the claimant's team at Agency Two, NOO, worked for him for eighteen months after completing his training, and subsequently worked with him at Agency Two in a more senior role. He describes the claimant as the manager who stands out as a genuine role model for himself and others who worked around him. His defining characteristics were his boundless energy, his willingness to challenge the status quo to get things done, and the passion he had for his clients, colleagues and friends. He cites as an example of how hardworking the claimant was an episode when the claimant had promised to go to the theatre with his wife but also had a deadline to meet on a job at work. He did both. He returned to the office after the theatre, working through into the small hours so as not to let anyone down.

75. NOO describes the claimant as a natural leader, with the precious ability to get people to want to contribute and go the extra mile. NOO also gives as an example of the claimant's capability his reinvigoration of "Product One", a panel of general practitioners in the United Kingdom which helped to provide market data. This service had declined but the claimant revived it and increased its turnover, profit and scope, not least by introducing several new services which are still running ten years later. This ability to breathe new life into projects and institutions is mirrored in his work as chairman of his professional association, to which I shall return.

76. Another colleague at Agency Two, slightly senior but working alongside the claimant day by day as his manager, was AO. She describes him as an excellent person to work with, emphasising his reliability and consistency. He combined good personal skills with good strategic thinking, and consequently he excelled. Those working under him loved working for him because he was very fair and very driven. Importantly, she describes him as always ambitious, always planning ahead for his career.

77. In 1998 the claimant was, in effect, allowed a sabbatical by OA. The claimant's girlfriend, now his wife, had just been diagnosed with rheumatoid arthritis. They went around the world for a year. As OA explained in evidence, it is important to retain good staff and he therefore paid the claimant a small monthly sum and maintained his pension contributions during that year.

78. On his return the claimant completed a further two years with Agency Two. At that stage he was made Group Head of Healthcare Intelligence Systems, managing all the UK continuous healthcare audits including Product One already referred to. He turned his department into the most profitable department of Agency Two. He travelled extensively, both in the UK and internationally.

79. As group head, he had now reached the most senior level within Agency Two. It came as no surprise to OA that the claimant thought it was time to move on in order to develop his career more widely. At the age of 29 he was already earning a salary of £50,000. The claimant sought professional advice from a personnel and management consultant, LE. She interviewed him and was very impressed. Some of the detail in the summary of his career I have so far given of is taken from the notes she made of her

interview with him in February 2001. With his breathless delivery he gave her the impression of being a young man in a hurry, literally and metaphorically.

80. LE noted he had progressed extremely quickly in his career, and was clearly highly thought of by OA and rewarded accordingly. He referred in the interview to the esteem in which he held OA, and his admiration for OA's light touch management style. He was somewhat apprehensive that a new managing director for the UK had been appointed, IO, whose style might be rather more controlling and less to his taste. He preferred to be given a target and left to deliver it. He also told LE that he regularly worked a twelve hour day and felt he would like to improve the quality of his life. Miss Bowron, for the defendant, points to this as some possible indication of a desire on the claimant's part to reduce rather than increase the frenetic pace of his working life. I do not see it in that way.

81. The job LE found for the claimant was on the client side of the pharmaceutical industry, with one of the biggest players, Pharmaceutical Company Three. He remained there for three years. His curriculum vitae lists the range and breadth of the activity he undertook at Pharmaceutical Company Three. For a year he worked in the European side of their operation, regularly travelling to the United States and to Europe. For the second year he was working principally in the UK, managing market researchers and developing teams.

82. Again, there is unchallenged evidence from colleagues and clients of his performance and potential at Pharmaceutical Company Three. For example, LU worked for a pharmaceutical company which had a co-promotion arrangement with Pharmaceutical Company Three. Through that connection she worked alongside the claimant. Technically she was in competition with him, making her assessment the more impressive for its objectivity. She describes him as incredibly enthusiastic, very passionate about his beliefs, very knowledgeable, very bright, very motivated and inspiring. His enthusiasm was infectious. He was very well organised and focused in the sense of understanding what needed to be done.

83. In September 2004 the claimant moved to another leading pharmaceutical company, Pharmaceutical Company One. He remained there until January 2008, a few weeks before the transplant operation. His post was head of market research. His basic salary, by the time he left Pharmaceutical Company One, was £62,900. With bonus and fringe benefits his salary package was £90,494. His role at Pharmaceutical Company One brought him into contact with the company's most senior management internationally. In his oral evidence he described the importance of his role in requiring him to provide an objective view of the pharmaceutical market to senior management.

84. The claimant explained in evidence the distinction between quantitative and qualitative market research. The quantitative side involves researching large numbers of health care professionals, e.g. 100 general practitioners, or 50 specialists, contact being made by telephone or the internet. On the basis of the data obtained the claimant's job would be to provide forecasts and analyses directed at market share, effective sales and key

performance indicators. He had to recruit, train and manage experienced researchers. The qualitative aspect of market research involves more intensive questioning of health care professionals (or patients) drawing out deeper insights. This has to be done by direct contact and personal interview.

85. There is a wealth of unchallenged evidence from colleagues and clients at Pharmaceutical Company One. For example, MM was someone he recruited from Agency Two and he was her manager at Pharmaceutical Company One for nine months. She describes him as a great manager to work for, always supportive and encouraging, and concerned to develop people's careers. He was good at remembering the little details about people. This echoes the claimant's own evidence that he would store the names of employees' children on his iPhone. It was a characteristic he had observed in OA which had impressed him. MM describes the claimant as ambitious, driven and determined. He made no secret of the fact that his aim was to become the chief executive officer of a company.

86. Another researcher whom the claimant recruited was HA. He worked with the claimant for nearly three years and they became friends outside work too. He describes the claimant as a truly first class manager, very well respected at Pharmaceutical Company One. He was a strong "people person", extremely good at his job. I shall return to his evidence later in another context.

87. A valuable insight into the claimant's performance at Pharmaceutical Company One is found in the evidence of AN, the director of a specialist consultancy providing advice to large pharmaceutical companies such as Pharmaceutical Company One. He worked alongside the claimant for some three years on key projects for products coming off patent. He describes the claimant as dedicated, organised and determined. He always delivered to deadline. He was extremely energetic and worked very hard indeed. He had great people skills, led by example and was a very good mentor. He had an encyclopaedic knowledge of the industry and an excellent relationship with the various research agencies. In AN's view, the claimant was as good as anyone in the industry.

88. Soon after joining Pharmaceutical Company One, the claimant became a committee member of the Professional Trade Body. The aim of the Professional Trade Body is to promote and enhance the professionalism and value of business intelligence within the healthcare industry. To be elected to the committee is a reflection of a person's standing within the industry. The claimant embraced the work of the Professional Trade Body with the same energy and enthusiasm as the rest of his work, and in May 2006 he was elected chairman. No doubt as a recognition of the kudos this role brought vicariously to his employer, Pharmaceutical Company One allowed him time to devote to the work of the Professional Trade Body.

89. Once again, there is a wealth of unchallenged evidence as to the claimant's performance as chairman. In short, he transformed the Professional Trade Body from a rather lethargic body (on some of the evidence), very much in the background, to a dynamic high profile organisation. He achieved this, according to IR, a fellow

committee member, by his qualities of personal charm, dynamism and drive. He was a great "front man". He expanded the range of events and enlarged the industry training programme. The income of the Professional Trade Body grew substantially, to the point where a permanent member of staff had to be hired to take on the additional workload. IR recalls a significant example of the claimant's tenacity and sound business sense. The claimant wanted to run a summer evening event which the committee thought was not commercially viable. The claimant insisted he could make it work. The event turned out to be a great success, and has remained an annual fixture.

90. OAR, who knew the claimant from his days at Agency One, describes the claimant's ability to galvanise interest in the Professional Trade Body, and his success in transforming its professional standing. Annual conferences became sell-outs. The claimant persuaded very senior figures in the pharmaceutical industry to speak at conferences. He was very good at cajoling people into doing things. AS says that he nagged her into joining the Professional Trade Body, even though she had thought it was not for her because her agency (Agency Three) did not service UK companies. In fact it proved to be a good strategic move for her agency which became fully involved in the Professional Trade Body.

91. His chairmanship of the Professional Trade Body undoubtedly increased the claimant's profile within the industry. It was part of his career plan and a very valuable stepping stone to the successful development of his own agency. It is not without significance that the claimant had already embarked upon the drafting of his business plan for Tri Ltd in April 2006, a month before he was elected chairman of the Professional Trade Body.

92. In probing the evidential foundation for the claimant's case that he was bound to succeed in setting up Tri Ltd and achieving a high level of financial success, Miss Bowron quite properly drew attention to parts of the claimant's personnel file from Pharmaceutical Company One, including his annual performance reviews. It is however necessary to look at the documents broadly, and not to focus on minor or ill-defined criticisms.

93. The review for 2005 (dated 25th January 2006) identified high quality performance across the range of his work. In respect of some items his manager's assessment of his performance exceeded the claimant's own assessment, the exercise requiring a comparison of the two. For example, his manager praised as "excellent" his work in standardising a forecasting approach across all general medical brands, and praised his ability to report on time in spite of work load pressures. There was also praise for his building a very high performing general medical analysis team, and for very good coaching and support for his team. Overall he was described as an excellent people manager: "…he really cares for his people, invests time in their coaching and development, seeks opportunities for them and does all he can to help them manage their work load". In the section of the same review headed "values and behaviours" his manager noted that he had demonstrated "strong commitment to organisation in terms of hard work, long hours and willingness to hang in there to get the job done". His

manager did, however, comment that despite his very good communication style and presentation skills, he sometimes made inappropriate use of humour or casual remarks.

94. In his own concluding comments in the 2005 review the claimant expressed the hope that better working practices could be achieved to recognise the importance of planned work load and respect for individuals' work/life balance, enabling him to focus more on the content of the job and thinking time rather than mere process. Tied in with this is an entry in the claimant's general practitioner records dated 24th November 2005. He had gone to see his doctor because of back pain through lifting something too heavy (at home) five days earlier. The note continues (adding punctuation): "Concerned about stress levels at work affecting family life. Wife has real concerns. Returning from work stressed. Unable to sleep, headaches. Had a discussion with boss, threatened resignation, but the company promised changes but so far no action. Advised to see Occ Health and exercise".

95. The claimant explained the background to this in cross-examination. There had been senior management problems as a result of which his own line manager had changed. She worked 24 hours a day. She would e-mail him and text him all hours of the day and night. It was unreasonable. His wife thought things were getting out of control and said he should mention it when he saw the doctor. He had wanted to defend his team and did have a bit of a "spat" threatening to resign if things did not improve. He was more concerned for his team than for himself. The claimant's wife confirmed in evidence that he was working very long hours because of the problem with his manager, and she had told him he had better fix it. She nagged him to fix it and he did.

96. The upshot was that this was treated as a formal "grievance" and there was a formal referral to Occupational Health. He saw a doctor a few days later. There is no record of any follow up, but the claimant recalls that he was told he should keep a record of the hours he worked.

97. The annual performance review for 2006 was completed, curiously, five months early on 30th June 2006. By then the claimant had a different manager, his sixth line manager at Pharmaceutical Company One. She had only been managing him for three months. Again, the assessment is generally very positive and fulsome although the manager's section of the "objectives" part of the review is largely blank. In the section headed "values and behaviours" there is reference, at two points, to the need for more focus or work on "peers" in being seen as a leader. This is vague and unexplained and, to the extent that it was intended as a criticism, it is completely at odds with the wealth of evidence to which I have referred, from colleagues, as to his leadership qualities. I therefore attach no weight to it.

98. In autumn 2006 there are two further potentially relevant entries in his general practitioner medical records. By this time his wife was heavily pregnant with their second child, a daughter. On 26th September 2006 the claimant visited his doctor complaining of some pain in the neck following a minor road traffic accident the previous week. The doctor also noted: "Numerous stresses at home. Wife pregnant –

has one child and suffers from RA [rheumatoid arthritis]. He has a stressful job working in marketing for Pharmaceutical Company One. Works long hours. He feels that his wife does not always understand the situation. Sleeping well. Not tearful. He will talk to Occupational Health. F/U [follow up] one week". He saw the same doctor on 3rd October 2006. The note reads: "The situation at home complex with wife pregnant and suffering from RA. Arguing over small things and not having time for each other. He is concerned as he has a family history of depression and bipolar. However, apart from last night he is sleeping well and life does have some kind of purpose. I feel that he probably needs some kind of counselling – Relate. He will contact one and let me know how it does."

99. Again, the claimant explained the background to this episode in cross-examination, and I accept his evidence. By now he was fully engrossed in his work as chairman of the Professional Trade Body as well as holding down his job at Pharmaceutical Company One. He was having (as he put it) the time of his life, in marked contrast to his wife who was imminently expecting their second child, whose arthritis had flared up, and who was having to cope with their son, then aged eighteen months, who was a difficult toddler. He was concerned for his wife. She confirmed this in evidence. She was irritable and unsympathetic because of the contrast in their situations and was giving him a hard time.

100. Again, I do not regard this episode as any indication that the claimant was susceptible to stress at work to the extent that it would have jeopardised his prospects in setting up Tri Ltd or working as hard in that business as was required. It was plainly a stressful time for both partners in the marriage. The problems were overcome. It is significant that there is no further entry in the medical records.

101. In early 2007 there was another significant event in the claimant's work history. He applied for and was offered a top job with one of the world's largest pharmaceutical companies, Pharmaceutical Company Four. This was the post of head of business intelligence. The person who had been doing the job for ten years told the claimant he was retiring, approached him and encouraged him to apply. The claimant was evidently flattered. He thought it would enhance his capabilities and skills to have on his CV the offer of such a prestigious post, and that it would be a tremendous advantage in running a successful agency. There was a one day assessment interview, in which he was competing against five or six other candidates. On 8th January 2007 Pharmaceutical Company Four wrote to him offering him the post. It was a real feather in his cap, but he turned it down. The basic salary (£68,500) was somewhat less than he was earning at Pharmaceutical Company One, but this was not the reason he turned the job down. For the opportunity and prestige of working at the top of such a company he would have done the job for a far lower salary, had that been his chosen path.

102. It is plain, in my judgment, that the real reason is that by this stage the claimant had decided upon the course of setting up Tri Ltd, and developing his own agency. The experience of applying for the post of Pharmaceutical Company Four was nevertheless

valuable. As the claimant put it, "I learned a lot about recruitment, and it endorsed my ego. It was an even greater thing to turn down the Pharmaceutical Company Four job".

103. So the claimant remained for a further twelve months at Pharmaceutical Company One throughout 2007. However, he was laying the ground for setting up his own agency as Tri Ltd. There is an issue as to whether, and if so when, that would have happened. It is therefore necessary to set out in some detail the evidence and in relation to the likely setting up of that business and my findings upon that evidence.

Preparations for setting up Tri Ltd

104. There was a great deal of cross-examination about the business plan the claimant produced for Tri Ltd. In particular it is an important part of the defendant's case that the business plan is so unimpressive, as a document and in its content, as to call into question the ability of the claimant to set up and maintain an agency at the financial level contended for. Miss Bowron submits that the business plan is, potentially, all the more significant because it is the only contemporaneous document in which the claimant's financial aims and objectives were set out.

105. The claimant, in summary, acknowledges the shortcomings in the document but says it was merely a work in progress. But for the tragedy which befell him in February 2008, his intention was to spend the months thereafter improving the business plan and putting it into effect.

106. It is common ground that it was, at least, commendable for the claimant to have set about preparing a business plan at all. The claimant's forensic accountant, Mr. Segal, said that he would not necessarily have expected such a plan to have been prepared. The defendant's forensic accountant, Mr. Barnes, was particularly critical of the document, drawing on his long experience of helping clients to set up and develop small to medium size businesses.

107. The claimant explained that he had no previous experience of drafting a business plan, and used two books called "Business Plans for Dummies" and "Starting a Business for Dummies". In writing the plan he followed their template, as is evident from the text of the document he produced on computer, where the guidance in the template is in some places still present.

108. The claimant began to write the business plan in April 2006. Even in its incomplete form, it is a lengthy document running to 65 pages. This is one of Mr. Barnes' criticisms. Significantly, the first page headed "Executive Summary" is blank. The template explains that this should be written when the plan is completed. It never was. The mission statement (written in April 2006) reads:

> "We aim to provide highly personalised Healthcare Market Research services to UK pharmaceutical companies, delivering fascinating customer insights that enable our clients to make competent decisions for their brands".

109. Under "goals and objectives" there appears:

> "Become a £1 million 'boutique' pharmaceutical market research agency within two years.
>
> - Achieve £500,000 sales within the first year of trading, and £1 million sales in the second year of trading, based on winning circa two £50k projects per month in the second year of trading.
>
> - Achieve Profit of £100,000 in the first year of trading and £200,000 in the second year of trading…..
>
> - Create a dynamic, vibrant and fun working environment through inspired leadership".

The "vision statement" reads:

> "To become *the* boutique agency in London that is a special place to work, with dedicated and motivated teams delivering fascinating insights to repeat clients re-creating the culture, fun and inspirational leadership of Agency Two during the late 90's".

110. There are then seven sections or chapters with the following titles: 1. Company overview 2. Industry overview 3. Customers 4. Competitors 5. Tri Ltd starting position 6. Financials 7. Strategic plan. The last of these – "Strategic plan… implementation" is blank. Most of the early chapters are packed with ideas, information, facts and figures, incorporating spreadsheets, company forecasts and the like.

111. Although the mission statement, quoted earlier, referred only to servicing UK pharmaceutical companies, it is important to note that at the start of chapter 3, "Customers", the business plan emphasised the goal of international development:

> "Initially we will work with companies based in the UK and conduct UK research projects. Over time, we intend to work with clients from pharmaceutical companies in Europe and the US".

There was a thorough analysis of UK client companies, identifying key staff at different levels of seniority. There was also a thorough analysis of the UK client base of 39 pharmaceutical companies, distinguishing between potential targets,

possible targets and non-targets. The business plan indicated that this was only a summary, and that there was a full table on excel file.

112. Chapter 4 of the Business plan analysed in depth the competitors against whom Tri Ltd would be pitching for business. The claimant added a note in April 2007 (as the red text indicates) that extensive "additional knowledge" of the competitors had been gained and would be updated in the final version of the business plan.

113. Chapter 5 consisted of a bullet point "SWOT" analysis (strength, weaknesses, opportunities, threats) The strengths included "highly experienced managing partners" (the defendant draws attention to the use of the plural), strong contacts across the industry, strong presentation skills and technical competence in designing market research studies and programmes. Weaknesses included lack of direct experience in qualitative moderating skills and qualitative analysis skills. Another weakness identified was "lack of experienced staff able to form 'boutique' agency environment".

114. "Boutique" is a word which appears throughout the business plan. The claimant explained that it was intended to convey the concept which had made Agency Two such a success: a friendly- almost Bohemian - working environment, perhaps with a base in Putney, Fulham or Clapham, and a service tailored very much to the customer rather than a "supermarket" style of approach. As the claimant pointed out, correctly, in cross-examination, "boutique" was a word used by a least one of his potential competitors to describe their business.

115. Another phrase used throughout the business plan, which grated somewhat and was the subject of withering cross-examination, was "fascinating insights", appearing first in the mission statement itself. The claimant explained that this was intended to convey the distinctive and memorable delivery of information to the client which was to be the hallmark of Tri Ltd's approach. "Insight" is what the customer was purchasing, and if it was delivered in an interesting and unusual way the customer was more likely to come back.

116. Although stylistic criticisms can be made of the business plan, not least its prolixity, I bear firmly in mind that this was not the intended finished product. It was certainly not intended for general dissemination in this draft form. It was a valuable exercise for the claimant to crystallise his thinking about the scope and nature of the business, its opportunities and challenges, and I accept that this was its principal purpose.

117. The most significant criticism of the business plan, potentially, is the way in which it dealt with the financial forecasting of Tri Ltd's performance over the first few years of trading. I have already referred to the aim in "Goals and Objectives" of becoming a "£1 million" agency within two years, achieving £500,000 sales in the first year, and £1 million in the second. That was written in April 2006. Chapter 6, headed "Financials", stated:

> "The financial forecast for the company is still to be worked out. Below is a very basic draft of a forecast – included only as a way of thinking about the business. The Managing Partners and staff should take home a salary each month – how the profits from the business are invested is a matter for the founding Managing Partners".

There is then a table setting out projected sales, costs and profit for the first five years trading, from 2008 to 2012. Sales are shown as £500,000 for 2008, £710,000 for 2009, £920,000 for 2010, £1,130,000 for 2011 and £1,340,000 for 2012. This, of course, contradicts the aspiration in Goals and Objectives of achieving a £1 million pound turnover in the second year. In chapter 6 the projection was for that target to be reached only in the fourth year. As to profit, the projection for the first two years was of significant losses. The profit would be £16,000 for year 3, £114,000 for year 4, and £212,000 for year 5.

118. The stark difference between these projected figures in the business plan and the projected figures underpinning the claim presented to the court is something which the defendant rightly investigated in detail and with vigour in cross-examination and in submissions. The claimant explained that the figures in chapter 6 were written into the business plan one night in April 2007 in advance of a meeting the following day with a former colleague, EZ, whom he was hoping to interest in joining him in the business. The figures were, he said, "completely made up" and based on no research. The purpose was simply to be able to show a salary (within the costs section) at a level which was no less than what he thought she would be already earning. The managing partner's salary shown in the table of figures, rises progressively from £100,000 in the first year to £140,000 in the fifth year.

119. The only other figures in the business plan appear in chapter 2, demonstrating that fieldwork accounts for the major component of the costs of a pharmaceutical market research business. Beneath a table setting out a breakdown of such costs for a particular project, the business plan states:

> "Tri Ltd should aim for a profit margin of 30% on all projects."

120. I accept the claimant's evidence as to how the financial forecast figures in the business plan came about. They were not intended to be a properly researched and considered set of figures for presentation, for example, to an institutional lender. The essence of his explanation is set out in the preface to the table, quoted above. A proper and detailed financial forecast was one of the tasks the claimant had set himself to complete in the spring and early summer of 2008 following the kidney operation. There were plainly other parts of the business plan to be written. Chapter 7 "Strategic Plan – Implementation" was still completely blank. I shall return to the defendant's more general submissions on the significance of the shortcomings of the business plan.

121. I accept the claimant's evidence, which was not challenged, that he did indeed meet EZ the following day, at a public house in Windsor, to discuss Tri Ltd. He had e-mailed the business plan to her. He says they talked about it and she thought there was definitely space in the market for Tri Ltd. She felt it was a business venture well worth looking at and exploring. She gave him no indication, however, that she would be prepared to be one of the founding managing partners envisaged by the business plan.

122. I also accept the claimant's evidence that several weeks later he met another former colleague, ME, at a public house in Wandsworth and, for the same reason, showed the business plan to her. He said she was very enthusiastic. She impressed upon him the importance of focusing on all five European countries (France, Spain, Germany and Italy) and not just the UK. From conversations he had with both women later he discovered that they had discussed the matter between themselves subsequent to his meetings with them. It was left that he might go back to them when he had fleshed out his plans. His impression was that for ME it was something she might be interested in for the future, perhaps after having a child. Similarly, for EZ, he got the sense it was something for the future. Again, I shall return to this evidence in relation to the defendant's submission that the court can have no confidence that he would have recruited a partner as readily as he suggests.

123. By October 2007 the claimant's plans for setting up Tri Ltd were taking firmer shape. On 22nd October 2007 he wrote a letter to Pharmaceutical Company One tendering his resignation with effect from 21st January 2008. The letter was written from a temporary address in County One, he and his wife having already sold their home in County One with a view to moving to County Two to live close to his wife's parents. For entirely understandable reasons, the letter did not mention his intended launching of Tri Ltd. It simply said that he and his family would be moving out of the area to set up home in County Two in the New Year. That move was in fact completed on 18th January 2008, five weeks before the operation.

124. In October 2007 the claimant met OA, for lunch, to talk about his plans for Tri Ltd. As OA put it, the claimant wanted to "bounce some ideas" off him. He regarded OA as a role model and mentor and, sensibly, was seeking his advice almost a year before the commencement of Tri Ltd. OA told the claimant at this meeting that he would be happy to offer any advice and support the claimant might require. This included taking a role himself in the company, such as chairman. OA even offered to put some money into starting the business, but the claimant told him that this would not be necessary.

125. The claimant worked out his three months notice at Pharmaceutical Company One. Because he had leave due, his last day in the office was 20th December 2007. He completed an exit interview questionnaire dated 12th December 2007 in which he gave, as his reason for leaving, that he was moving to a new part of the country and was going to be a full time father. Again, it was entirely understandable that he did not disclose to Pharmaceutical Company One his intention to set up Tri Ltd in a few months time. There was, in any event, a genuine intention to take nine months off

work in order to establish the family in County Two, spend time with the children, and prepare for the new venture planned to begin in September 2008.

126. Significantly, the claimant had discussed with LE, the recruitment consultant who had found him the posts at Pharmaceutical Company Three and Pharmaceutical Company One, the maximum time she thought he could be away from the industry without losing touch. She told him the maximum period was 9 – 12 months. This had provided the framework for the timing of the whole project of donating his kidney, recuperating, and preparing to start Tri Ltd.

127. Careful planning had gone into the arrangements for the months following the operation. A nanny had been hired for a maximum of 13 weeks, i.e. until the end of May 2008. During this period the claimant proposed to work on the business plan, and on the business generally. He worked in the evenings anyway and would have enjoyed extra time with the children during the day. In the spring and summer he intended to discuss the business with OA in greater depth and to meet and recruit staff. He did not wish to do this, however, until he was fully fit. Quite apart from pride in his physical appearance and fitness, it made good business sense to wait until he was restored to full health and vigour before launching the idea of Tri Ltd. As he explained in evidence, there was only one opportunity to make the necessary impact, and timing was all important. This is why, I accept, he had been circumspect in discussing his plans previously.

128. The commencement of Tri Ltd's trading in September 2008 was to coincide with the eldest child starting school. The intention was that the claimant's wife would give up work then, or soon afterwards, to provide the solid home base which they both recognised would be necessary when the new business took off and the claimant was totally absorbed in it and regularly away from home, in the UK and abroad. It was for this reason that they had moved to a new home in County Two only six minutes away from his wife's parents, so that she had that additional support and comfort.

129. Despite all this careful planning, what the claimant had not foreseen, in common with everyone else, was the world wide recession following the collapse of Lehman Brothers in September 2008, the very month in which Tri Ltd was to start trading. One of the matters I have to weigh up is the extent to which this recession would have affected the claimant's prospects of achieving the financial success contended for in the case which has been presented, including the extent to which it might have affected his ability to recruit staff as readily as he had hoped.

Discussion, analysis and findings

130. Against this background I turn to consider the specific issues which I am invited to determine in relation to the claim for loss of future earnings. I am grateful to counsel for their detailed written and oral submissions which I have taken fully into account.

What was the chance that the claimant would have launched Tri Ltd in the autumn of 2008?

131. Miss Gumbel submits on behalf of the claimant that the evidence is overwhelming and all one way. She submits that none of the points raised on behalf of the defendant by Miss Bowron is sufficient to displace the inference I should draw that the claimant would have commenced his own business, trading as Tri Ltd, in September 2008 as planned. It is, therefore, necessary to consider the points Miss Bowron makes, insofar as I have not already addressed them.

132. First, Miss Bowron emphasises the taxing nature of the work and long hours required to make a success of such a business. There are, she submits, indications in the general practitioner notes of problems in coping with stress at work. She queries whether the claimant would have been able to cope with the demands of such an exacting new business as well as the demands of a young family.

133. I reject these submissions. There is ample evidence that the claimant was under no illusions as to the work the new venture would entail. He had demonstrated an appetite and relish for hard work, over many years, in the employed sector. I am quite satisfied that with the additional spur of working for himself, he would have risen to and met all the challenges. The references in the general practitioner notes to stress at work must be read in context, as I have already explained. The claimant and his wife had gone to considerable lengths to plan their future family life around the new business venture. All necessary support mechanisms were in place.

134. Secondly, Miss Bowron points to the additional uncertainty created by the worldwide recession in the wake of the collapse of Lehman Brothers in September 2008. The evidence, however, is that the pharmaceutical industry has been comparatively untouched by the recession. No doubt this is a reflection of the strength of the global market for pharmaceuticals - some $400 billion. Mr Segal, the claimant's forensic accountant, stressed the strength of the contribution of pharmaceutical companies to United Kingdom exports. Although there have certainly been company mergers, Mr. Segal had never heard of any pharmaceutical company going to the wall in the current recession. The development of pharmaceutical companies is long term and cyclical. I reject the suggestion that the impact of the recession would have been so great as to jeopardise the start of Tri Ltd in September 2008.

135. Thirdly, Miss Bowron relies upon the incomplete state of the claimant's preparations: in particular the inadequate and unfocussed business plan, and the failure to identify and recruit a partner for the venture. I have already expressed my view about the alleged shortcomings of the business plan. It was very much a work in progress. Far from betraying a lack of proper preparation, it demonstrates the claimant's determination to start the business and make it succeed. Similarly, I accept the claimant's evidence that, for sound business reasons, the timing of his approach to potential partners was critical. The fact that his opening overtures to EZ and ME had not met with as positive a response as he hoped did not mean that renewed overtures

to them or to others, at the appropriate time, would have failed. I accept the claimant's evidence that he would have recruited in June, July and August 2008, or even at the time of the launch in September. The launch would have been by website and by letter to clients, whilst he was still working from home. The staff he would have recruited initially would have been executive researchers, associates rather than partners. There is no reason to think he would have had difficulty in finding such staff. If anything the impact of the recession would have been to swell the number of suitable graduates hungry for such work.

136. I therefore reject Miss Bowron's submission that, untried and untested as he was in running his own business, or for the other reasons she has advanced, the claimant would have got "cold feet" and never started the business at all. Such a conclusion would fly in the face of all the evidence which, I agree, is all one way. Unlike the claimant in *Dixon -v- Were*, I am concerned with a man who had been identified as a high flyer at an early stage in his career, and had risen to the very top of his profession in the employed sector. All the evidence shows that he was a man of exceptional promise, ready and well suited for the challenge of running his own agency. He had seen former colleagues at Agency Two, similarly nurtured by OA, go on to achieve success with their own agencies. This was his ambition, and he had set about achieving it methodically and with the full and all important support of his wife. It is a measure of OA's confidence in the claimant's potential that he offered to become chairman of the company, and to invest in the business if required. Alternatively, there was the prospect of funding from the claimant's father-in-law, or from his and his wife's own resources. There was no question of having to persuade a bank or other institution to finance the setting up of the business, in itself a considerable advantage as the recession began to bite.

137. Above all the evidence demonstrates that the claimant had the personal and professional qualities to guarantee that he would have set up the business as planned, and made it a success. He had the invaluable combination of experience, as an employee, on both the client side and the agency side of the industry. He had demonstrated his ability to innovate and to breathe new life into creaking institutions. His outstanding success as chairman of the Professional Trade Body is testament to this. Similarly, his success in securing the top market researcher post with Pharmaceutical Company Four, only to turn it down, demonstrates his ability to market himself and his talents. The witnesses speak with one voice as to the claimant's exceptional people skills, which OA rightly identified early on as one of the claimant's greatest strengths, and which would go a long way in itself to guaranteeing the success of the agency he set up.

138. For all these reasons I conclude, without hesitation, that the claimant would have launched Tri Ltd successfully in September 2008, as planned. I assess it as a virtual certainty.

If not, what would the claimant have done instead and what would he have earned?

139. In the light of my very firm conclusion that claimant would have launched Tri Ltd in the autumn of 2008, this question does not arise. I record, however, that the defendant's primary case is that in September 2008 the claimant would either have returned to paid employment, or opted for consultancy work. Averaging the figures the defendant puts forward for salaried and consultancy work, Miss Bowron contends for a net annual income of £81,313 for the first 5 years, and a net annual income of £93,115 thereafter. Plainly these figures fall far short of the earnings the claimant could anticipate from successfully running his own agency, to which I turn next.

Assuming that Tri Ltd had been launched in September 2008, what was the chance that the business would have had a turnover of £2 million per annum and, if so, by what date?

140. This question, and the subsequent questions directed at his achieving turnovers of £5 million and £10 million respectively, require a deeper analysis of the claimant's prospects of making a success of the business. It does not necessarily follow that simply because the claimant would, on my findings, undoubtedly have started his own agency in September 2008, that business would have flourished to the extent he hoped.

141. Miss Gumbel submits that it is a virtual certainty that the claimant would have achieved a turnover of £2 million per annum by the date of trial (November 2010). She relies specifically upon the evidence of OA and the evidence of IU (who has established a successful agency, Agency Four). She relies more generally upon the overwhelming evidence of the claimant's qualities and abilities which, she submits, compels the inference that he would have had no difficulty in achieving this turnover in the relevant timescale.

142. Miss Bowron submits that the success of the business was dependent wholly on the claimant's abilities, and that despite his impressive track record in the employed sector he was untried and untested as an entrepreneur. She points to the contrast with the projected figures for turnover in his own business plan, which fell far short of the level of turnover now contended for. She also points to the assumption underlying the figures put forward by the claimant in his third witness statement that he would, by then, have "an experienced partner". She submits that when one examines the turnovers of the businesses put forward by Mr Segal on behalf of the claimant as comparators, they do not support a safe conclusion that such a turnover was achievable by the claimant in the relevant timescale.

143. The starting point must be the evidence of OA. Miss Bowron rightly reminds me that he is not an expert witness. He is, however, exceptionally well placed to assist the court with an objective assessment of the prospects for the claimant's business. OA has had a long and highly successful career in the industry and is, perhaps, uniquely placed to make that assessment. He has seen several of his other protégés go on to develop highly successful agencies of their own. As he himself put it, this "gives him a good idea of what makes people successful". The claimant, he told me, was

definitely "at the top end of those people". He considered the claimant would be "exceptionally good" at running his own business, "one of the best he had known". His potential to set up an agency was "incredibly good". This no doubt influenced OA in offering to take a role as chairman of the company, and to help out financially if required.

144. Miss Bowron has made it clear that she does not dispute that OA "was trying to help [the court] as objectively as he could". She suggests, however, that his view is inevitably coloured by the regard he has for the claimant personally, and by his understandable deep sadness at the tragedy which has befallen the claimant. For this reason, she submits, he does not have the same status as an objective independent expert.

145. I found OA a most impressive, and moderate, witness. He clearly commands great respect in the industry generally, and amongst his former employees in particular, several of whom have relied upon him as a mentor. I have no hesitation in accepting the truthfulness and objectivity of OA's evidence.

146. In his first witness statement, OA expressed the view that the claimant "was likely to have become one of the top two or three market researchers in the industry". In his second witness statement he addressed the claimant's prospects in more concrete financial terms. He said he "had no doubt at all that the claimant would easily have managed quite quickly, within a year or two, to get his business up to a turnover of £2 million". In a later paragraph of the same witness statement he addressed the chance, in percentage terms, of achieving various levels of turnover within various periods. In this context he said, in the witness statement, that there was "an 80% chance that the claimant would reach a turnover of £2 million within 2 years".

147. In cross-examination he was pressed about this apparent contradiction. He explained that you never get to 100% certainty - you have to allow for Acts of God, and you never know what might happen. For example, Pharmaceutical Company One could suddenly be taken over by Pharmaceutical Company Four. However, he rated it a very strong probability that the claimant would achieve a turnover of £2 million within 2 years. He had everything going for him. To get to a turnover of £2 million is easy if you have the right skill sets, although it is very hard work. The claimant had all the right skill sets, the ability, the energy and an understanding wife. He likened the chance that the claimant would <u>not</u> achieve this turnover within 2 years to the chance that it would rain every day and night for 40 days.

148. IU has built up a very successful agency. He confirmed that the claimant was exceptionally well regarded within the profession. Such was the claimant's potential that he thought it would have been difficult for his own agency to pitch successfully against him, particularly where clients already knew the claimant's work. He thought the claimant had the two key advantages of reputation and connections, and was destined for success. In his oral evidence IU said that the claimant would have had an advantage over him through being so well known in the industry, and as chairman of

the Professional Trade Body, providing a platform from which he would have "got where we did a lot faster". He considered that a turnover of £2 million was "quite easily achievable in 1 to 2 years". I found IU too an impressive and moderate witness.

149. Taking the evidence of OA and IU together, and in the light of the claimant's exceptional potential, I find that the claimant would have achieved a turnover of £2 million by 1st November 2010. I reach this conclusion despite the points raised by Miss Bowron, which I reject for the following reasons.

150. The projected turnover in the business plan was indeed substantially lower. The aim in "Goals and objectives" was to become a "£1 million agency" within 2 years, achieving sales of £500,000 in the first year and £1 million in the second. However, these were not figures based upon research or comparators, but eye-catching headline figures for a business plan which was never intended to be relied upon as definitive. For example, it was never intended for submission to an institutional lender. The later figures in chapter 6 of the business plan, which were somewhat higher and contradictory of the £1 million headline, were added at a later stage simply to flesh out the document before it was shown to EZ. Furthermore, the claimant was not aware at that time of the actual levels of turnover that might be, or had been, achieved by comparator businesses. This information only came to his knowledge in the course of the preparation of the case for trial.

151. Similarly, despite the terms of the claimant's witness statement, I am unimpressed by the defendant's point that achieving a turnover of £2 million within 2 years would have required the presence of a partner in the business. I accept the evidence of OA in this regard that to achieve a turnover of £2 million, "you need one person and four slaves". In other words, executive researchers (of the kind described by the claimant in evidence) would have sufficed to take the business to this first threshold. Such a turnover is achievable by leadership and delegation, the skill sets which the claimant had demonstrated. Up to this level of turnover, OA explained, you do not have to delegate jobs, you simply delegate tasks. In other words, the claimant would have been quite able to retain overall responsibility for the requisite number of projects ("jobs"), delegating the routine work needed to complete them ("tasks").

152. Nor do I regard the exercise of analysing the turnover of the comparator businesses as anything more than the roughest guide to the level of success the claimant could have expected to achieve. None of the comparator businesses was a direct match for the business the claimant proposed, with his exceptional combination of qualities and abilities.

153. IU (of Agency Four) had started his agency without any experience of the pharmaceutical industry, splitting from his partner to develop that side. As he put it: "We came in cold. It took us from 1993 to 2000 to build up our reputation". He also confirmed in cross-examination that he came into the business with no management experience whatsoever, unlike the claimant.

154. AS (of Agency Three) has built up a business with a turnover of £12 million. She has one partner. She knew the claimant when they both worked for OA at Agency Two. She described him in her oral evidence as "certainly going places, a ladder climber and an achiever". Although she had a partner in the business from the outset, she took her first maternity leave within 18 months, and two further maternity leaves, all of only 3 months duration. She could not have managed without the support of her business partner. There is no figure in available accounts for turnover in the first year, but in the second year the turnover was £889,632. In year 3, turnover increased to £1.580 million and in year 4, £2,159 million. They hired no additional staff until 4 to 5 months after they began trading, and three or four extra staff each year thereafter. They started working from home, before moving to Fulham, confirming that there would have been no need for the claimant to have office premises from the outset. Whilst Agency Three is a closer model to the business the claimant was planning, it began 10 years earlier. The figures do at least demonstrate that a turnover of £1.5 million to £2.1 million was achievable within 3 to 4 years.

155. EU (Agency Five) had worked as an employee for Agency Four (IU) before setting up his own business at the end of 2002. EU had a "silent" partner (in Italy) who invested in the business and whom he has recently bought out, but effectively he managed the business alone. The business has blossomed through hard work, and has recently opened in San Francisco. EU acknowledged in his oral evidence that the claimant has far more energy and drive than him, and he would have been concerned at the prospect of having to compete with the claimant. EU also acknowledged that he had made some serious mistakes, including trying to do too much too soon, which resulted in a disappointing level of turnover in the first year or two. Mistakes also led to at least one significant bad debt. Despite this, in year 3 EU achieved a turnover of £1.442 million, with a jump to £4.12 million in year 4. Again, this at least supports, in broad terms, the expectations of OA and IU for the achieving of a £2 million turnover. I derive no assistance from any comparison with the other companies Mr. Segal analysed.

156. To be weighed against Miss Bowron's submission that the comparators do not support the claimant's case, Miss Gumbel relies upon the claimant's experience, position and contacts within the industry, together with his high profile chairmanship of the Professional Trade Body. These, I accept, militate strongly in favour of his having no difficulty in attracting work, in accordance with the expectations of OA and IU. The qualities I have already identified in addressing the first issue (i.e. whether the business would have started at all) would, in my judgment, also have been crucial to his achieving success at the level, and within the timescale, contended for. His management skills, and entrepreneurial flair and drive, had already been well demonstrated. He had OA to advise him as a mentor. Through his wife's contacts in the property world, he had every prospect of securing office accommodation on favourable terms.

157. Taking all these matters into account, I find that it was a virtual certainty that the claimant would have achieved a turnover of £2 million within 2 years, so that there is no need to apply a percentage discount to reflect the chance that he would not have done so. I reach this conclusion despite the qualification in OA's witness statement

that this was an 80% chance, because on his evidence as a whole - alongside the evidence of IU - I am satisfied that what OA was intending to convey was very strong probability, verging upon certainty, that this turnover would have been achieved within 2 years.

158. It follows that, for the purpose of assessing loss of future earnings, the baseline turnover per annum is £2 million. I reject Miss Bowron's submission that a more realistic approach would be to conclude that there was a 65% chance of achieving a turnover of £2 million within 4 years. I shall return, in due course, to the question of whether some overall discount is required to reflect all the uncertainties over the development of the business.

Further, what was the chance that the business would have had a turnover of £5 million per annum and, if so, by what date?

159. Miss Gumbel acknowledges that, in addressing this question, we are firmly into the territory of *Langford -v- Hebran*, and the assessment of a chance. She relies upon the evidence of OA that there was a 50% chance of the claimant achieving an annual turnover of £5 million within 5 years, i.e. by September 2013. She submits that the evidence of the claimant's qualities and capabilities supports this assessment and provides a safe basis upon which I can act. Miss Bowron submits that a more realistic assessment would be a 30% chance that the claimant would have achieved a £5 million turnover within 8 years.

160. For the reasons already explained, I am quite content to rely upon OA's evidence generally. I see no reason to reject his assessment of a 50% chance of achieving a turnover of £5 million within 5 years. Indeed, there is no evidence, as such, to contradict it. IU (Agency Four) said in evidence that whether, and is so when, a turnover of £5 million would have been achieved is much harder to predict. It depends very much on the team the claimant would have assembled. Without that knowledge, he would not want to put a percentage chance on it. Miss Bowron did not challenge OA's evidence, in terms, in cross-examination. I remind myself that OA does not have the status of an expert witness, but his evidence is no less impressive or reliable on that account. I note, for example, that in *Collett -v- Smith*, great weight was attached by Swift J to the evidence of Sir Alex Ferguson, as to the claimant's prospects in the Premiership and generally, although acknowledging that he was not an expert witness. In my judgment OA is rightly entitled to similar evidential standing.

161. In cross-examination OA explained that achieving a turnover beyond £2 million is more difficult. It is at this stage that one has to be able to delegate "jobs" (projects) rather than merely "tasks". It follows that in order to achieve a £5 million turnover the claimant would have to have recruited an experienced partner, with an equity share in the business.

162. In my judgment, as the business developed and flourished, the claimant would have taken that step once the threshold of a £2 million turnover had been achieved after 2 years. Although EZ and ME had not been willing to commit themselves to a joint venture with the claimant when he approached them in 2007, I accept the claimant's evidence that he sensed, for both of them, that it was something they might wish to consider in the future. Even if neither of them had been persuadable 3 years later, with the business now flourishing, I find that the claimant would have had little difficulty in recruiting some other suitable partner. One possibility would have been HA, whose witness statement was in evidence, and who said in terms that if the claimant had asked him to join him in the business, he would probably have done so. He plainly had the highest regard for the claimant, who had recruited him to Pharmaceutical Company One in 2005.

163. In any event, a natural inference from the successful development of the business in its first 2 years is that the claimant would have met and worked with many aspiring researchers, on the client side or the agency side of the industry. There is no reason to think that the success he had demonstrated previously in recruiting promising graduates to Pharmaceutical Company One would not have been replicated for the benefit of his own agency. There is a wealth of unchallenged evidence that he had the necessary charm and openness to attract an ambitious, talented and hardworking researcher such as he himself had been. He would also have had the connections and general assistance which OA was able to provide, with his very experienced eye for potential.

164. The evidence strongly supports the conclusion that the claimant had the necessary leadership and management skills to take the business to the next level. I have already referred, for example, to the evidence of AN, a director of a specialist consultancy providing advice to large pharmaceutical companies such as Pharmaceutical Company One, who worked alongside the claimant for 3 years and who expressed the view that the claimant was "as good as anyone in the industry".

165. In the light of all this evidence I find that there was a 50% chance that the claimant would achieve an annual turnover of £5 million within 5 years, i.e. by 1st November 2013.

Further, if the turnover reached £5 million, what would the turnover of the business have been at the median point of the period between reaching a turnover of £2 million per annum and a turnover of £5 million per annum?

166. Having concluded that the baseline figure for annual turnover is £2 million from 1st November 2010 onwards, and that there was a 50% chance of achieving a turnover of £5 million by 1st November 2013, the next issue is whether, for those three intervening years, it is appropriate to assess some intermediate increase. It is unlikely, for example, that there would have been a sudden step up from £2 million to £5 million at the end of that third intermediate year.

167. Miss Gumbel invites me to reflect the likely increase by assessing a mid-point figure of £3.5 million, which should then be applied to each of the three intervening years. I say three years because that is the fairest interpretation, in my judgment, of OA's evidence that this level of turnover would be achieved within 5 years. This is consistent with the commencement of the £2 million turnover baseline on 1st November 2010 (for practical purposes the end of the second year of trading) reflecting OA's assessment that this turnover would have been achieved within 2 years.

168. In Miss Gumbel's worked example helpfully provided to me in closing submissions (headed "The claimant's assessment subject to accountancy confirmation, 10th November 2010", referred to hereafter as her "worked example") the assumption is made that the £5 million turnover would have commenced at the start of year 5, i.e. 1st January 2013. In my judgment this is too generous to the claimant, and does not properly reflect the intervals of time between the stepped increases in turnover OA predicted.

169. I accept in principle that for this intermediate three year period an increased average annual turnover is properly to be allowed. Quite apart from the logic of such an approach, there is evidence to support it. First, in cross-examination OA said that even if a £5 million turnover was not achieved within 5 years, a turnover of £3 million or £4 million would have been achieved. Secondly, in his third witness statement (dated 21st April 2010) the claimant estimated that "after about 3 years" trading he thought the annual turnover would have been approximately £3.62 million, giving a breakdown of the income he would hope by then to achieve from different specified projects.

170. I accept that an intermediate average turnover figure of £3.5 million is appropriate throughout the period 1st November 2010 to 1st November 2013. The question is whether this figure should be discounted (like the £5 million figure) to reflect the chance that the claimant would not have progressed significantly beyond the baseline turnover of £2 million.

171. Miss Bowron submits that this must follow. But as she does not accept that a £5 million turnover would have been achieved until 8 years after commencement (and then only a 30% chance), she suggests that there would be, at best, a 40% chance of achieving an intermediate figure (i.e. £3.5 million) only after 6 years. In Miss Gumbel's worked example she has applied a figure of 80% to the intermediate earnings for this period.

172. In my judgment the appropriate figure is 75%, mid-way between the 100% chance (for present purposes) of achieving £2 million and the 50% chance of achieving £5 million.

173. Accordingly, I find that for the period 1st November 2010 to 1st November 2013 the claim should be calculated on the basis of an average annual turnover of 75% of £3.5 million.

Further, what was the chance that the business would have had a turnover of £10 million per annum and, if so, by what date?

174. The claimant's case is that his annual turnover would have reached £10 million after 10 years trading, and that there was a 20% chance of achieving this. His case rests solely on the evidence of OA that there was a 20% chance of achieving a £10 million turnover within 10 years. OA adhered to this assessment in cross-examination. When it was put to him that 20% could mean anything from 10% to 30%, he agreed. He explained that in order to get to a turnover of £10 million the business would have had to become international.

175. I find that there would have been no reason in principle why the claimant's business should not have developed the necessary international dimension within 10 years. It would, of course, have required a significant increase in staffing, even though (like EU) it would no doubt have been possible to have "virtual" offices abroad. As internet and other business technology develops, this is likely to become standard. The claimant had wide experience of the international market in his career in the employed sector of the industry, both on the client side and the agency side. Whatever the shortcomings of his business plan, the claimant had undoubtedly determined from the outset that the business would become international. As already pointed out, the business plan stated in chapter 3:

> "Initially we will work with companies based in the UK and conduct UK research projects. Over time, we intend to work with clients from pharmaceutical companies in Europe and the US".

176. I also accept the unchallenged evidence of IR, in his witness statement, to the effect that someone as well regarded as the claimant in the UK would be in an excellent position to access the international market. Had the claimant developed his business as planned, he would have found it "relatively easy" to expand internationally. IR speaks with 20 years experience in the industry, and owns his own business with offices in Japan, the United States and Europe. He had worked with the claimant at Agency One in the claimant's very early days, and had seen at close quarters his capability in chairing the Professional Trade Body. There is no reason, in my judgment, to think that the claimant would not have sought to emulate the progression of AS (Agency Three) who has found that the greater rewards lie in international business and has made a success of it.

177. Another important role model for the claimant in international development was OA's agency, Agency Two, which acquired offices in Asia, the United States and across Europe. There is unchallenged evidence in the witness statements of NO and BU to the effect that there was no reason why the claimant should not have been able to

build up a business as successful as Agency Two. Neither, of course, could say this with certainty, but I accepted this evidence as generally supportive of OA's approach.

178. I therefore accept OA's assessment that the claimant would have achieved a turnover of £10 million with 10 years. It is not contradicted by any other evidence, and indeed was not challenged as such in cross-examination, save to identify the width of the band. Miss Bowron points out, quite correctly of course, that OA's 20% chance means that it was four times more likely that the threshold would not be achieved. For the reasons already identified in my review of the relevant legal principles, there is no bar to an award of damages based on as low a chance as 20%. Indeed, in *Langford -v- Hebran*, the Court of Appeal upheld the assessment of one of the relevant chances at 20%. I therefore reject Miss Bowron's suggestion that any allowance for achieving a turnover of £10 million should be assessed only on the basis of a 10% chance of achieving this after 13 years.

179. Accordingly I find that there was a 20% chance that the claimant would have achieved a turnover of £10 million by 1st November 2018.

Further, if the turnover reached £10 million, what would the turnover of the business have been at the median point of the period between reaching a turnover of £5 million per annum and a turnover of £10 million per annum?

180. The same issue arises in respect of the intermediate period between achieving a £5 million turnover and a £10 million turnover as arose in relation to the earlier intermediate period. Miss Gumbel submits that, once again, I should assess a "mid-point" figure, between £5 million and £10 million which should then form the basis for the claim throughout this intermediate 5 year period. In her worked example, Miss Gumbel suggests that the figure should be £7.5 million, discounted by 50%.

181. Miss Bowron protests, with some force, that such an approach does not reflect the evidence, nor is it logically sound. If there is only a 20% chance of achieving a £10 million turnover at the end of that 5 year period, there is no logical basis to postulate that right up to the end of that 5 year period the chance of a significantly increased median figure should be discounted only at 50%. Miss Bowron submits that if there is any justification for taking a mid-point figure of £7.5 million at all, a more appropriate assessment would be a 15% chance of achieving such a figure by the end of the eleventh year (consistent with her earlier submissions).

182. Although there was no evidence addressed specifically to the likely level of earnings in this intermediate period of 5 years, it would be proper to infer that, as before, there would not be a sudden step up to £10 million from a plateau of £5 million throughout the intermediate 5 year period. However, this time the period is significantly longer: 5 years rather than 3 years. Furthermore, on the evidence as a whole, I am not persuaded that there would necessarily have been a steady progression to £10 million as if on a straight line graph. I bear in mind, for example, the accounts for the agency

businesses of AS (Agency Three) and EU(Agency 5), which show significant marked steps up (and down) when higher turnover was being achieved.

183. In closing submissions Miss Bowron accepted that, in principle, there is no reason why there should not be sequential discounting. In my judgment that is the appropriate course for me to take in respect of this intermediate period of 5 years. Nor is it appropriate, in my judgment, to assess a single "mid-point" figure of £7.5 million. I consider it more likely that there would have been an upward curve in turnover during this 5 year period.

184. For the first 2 years of the period I find that there should be no increase above the £5 million turnover. For years 3 and 4 of the 5 year period, a turnover of £6.5 million per annum should apply. For the final year of the 5 year period, a turnover figure of £8 million should apply. This, in my judgment, is consistent with the difficulty acknowledged by OA in predicting so far ahead, and consistent with the evidence as a whole.

185. The final question which arises is the percentage chance which should be applied for each of these periods. In my judgment for the first 2 years of the period the chance should remain at the assessment of 50% for the £5 million turnover. For the third and fourth year of the period, the chance should be assessed at 40% throughout. For the final year of the period, the chance should be assessed at 30%.

186. Accordingly, I find that for this intermediate 5 year period the claim should be assessed on the basis of:

(a) 50% of £5 million per annum from 1st November 2013 to 1st November 2015.

(b) 40% of £6.5 million per annum from 1st November 2015 to 1st November 2017.

(c) 30% of £8 million per annum from 1st November 2017 to 1st November 2018.

In relation to the issue of equity partnership, by the time of trial, and subsequently at the stage of reaching a turnover of £5 million and £10 million, would the claimant have had an equity partner and, if so, what percentage share of the business would that partner have had?

187. In order to assess the claimant's net loss of earnings, it is necessary to make a finding as to the proportion of the profits of the business the claimant would have retained. Thus it is necessary to assess the likely equity share of any partner the claimant would have taken into the business. Miss Gumbel submits that such a partner would have been taken on once the business achieved the turnover of £2 million, that the partner's

share would have been one-third, and that this would have remained the position right through until the sale of the business when the claimant retired.

188. Miss Bowron cautions against a simple finding, without some element of discounting, that a partner would have been recruited at a given share of the equity. She points out that all the claimant needed, in order to retain control of the business, was a 51% interest. Circumstances might have forced him to release a far greater proportion of the equity than one-third. Miss Bowron therefore suggests that a proper approach to assessing the equity partner's share would be to adopt the mid-point between 49% and 34%, i.e. 58.5%.

189. The claimant was firm in his evidence on this issue. In his third witness statement, and in his evidence in chief, he asserted that he would have retained his share of 66% of the business. In cross-examination he said that he would have "given away 30% of the equity, in order to retain good people". OA made it clear, in his oral evidence, that even if he had become chairman of Tri Ltd and/or had provided capital, he would not necessarily have expected to have an equity share.

190. By way of comparison, EU (Agency Five) has become sole owner of his business, by buying out his "silent" partner who initially injected funds. AS (Agency Three) had a 50/50 partnership from the outset of her business, but the circumstances were very different. She and her business partner left Agency Two together and set up their agency together. She was also heavily reliant upon her business partner during the most onerous periods of childcare.

191. Although the claimant could not foresee all the eventualities which might cause him to review his determination to retain a two-third share in the business, I accept that this is likely to have been the position throughout. Rather than fix on some notional mid-point figure, as Miss Bowron suggests, I propose to reflect any uncertainty in this regard as one of the factors justifying an overall discount at the end of the assessment exercise.

192. Accordingly, I find that the claim should be assessed on the basis that the claimant would have had an equity partner from 1st November 2010 onwards (i.e. from the achieving of the £2 million turnover) and I find that throughout the period of the business until sale (on the claimant's retirement) the partner would have had an equity share of 34%.

By the time of trial, what would the net profit margin of the partnership have been, and is it appropriate to apply the same net profit margin found to apply at the time of trial

193. This is the final assessment which is necessary to determine the claimant's projected net annual income during the life of the business. I am invited to assess the net profit margin adopting the formula agreed between Mr Segal and Mr Barnes, i.e. excluding

remuneration of directors from the expenditure of the business, and including it together with dividends in the sum for the net profits of the business.

194. Miss Gumbel submits, on the basis of the analysis carried out by Mr Segal in relation to the comparator businesses, that the appropriate net profit margin should be assessed at 22%. Miss Bowron submits that this cannot be regarded as anywhere near certain, and that a compromise figure is appropriate. She suggests 15%, i.e. two-thirds of the figure of 22% put forward on behalf of the claimant.

195. I do not propose to lengthen this judgment by a detailed analysis of the figures put forward by Mr Segal in his report and in his oral evidence, or the other figures which emerged in relation to the comparator businesses when he was cross-examined. The relevant points are summarised in the parties' closing written submissions. Suffice it to say that Mr Segal's analysis amply justifies 22% as a reasonable assessment. Mr Segal not only dealt with this in detail in the narrative of his report but also, helpfully, illustrated it in the form of a graph (SLS/3, B49.13). Whilst this shows, as one would expect, that the respective comparator businesses have experienced peaks and troughs in net profit margin, it does vividly demonstrate that 22% represents a reasonable assessment of the accumulated evidence of what a business such as this is likely to achieve as a net profit margin.

196. It is also unnecessary to rehearse the evidence in any more detail because, importantly, Mr Barnes said very frankly in cross-examination "I am quite happy to accept 22% may be the correct answer. It is within the range of answers".

197. It is, however, pertinent also to observe, on the issue of net profit margin, that in at least two respects, in the early years at least, there would have been factors tending to keep down expenditure. I have already alluded to both in another context. First, there was no need to borrow money from an institutional lender in order to get the business on its feet. Secondly, the claimant's wife's connections within the property industry would have ensured that office premises were obtained on the best possible terms.

198. I therefore conclude that, for the purpose of calculating net annual profits, it is appropriate to take a net profit margin of 22% throughout the duration of the business, until sale. Again, any uncertainty over the profit margin is something which can more properly be reflected in the overall discount at the end of the exercise.

In relation to all of the above, should there be a further discount to take account of uncertainties and contingencies that have not already been taken into account, having particular (but not exclusive) regard to the issues of the net margin and percentage share in the company, and the overall course of the company over the next 26 years?

199. In addressing this issue, I am invited (in the formulation of the issue agreed by the parties) to ignore the scenario of the claimant working other than as a director of Tri Ltd.

200. As I explained in my review of the relevant legal principles, an overall discount for uncertainties and contingencies in a "chances" case such as this may be achieved in different ways. In ***Langford -v- Hebran*** and in ***Smith -v- Collett***, the Court's approach was to apply an overall discount to the net figure for lost earnings: 20% in ***Langford***, 15% in ***Smith***. In ***Clarke -v- Maltby*** the approach was to adjust down the multiplicand (i.e. the projected earnings figure) to reflect contingencies not taken into account in the Ogden Tables, such as the fluctuation in partnership share of profits due to fluctuations in the market for legal services.

201. Miss Gumbel submits that any necessary overall discounting exercise has already been achieved because the agreed multiplier for the period from trial to age 65 is substantially lower than the appropriate multiplier in table 28 of the Ogden Tables. Table 28 indicates that the appropriate multiplier for this period would be 18.95. The agreed multiplier for this period, however, is 16.21. This represents a reduction of 14.46%. Miss Gumbel submits that this is very close to the 15% deduction applied by Swift J in ***Smith -v- Collett***. She submits that no further overall reduction is necessary or appropriate.

202. Miss Bowron, as I have already explained throughout this part of my judgment, has submitted that at each stage of the assessment of a chance upon which the claim depended, there should be a robust deduction to reflect the uncertainty of that event occurring. She submits that were I to go down that path, there might well be no further need to make an overall reduction at the end of the exercise. She submits that if I do not make deductions at each stage (and I have not) there should be a correspondingly greater reduction overall, and that it should be very substantial.

203. I have considered very carefully these competing arguments, and all the relevant issues and uncertainties. In my judgment there must be, by one means or another, a significant reduction overall to reflect the uncertainties which bedevil this unusual claim.

204. First, the claim covers a very significant period, some 26 years, far longer (for example) than the equivalent period in ***Smith -v- Collett***. It follows that even if, as I have found, the business would have started and grown over the years, the possibility always remains that market changes and the international financial climate might have put a different complexion on the prospects of achieving the success that, even on a chances basis, I have assumed. As Mr Barnes put it in his oral evidence: who would have thought a few years ago that Lloyds Bank would be in public ownership?

205. Secondly, the difference between the projected earnings from his own business, which form the basis of the claim, and the net earnings he would have been likely to achieve had he returned to the employed sector or become a consultant (the defendant's

primary case), would have been very considerable indeed. It follows that had the claimant found himself thrust back onto the employment market, as an employee or a consultant, the financial rewards would have been very significantly less.

206. Thirdly, I have made no allowance, so far, for the contingency that the claimant would have found himself compelled to release a greater share than 34% of the equity in the business to a partner, at some stage or another over the 26 year period. Unlike most of the other "variables", this is a chance which could work only "against" the claimant.

207. Fourthly, nor have I made any allowance, so far, for the contingency that the net profit margin of the business, for some period or periods over the 26 years of trading, could be significantly less than the 22% figure I have adopted. It is true that the profit margin could, at times, have been higher rather than lower, but this is far less likely in my judgment.

208. I bear in mind Miss Gumbel's submission that, by analogy with *Smith -v- Collett*, the claimant's business might have done significantly better than OA's projections, perhaps even approaching the success of Agency Two. More specifically, the thresholds of £5 million and £10 million turnover might have been met somewhat sooner than projected. However, the analogy between the present case and *Smith -v- Collett* has its limitations. In *Smith -v- Collett* Premiership earnings exceeded Championship earnings by a factor of 4 so that, as the Court of Appeal stressed, a 1% increase in the claimant's chance of playing in the Premiership would counterbalance a 4% chance of his not achieving a career in the Championship. Until this had been appreciated, Smith LJ (giving the judgment of the Court of Appeal) had thought the discount of 15% lower than she would have expected, hence her decision to grant permission to appeal. By contrast, in the present case, the differential would have been likely, in my judgment, to be much more modest, indicating that a higher discount than 15% would be appropriate.

209. I agree, as both counsel submitted, that this is an unusual case of its kind where the uncertainties and contingencies are more extensive and controversial than usual. This, in itself, calls in my judgment for a more cautious approach. Equally, the analogy between the present case and *Langford -v- Hebran* is limited. There the Court of Appeal applied a discount of 20% overall, on top of the "chances" ranging from 20% to 80% for the various scenarios, to reflect the overall contingency that none of the scenarios would have arisen. However, it is important to note that the "baseline" claim in *Langford -v- Hebran* was not (as here) the achieving of the first scenario, but the claimant's far more secure earnings as a bricklayer and part-time professional fighter. The four scenarios were, so to speak, the icing on the cake.

210. Finally, it should be noted that in *Herring -v- Ministry of Defence* the objection to as large a discount as 25% for general contingencies was that there were no identifiable contingencies to justify departing from the Ogden Tables. In the present case, for the reasons I have set out, the position is very different.

211. I am mindful of the observation of Ward LJ in *Langford -v- Hebran*, that the amount of an overall discount, in a situation such as this, must be a matter of judgment rather than mathematics. I note, however, that a comparatively modest adjustment, adverse to the claimant, in the equity share and in the net profit margin, could have a marked impact on the figures for any given year. I take, by way of example, Mr Segal's computations at paragraph 117 of his report [B29] for turnovers of £1.7 million (there is no calculation for £2 million), £5 million and £10 million. An adjustment of the profit margin from 22% to 20%, and an adjustment of the equity share from 34% to 40%, would on those calculations in each case result, very roughly, in a reduction in net earnings of about 15%.

212. I have limited information as to the basis upon which the multiplier of 16.21 was agreed, by way of discount from the indicated multiplier of 18.95 in table 28 of the Ogden Tables. In Miss Gumbel's closing written submissions, at paragraphs 5.11.1 and 6.13, it is described as a discount for "mortality and other contingencies of life". The necessary discount must, in my judgment, plainly reflect far more than mortality and "the other contingencies of life". It is a very different case, for example, from a conventional loss of earnings claim as an employee.

213. Miss Bowron has not submitted that it is inappropriate for me to have regard to this 14.46% reduction in the multiplier as going some way to meeting the need for the overall discount for which she contends.

214. In order to achieve a proper and necessary overall discount, I find that in addition to the reduction of 14.46% reflected in the agreed multiplier, there should also be a further discount of 15% applied to the claim for net loss of earnings. As the Court of Appeal pointed out in *Smith -v- Collett*, this discount should be applied before deducting the figure for residual earnings.

In relation to the claimant's earnings after the sale of the business (and if appropriate after working within the business during a transition period), what is the chance that he would have chosen to work after selling the company, if so for how long and what is the appropriate multiplicand?

215. It is common ground that the claimant would have worked until the age of 65. Miss Gumbel submits that, thereafter, he would have worked part-time until the age of 70. She submits that the appropriate figure (upon which the accountants in their joint statement have made calculations) would be 2 days work per week at £1,000 gross per day, producing a net figure of £48,600 per annum. For the period from age 65 to age 70 there is an agreed multiplier of 1.89. Again, this reflects a reduction from the multiplier indicated in table 28 of the Ogden Tables, this time a reduction of 11.5% for contingencies. Miss Gumbel invites me to assess the chance that the claimant would have worked during this period.

216. Miss Bowron submits that there must be doubt as to whether the claimant would have wanted to work at all beyond 65, assuming he had been working in the business for 26

years so strenuously. She submits that there is no more than a 40% chance that he would have worked on, and that the net figure should be no more than £25,000 per annum. She also submits that he might not have worked for the whole of the 5 year period after 65.

217. I bear in mind the claimant's evidence that, as some form of compensation for such a punishing work schedule over the years, he and his wife would have looked forward to "a fantastic retirement". The claimant's outlook, I am satisfied, would have differed from that of EU (Agency Five), who proposes to retire at the age of 50. I also bear in mind that the trend, in the current climate and for the foreseeable future, is likely to be towards a longer working life before retirement pensions are paid.

218. In my judgment the likelihood is that the claimant would indeed have worked on, part time, beyond 65, until 70. This is the path which OA has followed. It is also likely, in my judgment, that the claimant would have worked on in the business, post-sale, for those first 2 years after his 65th birthday.

219. As to the level of such part-time earnings, on the evidence I regard £1,000 per day, for 2 days per week, as a fair and reasonable assessment. After all, the claimant would by definition be a highly successful and experienced researcher, very much in the mould of OA, who continues to provide his services on a consultancy basis even at the age of 70.

220. Nevertheless, I do not regard the prospect of the claimant working a full 5 years from age 65 to 70 as so overwhelming that no discount is called for (even beyond the reduced multiplier). In my judgment it is appropriate to assess that chance in percentage terms, and apply that percentage to the relevant claim for the 5 year period. I find that there was a 75% chance that the claimant would have worked for the whole of the period at the level of remuneration claimed. Accordingly I assess this part of the claim at 75% of £48,600 net, to which the agreed multiplier of 1.89 will be applied.

Residual earning capacity

221. In relation to the claimant's residual earning capacity, the parties invite me to make a series of factual findings upon the basis of which the accountants will agree the relevant calculations. For the purpose of these findings I take into account the agreed statements of the consultant nephrologists and the consultant psychiatrists, and the history of the claimant's present medical complaints set out earlier in this judgment.

The first issue is the date when the claimant will commence work

222. Miss Gumbel submits that, on the evidence, the earliest the claimant is likely to be able to start work is May 2011, once he has explored the possibility of "botox" treatment instead of surgery to his foot. Miss Bowron submits that it is surprising, and unreasonable, that the claimant has not already returned to some form of work.

223. I have no hesitation in concluding that it is entirely understandable, and reasonable, that the claimant has not yet returned to work. He is not work shy, but has become obsessed by his medical condition, and its implications, to the point that he could not reasonably be expected to focus on remunerative work. I accept as reasonable his desire to regain his fitness before attempting to work. The troubling and disabling problem with his foot was initially thought to require surgery. It is reasonable that he should seek to avoid the irreversible consequences of that surgery, including fusing two toes permanently, by exploring the relatively late option of botox treatment. Indeed, the defendant has conceded that the cost of this treatment is recoverable. Realistically the claimant will not have completed that treatment, and recovered to a reasonable level of fitness for work, until May 2011.

224. I therefore conclude that, for the purposes of calculating residual earnings, the claimant will commence work on 28th May 2011.

The second issue is the age to which the claimant will work

225. This is dependent upon the date of the likely onset of debilitating clinical deterioration in the replacement kidney as he nears the date for a further surgical transplant. It also depends upon my assessment of the extent to which he will be able to work once those symptoms begin.

226. There is a measure of agreement between the consultant nephrologists. They both agree that the further surgical transplant will be required at about the age of 61. They further agree that deterioration in his existing replacement kidney is likely to occur 3 ½ years before that, i.e. at the age of 57 ½ years. What the consultants disagree upon is whether the claimant is likely to be able to work during that 3 ½ year period. Dr Andrews (relied on by the defendant) suggests that the claimant could work until the age of 60. Dr Mansell (relied on by the claimant) considers that he will be unlikely to work once the kidney graft begins to cause significant clinical deterioration.

227. In resolving this issue I have regard to the history of the claimant's anxiety about his medical prognosis, and to the agreed findings of the psychiatrists. Even if, from a purely physical point of view, the claimant were able to manage to perform paid work once the deterioration in his kidney occurs, I consider it unlikely in the extreme that he would in fact be able to apply himself to such work. I have no doubt that when that stage is reached he will be as preoccupied with his medical condition as he has been hitherto. Not even the peace of mind of private medical treatment will, in my

judgment, assuage this anxiety. I note that the likely symptoms when deterioration in the graft occurs, are described by the doctors as tiredness, anaemia and renal bone disease, although the doctors disagree on the likely severity of these symptoms.

228. I therefore conclude, for the purpose of assessing residual earning capacity, that the claimant will cease work at the age of 57 ½ years.

The third issue is the multiplier taking into account the relevant contingencies for his injured state

229. No agreement has been reached by the parties in relation to this multiplier. The starting point must be the period of 17 ½ years (aged 40 to 57 ½) during which I have found that the claimant will work. Miss Gumbel submits that in respect of this period the arithmetic multiplier from table 28 of the Ogden Tables is 14.2, before reduction for mortality. That reduction brings the multiplier down to 13.7. She submits that there should be a further reduction for contingencies to reflect the claimant's injured condition. She relies upon the more recent (and more controversial) new Ogden Tables which factor into the equation a claimant's educational attainment, disability status, and employment status. At age 40 (the start of his period of work), if regarded as "disabled" and if "employed", the applicable adjustment to the multiplier is 0.57. If he is "disabled" but "unemployed", the applicable figure of 0.33.

230. Miss Bowron takes issue with the suggestion that the claimant meets the four "disabled" criteria in the notes to the relevant Ogden Tables (see paragraph 35 of Facts and Figures 2010/2011, page 58). She submits that the maximum discount should not exceed 30%.

231. The explanatory notes to the Ogden Tables make it clear (at paragraph 38) that the claimant's employment status and disability status need to be determined "as at the date of the accident (or the onset of the medical condition) giving rise to the claim" in order that the correct table is applied. The test for "disability" requires an illness whose impact substantially limits the person's ability to carry out normal day to day activities and affects the kind or the amount of paid work they can do. Detailed examples are given, which mirror the criteria for relevant state benefits arising from disability. It is, in my view, a borderline decision whether the claimant's lack of mobility and urinary problems meet in full the relevant criteria. Similarly, although the claimant was, technically, "unemployed" at the date of the "accident", he was taking a sabbatical. It would be unrealistic to treat him as "not employed" for the purpose of the new Ogden Tables.

232. For this reason I do not accept, in full, Miss Gumbel's approach, which is to take a mid-point between the range of figures for employed/unemployed males who are disabled. For an employed male who is not disabled, the appropriate discount factor, at the age of 40, is 0.88. For a male who is disabled, the equivalent appropriate factor at age 40 is 0.57. The mid-point of these figures is 0.73. This, in my judgment,

represents the fairest approach to adjusting the multiplier of 13.7 (which reflects only a reduction for mortality).

233. I therefore conclude that the multiplier in respect of the claimant's earnings between aged 40 and aged 57 ½ should be 13.7 x 0.73, which conveniently produces a figure of 10.00.

The fourth, fifth and sixth issues are the daily rate at which the claimant will earn, the number of days a week he will work, and the number of weeks each year he will work

234. I address these issues together. Having heard the claimant explain his current problems, and the impact of his disability and forced absence from the industry for the last 3 years, I have no hesitation in concluding that he will never be able to work to anything like the same level or intensity as he did in the past. I have recited earlier in the judgment the physical constraints under which he labours, and their psychological impact. Although it is to be hoped they will improve with time, he will never be able to manage the exacting schedule he once relished in the employed sector. For example, I accept that he will not be able to travel long distances from home, staying overnight, in order to conduct in-depth analysis sessions. In other words the "qualitative" side of the work is now beyond him. He could not physically manage it. I accept his evidence that such work would involve trips (e.g. to Manchester) in which he would have to attend focus meetings late into the night. At present, and for the foreseeable future, he is handicapped by a need to be in bed by 10 pm. As he put it, he would simply be unable to "ramp up the energy". I see no real prospect for improvement in this regard.

235. Furthermore, having now been out of the industry for 3 years, he is badly out of touch. I accept that the longest he could have gone without losing touch would have been 9 to 12 months. I accept the claimant's assessment that he will now be confined, realistically, to "back room" work, processing research data, freelancing for a research agency. Any prospect he had of returning to the inner circle of pharmaceutical market research has, in any event, almost certainly been irretrievably lost as a result of his reaction to his illness. He sent "suicide emails" to everyone. As he put it in evidence, "everyone is sympathetic, but they are business people not charity workers. I cannot step back in now".

236. As to the level of remuneration for the work he proposes, I accept the claimant's evidence that he has been advised by one of his former colleagues, NOO(a former colleague who works for the company which bought Agency Two from OA), that the rate for agency work of the kind in question would be £230 to £250 per day. Although LE thought it would be a case of "suck it and see", this, in my judgment, provides no proper basis for rejecting the figures emanating from NOO. At one stage Mr Barnes put forward a rate of £550 per day, but this was abandoned.

237. As to the number of days a week the claimant will work, I accept his evidence that 2 to 3 days is the most he is ever likely to be able to manage, realistically. Having seen him for myself giving evidence at length, I accept without hesitation the compelling evidence of his wife as to the shattering effect the accident has had upon his stamina and enthusiasm.

238. As to the number of weeks each year the claimant will work, the suggestion he puts forward is 42 weeks, which allows for holidays equating to the children's school holidays. I bear very much in mind the claimant's evidence that his priority now is to take every opportunity make up for lost time with his family, conscious as he is that his life has been shortened by 10 years.

239. I therefore conclude that the claimant's residual earnings should be assessed on the basis of 2 ½ days per week, for 42 weeks a year, at a rate of £240 per day gross. I do, however, consider that once the youngest child finishes the school year in which she reaches 18 (2025) it is reasonable to assume that the claimant could manage 3 days per week, and 44 weeks per annum. He will then be 54 years of age, so this increase will apply only to the last 3½ years of his career, between age 54 and age 57 ½. This will produce a gross annual income of £31,680 rather than £25,200.

The seventh issue is the amount to be deducted each year for the claimant's expenses of working

240. There was very little evidence about this, and no realistic challenge to the figure of £6,000 put forward by Mr Segal at paragraph 123 of his report [B31]. His figure of £6,000 incorporates legal costs of agreeing freelance contracts, accountancy and taxation fees, non-recoverable travel and entertaining and an allowance for sundry and office expenses. These are, in my judgment, reasonable. I therefore assess the appropriate deduction each year (including the final 3 ½ years when the income will be somewhat greater) at £6,000 per annum. I note that this deduction is incorporated into the agreed calculation by the accountants in their joint statement [B49.9] of the claimant's net earnings as £15,451 for the year 2011, and thereafter £15,368. The figure for the final 3 ½ year period will have to be calculated.

Claim for the sale of the business

241. This claim proved, in final submissions, to be less contentious in principle than had first been anticipated. On the assumption that the claimant's business would have commenced as planned and developed as OA predicted, it follows that the business would have acquired a capital value realisable upon sale. Indeed, as the sale by OA of Agency Two has demonstrated, this is likely to have been an important part of the incentive for the claimant to have pursued the business vigorously until retirement. The capital value, upon sale, would be an important part of his retirement provision.

242. Again, I am invited to make a series of findings, upon the basis of which the parties will be able to agree the calculation of the relevant capital value of the business. I bear firmly in mind that what I am valuing here is the chance that a very substantial capital sum would have been realised many years ahead from the sale of a business which had not yet traded.

The first issue is the age at which the claimant would have sold the business

243. The claimant's evidence in his third witness statement, confirmed in his oral evidence, is that he would have worked in the business until retirement at age 65, that is the date at which, in my judgment, it is likely that the business would have been sold. I have referred already to the claimant's evidence that he and his wife would look forward, as a reward for all the years of hard work, to a "fantastic retirement". On reflection, I do not consider that this would have led to his retiring before the age of 65. It would, however, have meant that he would be anxious to relinquish control of the business by selling it no later than at the date of his retirement. I think the likelihood is that in the period of 2 years up to the age of 65 he would have been looking for the opportunity of a sale, negotiating to complete the sale at the age of 65.

The second issue is whether, following the sale of the business, the claimant would have remained involved with it for a transition period

244. I have already covered this issue in my earlier findings. I have concluded that the claimant would have carried on working, on a part-time basis, as a consultant for two days per week from the age of 65 to the age of 70. I have assessed the chances of his working at the net annual remuneration of £48,600 for the full 5 year period at 75%. As I pointed out in oral argument in closing submissions, it is to be inferred that OA (who has just reached his 70th birthday) must have been 63 when he negotiated the sale of Agency Two, completing the sale at the age of 65. In other words, he carried on working in Isis for a transitional period. This is the model which the claimant is likely to have followed in my judgment. He would have wished to ensure that the profitability, and thus the capital value, of the business was maintained at its highest possible level at and around the time of sale. I find that he would have been prepared to commit himself to working in the business as a part time consultant post-sale in order to maintain the good will of the business. Furthermore, as the claimant put it in his oral evidence, he wanted Tri Ltd to outlive him. He was creating a brand which he hoped people would look back on for 30 years.

The third issue concerns the turnover of the business at the date of the sale and the percentage chances of having reached that turnover and any earlier turnover thresholds (as assessed in relation to a loss of earnings claim)

245. The turnover of the business at the date of sale, coinciding with the claimant's 65th birthday in May 2026, has been the subject of my earlier findings on the different levels of turnover which would have been achieved throughout the life of the

business. They enable the accountants to calculate and agree the corresponding capital value of the business at the date of sale.

The fourth issue is the amount of the net profit margin at the date of sale (as assessed in the loss of earnings claim)

246. This too has been the subject of my earlier findings. I have concluded that up to and including the date of sale the net profit margin would have been 22%. I reflected any uncertainty about this figure, throughout the duration of the business, in applying an overall discount to the claim for loss of earnings. No such discount is appropriate at this stage of my findings, but I shall return to it in dealing with the final issue of whether any further deduction for contingencies is appropriate.

The fifth issue is the notional deduction, if any, to be made from the net profit margin for the buyer to account for the cost of the equity partners in the business

247. This is a contentious issue. It arises because Mr Segal and Mr Barnes agree that, in principle, the capital value of the business should be regarded as six times the annual net profit. The correct approach, however, is also to deduct from profits before drawings a notional value for the salaries of the proprietors of the business who are selling. Mr Segal has chosen a figure of £200,000 as representing the estimated proprietors' salaries. In cross-examination Mr Segal agreed that this figure might be regarded as too low. He rejected the suggestion that it should be as high as £400,000. He appeared to acknowledge that a figure in the bracket of £250,000 to £300,000 might be realistic. Miss Bowron submits that I should adopt the figure of £300,000.

248. Having considered this matter carefully, I conclude that Mr Segal's figure of £200,000 is on the low side, and that the appropriate figure should be £300,000. I bear in mind that the remuneration for the claimant himself, post-sale, will be £96,000 per annum gross, i.e. £2,000 per week x 48 weeks. This is the basis of Mr Segal's calculation which I have accepted in respect of the claimant's income during retirement (see my earlier findings, and the accountants'agreed statement, at [B 49.7]). However, that would reflect only 2 days per week of the claimant's time and expertise, however valuable. There would, by definition, at this stage also be a further significant equity partner, who would expect a salary commensurate with that level of seniority and responsibility. This would, in my judgment, be a salary in the region of at least £200,000 gross, producing the combined figure of £300,000.

249. Accordingly, I find that, for the purpose of calculating the sale price of the business, the notional deduction to be made from the net profit margin which the buyer would have to find for the cost of the equity partners in the business, is £300,000.

The sixth issue is the sale price of the business before accelerated receipt

250. It is agreed by the parties that the sale price should be assessed as six times the net profit margin. This represents the conventional approach to valuing a business, an approach which has stood the test of time for at least the last 100 years, as the accountants explained in evidence.

The seventh issue is the equity partnership share the claimant would have held at the date of sale

251. Again, I have already covered this matter in my earlier findings in relation to loss of future earnings. My finding is that the claimant would have had an equity partner (or more accurately co-director) owning 34% of the equity in the business. I applied no reduction to this for contingencies, reflecting any uncertainty in the general discount I applied at the end of the exercise. As with the fourth issue above in relation to net profit margin, it is not appropriate at this stage of the present exercise to apply any discount. I shall return to that in the general discounting exercise, which is the last issue arising.

The eighth issue is the deduction to be made for accelerated receipt

252. It is agreed, that by reference to table 27 of the Ogden Tables, the appropriate reduction for accelerated receipt, upon sale of the business when the claimant reached the age of 65, is 0.5328. Accordingly I find that to be the appropriate rate of deduction.

The ninth issue is whether there should be any further deduction for mortality risk or other contingencies

253. This is the final, but nonetheless important, contentious issue. Miss Gumbel accepts that there should be some further deduction or discount, but submits that it should be no more than 11.5%.

254. Miss Bowron invites me to consider carefully the evidence of Mr Barnes, with his particular expertise in valuing businesses and companies. He stressed that he had reservations about attempting any valuation at all of a hypothetical business with a projected sale nearly 26 years into the future. It is, he said, a very unusual task and one which he had never previously been asked to perform. He accepted the principle of valuation on the basis of six times profit. But he had difficulty with the concept of predicting, sufficiently robustly, what the earnings would be that far ahead. When pressed to say what he thought the final discount should be he declined to put forward a figure, because he did not accept the general approach. He did however emphasise that he did not think that the Ogden Tables accommodated the risks which exist here. Miss Bowron suggested, in oral closing submissions, that the discount should perhaps be as high as 50%, unless there had been discounting at each stage of the assessment of the loss of earnings claim.

255. I reject Miss Gumbel's submission that the ceiling to any discount should be the figure of 14.46% represented by the reduction in the agreed multiplier for the loss of earnings claim to the age of 65. For the reasons I have already given in concluding that a much more substantial overall discount is necessary for the loss of earnings claim, a discount of only 14.46% simply does not reflect all the contingencies. In particular, it does not adequately reflect the possibility that the share of the equity ceded to the claimant's partner would have been more than 34%, nor the possibility that the net profit margin would have been less than 22%. Miss Gumbel went further by submitting that a discount as high as 14.46% is inappropriate because the risks in respect of the sale of the business are less than in respect of the loss of earnings. Her reasoning is that if the claimant died, or was unable to work through illness or accident, the business could still be sold. If one deducts from the 14.46% the proportion referable to a reduction for mortality only (3.38%) one is left with a figure of about 11.5%. That, she submits, should be the limit of the deduction.

256. I accept that the discounting exercise must proceed on the footing that the business would have developed, despite all the contingencies I have taken into account, to the point where it would undoubtedly have acquired a capital value. This means that however the claimant came to relinquish control - through sale, death or illness- it would have had some capital value. But this, in my judgment, does little more than distinguish the present case from *Collett -v- Smith*, where Swift J declined to award any sum for loss of the prospects of becoming a manager or trainer because it was simply too speculative. In other words, there was in that case no accrued capital value to the claimant's achievement as a professional footballer. Here, by contrast, the claimant had accrued a capital asset as well as an income over the years.

257. Nevertheless the fact remains that the capital value of the business might have been severely affected by an early cessation in trading, particularly if the claimant had died suddenly or had through illness been unable to drive forward the business with his full vigour.

258. Finally, I am very much mindful of the unusually hypothetical nature of the exercise I am being asked to perform. In my judgment the contingencies and risks are so varied and significant that it is proper and necessary to discount the valuation of the business by 25%.

Summary of conclusions

259. **Claim for future medical expenses**

I award the following sums:

(a) Monitoring: £ 42,678

(b) Medication:	£ 90,225
(c) Surgery:	£ 34,854
Total:	£167,757

Findings relating to the claimant's uninjured earnings

260. Adopting the paragraph lettering in the agreed list of issues for me to determine, my findings are as follows:

(a) I find that there was a very strong probability, verging on certainty, that the claimant would have successfully launched the business of Tri Ltd in September 2008.

(b) In view of my finding in (a) above, the question of what he might have done instead, and how much he might have earned, does not arise.

(c) I find that there was a very strong probability, verging on certainty, that the claimant's business would have achieved a turnover of £2 million by 01.11.2010. No discount is appropriate for the chance that it would not have done so. Accordingly £2 million represents the baseline annual turnover for the business throughout its projected life.

(d) I find that there was a 50% chance that the business would have achieved a turnover of £5 million by 01.11.2013.

(e) As to the period between reaching a turnover of £2 million and a turnover of £5 million, I find that there was a 75% chance that the business would have achieved an average turnover of £3.5 million per annum throughout the period 01.11.2010 to 01.11.2013.

(f) I find that there was a 20% chance that the business would have achieved a turnover of £10 million by 01.11.2018.

(g) As to the period between reaching a turnover of £5 million and a turnover of £10 million, I find that:

(i) there was a 50% chance of achieving an average turnover of £5 million per annum throughout the period 01.11.2013 to 01.11.2015

(ii) there was a 40% chance of achieving an average turnover of £6.5 million per annum throughout the period 01.11.2015 to 01.11.2017

(iii) there was a 30% chance of achieving an average turnover of £8 million per annum throughout the period 01.11.017 to 01.11.2018.

(h) In relation to the issue of equity partnership, I find:

(i) that by 01.11.2010 (by which date the business would have achieved a turnover of £2 million) the claimant would have had an equity partner

(ii) that the claimant's partner would have had a 34% share of the business from 01.11.2010 throughout the duration of the business until sale (when the claimant reached the age of 65 years).

(i) In relation to the issue of probable net profit margin (adopting the formula agreed between Mr Segal and Mr Barnes for the treatment of directors' remuneration and dividends) I find:

(i) that the net profit margin of the business, by 01.11.2010 would have been 22%

(ii) that the same net profit margin of 22% should apply throughout the life of the business thereafter until sale (when the claimant reached the age of 65 years)

(j) In relation to the issue of an overall discount to take account of uncertainties and contingencies I find:

(i) that there should be a further discount to reflect uncertainties and contingencies not already taken into account, including the possibility that the net profit margin and partners' equity share would have been different from my assessment

(ii) that the reduction of 14.46% in the agreed multiplier of 16.21 for the period from trial to age 65 should be treated as contributing to the appropriate discount

(iii) that, in addition to that discount of 14.46%, there should be a further discount of 15% applied to the claimant's projected net annual income throughout the life of the business until sale (when the claimant reached the age of 65 years).

(k) In relation to the claimant's earnings after sale of the business, I find:

(i) that there was a 75% chance that the claimant would have worked part-time between age 65 and 70, following the sale of the business

(ii) that his net annual earnings during this period would have been £48,600 (representing 2 days per week at £1,000 per day gross for 48 weeks per annum)

(iii) that the appropriate multiplier for this period is the agreed multiplier of 1.89.

Findings in relation to the claimant's residual earning capacity

261. Adopting the paragraph lettering in the agreed list of issues for me to determine, my findings are as follows:

(a) I find that the claimant would have commenced work on 28th May 2011.

(b) I find that the claimant would have worked until the age of 57 ½ years.

(c) In relation to the issue of the appropriate multiplier, taking into account the relevant contingencies for the claimant's injured state, I find:

(i) that the appropriate multiplier for the period of 17 ½ years from age 40 to age 57 ½ is 10

(ii) that the multiplier of 10 should be split to reflect my finding (at paragraphs (e) and (f) below) that the claimant's earnings would have increased for the final 3 ½ year period from age 54 to 57 ½ years.

(d) I find that the appropriate daily rate for the claimant's earnings, throughout the period of his working life, is £240 gross.

(e) In relation to the number of days a week the claimant will work, I find:

(i) that for the period from age 40 to age 54, the claimant will work 2 ½ days per week

(ii) that for the period from age 54 to age 57 ½ the claimant will work 3 days per week.

(f) In relation to the number of weeks each year the claimant will work, I find:

(i) that for the period from age 40 to age 54 the claimant will work 42 weeks each year

(ii) that for the period from age 54 to age 57 ½ the claimant will work 44 weeks each year.

(g) In relation to the amount to be deducted each year for the claimant's expenses of working, I find:

(i) that the appropriate annual deduction is £6,000

(ii) that this figure is appropriate throughout the period from age 40 to age 57 ½.

Findings in relation to the sale of the business

262. Adopting the paragraph lettering in the agreed list of issues for my determination, my findings are as follows:

(a) I find that the claimant would have sold the business at the age of 65 years.

(b) I find that the claimant would have remained involved with the business, as a part-time consultant, for at least 2 years after age 65, at the level of remuneration I have found at paragraph 260 (k) above.

(c) I find that the turnover of the business at the date of sale, and the percentage chances of the business having reached that turnover and the earlier turnover thresholds relevant for calculating the capital value of the business, are as I have found at paragraphs 260 (a) to (g) above.

(d) I find that the net profit margin of the business at the date of sale, for the purpose of calculating the capital value of the business, is 22%.

(e) In relation to the notional deduction to be made from the net profit margin to reflect the amount the buyer of the business would have had to account for in

respect of the cost of the equity partners, I find that the appropriate sum is £300,000.

(f) I find, as agreed between the parties, that the sale price of the business should be assessed as six times the net profit margin.

(g) I find that the claimant would have held 66% of the equity in the business at the date of sale.

(h) I find that the appropriate deduction to be made for accelerated receipt (using the Ogden table 27) is 0.5328, as agreed between the parties.

(i) In relation to whether there should be any further deduction for mortality risk or other contingencies, I find:

(i) that a significant deduction is appropriate to reflect all the contingencies, and in particular the possibility that the net profit margin and the claimant's equity share in the business might have differed from my findings, and the unusual and hypothetical nature of the valuation exercise

(ii) that the appropriate discount, reflecting all these factors, is 25%.

Calculations based upon my findings

263. In accordance with the agreement reached at the outset of the hearing, the parties (with the assistance of their forensic accountants) have agreed the calculation of the claim for loss of future earnings and the claim relating to the sale of the business, based upon my findings above. This includes agreement of the appropriate split multiplier for residual earnings. The resulting table of figures (set out below) was submitted to me for approval following distribution of my draft judgment. It summarises the damages awarded under all heads.

Item	Amount	Judgment
General damages	£168,000	Para.16
Past losses inclusive of interest	£287,500	Paras.15 and 17
Future losses (other than earnings and medical expenses)	£432,500	Para.18
Medical expenses & treatment	£167,757	Paras.41 & 259
Loss of earnings to the age of 65	£4,580,869	Para.260(a)–(j)
Loss of earnings after the age of 65	£68,891	Para.260(k)
Deduction for residual earning capacity	[less£164,108]	Para.261
Capital loss of sale of the business	£1,199,237	Para.262
Total award	**£6,740,646**	

264. I repeat my expression of gratitude to all counsel for the thoroughness and clarity of their written and oral submissions, and for their assistance in this unusual and complex case.