

JERSEY / JUDGMENT

Snell -v- Beadle 16-Nov-2006 [2006] JCA 164 (16 November 2006)

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COURT OF APPEAL 16th November 2006 Before : Dame Heather Steel, President; M. S. Jones, Esq., Q. C., and; G. R. Rowland, Esq., Bailiff of Guernsey. Between Anthony John Snell Plaintiff/Appellant And Advocate Charles Malcolm Bedford Thacker (as executor of the Moveable Estate of the late Mrs Margaret Beadle) First Defendant/Respondent Alan Joseph Beadle John Charles Beadle Second Defendants/Respondents A. J. Snell appearing for himself as a litigant in person Advocate D. F. Le Quesne for the First Defendant and for the Second Defendants.

JUDGMENT

JONES JA: This is the Judgment of the Court.

Background

1. In June 1992, Mr Snell inherited from his father two properties in St Clement, Broadlands and Abalone. These lay on either side of a strip of land which belonged to Mrs. Beadle, the mother of the second defendants. Abalone was Mr Snell's home, which he had shared with his father, and which had been run for many years as a guest house. Taken together, the properties lay between a public road and a private road which ran along the margin of the sea shore. The public road, the strip of land and the private road ran parallel to each other up to a point where the private road turned at right angles across the line of the strip of land to join the public road. Broadlands lay between the public road and the strip of land. Abalone lay between the strip of land and the private road. The strip of land was narrow and un-developed. The only use to which it had been put was as a footpath. Vehicular access from the public road to Abalone was obtained by means of the private road, but there was no vehicular access at the relevant time to Broadlands.
2. There was a hypothèque conventionnelle simple on Broadlands in favour of Mr and Mrs Rayson, in the principal sum of £45,000, with interest at 9½% and there was a judicial hypothec on Abalone in favour of Mrs Bell, in the principal sum of £60,000, with interest at 14%. Mr and Mrs Rayson were pressing for repayment of their loan, the term of which had expired, and Mr Snell was unable to service the interest on either loan. He decided to try to find a way out of his financial difficulties by developing Broadlands. In August 1992, Mr Snell submitted an application to demolish the two dilapidated buildings that stood there and build two semi-

detached cottages. The development plan involved demolishing part of the granite wall which separated Broadlands from the public road, in order to give vehicular access. The application was refused on the grounds, amongst others, that the Island Development Committee ("IDC") was not willing to grant access from the public road by demolishing any part of the granite wall. 3. In October 1992, Mr Snell and Mr Stein, a planning officer at the IDC, met on site. On learning that Mr Snell owned Abalone as well as Broadlands, Mr Stein expressed the view that it might be preferable to develop both sites. He said that a total of ten parking spaces would be required, of which four would be for the occupants of Broadlands and six for the occupants of the redeveloped Abalone. 4. There remained the problem that permission to develop Broadlands would depend on there being vehicular access to it from the public road. With that in mind, Mr Snell contacted his advocates, Pickersgill & Le Cornu, about Mrs Beadle's strip of land. They knew her and were confident that she would consent to the granting of a vehicular right of way from Abalone to Broadlands. They told Mr Snell that they would approach her and that, in the meantime, they saw no reason why Mr Snell should not proceed on the basis that vehicular access to Broadlands was obtainable. 5. On 18th November 1992, Mr Snell submitted a new application for a combined development of Broadlands and Abalone. The proposed development involved the construction of two new cottages on Broadlands and three on Abalone. The plans accompanying the application provided for four parking spaces on Broadlands and six on Abalone. Mrs Beadle's strip of land was marked as "current pedestrian right of way in hands of advocate to free use of land to vehicular usage". 6. The IDC had concerns about certain details of the Abalone development and would have preferred that there were two cottages rather than three on that property. Following discussions with the planning officials, Mr Snell submitted a further application on 20th April 1993, this time for the development of Broadlands alone. The plans again provided for four parking spaces on Broadlands and assumed that vehicular access to them would be gained from Abalone over the strip of land. On 8th July 1993, planning permission was granted for the Broadlands development. Among the conditions attached to the grant were the requirements that the granite wall towards the public road be retained and that four parking spaces be provided as shown on the plans. Broadlands could not be developed, therefore, unless a right of vehicular access was acquired from Mrs Beadle across the strip of land from Abalone to Broadlands. 7. On 19th October 1993, planning permission was granted for the development of three cottages at Abalone. By then, however, Mr Snell had decided to refurbish the existing building so as to enable it to be registered as a lodging house with six units of accommodation, something which he and his father had planned to do before the latter's death. Mr Snell would need only building bye-law consent, not planning permission, for the refurbishment. 8. Mr Snell engaged Mr Harry Cole of Royston Associates to assist him in securing finance for the project. Mr Cole approached Mrs Garner, the principal beneficiary of a trust known as the Taylor Settlement. Mrs Garner was keen for the Settlement to lend Mr Snell a total of £225,000, at the rate of 15%. It was thought that £225,000 would be sufficient to pay off the Rayson and Bell loans and carry out the development. 9. By January 1994, matters had progressed. It was proposed that the £225,000 would be advanced in two

tranches. The first was to be used to pay off the Rayson and Bell loans, and the Taylor Settlement would be granted a first charge over Broadlands and Abalone. The second would be used to finance the development of Broadlands. Mr Snell's builder was ready to start work. 10. According to Mr Snell, it then transpired that Pickersgill and Le Cornu had not approached Mrs Beadle about the vehicular right of way. They wrote to Mrs Beadle on 26th January 1994, explaining the need for vehicular access across the strip of land in order to be able to develop Broadlands in accordance with the planning permission. They explained that Mr Snell faced judgment being taken against him the following Friday in respect of the sum of £45,000 and that Mr Snell was unable to pay the interest. They told Mrs Beadle that a backer had been found to allow the Abalone and Broadlands developments to proceed, but that the lender was not prepared to advance Mr Snell any money unless the matter of vehicular access over the strip of land was resolved. Finally, Pickersgill and Le Cornu asked if, as a matter of urgency, Mrs Beadle would agree to give Mr Snell the requested vehicular right of way across the strip of land. 11. Mrs Beadle did not reply to that letter. On 1 st February 1994, when Mr Snell learned that his lawyers had not heard from her, he went to Mr Cole's office and Mr Cole then made contact with Mrs Beadle. She agreed to meet him and Mr Snell on site that day. 12. Mr Cole had previously obtained Mr Snell's consent to make a full and frank disclosure to Mrs Beadle of Mr Snell's financial position. He gave Mrs Beadle details of the action by the Raysons, and the fact that this was due in Court the following Friday. He explained why vehicular access across the strip of land was required. He showed Mrs Beadle the plans for the Broadlands development and he recalled Mr Snell showing Mrs Beadle over Abalone and discussing with her his plans for the development of Abalone. According to Mr Snell, Mr Cole explained at the meeting that he (Mr Snell) was facing judgment being taken against him unless he could obtain vehicular access to Broadlands across the strip of land from Abalone, and that the financing for the development would not be forthcoming unless the matter of such access was resolved. Mrs Beadle was very interested in his plans for Abalone because she had previously owned the property and still retained property in the area. He showed her the plans and a report from Broadland Estate Agents on what he was proposing for Abalone. She was happy with what he was suggesting. He said that Mr Cole had earlier told Mrs Beadle at the meeting that the reason he was developing Broadlands and having to experience such difficulties with the IDC was because he wished to retain Abalone and convert it into five apartments to let and one for his own occupation. 13. In the affidavit by Mr Cole which was before the Royal Court, he said this:- "As far as I recall at that stage although I was aware of the proposed plans to convert Abalone into 5/6 units and had seen some construction taking place, I can't recall seeing any plans of that conversion. The plans I refer to are those relating to Broadlands. However, I do recall Mrs Beadle being shown over Abalone by Mr Snell and Mr Snell discussing what his plans for Abalone were. Mrs Beadle would have been in no doubt just what Mr Snell was hoping to achieve." 14. Mrs Beadle agreed at that meeting to consider favourably Mr Snell's request that she grant him a vehicular right of way across the strip of land in consideration of the sum of £100, and payment of her legal costs in passing the necessary contrat before the Court. The next day, 2 nd February, at Mr Cole's office, Mrs

Beadle signed a written agreement in which she undertook to grant the right of way. On 11 th February 1994, however, Mrs Beadle's advocates wrote to Mr Snell's advocates to advise them that Mrs Beadle did not propose to go ahead with the transaction. The Litigation and Litigants 15. On 16 th August 1994, Mr Snell issued an Order of Justice against Mrs Beadle for breach of contract. The Royal Court found against Mrs Beadle on liability, on 4th February 1998. On 18 th January 1999, Mrs Beadle appealed successfully to the Court of Appeal. The Privy Council restored the Royal Court ' s Order on 29 th January 2001. Sadly, Mrs Beadle died on 27 th March 2002. Advocates acting for Mr Snell filed Particulars of Claim in this case on 30 th January 2004, and a trial on damages was held in February and March 2006. The first defendant is the executor of Mrs Beadle's movable estate. Her two sons have been joined as second defendants on the basis that, if the personal estate is insufficient to meet any award of damages, they will be liable to the extent of the immovable property inherited by them from Mrs Beadle. Evidence of Loss 16. In the seven years between the date of Mrs Beadle's breach of contract and the Privy Council's finding against her, Mr Snell's fortunes suffered a decline. The Raysons took judgment on 11 th February 1994 for the amount which they were owed. On 16 th February, Pickersgill & Le Cornu wrote to the advocate acting for the Taylor Settlement, Advocate Habin, referring to a telephone call in which they had advised him that Mrs Beadle was not prepared to honour her agreement to allow vehicular access across the strip of land. The letter went on to say that, for obvious reasons, Mr Snell had decided not to proceed. On 22 nd February, Advocate Habin sent a note of his fees to Pickersgill & Le Cornu for settlement. 17. Following the refusal by Mrs Beadle to pass the necessary contrat, Mr Snell tried to persuade the IDC to change its mind about the granite wall. After further negotiations and the presentation of amended plans, the IDC maintained its position that the granite wall could not be breached. By letter dated 22 nd March 1994 from Mr Cole to Mr Stein, Mr Snell asked the committee to consider certain compromise solutions. However, on 14 th April 1994, the IDC rejected these. On 14 th June 1994, Mr Snell lodged an appeal to the Royal Court against the IDC ' s decision. 18. In the meantime, Mr Snell had instructed Mr Cole to place both properties on the market. In his evidence before the Royal Court, Mr Cole confirmed that he advertised both properties for sale in the Jersey Evening Post. His recollection was that there was a total asking price of £375,000. He thought that Abalone was worth £250,000 to £275,000 and Broadlands about £100,000. There is no evidence that any offers were received. 19. On 22 nd July 1994, Mrs Bell took judgment against Mr Snell in respect of her loan. The sum involved was £76,800 plus interest. Faced with two judgments and the risk of one or other of them being enforced by dégrèvement (in which event he could have lost the equity in the relevant property) Mr Snell applied for a Remise de Biens on 5th August 1994. 20. During the Remise, the Jurats sought to acquire the strip of land from Mrs Beadle. Negotiations took place with her advocates. In essence, Mrs Beadle agreed to sell the land for £10,000 but made it a condition that Mr Snell would have to abandon any claim which he might have against her for breach of contract. Mr Snell refused to do so and the acquisition did not proceed. 21. Abalone was sold by the Jurats in the course of the Remise in its undeveloped condition for £265,000, on 9th February 1996. The appeal to the Royal Court against the IDC ' s decision was not proceeded with . In June 1996, a Mr

Biddlecombe, presumably with the consent of Mr Snell and the Jurats, applied to the IDC for a slightly modified development of Broadlands, but including the demolition of the granite wall on to the public road so as to provide three parking spaces. On 30 th October 1996, perhaps surprisingly, the IDC granted this application. 22. Following the end of the Remise and the obtaining of the above planning permission, Mr Snell sold Broadlands to Mr Biddlecombe for £100,000 on 14 th March 1997. Damages 23. The issues which the Royal Court had to determine in assessing damages included remoteness, failure to mitigate, and method of quantification. In its Judgment, dated 23 rd March 2006, the Royal Court held that the damages claimed by Mr Snell were not too remote, and that he had not failed to mitigate his loss. The following findings, in particular, are relevant to the determination of this appeal: "(i) On a balance of probabilities, but for Mrs Beadle's breach of contract, Mr Snell would have proceeded with the Broadlands and Abalone developments, if he had obtained the financing. (ii) It is more likely than not that Mr Snell would have obtained the necessary financing for his proposed development. (iii) Mr Snell would have completed the proposed developments and received lodging house status for Abalone by 31 st December 1995." (Judgment paragraph 41) 24. Against the background of these findings, in its Judgment of rd March 2006 , the Royal Court expresses the view that, prima facie, the quantum of the claim will be the difference between what Mr Snell's financial position would have been if the two developments had proceeded and his financial position as it in fact turned out to be. It continues:- "We think it convenient first to assess what Mr Snell's position would have been at 31st December 1995, which was the date by which he planned to have completed both developments and to have received lodging house status following the refurbishment of Abalone. As already stated, subject to the matter which we shall mention in a moment, the agreed value of the refurbished Abalone as at 31st December 1995 was £500,000. The agreed costs in respect of the Abalone conversion are set out in appendix A of the 'summary of potential losses for the period 31st December 1994 to 20th February 2006 (revised 13.30 on 28th February 2006)' ('the Summary'), being an agreed document produced during the course of the trial by the two accountants. We proceed on the basis that, as shown in schedule 1(a), Mr Snell would have had a carried forward borrowing requirement of £23,761 following the development and sale of Broadlands. He would then have borrowed a further £64,450 to carry out the Abalone development and the experts have treated this as being at the same interest rate as the Taylor Settlement loan, namely 15%. The experts are also agreed that, had matters proceeded as he envisaged, he would, on his evidence, have received rental income in 1995 from Abalone and this is assessed at £20,150. Accordingly, in order to assess what his financial position would have been as at 31st December 1995, one starts with £500,000, from which one deducts the outstanding loans, the interest accumulated thereon and the deemed selling costs (2½%) of Abalone and one adds back the lost rental income. The total, as shown in appendix A of the Summary comes to £409,993. In other words, that would have been his net financial position following the completed development and sale of Broadlands and the refurbishment of Abalone." (Judgment paragraph 61). 25. Having reached that view, the Royal Court goes on to compare Mr Snell's "net financial position" with what actually happened, in these words:- "Having established

what Mr Snell's financial position would have been if he had carried out the two developments, we must compare that with what actually happened in order to assess his loss. The Summary shows he received a total of £69,955 following the sale of Abalone and the completion of the Remise. He received this sum either by direct payment or by settlement of debts which he would have incurred in any event, e.g. income tax, parish rates etc. and which were not therefore a result of Mrs Beadle's breach of contract. However, certain sums arose as a result of the Remise, including increased interest on the Rayson and Bell loans as a result of delay in their repayment, legal fees of the Jurats and Mr Snell (sic) etc. We consider that all costs which occurred naturally and in the ordinary course as a result of the Remise are losses which are not too remote, on the basis that a Remise (or any other form of bankruptcy) was something which ought to have been contemplated as being not unlikely following Mrs Beadle's breach of contract. The Summary shows a total of £60,079.05 in respect of such matters but this includes fees to Mr Cole of £11,110. These were all incurred after the breach of contract. In our judgment, to the extent that Mr Cole's fees were incurred prior to the Remise, these were a result of Mrs Beadle's breach of contract because it was reasonable for Mr Snell to request Mr Cole to try and help extricate him from the dilemma in which he found himself. However, to the extent that Mr Cole's fees were incurred after the Jurats were appointed, we do not think that they are recoverable. The Jurats then had responsibility for Mr Snell's affairs and we do not think it was a natural consequence of the Remise that a property and business adviser to Mr Snell should be employed. Of the sum of £11,110, £7,110 was clearly incurred after the Jurats were appointed (being for the period October 1994 to November 1995). The sum of £3,450 was clearly before the Jurats were appointed, being for the period April to June 1994. The balance of £550 covers the period 14th June to 22nd September 1994. We do not think it worthwhile to ask the parties to analyse this and we propose to treat it as having been incurred before the Remise. It follows that Mr Snell is to be treated as having received £77,065 out of the Remise rather than £69,955 (i.e. an increase of £7,110). The result is that as at 31st December 1995, the loss was £409,993. On 22nd November 1996 he received the sum of £77,065 from the Remise so that his loss was reduced to £332,920. On 31st March 1997, Mr Snell received the net proceeds of sale of Broadlands in the sum of £98,500 with the result that his loss was then further reduced to £234,428." (Judgment paragraph 65). 26. Having calculated a figure based on these elements, the Royal Court awarded Mr Snell damages which discounted that figure by 25%, for reasons which are explored later in this Judgment. 27. Mr Snell does not quarrel with those of the Royal Court's findings which are summarised in paragraph 23 above. He contends, however, that the quantification of damages ought to have been based on the following:- (i) The market value of Abalone as it would have been at the date of the trial on damages; (ii) The income that he claims to have lost as a result of not having been able to let out five units in Abalone, developed in accordance with his plans; (iii) The rent which he claims to have paid as a result of not having been able to live in the sixth unit in Abalone, developed in accordance with his plans. (iv) Compound interest on the above three elements; and (v) As an alternative to (i) above, the income which he claims that he will lose and the rent which he claims that he will have to pay, between the date of trial and his death.

Discussion 28. The fundamental principle which underlies the assessment of damages in a case such as this is that a plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the plaintiff's duty to mitigate his loss . In principle, he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract. How much that amounts to in money terms is a question of fact, to be determined by reference to the circumstances of the particular case. See *British Westinghouse Electrical and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd* .

[1912] AC 673 , pp 688 and 689 per the Lord Chancellor (Viscount Haldane). 29. In this case, as is noted in paragraph 23 above, the Royal Court was satisfied on the balance of probabilities that, but for Mrs Beadle's breach of contract, Mr Snell would have proceeded with the Broadlands and Abalone developments if he had obtained the financing. Furthermore, it held that it was more likely than not that Mr Snell would have obtained the necessary financing for his proposed development. It says, correctly in our view, that, on the face of it, the quantum of the claim is the difference between what Mr Snell's financial position would have been if the two developments had proceeded and his financial position as it in fact turned out to be. 30. The issue at the centre of this appeal, however, is whether or not the Royal Court has correctly assessed what Mr Snell's financial position would have been if the two developments had proceeded. 31. The approach to quantification contended for on Mr Snell's behalf proceeded on the basis of his evidence that he intended not only to develop Abalone but, after completion of the development, to continue to live there in one of the six units and to let out the other five. If it is established that Mr Snell would have done so, Mrs Beadle's breach of contract cost Mr Snell the chance of developing Abalone and thereby

- (a) increasing its market value, (b) producing an income stream and (c) providing him with rent-free accommodation. In our judgment, the approach adopted by the Royal Court in quantifying Mr Snell's loss compensates him only for part of the first element of the consequences of the lost chance. That can be demonstrated by comparing the facts of this case with those in *Cottrill*

v. *Steining and Littlehampton Building Society*

[1966] 1 W. L. R. 753, which was before the Royal Court. The defendants in that case breached their contract with the plaintiff by failing to sell him a piece of land. The court had to determine an issue on the measure of damages. The defendants argued that they should be liable to make good only the difference between the agreed price, and the market value of the subjects at the time of the breach. The Judge held that, as the defendants knew that the plaintiff intended to develop for profit, they were liable in damages assessed by taking the market value of the property after development and deducting the expenses attributable to the building work and all matters ancillary thereto. There is no suggestion anywhere in the report of the case that the plaintiff, who was described as being in

business "as a developer of property", intended to do anything other than sell the property on the completion of the development, and realise his profit. 32. What the Royal Court's quantification does, in this case, is to compensate Mr Snell as if he had intended to sell Abalone on completion of the development. The Royal Court itself recognised that. At paragraph 72 of its Judgment, referring to the summary of losses prepared during the trial at the request of the Court, it says:- "It shows that, as at 31 st December 1995, after allowance for repayment of the loans and interest and making provision for lost rental income in 1995, Mr Snell would have received net assets on a sale of Abalone of £409,993." 33. The Royal Court appears to have been attracted to the method of quantification which it adopted by the consideration that lodging houses are valued by reference to their projected income stream. The parties' experts had agreed the market value figure of £500,000 on that basis. This led the Court to conclude:- "Accordingly, the market value allows for the income which Mr Snell could have expected to have received. The value is not affected by whether Mr Snell chose to let out all six units or whether he let out five and lived in one himself. We think that in the ordinary case, the market value of a developed property at the date of completion of the development is likely to be a fair assessment of what a plaintiff has lost by reason of not being able to develop the property." 34. In our opinion, there is a flaw in the reasoning which leads to that conclusion. This can best be demonstrated by considering two hypothetical cases. In the first, a plaintiff is deprived of the opportunity to develop a property because of the defendant's breach of contract. The loss that he suffers will depend on what he had intended to do with the property on completion of the development. If his intention had been to sell on completion, he will have suffered a capital loss. The measure of that loss is what the market value of the property would have been at the projected date of sale, less appropriate deductions, such as the cost of development. If the property is one of a type which is valued in the market with reference to the income stream that it is expected to produce, such as a lodging house, the plaintiff's capital loss will be the market value of the property determined in that way, less appropriate deductions. Assuming that the defendant knew of the plaintiff's intentions, so that there are no remoteness problems, the plaintiff will be entitled to recover damages based on the market value. What should be noticed is that the plaintiff is being compensated for his capital loss, not for any loss of income. 35. If, in the second hypothetical case, the plaintiff's intention had been to complete the development, retain the property, derive an income from it, and sell it after, say, five years, he will have suffered a capital loss and a loss of income. As in the first case, the measure of his capital loss is what the market value of the property would have been at the projected date of sale, less appropriate deductions. If the property is a lodging house, which is valued in the market with reference to the income stream that it is expected to produce, the plaintiff's capital loss will be the market value of the property determined in that way, less appropriate deductions. In this hypothetical case, again assuming that the defendant knew of the plaintiff's intentions, so that there are no remoteness problems, the plaintiff will be entitled to recover damages based on the market value as at the projected date of sale. But that compensates him only for his capital loss. If he is to be restored to the position in

which he would have been but for the breach of contract, it is necessary to compensate him, also, for his loss of income over the five years between the date when the development would have been completed and the date when the property would have been sold. 36. On that analysis, we are unable to agree with the Royal Court that the market value of Abalone allows for the income which Mr Snell could have expected to have received. In our judgment, if Mr Snell would have continued to live in Abalone and derive an income from it, after the date of completion of the development, and if Mrs Beadle knew of his intention to do so, Mr Snell would not be duly compensated by the award of damages made by the Royal Court. 37. Mr Snell produced a report, dated 11 January 2004, by Peter Beamish of Deloitte & Touche, in which loss was calculated on the hypothesis that Mr Snell would have continued to live in Abalone after completion of the development. That report was updated by Mr Beamish's letter of 21 February 2006. The Royal Court acknowledged that it was Mr Snell's wish to retain Abalone, but it says "it would not be right to proceed on the basis that that is what would happen". (Judgment paragraph 70) Its reasoning is as follows:- "There are so many variables. Plans can change. Furthermore, the many possible variables make it difficult (and therefore potentially unfair) to calculate the loss in the manner suggested by the plaintiff. For example, Mr Beamish's schedule on the lost income makes no allowance for any living expenses on the part of Mr Snell. No evidence has been put forward at any stage to suggest that Mr Snell had an income from employment. On the contrary, he accepted in evidence that his sole income at the relevant time was from lodgers at Abalone. Nor was any allowance made for tax. The schedule suggests that Mr Snell would have been able to repay the loans on Abalone by the end of 1998. We conclude that this is unduly optimistic in the absence of any allowance for living expenses and tax. Furthermore, the figures for lost income have been calculated simply by reference to inflation rates and the figure for personal rental paid by Mr Snell similarly discounted back by inflation from an estimate of a current cost. There is clearly room for great uncertainty on the figures. In addition there must be real doubt as to whether Mr Snell would in fact have retained Abalone until today." 38. Taking the last point first, Mr Snell was clear in his evidence that it was his firm intention to continue to live in Abalone. In his affidavit of 22 September 2005, he describes Abalone as "my beloved home" and "my home and my only source of income". When asked in re-examination whether he was converting Abalone at the same time as the Broadlands development was in progress, he replied "Well, we had just started. We were converting it into six apartments and I was going to keep one as my home and let the other five." A little later, when asked if he continued to live in Abalone during the works, he repeated "Yes, Abalone was my home". It was not suggested to Mr Snell during his evidence that he might have sold Abalone at some point before the trial. Mr Snell's evidence of his intentions was supported by the evidence of Mr Cole, which is referred to in paragraphs 12 and 13 of this

Judgment.

39. Further, in December 1993, a Valuation Report on Abalone, which had been commissioned by the Taylor Settlement, was produced by Mr Sarre, a Chartered Surveyor employed by Broadland Estates Limited. In the "General Remarks" section of that report, Mr Sarre wrote:- "The property was previously a Guest House registered for 23 persons but the current owner has stopped taking guests. Instead the owner is in the process of creating 5 one bedroomed flatlets plus a large one bedroomed flat, and intends to take 5 tenants in, this being the maximum number of tenants allowed before having to register the property as a lodging house. As the large one bedroomed flat will be the owner's principle (sic) residence and all the units will be using the same entrance we understand that each of the 5 smaller flatlets can be let to non qualified persons thus achieving a premium rental. "It should be noted that this conversion is currently underway with phased completion due from January next year. One flatlet has been completed and is let." 40. If Mrs Beadle's breach of contract caused Mr Snell to lose the chance to develop Abalone, to live in it and to let out parts of it, the evidence, as it is recorded at paragraphs 12 and 13 of this judgement, discloses that Mrs Beadle was aware that a breach of contract by her would be likely to deprive Mr Snell of the chance of realising his plans. Consequently, Mr Snell would be entitled to compensation from the defendants for the monetary equivalent of that lost chance. 41. In light of the evidence about Mr Snell's intentions, the question arises whether there was material before the Royal Court such as to entitle it to hold that circumstances may have forced Mr Snell to abandon his wish to continue to live in, and to let out parts of Abalone. 42. During the hearing of the appeal, Advocate Le Quesne was asked to assist the Court by identifying the evidential basis for the remarks of the Royal Court that are quoted at paragraph 37 above. Mr Snell was given the opportunity to comment on Mr Le Quesne's submissions in response to that request. 43. With reference to the Royal Court's observations, "There are so many variables" and "Plans can change", the only mention of variables that Mr Le Quesne could direct us to in the evidence appears in a passage in the testimony of Mr Beamish. That passage is to be found in the transcript of 28 th February, at page 14. Mr Beamish was looking at the " summary of potential losses for the period 31 st December 1994 to 20 th February 2006", the agreed document which was produced during the course of the trial by the accountants for both sides at the request of the Royal Court, and which is referred to in paragraph 24 of this Judgment. Advocate Le Quesne asked Mr Beamish what the effect on the figures brought out in the summary would be if completion of the Abalone development were delayed beyond 31 st December 1995. Mr Beamish replied that it would impact on the interest calculation. Mr Le Quesne asked, "So it is just one of the variables that should be taken into account?" and Mr Beamish replied, "Yes, one of the variables, of many variables." Given that the Royal Court held that Mr Snell would probably have completed the proposed developments and received lodging house status for Abalone by 31 st December 1995, the possibility that Mr Snell would have been forced to change his plans by reason of the variables inherent in the agreed summary falls away, as having no evidential basis. 44. Mr Le Quesne could point us to no evidence before the Royal Court about the effect on Mr Snell's

claim of the lack of allowance for Mr Snell's living expenses in Mr Beamish's schedule of lost income. Neither Mr Snell nor Mr Beamish was asked about it. Nor was it put to either of them that the suggestion in Mr Beamish's schedule that Mr Snell would have been able to repay the loans on Abalone by the end of 1998 was unduly optimistic. Mr Beamish was not challenged on his method of calculation of lost income or of rental paid by Mr Snell. 45. In our opinion, for the reasons already given in this Judgment, an award of damages assessed by reference to the market value of Abalone as at 31 December 1995 would not properly compensate Mr Snell for his loss. That is consistent with what appears to have been Mr Beamish's view, expressed in the transcript of his evidence for 28 th February 2006, at page 9. It is necessary to consider the consequences of that

determination.

46. Mr Le Quesne submitted that, if this Court were minded to reject the Royal Court's approach to quantification, we ought to order a re-trial so that the issues raised in paragraph 70 of the Royal Court's Judgement could be properly explored. 47. As matter of principle, we would be particularly reluctant to order a re-trial in an action which was raised over twelve years ago. Having regard to the particular circumstances of this case, in our judgment there is no proper basis for doing so, for the reasons which follow. 48. During the hearing of the appeal, Mr Le Quesne sought to explain the lack of challenge to the detail of Mr Beamish's calculations by arguing that the Royal Court had made it clear from early in the trial that it was inclined to approach quantum in the way that it ultimately did. At no time, however, did the Royal Court say that it would not consider the computation advanced on behalf of Mr Snell. Although encouraged to consider doing so by the Royal Court, Mr Snell refused to amend his pleadings, even on an alternative basis. Consequently, for the duration of the trial, his damages claim was based on Mr Beamish's calculations. On our reading of the transcript, at no time did the Royal Court suggest that it would not entertain the claim as advanced by Mr Snell and as spoken to by Mr Beamish. In his closing submissions, Advocate Harris for Mr Snell presented the claim on the basis of Mr Beamish's calculations. 49. The defendants' approach to quantification is set out in their skeleton argument prepared for trial. They say:- "The usual measure of damages where a vendor fails to sell is either the difference between the purchase price in the contract, here £100, and the actual value, or is the value of the land (in this case the right of way) "Should damages be awarded for consequential loss, the defendants will contend that none of the losses claimed in relation to Abalone were foreseeable, and that there was no loss in relation to Broadlands, which was not and would not have been a profitable development." 50. It is clear from the transcript that the defendants' accountant took no issue with Mr Beamish's method of quantification. The defendants' strategy was to attack the principle of Mr Snell's claim, rather than the detail. 51. A re-trial on the issue of quantification would give the defendants a second chance to challenge Mr Beamish's approach. In our view that would be manifestly unfair to Mr Snell, and we would not allow it. 52. In our opinion, the proper measure of damages in this case should be based on (a) the capital value of Abalone as it would have been at the date of

trial, agreed at £850,000, (b) The income lost up to 31 st December 1995, as determined by the Royal Court, (c) the income lost between 31 December 1995, and the date of trial, as set out in Mr Beamish's report, and (d) the rental expenditure incurred by Mr Snell over the same period, as set out in Mr Beamish's report. The figures are subject to the deductions identified by the Royal Court in its Judgement at paragraph 65. Since the claim for compensation for future loss of income and rental costs is an alternative to (a), it falls. 53. As we have noted in paragraph , the Royal Court applied a 25% discount to its computation of damages. In doing so, it followed the principles enunciated in the decision of the English Court of Appeal in *Allied Maples Group Ltd.*

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[1995] 1 WLR 1602 . Its reasons were as follows:- "The breach in this case was one of omission; Mrs Beadle failed to confer the right of way which she had agreed. The Court therefore has to determine what would have happened if she had honoured her agreement. To the extent that that depends upon what Mr Snell would have done, he has to show on the balance of probabilities that he would have taken the relevant steps; but to the extent that what would in fact have transpired if there had been no breach depends upon the hypothetical action of a third party, Mr Snell does not have to satisfy the Court that, on the balance of probabilities, the third party would have taken the particular action relied upon; he merely has to satisfy the Court that there was a substantial chance, as opposed to a speculative one, that the third party would have so acted. The measure of damages awarded will reflect the Court 's assessment of this chance. As we shall see, both aspects are relevant in this case. "Although, as per *Allied Maples Group*, we only have to be satisfied on this aspect that there is a real or substantial chance that financing from the Taylor Settlement or some other third party would have been forthcoming so as to enable the development of Broadlands and the refurbishment of Abalone to proceed, we have found that such financing would have been successfully obtained on the balance of probabilities. However, we accept that, for the reasons powerfully put forward by Mr Le Quesne, there are question marks over the project in the sense that one cannot be sure that the necessary financing would have been forthcoming, either from the Taylor Settlement or a third party. In the circumstances, applying the principles described by Stuart-Smith LJ earlier, we think that it would be fair to make a discount to reflect this uncertainty and we consider that an appropriate figure would be a 25% reduction." (Judgment paragraphs 30 and 44) . 54. Mr Snell challenges the 25% discount. He argues that, since the Royal Court has held, on a balance of probabilities, that he would have completed the development of Abalone and received lodging house status by 31 st December 1995, that is as good as holding that it would certainly have happened, and that, consequently, " loss of chance falls away". 55. In our view, the answer to Mr Snell's challenge is to be found in the speech of Lord Reid in *Davies*

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[1974] A. C. 207. That case turned on the question whether or not a widow, who was claiming damages under the provisions of the Fatal Accident Acts 1848-1959 for the death of her estranged husband, would have had a reconciliation with him at some future date, had he survived. His Lordship said this:- "The peculiarity in the present case is that the appellant had left her husband some five weeks before his death and there was no immediate prospect of her returning to him. He wanted her to come back but she was unwilling to come. But she says that there was a prospect or chance or probability that she might have returned to him later and it is only in that event that she would have benefited from his survival. To my mind the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than 'substantial', on the one hand, or 'speculative' on the other. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on a consideration of all the facts in proper perspective. "I am well aware of the fact that in real life chances rarely are or can be estimated on mathematical terms. But for simplicity of argument let me suppose two cases of a widow who had separated from her husband before he was killed. In one case it is estimated that the chance that she would have returned to him is a 60 per cent. probability (more likely than not) but in the other the estimate of that chance is a 40 per cent. probability (quite likely but less than an even chance). In each case the tribunal would determine what its award would have been if the spouses had been living together when the husband was killed, and then discount it or scale it down to take account of the probability of her not returning to him. "But in the present case the trial judge applied a different test. He held that there was an onus on the appellant to prove that on a balance of probabilities she had an expectation of continued dependency - that it was more probable than not that there would have been a reconciliation. I think that the learned judge was misled. "When the question is whether a certain thing is or is not true - whether a certain event did or did not happen - then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen. "But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent. 'Injury' in the Fatal Accidents Act does not and could not possibly mean loss of a certainty. It must and can only mean loss of a chance. The chance may be a probability of over 99 per cent. but it is still only a chance. So I can see no merit in adopting here the test used for proving whether a fact did or did not happen. There it must be all or nothing. "If the balance of probability were the proper test, what is to happen in the two cases which I have supposed

of a 60 per cent. and a 40 per cent. probability. The 40 per cent. case will get nothing but what about the 60 per cent. case. Is it to get a full award on the basis that it has been proved that the wife would have returned to her husband? That would be the logical result. I can see no ground at all for saying that the 40 per cent. case fails altogether but the 60 per cent. case gets 100 per cent. But it would be almost absurd to say that the 40 per cent. case gets nothing while the 60 per cent. case award is scaled down to that proportion of what the award would have been if the spouses had been living together. That would be applying two different rules to the two cases. So I reject the balance of probability test in this case."

56. In this case, Mr Snell's ability to develop Broadlands and Abalone would have been dependant on funding provided by others. His loss, as it was put in *Allied Maples*, "depends upon the hypothetical act of a third party". The Royal Court has held that funding would probably have been available but says that it cannot be sure, and it applied the discount to reflect that uncertainty. In our Judgment, it was justified, in principle, in doing so. The amount of the discount in any particular case is a jury question, to be decided by the tribunal of fact in light of the facts and circumstances. We see no reason to interfere with the Royal Court's assessment of the amount of the discount to be applied in this case.

57. In his report, Mr Beamish applied compound interest to the figures that he calculated as representing Mr Snell's loss under the various heads. During the trial, Advocate Harris conceded that simple interest should be applied at the court rate. In this appeal, Mr Snell, in effect, withdraws that concession, and urges us to award him compound interest. In our view, there is no reason, in principle, which would justify the application of compound interest. In any event, having regard to the terms of the Interest on Debts and Damages (Jersey) Law 1996, we are of the opinion that we have no power in this case to award other than simple interest. 58. The sum which Mr Snell claims in respect of loss of rental income is a gross figure, without deduction of tax. Mr Beamish says in his report, at paragraph 9.2.1, that any award of damages received by a Jersey resident individual in respect of loss of rental income would be subject to income tax. During the hearing of the appeal, we asked to be given the authority for that proposition, but parties were unable to assist. If the assertion is correct, then it is right that the award in respect of loss of rental income should be a gross figure. But if it is incorrect, an award based on a gross figure would over-compensate Mr Snell. Consequently, we are of the view that we should remit this case to the Royal Court to determine the matter. We do so in the earnest hope that parties can agree the tax treatment of the lost rental element of the award, without the need for a further hearing in this protracted litigation. 59. Finally, we note that, in his written contentions, Mr Snell accuses the Deputy Bailiff of having had what is described as an "agenda" and a "closed mind", in approaching Mr Snell's claim. It is not unknown for an unsuccessful litigant to accuse the tribunal that has found against him of partiality, without any proper foundation for doing so. This is such a case. We have read the transcript with great care in light of Mr Snell's accusations, and we firmly reject them. It is clear to us beyond doubt that the Deputy Bailiff presided over the trial with scrupulous fairness. Disposal 60. The appeal is allowed. 61. The cause is remitted to the Royal Court to determine the question whether the award of damages in respect of lost rental income is

taxable in Mr Snell's hands, and to make any necessary adjustment to that award in light of its determination. 62. Parties are invited to seek to agree the quantum of damages payable to Mr Snell in accordance with the principles set out in paragraph of this Judgment, taking into account any adjustment made by the Royal Court, or agreed by the parties, in respect of lost rental income, together with interest on past loss at the court rate of 2% above base up to 20th February 2006. We order payment by the defendants to the plaintiff of 75% of the resulting sum, with interest thereon at the court rate from 20th February 2006 until date of payment. *Authorities British Westinghouse Electrical and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*

[1912] AC 673 , pp 688 and 689. *Cottrill v. Steyning and Littlehampton Building Society* [1966] 1 W. L. R. 753. *Allied Maples Group Ltd. v. Simmons & Simmons*

[1995] 1 WLR 1602 . *Davies v. Taylor* [1974] A. C. 207. Fatal Accident Acts 1848-1959. Interest on Debts and Damages (Jersey) Law 1996. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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