Judgment : His Honour Judge Richard Seymour Q. C. : TCC **:** 30th July 2003

Introduction

1. The Claimant, Stephen Donald Architects Ltd., is the corporate manifestation of Mr. Stephen Donald. The realities of life, if not the strictly correct legal analysis, will be reflected if I do not differentiate for the purposes of this judgment between Mr. Donald and the Claimant save where it is necessary to do so in order to make clear the legal rights and obligations of the Claimant. Mr. Donald is, and was at all times with which I need be concerned for the purposes of this action, an architect. He practised, and practises, as such through the medium of the Claimant. The Defendant, Mr. Christopher King, is a photographer. Mr. Donald and Mr. King were friends. Their former friendship forms an essential part of the background to this action.

2. Mr. King is and was at all times relevant to this action the freehold owner of the property known as and situate at 13, Murray Grove, London N1 (*"the Property"*). The Property was formerly, it seems, a public house called *"The Princess Alice"*.

3. From sometime in the year 1999 Mr. King had it in mind to redevelop the Property so as to provide a photographic studio which he could use for the purposes of his business, living accommodation for himself, and a number of flats which he could let in order to generate premiums on the grant of leases and to provide an income. In this judgment I shall call that proposed redevelopment *"the Project"*.

4. Mr. King had met Mr. Donald in *"The Rosemary Branch"* public house some years previously and they had become friends. He told Mr. Donald what he had in mind. That set in train the course of events which has led to this action.

The claims made in this action

5. The first of the claims made by the Claimant in this action was for payment of fees for architectural work allegedly done by Mr. Donald and various employees of his for Mr. King in connection with the Project. The principal justification for the claim to be paid fees set out in the Re-Amended Particulars of Claim was that there was a legally binding agreement made between Mr. Donald, on behalf of the Claimant, and Mr. King whereunder Mr. King engaged the Claimant to provide architectural services in relation to the Project. The way in which that allegation was put in the Re-Amended Particulars of Claim was:-

"*6. The architectural services provided by the Claimant were provided in accordance with a contract between the parties ("the contract").*

7. The contract was agreed between the parties in the following manner:

(i) In or about mid 2000 the Defendant communicated his requirements for the redevelopment to the Claimant (as set out at paragraph 4 above).

(ii) In meetings between Mr. Donald and the Defendant in September 2000, Mr. Donald stated that the Claimant would be willing to provide the necessary architectural services for the redevelopment and informed the Defendant that the Claimant's fees for proving [sic] *such services would be in excess of £100,000. Mr. Donald provided the Defendant with a copy of the Design and Management Services Supplement schedule from a document published by the RIBA entitled SFA/99 which set out the list of architectural services (work stages A – L) that would be required for the completion of the redevelopment. It was agreed by the parties that the Claimant was to carry out such services.*

(iii) Subsequently, in January 2002, the Claimant and the Defendant agreed that the fee that would be payable to the Claimant for the services that were to be provided would be £125,000 (ex VAT).

(iv) On or about 18 June 2002, the Defendant and Mr. Donald agreed that the fees payable to the Claimant for the provision of the services would be £125,000 (ex VAT) + disbursements.

*(v) On 11 July 2002 the Claimant wrote to the Defendant in the following terms: "**My proposal for securing an ongoing business relationship on the project comprises the following. I will continue to provide the full range of architects services as outlined in RIBA Plan of Work, as per the attached copy of the Architects Standard Form of Agreement SFA/99, my net fee is £125,000 + standard disbursements (Approx £12,000) + VAT …"***

*(vi) The Defendant replied to the Claimant on 16 July 2002, in which letter it was stated inter alia as follows: "**I confirm that from all our previous discussions that fees of £125,000 + vat [£15,000 inc vat has been paid on account] is due for design, planning drawings consultation with expert company's engineers Durkan***

Pudelek pricing, building supervision, certification, guarantees and the final signing off of the building 13 Murray Grove N17QT on its complition *(sic)."*

8. In the premises it is the Claimant's case that the contract for services between the parties was formed in or about September 2000, but that an exact fee for the works had then yet to be agreed (save that the fee would be in excess of £100,000). The exact fee for the services (£125,000 (ex VAT) + disbursements) was agreed thereafter, either in January 2002, at the meeting of 18 June 2002 or alternatively in mid July 2002."

6. It was alleged in the Re-Amended Particulars of Claim that the Claimant carried out the work covered by stages A – H of the Standard Form of Agreement SFA/99 published by the Royal Institute of British Architects (*"the RIBA Form"*) and thus was entitled to be paid 75% of the agreed fee of £125,000 plus Value Added Tax and disbursements totalling an estimated £11,829. How that claim was put in the Re-Amended Particulars of Claim was that:-

"*9. In the premises, it was an express term of the contract that the Claimant would provide the architectural services set out at stages A –L of the RIBA Standard Form of Agreement for the sum of £125,000 + VAT + disbursements.*

10. It was an express alternatively an implied term of the contract that the Claimant would be entitled to request and receive interim payment for the architectural services provided.

11. Pursuant to the contract between the parties, the Claimant is entitled to be paid for the architectural services it has provided to the Defendant 75% of the sum of £125,000 + VAT + disbursements (being the percentage due in respect of stages A – H of the RIBA Standard Form of Agreement) ie £93,750 + VAT of £16,406.25 + disbursements. The Claimant's disbursements are estimated in the sum of £11,829."

Credit was given against the sum claimed for an amount of £15,000 paid by telegraphic transfer on 27 June 2002.

7. The alternative way in which the claim for work allegedly done, as such, was put was pleaded at paragraph 16 of the Re-Amended Particulars of Claim:- "*In the alternative, if, contrary to the Claimant's primary case, there was no concluded contract between the parties as pleaded above, the Claimant is entitled (either by way of quantum meruit or on the basis of an implied promise) to be paid a fair and reasonable sum for the architectural services it provided to the Defendant. It is the Claimant's case that such a fair and reasonable sum is approximately £165,990 (ex VAT). The Claimant will rely on the time spent by its staff on the project (details of which have already been provided to the Defendant by way of disclosure).*"

8. A further claim advanced on behalf of the Claimant was in respect of the alleged wrongful termination of its engagement. How that case was pleaded was:-

"*15. By letter dated 2 August 2002, the Defendant's solicitors, for and on behalf of the Defendant and without prior notice, repudiated the contract between the parties. The Claimant claims damages for repudiatory breach of contract.*

Particulars of Loss and Damage for Repudiatory Breach

(1) Had the contract not been repudiated, the Claimant would have been entitled to complete the contract works and be paid fees of £125,000 + VAT + disbursements for its architectural services. The Claimant claims the sum of £125,000 + VAT + £11,829 disbursements, less (1) the sum of £15,000 (inclusive of VAT) already paid to the Claimant; and (2) less the cost of completing its obligations under the contract estimated at £10,000.

(2) In the alternative, if contrary to the Claimant's case (but as alleged by the Defendant), there was an agreement between the parties that instead of being paid in money the Claimant would be rewarded for its services by the transfer of a one bedroom flat at the Property, the Claimant is entitled to and claims the current market value of a notional one bedroom flat at the Property (less an allowance for the sum of £15,000 (inclusive of VAT) already paid) as damages for the repudiatory breach. The Claimant is presently unable to quantify the current market value of the said flat and shall rely on expert evidence in respect of the same."

9. The final claim advanced in the Re-Amended Particulars of Claim was for the amount of an allegedly dishonoured cheque. This did not seem to be a claim for an amount additional to the sums claimed as fees, in that it appeared to be included within the amount which was said to be due as fees, but it did have a different legal foundation. The relevant pleas in the Re-Amended Particulars of Claim were:-

"*12. On 21 June 2002 the Claimant submitted to the Defendant an invoice number SDA207 in the sum of £40,000 plus £7,000 VAT and on the same date an interim fee request SDA208 in the sum of £53,750 plus VAT of £9,406.25 as the balance due. The invoice SDA207 was in respect of a cheque for £47,000 drawn by the Defendant on 20 June*

2002 on his account with AIB Bank, Old Jewry Brach [sic]*, which was presented for payment on 21 June 2002 but was not met on presentation. Both the invoice and interim fee request were made in respect of sums due as interim payment for architectural services.*

13. By a letter dated 20 August 2002 to the Defendant from Percy Short & Cuthbert, then solicitors for the Claimant, notice of dishonour of the said cheque was given to the Defendant….

17. Further and in the alternative, in respect of the architectural services performed the Claimant is entitled to and claims payment of the sum of £47,000 by reason of the dishonour of the Defendant's cheque as set out at paragraphs 9 – 10 [sic] *above. For the avoidance of doubt, the Defendant is not entitled to claim any right of set-off in respect of the said sum of £47,000.*"

The Amended Defence and Counterclaim

10. The main thrust of the Amended Defence and Counterclaim pleaded on behalf of Mr. King was that the Claimant so failed to take account of the actual requirements and funding abilities of Mr. King in the preparation of his designs for the Project that its work was of no value to Mr. King and Mr. King sustained additional loss and damage. It was contended that Mr. King was, in the circumstances alleged, entitled to determine the engagement of the Claimant. Before coming to consider these allegations in more detail it is convenient to note the difference between the Claimant's case and the case of Mr. King as to the terms of the agreement between them, if any. What was pleaded in the Amended Defence and Counterclaim in relation to these matters was:-

"*10. Mr. Donald began carrying out planning, project management and architectural services in early 2000. Mr. Donald suggested to the Defendant that Mr. Donald should be a co-developer, and receive £300,000 at the end of the development, which he said would be three times his normal fee of £100,000. The Defendant suggested to Mr. Donald that he should instead receive a one bedroomed flat. Mr. Donald wanted a two bedroomed flat. The Defendant indicated that they should assess what was possible once the costs and financial return from the development of the Property were clearer.*

11. In early 2002, the identity of the unit to be provided to the Claimant in lieu of fees was still under discussion, but a figure needed to be included in the figures presented to the Allied Irish Bank to cover architectural fees. Mr. Donald and the Defendant agreed that although an allowance for architectural fees would be made in calculations for funding purposes, it was essential if the development was to go forward that the architectural fees or the transfer of a flat in lieu of fees should only take place once the development was complete and the flats ready for sale or occupation.

12. In the premises, the Claimant agreed to provide planning, project management and architectural services for the Development of the Property, for a reasonable fee (or transfer of flat in lieu) payable after the development was finished and the flats ready for occupation. If the Development of the Property could not take place, then no fee would be payable. It was an implied term of the said contract that the Claimant should provide services with skill and care, and faithfully as the Defendant's agent, and the duties pleaded at Paragraph 7 above were implied terms of the said contract.

13. If, contrary to the Defendant's case, it was not agreed that the Claimant would only be entitled to any fees at the end of the development, then the parties were never ad idem and there was no contract at all, since he Defendant never agreed that the Claimant could be paid before the development was complete."

11. The pleas in response to the allegations contained in paragraphs 10 to 13 inclusive of the Amended Defence and Counterclaim which were set out in the Amended Reply and Defence to Counterclaim were:-

"*10. As to paragraphs 10 and 11:*

(i) The Claimant began carrying out planning, project management and architectural services in August 2000.

(ii) From the outset, Mr. Donald informed the Defendant that the Claimant's fees would be in excess of £100,000. The Defendant and Mr. Donald also discussed the possibility of the Claimant accepting a flat in lieu of the fees. Mr. Donald indicated that the Claimant would require a flat worth about 3 times his fee if this arrangement was to be acceptable. Accordingly, he indicated that the Claimant would require a two-bedroom flat in the development. The Defendant offered a one-bedroom flat.

(iii) The Claimant and the Defendant did not reach an agreement as to the identity of a flat to be provided to the Claimant in lieu of its fees. Although the principle of providing a flat instead of fees was a subject of continuing discussion between the parties up until the Defendant's repudiation of the contract, no agreement as to which flat was to be provided was concluded.

(iv) In early 2002 a feasibility report was provided to Allied Irish Bank. A figure of £125,000 (ex VAT) was allocated for the Claimant's fees. It is the Claimant's case that this figure did in fact represent the sum which the parties were agreed would be paid to the Claimant (except if some other agreement could be made for the transfer of a flat in lieu of fees).

(v) The Claimant admits that if a firm agreement had been reached for the transfer of a flat in lieu of fees, that such transfer could have taken place at the conclusion of the project. However, no such agreement was concluded.

(vi) Save as aforesaid paragraphs 10 and 11 are denied.

11. The first sentence of paragraph 12 is denied. The agreement between the parties is as pleaded in the Amended Particulars of Claim. For the avoidance of doubt it is specifically denied that it was ever agreed or even contemplated by the parties that if the development of the property could not take place, then no fee would be payable to the Claimant. As to the third sentence of paragraph 12, the implication of the terms alleged are admitted only insofar as is admitted in respect of the duties referred to at paragraph 7 above.

12. Paragraph 13 is denied."

12. The duties alleged at paragraph 7 of the Amended Defence and Counterclaim, which were primarily said to have been owed in tort, were:-

"*(1) To carry out his services as the Defendant's agent faithfully with proper regard for the interests of the Defendant;*

(2) to carry out his services with the skill and care reasonably to be expected of an architect, project manager and adviser;

(3) To give advice as to the Development with reasonable skill and care.

Further such advice extended to financial advice because the Claimant involved himself in financial advice:

(1) He supplied costs and sale figures for funders and potential funders.

(2) He accompanied the Defendant in inspecting large numbers of properties in the area and investigating sale prices.

(3) He carried out research into prices.

(4) He was copied in with, or obtained, all the estate agency advice received by the Defendant, commented on it, and formed his own, different opinions, and communicated them to the Defendant and the funders;

(5) He spoke of himself as a co-developer on occasion, and he discussed the project with the Defendant as part of the team.

(6) He was the person through whom all the advice of the structural engineer, and the quantity surveyor was communicated to the Defendant. He was team leader, instructed the other professionals, and they dealt with the Defendant through him.

(7) The Defendant had no expertise in a development of this kind, and the Claimant was the expert who advised on all major decisions."

The duties of care contended for were admitted in the Amended Reply and Defence to Counterclaim, subject, so far as the allegation that the duties of care extended to giving financial advice, to these points pleaded at paragraph 7(iii) of the Amended Reply and Defence to Counterclaim:-

"*a. that is accepted only insofar as the skill and care to be expected from the Claimant was that of a reasonable architect, and not a professional financial adviser or quantity surveyor; and*

b. that duty to use skill and care extended only to advice that was in fact given (rather than advice which it is alleged was not given but should have been given) because the Defendant had specifically appointed a quantity surveyor to assess the costs of the project and received financial advice from his accountant, bankers and estate agents on the other financial aspects of the development."

13. The essence of the defence to the claim of the Claimant to be entitled to payment of fees under the contract between the parties was that it had been agreed that no fees were to be payable until successful completion of the Project. However, it was admitted that Mr. King had in fact made a payment of £15,000. About the alleged discussion and agreement of an amount to be paid as fees what was pleaded in the Amended Defence and Counterclaim was:-

"*17. The first subparagraph of Paragraph 7 of the Amended Particulars of Claim is admitted. It is admitted that no fee was agreed at any time in 2000 or 2001. It is denied that any fee was agreed on any of the three occasions identified by the Claimants. As to those occasions the Defendant's case is as follows:*

(1) January 2002. The figure of £125,000 was put into proposals sent to the Allied Irish Bank so that the bank would know (as it needed to) what allowance was being made for architect's fees, but the Claimant and the Defendant were agreed that in fact the fees would be paid in accordance with the agreement set out above.

(2) June 2002, it is denied that any agreement was made as alleged or at all.

(3) July 2002 the documents quoted are admitted as documents. The letter from the Defendant will be relied on for its full terms and effect, it makes clear that it is a draft offer for consideration by the Claimant, and for that reason it was not signed by the Defendant. It would only have been signed if the Claimant and the Defendant had come to an agreement, which they did not. Negotiations and drafts of proposed agreements continued for the rest of July, and no agreement was reached. "

14. Mr. King's response to the claim of the Claimant to be remunerated on a quantum meruit basis was set out in paragraph 24 of the Amended Defence and Counterclaim:- *"The Defendant pleads as follows in relation to quantum meruit:*

(1) the Claimant is put to proof of the time spent on the Claimant's design, and the tasks on which that time was spent. The Claimant's design is in the nature of a competition entry for a public building and most of the effort it involved was effort which was never required or requested by the Defendant.

(2) to the extent a quantum meruit is appropriate the Defendant contends that outline planning permission is the only real benefit achieved by the Claimant's work, and that that planning permission will need to be varied extensively or replaced by fresh planning permission.

(3) further, the Claimant did his work on the clear agreement and understanding that he would be paid once the Development was complete, and therefore a normal quantum meruit is not appropriate, because it is inconsistent with the agreement of the parties, and/or with the understanding on which the work was done. The Defendant will further rely in this regard on the duty of the Claimant under his code of conduct to define beyond reasonable doubt the fee structure and the consequences of early determination. The Defendant was quite entitled to rely on the Claimant's intention to treat fees as falling due only on completion, and any request for work must be read in that context."

15. There was no dispute that Mr. King had determined the involvement of the Claimant with the Project at the beginning of August 2002. What was said about that at paragraph 22 of the Amended Defence and Counterclaim was:- *"It is admitted that the Defendant's solicitors gave notice that the involvement of the Claimant had to cease. It was clear that there had been a breakdown of relations which made it impossible for the Claimant to continue to act for the Defendant. It is denied that the Defendant repudiated the alleged or any contract as alleged or at all. Further, the Defendant had to bring the Defendant's* [sic] *contract to an end because he could not afford the Claimant's design, and so the contract would have ended in any event. An architect has no contractual right to insist that his client builds any project which the architect designs. The loss and damage claimed is in any event denied, the Claimant's design was such that there was no possibility of the development being completed to the Claimant's design, and the Claimant had shown himself wholly unwilling or unable to redesign the project to suit the Defendant's resources. In the premises, the Claimant's engagement was bound to end fairly soon."*

16. The response to the pleas in paragraph 22 of the Amended Defence and Counterclaim contained in paragraph 15 of the Amended Reply and Defence to Counterclaim was:-

"(i) The alleged breakdown in relations is denied. It was not impossible for the Claimant to continue to act for the Defendant.

(ii) It is denied that the Defendant had to bring the Defendant's [sic] *contract to an end because he could not afford the Claimant's design. The Claimant shall rely on the following matters:*

(a) Quite apart from the fact that it was apparent that Durkan Pudelek's latest quotation had been artificially inflated (and that cheaper tenders would be likely to have been received from other builders) a firm of builders, Developing Interiors, submitted provisional costings for constructing the Claimant's design on 14 August 2002 in the sum of £1,181,350.00.

(b) Even if the Claimant's design could not have been built within the Defendant's finances (as to which the Defendant is put to strict proof), the design could have been adapted to allow it to be built for a lesser sum. The Defendant did not give the Claimant any or any adequate opportunity to adapt his design. Instead it [sic] *wrongfully terminated his appointment without warning.*

(iii) As to the Claimant's claim for repudiatory breach, the entitlement to damages in respect of the same depends on the facts of each particular case. In the present case the Claimant is entitled to such damages.

(iv) The Claimant would have been ready and willing to adapt or redesign the project had the Defendant so instructed him."

17. The defence which was pleaded in the Amended Defence and Counterclaim to the claim on the cheque was set out at paragraphs 26 to 32 inclusive:-

"*26. In reliance upon the agreement contended for above in this defence, alternatively in reliance upon a common understanding between himself and Mr. Donald that fees would be paid or satisfied by the transfer of a flat at the end of the development, the Defendant proceeded with the development of the Property, and explored the tax and other implications of giving Mr. Donald a flat in lieu of fees.*

27. After the first and second stage tenders had been submitted by a company known as Durkan Pudelek, (in February and April 2002) it became clear to the Claimant and Mr. Donald, that the Development was at risk and was not going to take place. Only at that stage, by letter dated 20th June 2002 did the Claimant and Mr. Donald then set out expressly to the Defendant the proposal that the Claimant should be paid in accordance with the RIBA scale, or a fixed fee, and on completion of various stages as contemplated by the RIBA scale. The said proposal was wholly contrary to the agreement or common understanding pleaded above.

28. If there was no binding contract for services as pleaded above, then the Claimant and Mr. Donald are estopped from denying that there was a binding agreement to postpone any payment of fees until the development was complete. It would be unconscionable for the Claimant or Mr. Donald to contend that any different fee structure applies, for three reasons:

(1) because of the conventional understanding between the Defendant and Mr. Donald set out above, and

(2) because the Defendant acted to his detriment in proceeding with the development and exploring the provision of a flat to Mr. Donald, and

(3) because it is a requirement of the Code of Conduct of the RIBA inserted for the maintenance of the standards of the profession and for the protection of consumers who employ the profession, that "A member shall when making an engagement, whether by an agreement for professional services by a contract of employment or by a contract for the supply of services or goods, have defined beyond reasonable doubt and recorded the terms of the engagement including the scope of the service, the allocation of responsibilities and any limitation of liability, the method of calculation of remuneration and the provision for termination". The Claimant wholly failed to set out any proposed method of calculation of remuneration, and wholly failed to identify any proposed provision for termination, and in particular what would happen if the Development did not go ahead, beyond reasonable doubt or at all, until 20 June 2002, and those proposals of June 2002 were never accepted by the Defendant, and no work carried out by the Claimant was done pursuant to or in reliance on those proposals.

29. In June the Claimant approached the Defendant and said he was in acute financial difficulties with substantial demands from the Inland Revenue and asked the Defendant for help. The Claimant threatened the Defendant that he would not complete design of the development if the Defendant did not give him financial assistance. This was an attempt to depart from the agreement that the Claimant was only to be paid after the Development was complete, and/or to resile from the convention and understanding that the Claimant was only to be paid after the Development was complete. After a conversation lasting in excess of two hours the Defendant reluctantly agreed to give the Claimant the cheque for £47,000 on the express proviso that this would require permission from the bank and was not to be cashed before that permission was given. The Claimant ignored this stipulation and paid in the cheque immediately.

30. The Defendant was unable to contact Mr. Finbarr Daly at the Allied Irish Bank, who was ill, and so could not discuss with Mr. Daly an extension of the facility to permit cashing the cheque to assist Mr. Donald. The Defendant therefore stopped the cheque.

31. The Defendant arranged a meeting between himself, Mr. Donald and Mr. Daly as soon as Mr. Daly returned to work, to discuss the cheque. At that meeting Mr. Daly did not give permission to cash the cheque, but offered to give Mr. Donald a personal overdraft, and also arranged for a telegraphic transfer of £15,000 at the request of the Defendant to assist Mr. Donald. Mr. Donald did not threaten to sue on the stopped cheque at that meeting, or in his subsequent proposals for revised fees in July and the Defendant was thereby led to assume that such legal proceedings would not be brought. Furthermore, the Defendant still believed at that meeting that he and Mr. Donald were still working together, and that together they could achieve the Development as designed by Mr. Donald, and pay Mr. Donald at the end as agreed. The Defendant as a further gesture of friendship provided an additional £15,000.00 paid by telegraphic transfer in order to assist the Claimant. The said payment of £15,000.00 was made on the basis that the

Claimant was once again going to join wholeheartedly in the Development on the agreed basis that his fee would be postponed. The Defendant then acted further to his detriment in continuing with the Development on that basis.

32. In the premises the Defendant is not liable to the Claimant as pleaded or at all."

18. At paragraph 17 of the Amended Reply and Defence to Counterclaim it was denied that there was any understanding that no fees would be payable to the Claimant until the successful completion of the Project or that Mr. King could have believed that that was the case. In the following paragraph of the Amended Reply and Defence to Counterclaim it was denied that it was apparent after the second stage tender of Durkan Pudelek Ltd. (*"DP"*) that the Project was not going to take place. What was pleaded in relation to the allegations contained in paragraphs 29, 30 and 31 of the Amended Defence and Counterclaim at paragraph 20 of the Amended Reply and Defence to Counterclaim was this:-

"*(i) The sum of £47,000 was paid to the Claimant as an interim payment on* [sic] *fees that the Defendant acknowledged were due in the sum of approximately £90,000. The Defendant provided the Claimant with a cheque for the said sum; the Defendant did not specify any conditions for cashing the cheque.*

(ii) It is admitted that subsequent to the dishonour of the cheque the Claimant attended a meeting with the Defendant and Mr. Daly during which an overdraft facility was discussed (but never agreed). It is admitted that £15,000 was subsequently transferred to the Claimant. It was not paid as a gesture of friendship but rather as payment for sums due to the Claimant for services provided. The £15,000 was not paid on the basis that the Claimant's fee would be postponed.

(iii) It is admitted and averred that at that meeting the Claimant and the Defendant were still working together and that the Claimant had every intention of seeing the project to completion.

(iv) Save as aforesaid paragraphs 29 – 31 are denied."

19. It was pleaded in the Amended Defence and Counterclaim at paragraph 34 that Mr. King was entitled to set off against any liability which he might otherwise have to pay any sum by way of fees to the Claimant so much as might be necessary of the sums found to be due to him in respect of his counterclaim. At paragraph 35 of the Amended Defence and Counterclaim it was pleaded that the services provided by the Claimant to Mr. King were in any event of no value to him.

20. The alleged context for the counterclaim of Mr. King set out in the Amended Defence and Counterclaim was that pleaded in paragraphs 4, 5 and 6:-

"*4. As a result of friendly discussions between the Defendant and Mr. Donald, in the "Rosemary Branch" public house, the Defendant and Mr. Donald became friends over a period of four or five years. In or about 1999 the Defendant told Mr. Donald of the Defendant's financial problems, and discussed with Mr. Donald whether the Defendant could convert "the Property" into flats to sell to make money. The Defendant explained the following facts and matters about the Defendant's requirements to Mr. Donald:*

(a) the Defendant was asset rich (in the sense that the Property was a valuable asset) but cash poor, and would be dependent on bank finance;

(b) the Defendant needed to make money from any development;

(c) the Defendant was worried about money because he had lost some major customers, and had three children about to go to university.

(d) the Defendant wanted somewhere to live and work.

(e) the Defendant needed the sale proceeds from the flats to be created by the development to be large enough both to pay for the development and to provide a fund for his retirement. He wanted and needed the Property to provide him with a studio, a home, and a pension.

(f) the Defendant had never undertaken a development of this kind, and the figures required for this development (of over £1 million) were entirely outside his experience.

(g) the Defendant wanted a studio which would be 12 feet high.

(h) the Defendant wanted a top floor flat.

(i) the Defendant necessarily relied on the professional knowledge and expertise of Mr. Donald.

5. Paragraph 4 is admitted, and the instructions from the Defendant pleaded at Paragraph 4 (i) to (iii) of the Amended Particulars of Claim are admitted and averred. The Claimant was aware, alternatively ought to have been aware, that in the event of conflict between the Defendant's financial constraints as set out in Paragraph 4 (a) to (c) above and

any of the Defendant's requirements for the design of the building, the financial constraints would have to take priority.

6. At all material times the Defendant's instructions and requirements remained essentially the same but they became more precise in the following respects:

(1) the amount which the Defendant could obtain by way of loan from the Allied Irish Bank and the basis on which that loan was being made available became known to the Defendant and the Claimant through the offer letter from Allied Irish Bank of 19th March 2002. The loan was expressly predicated on the basis that development costs would be £1,114,000, with £100,000 contingency. The Defendant's instruction pleaded at 4(a) above therefore became precisely defined.

(2) before accepting the loan offer from the Allied Irish Bank, at a meeting round the Defendant's kitchen table at which the Claimant was present, in or about June 2002, the Defendant asked the Claimant "can we do it for the money", and the Claimant said yes."

Paragraph 4 of the Re-Amended Particulars of Claim was in these terms:-

"*Between early 2000 and 2 August 2002, the Claimant provided professional services to the Defendant in respect of the proposed redevelopment of the Property. In accordance with the Defendant's instructions to the Claimant, the proposed redevelopment of the Property was to provide for the following:*

(i) A ground and basement studio which the Defendant could use for his photographic business; and

(ii) A top-floor flat to be lived in by the Defendant which was to be connected to the photographic studio by a private staircase and a large passenger/goods lift and which would, in addition, be suitable for occasional use as a location for photo-shoots; and

(iii) An unspecified number of residential units which could be offered for sale."

There was no real dispute as to the matters set out in paragraphs 4, 5 and 6 of the Amended Defence and Counterclaim, other than as to whether it formed part of the brief of the Claimant to seek to provide Mr. King, through the medium of the Project, with a pension fund, and as to whether Mr. Donald had said that the Project could be completed for the amount of the loan offered by Allied Irish Bank (*"AIB"*), which in fact seems to have been a trading style of a company incorporated in Northern Ireland the correct name of which was AIB Group (UK) plc. The former of these allegations was denied at paragraph 4(e) of the Amended Reply and Defence to Counterclaim, whilst the latter was denied at paragraph 6(ii) of that statement of case. It was pleaded at paragraph 6(iv) of the Amended Reply and Defence to Counterclaim that Mr. Donald was not aware that Mr. King intended to accept the loan offered by AIB until he in fact did so on 21 May 2002.

21. The alleged basis for the counterclaim of Mr. King was pleaded in the Amended Defence and Counterclaim in this way:-

"*37. In breach of contract and in breach of a duty owed to the Defendant the Claimant was negligent in the provision of architectural and planning services and failed to exercise proper skill and care.*

38. The Claimant developed plans on the basis of which the Claimant secured planning permission on the Defendant's behalf. The Claimant and Defendant attended meetings with the Defendant's bank, the Allied Irish Bank, to assist the Defendant in securing bank finance on the basis of the Claimant's plans.

39. The Claimant failed to act faithfully in the interests of the Defendant in that the plans and proposals he developed were such as to provide a striking architectural design which was too extravagant and expensive ever to maximise the money the Defendant would receive, contrary to the interests of the Defendant as set out at Paragraph 3 [sic]. *It provided a landmark building which showed off the skills of the Claimant, but the Defendant had no interest in such a landmark building, nor could the Defendant realistically get finance adequate for such a landmark building.*

40. The Claimant failed to carry out his services with the skill and care reasonably to be expected of an architect, project manager and adviser, in that his design was wasteful extravagant [sic], *and failed to maximise saleable space.*

PARTICULARS OF NEGLIGENCE

A. Extravagant features:

The following features in particular are wholly unnecessary, extravagant, do not serve to increase saleable value, and were far beyond the budget of a client such as the Defendant:

(1) the lightwell over the courtyard, the courtyard and the roof terrace;

(2) the decision to have different layouts on different floors;

(3) the decision to have bathrooms and other "service zones" so that they are neither modular nor back to back;

(4) the steelwork required by the layout;
(5) the mixture of reinforced concrete and steelwork for the structure;
(6) the 7 types of external finish; these were excessive in variety increasing costs and causing difficulty and technical complexity in the joining of these finishes. Further the finishes, in particular substantial areas of external glass, were vulnerable to vandalism. Further the finishes, including wood, have a high maintenance requirement. The finishes have therefore increased building costs and also created an unnecessary and excessive future maintenance liability. Further the weight and complexity of the external finishes has lead [sic] *to a requirement for additional structural strength further increasing costs.*
(7) the void over the NW stairs;
(8) the decision to glaze the northwest staircase;
(9) the decision to have three sanitary spaces within a two bedroom flat;
(10) the different types of window;
(11) the complicated geometry of the façade;
(12) the huge figures of naked men to be etched on the outside by a special process developed for a library in Germany.
(13) the absence of any attempt to keep the structure simple modular and regular to allow buildability;
(14) the absence of any attempt to keep the structure simple and easily divided so as to reduce and simplify the amount of fireproofing;
(15) the complexity of the drainage;
(16) the projecting balcony on the 4th floor, which would have trespassed over the edge of the Defendant's property boundary into the neighbouring property.

B. Saleable space:
The Claimant failed adequately or at all the need [sic] *to maximise saleable space in any speculative development, which needs to maximise the number of units of a saleable type, and to consist of units of a standard, saleable type, or to explain to the Defendant the implications of giving up space.*
The following features in particular reduced the saleable space or made the flats unusual and less likely to sell for the cost:
(1) vertically interlocking duplex apartments;
(2) the positioning of a staircase in the North West corner;
(3) the lightwell over the courtyard, the courtyard, and the roof terrace;
(4) the decision to have different layouts on different floors;
(5) the decision to have bathrooms and other "service zones" so that they are neither modular nor back to back;
(6) the void over the NW stairs;
(7) the sizing of the bedrooms, which are too small to have room around a double bed.

C. Maintenance: Further the Claimant's design makes no allowance for ongoing maintenance issues and the complex design means that window cleaning, external painting maintenance is expensive and difficult.

41. *The Claimant failed to give advice as to the Development with reasonable skill and care, in that having created his landmark design he neither adapted it to reduce costs, nor did he give the Defendant realistic advice as to the selling prices of his design. The Claimant was at the meeting in the Defendant's kitchen, around the Defendant's kitchen table, at which Mr. Finbarr Daly the responsible manager at the Allied Irish Bank, tabled the finance offer dated 19th March 2002. At that meeting the Claimant confirmed to the Defendant both that the allowance made in that offer for the costs of the development was high enough, and that the Claimant would not be taking any fee in advance of completion of the Development.*

42. *The Claimant's advice, once the high tender prices from the builders became known, and the discrepancy between those prices and the amount allowed by the bank was clear to him, was:*
    (a) that the Defendant should not worry, the costs would come down, and the Claimant could obtain further finance for the Claimant's design. The said advice was wrong and negligent, and promoted the Claimant's interest in building a landmark building above the Defendant's interest in a viable and profitable Development.
    (b) When the Claimant became concerned that that was not the case, he pressed the Defendant to obtain further finance, from the Allied Irish Bank or another lender, on the basis of more optimistic projections than the projections put forward by the estate agents who had advised on this development. The said advice was negligent and wrong. The Claimant ought to have stuck prudently to the figures given to him by estate agents.

(c) Furthermore, the Claimant failed to take any or adequate account of the true nature of the advice he should be giving to his client, in that the Claimant put a high priority on building to his design, and did not consider sufficiently the potential risk to which building to that design would expose the Defendant.

(d) The Claimant ought to have radically simplified his design to suit the Defendant's requirements, in accordance with the suggestions of the builders Durkan Pudelek, who said there was no value in building voids, no value in complex facades, or complex layouts, and that the complexity was the root cause of the high costs to build the Claimant's design.

(e) The Claimant ought in any event to have given the Defendant clear advice as to the true cost of the different features so that the Defendant could decide which features were important. The features listed in the particulars under Paragraphs 39 and 40 above were suggested or inserted by the Claimant, not the Defendant, with the exception of:

the roof terrace by the penthouse,
the separate front door for the studio,
the separate staircase for the penthouse,
and the studio itself.

The Claimant gave no advice as to whether these features were really necessary would increase saleability or would be likely to be costly, so that the Defendant could make no rational and informed decision as to the necessity for them. The Claimant simply maintained and expressed at all times a very high opinion of the merits of his design."

22. The broad answer to the allegations of negligence and breach of contract set out in the Counterclaim given in the Amended Reply and Defence to Counterclaim at paragraph 26(ii) was:- "*The Claimant's design was in the best interests of the Defendant; it is denied that (as appears implicit in the Defendant's case) the Defendant's interest could only be advanced by the Claimant producing the cheapest and most mundane design. For the avoidance of doubt is* [sic] *the Claimant's case that a functional design of architectural merit was in the Claimant's* [sic] *interest because:*

(a) a well designed building is intrinsically more valuable and attractive to prospective purchasers thereby increasing the sale value of the development (and the money the Defendant would receive); and

(b) the Defendant intended to live and work in the development and would therefore benefit on a daily basis from the design."

Detailed responses to the specific individual criticisms of the design set out in the particulars under paragraph 40 of the Amended Defence and Counterclaim were given in paragraph 27 of the Amended Reply and Defence to Counterclaim, but they can be summarised as nothing included was inappropriate. It was pleaded that there were in fact three external finishes, timber cladding, in situ concrete and rendered concrete block. The only other points which need be noted are, first, that the question of etching figures on the outside was a matter under consideration, with the cost excluded until a conclusion had been reached, and, second, the admission that the balcony as designed would have trespassed into neighbouring airspace, although it was said that the problem could have been dealt with by a minor change to the design.

23. At paragraph 30(ii) of the Amended Reply and Defence to Counterclaim it was pleaded that Mr. King was advised by local estate agents as to the probable resale value of the redevelopment of the Property, but that Mr. Donald also produced estimates in respect of various elements which were included in letters to AIB dated 18 April 2002 and 2 May 2002. These latter estimates were said to have been based on sales brochure prices for similar developments taking place in the neighbourhood of the Property.

24. It was not in dispute that Mr. Donald had emphasised to Mr. King that there were available sources of finance alternative to AIB. That was specifically averred in paragraph 6(iii) of the Amended Reply and Defence to Counterclaim. It was in dispute that both Mr. King and Mr. Donald had attended meetings with AIB. At paragraph 25 of the Amended Reply and Defence to Counterclaim it was pleaded that they only ever went together to AIB to a social function on St. Patrick's Day. However, at paragraph 30(iii) it was admitted that Mr. Donald had attended a meeting with Mr. Daly of AIB in Mr. King's kitchen on about 22 May 2002 during which an offer of finance from AIB was tabled.

25. At paragraph 31(i) of the Amended Reply and Defence to Counterclaim it was pleaded that:- "*The tender prices from the builders were received in the following way:*

a. Boyden & Co. had initially suggested in [sic] *31 January 2002 that the scheme (based on a cost model) would be £1.35m*

b. An initial letter from Durkan Pudelek dated 26 March 2002 estimated the works would cost £110 - £120 /ft2.

c. On 26 April 2002 Durkan Pudelek submitted a cost plan of £1,786,244 equating to £154/ft2. That cost pan [sic] *was revised to £1,577,522 to* [sic] *equating to £136/ft2.*

d. On 30 April 2002 it was reduced to £1,314,683. On 31 May it was increased to £1,462,463. A cost saving exercise of the same date reduced it to £1,278,569.

e. On 18 July 2002 Durkan Pudelek increase [sic] *the tender to £1,614,031.81.*"

26. The loss and damage which it was alleged Mr. King had sustained as a result of the alleged negligence and breaches of contract on the part of the Claimant were in essence said to be costs thrown away by the need to employ other architects and effectively to start work again on the proposed redevelopment of the Property. The actual figures claimed were introduced with this explanation in paragraph 44 of the Amended Defence and Counterclaim:- "*In particular, whereas if the Claimant's design had been such as to make it possible to keep within the parameters set by the Allied Irish Bank in its loan letter of 19th March, the Defendant would have had the option of continuing with the Claimant's design and taking advantage of it, that was simply impossible in fact, and in the view of the Allied Irish Bank. The Allied Irish Bank on whom the Defendant had to rely, took the view (correctly) that the costs figures on which they had made a facility available were too low, and that the proposed design used the space available poorly, and was not a cost effective design for a speculative development. The bank relied in this respect on the professional advice of Dunlop Heywood Lorenz in their second report of about August 2002, who were monitoring in accordance with the conditions attached to the facility letter of 19th March, and whom the bank asked to look at the development in more detail when it became clear that the work was not proceeding. The bank therefore explained to the Defendant that he should not proceed further, and the bank would not allow further drawdowns, and had he not taken their advice and stopped, the bank would have stopped him from proceeding.*"

27. The actual alleged losses sustained by Mr. King as a result of the alleged negligence and breaches of contract on the part of the Claimant were particularised under paragraph 45 of the Amended Defence and Counterclaim as follows:-

"*1. The difference of £1817 per month between the Defendant's mortgage of £1,000.00 per month in respect of 13 Murray Grove and rent in the sum of £650 per week equivalent to £2817 per month of alternative premises at 21 Cross Street from 1st June 2002 and continuing.*

2. Quantity Surveyor's fees:

invoice 14th June 2002 £10,000.00;

invoice 20th October 2002 - £7,625.00

3. RYKBA fees – 18th August 2002 - £11,750.

4. CPE Soil Engineer's Report – 11th October 2002 - £3,223.00

5. Bank facility fee – 19th March 2002 - £21,960.00

6. Interest on bank borrowing as set out in the letter dated 19th March 2002. A full calculation will be supplied.

7. Valuation fee – Dunlop Heywood Lorenz - £4,996.68.

8. Fees of Techniker Engineers - £30,800.00 plus VAT.

The Defendant claims return of the £15,000 paid to the Claimant."

28. There was also a claim for damages for distress and inconvenience.

The issues in this action

29. In the light of the foregoing analysis of the statements of case of the parties in this action there appeared to be little dispute of fact as between the parties as to what instructions Mr. King had given or as to what Mr. Donald had actually done pursuant to those instructions. In relation to the question of the entitlement of the Claimant to payment for the work done the principal issue, apart from the alleged entitlement to set off against any sum otherwise due so much as was necessary of the sums found to be due to Mr. King in respect of the Counterclaim, was whether it had been agreed that the Claimant would not receive any fees until successful completion of the Project. The contention that that had been agreed was the main plank of opposition to the claims to payment under the contract for which the Claimant contended and upon a quantum meruit. Subsidiary issues were whether any lump sum fee had been agreed, and if so what, and whether it was a term of the contract for which the Claimant contended that it should be entitled to payment

of fees on an interim basis by reference to the usual work stages defined in the RIBA Form. On the basis that the remuneration to which the Claimant was entitled fell to be assessed on a quantum meruit basis, the question arose what was the sum to which the Claimant was properly entitled.

30. The other issues to which the claims made in the action appeared principally to give rise were, first, whether, by terminating the further involvement of the Claimant in the redevelopment of the Property Mr. King had repudiated some contract, and, if so, to what damages the Claimant was entitled in consequence, and, second, whether, having regard to the circumstances in which it was drawn (as to which there was a dispute), Mr. King was liable to the Claimant for dishonouring the cheque for £47,000.

31. The question which commanded much attention at the trial, however, was what substance, if any, there was in the Counterclaim.

32. I consider in turn the principal issues in the action.

What was agreed in relation to fees

33. It seems quite clear that at the outset of the discussions between Mr. Donald and Mr. King about the possibility of redeveloping the Property, and for a good long time after that, such conversation as there was about the remuneration of the Claimant in respect of its involvement in the Project was vague. It seems that a number of conversations in which the subject was touched on took place in public houses on occasions when the enthusiasm of the participants in the conversation for pressing ahead with the scheme was reinforced by liquid refreshment. Thus not only were the relevant discussions themselves indefinite, but the recollections of Mr. Donald and Mr. King of what had been said were hazy.

34. In his witness statement made for the purposes of this action Mr. Donald dealt with the early discussions in this way:-

"*22. As the Defendant had said that he was not well placed financially, as a consequence of losing some large contracts the agreement reached was that the Claimant would meet the costs of the planning process, with the exception the Defendant would pay the planning application fee directly to the Local Authority, this being a disbursement. It was agreed that the Defendant would then pay these sums upon receipt of planning consent. However in order to proceed it was agreed in principal* [sic] *by both parties that a secondary option would be that the Claimant would re-invest some of the fees earned into the Project, by acquiring one of the units.*

23. I always envisaged that should the Project go to plan, this would possibly be a suitable arrangement. However, the arrangements were on the basis that the Claimant and the Defendant's respective legal and accountancy team would oversee any final agreement. At this early stage of the contract, neither the Claimant nor the Defendant had approached their advisers for guidance.

24. It was clearly understood by both parties that should the fee investment/ equity agreement not come to fruition then the Claimant would be remunerated under the terms of RIBA terms of engagement, in any event. In meetings between the Defendant and I in September 2000, I stated that the Claimant would be willing to provide the necessary architectural services for the redevelopment and informed the Defendant that the Claimant's fees for proving [sic] *such services would be in excess of £100,000. I provided the Defendant with a photocopy of the Design and Management Services Supplement schedule from a document published by the RIBA entitled SFA/99 which sets out the list of architectural services (work stages A – L) that would be required for the completion of the redevelopment …. It was agreed with the Defendant that the Claimant was to carry out such services.*

25. I made it clear to the Defendant at the start of the Project, and the Defendant understood that the Claimant's fees would be at least £100,000. I referred to the RIBA plan of work, Stages A – D expressed as a percentage in terms of the guidelines. The Defendant therefore knew that the Claimant's fees up to lodging the planning submission stage would be approximately 35% of the overall fee. Further, the process of revising design proposals is an integral part of the planning negotiation procedure, and forms part of RIBA Plan of Work Stage E: Detailed Design Services. A further 20% of the overall fee is due in respect of this element of the work.

26. In hindsight, it would have been prudent for both parties to set down the exact terms of our Contract in writing before starting work on the Project. However, as a close friend of the Defendant, I completely trusted him and so did not prepare, complete and sign any standard RIBA form of Terms of Engagement."

35. By contrast Mr. King, in his witness statement, said of the early discussions:-

"*3. From the beginning I emphasised to Donald that I was asset rich and cash poor. I told him that the development had to be self-financing since I had no cash. It was clear from an early stage that the development costs would be in excess of £1m. I had no experience with property or finance other than freelance photography and buying my various homes. I am sure that Donald also became aware that I have difficulty with documents. I left school with two "O" levels, in art and metal work. The careers advice I received was that my ambitions should be limited to unskilled factory work. I was fortunate that I found my feet as a photographer and that my visual abilities have outweighed my limited literacy skills. Because of this I was particularly reliant upon Donald, who I trusted as a personal friend as well as a professional. He dealt with all the documentation, he kept all the documentation and he also was my exclusive channel of communication to other people on all matters concerning this development. £1m was a figure entirely outside my experience. I emphasised to Donald that I was completely dependent on his professional advice and expertise. I often emphasised that the development had to be self-financing. I also emphasised that I had no pension provision and needed the development to give me an income in my retirement. Money was of primary importance to me and I made this clear right from the start, from our first friendly informal discussions in the pub.*

4. Donald told me not to worry about money but get the project going. He suggested that he should be a co-developer and, on that basis, receive three times his normal fee, that is £300,000.00 instead of about £100,000.00. He said this when we first started talking. I cannot remember how many times it has cropped up but it was often repeated in conversation. The first reference was probably in about the spring of 2000, soon after his son's christening. To the best of my recollection he would use a form of words such as "If I put my money in then I expect to be treated as a co-developer and have a three to one return" or "If I put in £100,000.00 of my own money I expect to get a good return". I suggested in response that he could have a one bedroomed flat, which at the time was valued at about £160,000.00, still a significant increase on his proposed fee, He wanted a two bedroomed flat. I said we would assess what was possible once we knew the costs and financial return. My accountants, Keeling Lester, advised that accounting and taxation difficulties would be caused by him taking a flat instead of a fee."

The advice of the accountants was given in writing and was very much later than the reference to it in Mr. King's witness statement would suggest. The relevant letter was dated 30 May 2001, but it was common ground that it was actually written on 30 May 2002.

36. Both Mr. Donald and Mr. King gave evidence before me and were cross-examined. In the light of their evidence I am satisfied that their discussions at the outset of the project were far less focused and definite than the account given by Mr. Donald in his witness statement in the passage which I have quoted would suggest. Mr. King, in my judgment, is not much disposed to clarity of thought or clarity of expression in any event. However, while commendably frank in his witness statement about his literacy skills, he obviously can both read and write, and there was no indication from the way in which he gave his evidence that his general intellectual abilities are impaired. What led to the discussions between Mr. Donald and Mr. King in relation to the proposed redevelopment being vague in the early stages as to remuneration for Mr. Donald or the Claimant seems to me to have been the fact of their friendship and the milieu in which most of the discussions seem to have taken place. I find that Mr. King did indeed comment at some stage that he was looking to a redevelopment of the Property to provide his pension fund, but as a throw-away remark such as one man might make to another in a public house, rather than as a defining characteristic of Mr. Donald's brief. I find that Mr. Donald did describe, in general terms, the services which he, as an architect, would be able to provide in relation to the Project and indicate that, if Mr. King were an ordinary client of the Claimant, he, Mr. Donald, would expect to charge him fees in relation to the services which he described of a sum in excess of £100,000. However, I find that the focus of the discussion as to the eventual remuneration of Mr. Donald in respect of his participation in the Project at this time was the possibility of him taking an interest in one of the flats to be constructed as part of the development. Nothing at this stage was agreed definitely, but the contemplation was that the likely means by which Mr. Donald would be compensated for his contribution to the development was by the grant to him of a lease of one of the flats. I find that Mr. Donald did not provide Mr. King with a copy of, or of extracts from, the RIBA Form. A copy was sent to Mr. King under cover of a letter dated 11 July 2002 written by Mr. Donald to Mr. King, to which I shall come. The provision of a copy of the RIBA Form at that stage, in my judgment, demonstrated that Mr. Donald then knew full well that he had not provided one earlier.

37. That everything was all pretty indefinite in terms of the understandings between Mr. King and Mr. Donald at the outset was confirmed by the terms of a letter dated 14 November 2000 which Mr. Donald wrote to Mr. King. Unlike the previous informal discussions, the letter was drafted in a business-like fashion. Enclosed with it were copies of the documents submitted to the Council of the London Borough of Hackney seeking planning permission for the proposed redevelopment. In accordance with the instructions given by Mr. King, the development for which planning permission was sought included a photographic studio at basement and ground floor levels, a penthouse flat, and a separate staircase linking the two. After dealing with the planning application the letter went on:- "*We also enclose a copy of the letter dated 9th November 2000 from Techniker who are a firm of structural engineers that we have often worked with previously, confirming their interest in the project and an otlline* [sic] *of their anticipated services and associated professional fees.*

You should also anticipate additional consultancy input from environmental services, (in respect of heating + ventilation systems) and cost control consultants at a later part of the more detailed design stages of the project. We will advise you of the scope of these services and associated fees in due course.

Finally we would welcome an early opportunity to re-discuss and confirm our own scope of services and associated fees, and/or investment in the project as soon as convenient, but in the meantime, look forward to working with you on this very exciting project."

As it seems to me, there would have been no need for any discussion or confirmation of the scope of the Claimant's services or the associated fees if those matters had already been addressed in the manner in which Mr. Donald indicated in his witness statement.

38. I regret to have to say that it seemed to me, as Mr. Donald was being cross-examined, that he was acutely aware of the difficulties of the claims for fees, having regard to the background of what had actually been discussed between him and Mr. King. I find that his denial that the contemplation had always been that he would be remunerated upon successful completion of the Project was untrue to his knowledge, as were his accounts of critical conversations with Mr. King and Mr. Finbarr Daly of AIB in May, June and July 2002, to which I shall come. In contrast, I found Mr. King to be a persuasive witness. As I shall explain, I did not accept all of his evidence, but where I did not accept it, I was nonetheless convinced that Mr. King was telling the story as he now remembers it, even if his recollection was to a degree unreliable.

39. In fact the matter of obtaining planning permission for the Project was protracted. The application was amended twice. Planning permission was eventually granted on 21 December 2001. It appears that it was only in the autumn of 2001, when it seemed likely that planning permission would be granted, that any thought was given to whether the Project should proceed and, if so, how it could be funded.

40. Mr. King decided to take advice from Mr. Tom Mulligan of Bridge Development Consultants Ltd. (*"Bridge"*). The name of Bridge is somewhat misleading because its business is that of estate agents. Mr. Mulligan was invited to inspect the Property and was told of the nature of the redevelopment proposed. He wrote a letter dated 24 October 2001 to Mr. King which included the following:- "*I would suggest the following.*

To market as a house, I suggest a figure of £700 to 750,000. However yours is a very unusual property and it may take some time, high value home buyers are very "fussy", we can sell it, but it will take longer to track down the particular buyer who suits your property.

The other alternative is to explore the development angle, where the market is very strong in your location. There is a strong demand for new build land with planning. You have already sensed this, hence your wise decision to apply for planning. Stephen is a very good architect and the massing on the site is excellent.

With the existing scheme you would be looking at late £600's. However, if the ground floor void could be reduced, and say 2 live-work units granted, then the site value would rise by some £200,000. Seeing as the property is already live-work, and at The Shaftesbury we got full residential, the planners may allow this amendment.

The planning is the key. I did speak with Stephen, but he seemed a little upset at my suggestions, so unfortunately the call was a brief one. ….

My advice is to re-analyse the planning. If not you may undersell, to then see your buyer gain the extra £200,000 by getting the consent later.

I appreciate this may delay your existing application. However once planners have granted the existing consent, with Hackneys problems, it could then take a year to make a new consent to change it, plus all the extra fees involved in a new application.

Whether you decide to build the scheme out yourself, or sell the building as is, in order to make this judgement, it is important for you to be aware of build costs, end values, site values etc."

41. The questions of what prompted Mr. King to consult Mr. Mulligan and why, as he evidently did, Mr. King rejected the advice proffered by Mr. Mulligan were not explored in evidence. After what was obviously an indication to Mr. Mulligan by Mr. King that he did not accept the views expressed in Mr. Mulligan's letter dated 24 October 2001, and in particular that he wanted a studio at the Property, Mr. Mulligan wrote again on 26 October 2001. What he said in that letter was:- "*Just a brief note to explain my views.*

Under existing consent if built you would make say a £436,000 profit.

With my live work scheme the profit is £700,000 (made up of £501,000 profit, plus £200,000 difference in the site values).

If you built out the live-work scheme you would be almost £300,000 better off. I know you are not focused on profit, but ask yourself this: How long and how hard would you have to work to earn an extra £300,000 profit in your existing business? In effect the studio does not have a "cost" to you of £300,000 but £600,000. I know it is not a true cost as you want to keep it, but on paper the true cost of your studio is a lot more than you may realise.

I may sound like an agent hungry for work, but I am not. I just believe passionately that as this is probably one of your major assets, and you may miss the opportunity to gain an extra profit £300,000 when you build out. It is no skin off my nose. I personally will not earn any more money, but I do understand how to maximise development in your area, my track record speaks for itself.

My suggestion: consider the live-work scheme, try to amend the planning, but in such a way that you can use it as either. You build a studio that can be converted to live-work when you want to sell, all windows, services etc in the right place.

The council will always allow a change of use from live work to commercial, but may resist a change the other way after the consent has been granted, plus all the fees etc.

Another angle to consider: you could buy a commercial unit elsewhere, perhaps a ground floor in an existing building. Obviously you will have to move out of the Princess Alice for the 14 month construction period anyway. In your area this will cost some £100 per sq. ft. I know you would like to keep within your structure, but be open to ideas.

I do wish you well in the scheme, the flats will sell, but in a property development always keep a sharp eye on money/profit. It is usually un-foreseen construction costs increases that destroy it. My figure of £100 is a "own build" i.e. no contractors profit. You may find a general builder quoting closer to £135 per sq. ft. you should get a fixed price quote.

You've got some major thinking to do."

42. Despite the terms of Mr. Mulligan's letter dated 26 October 2001 Mr. King decided to continue along the road of redeveloping the Property so as to provide both living and working accommodation for himself, in addition to residential space to sell. Mr. Donald approached the firm of Boyden and Company (*"Boyden"*), quantity surveyors, to act as quantity surveyors for the purposes of the Project on behalf of Mr. King. Thus it was that Mr. Kevin Bonfield of Boyden became involved in the Project. He was asked to produce a cost for the redevelopment. His initial estimate, produced on 27 January 2002 for the purposes of establishing a figure upon which to base the fees of Boyden, was £1,960,000. That figure assumed that the size of the intended redevelopment was 13,939 square feet, and thus equated to a cost of £140.61 per square foot. Following discussion with Mr. Donald Mr. Bonfield produced on 31 January 2002 a cost model in the sum of £1.325 million, based on an area of which Mr. Bonfield had calculated as 10,534.94 square feet, and thus equating to a cost per square foot of £125.77. However, as Mr. Bonfield explained at paragraph 5 of his witness statement made for the purposes of this action, that figure excluded:-
"*Value Added Tax*
Planning, Professional, Survey and Legal Fees

All loose furniture, furnishings, fittings and effects
Operational equipment other than noted
Computer systems
Works beyond the defined area including diversion of Statutory Services in paving or roads
Works associated with the diversion of or protection to existing services of systems crossing the Site
Any abnormal Local Authority, Fire Authority and/or Planning requirements
Party Wall awards or work in connection thereto
Phased completion, out of hours working and accelerated working costs, however partial possession is included if the requirement is established at start of tendering
Increased costs beyond 4Q 2002
Piled foundations
Kitchen fit-outs"

43. Mr. King sought finance for the proposed redevelopment of the Property. His accountant suggested that he try AIB. He did, and thus came to meet Mr. Finbarr Daly, who is, and was at the time, an assistant manager at AIB. Mr. Daly also gave evidence at the trial. I was impressed by Mr. Daly as a witness. There were a number of matters which he was asked about in cross-examination to which at the time he had had no reason to give particular attention, and so was not really able to help. However, where he did have a recollection of a matter about which he was asked, I consider that his evidence was clear and balanced.

44. Before deciding whether or not to offer funding for the redevelopment AIB sought information as to the likely selling prices of flats provided as part of the project, and a valuation of the Property in its existing condition, from Messrs. Foster Slater, surveyors. In a letter dated 6 December 2001 Mr. John Slater of Messrs. Foster Slater advised that the likely resale prices were of the order of £300 to £325 per square foot. In a report dated November 2001 Mr. Slater valued the Property at £700,000 on the assumption that planning permission for the proposed development was obtained. The report contained a comment that:- *"We are advised by the customer's Architect that the estimated cost of the building works (based upon £100 per square metre) is likely to be in the order of £1,000,000 (One million pounds), exclusive of any VAT which may be payable.*"

45. In his cross-examination Mr. Donald pointed out that the figures set out in the passage from Mr. Slater's report of November 2001 which I have quoted in the preceding paragraph were obviously erroneous. If the building cost was in truth estimated at £100 per square metre, that would equate to about £10 per square foot, and be far too low, while it would also mean that the building proposed had an area of 10,000 square metres, which was far too large. Mr. Donald said that his view had always been that the realistic construction cost of the building which he had designed for erection at the Property was £1,250,000. That was indeed the figure which appeared in a document entitled *"Princess Alice Studios – Murray Grove, London Overall Development Strategy – Summary"* dated February 2002 (*"the Strategy Document"*) which he prepared for consideration by Mr. King and onward transmission to AIB in the context of the application for a loan which Mr. King had made. That document included:- *"The overall new gross floor areas to be constructed is calculated at 1000m2/ 10800 ft2.*
We are advised by our cost control consultant that construction costs should be anticipated to be in the region of £1,250,000 + VAT.
The professional team comprises of the following consultancies and their anticipated professional fees are apportioned thus:
Architects + Project Managers: Stephen Donald Architects Ltd. £125,000
Cost Control Consultants: Boyden & Co. £25,000
Structural Engineers: Techniker £25,000
Environmental Services (Partial): Rybka £5,000
Planning Supervision: Boyden PS £10,000
These figures combined provide an overall Construction Design & Management cost of £1,440,000 + VAT."

46. In the event, by a letter dated 19 March 2002 AIB offered to lend Mr. King a total of £1,464,000, subject to satisfaction of a number of conditions in relation to the Project the detail of which I need not set out. Of the total amount offered, £180,000 was said to be for a re-mortgaging of the Property, £1,114,000 was designated as *"To assist with the development costs of Princess Alice Studio Murray Grove N1"*, £100,000 was indicated as a

"Contingency for cost overruns", and the balance of £70,000 was rolled up interest. Mr. King did accept that offer, but not until May 2002. I shall come to the circumstances in which the offer was accepted a little later in this judgment.

47. Despite the plea in paragraph 7(iii) of the Re-Amended Particulars of Claim that *"Subsequently, in January 2002, the Claimant and the Defendant agreed that the fee that would be payable to the Claimant for the services that were to be provided would be £125,000 (ex VAT)"*, there was actually no evidence to that effect. Mr. Donald's witness statement dealt with the matter of any agreement of a fee earlier than the middle of June 2002 in a very curious way. The phrase *"agreed £125,000"* suddenly appeared from nowhere between paragraphs 27 and 28, which two paragraphs followed on from the passage from Mr. Donald's statement which I have already quoted. Paragraphs 27 and 28 were in these terms:-

"*27. I discussed the construction cost with the Defendant in terms of price per square foot. From previous experience, I estimated that it would cost at least £120 per square foot. Therefore, because the property comprised of 10,500 square feet, the overall cost would be at least an estimated £1.25 million. I advised the Defendant he would have to instruct engineers and other consultants with a global estimated fee of 20% of the construction price including the Claimant's fees.*

28. In or around May 2002 we re-considered the proposed arrangement whereby the Defendant would pay the Claimant the agreed £125,000, at which point the Claimant would invest the £125,000 into the Property, by way of purchasing a unit."

48. I reject the suggestion that Mr. King agreed in January 2002 to pay a fee of £125,000 to the Claimant in respect of the work of Mr. Donald and other employees of the Claimant in relation to the Project. The figure of £125,000 did indeed appear in the Strategy Document, but I am satisfied that it did so simply because it was appreciated that AIB, or any other prospective funder, would expect some allowance for architectural fees to be included in a financial appraisal of the Project. The sum of £125,000 was certainly not an agreed fee. The continuing focus of attention in the discussions between Mr. Donald and Mr. King at this time was the provision of a flat by way of remuneration to the Claimant upon successful completion of the Project.

49. What actually seems to have happened, and the reason why Mr. King did not accept the offer of AIB earlier than he did, was that it was immediately appreciated by Mr. Donald that the amount of the loan offered by AIB was insufficient to enable the Project to proceed and efforts were made to raise a larger loan from alternative sources. The lack of success in raising a larger loan caused Mr. Donald to make an effort to persuade AIB itself to offer a larger loan. He wrote a letter dated 18 April 2002 to Mr. Mike Barnes of AIB which included these passages:- "*The overall new gross floor areas to be constructed is* [sic] *calculated at 1000m2/10800ft2.*
We are advised by our cost control consultants that construction costs should be anticipated to be in the region of £1,250,000 + VAT. Also refer to Durkan Pudelek letter dated 26th March 2002, further copy enclosed.
The professional team comprises the following consultancies and their professional fees are apportioned thus:
Architects + Environmental Services (Partial) + Project Managers:
Stephen Donald Architects Ltd. £125,000
Cost Control Consultants: Boyden & Co. £25,000
Structural Engineers: Techniker £25,000
Environmental Services (Partial): Rybka £5,000
Planning Supervision: Boyden PS £10,000
Consultants + Project Management Fees Subtotal £190,000
These figures combined provide an overall Construction, Design & Management cost of £1,440,000 + VAT …
Finally we would welcome an early opportunity to re-discuss any aspect of the proposed funding and investment elements of these proposals as soon as convenient, but in the meantime, look forward to working with you on this very exciting project."

The truth is that the so-called agreed fee of £125,000 first appeared in the Strategy Document. It was no doubt not a coincidence that the figure was simply 10% of the estimated construction cost, net of Value Added Tax, mentioned in the document. The same figures as those set out in the Strategy Document were then simply repeated in the letter dated 18 April 2002. That letter to Mr. Barnes was copied to Mr. King, but there was no evidence that the contents of it were ever discussed or agreed with him.

50. Mr. Donald wrote a further letter to Mr. Barnes which was dated 2 May 2002. That letter was in terms very similar to those of the letter dated 18 April 2002. In particular it included the same indication as to the composition of the professional team and identical statements as to the anticipated fees of the various consultants. However, it also included these passages:- "*Further to our earlier correspondence and enclosures dated 18th April, we have had further and more detailed meetings with the preferred contractors and cost control consultants. We have been asked by Chris to provide you with updated estimates of construction and development costs as follows. ….*

We are advised by our cost control consultants and preferred contractors that construction costs should be anticipated to be in the region of £1,450,000, which equates with a cost of £125/ft2 and includes an allowance of £100,000 for fully fitted kitchens and floor finishes throughout, essentially providing a turnkey operation."

The reference to updated estimates was to cost plans received from DP at the end of April and discussions which took place at a meeting on 30 April 2002. I shall come back to those cost plans and to the discussions at the meeting. Mr. Donald's letter dated 2 May 2002 was also copied to Mr. King. Once again there was no evidence that the contents were ever discussed or agreed with him before it was despatched. There was, however, evidence that it was discussed with him after it had been despatched, and to that I now turn.

51. There was some confusion in the evidence as to when precisely in May 2002, and in what circumstances, Mr. King accepted the offer in the letter dated 19 March 2002 written by AIB. His signature was accompanied by the date 7 May 2002. Mr. King's evidence was that he signed in the presence of both Mr. Daly and Mr. Donald. In his witness statement Mr. King dealt with the matter in this way:- "*Although the facility letter was dated March, I did not sign it straightaway because I was unsure of final costs. Some months later Finbar, Donald and myself sat around my kitchen table at Murray Grove. I made a joke in reference to the fact that there was an Englishman, and* [sic] *Irishman and a Scotsman all talking money! Donald continued to insist that "we can build it for the money". I even asked Donald can we build for the money. He confirmed. I signed the letter in his presence.*"

52. Mr. King was asked in cross-examination about his assertion that Mr. Donald said *"we can build it for the money"*. He said that that was a reference not to the amount of the loan offered by AIB which could be devoted to the development, but to an amount of £1.35 million, which was the sum which Mr. Donald had always said, according to Mr. King, the project could be completed for.

53. Mr. Daly in his cross-examination supported the evidence of Mr. King that Mr. King had signed to indicate his acceptance of the offer made by AIB in its letter dated 19 March 2002 on 7 May 2002 in the presence of both Mr. Daly and Mr. Donald. He was asked how it came about that the offer was accepted on 7 May 2002, only a few days after Mr. Donald had written to Mr. Barnes of AIB his letter dated 2 May 2002 in which he estimated the construction cost at £1.45 million and the applicable professional fees at a total of £190,000, including his own at £125,000. Mr. Daly was emphatic that his understanding was that, whatever remuneration Mr. Donald was to get in respect of his participation in the Project, he would not take it until the building was complete. Specifically with reference to the meeting at which Mr. King signed the facility letter Mr. Daly said in cross-examination:- "*The whole point of the two hour meeting that we had was to try to establish that it was possible to reduce the figures that Stephen Donald had quoted in that letter* [of 2 May 2002].

The conclusion of the meeting was: he was going to be able to deliver the project within the available funding, part of which was back ending his remuneration, whatever form it took, and the whole point of the meeting was to say that the letter he had furnished essentially said the project cannot go ahead because there was not enough money to fund it.

During the course of that meeting we discussed the various ways and means, part of which was my suggestion that it should be possible to mortgage the portion of the property which Chris King would retain to meet some of the shortfall but it was very, very clear that Chris's acceptance of the facility was on the basis that Stephen Donald was going to be able to procure the construction for a lesser sum than he referred to in his letter."

54. Mr. Donald's position, at least initially, was that he had not attended any meeting with Mr. King and Mr. Daly on or about 7 May 2002. He said that he had attended a meeting with them on or about 21 May 2002. His account of that meeting set out in his witness statement was:-

"*96. On the 21 May 2002 the Defendant asked me to go to a meeting with him and Mr. Daly of the Bank at his studio. Mr. Daly and the Defendant came up with an idea of using the restricted budget and alleviating cash flow difficulties by*

attempting to defer payment to contractors until, presumably, the units had been sold. Nevertheless, the Defendant acknowledged he would have to consider further extending his mortgage. The long and the short of the meeting was that the Bank was not amenable to the idea of increasing the offer of funding.

97. I again made it clear to Mr. Daly and the Defendant that the funding proposed was totally inadequate."

55. Mr. Donald did produce a manuscript note during the meeting which he said that he had attended with Mr. King and Mr. Daly. A copy of the note was put in evidence. It comprised mostly figures. It included these items:-

"*1. £100,000 for kitchen/flooring : etc*
Drawn down later ….
2. £125,000 SDA Bal £65,000 aditional [sic] *consultancies.*
3. 1 640 000
225 000
1 415 000"

Mr. Donald was asked about those figures. It was suggested to him that the figure of £1,640,000 was the total of the estimated construction costs set out in his letter dated 2 May 2002, which it fairly obviously was, and that the figure of £225,000 represented the element of £100,000 included in the total estimate of construction cost of £1,450,000 in respect of kitchens and floor finishes and the element of £125,000 in respect of the fees of the Claimant indicated in that letter. He said that the element of £225,000 was in fact the overall consultancy fees plus Value Added Tax. That actually it is not. The total of the contemplated consultancy fees was £190,000. Value Added Tax on that sum at 17.5% is £33,250. Then this exchange took place, as recorded in the transcript for Day 1 at page 103 lines 12 to 24:-

"*Q. Well, leaving aside what the 180,000 means, I suggest to you this is a note by you which reflects the fact that at this meeting you were saying that SDA fees can be treated differently to the fees of the other consultants?*
A. On the basis that we had an alternative agreement for a flat in lieu of fees, which Mr. King, approximately a week after this meeting, went off to discuss with his accountant in respect of various tax implications.
Q. So the answer is: "Yes, SDA fees should be treated differently, but only if the flat proposal was still live".
A. Yes."

Mr. Donald also at length accepted in cross-examination that on the occasion of the meeting between Mr. King, Mr. Daly and himself he had seen Mr. King appear to sign a document, although he contended that he could not see what that document was or whether Mr. King actually signed it.

56. I accept the evidence of Mr. Daly in cross-examination as to what occurred at the meeting between him, Mr. King and Mr. Donald and that the date of the meeting was 7 May 2002. Insofar as the accounts of Mr. Daly and Mr. King coincided I accept the evidence of Mr. King also, but I do not accept that on the occasion of this meeting and in the context of whether or not to accept the offer of funding from AIB Mr. King asked Mr. Donald whether they *"could do it for the money"*, or that Mr. Donald responded that they could. Mr. King's account of what he meant by the expression *"the money"* did not reflect any version of the meaning of that expression put forward before he gave it in cross-examination, in particular not the version pleaded in paragraph 6 of the Amended Defence and Counterclaim, and there was no suggestion put to Mr. Donald during his cross-examination that he understood the expression in the sense in which Mr. King said he meant it. Mr. King may have had the impression, in the light of the course of the discussion at the meeting, and especially the identification of the costs of kitchens and floor finishes and the fees of the Claimant as elements which need not be met out of the funds available because they could be deferred until completion of the Project, that he could afford to undertake the redevelopment of the Property, but I find that that was not as a result of anything specific to that effect which Mr. Donald said. Certainly Mr. Daly did not say that he had any recollection of anything along the lines of what Mr. King asserted having been said by Mr. Donald.

57. It was only after Mr. King had communicated to Mr. Donald the advice which he had received from his accountants at the end of May 2002 as to the undesirability of the Claimant being paid by means of the grant of a lease of a flat once the Project had been completed that the question of payment of a fee in cash became the centre of the debate concerning remuneration between Mr. King and Mr. Donald. The circumstances in which that happened and how the matter eventually turned out were the subject of vigorous conflict between

Mr. Donald and Mr. King. It was, however, common ground that there were two significant stages in the debate, the first in June 2002 and the second in July 2002.

58. About the June 2002 stage in the discussions about remuneration the account given by Mr. Donald in his witness statement, so far as is presently material, was this:-

"*31. On 17th June 2002, I met with the Defendant initially at the Property and thereafter at a local bar/restaurant to discuss the letter from the Accountant. The Defendant confirmed he would pay a fee of £125,000 for the Claimant's services. He asked what work had been undertaken to date, and I informed him that approximately 75% or £90,000 of work had been undertaken by the Claimant.*

32. At this stage I provided the Defendant with a detailed account of the estimation of 75% of the overall body of work provided, reminding the Defendant of the various stages of the Project and the proportionate levels which accord with RIBA Plan of Work. The Defendant asked me if the Claimant would accept approximately 50% of the fees incurred to date as an immediate interim payment. I agreed this would be acceptable and the Defendant stated he would contact his bank, the Allied Irish Bank ("the Bank") the following day.

33. The Defendant stated that he had contacted the bank and called me at approximately 3.00 – 3.30 pm on the 19th June 2002. He said he had his chequebook with him and wanted to come to the Claimant's offices.

34. At the Claimant's offices, the Defendant brought his chequebook and said he would pay approximately half the fees incurred to date. He offered to pay me £47,000 (£40,000 plus VAT) as a payment on account. I said I would hold on until the following day before cashing the cheque in order to comply with formalities, such as producing an invoice for the sum received.

35. Based on the 17 June meeting with the Defendant it was made very clear that the only option which was being presented at that stage was to proceed with the agreement for the Defendant to pay my fees in the sum of £125,000 with perhaps the opportunity to re-invest the fees at a later stage. I called my then solicitors (Mr. Boyes of Percy Short & Cuthbert) to discuss this proposal approximately 30 minutes after meeting the Defendant and receiving the on account payment. Mr. Boyes said he couldn't comment on tax matters but advised to write the Defendant a covering letter re-confirming what I understood the Claimant's terms of appointment to be, incorporating an invoice for the monies received and then present the cheque for payment.

36. I then wrote a covering letter dated 20th June 2002 … stating what I understood to be the terms of appointment and sent this, together with an invoice and a fee request dated 21st June 2002 … In the same letter, I also requested financial assurance from the Defendant as to when the outstanding monies might be paid….

46. The following day, Wednesday 26 June 2002 the Defendant called me at approximately 8.00 in the morning to inform me that he was meeting Mr. Daly at the Bank at 9.30 am. At 10.30 am I met the Defendant with Mr. Daly at the Claimant's offices. Mr. Daly informed me that he had put a stop on the cheque because the Defendant did not have sufficient funds in his account to honour it.

47. Mr. Daly tried to imply that I and/or the Claimant were a party to the agreement between the Bank and the Defendant. However, this was not substantiated. I specifically pointed out to Mr. Daly that at the previous meeting I had asked whether the Claimant was required to be part of any such agreement between the Bank and the Defendant, but Mr. Daly said this was unnecessary. I did not understand why the Bank was now saying I was a party to the agreement, as this had never been the case. Further, up until June 2003 in these proceedings, I had not seen the agreement, which was eventually signed by the Defendant. I have reviewed the AIB offer letter of 19th March 2002 and still cannot understand the banks' [sic] *justification for stopping the on account payment….*

49. As a compromise, Mr. Daly offered me a £50,000 overdraft on a new personal bank account to compensate for the Bank not honouring the cheque in the sum of £47,000. In order to do this, Mr. Daly said he would need a utility bill. I had a number with me for the Claimant. However, Mr. Daly said I would need one from my home address and not the company. In the Defendant's absence Mr. Daly further advised that the Defendant would act as a financial guarantor for the loan. I thought this was a rather dubious proposition and said I would speak to my own accountant before making any decision. Mr. Daly predicted that if I took advice from an independent accountant, the accountant would tell me not to do it. In fact, this was the case and my accountant, Mr. Chin, strongly advised against such an arrangement. Mr. Chin also discussed the proposition with Mr. Daly, although I have no note of that conversation.

50. After the extended private meeting between the Claimant and Mr. Daly, the Defendant went away in order to draft and sign a document to confirm the Defendant would act as financial guarantor for the £50,000 overdraft. Approximately one hour after the meeting ended, I received by fax at 12.31 pm the necessary application form from the Bank to open an account on behalf of the Claimant…."

59. A copy of the cheque drawn by Mr. King was put in evidence. It bore upon it as the date of drawing 20 June 2002. Mr. Donald never sought to deal with the puzzle as to why a cheque in fact, on his account, drawn on 19 June 2002 should have been dated 20 June 2002. Mr. King, on the other hand, maintained, and I accept, that the cheque was drawn on 20 June 2002. There was also put in evidence a copy of the paying in slip under cover of which Mr. Donald had deposited the cheque with his bankers. That was dated 21 June 2002. As it seems to me, the fabrication by Mr. Donald of the suggestion that the cheque had in fact been drawn on 19 June 2002 was intended to create an opportunity for there to have a delay between Mr. Donald being given the cheque and him presenting it for payment. The purpose of that was so that it should not appear that the Claimant was, as Mr. King told me Mr. Donald had told him, desperate for money. On the evidence of Mr. King, which I accept, he handed over the cheque after banking hours on 20 June 2002. On the evidence of the paying in slip the cheque was presented for payment the very next day.

60. I find that the account given by Mr. Donald at paragraphs 31 to 36 inclusive of his witness statement was, to his knowledge, totally untrue.

61. The account given by Mr. King in his witness statement of the events in June 2002 was rather more brief than that of Mr. Donald, but I accept it. In paragraph 14 of his statement he said:- *"Meanwhile, in the latter part of June, Stephen Donald asked me to meet him in the pub. He told me that my job would have to take second place as he could not afford to do it because of financial pressures, in particular from his bank and the Inland Revenue. After some two hours of arguing and three bottles of wine I eventually gave in and, as a gesture of friendship, gave him a cheque for £47,000. Although he gave me a fee note as a receipt, our agreement was that fees would be deferred and this was purely a gesture of friendship to help him out. I also made it clear that I would need to speak to Finbar Daly, the manager at Allied Irish Bank, to clear the cheque. That was because the conditions for funds being available had not yet been met, due entirely to Donald's default. He ignored my request and paid the cheque in anyway and later told me that he had written out cheques before the money had cleared. That is suggestive of the financial pressures to which he was subject. Unfortunately Finbar Daly was absent from the office with an ear infection and I was not able to speak to him until six days later on the following Wednesday, as a result of which I stopped the cheque. Finbar Daly and I met with Donald the same day. Finbar Daly agreed to loan Donald money through Allied Irish Bank in order to get him out of trouble so that he could continue working. He refused this. I gave him £15,000 sent by TT, which Finbar Daly authorised. Having given him the £15,000.00 I thought the question of the returned cheque was forgotten. Donald had told me that he was in difficulties and I believed that the £15,000.00 would sort him out financially for the time being and tide him over as far as necessary. I certainly did not believe that he would sue me on the cheque. I understood that he was under acute financial pressure. I assumed that he had lots of work, since he said that my work would have to go "to the back of the queue" if I did not pay him. With hindsight, I think he was trying to force me to give him money because he realised that the project was not viable financially and would never get completed.*"

62. Mr. Daly in his witness statement dealt with the meeting which he attended with Mr. King and Mr. Donald concerning the cheque for £47,000 at paragraphs 3 and 4:-

"*3. I comment in particular on the circumstances as I know them relevant to the issue of a cheque by the Defendant, in the sum of £47,000 and a telegraphic transfer from the Defendant's account to the Claimant in the sum of £15,000. As I have said above no funds were available from my bank until the conditions were met. I had been away for a few days when the Defendant contacted me and said that he had issued a cheque to the Claimant for £47,000 because of considerable pressure from the Claimant who appeared to be in acute financial difficulties. Accompanied by the Defendant I visited the Claimant and explained to him that, until the conditions attached to the offer were fulfilled, with particular reference to his role, funds could not be made available. It was also made clear that the funding was on the basis that the Claimant had agreed, right from the start, that he would not be paid until the development was complete and he would then be given one of the flats in the development in lieu of fees. I rather reluctantly agreed to release £15,000 that was paid by telegraphic transfer directly to the Claimant's account.*

4. From professional advice received I understand that the design by the Claimant made poor use of the site and more financially robust arrangements were possible providing more units at lower cost. The facility given was quantified

specifically on the professional advice and figures provided by the Claimant. I should add that I am also particularly concerned at the timing of the Claimant's pressure on the Defendant which came immediately after the Defendant had vacated his home and when he certainly appeared to me to be particularly vulnerable. I was also concerned that the Claimant's design represented what I regarded as a "trophy building", that is a monument to the Claimant's professional expertise rather than providing a pension for the Defendant which was the intention. The Claimant said to me that he was not a party to the offer letter and therefore did not regard myself as being bound by him [sic]. *That is obviously true in a technical sense but in the circumstances I regard it as showing a degree of cynicism. I understand it to be his professional role to procure a building that could be constructed within the budget fixed. That budget was fixed on the basis of the figures he put forward and the bank facility was based on figures put forward by the Claimant to me in the circumstances set out in this statement. His demand to be paid up front rendered the already faltering procurement process futile. He had failed to produce cost reductions by changes in the building, despite representations by other professional advisers. His demand to be paid removed his fees from the available funds. It was never envisaged that he would be paid until the project was finished. It was never agreed that he should be paid a fee but be given a flat in lieu of fees.*"

Many of Mr. Daly's comments on his perception of the quality of the work done by the Claimant seem to me to be based upon a misconception as to the nature of the functions of an architect, but his understanding of the financial arrangements contemplated as between Mr. King and the Claimant is obviously material in deciding what was actually agreed between them. I accept the evidence of Mr. Daly on that point.

63. It seems to me that the letter dated 20 June 2002 which Mr. Donald wrote to Mr. King after Mr. King had handed over the cheque for £47,000 is highly material to the question of what was agreed between them in relation to the remuneration of the Claimant in respect of its involvement in the Project. The terms of the letter indicate, in my judgment, first, that the relationship between the Claimant and Mr. King was not an ordinary one of architect and client, but that the Claimant had participated in what was essentially a joint venture out of which each expected to make a profit. It follows from that, in my view, that the relationship was not such as one would necessarily expect would involve the payment of professional fees calculated in a conventional way or the making of interim payments of fees. Second, the terms of the fourth paragraph of the letter are, in my view, totally inconsistent with there having been, or with Mr. Donald believing that there had been, any agreement to pay fees calculated on any particular basis or to pay fees of a particular amount. All Mr. Donald asserted in the fourth paragraph was that Mr. King had been told what fees the Claimant anticipated. Whilst the terms of the seventh paragraph of the letter on their face appeared to record that a fee of £125,000 had been agreed following discussion of the implications of the advice which Mr. King had received from his accountant, it is plain, in my judgment, from the terms of the eighth paragraph that the payment of a proportion of the fee said to have been agreed in advance of the completion of the redevelopment had not been agreed. What Mr. Donald said about payment of such proportion – in fact 75% - was that it was what he would expect, not what had been agreed. Equally the same paragraph is, it seems to me, inconsistent with any suggestion that Mr. King had proffered the cheque for £47,000 actually as a payment on account of fees. Mr. Donald did not assert that that was the basis upon which it had been tendered, but indicated that that was how he was going to treat it. Last, the references in the ninth paragraph of the letter to the wish of Mr. Donald that Mr. King verify with his bank when further fees might be paid, and to him being prepared to delay for a few days presentation of the cheque, confirm, in my judgment, that Mr. Donald knew full well, because, as Mr. King said in his evidence, he had told him, that any payments to the Claimant could only be made with the agreement of AIB.

64. The letter dated 20 June 2002 was lengthy, but for the reasons indicated in the preceding paragraph, important and it is appropriate to quote the full text of the letter:- *"This project, initiated by yourself and subsequently co developed with myself on behalf of SDA Ltd. in September 2000, has been documented at different stages over the past 20 months or so, in various items of correspondence, drawings etc, dating back to 14th November 2000, wherein our letter to you of that date, covering the planning permission documents and local authority costs, referred to my interest and preparedness to act in an extended co development and investment capacity in the project.*

The project was progressed, based on subsequent meetings and conversations between ourselves and was agreed in principle whereby I endeavoured to develop the scheme beyond the basic architect's services normally provided, perhaps

most obviously including providing the majority of the financial backing/support for the project up until now. In addition I was responsible for implimenting [sic] *various examples of extremely productive and advantageous development strategies, with myself assuming the lead role yet always operating in tandem with yourself. Although there were some critical moments when the financial resources of my practice were perhaps obviously overstretched, my natural tenacity and hopefully skillful project management prevailed and ultimately I was able to demonstrate adeptness to yourself in identifying and affording the maximum development potential of this project (for our mutual commercial benefit). An example of this being the extremely time consuming, detailed and complex procedures involved in obtaining such a commercially advantageous planning consent from the development control department of the bankrupt London Borough of Hackney. At all times I believe you have been very generous in your acknowledgement and appreciation of my input in these respects.*

SDA Ltd. in our extended role were also and exceptionally involved in helping you, in various ways, secure the major financial input for the project to date. Not only with your recently appointed bank, the AIB, but prior to this, helping to investigate a number of potential alternative sources of finance including NatWest + CBF Ltd.

The cost of our basic architectural/project management fees were confirmed in all correspondence and development documents, since planning consent was obtained by SDA Ltd. in March this year. Over the past three months further associated correspondence, based on negotiations conducted by ourselves as co developers of the project, has been exchanged between SDA Ltd. and others, appointing the various members of the professional consultancy team and several firms of prospective contractors, etc. relating to the project.

On 12th June 20002 [sic] *you diligently provided me with a copy of a letter from your accountants Messrs. Keeling Lester + Co. dated 30th May, the contents of which have instigated the requirement for a clarification of the situation which exists.*

After our own private, further and more detailed meetings over the last few days, aimed at enabling us to re-appraise the situation, I am pleased on behalf of SDA Ltd. and both of us, to confirm the terms of our modified appointment as follows which I accept has been made within mutually acceptable parameters of commercial efficiency, cost effectiveness and affordability.

With regards to the proposals contained in your accountant's letter, which I refer to with the utmost professional respect; although it seems, in the main, to perhaps represent a fundamental misapprehension of the extent and nature of my endeavours beyond that of the basic architect's/project management services which we have already provided and invested in the project; I nevertheless write to confirm my acceptance of the particular recommendations relating to the tax implications. We therefore have agreed that our basic fees for architectural and project management services of £125,000 + vat are to be paid as a separate transaction to an associated and additional fee or commission in lieu of our supplementary input to the project to date as principal financiers and co developers of the project.

In accordance with RIBA guidelines, RIBA Plan of Work, the project has been advanced almost to stages K –L ("Operations on Site and Completion"), whereby we are very close to appointing the contractors Durkan Puddelek [sic] *on your behalf and therefore we calculate that our basic architectural and management services are now 75% complete. We would now expect to be paid 75% of the overall fee of £125,000 + vat, which equates with the sum of £93,750 + vat. In this respect the cheque for £40,000 + vat which you presented yesterday is gratefully received as an "on account" payment and therefore leaves a current balance of £53,750 + vat to be paid, for the basic architectural and project management services provided and completed to date.*

Thereafter the remaining post contract fee balance of £31,250 + vat can be paid in 12 equal monthly sums over the duration of the building contract. Whilst we welcome the relatively prompt payment of the "on account" sum of £40,000 + vat following our meeting last Monday, it would also be appreciated if you could provide some additional financial reassurance, by verifying with your bank when the existing outstanding balance might be paid. In this regard it may be prudent to provide a copy of this letter both to your accountant and your bank. We would be happy to forestall the lodgement of the cheque received yesterday for a few days in order to enable you to achieve this if necessary.

In regards to the above payments we enclose our invoice ref. no. SDA/207 for the payment of £40,000 + vat made yesterday and a further fee request ref. no. SDA/208 which indicate a balance of payment of £53,750 + vat which is the outstanding sum currently due.

Finally, with regards to negotiating terms and agreeing the additional value of our supplementary input to the project to date, as principal financiers ad co-developers of the project and from now until completion, (from this new more business-like perspective), perhaps we could arrange an early meeting tomorrow between ourselves and then thereafter with either or both the bank and your accountant, so that we can re-establish and formalise our extended business relationship with mutually beneficial co-development incentives and performance related levels of remuneration.

In the meantime, I can again reconfirm the unstinting commitment of my practice and my own extended personal involvement in this great project, in addition to my appreciation of your generous spirit and friendship and my looking forward to working with you further on this very exciting, (though challenging endeavour), which I am sure will mark a significant threshold for both our careers."

65. On any view the letter dated 20 June 2002 was a very strange one for one friend to have written to another. From its length, complexity and ambiguity it is difficult to avoid the conclusion that it was written with a view to being relied upon subsequently in circumstances such as those of the present action. The fact that actually the contents are damaging to the case of the Claimant, for the reasons which I have set out, does not detract from that conclusion.

66. The discussion between Mr. Donald and Mr. Daly at their meeting on 26 June 2002 of the possibility of AIB lending Mr. Donald or the Claimant a sum of £50,000 and the giving of approval by Mr. Daly to Mr. King transferring a sum of £15,000 immediately to the Claimant, is only consistent, as it seems to me, with Mr. King and Mr. Daly believing at the time that Mr. Donald or the Claimant was in urgent need of substantial funds. They could only have had that belief if that was what they had been told by Mr. Donald. I find that that is what he did tell Mr. King and what induced Mr. King to draw the cheque in the sum of £47,000. I find that that cheque was drawn, and understood by Mr. Donald at the time to have been drawn, as a loan – as Mr. King put it, *"a gesture of friendship"*, not a payment on account of fees, and to have been subject to a condition that the permission of AIB to the cashing of the cheque be first obtained before the cheque was presented. Neither the sum of £40,000 nor the sum of £15,000 had any particular significance in the context of what Mr. Donald contended was the fee agreed by 20 June 2002 for the services of the Claimant in connection with the Project. I find that the sum of £15,000 was, when paid, also in the nature of a loan and not tendered as a payment on account of fees.

67. That, despite the apparent confirmation in the letter dated 20 June 2002 that a fee of £125,000 had been agreed by Mr. King, there actually had been no such agreement appears from the terms of a letter dated 11 July 2002 written by Mr. Donald to Mr. King. According to the evidence of Mr. Donald that letter was written in the context of him pressing Mr. King for a proposal as to how the Claimant was to be paid. The account which Mr. Donald gave in his witness statement was:-

"*56. Approximately one week later the Defendant met the Claimant and started to write his proposals on the back of a Guardian dated 10 July 2002 … He then put the proposal down on blank A4 paper, after I had asked him to do so to make the proposal clearer …*

57. I took the letter away to consider and then wrote to the Defendant on the 11th July 2002 … setting out why I thought it would be totally inadequate to accept the Defendant's proposal and putting forward the Claimant's proposal in writing.

58. In essence, the proposal states that the Claimant was willing to invest £125,000 plus vat into the Property by acquiring a 2 bedroom flat. I thought this was fair, by reference to DHL's valuation report. It should be noted that we are also advising the Defendant that we did not anticipate at that stage the construction cost estimates which were being prepared by the contractors to be less than they had been submitted previously. Further, that the bank should be reminded of the estimated construction costs noted in our letter 2nd May 2002 and by extension those referred to in DHL valuation report.

59. By return letter dated 16th July 2002 …. the Defendant agreed fees in the sum of £125,000 plus VAT (with £15,000 including VAT being paid on account). The Defendant repeated his proposal of the Claimant investing some of those fees in a one bedroom flat in the Property. I replied to the Defendant's letter, by letter dated 18th July 2002 …. confirming I would accept in principle the offer of unit no. 5, a one bedroom flat equating to 60% of outstanding fees i.e. £75,000 plus VAT."

68. Again Mr. King's version of the circumstances in which the letters to which Mr. Donald referred in the passage from his witness statement quoted in the preceding paragraph came to be written was different:-

"*15. Despite these gestures of friendship, perhaps recognising the vulnerable position I was in having given up my premises at Murray Grove, Donald kept pressure on me to sign a contract. I was increasingly concerned about the quality of his design and professional advice. We still did not have a firm contract to develop the flats and still had not met the bank's requirements for release of funds. Donald kept calling me every day trying to force me to sign contracts and agree to the two bedroom flat.*

16. As a result of our meeting and discussions I wrote a letter in July to Donald suggesting I would give him a one bedroom flat, subject to a firm contract with the builders at a fixed contract price. Donald kept pressuring me to sign a contract. I believe that at this stage he realised that his building could not be built within budget and that the job would therefore never get finished. I believe that he hoped that me signing a contract might ensure that he got his flat anyway. Durkan Pudelek grew increasingly agitated at the lack of construction drawings from Donald. They doubled there [sic] *tender fee to £7500 because of the complexity of the tender process.*"

69. The proposal which Mr. King wrote on the sheets of A4 paper mentioned by Mr. Donald in his witness statement was in these terms, using Mr. King's original spelling and punctuation:-

"*To Steve Donald*

If you can wait until the building is complete and signed off with all appropriate doc's prices realised and properly certificated with garentees estate agent etc consulted with good intent – a 2 bed flat of approx 1000 sq ft will be writen to contract to Steve Donald. However if markets take serious turn down a 1 bedroom apt approx 500 sq ft may be offered as payment of fees.

This offer is made on the understanding that Steve Donald fee's are a part and wholly paid with echange of contracts on decide apartment and fee demand are not applicable on agreement of this note.

This offer only apply's to final cost given by builder contractors etc to the building 13 Murray Grove N17QT and is not binding until all the above fullfilment have been made.

£15000 has already been paid to Steve Donald as payment and this should be returned to Chris King.

If this is an uneceptable offer and Steve Donald is unable to accept the fees will be paid and I would expect all work to be fullfiled with appropriate costs without prededise to his high quality and dillygence and building supervision is contracted to him at appropriate fee to be decided before contract are signed.

With all the good will I do wish to carry on with this project and I must now push for final cost so that Allied Irish can be approached with the intent of extra funding to found."

70. Mr. Donald's reaction to that proposal was set out in his letter dated 11 July 2002:-

"*Further to my letter dated 20th June 2002, our subsequent meetings on Monday 1st July and yesterday 10 July during which you drafted your proposals, a photocopy of which I enclose, I write to let you know that not only are the proposals unacceptable they indicate a complete lack of commitment from your self, although I acknowledge that this was not your intention.*

I therefore write to confirm my terms for carrying on with this project as follows.

Firstly I require your written confirmation that my basic architectural fees are agreed and that 75% are currently due for payment as referred to in my letter dated 20th June 2002. These were also referred to earlier in my letters dated 28th [sic – in fact 18] *April and 2may* [sic] *to AIB, discussed and agreed with yourself previously. You could also refer to these letters in regards to overall anticipated construction and development costs and immediately re-advise the bank that we do not anticipate the updated construction costs, which we hope to receive from Durkan Pudelek on Monday 15th July, to be lower than those indicated previously.*

My proposal for securing an ongoing business relationship on the project comprises the following. I will continue to provide the full range of architects services as outlined in RIBA Plan of Work, as per the enclosed copy of the Architects Standard Form of agreement SFA/99, my net fee is £125,000 + Standard disbursements (Approx £12,000) + vat. In lieu of me providing these services and the co-development input to date I will accept a 99 year lease, at no premium, for the pre-sale of the specific unit No. 4 valued at between £250,000 - £300,000 as referred to in the valuation report commissioned by AIB from Dunlop Heywood Lorenz dated 31st May 2002. This obviously discounts the payment of £15,000 which I have already received.

Before I or other members of my company do any further work after today, it is essential that the basis on which I am to be adequately remunerated must be agreed and resolved. It would therefore be appreciated if you could discuss this proposal with your financial and legal advisors as soon as possible so that contracts can be drawn up and exchanged at the earliest opportunity."

71. The reply of Mr. King to that letter was dated 16 July 2002, but unsigned. It was in these terms, again using Mr. King's spelling and punctuation:-
"*I confirm that from all of our previous and discussons that fees of £125.000 + vat [£15,000. Inc vat has been paid on account] is due for design, planning drawings consultation withexpert company's engineers Durkan Pudelek pricing, building supervision, certification, guarantees and the final signing off of the building 13 Murray Grove N17QT on its complition. As you have been well aware from the out set of this project that this money has not been available to be drawn down from the AIB as the original plan to the bank left your fees in. For this consideration my offer of a one bedroom flat still stands in lieu of your fees. Estimated value £160,000 - £180,00 possibly more depending on the market forces at the time.*

I do hope the planning notice that now is proved to have a mistake on is correct and enables us to proceed swiftly. That we are able to get building cost to a manageable level and I reserve the rights to change any part of the final finishes to accommodate the budgets.

I eagerly await final costs from Durkan and hope that we can now go ahead swiftly and get building start date. I must make you aware that my costs are rising day by day and my enthusiasm and commitment for this project may change if we cannot resolve a building start as you are already aware that on completion of this project we could be launching into a slightly lagging market which also make me very nervous.

I do appreciate all the hard work you have put into this project and we can go forward united and finish what started life as a few jottings on a beer mat."

72. It seems to me to be clear from the terms of Mr. King's letter dated 16 July 2002 that it was not, upon proper construction, an agreement, such as was contended for on behalf of the Claimant, that the fees of the Claimant for the work of Mr. Donald and others in connection with the Project should be £125,000 plus Value Added Tax payable as to particular percentages at particular stages in the undertaking by the Claimant of the work, but rather an offer to agree to pay that sum on completion of the redevelopment in respect of all the services listed, that is to say, design, planning, consultation with engineers, pricing, supervision, certification, obtaining appropriate guarantees and final signing off of the building. That the interpretation which seems to me to be correct is the proper construction of the letter is, in my judgment, demonstrated, first, by the list of activities in respect of which the fee was to be paid, which extended to completion, and, second, by the second sentence of the letter, which recorded that the original plan was that the fees would not be paid until completion and that money was not available to pay them until then. The construction of the letter dated 16 July 2002 which seems to me to be correct is reinforced when the terms of the letter are considered against the background of the previous exchanges between Mr. King and Mr. Donald, and in particular the unusually close involvement of the Claimant in the commercial aspects of the project, in respect of which there was an expectation of profit dependent upon a successful outcome of the Project as explained in Mr. Donald's letter dated 20 June 2002. The Claimant did not accept the offer which in my judgment Mr. King made in his letter dated 16 July 2002. Matters went off in the different direction of instructing solicitors to draft an agreement for the letting of one of the flats in the redevelopment to Mr. Donald. No such agreement was concluded before the relationship between the parties was brought to an end by the writing by Messrs. Biebuyck, solicitors acting on behalf of Mr. King, of a letter dated 2 August 2002 to Mr. Donald, to which I shall come.

73. The other matter which emerged from the letter dated 16 July 2002 was that Mr. King was content that the sum of £15,000 which he had paid, on my findings, as a loan, should be treated as a payment on account of fees.

74. As I have already commented, the present was not an ordinary case of a client instructing an architect to prepare plans for a redevelopment of a property, to apply for planning permission and then to arrange for, and to supervise, construction. In the ordinary case it is no doubt sufficient to bring about a legally binding contract between the parties that the client requests the architect to provide his professional services and the architect agrees to do so. If no express agreement is made as to payment of fees, in the ordinary case the law

will imply a term that the client should pay the architect reasonable fees for his services. In this case, against the background of their friendship, and the knowledge of Mr. Donald that Mr. King did not have the means to pay fees until the completion of the Project, Mr. Donald undertook the preparation of the initial designs in connection with the necessary application for planning permission on a speculative basis, even meeting the associated costs, other than the application fee. He involved himself in seeking finance to enable Mr. King to undertake the redevelopment. His investment of time and effort, as well as money insofar as he met the salaries of his staff and disbursements, he characterised in his letter dated 20 June 2002 as him *"providing the majority of the financial backing/support for the project up until now"*. It is obvious, in my judgment, that the parties did not have it in mind, until Mr. Donald changed his position in June 2002, that they should conclude any legally binding agreement under which Mr. King should pay the Claimant fees for its architectural services, at any rate on terms which involved any payments being made before completion of the Project. Once Mr. Donald had changed his mind, and certainly as from the time he wrote the letter dated 20 June 2002, the Claimant's aim was to secure the agreement of Mr. King to pay fees for architectural services in the sum of £125,000 and on the basis that interim payment would be made of an amount equal to 75% of those fees. As I have already indicated, Mr. King did not agree to that, and Mr. Donald did not agree to his counter-proposal in his letter dated 16 July 2002. The result, in my judgment, is that the parties in fact never entered into a legally binding agreement at all. It follows that the claim of the Claimant to payment of fees under a contract with Mr. King fails.

Quantum meruit

75. As an alternative to the claim for fees under the contract for which it contended, the Claimant sought payment of what was said to be a reasonable sum in respect of the services which it said that it had provided to Mr. King. The sum claimed as a reasonable sum, £165,990 plus Value Added Tax, was considerably greater than the sum alleged to be due under the contract contended for in respect of the work in fact done, £93,750, plus Value Added Tax and disbursements of £11,829. There was no real dispute as to what work had actually been done. It was agreed that the hourly rates charged for Mr. Donald, £100, and those of his various assistants who worked on the project, which were either £30 or £45, depending upon the degree of qualification of the assistant concerned, were reasonable as rates. However, the Claimant had not maintained detailed time records specific to the project for the redevelopment of the Property, so the numbers of hours which it was contended each relevant employee of the Claimant had spent on the project were based on estimates made by Mr. Donald. The degree of disparity between the figure said to be due on the basis which it was contended had been agreed and what was said to be a reasonable sum certainly caused me concern as to the accuracy of the estimates of hours made by Mr. Donald. However, those estimates were supported as reasonable by the expert architect called on behalf of the Claimant, Mr. Frank Cleveland. I was impressed by Mr. Cleveland as a witness and, despite my initial reservations, I find that the estimates of hours spent made by Mr. Donald were accurate. I should make clear that, although I am satisfied that Mr. Donald's evidence in relation to the making of an agreement between himself and Mr. King that a fee of £125,000 plus Value Added Tax would be payable was, to his knowledge, untrue, other than in relation to that, to him, highly sensitive, area, I found Mr. Donald to be a straightforward, and substantially accurate, witness. It was the contrast between the manner in which he gave the bulk of his evidence and the manner in which he gave the evidence which I do not accept, as well as a consideration of the contemporaneous correspondence, which led me to the conclusion which I have expressed as to his evidence of making an agreement with Mr. King.

76. Had it been necessary to assess what was reasonable remuneration for the work done by the Claimant I should have followed the guidance given by the House of Lords in ***Way v. Latilla*** [1937] 3 All ER 759, to which Mr. Robert Clay, who appeared on behalf of Mr. King, drew my attention. In his speech at page 766A-B Lord Wright said, with reference to the facts of the particular case:- *"While it is not unknown that such services should be remunerated by a fee if it is expressly or impliedly so agreed, this is by no means necessarily, and would not generally be, the case. The idea of such a fee being excluded, it follows that the question of the amount to which the appellant is entitled is left at large, and the court must do the best it can to arrive at a figure which seems to it fair and reasonable to both parties, on all the facts of the case. One aspect of the facts to be considered is found in the communings of the parties while the business was going on. Evidence of this nature is admissible to show what the parties had in mind, however indeterminately, with regard to the basis of remuneration. On those facts, the court may be able to infer, or attribute to the parties, an intention that a certain basis of payment should apply."*

In the present case the parties had been discussing, and had agreed in principle by no later than the despatch by Mr. King of his letter dated 16 July 2002, a fee of £125,000 for the totality of the architectural services involved in the completion of the redevelopment. By reference to the RIBA Form, of which Mr. Donald sent Mr. King a copy under cover of his letter dated 11 July 2002, the work which had actually been done by 2 August 2002 amounted to some 75% of the total. I should thus have awarded the Claimant on a quantum meruit basis, had it been appropriate to do so, 75% of £125,000 plus Value Added Tax at 17.5%, namely a total of £110,156.25.

77. The submissions of Mr. Nicholas Collings, who appeared on behalf of the Claimant, in relation to the alternative claim upon a quantum meruit rather assumed that it was plain that, if there was no contract between the parties, the Claimant must be entitled to payment of a reasonable sum in respect of the architectural work which it did in connection with the Project. In opening his client's case he simply referred me, in support of his submissions, to paragraphs 4-23 to 4-26 of the seventh edition of *Keating on Building Contracts* and to the decision of Robert Goff J, as he then was, in ***British Steel Corporation v. Cleveland Bridge and Engineering Co. Ltd.*** [1984] 1 All ER 504. In fact, of course, a claim upon a quantum meruit is conceptually a claim in restitution. In ***Banque Financiere de la Cite v. Parc (Battersea) Ltd.*** [1999] 1 AC 221 at page 227 Lord Steyn identified four questions which arose in relation to any claim in restitution, namely (1) had the defendant benefited or been enriched? (2) was the enrichment at the expense of the claimant? (3) was the enrichment unjust? and (4) were there any defences? In his speech in the same case at page 234 Lord Hoffmann made the point that the availability of subrogation as a remedy to prevent unjust enrichment did not turn entirely on the question of intention, and went on:- *"This does not of course mean that questions of intention may not be highly relevant to the question of whether or not enrichment has been unjust."*

78. In his closing submissions Mr. Clay drew to my attention a decision of Mr. Nicholas Strauss Q.C., sitting as a deputy judge of the High Court, *Countrywide Communications Ltd. v. ICL Pathway Ltd.* [2000] CLC 324. In that case a consortium was assembled to make a bid for a substantial contract. The preparation for the making of the bid involved the members of the consortium in considerable amounts of work. The expectation was that, if the bid succeeded, the members of the consortium would be rewarded through payments made under the contract which resulted from success in the bid. If no contract was obtained it was recognised that there would be no recompense for work done. What actually happened was that the bid was successful, but one of the members of the consortium was then excluded from participation in the resultant contract. A question which arose in those circumstances was whether the excluded member had a claim for payment on a quantum meruit basis in respect of the work which it had done. Mr. Strauss reviewed a number of authorities and then stated his conclusions at page 349 of the report:- *"I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations which have arisen, let alone those which could easily arise in other cases. Perhaps, in the absence of any recognition in English law of a general duty, of good faith in contractual negotiations, this is not surprising. Much of the difficulty is caused by attempting to categorise as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff. There is a lot to be said for a broad principle enabling either to be recompensed, but no such principle is clearly established in English law. Undoubtedly the court may impose an obligation to pay for benefits resulting from services performed in the course of a contract which is expected to, but does not, come into existence. This is so, even though, in all cases, the defendant is* ex hypothesi *free to withdraw from the proposed contract, whether the negotiations were expressly made "subject to contract" or not. Undoubtedly, such an obligation will be imposed only if justice requires it or, which comes to much the same thing, if it would be unconscionable for the plaintiff not to be recompensed.*

Beyond that, I do not think that it is possible to go further than to say that, in deciding whether to impose an obligation and if so its extent, the court will take into account and give appropriate weight to a number of considerations which can be identified in the authorities. The first is whether the services were of a kind which would normally be given free of charge. Secondly, the terms in which the request to perform the services was made may be important in establishing the extent of the risk (if any) which the plaintiffs may fairly be said to have taken that such services would in the end be unrecompensed. What may be important here is whether the parties are simply negotiating, expressly or impliedly "subject to contract", or whether one party has given some kind of assurance or indication that he will not withdraw, or

that he will not withdraw except in certain circumstances. Thirdly, the nature of the benefit which has resulted to the defendants is important, and in particular whether such benefit is real (either "realised" or "realisable") or a fiction, in the sense of Traynor CJ's dictum. Plainly, a court will at least be more inclined to impose an obligation to pay for a real benefit, since otherwise the abortive negotiations will leave the defendant with a windfall and the plaintiff out of pocket. However, the judgment of Denning LJ in the Brewer Street *case suggests that the performance of services requested may of itself suffice amount* [sic] *to a benefit or enrichment. Fourthly, what may often be decisive are the circumstances in which the anticipated contract does not materialise and in particular whether they can be said to involve "fault" on the part of the defendant, or (perhaps of more relevance) to be outside the scope of the risk undertaken by the plaintiff at the outset. I agree with the view of Rattee J that the law should be flexible in this area, and the weight to be given to each of these factors may vary from case to case.* "

79. The observations of Mr. Strauss which I have quoted in the preceding paragraph of this judgment were obviously made in the context of the factual situation in the case before him. It is necessary to make that rather elementary point because Mr. Collings sought to answer Mr. Clay's reliance on the decision in part by pointing out that in the present case the intended contractual arrangements were different, and in particular that it was not a failure of the Claimant and Mr. King to agree terms which led to the cessation of their relationship, but the failure of Mr. King to enter into a contract with a third party contractor to undertake the Project. However, it seems to me that what is important for the present case in Mr. Strauss's consideration is his identification of the nature and extent of the risk assumed by the party claiming payment on a quantum meruit basis in relation to the abortive transaction as a material consideration in determining whether an enrichment has been unjust. The short and simple point, as it seems to me, is that there is nothing unjust about being visited with the consequences of a risk which one has consciously run. An analysis along those lines commended itself to Hart J in an unreported decision to which Mr. Clay also drew my attention, ***Easat Antennas Ltd. v. Racal Defence Electronics Ltd.*** At paragraph 70 of his judgment in that case, in which the claim succeeded, Hart J said:- *"Thus, in a case such as* Regalian, *the work undertaken in order to obtain the contract gives rise to no restitutionary remedy because the party providing the services is taken to have run the risk that the contract will not eventuate and he will therefore not be paid. Here, however, while the claimant was prepared to take the risk that the defendant's bid would fail, it was not prepared to run the risk that, if the defendant's bid succeeded, it would not be rewarded. That was the whole purpose and underlying assumption of the 15 September Agreement. The claimant's costs were incurred in the belief that it would get them (and more) back under the sub-contract if the defendant's bid succeeded. That bid did succeed. The contingency on which the services were to be paid for happened. The claim is therefore in my judgment a good one.* "

80. In the present case there has probably been an element of benefit to Mr. King from the activities of the Claimant, even though the redevelopment of the Property in accordance with the designs of the Claimant is not proceeding. The obtaining of planning permission for the redevelopment of the Property to provide a number of units of residential accommodation, as well as a substantial photographic studio, probably establishes a principle as to redevelopment of the Property which will be of benefit to Mr. King in pursuing whatever scheme of redevelopment he decides upon. That element of benefit was undoubtedly obtained at the expense of the Claimant. However, it in the context of the question whether the enrichment was unjust that it seems to me the alternative claim of the Claimant founders. The whole idea behind the activities of the Claimant in relation to the Property was that through a joint effort, in which the anticipated contributions of Mr. King were to make the Property available for redevelopment and to shoulder the burden of discharging any loans necessary to enable the redevelopment to proceed, and those of Mr. Donald were to undertake the necessary architectural work and provide assistance in raising finance, Mr. King and Mr. Donald should bring about a situation in which the Property was redeveloped to the profit of both. The profit to Mr. Donald was expected to be payment, upon successful completion of the Project, in cash or in kind of compensation for the architectural work which the Claimant did, plus some tangible recognition of his wider role in the whole operation. The initial joint expectations were disappointed, ultimately, as I shall explain, because the financial resources available to Mr. King were perceived by him to be insufficient to enable a redevelopment to the designs of Mr. Donald to be undertaken, and, in Mr. King's perception, Mr. Donald was unable or unwilling to modify those designs to suit the funds available. The venture having failed for that reason, there is nothing unjust, as it seems to me, in Mr. King retaining the modest element of benefit which he may have derived from the joint venture without paying compensation to Mr. Donald additional to the £15,000 which

he has already paid. It may well be that, by reference to the actual benefit derived by Mr. King, the Claimant has been over-compensated. Whether that is so or not, it was obvious that the viability of the entire Project was dependent, at the stage at which matters had progressed to the point at which a contract for the redevelopment work could be entered into with a building contractor, upon Mr. King being prepared to shoulder the financial burdens associated with whatever funding arrangements had been made. Mr. Donald thus assumed the risk, in relation to his work up to the point at which a building contract might have been concluded, either that sufficient finance could not be arranged at all, or that the terms upon which otherwise adequate funding was available were perceived by Mr. King to be unsatisfactory. In other words, the Claimant assumed the risk that at that stage Mr. King might decide not to proceed. That is the risk which eventuated.

Termination

81. Relations between Mr. King and the Claimant were brought to an end by the writing by Messrs. Biebuyck on behalf of Mr. King of a letter dated 2 August 2002 to Mr. Donald. A copy of the letter was put in evidence. Although the letter was marked *"Without Prejudice"* and did indeed contain a paragraph which referred to an enclosure which contained a proposal for compromise of any claims alleged to arise by reason of the termination of relations which the first paragraph of the letter brought about, the copy put before me was of the whole of the letter, and a copy of the enclosure was also put before me. I consider that what ought to have happened was that the copy of the letter put before me should have been redacted to exclude any reference to the *"Without Prejudice"* proposal, and no copy of the enclosure should have been put before me at all. As it is, I have ignored the material which I have indicated I should not have been shown, and I will make no further reference to it.

82. The first paragraph of the letter dated 2 August 2002 to Mr. Donald was in these terms:- *"We are instructed by Christopher King to terminate your involvement in the above development. This involvement has been ad hoc without any concluded contract. In the alternative any agreement, which is denied, is void for uncertainty. In the further alternative, any performance of professional duties as an architect has been without proper skill and care to the extent that the lender is unable to proceed with funding because the procurement process has not delivered a building tender for an amount within the available budget. Advice has been received that a fresh planning application is required with the consequence that a completely fresh design is required."*

83. As I have found, the first of the points made in the paragraph quoted in the preceding paragraph of this judgment was sound. There being no contract between the parties, it was open to Mr. King to bring relations with the Claimant to an end at any time without being exposed to any legal liability. The claim for damages for wrongful repudiation therefore fails.

84. In opening the case on behalf of the Claimant Mr. Collings did explain that the claim for damages for wrongful repudiation was only pursued if and insofar as I found that there was a concluded contract between Mr. King and the Claimant, but that it was an express term of that contract that no fee would be payable until completion of the Project. In that event, said Mr. Collings, the Claimant sought damages in respect of being deprived of the opportunity of earning the fees which would otherwise have been payable. I can understand that analysis, although it seems to me that the claim for damages upon the hypothesis adopted should more properly have been formulated as a claim for the whole fee less any savings achieved by not having to do some element or elements of work not yet done at the moment of alleged repudiation, and thus a true alternative to the claim for 75% of the fee for work done up to that point, and not as a claim for the balance of 25% of the fee less the appropriate savings as an addition to the claim for 75% of the fee.

The claim on the cheque

85. The giving of the cheque for £47,000 upon which the Claimant sued was, as I have found, not supported by consideration as it was intended, notwithstanding how Mr. Donald later sought to characterise it, as a loan. As the cheque was not supported by consideration Mr. King is not liable in law for countermanding payment.

86. Moreover, the cheque was drawn subject to a condition that it should not be presented for payment until the agreement of AIB to presentation had been obtained. That condition was not complied with. While I accept that that condition was not such as to make the cheque itself a conditional instrument, in my view the

imposing of the condition, and the acceptance of it by Mr. Donald on behalf of the Claimant, amounted to a contract collateral to the contract constituted by the drawing and acceptance of the cheque that, in consideration of Mr. King drawing and delivering the cheque to the Claimant, the Claimant would not present the cheque for payment until the consent of AIB to that course had been obtained. The Claimant presented the cheque in breach of that collateral contract. By reason of that breach, if the cheque was supported by consideration, Mr. King has been exposed to liability to make payment of the amount of the cheque, to which liability he would not have been exposed but for the breach of the collateral contract. In other words, if he is liable to make payment of the amount of the cheque, Mr. King has a cause of action for damages in the amount of the cheque for breach of the collateral contract. The claim on the cheque in those circumstances would fail for circuity. For that reason also Mr. King is not liable for countermanding payment.

The counterclaim

87. Bearing in mind that the redevelopment of the Property was a joint venture between Mr. King and Mr. Donald, as I have explained, I am not altogether persuaded that it would be appropriate to impose upon the Claimant the duties of care alleged in paragraph 7 of the Defence and Counterclaim. Obviously, given my finding that the parties did not in fact conclude a legally binding agreement, there could be no question of similar duties arising under a contract. However, the existence of the duties contended for, subject to the qualification which I have already set out in relation to the question of financial advice, was admitted at paragraph 7 of the Amended Reply and Defence to Counterclaim, and so I proceed on the basis that the Claimant did indeed owe the duties alleged to Mr. King.

88. The fundamental criticism made on behalf of Mr. King of the designs prepared by Mr. Donald is of the approach adopted. In essence what was said was that instead of designing a building which maximised saleable residential space and utilised the most economical materials in the most cost-effective manner, Mr. Donald had designed a building which was over-elaborate in its use of materials and wasteful in its use of space.

89. Apart from the criticisms of the design as such, an important part of the complaints made on behalf of Mr. King of how the Claimant performed its duties was that Mr. Donald did not, once it had become apparent that a building to his designs might not be able to be constructed for the funds available, modify his designs so that they could be constructed for the amount at the disposal of Mr. King.

90. Architect experts were called on behalf of each party. As I have already noted, Mr. Frank Cleveland was called on behalf of the Claimant. Mr. David Harper was called on behalf of Mr. King. Mr. Cleveland had no previous involvement with the Property. He prepared a lengthy and thorough report which I found helpful and the contents of which I very largely accept. Mr. Harper is in fact the successor to Mr. Donald as architect to Mr. King in relation to the scheme for development of the Property which Mr. King is now minded to pursue. That scheme is of a different type from that designed by Mr. Donald. The requirements for a studio on basement and ground floor levels, a penthouse flat for Mr. King at top floor level, and a lift and a private staircase linking the studio and the penthouse have been omitted. The emphasis now is on cramming as much residential accommodation into a new building at the Property as possible, and constructing that new building at the lowest possible cost. Mr. Harper's report prepared for the purposes of this action was, in its essence, as it seemed to me, an explanation of those features of the designs of Mr. Donald which were not appropriate to be included in designs to meet the brief given to Mr. Harper. That explanation was expressed as criticisms of the designs of Mr. Donald, without any consideration whatever being given to the issue whether no reasonably competent architect given the brief which Mr. Donald took on could possibly have produced the designs which Mr. Donald did. Moreover, each matter of criticism was stated in terms indicating that Mr. Harper considered the justification for it to be self-evident, so that there was nothing approaching a sophisticated, independent evaluation of the issues which I have to determine in relation to this part of the case, namely whether the designs which Mr. Donald prepared were such as no reasonably competent architect given his brief could possibly have prepared in the first place, and whether, once it became apparent that a building to the designs prepared by Mr. Donald might not be able to be constructed for the funds available, his response was such as no reasonably competent architect could have made. Mr. Harper did not in his report deal with the latter aspect at all.

91. It seems to me that the criticism of the design approach adopted by Mr. Donald was misconceived. Mr. King had particular and rather unusual requirements. He wanted a working photographic studio at basement and ground floor level, a penthouse at top floor level, and a private staircase and lift linking the two. Those requirements meant that the space in which to provide saleable residential accommodation started at first floor level and ended below the top floor. The issue then was how to create within that space units of residential accommodation which would be attractive to purchasers.

92. Mr. King evidently told Mr. Mulligan, because Mr. Mulligan recorded it in his letter dated 26 October 2001, that he was not focused on profit. He presumably also made that known to Mr. Donald. Mr. Donald provided Mr. King with copies of his drawings submitted in support of the application for planning permission, so Mr. King was aware of what Mr. Donald was proposing. He did not object.

93. In May 2002 AIB instructed the firm of Dunlop Heywood Lorenz (*"DHL"*) to prepare a commercial valuation of the Property. The individual within DHL who undertook that valuation was Mr. Jonathan Phillips. He prepared a report dated 31 May 2002 for AIB and a copy of that report (*"the DHL Report"*) was put in evidence. At paragraph 5.4 of the DHL Report Mr. Phillips wrote:- *"As proposed the property will have a unique appearance and should prove to be a landmark building in this locale."*

    At paragraph 11.8 he commented:- *"From our conversations with local estate agents it is evident that the residential market is relatively buoyant in the area and provided this continues the completed residential unit should be readily marketable. Furthermore, we consider that the basement and ground floor studio should appeal to any number of potential users should it be available for disposal on a long lease at a nominal ground rent."*

94. The view of Mr. Phillips at the time thus seems to have been favourable so far as the design and layout of the proposed redevelopment was concerned. One can well understand how opinions may differ as to the aesthetic attractions of a particular design and as to the cost-effectiveness of the various individual features of it. However, the Property is located in the midst of what is, or was, mostly local authority public housing stock. Its main attraction, apart from any perceived benefits resulting from a redevelopment, is its location relatively close to the City of London. It may well be thought that in order to seek to overcome what high-earning workers in the City of London may consider to be the disadvantages of the immediate surroundings of the Property, and thus to attract such people to purchase flats in the Property once redeveloped, it was desirable for the redevelopment to look attractive and to have what might be perceived as luxurious features. At paragraph 11.13 of the DHL Report Mr. Phillips indicated that his valuation of the Property took into account a predicted sales price of £375 per square foot for each of the three maisonettes and for each of the three flats which Mr. Donald's designs allowed for. The areas of the maisonettes and flats were set out at paragraph 4.3 of the DHL Report. The maisonettes were, respectively, 805, 915 and 1,012 square feet, whilst the flats were respectively 388, 463 and 495 square feet. Mr. Phillips's valuations of the maisonettes were thus £301,875, £343,125 and £379,500, respectively. His valuations of the flats were £145,500, £173,625 and £185,625, respectively. At all events it does not seem to me that it was inappropriate for Mr. Donald to adopt in his designs of the redevelopment the philosophy of seeking to make the redevelopment visually attractive and spatially generous. Certainly I do not consider that it is seriously arguable that no reasonably competent architect could have approached his brief in the manner in which Mr. Donald did. Mr. Harper in his report did not address at all the question of whether Mr. Donald had adopted features in his designs which no reasonably competent architect given the brief which Mr. Donald had could possibly have adopted. He simply pointed out how particular aspects of the designs of Mr. Donald might have been done differently, or, more especially, so as to produce a reduced cost of construction. In cross-examination Mr. Harper seemed to accept that the approaches adopted by Mr. Donald in relation to many of the matters which Mr. Harper criticised were permissible approaches, given the brief which Mr. Donald had. With the benefit of hindsight Mr. King in his witness statement adopted many of the criticisms made by Mr. Harper, but these did not mirror any points which Mr. King made at any time before the continuing involvement of Mr. Donald in the proposed redevelopment was terminated by the letter dated 2 August 2002 written by Messrs. Biebuyck.

95. I have firmly the impression that no criticism of the designs of Mr. Donald would have occurred to Mr. King or to those now advising him had it not been for the issues of what construction of a building to those designs would cost and whether Mr. King could afford it. Mr. Clay said that in terms in the course of opening his client's case. As I have recorded, no real attention seems to have been given to raising funds to finance the

redevelopment until the latter part of 2001. At about the same time Mr. Bonfield was involved in the project, leading to his production of a cost model figure of £1.325 million on 31 January 2002. As I have already noted, that figure was produced on the assumption that the area of the redevelopment would be 10,534.94 square feet, and so equated to £125.77 per square foot. I have also recorded earlier in this judgment that Mr. Bonfield had previously, on 27 January 2002, for the purposes of providing a basis for calculation of the fees of Boyden, produced a summary estimate in the sum of £1.96 million based on an area of 13,939 square feet. That equated to £140.61 per square foot. The difference between the figures allowed per square foot in these estimations, the lower being some 79.18% of the higher perhaps rather emphasised the need to obtain some tenders from real contractors to get a better idea of what the cost of construction was actually likely to be. Mr. Donald's own estimate of cost in February 2002 in the Strategy Document, based on an area of 10,800 square feet, was £1,250,000, which equated to £115.74 per square foot. The different measurements of the area of the intended building at the Property seem to have been something of a feature of the various attempts to estimate costs, and obviously bedevilled any attempt to arrive at an overall likely cost. Another complicating aspect was that the estimates of cost by Mr. Bonfield and contractors only took into account construction costs, whereas any assessment of development costs, which was what had to be funded, needed to include professional fees.

96. On the advice, or at least with the participation of Mr. Bonfield, it was decided to adopt a two stage selective tender procedure. By letters each dated 22 February 2002 a number of contractors, including in particular DP and RPA Creative Ltd. (*"RPA"*), were invited to submit indications of the amounts which they would wish to receive in excess of an assumed contract value of £1,325,000 in respect of preliminaries, attendance and gross profit if they undertook the redevelopment of the Property in accordance with the designs of Mr. Donald. Tenders were to be returned by 13 March 2002. All bar one of those invited to tender did so by the appointed date. RPA did submit a tender, but it was late and therefore disregarded. Mr. Bonfield analysed the tenders received in due time and reported thereon to Mr. Donald in a letter dated 15 March 2002. The lowest tenderer on this basis was DP, which quoted a total of £290,640 for the elements which I have identified. Interviews with three of the tenderers were arranged for 19 March 2002 and were attended by Mr. King. In the event it was decided to proceed to try to negotiate a contract with DP. The first step in this process was to invite DP to submit a second stage tender. That invitation was extended at a post-tender meeting on 25 March 2002. In a letter dated 26 March 2002, which was copied to both Mr. King and Mr. Donald, DP wrote to Mr. Bonfield indicating that a probable datum for a development such as that proposed was £110 to £120 per square foot, in other words a bracket in which the figure implicit in Mr. Donald's estimate fell almost exactly in the middle, while the figure taken by Mr. Bonfield in his cost model was over the upper limit, albeit not by much.

97. The AIB offer of funding contained in its letter dated 19 March 2002 seems to have been based to a degree on Mr. Donald's estimated figure of £1,250,000, for that figure included a contingency of £100,000, as did the offer, with the element of the loan offered which was designated as to assist with the development costs of the Property was £1,114,000. On those figures the shortfall on the face of the loan offered in relation to estimated cost of construction was £36,000, while the deficiency in relation to the anticipated costs of the overall development was substantial – some £226,000. That potential deficiency in funding, coupled with the preliminary indication of DP that the likely cost per square foot of construction could be as much as £120 per square foot, and therefore £1,296,000 for a building of 10,800 square feet, seem to have been the context in which efforts were made during April 2002 to obtain alternative offers of finance and to persuade AIB to increase its offer.

98. In the letter dated 18 April 2002 to Mr. Barnes of AIB Mr. Donald took a gross area of the proposed new building of 10,800 square feet. On that basis the construction cost indicated in that letter of £1,250,000 equated to £115.74 per square foot, as I have already recorded.

99. Mr. Donald also approached a company called Commercial Business Funding Ltd. (*"CBF"*). He wrote a letter dated 19 April 2002 to CBF which was more or less in identical terms to his letter to Mr. Barnes of the previous day. In a letter dated 29 April 2002 CBF indicated to Mr. Donald that it was in principle prepared to advance funds to finance the undertaking of the redevelopment of the Property. The enclosures to the letter indicated that the amount which CBF would be prepared to lend was a maximum of £1,800,000, of which £1,530,000 would be available *"towards build cost and fees"*, with an amount of £180,000 to be available to

refinance existing borrowing (that is to say the existing mortgage over the Property), and an amount of £90,000 to be devoted to *"interest accrual"*. Mr. King did not pursue this offer of finance.

100. Under cover of a facsimile transmission made on 26 April 2002 DP communicated to Mr. Donald in the form of a cost plan its estimate of the cost of construction of £1,786,244. For a building of 10,800 square feet that figure equated to a cost of £165.39. Mr. Donald noted that that figure was greater than would have been produced by an application of the bracket indicated as a probable datum in DP's letter dated 26 March 2002 to Mr. Bonfield to the perceived total area. He told me in cross-examination, and I accept that he made contact with the chief executive of DP, Mr. Mike Pudelek, who agreed to go away to check DP's measurement of the total floor area. Mr. Donald also sent the cost plan on by facsimile transmission to Mr. King with the note:-
"*Chris –*
Just received this information from Durkan Pudelek.
- Not exactly what we were looking for @ approx £165/ft2
Bell me on mobile later and we can jump in the canal together maybe after a quick gargle @ the commissary "

"The Commissary", Mr. Donald told me, is a wine bar. The effect of Mr. Donald's message obviously was that the high level of cost indicated by DP made it look as if the project for the redevelopment of the Property was not viable on financial grounds.

101. Mr. Pudelek did come back to Mr. Donald on 29 April 2002 and indicated that the high figure indicated in the cost plan sent on 26 April 2002 was based upon a misunderstanding as to the area of the proposed development. A revised cost plan sent by DP to Mr. Bonfield on 29 April 2002 was in the sum of £1,577,544, equating *to a cost of £146.07 per square foot for a building of 10,800 square feet.*

102. The DP cost plan sent to Mr. Bonfield on 29 April 2002 was discussed at a meeting held on 30 April 2002. At that meeting and a number of other meetings, held on 13 May 2002, 20 May 2002 and 31 May 2002, various "value engineering" exercises were discussed. In other words, consideration was given to modification to the designs of the proposed redevelopment in order to see whether savings in cost were achievable. The main focus of these exercises seems to have been the possibility of changes to the structural elements, although a change to sprayed concrete in place of traditional reinforced concrete constructed using shuttering was included. Those who attended the meetings which I have mentioned were Mr. Donald, Mr. Bonfield, Mr. Robert of Techniker Ltd. (Techniker"), the structural engineers, and various representatives of DP. Mr. King himself attended some of the meetings. The discussion on 30 April 2002 resulted in a projected cost of £1,314,673, equating to £121.73 if one assumes a building of 10,800 square feet, but which was treated by those at the meeting as equating to £113 per square foot. If the latter cost per square foot was correct the area of the building was some 11,634 square feet. The next stage cost figure was of £1,462,463 tabled at the meeting on 31 May 2002. The tender summary document in which that figure and its build-up were set out recorded that it excluded concrete screen printing, kitchens, floor finishes, modifications to existing statutory services and new incoming statutory services. Following discussion at that meeting the cost figure was reduced to £1,278,569.

103. During the course of the "value engineering" discussions the principal omissions from the designs of Mr. Donald suggested by DP were the basement and the second staircase, exactly those features which Mr. King had always indicated that he particularly wanted. It is thus not, perhaps, particularly surprising that Mr. Donald was not keen to adopt the suggestions of DP.

104. DP went away from the meeting on 31 May 2002 to prepare its second stage tender. The pricing document for the second stage tender was issued by Mr. Bonfield on 21 June 2002. Under cover of a letter dated 18 July 2002 DP sent to Mr. Bonfield what it described in the letter as "our updated costed schedule of works". The main text of the letter was essentially a commentary upon various of the items in the schedule of works. That commentary included:-
"13. <u>Measure</u>
The quantity surveyor's measurements are appreciably greater than our own. As a consequence we have added a £30,000.00 contingency to the updated cost schedule. The enclosed schedule clarifies. …
15. As a last but important point we have allowed for masonry and render in lieu of screen printed concrete walling."

In other words, DP at that stage had included a contingency element which it had not been asked to include and for which there was no obvious justification, and it had allowed for fair-faced brickwork in place of the screen printed concrete. The amount of the revised tender was £1,614,013.81. That figure equated to £149.45 per square foot, on the basis that the area of the proposed new building was 10,800 square feet. Once more the figure was said to exclude concrete screen printing, kitchens, floor finishes, modifications to existing statutory services and new incoming statutory services. However, it now expressly excluded in addition client fitout, rental of adjacent land (for a site compound), and local authority fees. The revised tender as tabulated was set out beside what was said to be "original cost plan", which totalled £1,426,315.28. Quite where that figure came from or when it had been produced did not appear. It was not identical with, although of a similar order of magnitude to, the cost plan figure discussed at the meeting on 31 May 2002.

105. The "updated costed schedule of works" was discussed at a meeting held on 22 July 2002. The account which Mr. Donald gave of that meeting and of its immediate aftermath in his witness statement was this:-

"65. At a meeting on Monday 22 July 2002 at the Claimant's offices which was attended by the Defendant, Kevin Bonfield of Boyden & Co., the Quantity Surveyor and Cost Consultant ("Boyden & Co."), 2 representatives of Durkan Pudelek ("DPL"), the Main Contractor and I, it was clear that DPL was not interested in negotiating down from the proposed £1.6 million and, likewise, was not interested in securing the work.

66. After the meeting the Defendant, Kevin Bonfield and I had a brief chat. The Defendant asked me if I could go to the Bank on Tuesday, the following day. I said I was unable to due to prior commitments, but I could attend on Wednesday. The Defendant and Kevin Bonfield then entered into their own discussion. The Defendant asked Kevin Bonfield whether he (the quantity surveyor) would go to the Bank with the Defendant the following day, Tuesday. I expressed my opinion that the Defendant should contact the Bank himself to arrange an early meeting, but as Kevin Bonfield was not involved in the previous discussions with the Bank and therefore might be of limited value. My final suggestion was that the most productive route would be for the three of us to meet the Bank as soon as practicable.

67. In conversation with the Defendant later that evening I reiterated my offer to attend a meeting with the bank on Wednesday and also reconfirmed that we would send out all packages to another contractor Developing Interiors Limited (formerly RPA Creative) who had originally been involved in the initial tendering procedures and who had expressed an interest in proving an updated submission. I also re-assured the Defendant that contrary to the advice of the Claimant's then solicitors to stop work until we could secure a proper contract and lease, the Claimant would carry on providing services."

106. Mr. Donald confirmed in a facsimile transmission dated 23 July 2002 to Mr. King his position as indicated in the last paragraph of the passage quoted from Mr. Donald's witness statement in the preceding paragraph. The material part of that transmission was in these terms:- *"In the meantime, contrary to my solicitor's advice that I stop work, I have asked Kevin and Frank to forward to me all copies of their costing and structural data and I will add to this information to [sic] detailed design drawings and schedules and provide them to the contractors RPA in order to obtain alternative costings within the next few days."*

107. In a facsimile transmission dated 25 July 2002 to Mr. Bonfield Mr. Donald asked him to let him know when his tender report document had been completed, so that the next move could be discussed. Mr. Bonfield gave his tender report in a letter dated 29 July 2002 addressed to Mr. Donald. The letter was copied to Mr. King. The material part of that letter for present purposes contained these comments:- *"Further to our meeting on 22nd July 2002 with Durkan Pudelek Ltd. (DPL) and our mutual Client, Chris King, I confirm the following:- …*

2.0 This pricing exercise was in principle to contain the previous negotiations carried out with DPL since the submission of their First Stage Tender on 13/03/02. …

3.0 The costs submitted by DPL are greatly in excess of the most recent total project budget discussions. As part of their submission, DPL listed the following reasons for the disparity in their figure:

3.1 Underestimation of elements prior to sub-tendering.

3.2 Inability to achieve sub-contract prices for certain elements.

3.3 Increased allowances for Preliminaries.

3.4 Inclusion of a contingency.

3.5 General over optimistic target savings for the majority of elements.

4.0 It is our opinion that DPL have not fully complied with the principles of Two Stage Tendering. In particular the following comments are made:

4.1 Previously agreed cost parameters have not been adhered to.

4.2 The correct sub-tendering of the packages has not been carried out in the main.

4.3 The increase in Preliminaries is in contravention of the First Stage tender. In fact the Preliminaries as submitted initially were agreed to be revisited and reduced due to the simplification of and reduction in the Scheme generally.

4.4 The inclusion of a contingency has not been requested.

5.0 The submitted DPL figure lacked the back-up of a price document (this has been requested)…

6.0 Conclusion

DPL have been given a total of four weeks to price the project based on a full set of tender documents. Despite this ample tender period, they have failed to produce a thorough and detailed price with full back-up material.

The previous discussions held with DPL regarding the scheme and value engineering have largely been ignored resulting in an exaggerated price for the scheme.

The willingness of DPL to continue to work towards a mutually acceptable figure is in question and therefore confirmation of this must be obtained."

108. Notwithstanding the terms of his letter dated 29 July 2002 to Mr. Donald, which contained quite serious criticisms of the "updated costed schedule of works" produced by DP, in his witness statement produced for the purposes of this action, in which he was called on behalf of Mr. King, Mr. Bonfield said this:-

"22. Durkan submitted a priced document on 22/7/02 totalling £1,614,031.81 (£139/ft2 [only if the assumed total area of the proposed new building was 11,611.74 square feet]) and excluded kitchens, statutory connections, floor finishes, screen printing, Local Authority fees and rental of adjacent land. These exclusions could have added a potential further £100,000 to £120,000 to the total.

23. From analysis of this figure, it was apparent that certain structural elements were changed following extensive input from Techniker resulting in savings. However, the architectural value engineering changes that discussed [sic] and were not incorporated and remained priced at such a level that the overall figure was in excess of the desired budget.

24. Following a further meeting with Durkan and Mr. Donald, we wrote to Mr. Donald with a summary of the status of the project costing by Durkans on 29/7/02. Durkan's pricing had reflected the design as issued in the second stage tender but included increases that were not fully explained i.e. Preliminaries costs, inclusion of risk money against the more complex interface elements and the like. These issues were likely to be reconcilable given the time required. We also stated that the value engineering exercises carried out in April and May 2002 had been largely ignored in the design. We suggested that some fundamental changes could be made to reduce the Durkan price initially including the use of Mr. Donald's suggested Electrical Sub-Contractors, MBS Ltd. It transpired that MBS Ltd. were unable to substantiate their indicated cost. It was clear that the design of the building was not in keeping with the budget aspirations of the Client, despite extensive work to establish the changes required to meet this budget. Whilst Durkan's price as submitted was high, we believe that Durkan foresaw high risk elements in this design and priced the project accordingly. This could have been avoided if the value engineering exercises were adhered to by Mr. Donald. However, it is unlikely that the cost of £1.2m would be achievable without fundamental changes in the design, all of which were discussed with Mr. Donald at length. It became apparent that Durkan were becoming less interested in proceeding to contract and Mr. Donald advised them that their services were no longer required.

25. Mr. Donald continued to believe that the Durkan pricing was responsible for the significant over budget costings. Mr. Donald approached a contractor known to him, namely RPA Developing Interiors, to price the project. This company produced a figure to Mr. Donald of £1,181,360 during the course of August 2002. Following repeated requests from us we eventually received a fax on 10/9/02 from Mr. Donald enclosing a one page letter from Developing Interiors Ltd. which contained an elemental summary of costs. The costs were stated as provisional and without any back-up were meaningless.

26. Following the meeting on 22nd July 2002, I spoke to Mr. King and asked if he was fully aware of the build-up of the then current pricing issues. He appeared to be poorly informed of the negotiations with Durkans and it appeared that there was some disagreement over Mr. Donald's appointment/fee arrangements with the Client. I informed Mr. King that whilst Durkan's pricing as submitted was high, the fundamental problem lay in the design of the building. The optimum commercial development of this site was being compromised by the excessive cost of construction and the risks attached to achieving the design. These risks were apparent to Durkans, and any professional contractor, and would be priced accordingly.

27. With the inability of a contract sum to be agreed with Durkans, due to the non incorporation of fundamental value engineering measures, the Client found himself at a point close to starting on site without a contractor. Mr. King had apparently vacated 13 Murray Grove which surprised me in the light of the difficulties in pricing during May and June 2002, a fact which Mr. Donald should have made clear to his Client."

109. The explanation for the apparent change in the position of Mr. Bonfield between that indicated in his letter to Mr. Donald dated 29 July 2002 and that indicated in his witness statement emerged in the cross-examination of Mr. King. He frankly admitted that after the meeting with representatives of DP on 22 July 2002 he was dumbfounded and at his wit's end as to how to grapple with the problem of the level of cost indicated by DP. He was upset. He evidently expressed to Mr. Bonfield his concerns and discussed them with him. The upshot seems to have been that, following discussion with Mr. Bonfield, Mr. King resolved there and then to bring the involvement of Mr. Donald in the proposed redevelopment of the Property to an end. That was effected by the writing by Messrs. Biebuyck of the letter dated 2 August 2002 to which I have referred. Although it was suggested to Mr. King by Mr. Collings that Mr. Daly influenced the decision, and Mr. King indicated that Mr. Daly expressed the view that Mr. Donald's involvement should be terminated, in fact it appeared from the evidence of Mr. Daly himself in cross-examination that a factor in his forming his view that the continuing involvement of Mr. Donald should cease was the terms of a further report, called "13 Murray Grove, London N1 Report on Construction Issues", dated August 2002 prepared by Mr. Neil Powling of DHL. That report does not seem to have been available until after Messrs. Biebuyck had written the letter dated 2 August 2002. Consequently, although Mr. Daly may, after the event, have expressed his agreement with the course taken, it does not appear that his views influenced Mr. King in his decision to bring the involvement of Mr. Donald in the Project to an end. Very speedily after the letter dated 2 August 2002 was written Mr. Bonfield had introduced Mr. King to three firms of architects and had arranged meetings to discuss possible ways forward. Those discussions centred on a completely different type of scheme of redevelopment, namely construction of a building composed entirely of residential flats, with no studio for Mr. King and no penthouse for him either. It seems that one application for planning permission for such a scheme has been made and been rejected, while a further application is pending.

110. Following the meeting on 22 July 2002 Mr. Donald did send to RPA, which had by this time changed its name to Developing Interiors Ltd., a set of the second stage tender documents previously sent to DP and which had resulted in the production of the costings considered at the meeting on 22 July 2002. In a letter dated 14 August 2002 Mr. David Cumberworth of RPA responded to the invitation to submit a price, so far as is presently material as follows:- *"Further to receiving your tender document 25th July 2002 please find our provisional costings for the work at Murray Grove, which we can go into greater detail should our preliminary costings, be of interest to you. …*

18. ***Total £1,181,350.00***

I would like to clarify that the time scale for the tender was very tight and firm upper costs at a later date subject to a meeting with yourself and the quantity surveyor to go through the project."

111. Mr. Donald sent a copy of the letter dated 14 August 2002 from RPA to Mr. Bonfield under cover of a facsimile transmission dated 9 September 2002, in which he said:- *"Ref: Proposed Development @ 13 Murray Grove London N1*
Further to our earlier conversations regarding the above, please find attached the letter dated 14th August 2002 from Developing Interiors Ltd. (formerly RPA Creative) confirming their schedule of costings for the project in response to the package of information issued to them 23rd July 2002.
Please call me to advise me of your views."

The facsimile transmission dated 9 September 2002 was copied to Mr. King. By 14 August 2002 the costings indicated by RPA were only of academic interest, as Mr. King had already decided to pursue a different type of scheme from that designed by Mr. Donald, and to pursue it with different architects.

112. The expert evidence of Mr. Cleveland in relation to the allegations of negligence against the Claimant concerning its response once it became apparent from the estimates of cost made by DP that it might not be possible to construct a building to the designs prepared by Mr. Donald at the Property for the funds available was broadly to the effect that Mr. Donald reacted exactly as one would expect a reasonably competent architect to react.

113. In my judgment what any reasonably competent architect would have done once it became apparent that the preferred contractor, in this case DP, estimated the costs of constructing a building to the designs which had been prepared would exceed the budget available was, in the first instance, to consider with the preferred contractor and with other members of the professional team, such as the quantity surveyor and specialist engineering consultants, whether there were any means by which the costs could be reduced to that which the client could afford. That strikes me as just plain common sense. It is the process described during the course of the trial as "value engineering" and is, on the evidence, in particular that of Mr. Bonfield, which on this point I accept, a well-established feature of the commissioning of projects in the construction industry in these days. The probable, as opposed to possible, existence of a problem did not become apparent until DP submitted its cost plan sent to Mr. Donald by facsimile transmission on 26 April 2002. Up to that point such indications as to likely cost as had been given, other than Mr. Bonfield's first estimate of 27 January 2002, had suggested that the project could be achieved for the sum which Mr. King considered was available. Mr. Donald first challenged Mr. Pudelek as to the basis of the cost plan of 26 April 2002 and, by that step alone, produced a significant reduction, of some £208,722. A "value engineering" discussion at the meeting on 30 April 2002 suggested possible savings of a further £262,849. Further work on "value engineering" produced by the end of the meeting on 31 May 2002 an indication that a construction cost of £1,278,569 was achievable. That outcome, it seems to me, meant that a reasonably competent architect could properly decide to wait for the outcome of the second stage of the tender process before considering what, if anything, further should be done. As it happened, the outcome of the second stage tender was very disappointing. The obvious next step for a reasonably competent architect to take in the light of that outcome was to try other contractors to see whether a better price could be obtained. That Mr. Donald did by going back to RPA. He did that promptly, but the ground was cut from under his feet before RPA had had a chance to respond. It does not seem to me that there is any substance in the criticisms made of the Claimant in relation to its reactions to the problem of affordability of the designs which Mr. Donald had prepared.

114. In the result the counterclaim fails and is dismissed.

Mr. King's alleged losses

115. It is not strictly necessary for me to consider the losses which it was alleged Mr. King had suffered as a result of the negligence of the Claimant. That is perhaps just as well from the point of view of Mr. King, as the quality of the evidence was far from satisfactory.

116. The first element of alleged loss was the difference between the amount of the mortgage payments in respect of the Property and the rent which Mr. King has had to pay in respect of alternative premises at 24, Cross Street, Islington which Mr. King has rented as residential accommodation since 1 June 2002. I accept that Mr. King has in fact rented the premises at 24, Cross Street since 1 June 2002, but there was no satisfactory explanation as to why. No work has in fact been undertaken at the Property. Mr. King's own evidence in paragraph 13 his witness statement as to why he rented 24, Cross Street in the first place was:- *"The Quantity Surveyor advised that work could start on 24 July 2002. I therefore arranged to move out of Murray Grove, selling a lot of my furniture because I knew that I would have to move into somewhere smaller."*

In other words, he moved out not in the light of anything said by Mr. Donald, but in the light of what Mr. Bonfield had said to him, and said, moreover, so it would seem from the date upon which rent started to be paid, at a time long before second stage tender documents had been sent to DP, still less a price tendered which was likely to be acceptable. The move thus, in my judgment, had nothing to do with Mr. Donald, and the Claimant could not be held responsible for the costs incurred in additional living expenses in any event.

Not merely was the incurring of the costs not caused by the Claimant, but it was not, it seems to me, reasonably foreseeable that Mr. King would do something so stupid as to move out of the Property into smaller, but more expensive, accommodation in advance of the concluding of a binding contract for the undertaking of building work at the Property. Furthermore, it is not obvious why, since he has known since 22 July 2002 that the scheme designed by Mr. Donald was not going to proceed, he has continued to incur accommodation costs instead of moving back to the Property.

117. The other elements of alleged loss fall, broadly, into two categories, namely professional fees incurred in relation to the proposed redevelopment of the Property and liabilities incurred to AIB.

118. Of the professional fees, Mr. King accepted in cross-examination, rightly as it seems to me, that he has had value for the sums paid for a soil investigation report and for specialist environmental advice concerning the impact upon occupiers of surrounding buildings of the construction of a building at the Property of the size of that designed by Mr. Donald. Both of those elements of work would be necessary to be undertaken for any redevelopment of the Property and, as I have said, Mr. King continues to desire a redevelopment of the Property, albeit of a different nature from that in which Mr. Donald was involved. The claims in respect of the fees of Rybka for an environmental assessment and in respect of the report of CPE concerning ground conditions therefore fail in any event. Mr. King accepted that he had not paid fees to Techniker of £30,800 plus Value Added Tax, which was the sum claimed, but only some £10,000, with the balance being outstanding. In fact, from copies of receipted invoices numbered, respectively 2407/MM133 and 2440/MM133, each dated 21 May 2002, put in evidence it seems that the total sum paid was £10,895.64 plus Value Added Tax of £1,913.73. Whether the balance owed to Techniker, whatever it was, was ever likely to be paid was unclear, as was the issue who exactly had paid the sum of £15,000 plus Value Added Tax of £2,625 which had been paid to Boyden. The confusion arose because Mr. King had established a company, Chris King Construction Ltd., as the vehicle through which any redevelopment of the Property was to be undertaken. The fee invoices of Techniker were addressed to that company. The company seems to have no assets. It thus appears unlikely that the unpaid balance of the fees is ever likely to be paid. There was no clear evidence as to the source of any funds used to pay such of Techniker's fees as had been paid or as to the accounting treatment of the fees paid to Boyden. There was no evidence as to whether or not the company, Chris King Construction Ltd., was registered for Value Added Tax purposes, and thus whether any Value Added Tax paid on professional fees had been able to be reclaimed. If it had been reclaimed, it would not have formed part of any loss sustained on any view. No copies of the fee invoices of Boyden which had been paid were put in evidence. Mr. King in his witness statement identified the dates and amounts of the invoices as being one dated 14 June 2002 in the sum of £10,000 and one dated 20 October 2002 in the sum of £7,625. As I have pointed out, Boyden continued to do work for Mr. King after the cessation of the involvement of Mr. Donald on about 2 August 2002. To what extent the invoices of Boyden related to work done after 2 August 2002 was unclear.

119. Mr. Daly was clear in his evidence that AIB's customer was Mr. King personally, not Chris King Construction Ltd. Any liabilities incurred to AIB were thus those of Mr. King personally. All of the sums which Mr. King had paid to AIB were consequent upon his acceptance of the offer of a loan contained in AIB's letter dated 19 March 2002. Had I found that the designs of Mr. Donald were negligently prepared I should thus have found that the facility fee of £21,960 and the fee of £4,996.68 paid in respect of the production of the DHL Report, the obtaining of which was a term of the loan agreement, were recoverable as damages. However, there was no evidence as to the amount of any interest which Mr. King had paid AIB. As the redevelopment proposed had never begun, and the evidence of Mr. Daly was that the facility had now been withdrawn, it did not seem particularly likely that any interest had in fact been paid.

Conclusions

120. For the reasons which I have set out, both the claims and the counterclaims in this action fail and the action and the Part 20 claim are dismissed.

Nicholas Collings (instructed by Browne Jacobson for the Claimant)
Robert Clay (instructed by Francis, Thatcher & Co. for the Defendant)