

JERSEY / JUDGMENT

Snell -v- Beadle 23-Mar-2006

[2006] JRC 046 (23 March 2006)

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judgment

the deputy bailiff: 1. Little can the late Mrs Beadle have known, when she decided not to go through with her agreement to provide a vehicular right of way to Mr Snell across a small strip of scrub land which she owned in St Clement, that the resulting case would occupy the attention not only of the Royal Court but also the Court of Appeal and the Judicial Committee of the Privy Council and would become the leading authority on the principle of Jersey law *déception d'outré moitié du juste prix*. 2. The Privy Council (2001 JLR 118) having held that the principle did not avail Mrs Beadle and that accordingly she was in breach of her agreement by refusing to pass the necessary *contrat* before the Royal Court to confer the right of way, we are now sitting to consider what damages, if any, should be awarded to Mr Snell in respect of Mrs Beadle's breach. She would no doubt have been equally surprised to find that the plaintiff's claim for damages totals some £1.5 million. The claim is based upon the profits which Mr Snell claims would have accrued to him had he been able to develop the properties as he intended. The defendants, on the other hand, argue that he has suffered no loss. The factual

background

3. Many of the facts are not in dispute. At the material time, Mr Snell was the owner of two properties in St Clement, called respectively "Broadlands" and "Abalone". They lay on either side of a strip of land approximately 6½ ft. wide and 158 ft. long which belonged to Mrs Beadle. The properties lay between the public road called "Grève d'Azette" and a private road which ran along the edge of the foreshore. 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 undeveloped and the only use to which it had been put was as a footpath. There was a right of way on foot across the strip of land to Broadlands but no vehicular right of way. Vehicular access from the public road to Abalone, which had been used for many years as a guesthouse, was by means of the private road. 4. Mr Snell inherited the two properties on the death of his father in June 1992. Each was burdened with debt at the time of inheritance. There was a *hypothèque conventionnelle simple* on Broadlands in

favour of Mr and Mrs Rayson in the principal sum of £45,000 carrying interest at 9½%. There was a judicial hypothec on Abalone in favour of a Mrs Bell in the principal sum of £60,000 carrying interest at 14%. Both properties were in a dilapidated state although Mr Snell was living in Abalone and taking in a few lodgers. 5. Mr and Mrs Rayson were pressing for repayment of the Rayson loan and in any event Mr Snell was unable to service the interest on either loan. He decided that development offered the best prospect of improving his financial position. The planning permission granted in respect of Broadlands is important from the point of view of assessing the damage suffered as a result of Mrs Beadle's breach of contract and we heard evidence from Mr Michael Stein, who was a planning officer at the Island Development Committee ("IDC") at the time. 6. In August 1992 Mr Snell submitted an application to demolish the two dilapidated buildings on Broadlands and replace them with two semi-detached cottages. The application 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, inter alia, that the IDC was not willing to grant access from the public road by demolishing any part of the granite wall and there was therefore inadequate parking provision. However, in October 1992, in the course of discussing the application, Mr Stein met Mr Snell on site, together with the architect Mr Benest. At the meeting, Mr Snell explained that he also owned Abalone and Mr Stein expressed the view, which he subsequently confirmed in a letter dated 14 th October 1992, 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 but that they could perhaps all be placed on Abalone. 7. Following this, Mr Snell made contact with his advocates, Pickersgill & Le Cornu, about Mrs Beadle's strip of land. It transpired that Mrs Beadle was known to Pickersgill & Le Cornu and believed to be a reasonable lady. They were confident that she would consent to the granting of a vehicular right of way from Abalone to Broadlands. They said that they would approach her and in the meantime, they saw no reason why Mr Snell should not proceed on the basis that vehicular access to Broadlands was attainable. 8. Having noted Mr Stein's advice, Mr Snell submitted a new application on 18 th November for a combined development of Broadlands and Abalone. It involved the construction of two new cottages on Broadlands and three on Abalone. The application did not however put the Broadlands parking spaces on Abalone in accordance with the suggestion floated by Mr Stein. The plans accompanying the application stated in relation to Mrs Beadle's strip of land "current pedestrian right of way in hands of advocate to free use of land to vehicular usage". They provided for four parking spaces on Broadlands and six on Abalone. The IDC had various concerns about the details of the Abalone development and would have preferred only two cottages rather than three on that property. Various discussions with the officers subsequently ensued on this point. 9. In the light of these difficulties, Mr Snell submitted a further application on 20 th April 1993. This in effect hived off the Broadlands application into a separate application. 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 8 th July 1993, planning permission was granted to this development of Broadlands.

There were conditions requiring, inter alia, the retention of the granite wall towards the public road and the provision of the four parking spaces as marked on the plan. It followed that Broadlands could not be redeveloped in accordance with this planning permission unless or until a right of vehicular access from Abalone across the strip of land to Broadlands was acquired. Eventually, on 19 th October 1993, planning permission was also given for the Abalone development, comprising three cottages with the provision of six parking spaces. 10. However, Mr Snell had decided not to proceed with the development of both sites. He decided to proceed with the Broadlands development as approved in the July planning permission but simply to refurbish Abalone so as to enable it to be registered as a lodging house with six units of accommodation. This would not have required planning permission, only building by-law consent and would have been carried out after the Broadlands development. 11. In the meantime Mr Snell had set about obtaining finance for the Broadlands development. He engaged Mr Harry Cole of Royston Associates in October 1993 to assist in this process. Mr Cole approached a Mrs Garner who was the principal beneficiary of a trust known as the Taylor Settlement. She was keen for the Settlement to lend a total of £225,000. The loan would be at the attractive rate (from the point of the view of the Settlement) of 15%. It was thought that £225,000 would be sufficient to pay off the Rayson and Bell loans and carry out the development. Advocate Simon Habin (through his practice's wholly owned trust company) was effectively the trustee of the Taylor Settlement and on 12 th November 1993 Pickersgill and Le Cornu wrote to him on Mr Snell's instructions. 12. We have been taken through the correspondence between Advocate Habin, Pickersgill and Le Cornu and Mr Cole. It is not necessary to recite it in detail. Suffice it to say that Advocate Habin obtained valuations of Broadlands and Abalone from Broadlands Estate Agents and also made it clear that the £225,000 would be advanced in two tranches. The first was to be used to pay off the Rayson and Bell loans, thus giving the Taylor Settlement a first charge over both properties. There was by now considerable pressure in this respect because Mr and Mrs Rayson had instituted proceedings against Mr Snell for recovery of their loan. The exact amount needed for the first tranche seems to have been something of a moveable feast but, by the date of the breach of contract in February 1994, it had been agreed at £142,500. That left £82,500 available in the second tranche for carrying out the development. Despite requests from Pickersgill and Le Cornu and Mr Cole, Advocate Habin had not committed the Taylor Settlement to lend the second tranche, but it is clear from his evidence that he would have been willing to do so subject to his being satisfied on two matters. First, there had to be vehicular access across the strip of land in order that the Broadlands development could take place. Secondly, he needed to have accurate costings of the development in order to satisfy himself that it was viable. 13. As to the latter, Mr Colin Elkin, a quantity surveyor, had been instructed by Mr Snell and his chosen builder, Mr Friel, in January 1993 to prepare such costings and he had produced a 'budget forecast and viability exercise' for the Broadlands redevelopment in June 1993. This essentially showed building costs of £112,774 and a projected profit of just over £25,000. However, it is clear that it would have needed some revision to take into account the changes to the financing costs. Nevertheless, it was a detailed costing from a quantity surveyor. According to Mr Snell - and

we have no reason to doubt his evidence - he had supplied this to his advocates but for some reason they had not supplied it to Advocate Habin by the date of Mrs Beadle's breach of contract. 14. By January 1994, Mr Snell was about ready to proceed. Financing from the Taylor Settlement was at an advanced stage and Mr Friel was ready to commence work. According to Mr Snell, it then transpired that Pickersgill and Le Cornu had not in fact approached Mrs Beadle about the vehicular right of way. They immediately wrote to Mrs Beadle on 26 th January, but it would appear from her evidence before the Royal Court at the original trial that she never received this letter. This is somewhat surprising because it would seem from their letter of 11th February 1994 to Pickersgill & Le Cornu that Bois & Bois, her advocates, were in possession of the letter and one can only assume they obtained it from her. Be that as it may, it is helpful to refer to it because it indicates the degree to which, through his lawyer, Mr Snell was willing to lay his cards on the table and disclose to Mrs Beadle the full details of his plans and his dire financial position. The letter explains the need for vehicular access across the strip of land in order to be able to develop Broadlands in accordance with the planning permission. It describes how 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. It also states that a financial backer (clearly a reference to the Taylor Settlement) had been found to produce finance to develop Abalone and Broadlands but that, for obvious reasons, 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, the letter 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. 15. Having discovered from his lawyers that they had not heard from Mrs Beadle in response to this letter, Mr Snell turned in desperation to Mr Cole, who telephoned Mrs Beadle. She agreed to meet him and Mr Snell on site that very day, namely 1 st February. In the original trial, the Royal Court heard evidence from all three persons present at the meeting, although their evidence on that occasion was directed more towards the question of whether an agreement had been reached and, if so, the circumstances in which this had come about. For our purposes it is sufficient to note that 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. She thought about it overnight, and the next day, 2 nd February, she signed a written agreement at Mr Cole's office which agreed to grant the right of way and which gave rise to the litigation previously referred to. For our purposes, we need only to consider things said at that meeting which are relevant to the issue of remoteness of damage. 16. According to Mr Cole, he had previously obtained Mr Snell's consent to make full and frank disclosure to Mrs Beadle of his (Mr Snell's) financial position. This is consistent with Pickersgill & Le Cornu's letter of 26 th January to Mrs Beadle. He therefore explained the position fully to Mrs Beadle, including 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 Broadlands and he recalled Mr Snell showing Mrs Beadle over Abalone and discussing with her his plans for the

development of Abalone. 17. 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 therefore showed her the plans and a report from Broadlands 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. 18. In her evidence before the Royal Court Mrs Beadle was not questioned in detail about these matters (as they were not relevant to the point then in issue) but she did confirm that she had been shown a plan of the two properties, that she was aware that the IDC had refused permission to demolish the granite wall and that vehicular access over her strip of land was required, that there was to be a redevelopment on both sites, that she knew that Mr Snell was in terrible financial difficulties and that she was willing to grant the right of way in order to help him out of his difficulty. As the Royal Court summarised it in its judgment, the whole matter was explained to her, she was well aware of the problems that Mr Snell faced, his financial problems were explained to her and she "was prepared to go along and help the poor man" in his terrible financial trouble. 19. On 3rd February, Pickersgill & Le Cornu wrote to Bois & Bois (Mrs Beadle's advocates) referring to the agreement reached between Mrs Beadle and Mr Snell, explaining the position concerning the need for vehicular access to comply with the planning permission, referring to the risk of the Raysons taking judgment the next day and the position concerning the loan from the Taylor Settlement, and enclosing a draft contrat de transaction conferring a vehicular right of way across the strip of land. The letter went on to ask if Mrs Beadle would pass the necessary contrat before the Royal Court the following afternoon. Advocate Falle of Bois & Bois replied the next day stating that Mrs Beadle was not bound by the written agreement and that he would meet with her on site the next week to consider the position. That meeting clearly took place because the following week, on 11th February, Advocate Falle wrote stating that Mrs Beadle did not propose to go ahead with the transaction. That is the date of her breach of contract. It is clear from Mrs Beadle's evidence to the Royal Court in the original trial that this decision was reached on the basis of the legal advice she had received from Advocate Falle. 20. The Raysons accordingly took judgment on 11th February 1994 for the amount which they were owed. On 16th February, Pickersgill & Le Cornu wrote to Advocate Habin referring to a telephone call which had clearly taken place the previous Friday when 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 22nd February, Advocate Habin sent a note of his fees to Pickersgill & Le Cornu for settlement. 21. Mr Snell asserted in evidence that the letter of 16th February from Pickersgill & Le Cornu was written without his authority. What is clear is that he instructed Mr Cole to write to Advocate

Habin in order to see if the Taylor Settlement would proceed with the first tranche so as to enable the Rayson and Bell debts to be cleared and to give time for consideration of his position. Mr Cole wrote a letter to this effect to Advocate Habin on 22 nd February (although he increased the requested amount of the first tranche to £150,000). Advocate Habin replied very briefly on 1 st March stating simply that he had been informed by Pickersgill & Le Cornu that the transaction was not now proceeding. It would seem that Advocate Habin issued a summons against Mr Snell for the fees because on 25 th March Mr Cole wrote on Mr Snell's part asking for more time as he had no funds. In passing, Mr Cole asserted that Mr Snell disputed that he had withdrawn from the transaction, stating that he had given no such instructions to his lawyers. Indeed, Mr Cole referred back to his letter of 22 nd February proposing that the first tranche proceed. Advocate Habin replied on th March but made no reference to that proposal. Finally, Mr Cole wrote to Advocate Habin once again on 30 th March, repeating that it was the Taylor Settlement which had withdrawn from the transaction due to Mrs Beadle's repudiation of her agreement. The letter went on to ask whether Advocate Habin would reconsider the request for the first tranche put forward by Mr Cole in his letter of 22 nd February. The letter went on to say that the properties had been placed on the market. On 6 th April, Advocate Habin replied stating - "It is not really important but I feel that I should put the record straight in your mind in that the Taylor Settlement never withdrew its support. Mr Snell was merely unable to satisfy one of the conditions precedent, being the passing of a contract of transaction with Mrs Beadle". 22. Following the refusal by Mrs Beadle to pass the necessary contrat Mr Snell tried to persuade the IDC to change its mind. Mr Cole and Mr Snell met with a representative of the Public Services Department on 21 st February, with a view to persuading that department to alter its advice to the IDC in relation to the parking issue. Subsequently, a new architect, Mr Whittaker, was asked to draw up amended sketch plans of the Broadlands development to include two garages underneath the two cottages. This was presented informally to the IDC on 17 th March but the Committee maintained its position that the granite wall could not be breached. By letter dated 22 nd March from Mr Cole to Mr Stein, Mr Snell 'appealed' to the Committee and put forward certain compromise solutions. However, on 14 th April 1994, the IDC rejected this and maintained its position while expressing sympathy for the difficult position in which Mr Snell found himself following the failure to obtain the right of way. On 14 th June 1994, Mr Snell lodged an appeal to the Royal Court against the IDC's decision. 23. In the meantime, it appears from a letter dated th February 1994 from Mr Cole to Mr Snell that Mr Snell had instructed Mr Cole to place both properties on the market. In his evidence before us, Mr Cole confirmed that he acted pursuant to his instructions and advertised both properties for sale in the Jersey Evening Post. We have not seen the advertisement, but his recollection was that there was an asking price of £375,000 for both properties. He thought that Abalone was worth £250,000 to £275,000 and Broadlands about £100,000. However, there is no suggestion that any offers were received. On 16 th June 1994 Mr Snell issued an Order of Justice against Mrs Beadle for breach of contract. 24. 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(ies)) Mr Snell applied for a Remise de Biens on 5 th August 1994, which application was granted on 26 th August. In their report on whether the application should be granted, the two nominated Jurats stated that Broadlands Estates Limited had been asked to value the properties and had valued Broadlands at £85 - £90,000 but added that this should be discounted to £50,000 in the absence of a vehicular right of way enabling the property to be developed in accordance with the planning permission. 25. During the Remise , the Jurats sought to acquire the strip of land from Mrs Beadle. Negotiations took place with Advocate Falle. 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. This Mr Snell refused to do and accordingly the acquisition did not proceed. 26. Abalone was sold by the Jurats in the course of the Remise in its dilapidated state for £265,000 on 9 th February 1996. The appeal to the Royal Court against the IDC's decision was not proceeded with during the Remise. 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, the IDC granted this application. One might immediately question why this application was allowed in 1996 when the IDC had been so adamant in 1993 and 1994 that the granite wall could not be demolished so as to allow vehicular access. According to Mr Stein the differences between the applications were as follows - (i) In 1994 Mr Snell owned both Abalone and Broadlands, whereas, by 1996, Abalone was separately owned. (ii) The 1996 proposal was more modest than the 1994 proposal. (iii) In about 1996, in relation to a different case, the Attorney General had advised that the IDC could not deny reasonable access to an applicant when none existed. According to Mr Stein it is speculative to say that the IDC would have viewed the 1994 application favourably if such advice had been received at that time. Nor could one know what the outcome of Mr Snell's appeal to the Royal Court might have been, given the Attorney General's later advice, which might well have been given to the Committee in the Snell appeal had he pursued it. (iv) Mr Snell had assured the IDC in 1993 that he could achieve vehicular access over the right of way whereas this was impossible in 1996 because he no longer owned Abalone. Mr Stein accepted that it appeared unlikely that Mr Snell would be able to achieve this in 1994. 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. 27. The litigation followed its course. The Royal Court upheld Mr Snell's claim and found against Mrs Beadle on liability on 4 th February 1998. Mrs Beadle appealed successfully to the Court of Appeal on 18 th January 1999 but the Privy Council restored the Royal Court's order on 29 th January 2001. Sadly, Mrs Beadle died on 27 th March 2002. The first defendant is the Executor of her 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. 28. It is in these circumstances that this Court now has to assess what damages, if any, should be awarded in respect of Mrs Beadle's admitted breach of contract when she failed to confer the vehicular right of way as

agreed on 2 nd February 1994. Remoteness and measure of damages 29. Before turning to the facts, we need to say a little about the two topics of remoteness and measure of damages. It is well established that in such matters this Court applies similar principles to those applied by the English courts. On this occasion, we have derived considerable assistance from the judgment of the English Court of Appeal in *Allied Maples Group Limited v Simmons and Simmons*

[1995] 4 All ER 907 . The judgment of Stuart-Smith LJ (agreed by the other judges on this point) is of such assistance that we think it helpful to quote from it at some length beginning at 913 - "In these circumstances, where the plaintiff's loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins. (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists in some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on the balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury. Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis; whether he will continue to earn the same rate until retirement; whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which, it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer. (2). If the defendant's negligence consists of an omission, for example to provide proper equipment or to give proper instructions or advice, causation depends, not upon a question of historical fact, but in the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances..... Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. (3) In many cases, the plaintiff's loss depends upon the hypothetical act of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on the balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit, or avoid the risk to the plaintiff or can

the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct" The judge went on to say at 918- "In that case the court was not concerned to distinguish between causation and quantification of loss but, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be. All that the plaintiffs had to show on causation on this aspect of the case is that there was a substantial chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection". Stuart-Smith LJ also went on to make clear on the same page that in such cases the third party's attitude will often be a matter of inference because direct evidence from the third party will often not be available. 30. 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. What were Mr Snell's plans and would they have been achieved? 31. There is no dispute about what Mr Snell intended as at 11 th February 1994. He intended to borrow £225,000 from the Taylor Settlement. The first tranche would be £142,500 and he would use this to pay off the Rayson and Bell loans. The Taylor Settlement would then have the first and only charge over both Broadlands and Abalone. He would then have developed Broadlands, using the second tranche of the loan from the Taylor Settlement. Mr Friel was the builder who would have carried out the Broadlands development. He had agreed to do so at 1993 rates, notwithstanding the delay until 1994. He had also agreed to wait for the final instalment of his payment until the two new cottages were sold. The Taylor Settlement had agreed that the interest would only be payable on the sale of the properties. The development would have taken place in 1994 and taken some six months. Whilst Mr Snell thought originally that the Broadlands development would leave him with a small surplus of cash after repaying the Taylor Settlement, he had, by February 1994, come to realise that there would be a small

shortfall. Once the two cottages at Broadlands had been sold, he intended then to carry out the conversion of Abalone. He did not intend to redevelop it in accordance with the planning permission of 19 th October 1993 by knocking it down and building three cottages in its place; he intended merely to refurbish Abalone so as to provide six units and have it registered as a lodging house. He intended to live in one of the units himself. Planning permission was not required for this conversion. He would have borrowed the funds necessary to carry out the refurbishment. He planned to carry out the works in 1995 and achieve registered lodging house status by 31 st December 1995. 32. Many of the submissions in this case have been directed towards the question of whether the above plan on the part of Mr Snell was realistic. Would it have been achievable? Fortunately, much of the underlying evidence is not disputed. Mr Mark Liron of Colin S Smith and Partners, quantity surveyors, was asked in December 2003 to assess what it would have cost at the relevant time (i.e. 1994 and 1995) to carry out the development of Broadlands and the refurbishment of Abalone as intended by Mr Snell. The parties have accepted Mr Liron's figures, namely £112,500 for Broadlands and £64,450 for Abalone (being £54,450 and an additional sum of £10,000). 33. The Court heard evidence from two financial experts, both chartered accountants. Mr Peter Beamish of Deloitte & Touche was called on behalf of Mr Snell and Mr Matthew Corbin of B. D. O. on behalf of the defendants. Each prepared financial projections of the outcome of Mr Snell's proposal on the basis of the underlying figures. We would like to take this opportunity of paying tribute to both Mr Beamish and Mr Corbin. They each produced very helpful and clear reports, they subsequently met to prepare a joint report which was a model of its kind in identifying the issues where they agreed and those issues where they disagreed and why; and finally, they undertook further joint calculations during the course of the trial. We found them both to be impressive and helpful witnesses. 34. The result of their work can be seen conveniently in schedule 1(a) of their joint report. This was an estimated cash flow statement of the Broadlands redevelopment and although it was prepared by Mr Beamish, Mr Corbin did not dissent from it to any material extent. The statement was prepared on the basis of the information provided to them as to the costs and timing of the development etc. and also on the assumption that the first tranche of the loan from the Taylor Settlement was drawn down in February 1994 and that the balance was paid out against architects' certificates as work progressed. What this shows is that Mr Snell would have run out of cash in August 1994 to the extent of some £15,100. He would therefore have needed to secure extra funding in this sum (at a minimum) in or before August. Assuming that this financing was found, the cash flow statement also shows that, on the assumption that the two cottages were sold for £135,000 each, Mr Snell would have been left with an ongoing cash shortfall of £23,761. His financial position would have improved as a result of the development because, before it began, he owed approximately £138,000 on the Rayson and Bell loans whereas, following the development, he would be indebted only in a total sum of £23,761. However, it shows that there would have been a need for ongoing funding, either from the Taylor Settlement or from some other source, in the sum of £23,761 as he moved on to carry out the Abalone development. 35. Assuming that he found funds for this carried

forward amount and that he also borrowed the funds of £64,450 necessary to carry out the Abalone conversion, the evidence shows that Mr Snell would have done very well out of the Abalone conversion. Leaving aside one issue to which we shall return later, the expert valuers for each party agreed that, if Abalone had been converted into a registered lodging house in accordance with Mr Snell's plans, it would have had a market value of £500,000 as at 31 st December 1995. This compares with an actual sale price in its dilapidated state in February 1996 of £265,000. It would therefore have been a very profitable undertaking. 36. The defendants submit that it is extremely unlikely that the development would have come to pass and Mr Snell has therefore suffered no loss as a result of Mrs Beadle's breach of contract. They say that there are a number of factors which point to this conclusion. First, they submit that the figures in schedule 1(a) assume that things would have turned out on the most favourable basis for Mr Snell whereas the outcome could well have been very different. Thus, the schedule does not build in anything for contingencies; the figures assume a prompt sale of the two cottages (thereby minimising financing charges); they do not allow for any fees of a structural engineer (usually 1½%) whereas according to Mr Liron one would have been necessary; they do not make any allowance for Mr Snell's personal debts; and finally, no allowance has been made for any stamp duty or legal fees on any additional loan of £15,100. We accept that all of this is correct. 37. But on the other hand, the sale price allowed for the cottages in the figures is £135,000. Mr Frank Luce, an estate agent, stated that he would have been looking for £140,000 per cottage and Mr Cole, in his evidence, said that prices were rising fast at the time and a sum even greater than that could well have been achieved. Furthermore, Mr Friel, in his evidence, confirmed that there would have been a 5% retention out of his fees for a six months period to cover the usual minor defects. No allowance in the cash flow statement has been built in for that delay, as it is assumed that Mr Friel would have been paid in full immediately upon sale of the second cottage. This would not, of course, have reduced the need for the £15,100 but it would have reduced for six months the amount of the ongoing deficit of £23,761. 38. Balancing these various factors, we have concluded that schedule 1(a) is not unduly favourable to Mr Snell. In our judgment, it represents a fair assessment of the most likely outcome of the Broadlands development, bearing in mind that no one can know exactly what it would have produced, because it was never in fact carried out by Mr Snell because of Mrs Beadle's breach of contract. 39. Secondly, Mr Le Quesne submitted that the second tranche from the Taylor Settlement would not have been forthcoming. Mr Habin made it clear in evidence that he would have been perfectly happy to have lent the first tranche of £142,500 even in the absence of being satisfied about the vehicular right of way or the development costings. There was plenty of equity in the two properties and he was quite satisfied therefore that, even if Mr Snell were to default, the Settlement would recover its capital and interest. However, he made it clear that two things would have been necessary before he would have agreed to lend the second tranche. Firstly, the vehicular right of way had to be obtained so that the Broadlands development could proceed and secondly, he would have had to have seen proper costings so that he could satisfy himself that the development was viable. He said that he had never been given any such costings; he had

merely been told what the building costs were. We accept that this was so. However, it is clear that Mr Snell had in fact obtained detailed costings because he was in possession of the "budget forecast and viability exercise" prepared by Mr Elkin in June 1993. We accept Mr Snell's evidence that he had given a copy of this to his advocates, Pickersgill and Le Cornu, but that, for some reason, they had not passed it on to Advocate Habin by the time of Mrs Beadle's repudiation of her agreement. Unfortunately, neither counsel put Mr Elkin's document to Advocate Habin in order to ask him if he would have been satisfied by the document; but, having considered it, and having heard Mr Habin's evidence, we think it most likely that Mr Elkin's document adjusted in certain respects would have satisfied him. The document would have needed to be adjusted to take account of the changes since 1993 and the fact that Mr Snell was carrying out the development by means of financing from the Taylor Settlement. The financing calculations would therefore have been different. We find therefore that Mr Snell would have produced adequate costings to Mr Habin to as to enable the second tranche to proceed in a timely manner. 40. Still in connection with whether the second tranche of the Taylor Settlement funding would in fact have been made available, Mr Le Quesne submitted further that, if the costings had been prepared, they would have shown (as per schedule 1(a)) that Mr Snell would have run out of money in August 1994 and would have needed an extra £15,100 over and above the £225,000 in order to complete the development. He submitted that, given that the total assets of the Taylor Settlement were only some £270,000, it was highly unlikely that Advocate Habin would have considered the prospect to be viable or would have agreed to increase the loan to £240,000. Despite his heroic efforts in re-examining his own witness to get Advocate Habin to agree to this proposition, he was unsuccessful in doing so. Advocate Habin said that he would still have regarded it as viable given the equity in the two properties and that it was quite possible that the Settlement would have lent an extra £15,000. Whether he had been faced with the problem at the beginning or half way through, he would have consulted with his principal beneficiary in order to assess her income needs and those of her daughter and whether the settlement could therefore advance a further £15,000. The agreed interest rate of 15% was regarded as a good one and was very much better than could have been obtained on bank deposit. He also considered that there was plenty of equity, given the value of Abalone. Even if the Settlement had decided not to advance the extra £15,000 he would certainly have consented to any other lender taking a second charge over Abalone. 41. We are satisfied on the balance of probabilities that Mr Snell would have proceeded with the Broadlands and Abalone developments if he had obtained the financing. Furthermore, in our judgment, it is more likely than not that Mr Snell would have obtained the necessary financing for his proposed development. We think it likely that Advocate Habin would have agreed to increase the loan from £225,000 to £240,000 at the outset. Interestingly, he had been requested shortly before Mrs Beadle's breach of contract to increase the total amount to £235,000 and, although he had not agreed to do so, he had not ruled it out. On the figures in schedule 1(a), the loan would have been for a period of approximately nine months with an interest rate of 15%. At the end of that period, the Settlement would have been repaid everything

(including interest) with the exception of £23,761, which would have had to be carried forward until repaid out of the refurbished Abalone, or out of a refinancing effected for that purpose. As Advocate Habin said, there was plenty of equity available. We also find on the balance of probabilities that, if the problem had not become clear until August 1994 the Taylor Settlement would have lent the extra £15,100 at that time. As Advocate Habin said, the security by then would have been greater as the two cottages would have been half-built, the additional loan would have been for a short period and there was plenty of equity in Abalone. 42. Even if the Settlement itself had not been willing to advance the additional funds, we are satisfied that another lender would have been found, either for the cash shortfall, or, more likely, as part of a plan to finance both the £23,761 and the amount needed to refurbish Abalone. We think it likely that such a lender would have been willing to have taken a second charge on Abalone for a short period of time until the Broadlands houses were sold and the Taylor Settlement repaid, at which time the secondary lender would have a first charge over Abalone. Mr Corbin said that he had seen no evidence of the existence of such a lender, but that is inevitable, because the development did not proceed and the need for such a lender never arose. As Stuart-Smith LJ made clear, one is therefore having to consider what would have happened in a hypothetical world and draw the necessary inferences. But Mr Cole, who procured the loan from the Taylor Settlement, stated that he foresaw no difficulty in obtaining such finance. There is a well established private lending market in Jersey whereby private investors lend on immoveable property with a view to obtaining a better interest rate than they can in the bank. They feel secure because of the level of equity offered, even if the borrower defaults. It is, of course, the position that if *dégrèvement* is the method adopted to enforce the security the lender may keep any equity at the expense of the borrower. All in all, we are satisfied that, on the balance of probabilities, Mr Snell would have been able to obtain the shortfall of £15,100 in August 1994 and the sum of just under £24,000 carried forward at the end of the Broadlands development. We are also satisfied that he would have been able to raise the additional sum of approximately £65,000 to carry out the refurbishment of Abalone, such sum to be secured against Abalone. 43. As a discrete point, Mr Le Quesne pointed out that the draft *contrat de transaction* supplied by Pickersgill & Le Cornu with their letter of 3rd February 1994 was defective in that it only gave a vehicular right of way to Mr Snell personally, it did not extend to his successors in title. He submitted therefore that, even if Mrs Beadle had not broken her agreement, Mr Snell would not have achieved a right of way which could be used by the purchasers of the two Broadlands cottages. We agree that the draft *contrat* was defective but we find that this would not have prevented a successful development for two reasons:- (i) We think it highly likely that the defect would have been spotted before the *contrat de transaction* was actually passed once all the relevant lawyers focused on it. (ii) Even if the defect was only discovered a little while later when the second tranche was needed or when the cottages were to be sold, we have no doubt that Mrs Beadle would have agreed to a short amending *contrat*. It was clearly intended that the vehicular right of way should be for the benefit of the owners of Broadlands from time to time. Mrs Beadle was a reasonable woman who

wanted to help Mr Snell and, on the assumption that she had honoured her agreement so as to confer a vehicular right of way, we have no doubt that she would have agreed to correct what was obviously a technical error. 44. 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. Are Mr Snell's consequential losses too remote? 45. Mr Snell is claiming essentially for the loss of the profits which he would have achieved had he been able to develop both Broadlands and Abalone in accordance with his intention. It is therefore a claim for consequential loss. This immediately raises the issue of whether the losses which he has suffered can be said to be within the reasonable contemplation of the parties. 46. It is well established that the law of Jersey on this aspect of remoteness of damage is to be found in the well-known trilogy of English cases, namely *Hadley v Baxendale*

(1854) 9Ex.341, *Victoria Laundry v Newman*

[1949] 2KB 528 and *Czarnikow v Koufos* [1969] 1AC 350. In essence, adapting what was said by Asquith LJ in *Victoria Laundry* in the light of the comments of the House of Lords in *Czarnikow* , in cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract in the reasonable contemplation of the parties, in the sense that the loss is of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from a breach, the words 'not unlikely' denoting a degree of probability considerably less than an even chance. What was at the time of the contract in the reasonable contemplation of the defendant depends upon the knowledge then possessed by the defendant. For this purpose, knowledge possessed is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale* . But to this knowledge, which a contract-breaker is assumed to possess, whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make the additional loss also recoverable. 47. Mr Le Quesne submits that there is a special rule for the sale of land and that there cannot be

any liability for consequential loss if there are not 'special circumstances' by which he means something different from the way in which that phrase was used in *Hadley v Baxendale* and *Victoria Laundry*, as described in the preceding paragraph. For this proposition, he relies upon the decision of Buckley J in *Diamond v Campbell-Jones*

[1960] 1 All ER 583. We do not agree that Buckley J was purporting to lay down a special rule for breaches of contracts for the sale of land. On the contrary, the judge refers extensively in his judgment to *Hadley v Baxendale* and *Victoria Laundry* and was clearly seeking to apply those principles in the context which faced him. The use of the phrase 'special circumstances' was in the context of the use of that phrase in *Hadley v Baxendale*. In *Diamond*, the plaintiff sought damages for loss of the development profit which he would have made in respect of his proposed purchase of a property in Mayfair, had the defendant not failed to go ahead with the sale. There was no evidence that the defendant had specifically been told that the plaintiff intended to develop the property; there was merely evidence that the property was ripe for conversion and that everyone recognised this. All that Buckley J held was that this was not sufficient to impute to the vendor knowledge that the purchaser intended or was likely to develop the property. The case was simply an application of the principle in *Hadley v Baxendale* with the judge finding that the defendant did not have any particular knowledge which brought the second rule into play. Thus, were it to have been the fact in the present case that Mrs Beadle had simply been asked to confer a vehicular right of way and had not been told by Mr Snell of any plans for redevelopment, we agree that Mr Snell would not have been able to recover for any loss of his development profit. 48. In order to decide whether Mrs Beadle is to be held liable for Mr Snell's loss of development profit in accordance with the second rule in *Hadley v Baxendale*, we must consider her state of knowledge at the time of the contract on 2 nd February 1994. We are quite satisfied from the evidence of Mr Snell and Mr Cole (which is not inconsistent with Mrs Beadle's own evidence in the original trial before the Royal Court) that she was fully aware of Mr Snell's plans to develop and sell Broadlands and to develop Abalone, that the vehicular right of way was essential to the development of Broadlands, that Mr Snell was in dire financial straits with judgment imminently to be taken against him in respect of the Rayson loan, that he had arranged financing to pay off his debts and provide for the development and that such financing was dependent upon his obtaining the vehicular right of way. 49. The major part of Mr Snell's claim relates to the loss of profit which would have resulted from the development of Abalone. Mr Le Quesne does not seriously dispute that she ought to have realised that failure to confer the right of way would prevent the Broadlands development taking place, but he asserts that, in order to be liable for any loss of profit in relation to Abalone, she must have had knowledge that part of the purpose of obtaining the right of way was to enable Abalone to be developed. She must have been told that the Abalone development was in some way dependent upon the granting of the right of way. 50. We do not accept that Mr Snell needs to go so far. The Court is satisfied that, on the knowledge which we have found her to have had in paragraph 48, Mrs Beadle ought to have realised that, if she broke her contract by

refusing to confer the right of way, it was not unlikely that Mr Snell would be unable to carry out either of his proposed two developments. She should have realised that, if she did not confer the right of way, it was not unlikely that the financing would fall through and that judgment would be taken against him. She knew he was in dire financial straits. If he was unable to obtain financing, it would follow that it was not unlikely that he would be unable to carry out the development of Broadlands or Abalone. It was also not unlikely that, if he was unable to obtain financing, some form of bankruptcy proceedings would be instituted against him which would mean that he was unlikely to be able to carry out either development. We therefore find that the loss of profit in relation to both the Broadlands and Abalone development was within the reasonable contemplation of Mrs Beadle at the time she entered into the contract. We also find that the costs of the Remise were caused by Mrs Beadle's breach of contract and that such costs were in her reasonable contemplation at the time of the contract. Mitigation of loss 51. A plaintiff must take all reasonable steps to mitigate the loss to him consequent upon a defendant's breach of contract and cannot recover damages for any such loss that he could have avoided but has failed, through unreasonable action or inaction, to avoid. In assessing the standard of conduct which a plaintiff must attain when assessing what steps in mitigation should have been taken by him, we have found the following passage from McGregor on Damages (16th edition) at para 322 of assistance - "Although the plaintiff must act with the defendant's as well as his own interests in mind, he is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord MacMillan put this point well for contract in *Banco de Portugal v Waterlow*; his remarks apply equally to tort. He said: 'Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken'. Whether the plaintiff has acted reasonably is in any case a question of fact, not of law". 52. Mr Le Quesne submits that, following Mrs Beadle's breach of contract, Mr Snell should have mitigated his loss in a number of ways. First, he argues that Mr Snell should have gone ahead with the borrowing of the first tranche of £142,500. This would have removed the risk of the Raysons taking judgment and the consequent risk of some form of bankruptcy proceedings would thereby have been averted. Mr Snell would then have had a breathing space to consider his position. 53. It is because of this submission that we have set out the sequence of correspondence on this topic at paragraphs 20 and 21 above. We accept Advocate Habin's evidence that he was in fact willing to lend the first tranche even in the

absence of a vehicular right of way and accurate costings of the development. This could also be inferred from his letter of 9 th February 1994 to Pickersgill & Le Cornu when he agreed to increase the first tranche to £142,500 and stated that he was anxious that the initial advance should now be completed, thus permitting the second facility in respect of the building works to be dealt with in a more orderly fashion. It is also clear that Pickersgill & Le Cornu, in their letter of 16 th February, told Advocate Habin that Mr Snell had decided not to proceed following Mrs Beadle's decision not to grant the right of way. Mr Snell says that he did not authorise that letter, but we think that his lawyer's actions must in law be attributed to him. Had the matter rested there, we would have agreed that Mr Snell had not attempted to proceed with the first tranche and we would therefore have gone on to consider whether that was reasonable on his part. 54. However, the position did not rest there. As recounted earlier, Mr Snell procured Mr Cole to write on his behalf to Advocate Habin in order to try and obtain the first tranche. Thus, on 22 nd February, Mr Cole wrote specifically asking for a loan for nine months at 16% and stating that the objective was to give time to deal with the Broadlands situation without Mr Snell being placed under great pressure. It is true that Mr Cole had increased the requested sum marginally from £142,000 to £150,000 but he had also offered a 1% increase on the interest rate. As mentioned earlier Advocate Habin ignored that request and stated simply that he had been informed by Pickersgill & Le Cornu that the transaction would not proceed. Mr Cole referred to his request in a further letter dated 25 th March and, more particularly, specifically asked Advocate Habin to reconsider the request in a letter dated 30 th March. It was to this letter that Advocate Habin responded that the Taylor Settlement had not withdrawn its support, but that Mr Snell had merely been unable to satisfy one of the conditions precedent, being the passing of the contract of transaction with Mrs Beadle. 55. In his evidence before us, Advocate Habin stated that, in that letter, he was referring only to the second tranche. We accept that that is what he meant to say. But the fact remains that the letter is written in general terms and the natural reading of the letter is that the loan as a whole from the Taylor Settlement could not proceed because Mr Snell could not satisfy one of the conditions precedent, namely the passing of the contract with Mrs Beadle. We find that it was entirely reasonable and natural for Mr Cole and Mr Snell to believe, as a result of the correspondence with Advocate Habin, that there was no prospect of any funds being loaned by the Taylor Settlement as long as the right of way issue was not resolved. Mr Snell therefore acted reasonably in not taking any further steps to pursue that option. In short, we find that Mr Snell did exactly what Mr Le Quesne said he should have done. He sought to borrow the first tranche from the Taylor Settlement in order to give himself breathing space but this did not materialise because he reasonably understood from the correspondence that such funds were not available, even though it now appears that Advocate Habin would have been willing to lend the first tranche. In this connection it is clear that Advocate Habin found Mr Cole somewhat difficult and the relationship between them was not very good. This, coupled with the letter of 16 th February from Pickersgill & Le Cornu may explain why Advocate Habin responded to Mr Cole's various letters as he did. However, that was not Mr Snell's fault and, as we have said,

we find that he acted reasonably in concluding from the correspondence that the first tranche was not available. 56. Secondly, Mr Le Quesne submits that Mr Snell should have sold Broadlands immediately in its undeveloped state in order to clear the Rayson debt. The evidence shows that Mr Snell had received an offer some time earlier from Mr Friel for just under £90,000 but that this was conditional upon compliance with the planning permission. It was therefore conditional upon gaining the vehicular right of way. The only evidence before us as to the value of Broadlands without the right of way is to be found in the report of the Jurats upon the application for the Remise when they were advised by Broadlands Estates Limited that a valuation of £50,000 was appropriate for Broadlands without the vehicular right of way. 57. We do not think it reasonable to have expected Mr Snell to have sold Broadlands at a price based upon there being no vehicular access. We summarise our reasons as follows - (i) Inevitably it would take a little while to find a purchaser and take the matter through the Royal Court. The Jurats' report shows that by 5th August 1994 the Rayson debt had increased to £50,956. Assuming a sale price of £50,000, it is therefore by no means clear that the net sale proceeds after selling costs would necessarily have cleared the Rayson debt. (ii) On the evidence, the difference between the value of Broadlands with the right of way (approximately £90,000) and without the right of way was some £40,000. It would be asking a lot of Mr Snell to have decided to sell at such a heavily discounted price. (iii) This was particularly so when he had lodged an appeal to the Royal Court against the decision of the IDC not to allow access from the main road. As Mr Stein's affidavit makes clear, there were certainly reasonable prospects of success on that appeal, given the advice which the Attorney General subsequently gave in another case. In our judgment it was quite reasonable for Mr Snell to wish to exhaust the remedy of his appeal before agreeing to accept the inevitable and sell at a price discounted by £40,000. The matter was then taken out of his hands following the Remise. (iv) In this connection it is of note that, after they were appointed in August 1994, the Jurats did not conclude that the sale of Broadlands without the right of way was an appropriate way of realising the best value from Mr Snell's assets. If they did not so conclude, it would seem unduly harsh to hold that Mr Snell should have done so. 58. Thirdly, Mr Le Quesne submits that Mr Snell should have submitted a new application to the IDC placing the four required parking places for Broadlands on the Abalone site. He based this on the suggestion contained in Mr Stein's letter of 14th August 1992. But that letter was written in the context of a combined redevelopment of both sites and the building on Abalone being knocked down and replaced by three buildings. However there is no evidence before us as to whether that was a practical suggestion. No one in fact ever acted on it. All the plans submitted at any time showed the parking for Broadlands on the Broadlands site and that for Abalone on the Abalone site. Furthermore, Mr Snell had decided before the breach of contract not to proceed with the major Abalone redevelopment. One simply does not know whether the IDC would have agreed to such a suggestion. Furthermore, given that the Abalone building was to remain and simply be refurbished rather than knocked down and replaced, there is simply no evidence before the Court as to whether there would have been room for an additional four parking places for the residents of Broadlands as well as

the required parking spaces for the residents of Abalone. The Court was reduced to Advocate Le Quesne pointing to the plans and saying that he thought that there would be enough room and Mr Harris pointing to the same plans and indicating that he thought that there would not be. The onus lies upon a defendant to show that a plaintiff ought reasonably to have taken certain mitigating steps. We find that the defendants have not discharged that burden in this respect. 59. Fourthly, Mr Le Quesne submits that Mr Snell should have accepted Mrs Beadle's offer to sell him the strip of land itself for £10,000 on condition that he did not pursue his claim against her for breach of contract. It seems highly likely that, had such a sale proceeded, Mr Snell's losses would be much less than they are now claimed to be. Had Mrs Beadle not sought to attach the condition, Mr Snell probably should have mitigated his loss in that way. However, in our judgment, Mrs Beadle was very ill advised to impose the condition in question and it was a deeply unattractive offer on her part. On any view, Mr Snell had already suffered considerable losses by then as a result of Mrs Beadle's breach of contract. It is not possible to know exactly how large they were, nor was it possible for Mr Snell to ascertain that at the time. What the defendants are really saying is that, in order to mitigate his loss and thereby reduce the amount which Mrs Beadle had to pay him in damages, Mr Snell should have agreed to forego altogether his claim for any of his losses from Mrs Beadle. In our judgment, Mr Snell acted wholly reasonably in refusing to give up his claims against Mrs Beadle. The fact that she now faces a claim which is enormously higher than that which she would almost certainly have faced had she agreed to sell the strip for £10,000 without the condition, must lie entirely at her door or at the door of those who advised her to impose such a condition. The quantum of the claim 60. In the light of our findings, we therefore proceed on the basis that, in the absence of Mrs Beadle's breach of contract, Mr Snell would have carried out his proposed redevelopment of Broadlands and refurbishment of Abalone. Prima facie therefore, the quantum of the claim will be the difference between Mr Snell's financial position if the two developments had proceeded and his financial position as it in fact turned out to be. 61. We think it convenient first to assess what Mr Snell's position would have been at 31 st 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 31 st 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 31 st December 1994 to 20 th February 2006 (revised 13.30 on 28 th 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 31 st 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. 62. Originally, the two valuation experts relied upon by the parties agreed that the market value of Abalone at 31 st December 1995 was £500,000. However, the next day Mr Luce, the plaintiff's expert, said that he would include an additional figure of £40,000 to reflect the value of a separate building on Abalone called "End Cliff". This was a building which was adjacent to the strip of land. It was a single storey block building consisting of two bedrooms, one living room, one bathroom/wc and one kitchen. It was, however, very basic and, according to Mr Luce, had probably been used as summer accommodation by the owner of the guesthouse. 63. In his oral evidence, Mr Luce accepted that most of End Cliff would have had to be knocked down in order to create the vehicular right of way across the strip of land to Broadlands. One would therefore have been left only with a very small part of the building. He said that it was not possible to know what, if anything, IDC would have allowed by way of redevelopment in place of the remaining part of the building, but he thought they would allow something. 64. We have carefully considered Mr Luce's evidence but we consider that it is all too speculative. On any view, most of the building would have disappeared to make the right of way. Only a small part would have remained. It is not possible to know what redevelopment use could have been made of this. Would the IDC have allowed a new redeveloped End Cliff to cover part of what was otherwise open space used for parking for the refurbished Abalone? All of this is unknown. All in all we think the position is too speculative to attach a value to End Cliff over and above the value attributed to the refurbished Abalone. 65. 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 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 14 th June to 22 nd 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 31 st December 1995, the loss was £409,993. On 22 nd November 1996 he received the sum of £77,065 from the Remise so that his loss was reduced to £332,920. On 31 st 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. 66. Mr Snell put his losses in a somewhat different manner. They can be summarised as follows - (i) It is agreed by the accountancy experts that, on the basis of the figures used for the purposes of schedule 1(a), Mr Snell would have made a profit of £15,788 as a result of the development of Broadlands. Accordingly he claims that sum. (ii) He asserts that, as he intended to retain Abalone and to rent out five of the six units, he would have received income from lodgers in Abalone up to the date of trial. He should therefore be compensated for the loss of that income. Mr Beamish has prepared a schedule of such income, although this has naturally had to make a number of assumptions as to the level of income, at what rate it would have increased, the amount to be spent on repairs and maintenance, the occupancy rate of the property, the rate at which the loans on Abalone would have been repaid, etc. On the basis of these various assumptions, Mr Beamish estimates the loss of income from August 1994 to 20 th February 2006 to be £435,912. (iii) Mr Snell asserts that, because he intended to retain Abalone, he should receive the capital value of Abalone as at the date of trial less what he actually received on the sale. The evidence of Mr Luce (which was not challenged) was that the value of Abalone, if it had been refurbished in accordance with Mr Snell's plans, would now be £850,000. We should add that Mr Luce also added £100,000 in respect of End Cliff but, for the reasons that we have already given in para 64 above, we do not think that this should be allowed. Accordingly, the value we would allow would be £850,000. From this falls to be deducted the actual receipts from the sale of Abalone of £258,355, leaving a balance of £591,645 for which he claims compensation. (iv) He claims for the costs incurred as a result of the Remise . These are summarised at appendix 9A of Mr Beamish's updated schedule of loss and come to £60,906. However, we find that the sum of £826 in respect of Advocate Habin's fees was not a result of the Remise . They had been incurred prior to the breach of contract. Furthermore, as already stated, Mr Cole's fees should be reduced by £7,110 on the basis that they did not follow from Mrs Beadle's breach of contract. The total amount therefore under this head of damage would be £52,970. (v)

Because Mr Snell intended to live in the sixth unit of the refurbished Abalone, but was unable to do so, he has had to find alternative accommodation. It appears that he has no record of the rent which he has paid from August 1994 (when he had to vacate Abalone upon the Remise) Indeed we have no evidence as to his circumstances generally. Accordingly, Mr Beamish has taken a figure of £143 per week for a one bedroomed unit which he has reached by taking the average figure for (a-h) property of this category as advertised in two estate agents at the time of his report. He has then discounted this figure backwards by the rise in the cost of living index in order to assess the figure for each year from 1994 onwards. The resulting figure is a total of £75,209. 67. Accordingly, the plaintiff's total claim (adjusted as described above) is as follows - (i) Loss of profit on the Broadlands development £15,788 (ii) Loss of income from Abalone £435,912 (iii) Loss of capital value of Abalone £591,645 (iv) Remise de biens costs £52,970 (v) Personal rent payable by Mr Snell £75,209 TOTAL £1,171,524 To this Mr Snell adds interest from the relevant date for each particular head of loss. Mr Harris submitted an updated schedule on the opening day of the trial but at that stage he was still claiming compound interest, which was then put at a total of £273,891. However, during the course of the trial, Mr Harris conceded that he could only properly claim simple interest at the court rate. Accordingly, if necessary, calculations as to interest would have to be redone. 68. We would add that the plaintiff put forward an alternative method of calculating the current value of Abalone by assuming that Mr Snell would live in it until his death and then applying a multiplier to the net income based upon the Ogden actuarial tables. We consider that this introduces even more uncertainties. As it happens, it also suggests an even higher value attributable to Abalone. We consider that market value is the preferable measure of the loss incurred. Accordingly, had we proceeded on the basis of current market value, we would have taken the figure of £850,000. 69. The underlying measure of damages in cases of breach of contract is the sum which would put the plaintiff in the same position as he would have been if the defendant had performed the contract. Mr Harris argues that Mr Snell would, after developing and selling off Broadlands, have lived in the refurbished Abalone and would still have retained it today. His losses should therefore be calculated as the loss of profit on the development of Broadlands, his loss of income to date on Abalone, the market value today of Abalone (less the receipts on its sale), the costs of the Remise and the costs of his alternative accommodation in the meantime. 70. However, we have concluded that that is not the appropriate measure of damages in this case. Whilst it may have been Mr Snell's wish to retain Abalone, we do not think it would be right to proceed on the basis that that is what would have happened. 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. 71. We think a better way of looking at is to consider that, if all had gone to plan, by the end of December 1995, Mr Snell would have been the owner of a refurbished Abalone worth £500,000. According to Mr Luce, lodging houses are valued by reference to their projected income stream. He and Mr Sarre, (the defendants' expert valuer) had reached the figure of £500,000 on this basis. 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. If a development had gone ahead, a plaintiff might keep such a property and obtain the yield therefrom, he might sell it (in which event he might re-invest in new real property or in other forms of investment) or he might keep the property for a while before selling it. All of these are imponderables and we do not think that in the ordinary case the amount paid by a defendant should depend upon and vary with such matters. In our judgment, the fairest way of compensating Mr Snell is to try and put him back in the position (in financial terms) in which he would have been at the completion of the development and to compensate him by an award of interest for the fact that, since then, he has been kept out of his money. An award at the court rate (2% over base rate) is quite generous in this respect in that it equates more to the cost of borrowing than to the amount which would be received on deposit. 72. The Summary calculates the loss on this basis. 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. Given that, at that time, he had received no other assets (because of the Remise) that was his loss at that time and interest should be calculated upon it. Subject to minor adjustment of the figures as discussed earlier, the Summary (and the calculations of interest) seem to us to be based upon the correct principles. The sole change is that, as mentioned in paragraph 65, the amount to be allowed as a receipt from the Remise should be increased from £69,995 to £77,065. Thus the continuing loss decreased by £77,065 in November 1996 when he received the net proceeds of the Remise and by a further £97,500 in March 1997 when he received the net proceeds of sale of Broadlands. Interest should be calculated at the court rate accordingly. The total figure contained in the Summary (with interest up to 20 th February 2006), was £432,777, to which was to be added £7,596 in respect of the rental costs up to 31 st December 1995 plus interest thereon of £4,798. In our judgment, subject to the next paragraph, what is to be awarded to Mr Snell is a sum calculated exactly as per the Summary (including the rental costs), but with an adjustment for the amount received

from the Remise and a corresponding adjustment to the interest calculations. We invite the parties to agree such calculations. 73. That leaves simply the question of a discount. As we have said earlier, we find that there were uncertainties on whether the Taylor Settlement or a third party would have been willing to provide the necessary finance for Mr Snell's proposed development. We have concluded that on the balance of probabilities such finance would have been forthcoming, but, in accordance with the principles set out in the Allied Maples Group case, we think it would be appropriate to make a discount of 25% to reflect the chance that the financing would not have been forthcoming and that Mr Snell would not have been able to complete his plans even if Mrs Beadle had honoured her contract. Accordingly we award a sum calculated in accordance with para 72 but then reduced by 25%. From this should also be deducted the £100 which Mr Snell would have paid Mrs Beadle for the right of way. Her legal costs in respect of passing the contract should in theory also be deducted but, in the absence of any evidence as to what they might have been, we make no deduction. 74. This judgment was distributed in draft and the experts have agreed the figures calculated in accordance with paragraph 72 up to 20 th February 2006. The total amount, inclusive of interest, comes to £435,620 from which falls to be deducted £108,905 in respect of the 25% discount and the £100 as set out in paragraph 73. We therefore give judgment in the resulting sum of £326,615 and order that interest continue to accrue at the court rate from 20 th February 2006 until date of payment. Authorities Snell v Beadle

[2001] JLR 118 . Allied Maples Group Limited v Simmons and Simmons

[1995] 4 All ER 907 . Hadley v Baxendale (1854) 9Ex.341. Victoria Laundry v Newman [1949] 2KB 528. Czarnikow v Koufos

[1969] 1AC 350 . Diamond v Campbell-Jones [1960] 1 All ER 583. McGregor on Damages (16 th edition) at para 322. Page Last Updated: 15 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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