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Case No: PT-2025-LIV-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Family and Civil Courts
35 Vernon Street
LIVERPOOL
Merseyside
L2 2BX

Tuesday, 18 November 2025

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

ROMAL CAPITAL (C02) LIMITED

Claimant

- and –

PEEL L&P (PORTS) LIMITED

Defendant

- -
- -

Joanne Wicks KC, Lord Banner KC and Emer Murphy (instructed by **Clyde & Co LLP**) for the **Claimant**
Katherine Holland KC, David Forsdick KC and Katrina Yates, (instructed by **Squire Patton Boggs LLP**) for the **Defendant**

Hearing dates: 8, 9 May (pre-reading), 12-16, 19-23, 29, 30 May, 17 June 2025

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APPROVED JUDGMENT

(draft judgment supplied on 5 November 2025)

This judgment was handed down via remotely at 10.00 am on 18 November 2025 by circulation to the parties or their representatives and by release to the National Archives.

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Mr Justice Fancourt :

I. Introduction

1. This is a claim for damages for breach of contract. In barest outline, the Claimant ("Romal") claims that, but for breaches by the Defendant ("Peel") of its obligations in an agreement for lease, it (Romal) would have had a very good chance of obtaining a valuable planning permission, more quickly, for a large redevelopment scheme at West Waterloo Dock, Central Docks, Liverpool. Had it obtained that planning permission, Romal claims, it would have made significantly greater profits than it will obtain from the smaller development, for which it did later obtain planning permission and which is now being built.

2. Peel contends that:

    i) Romal did not satisfy preconditions in the agreement for lease, and so the relevant obligations on the part of Peel to support Romal's application for planning permission never arose;

    ii) if any of its obligations had to be performed, it was not in breach of any such obligation;

    iii) if it was in breach of any such obligation, no breach caused Romal to lose a realistic opportunity to make a profit on a larger development – principally because, even in the counterfactual world, there was no realistic prospect of planning permission for a larger scheme being granted;

    iv) if such a loss was caused, the chances of planning permission were only small, and Romal's claimed quantum of loss is unsubstantiated and wrong in principle;

    v) both larger developments in contemplation would have made significantly smaller profits than Romal will in fact make from the consented, smaller development.

3. The principal difficulty in this case arises from the complexity of the planning policies and considerations applying to the Central Docks area in Liverpool, which is one part of a larger area of disused dockland that is subject to an outline planning permission (the Liverpool Waters Outline Planning Permission, or "LWOPP") obtained by Peel in 2013. Part of the Central Docks was, at the relevant times, part of the Liverpool City Centre World Heritage Site. These policies continued to evolve over the period from 2013 to June 2021 (the latest time at which Romal contends that it would have obtained a more valuable planning permission but for Peel's breaches of contract).

4. The emerging planning landscape was the backdrop to: the conditional agreement for lease made between Peel as landlord and Romal as tenant on 18 May 2018 ("the AfL"); the submission by Romal on 7 December 2018 of its first standalone application for full planning permission ("the 646 Scheme"); negotiations with Peel and the local planning authority, Liverpool City Council, that resulted in the planning application being amended in November 2019 ("the 538 Scheme"); a second standalone planning application for a much reduced scheme ("the 330 Scheme"), which was submitted in February 2021; and the withdrawal of the first planning application in March 2021.

5. On 23 December 2021, Romal appealed against the City Council's failure to determine the 330 Scheme application and secured planning permission from a planning inspector on 11 July 2022.

6. The 330 Scheme is in course of construction. By the date of trial one of the three blocks was nearing practical completion, and work was about to start on the second block.

7. The development appears likely to generate a substantial profit for Romal. However, Romal is aggrieved because, it alleges, Peel amended the LWOPP and brought forward a neighbourhood masterplan for the Central Docks in a way that was inconsistent with Romal's first planning application, thereby prejudicing the prospects of permission being granted for the 646 Scheme or the 538 Scheme, and it did not tell Romal what it was doing. Romal only discovered what Peel had done in late August 2019, by which time it had been persuaded by the Council not to proceed with the 646 Scheme and to submit alternative designs instead.

8. What Peel did from late 2018 to late 2019, and what it failed to do, are alleged to be breaches of contract because Peel was obliged under the AfL to assist Romal to obtain planning permission for a design that it had first approved. However, Peel denies that it was so obliged. It says that Romal decided to proceed with the planning application for the 646 Scheme without Peel's approval, and therefore proceeded outside the envelope of the AfL, at its own risk. That contention, and related matters, give rise to the first group of issues that I have to determine, which depend on the true interpretation of the AfL, the facts relating to the making of the first planning application and its later amendment, and how Romal and Peel conducted themselves thereafter.

9. The second group of issues relate to the allegations of breach of contract. These depend on the meaning of the obligations (if any) that Peel had under the AfL to cooperate with Romal and support its planning application, and on what Peel was in fact doing between December 2018 and December 2019. Much of the factual evidence that I heard, over 6 days of the trial, related to those allegations.

10. The third group of issues are causation issues. The central point, asserted by Peel, is that even if Romal and Peel had done everything they could and should have done to promote and support the 646 Scheme or the 538 Scheme, there was no realistic prospect of planning permission being granted for either Scheme, because their height and massing (a) substantially exceeded the constraints in the parameter plans that were part of the LWOPP, which were there to protect heritage assets within the Central Docks; and (b) would obstruct views of Waterloo Warehouse, one of the landmark heritage buildings within the World Heritage Site, in particular distant river views of Waterloo Warehouse from Wallasey, on the west side of the River Mersey ("the River"), and views from boats moving on the River. Peel says that, for this reason, there was no realistic prospect of planning permission being granted until Romal came forward with a design (the 330 Scheme) that respected the height and massing constraints and did not significantly impair the protected River views. Even then, with Peel supporting the scheme, the City Council was unwilling to grant planning permission. It was only granted on appeal.

11. I heard two days of expert planning evidence relating to the planning and (to some extent) the heritage context in which these questions arose. However, no expert heritage evidence was called. In the event, Peel's planning expert considered that there was a 20% chance of obtaining planning permission for the 646 Scheme on appeal, but Romal's expert

considered that there was an 80% chance of obtaining planning permission, either from the City Council or on appeal.

12. The final group of issues relate to the quantum of damages. Assuming that there was a realistic prospect of obtaining planning permission (either from the Council or on appeal) for the 646 Scheme or the 538 Scheme, how much profit would probably have been made in building out and selling off such a scheme, compared with the profit that is likely to be made under the 330 Scheme? I heard two days of evidence from experts on the profitability of developments, who addressed those questions.

13. It is common ground that the percentage chance of obtaining planning permission has to be applied to the increase in profit (if any) to determine the quantum of damages, but the parties do not agree how that percentage should be arrived at, nor is there much agreement on the components of the likely profits of the alternative Schemes.

14. For convenience, I set out here the timing of the principal events with which this claim is concerned, and how Romal's counterfactual case fits that timeline:

    i) December 2017, when Romal's sister company obtained a standalone planning permission for the first residential development on the Central Docks area, on plots C-04 and C-06, just to the north of West Waterloo Dock;

    ii) 2018, when:

        a) in February, Romal's sister company began to build C-04, and agreement in principle was reached between Romal and Peel for a (mainly) residential development on plot C-02, to the west of West Waterloo Dock;

        b) the AfL was signed, in May;

        c) Peel's first non-material amendment application was made in October in respect of the LWOPP, and promptly granted in November; and

        d) the first planning application for the 646 Scheme was made, in December;

    iii) 2019, when:

        a) in April, Peel submitted a second important non-material amendment application in respect of the LWOPP;

        b) in May, Peel applied to discharge a condition of the LWOPP requiring the approval of a Central Docks neighbourhood masterplan ("the CDNMP");

        c) in July, the City Council invited Romal to prepare redesigns of its C-02 development and Romal did so; and

        d) following grant of permission for the non-material amendments and the approval of the CDNMP, Romal applied in November to amend its planning application to seek to proceed with the 538 Scheme;

    iv) 2020, when:

a) Romal and Peel sought approval of a third non-material amendment to the LWOPP that would facilitate the grant of permission for the 538 Scheme but the City Council would not accept the necessary amendments;

b) In September, more modest non-material amendments were granted, which still left the 538 Scheme non-compliant with the CDNMP; and

c) In November, Romal first presented designs for the 330 Scheme to the City Council:

v) 2021, when:

a) Liverpool Maritime Mercantile City was deleted from the UNESCO World Heritage List;

b) Romal applied for planning permission for the 330 Scheme and withdrew the first planning application, rather than appeal its non-determination;

c) The City Council still did not determine the second planning application for the 330 Scheme; and

d) Romal appealed against the non-determination in December 2021;

vi) 2022, when:

a) In January, the Liverpool Local Plan 2013-2033 was adopted;

b) In July, a Planning Inspector granted permission for the 330 Scheme;

c) In September, leases of the Property were granted to Romal pursuant to the AfL; and

vii) February 2023, when development on the consented scheme began.

15. Romal's case, following pre-trial amendment and further concession during the trial, is now that if Peel had not been in breach of covenant, planning permission would have been granted by the City Council for the 646 Scheme in November 2019, or planning permission would have been obtained on appeal in January 2021; alternatively planning permission would have been granted by the City Council for the 538 Scheme in August 2020, or on appeal in June 2021. There is no dispute now that these are the relevant dates at which to consider the likelihood of planning permission being granted, and if granted, the time from which Romal could have started to sell apartments in and prepare to construct the 646 Scheme or the 538 Scheme instead of the 330 Scheme.

16. Romal's claim was issued in March 2023.

17. I must now summarise the main features relating to the Property, the Central Docks area, the planning context and the terms of the AfL, before turning to the First Group of Issues.

II. The Property and the Central Docks

18. The Property to be leased to Romal, subject to obtaining a Satisfactory Planning Permission (as defined in the AfL), was first fixed by heads of terms that were agreed in February 2018. There are two adjoining areas, each to be separately demised, which comprise an area of quay adjoining the West Waterloo Dock and areas of the dock itself, which it was envisaged would be partially infilled to create a larger development platform.

19. The Property, as so defined, was largely unchanged in the AfL itself. It comprises what is shown as parcel 3b in the LWOPP parcels parameter plan, together with a small sliver of parcel 3c immediately to the north, and a part of parcel 3a to the south. On the plots parameter plan within the LWOPP (the plots being the area on which the buildings are to be built), there is a single plot within parcel 3b designated for the building or group of buildings – known as plot C-02.

20. Parcel 3a was at the time of the LWOPP designated for a cruise liner terminal ("CLT"), though by the date of the heads of terms it was already known that, at the insistence of the City Council, it would be used instead as the Isle of Man Ferry Terminal ("IoMT"), which required a smaller development footprint than the CLT and its associated buildings. The CLT was relocated to Princes Dock, to the south of the Central Docks area.

21. It was as a result of the change from the CLT to the IoMT that the heads of terms and AfL included part of parcel 3a. The design for the CLT in Central Docks had included a high rise hotel to the south and a lower level terminal building to the north. These different heights were represented on the heights parameter plan in the LWOPP as 12 metres for the northern part of parcel 3a and 40 metres for the southern part. The IoMT was to be entirely low build, and so the intended height and massing on parcel 3a did not come about.

22. This had implications for what Romal and its advisers considered could be achieved on parcel 3b. By February 2018, Romal's sister company had already started construction of one of two residential buildings for which it had obtained a "standalone" planning permission, situate to the north of East Waterloo Dock. These buildings were designed as being of 8 and 14 storeys and were built on plots C-04 and C-06. They were in close proximity to the Grade 2 listed building known as East Waterloo Warehouse ("WWH"), which as well as being listed was, until July 2021, a landmark building forming part of the World Heritage Site in Liverpool. WWH had many years previously been converted into a residential building. Views of WWH from the City, the Liverpool Waters site, the River and from Wallasey were important considerations when considering what size of development on parcel 3b was appropriate, as parcel 3b stands directly between WWH and the River.

23. Also relevant was the fact that parcel 3c, immediately to the north of parcel 3b, had been designated on the LWOPP as the site of an iconic cultural building (though as yet undesigned), to be sited at the western end of and immediately adjoining Prospect Park, at the waterfront. Prospect Park was one of two large parks (the other being Central Park) indicated on the LWOPP access and movement plan and the indicative masterplan. Prospect Park was to be created on a west-east axis, running from the intended Cultural Building on the Mersey to the boundary wall on the eastern edge of the Central Docks

area, and Central Park was to be created on a north-south axis, running north from Prospect Park, and lying between development parcels on each side.

24. Before Romal's interest in the Property, HMRC had expressed interest in building a new, large building on parcel 3b, but this was never designed. In the end, HMRC decided to acquire a refurbished building in the City Centre instead. That left the parcel free, and Romal expressed interest in it. Mr Malouf, a director of Romal, had in mind a development of scale. He held discussions with Mr Lindsey Ashworth of Peel, who had been primarily responsible for the LWOPP and its implementation for many years, and the two quickly saw eye-to-eye. Each had an interest in seeing buildings of real presence coming forward on parcel 3b. Mr Ashworth wanted a strong waterfront presence on Central Docks and a substantial development to give impetus to the redevelopment of Liverpool Waters, which had barely started. Mr Malouf wanted to build the largest and most valuable development that he could on the Property, in order to maximise Romal's profits.

25. It was as a consequence of their discussions that the original "five finger" designs were brought forward (comprising about 618 residential apartments and other developed space), and the AfL required Romal to seek Peel's approval of and then apply for planning permission for a design containing at least 600 apartments. There is no dispute that a development of 600 apartments could not have been built on the Property within the approved parameters of the LWOPP: either a much larger plot or much higher buildings would have been needed to achieve that. In any event, the anticipated planning application would have to be a "standalone" application because no application under the LWOPP for approval of reserved matters could be made until various conditions (including the requirement for an approved neighbourhood masterplan for Central Docks) had been discharged.

26. At the relevant times (2018-2022) in this claim, Liverpool was under threat of losing its UNESCO World Heritage Site ("WHS") status, and then did lose it. The area of the WHS included areas of the City Centre and adjoining areas, such as the Georgian Quarter, and significant parts of the docks and hinterland to the north of the City Centre. The docks were considered to be of outstanding universal value ("OUV"), as being the largest remaining, intact expanse of docks built and used during the era of maritime trade from the late 18th to the first half of the 20th Centuries.

27. Regeneration of certain areas in Liverpool, particularly the Albert Dock to the south of Pier Head, had been continuing for years, but a huge expanse of dockland to the north of Pier Head remained largely untouched and was derelict. Liverpool as a city had been seeking economic prosperity and regeneration but substantial regeneration within the WHS and surrounding areas was not achievable, save at some cost to the heritage assets.

28. Liverpool, which only gained its WHS status in 2004, was placed on a watch list by UNESCO in 2012, as a result of the proposal to grant the LWOPP. Regeneration and preservation of heritage assets were both desirable, and the development plan for the City reflected both aspirations and attempted to reconcile them. It is apparent from the changes in planning guidance and the draft local plan over the period 2002-2021 that there was a divergence of views among elected representatives of the City on whether economic regeneration or heritage preservation should be given greater weight and be the priority. The expression "heritage-led regeneration", which is argued by the Defendant to imply that heritage had at least as great if not a greater priority, is to be

found in planning guidance from 2009 but not in the draft local plan. A difference of views also existed about whether WHS status should be preserved at all costs, or whether its loss should be risked in the interests of greater economic regeneration and rebuilding of the City.

29. In the event, in 2021, events happened which decided the matter. The City Council resolved in February 2021 to grant Everton Football Club a standalone full planning permission for its iconic new stadium at Bramley Moore Dock, at the northern end of the Liverpool Waters area, which dock was within the WHS. (Bramley Moore Dock had been designated in the LWOPP as a location for 10 small development plots for 1,500 residential units, sitting around the retained dock basin). After the conclusion of the examination in public of the draft local plan in 2020, the Inspector's Report was published in October 2021. The new local plan (which was later adopted in January 2022) placed more emphasis on the importance of economic regeneration.

30. Liverpool was removed from the UNESCO World Heritage List with effect from 20 July 2021.

III. The Planning Context

31. I set out below the relevant parts of planning documents and principal policies which applied in the period 2018-2022. I was assisted in my understanding of these documents and policies by specialist planning Counsel (Lord Banner KC for Romal and Mr David Forsdick KC for Peel), and the expert planning witnesses whom they called to give evidence: Mr John Rhodes OBE, a senior director of Quod Ltd, for Romal, and Mr Jon Suckley, the managing partner of Asteer Planning, for Peel.

32. The starting point is the development plan, since s.70(2) of the Town and Country Planning Act 1990 ("the Planning Act") requires a local planning authority ("LPA") to have regard to the provisions of the development plan, so far as material to the application before it, and to any other material considerations, and s.38(6) of the Planning and Compulsory Purchase Act 2004 provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts **the determination must be made in accordance with the plan unless material considerations indicate otherwise**"

33. The relevant development plan until January 2022 is the City of Liverpool Unitary Development Plan ("the UDP"), adopted in November 2002. This was superseded by the new Liverpool Local Plan.

34. Paragraph 5.1 of the UDP, introducing the section on General Policies, states that the UDP's three major themes – economic regeneration, environmental improvement and reduction of inequality – underpin the strategic policies set out in that section.

35. At the forefront (though without any priority resulting from that) is policy GEN 1, which is to reverse the decline in economic activity, investment and employment experienced in recent years, through the identification of regeneration areas (which include the dock areas), the provision of sites for economic development and investment, promoting and enhancing the role of the docks, and promoting mixed use development.

36. Policy GEN 3 is to protect and enhance the built environment of the City by (relevantly) "preserving and enhancing historically and architecturally important buildings and areas and, where appropriate, improving them".

37. The introduction to the Heritage and Design section of the UDP recites government guidance (in Planning Practice Guidance ("PPG") 15 and 16) at the time, confirms the importance of reconciling the need for economic growth with the need to protect the historic environment, and states that successful conservation allows change as well as protection, with the emphasis on controlled and positive management of change.

38. Policy HD5, which is the most relevant because it deals with development affecting the setting of a listed building rather than its demolition or alteration (which is not in issue here), states that:

> "Planning permission will only be granted for development affecting the setting of a listed building, which preserves the setting and important views of the building. This will include, where appropriate:
> (i) control over the design and siting of new development;
> (ii) control over the use of adjacent land; …."

39. A general design requirement relating to heritage and design is contained in policy HD18, which states (so far as relied on by Peel):

> "When assessing proposals for new development, the City Council will require applications to comply with the following criteria, where appropriate, to ensure a high quality of design:
> (i) the scale, density and massing of the proposed development relate well to its locality; ….."

40. As Mr Rhodes explained, the UDP does not specifically address the Liverpool Waters regeneration, because the LWOPP postdated it by more than 10 years. Mr Rhodes did not accept that policy GEN3 meant that the UDP had a policy of "heritage-led regeneration". He emphasised that regeneration was promoted partly in order to preserve and restore the heritage assets, but that that did not mean that harm could not be done to those assets, in the interests of regeneration.

41. Some of the UDP policies are similar to policies in the National Planning Policy Framework, in its 2018 edition ("the NPPF") (which is agreed to be the relevant edition for the purpose of this trial), but the UDP (though the applicable development plan) is relevantly out of date because it does not reflect the objective of major regeneration of the large area of derelict docks from Bramley Moore Dock to Pier Head in the City Centre. Moreover, the UDP was adopted even before Liverpool was inscribed onto UNESCO's World Heritage list, in 2004.

42. That means that other planning policy and guidance documents are of greater importance than they might otherwise be had there been an up to date development plan, and are in any event material considerations in planning terms.

43. The first of these in the hierarchy is the NPPF (which was first produced in March 2012 and is regularly updated to reflect national planning policy). It states that development plans may need to be revised to reflect policy changes in the NPPF (para 212), which

should be progressed as quickly as possible; but that in the meantime, existing policies should not be regarded as out of date simply because they were adopted before the NPPF, but that due weight should be given to them according to the degree of consistency with the policies in the NPPF (para 213).

44. Chapter 16 of the NPPF, entitled "Conserving and enhancing the historic environment", recognises that World Heritage Sites are heritage assets with the highest significance (para 184). It requires LPAs to identify and assess the particular significance of any heritage asset that may be affected by a proposed development (including where the setting of such an asset may be affected), and take this into account (para 190). It then requires LPAs to take account of three matters in determining applications: the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses; the positive contribution that such assets make to sustainable communities, including their economic vitality, and the desirability of new development making a positive contribution to local character and distinctiveness. From this, it is evident that the national policy is far from being conservation at all costs, and requires a balanced approach to be taken.

45. The following policies are of particular relevance in this case, which (it is common ground) is one where only the setting of a designated heritage asset will be harmed, not the asset itself, and where the harm that will arise is properly characterised as "less than substantial" harm:

> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. [Substantial harm to, or loss of, the significance of certain designated heritage assets, including World Heritage sites, should be regarded as 'wholly exceptional'.]
>
> 195. [Presumption of refusal of consent in cases of substantial harm to or loss of a designated heritage asset.]
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

46. Thus, even in a case where less than substantial harm will be caused to the setting of a designated heritage asset, very great weight should be given to the conservation of the asset, given the status of the asset as part of a World Heritage Site, and clear and convincing justification is required to be shown for the harm to be caused.

47. One further policy in the NPPF of marginal significance is the so-called "tilted balance" policy in para 11(d), which is a stronger presumption in favour of sustainable development where either there are no relevant development plan policies or the relevant

policies in the development plan are out of date. Under it, permission is to be granted unless either NPPF protective policies provide a clear reason for refusal or any adverse impact of granting permission would significantly and demonstrably outweigh the benefits, when assessed against NPPF policies as a whole. The policy is only of minor significance here because Mr Rhodes did not rely on it for forming his views of the degree of probability of planning permission for the 646 or 538 Schemes being granted, either by the City Council or by a planning inspector on appeal.

48. The next planning policy document which is of importance is the Supplementary Planning Document adopted by the City Council in October 2009 entitled "Liverpool Maritime Mercantile City World Heritage Site" ("the WHS SPD"). It is a material planning consideration and is strongly relied on by both sides, though each reads the emphasis of its content slightly differently.

49. The foreword describes the purpose of the WHS SPD as being above all to provide a "policy document which will encourage economic regeneration with an emphasis on quality" and "guidance on land allocations to prioritise target areas for economic growth for the whole city, including the World Heritage Site and areas bordering on it". It further states that at the time of writing "a main priority for the City Council is the city's continuing economic regeneration – this is essential if the benefits of the World Heritage Site are to be maximised". Mr Rhodes suggested that the emphasis on regeneration in a policy document concerned with WHS assets was unusual and indicated the importance of regeneration, as a planning policy.

50. The introductory section of the WHS SPD identifies an overarching aim of providing guidance for protection and enhancement of the OUV of the WHS whilst encouraging investment and development that secures a healthy economy and supports regeneration. "Its intention is to ensure that the significant historic buildings are properly conserved and that the much-needed new developments integrate harmoniously with them". Para 1.1.4 refers to some previous "heritage-led regeneration projects", such as the restoration of Albert Dock.

51. Chapter 4 contains general guidance for development in the WHS and its "buffer zone", that being land immediately adjacent to and which provides a visual setting for the WHS, where development could potentially have an adverse impact on that setting. (While WWH itself is in the WHS, parcels 3a, 3b and 3c at Waterloo Dock are in the buffer zone.) Para 4.1.1 states that it provides guidance on how sustainable development and heritage-led regeneration should be delivered.

52. Paras 4.2.8 and 4.2.9 state (in redacted form):

> "All developments in the Buffer Zone … will, in accordance with HD18, need to respond to and reflect the characteristics of the area around them. The design and scale of developments will need to respond to, and respect, their context proportionately to their potential impact on the setting of … the WHS. Major schemes adjacent to … the WHS will be considered more carefully for their impact on the OUV of the WHS … than minor developments further away ….
>
> Where a proposal in the Buffer Zone is for … 2) a building with a mass that significantly exceeds that of surrounding buildings, 3) a development that is

> immediately adjacent to the WHS, 4) a building which has a significant impact upon key river views or key landmark buildings ….: special consideration should be given to the relationship between the development and the WHS and the impact of development on the historic character of its locality and any buildings that contribute to that character…."

53. Section 4.4 of the WHS SPD addresses views to, from and within the WHS, and identifies key visual landmark buildings and key views to the WHS from the. It is these that are central to the planning and causation issues in this case.

54. The WHS SPD emphasises the importance of the River to the OUV of Liverpool, and of the views of Liverpool from the River. WWH is identified as a key landmark building, and views to it and other such buildings form part of their setting and so are a material consideration, under policy HD5.

55. Para 4.4.6 identifies certain river prospects and panoramas that place the landmark buildings in their context and help to define where development might obscure a view or affect the visual prominence of the building. These include static views from the opposite bank of the River, at Wallasey Town Hall and Woodside Ferry Terminal in particular. Para 4.4.7 then identifies views from boats on the river as being of importance, though more difficult to map as they are kinetic rather than static views.

56. The guidance relating to such views is in the following main terms:

> " … it is important that new development is brought forward in a manner that respects the network of views to, from and within the WHS … [t]he City Council would therefore expect to work with developers at the pre-application stage to determine which views require assessment and consideration …" (4.4.12)
>
> "The City Council expects applications for planning permission to clearly demonstrate in their design and access statements how they have addressed potential impacts on the agreed views and the City Council will require applicants to provide accurate visual representations showing the effect of the development on the agreed views where it considers that this is necessary to assess the scale of the potential change …. (4.4.13)"
>
> "Whilst the City Council accepts that all developments have some impact upon views, it also accepts that some development can have a positive impact on views by enclosing space and creating framed views. The City Council expects that development should not have a significant adverse impact on the key view to, from and within the WHS, *by wholly obstructing a key public view of a landmark building* or overly dominating a panorama. (4.4.14)" (*emphasis added*)

Mr Rhodes stressed the materiality of the words in italics.

57. It is therefore not the case that any significant impact on any view of a landmark building, such as WWH, will be assumed to create an obstacle to the grant of planning permission. Instead, the City Council and the developer are to work together to identify and agree what views are important, and the developer will then present the expected impact where

the City Council considers it necessary to consider it. The criterion to be applied is that there should be no significant adverse impact by wholly obscuring a key public view or overly dominating the panorama. The reason for that is provided in section 4.5, which recognises that development alongside the River will be liable to have an adverse effect, and yet high quality development along the river is desirable. Even for key landmark buildings:

> "[s]ome development which intrudes into the views of them could be accommodated provided that it does not wholly obstruct key views, but developers will need to demonstrate that their proposals will not compromise their [sc. the landmark buildings'] fundamental contribution to the quality and interest of the skyline" (para 4.5.3)

58. The LWOPP is itself a material planning consideration, being an outline permission for the whole of the Liverpool Waters area, including Central Docks. That does not mean that any planning application has to be brought under the LWOPP. The application for the LWOPP was validated on 27 October 2010 but the decision notice granting outline planning permission is dated 19 June 2013. The proposed development is described as "comprehensive redevelopment of up to 60 hectares of former dock land to provide a mixed use development of up to 1,691,110 sq m", comprising (most significantly) up to a maximum of 733,200 sq m of residential (9,000 units), and up to 314,500 sq m of B1 business use, 53,000 sq m of hotel and conference facilities, 42,200 sq m in total of community and leisure facilities and up to 26,900 sq m in total of retail space, in addition to numerous other smaller uses, including restaurants, cafes, drinking establishments and a cruise liner terminal. Notably, the proposal also includes up to 412,800 sq m of parking space, so car parking was going to be a significant element of the developed area. The LWOPP, oddly, does not include provision for new public transport in the Liverpool Waters area.

59. The outline permission was granted, subject to conditions, on the basis of numerous reports and other documents that are part of the permission, including a Design and Access Statement, a Statement of Key Development Principles ("SKDP"), a Heritage Impact Assessment ("HIA"), an Environmental Statement and a Parameter Plan Report, among others. Of these, the SKDP was the most important, followed by the Parameter Plan Report and the Design and Access Statement. Development was to be "in general conformity with" all these documents (condition 3).

60. Condition 2 limits the amount of total floorspace within each neighbourhood for each land use, as stated in the SKDP – for Central Docks, the maximum residential floorspace was 235,300 sq m.

61. Condition 4, which is of particular importance in this case, states:

> "Any development undertaken under the benefit of this permission shall conform generally to the parameters set out in the Parameter Plans submitted with the application hereby approved and no reserved matters applications shall be submitted for any development which:
> ….
> c. differs from the development Parcels specified in Parameter Plan 004;
> d. differs from the development Plots specified in Parameter Plan 005

> e. exceeds the building heights specified in Parameter Plan 006;
>
> unless otherwise agreed by the Local Planning Authority."

62. Condition 4 applies only to development undertaken under the benefit of the outline permission, i.e. to reserved matters applications. That however does not prevent its terms being a material consideration for standalone applications for planning permission. It will be noted that permitted development had only generally to conform to the parameters, not conform fully with them all, and that the City Council had discretion to agree otherwise in any event. This was referred to by Romal in argument as the "tailpiece" to condition 4. The reason for condition 4 is stated to be that the development permitted had been subject to an Environmental Impact Assessment ("EIA") and a Transport Assessment, and that any material change to the overall configuration might have an impact that had not been assessed. The condition and the power of the City Council in the tailpiece therefore fall to be construed in that light.

63. Conditions 7 and 8 required an application for reserved matters approval for the first phase of the development to be made not later than 5 years after the date of the outline permission, in general accordance with the phasing sequence in Parameter Plan 003. Development of that first phase would then have to be started no later than 2 years after the approval of the last reserved matter to be approved. Prior to the approval of any reserved matters, an Implementation Phasing Plan had to be submitted and agreed by the City Council (condition 9).

64. Condition 11, which is of particular importance too, states (so far as material):

> "Prior to the submission of the first application for reserved matters approval within each respective neighbourhood identified in Parameter Plan 002 a Detailed Neighbourhood Masterplan for that particular neighbourhood based on the Principal Application Documents shall be submitted to and approved in writing by the Local Planning Authority, which shall provide the context for all reserved matters applications made within that neighbourhood. The Detailed Masterplan shall include the following information for the neighbourhood:
>
> i. Details of all individual development sites proposed;
> ….
> iii. A land use typology plan to inform the land use distribution;
> iv. A list of 'Key Design Principles' that establishes the context for all development;
> v. A Design Code … that will establish the design criteria and objectives for all development;
> ….
> xi. The general disposition of building plots, public realm and movement routes within development parcels and plots;
> xii. Details of the proposed scale and massing in three dimensional form of each building/development plot;
> xiii. Provision of key open space and linkages informed by the indicative list contained in Schedule 5 ….
> ….
> xvii Details of the community and social infrastructure;

> ….
>
> All reserved matters applications shall be in accordance with the approved Detailed Neighbourhood Masterplans."

65. It is clear from condition 11 that once a Detailed Neighbourhood Masterplan has been submitted and approved for any neighbourhood, the scope for approval of reserved matters (in effect, the grant of full planning permission) that do not comply with the masterplan disappears. It is the neighbourhood masterplan that ties down the detail of each individual development in that neighbourhood. But no application for reserved matters approval on Central Docks could be sought until (a) conditions 7 and 8 had been discharged in relation to the first neighbourhood (Princes Dock), and (b) the masterplan for Central Docks had been submitted and approved by the City Council.

66. At the date of the AfL, there was no prospect of the detailed neighbourhood masterplan for Central Docks being in place by the time of the planning application that Romal was required to submit, at the latest on 31 December 2018. It was therefore clear, and clearly understood, that the planning application would have to be a standalone planning application, not governed by the LWOPP except to the extent that the LWOPP was a material planning consideration in the determination of the standalone application. There was another reason why the agreed application could not be a reserved matters application, namely that the size of the agreed development – at least 600 residential apartments – could not be accommodated within the plot and height parameters of the LWOPP as they stood. The planning application that Peel reasonably had to approve and make jointly with Romal was therefore one that would not comply with the parameter plans in relation to either plot or building height, or both, and would be made outside the terms of the LWOPP.

67. Condition 58 of the LWOPP states, so far as material:

> "The key areas of public open space and key linkages indicated on Parameter Plan 007 [Access and Movement Plan] hereby approved, shall be delivered relative to associated parcels/plots referred to in Schedule 5 attached to this permission on the basis approved in the Detailed Neighbourhood Masterplan for the neighbourhood concerned as referred to in Condition 11 of this permission, having regard also to the approved Phasing Parameter Plan 003, the Implementation Phasing Plan referred to in condition 9 and the relevant Detailed Neighbourhood Phasing Plan for the neighbourhood concerned referred to in Condition 12 of this permission. The development parcels referred to in Schedule 5 shall not be brought into use until such areas of public open space and key linkages have been implemented in full ….."

The reason given for this condition is so that the development is supported by key areas of public amenity space and movement routes.

68. Schedule 5, as referred to in conditions 11 and 58, lists the key public open spaces and linkages, and includes the following descriptions (where all parcels identified with a "3" are those within the Central Docks neighbourhood):

> "Culture Square shall be provided at the same time as any cultural buildings are constructed within development Parcel 3c, and completed before the opening of any such building/s.
>
> Prospect Park shall be commenced at the same time as the start of any construction work to provide buildings in any of development Parcels 3a, 3b, 3c, 3d and 3f.
>
> Central Park shall be commenced at the same time as the start of any construction work in development Parcels 3f or 3g."

A footnote to Schedule 5 explains that the preparation of the detailed neighbourhood masterplans will potentially lead to changes to the features shown on the indicative masterplan included in the Parameter Plan Report.

69. The Parameter Plan Report includes one plan showing parcels for development, of which parcels 3a, 3b and 3c are contiguous in the southern half of Central Docks (Parameter Plan 004), with parcel 3b being significantly smaller than parcels 3a and 3c, and another plan showing the plots within each parcel on which proposed buildings would be located (Parameter Plan 005). The latter plan shows a building plot (C-02), which includes the majority of parcel 3b, up to the northern edge of the parcel, but leaving space between the proposed building and West Waterloo Dock. The plot for the Cultural Building on parcel 3c (C-03) is some distance from the boundary between parcels 3b and 3c, and a similar space is left between the Cultural Building plot and parcel 3e to the north of it. There is a gap between plot C-02 and the CLT (C-01) on parcel 3a.

70. Parameter Plan 006 identifies the maximum heights of the proposed buildings. The height for the Cultural Building is 41m AOD; the height for the building on C-02 is 30.7m AOD, and for the part of the CLT on the northern half of C-01 the heights is 12m AOD, and 44.5m on the southern half of C-01. Elsewhere in the Central Docks neighbourhood the heights of riverfront buildings are in excess of 40m. The car parking plan, Parameter Plan 008, indicates that one level of podium parking in the building on plot C-02 was proposed.

71. The final Parameter Plan of note is 007, the Movement and Access Plan. The commentary explains that this plan identifies strategic areas of open space as well as the access points and routes. Plan 007 shows a walkway running along the western edge of West Waterloo Dock, and Culture Square as being a main public space between the end of Prospect Park and the River. The southern edge of Culture Square is further north than the boundary of parcels 3b and 3c.

72. The indicative masterplan shows a built form on parcel 3b corresponding with plot C-02, and the Cultural Building in a different position from plot C-03, surrounded by open space. Both the Cultural Building and the open space are closer to plot C-02, but (both) still to the north of the boundary of parcel 3b.

73. The LWOPP Design and Access Statement ("DAS") describes the design proposals as "heritage-led", with preservation of the OUV of the WHS being fundamental, but also emphasises the "vitally important need for economic and social regeneration", with Liverpool Waters providing a once-in-a-generation opportunity for such regeneration:

> "… heritage is at the heart of the Liverpool Waters proposals which have been, quite literally, heritage-led".

74. The DAS has a section dealing with landmarks, vistas and focal points, which states that the development was designed to safeguard important views, create new ones and introduce new landmarks. It introduces the heritage views of Tobacco Dock and WWH, the main WHS buildings adjacent to the development area, including the views from across the River, and states:

> "In placing buildings and in aligning routes in the masterplan layout, great care has been taken to maintain the above key views mentioned above and to ensure that they will be important features of Liverpool Waters. Indeed, the distant views/river prospects, general views, panoramas, general views with focal point and defined vistas identified in the WHS Supplementary Planning Document have been analysed in great detail from both a heritage perspective and a landscape one as set out in the Environmental Statement … [7.4.9]
>
> … great care has been taken to retain the emphasis on key buildings of the World Heritage Site with nearby and adjoining development being significantly lower and smaller in scale." [7.4.12]

75. Section 7.5 of the DAS, addressing scale and heights of buildings in Liverpool Waters, describes the varying heights of buildings in Central Docks but does not ascribe any reason for the lower heights on parcels 3b and 3a:

> "Further to the South in the central docks area the cultural building will have a maximum height similar to that of other buildings on the waterfront - up to 41 metres. To the South of this, West of West Waterloo dock, two hotels are proposed of 31 and 45 metres maximum height located here to serve the cruise liner terminal. The terminal building itself will be up to 12 metres in height."

In contrast, the same section of the DAS states that, in the Clarence Docks neighbourhood, a reason for heights being generally lower there is to "maintain the prominence of Tobacco Dock Warehouse (adjoining the site) as seen in views of the area".

76. The DAS has a section dealing with Landscape and Public Realm, paragraph 10.5.1 of which identifies Culture Square as being one of the recreational squares intended for Liverpool Waters, with defining characteristics of world-class architecture and landscape in equal measure, prospect (with dramatic vantage points), and a role as a terminus of Prospect Park and with dramatic topography. The key in figure 46 is confusing, as it identifies Culture Square as a monumental square rather than a recreational square, but the text is consistent with the treatment of the square in the Public Realm Characterisation document, and figure 46 is therefore in error. The one specific locational characteristic of Culture Square was that it was to be the terminus of Prospect Park in Central Docks.

77. The Statement of Key Development Principles ("SKDP") describes Culture Square as being of approximately 130 metres in length by 100 metres wide, within which the cultural building will sit. It is categorised as a Key Landmark Building, as is the CLT.

However, the exact location of the square was not fixed by the LWOPP, save that it was to be a continuation of Prospect Park.

78. The SKDP, in introducing the indicative masterplan and accompanying axonometric drawing, explains at para 2.3.6 that this is only one solution for how the Liverpool Waters site might be developed within the overall parameters and key development principles:

> "The parameters and key development principles have been designed to allow a degree of flexibility and innovation through the implementation process, to respond positively to design and technological advancements that will inevitably take place during the delivery horizon of the Liverpool Waters proposal."

However, some of the parameters are intended to provide greater precision and "fix" than others. Para 2.3.8 states that examples of the more flexible solutions provided in the parameters are the north-south pedestrian routes and the proposed new public parks and squares. This would include Culture Square, as Mr Suckley accepted. In light of that indication, it was accepted that the indication of approximately 130m by 100m was to be treated flexibly. Indeed, Prospect Park was another such public park, and it was entirely removed pursuant to a non-material amendment application made by Peel in October 2018.

79. In describing the characteristics of the Central Docks neighbourhood, the SKDP indicates that the buildings in this neighbourhood "will have a strong waterfront building character", and that there would be mid-rise commercial buildings alongside the Leeds to Liverpool canal.

80. The Heritage Impact Assessment for the LWOPP identified some impact on heritage assets but considered that it was generally minor. Overall, the impact of the Liverpool Waters development would be overwhelmingly beneficial to the OUV of the WHS, by conserving the assets and bringing some back into beneficial use. The HIA identified some negative impacts on key views, only one of which is material:

> "**The effect of the riverfront blocks on visibility of the Stanley Dock Tobacco warehouse and the Waterloo warehouse when viewed from Wallasey Town Hall.** This, however, is a consequence of the location of these warehouses several blocks back from the riverfront, and mitigation comes in the form of kinetic views from the Wirral promenade, where the Stanley Dock will be gradually revealed, and will be more effective as a conveyor of OUV than the present largely featureless prospect."

81. The LWOPP was clearly granted in the knowledge that new development would, to a significant extent, obstruct but not wholly block views of these landmark buildings. There is nothing in the HIA or in the terms of the LWOPP more generally that indicates that buildings of scale cannot be put in front of WWH, save for the height parameters for plots C-01 (north) and C-02. The impact (including the impact of plots C-04 and C-06 at 44.8 m and 29.6 m AOD respectively) was assessed as "minor adverse" on the setting of WWH. The loss of the key river view from Wallasey Town Hall was described as "moderate adverse", but commented on as follows:

> "The consequences of these blocks, however, is to restrict views of the Tobacco Warehouse and the Waterloo Warehouse. In this view the Tobacco Warehouse is concealed apart from the upper floor and parapet, whilst the Waterloo Warehouse is partly obscured. This compromises the understanding of the role played by warehousing in the commercial life of the city. However, the location of these warehouses several blocks back from the riverfront, makes them background buildings, and any requirement to maintain their all-round visibility would inevitably lead to sterilising much of the regeneration site".

It is apparent from the HIA and the rejection of strong objections to the LWOPP application from Heritage England and UNESCO that the City Council was willing to accept moderate impact on views of heritage buildings where the views were not wholly obscured. However, there is no statement in the HIA or any of the LWOPP documents that a more dense or higher development on parcel 3b or 3a would be inimical to the balance that was acceptable to the City Council, provided always that key views of landmark heritage buildings were not wholly obstructed.

82. This is amply illustrated by The Landscape and Visual Impact at Appendix 5.5 to the HIA, which includes baseline photographs and photomontages of the proposed development in the illustrative masterplan from three viewpoints along the Wirral peninsula: from the beach at New Brighton, from Wallasey Town Hall and from Woodside Ferry Terminal. The view of WWH from New Brighton is distant and would be entirely obscured by the consented development. The view from Wallasey is almost perpendicular across the River and so clear, but a combination of the buildings on C-02, C-04, C-06, and the Cultural Building obscure all but a central bay and tower and the end (southern) bay of the warehouse. It is visible and identifiable if one knows what one is looking for, but loses its landmark impact. The view from Woodside is distant and WWH is visible in part, but with the consented development WWH is lost from view.

83. The conclusion must therefore be that the City Council placed more weight on kinetic views from the River or from the Wirral riverfront promenade than it did on static viewpoints, as there would be a part of the River or promenade to the south of Wallasey Town Hall from which a good view of WWH would be obtained, principally over the lower height CLT on parcel 3a.

84. While the HIA concludes that any heritage harm is "greatly outweighed by the benefits offered", it is important to bear in mind that that is in the context of the considerable benefits offered by the LWOPP overall, not just the benefits that would be offered by the 646 Scheme or the 538 Scheme on a standalone application for planning permission.

85. Finally, there is the emerging local plan (The Liverpool Local Plan 2013-2033). This had been progressing though its stages of publication, consultation, submission, examination in public and report since 2013, with the examination hearings taking place in October 2020 and the Report published on 20 October 2021. It was adopted in January 2022. The weight to be given to the draft local plan in any decision-making of the LPA increases as the process continues, with greater weight being given to it once the public examination of it has taken place, where there are no outstanding objections to particular policies in it, and to the extent that the policies in question are consistent with the NPPF.

86. The most relevant policy in the emerging local plan is CC12 Liverpool Waters:

> "Liverpool City Council will support planning applications to deliver the vision for Liverpool Waters, which is to regenerate a 60 hectare historic dockland site to create a world-class, high quality, mixed use waterfront quarter in central Liverpool that will allow for substantial growth of the City's economy."

The LWOPP is described in the local plan as follows:

> "Given the unique extent of the application a framework of controls was necessary to ensure heritage assets are properly conserved throughout the site whilst simultaneously facilitating development. These controls consist of a suite of conditions and series of publications within a legal agreement that accompanied the outline permission. The conditions set maximum parameters for development and provide a flexible framework within which changes can be made as detailed applications come forward. [6.95]
>
> ….. [identified standalone applications] and others that come forward will also be assessed utilising the provisions established through the outline permission. It is appreciated that due to the scale of the site and period of permission other proposals are likely to emerge which were not anticipated in the original plans. In instances where schemes are proposed which differ from the original master plan it will be necessary for the local planning authority to assess these alongside development approved to date and ensure such schemes do not prejudice the delivery of the overall scheme granted outline permission." [6.96]

87. As will be described later, Mr Rhodes stressed the words "flexible framework" and the recognition that schemes will come forward that were not anticipated in the LWOPP, and that these must be fairly assessed in the light of the LWOPP, with the relevant additional criterion being whether or not they prejudice the delivery of the overall scheme. Mr Suckley emphasised that such proposals would be assessed utilising the provisions established through the outline permission, interpreting that as requiring consistency with the LWOPP.

88. Policy HD1 promotes conservation and, where appropriate, enhancement of the historic environment of Liverpool. Particular consideration is given to ensuring that the most significant historic assets are not harmed, and these include the docks, warehouses and other maritime structures. Harm to elements of designated heritage assets that contribute to its significance will only be permitted where clearly justified and outweighed by the public benefit of the proposal (consistently with the NPPF).

89. Policy HD2 relates specifically to the WHS. It states that permission will not be granted for proposals that would have an adverse impact on the views of the key landmark buildings and vistas identified in the WHS SPD.

90. The public examination on the draft local plan came before - but the Inspector's Report came after - the de-listing of Liverpool's WHS. Rather than require the draft local plan to be re-written, the Inspector was content to allow it to stand with the out-of-date references to the WHS and buffer zone in it, including policy HD2, for review by the City Council at a later date:

> "This would enable appropriate consideration of future policy options in terms of the careful balance required between stimulating much needed regeneration and conserving the unique heritage of one of the world's major maritime cities." (para 257)

Even when the Local Plan was adopted in 2022 (and at the time of the determination of the 330 Scheme), therefore, there was no explicit prioritisation of regeneration over appropriate conservation of heritage assets in its policies, though the overall tone is more supportive of economic regeneration.

IV. The Agreement for Lease

91. The AfL was made in writing on 18 May 2018. It recites that Peel owns a long leasehold interest in Plot C02, Central Docks and that it has agreed (a) to grant Romal two leases of that property and (b) that the agreement for lease is subject to a preliminary condition relating to Romal carrying out its due diligence. The grant of the leases was recited to be subject to planning consent being granted by the City Council for the Development, which is defined in clause 1.1 as (so far as relevant):

> "the in-filling of those parts of the Property that are currently docks and the construction on the Property of five residential buildings in two phases containing no less than 600 apartments for private sale with commercial and/or leisure space on the ground floors of the buildings and car parking spaces with ancillary servicing and landscaping…" .

"Property" is defined as:

> "…together, the properties known as:
>
> (a) Phase 1, Plot C02, Central Docks, Liverpool as shown edged red on Plan 1 and as more particularly defined in the Phase 1 Lease; and
> (b) Phase 2, Plot C02, Central Docks, Liverpool as shown edged red on Plan 2 and as more particularly defined in the Phase 2 Lease".

92. The Plans show two adjoining parcels comprising mainly dock but some dockside walls and land. Phase 2 includes a small area of water to the north-east of the Property where the dock wall curves round, which was included in the intended demise so that a small area of water would not be left at that corner of the parcel when Romal filled in the area demised to it.

93. "Landlord's Adjoining Land" is defined as the property shown edged blue on Plan 3, which is the whole area of the Central Docks in which Peel had a long leasehold interest, including Phases 1 and 2 of Plot C02 to be let to Romal. Plan 3 is entitled "Central Dock Estate, Liverpool Service Charge Plan" and is the same plan that is included in the draft leases annexed to the AfL to identify the landlord's "Estate", which is the area for which the lessor intends to operate a service charge scheme for all its lessees.

94. By clause 23 of the AfL, Romal confirms that it will not object to any planning application for or the subsequent development of the Landlord's Adjoining Land and

acknowledges that Peel is intending to develop the whole of the Landlord's Adjoining Land and that works on it will continue after the Completion Date. There is a dispute between the parties as to whether references to the Landlord's Adjoining Land, in particular in clause 2.8 of the AfL (as to which, see below), include a reference to the land to be demised to Romal. I will address that later.

95. The due diligence on which the AfL is recited to be conditional is identified in the definition of Preliminary Condition:

> "the Tenant being satisfied (in its absolute discretion) that it has carried out and completed its preliminary due diligence in relation to the Property and the Development".

and then in clauses 2.1, 2.2 and 2.4, which are as follows:

> "2.1 The Tenant will continue with its due diligence in relation to the Property and the Development and will use reasonable endeavours to satisfy the Preliminary Condition on or before expiry of the Initial Period [31 August 2018].
>
> 2.2 If the Tenant wishes to evidence that the Preliminary Condition has been satisfied the Tenant will pay the Deposit to the Landlord in cleared funds by the date which is no later than 4:00 pm on the date of expiry of the Initial Period (time to be of the essence) and payment by the Tenant of the Deposit will mean that the Preliminary Condition has been satisfied.
> …..
>
> 2.4 If the Deposit is not paid in accordance with clause 2.2 then this Agreement will automatically lapse without prejudice to the rights of either party in relation to any antecedent breach"

96. The Deposit, payable according to those terms, at the election of Romal, is £225,000. On the date of the AfL, an Initial Payment of £50,000 was payable. Thus, Romal paid a modest sum for the option to decide, within a further 3 months or so, following completion of its due diligence, whether it wished to be bound by the terms of the AfL after that date. These would oblige it to work up and submit a planning application for a development of 600 or more apartments, which involved complex engineering works to in-fill part of the dock. If it did wish to take on those obligations, it had to pay the Deposit. The Deposit and the Initial Payment together make up 10% of the Premium for the leases in the sum of £2,750,000.

97. If the Deposit is paid on time, thereby satisfying the Preliminary Condition, the remainder of clause 2 of the AfL applies. These provisions do not apply unless the Preliminary Condition is satisfied.

98. Clauses 2.6 to 2.8 are as follows:

> "2.6 As soon as reasonably practicable after the Preliminary Condition has been satisfied the Tenant (to the extent that it has not already done so) shall prepare initial designs for the Development and shall send such designs to

> the Landlord for approval (such approval not to be unreasonably withheld or delayed).
>
> 2.7 Any subsequent variations to the initial design approved under clause 2.6 (save for Minor Variations) shall be provided to the Landlord for its approval (such approval not to be unreasonably withheld or delayed) as soon as reasonably practicable.
>
> 2.8 The Landlord and the Tenant shall use all reasonable endeavours to ensure that the Tenant's design for the Development is integrated with the Landlord's proposed development of the Landlord's Adjoining Land including (but not limited to) servicing and access arrangements and routes and the Landlord shall (where such plans and drawings exist) assist the Tenant by supplying plans and drawings identifying its proposals."

99. The AfL therefore contemplates that the initial designs, or any varied initial designs, shall be approved (reasonably) by Peel. Both parties are obliged to use all reasonable endeavours to integrate with each other's development designs. There is a dispute between the parties as to whether the obligation in clause 2.8 only applies for the period after satisfaction of the Preliminary Condition up to approval of the initial design, or whether it continues to have effect beyond that time.

100. The AfL then sets out the parties' obligations in relation to the application for planning permission, once the initial design has been approved. The following are the centrally important ones in this case:

> "3.1 As soon as reasonably practicable after the Landlord has approved the initial design for the Development in accordance with clause 2.6, the Tenant shall submit the proposed planning application for the Development ("Proposed Application") to the Landlord for approval (such approval not to be unreasonably withheld or delayed). The proposed planning application shall be:
>
> 3.1.1 made in the joint names of the Landlord and the Tenant;
>
> 3.1.2 made in accordance with the principles contained in the Outline Permission to the extent that they are appropriate in relation to the Property and the Development (unless otherwise agreed between the landlord and the tenant (both acting reasonably)); and
>
> 3.1.3 in accordance with the initial design for the Development approved in accordance with clause 2.6.
>
> 3.2 Within 15 working days after the Landlord has received the Proposed Application, the Landlord shall notify the Tenant in writing that the Landlord either approves or disapproves of the Proposed Application (such approval not to be unreasonably withheld or delayed).
>
> 3.3 If the Landlord does not approve the proposed application, it shall give reasons in writing for such disapproval to the Tenant and the Tenant shall

> submit a revised Proposed Application to the Landlord for approval. The procedure set out in clause 3.2 and this clause 3.3 shall apply to any revised scheme as if it were the first Proposed Application. The Tenant shall continue without unnecessary delay to submit revised Proposed Applications to the Landlord for approval until a revised Proposed Application is approved by the Landlord.
>
> 3.4 Following the receipt of the Landlord's approval to the Proposed Application or the revised Proposed Application (as the case may be), the Tenant shall as soon as reasonably practicable and (provided the Landlord has approved the Proposed Application by such date) on or before the date four months from the date that the Preliminary Condition is satisfied submit the Proposed Application to the Determining Authority in accordance with clause 3.1 and shall thereafter use its reasonable endeavours to obtain the grant of a Satisfactory Planning Permission as soon as reasonably possible.
>
> 3.5 If it appears necessary to obtain a Satisfactory Planning Permission, the Tenant may amend the Planning Application or withdraw and submit in substitution a revised application for planning permission. Any such amendment, withdrawal and substitution (save for any Minor Variations) shall be approved by the Landlord (such approval not to be unreasonably withheld or delayed)…."

101. The AfL therefore requires Romal to submit its proposed planning application to Peel for approval, and Peel must notify Romal within 15 working days whether it approves or disapproves the application, with reasons for disapproval in writing.

102. There are then further provisions requiring Peel to co-operate with Romal:

> "5.1 The Landlord shall co-operate with the Tenant and use all reasonable but commercially sensible endeavours to assist the Tenant in obtaining a Satisfactory Planning Permission which shall include entering into a Planning Agreement ….
>
> ……
>
> 5.3 The Landlord agrees to use reasonable endeavours to assist the Tenant in pursuing a Satisfactory Planning Permission which will include but not be limited to the Landlord attending and/or hosting key meetings with the Determining Authority, consultees and other interested parties to assist in the planning process and the Landlord will make available to the Tenant suitable facilities for hosting a public exhibition in close proximity to the Property."

103. A Satisfactory Planning Permission is one that, with any Planning Agreement, is:

> "… free from:
>
> (a) any Landlord's Unacceptable Condition [unless waived]; and
> (b) any Tenant's Unacceptable Condition [unless waived]".

There are various such Unacceptable Conditions defined in the AfL, but for the purposes of this claim the only Landlord's Unacceptable Conditions directly relevant are:

> "a condition imposed by the Planning Permission or a provision in a Planning Agreement or the requirement to pay CIL which:
> ……
> (d) will or is likely to reduce the capital value of the Landlord's and/or Group Company of the Landlord's respective interests in the Property and/or the Landlord's Adjoining Land; or
> (e) will or is likely to have an adverse effect on or prevent the development of any of the Landlord's Adjoining Land or make it more expensive to do so."

104. Peel's case is that a planning permission for the 646 Scheme could never have been a Satisfactory Planning Permission because it would have involved adjustments to the use of parcel 3c, to the north of the Property, on which Peel at the relevant time intended to site the Cultural Building, as part of the public realm in Central Docks. It says that the 646 Scheme would necessarily have involved Peel moving the Cultural Square or otherwise undertaking to reallocate parcel 3c for Romal's purposes, and so necessarily this would "prevent" development of the Landlord's Adjoining Land, or make it more expensive to do so. Peel did not pursue the argument that a planning condition or a term of a s.106 agreement, or a CIL obligation, would reduce the capital value of Peel's interests in either the Property or its adjoining land.

105. I will return to the question of the impact of the proposed developments in the context of the LWOPP generally in my consideration of issues relating to causation of loss. There is, however, a short answer to the particular argument raised by Peel here, which is that no such planning condition (as opposed to the grant of planning permission itself) has been identified by Peel which would have the effect identified in the definition of Landlord's Unacceptable Condition, nor any necessary or likely term of a s.106 agreement. The fact that planning permission is granted for the development of the whole of the Property cannot itself be an Unacceptable Condition, even were its effect to be adverse to the development potential of any adjoining land. On the other hand, a condition requiring the creation of a walkway to be sited on adjoining land could be.

106. A number of issues arise as a matter of interpretation of the AfL, including one raised by Romal, which is whether there are implied terms of the AfL that prevent Peel from preventing or delaying Romal's performance of its obligations, or from disabling itself from discharging future or conditional obligations before the time for performance arises, and from acting so as to prevent the satisfaction of preconditions to performance.

107. It is appropriate to make some general observations about the nature of the AfL and the parties' approaches to interpreting it at this stage.

108. The AfL is the means by which an important stage in the sequential development of parts of the Central Docks was to be brought forward, for the benefit not just of Romal's profit and loss account but, as importantly, for Peel's ambition of a regenerative development of the whole Liverpool Waters area. Without the first developments in phase 2 happening, Peel's ability to sell further development parcels in that phase for large sums would be much more limited, and the project would stall. That would be likely to kill off redevelopment of phases 3 and 4.

109. At the time of the AfL, there had been only one development in the derelict land in phase 2 (Central Docks) that had started - Romal's sister company's development north of Waterloo Dock, on plots C-04 and C-06. The successful development of parcel 3b was important as a means of kick-starting the linear development of Central Docks. It would form an important physical link and means of movement between phase 2 and Princes Dock and the City Centre to the south. Without the development of parcels 3a (which was to be the IoMT) and 3b (the Property), there would be no pedestrian and cycle route through the docks to the more northerly sections of Central Docks and to the larger Liverpool Waters area beyond. An impressive and successful development on parcel 3b was therefore of importance to Peel, for the impetus that it would give the Liverpool Waters development (in addition to the capital receipt upon grant of the leases), as well as of importance for Romal. That is why Mr Lindsey Ashworth, the development director for Liverpool Waters from 2010 to April 2018, was so anxious for there to be as large and imposing a development on parcel 3b as possible, and why the AfL specifies an application for planning permission for a minimum of 600 units, which could not have been built within the confines of the LWOPP parameters.

110. In light of that, and as is evident from the terms of the AfL, in particular those that require Peel to assist Romal and support its application for a Satisfactory Planning Permission and those that require both of them to cooperate and integrate their respective designs, the AfL is in the nature of a joint venture. The AfL stipulates for collaboration to achieve the most valuable development on parcel 3b that could reasonably be achieved, within a limited timescale (in order to progress the development as early as possible), in the knowledge that the planning application would be a standalone application that would not sit within the existing LWOPP parameters. I accept Mr Ashworth's evidence that, in view of the likely loss of 1,500 residential units at Bramley Moore Dock, there was a need to put in more elsewhere in Liverpool Waters, and that maximising floorspace and high building density on the Property was an essential design ingredient that was accepted by all parties.

111. Peel's approach to the meaning of the AfL is that it was in the nature of a one-sided gamble for Romal. If Romal complied with certain requirements, it would have a chance of obtaining a right to carry out a valuable development on the Property. Peel construes the due diligence obligation on Romal in clause 2.1 as being for the purpose of Romal assuming all the risk of proceeding, as regards all matters that it could reasonably have found out by due diligence by the Preliminary Condition satisfaction date. This would therefore have the effect of cutting down the extent of the obligations of Peel under clauses 2.8, 5.1 and 5.3 to assist Romal by (among other things) drawing Romal's attention to relevant matters and sharing its plans for its development of the Landlord's Adjoining Land.

112. Peel construes the AfL as creating a sequence of "promissory conditions precedent", which Romal has to surmount, one by one, in strict compliance with their terms (as one would construe the terms of an option agreement), failing any one of which Romal loses its rights under the AfL. The stages are: satisfaction of the Preliminary Condition by 31 August 2018; submitting a request for and obtaining approval of the initial design; submitting a draft planning application in conformity with the approved initial design and the LWOPP for Peel to approve or disapprove, at least 15 working days before 31 December 2018 (and as many times as is necessary to obtain Peel's approval); and then

submitting the planning application to the City Council by 31 December 2018 at the latest.

113. One might describe these stages (which I agree with Peel are part of the structure of the AfL) with a degree of metaphorical accuracy as hurdles that have to be surmounted on a journey to the finish line; however, the effect of Peel's suggested interpretation of the AfL is to treat the sequence of steps and requirements as if they were stages of an assault course, littered with trip wires and mines, where any misstep was liable to be fatal to the endeavour. Thus, if, despite Peel's agreement, Romal failed to obtain confirmation of that agreement in writing, or if the initial design were altered in a way that was just over the Minor Variation line without being re-submitted for Peel's formal approval at an initial stage, or if Romal submitted its planning application after Peel had orally approved it but before receiving a letter confirming approval, Peel contends that Romal had thereby failed in its attempt. In those circumstances, submits Peel, the planning application made cannot be "the Planning Application" within the meaning of the AfL, and the whole edifice of the AfL then falls away, unless the parties subsequently agree to revive it.

114. This is, to a large extent, an exercise on behalf of Peel of retrospective wishful thinking and over-literalism, designed to serve Peel's end in this litigation, rather than a realistic reading of a commercial agreement.

115. In my judgment, the submissions that were made on behalf of Peel in this regard fundamentally mistake the nature and purpose of the contract, whose terms regulate a collaborative endeavour, not a unilateral venture by Romal. The endeavour was with a view to obtaining the most attractive and valuable planning permission that could be obtained, in the interests of both parties, that did not prejudice Peel's interests in realising other development land or put the LWOPP itself at risk.

116. Once it is recognised that the terms of the AfL performed the function that I have described, their interpretation becomes more straightforward overall, though there remain some difficult points on their meaning and effect in the circumstance that arose.

V. The First Group of Issues

117. The first group of issues concerns whether Romal acted within the scope of the AfL when it submitted the first planning application in December 2018, and then acted subsequently to amend it in November 2019, or whether Peel and Romal proceeded entirely outside the envelope of the AfL, as a result of Romal's failure to comply with preconditions to its planning application.

118. The issues that the parties have agreed for determination are the following:

    i) Did Romal's rights pursuant to the AfL ever arise, such as to entitle it, in principle, to claim damages for the loss of a chance to undertake the 646 Scheme and/or the 538 Scheme?

    ii) Did Peel owe any obligations to Romal under the AfL in relation to the 538 Scheme?

iii) Is Peel estopped by convention, by representation or by promissory estoppel, from contending that the first planning application was submitted, in its original or amended form, other than pursuant to and under the provisions of the AfL?

iv) Did Peel waive its right to object to the first planning application, for either the 646 Scheme or the 538 Scheme?

119. The significance of the first issue is that Peel contends that Romal acted outside the envelope of the AfL, by failing to submit design documents and obtain approval for the design of the 646 Scheme, failing to make the planning application in joint names, and failing to obtain Peel's approval to the planning application in writing before making it. It says, accordingly, that the terms of the AfL that impose relevant obligations on Peel in relation to the planning application were never engaged, because Romal did not satisfy the conditions and Peel and Romal therefore proceeded outside the scope of the AfL. If Peel is right in this argument, the AfL came to an end on 31 December 2018 because Romal had not submitted a "Planning Application", within the meaning of the AfL, by that date. However, Peel did not say or notice that the AfL had come to an end, and continued to act as if it was still operative, as did Romal.

120. The significance of the second issue is that Peel contends that, even if the application for the 646 Scheme can be said to have been made within the scope of the AfL, the amended application for the 538 Scheme was not within it, either for the same reasons, namely that there was no approval sought and granted by Peel for an amendment to the planning application, and that Romal proceeded to amend its application without Peel's approval in writing, or because the 538 Scheme was not a proposed development that included at least 600 residential units.

121. The third issue arises because, if Peel is technically correct that the failure to proceed in accordance with the terms of the AfL and satisfy its conditions means that the original or amended first planning application was not a "Planning Application", as defined, Romal contends that Peel is estopped from relying on that technically correct position. That is because both parties mutually proceeded on the assumed basis that the first planning application was a "Planning Application" within the AfL, and similarly in relation to the amended application; and both parties acted towards each other on the basis that they were proceeding under the terms of the AfL, whose terms would apply if the planning application were successful.

122. The fourth issue is a variant of the third. Peel did not in fact object to the original or amended planning application (or indeed the second planning application for the 330 Scheme) until its pleaded defence in this claim.

123. The issues that I have identified are intensely fact sensitive, and it is therefore necessary to make findings of fact in relation to the way that Romal proceeded to prepare the design of the 646 Scheme and apply for planning permission, Peel's involvement in that process, and its conduct after the application had been made.

The witnesses

124. Many of the relevant facts are evidenced by documents and there were relatively few significant disputes of fact (but rather extensive disagreement as to their legal significance). Nevertheless there were some factual disputes and it is appropriate for me

to say something about the witnesses from whom I heard in person at the trial, as their reliability has some bearing on the fact finding, in ways that I will explain in the course of my judgment.

125. Mr Lindsey Ashworth was called by Romal, even though he had been a director of Peel prior to his retirement in April 2018. I felt that he might have been a little over-optimistic about what could be achieved in terms of planning permission (though it is possible that his personality, and personal relationship with the planning officers, could have made a difference had he remained in post). But what he said about the reasons for wanting height and massing on the River frontage, and about the understanding that was reached that Romal would obtain the benefit of ground rents, was persuasive. He clearly felt that Romal had been let down by Peel after his departure. I found Mr Ashworth to be straightforward and honest in the evidence that he gave, and impressively knowledgeable about the deal that was struck in the context of the LWOPP. I do not accept the suggestion (based on flimsy evidence from Mr Lawless) that Mr Ashworth left Peel in unhappy circumstances and that his evidence in this case is slanted against his former employer. I found him to be fair and even-handed and a truthful witness.

126. Mr Greg Malouf was called next. Mr Malouf was somewhat prickly and had difficulty at times in answering a straight question. He was not good at listening to the questions that were put to him. Too often, he started to talk over the questioner in order to say what he wanted to say. Given his and Mr Lawless's personalities, as I observed them, I can easily understand how relations between them got off to a bad start, as Mr Lawless described. Mr Malouf came across as being opinionated and liking to have his say on what he considers to be appropriate rather than acquiesce in others' wishes and requirements. Mr Malouf was sometimes not in a position to answer the question, and frequently stated that "others can explain this". He relied extensively on Romal's consultants for the detail of what was happening and did not know it himself. I did not find him to be wholly reliable as a witness, though a good deal of what he said about his dealings with Peel and the City Council was supported by other witnesses, or by documents, and was inherently credible. I believe him to have been truthful about Romal's funding arrangements.

127. Mr Ali Siddique, Romal's architect, was an impressive witness, logical and thoughtful in his answers to questions. I accept as truthful the answers that he gave.

128. Mr Paul Grover MBE (as he was at the time, and as I shall refer to him, but Kallee-Grover as he identified at the trial) was in a difficult position, having been retained as planning consultant by Peel and then also being retained by Romal from June 2018 to give strategic advice. His firm then, Arup, owed duties of confidentiality to Peel in respect of matters relating to the LWOPP and the emerging CDNMP, save in so far as any such matters were in the public domain or permitted to be shared with Romal. As a result, Mr Grover was aware from early 2019 of the likely consequences for Romal's planning application of the second non-material amendment application ("NMA2") by Peel and its application to approve the CDNMP, but was not able to warn Romal about those applications. He said in evidence that he had expressed his concern to Peel at meetings in May to July 2019 about the conflict and was told not to say anything to Romal, but then it became clear that there were no meetings in those months at which he was present. No other witness supported Mr Grover's account. Acting in Peel's best interests, he urged the City Council to approve NMA2, and when it did he warned Mr Malouf at the end of August 2019 that things were about to happen (with the CDNMP) that would cause real problems for Romal's planning application.

129. He obviously now believes that Romal was wronged by Peel and has a sense of guilt about his involvement in the process. Although his evidence was given with impressive command of detail and considerable self-assurance, I consider that I cannot safely rely on his memory of events relating to the dealings between Peel, Arup and Romal, save where it is supported by other evidence, though in general, in other respects, I found him to be honest and straightforward, including about his dealings with Romal and the planning officers.

130. Sam Rowlands, a director of Romal, made me feel uneasy by his willingness to blur the truth where it suited Romal's interests, e.g. in the content of documents presented to the City Council to seek to establish viability of developments on the Property. I did not find him to be totally straightforward about the extent of the involvement of others in preparing Romal's own profit assessments, but I accept that he was involved in the preparation of those and in producing timelines for the C-04, C-06, 646 Scheme, 538 Scheme and 330 Scheme development ("Exhibit 24"). I accept as truthful his evidence about the funding arrangements that Romal has and makes, however I will be cautious about accepting his evidence otherwise where it is unsupported by other evidence.

131. Peel called first Mr Peter Swift, the managing director of Planit. Mr Swift was fastidious and precise in the evidence that he gave. I consider that he was trying to give an honest account of how the problems with Romal's application arose, but in some respects he was clearly mistaken. His witness statement was "spun" in various respects, and therefore misleading at times, and I am concerned that it did not comply with Practice Direction 57AC by being written using his own words, despite his claim that he wrote every single word of it. If he did, then his evidence is unreliable because it is clearly wrong in parts.

132. Planit, and Mr Swift in particular, felt that they had a special responsibility to Peel, as "guardian" of the LWOPP, and that Romal's planning application threatened the integrity of the LWOPP, and so he was opposed to it, even though Peel was willing for the application to proceed. At some point (but not before submission of the application) Mr Swift became aware that Peel had contracted with Romal to support a development of at least 600 apartments on the Property, but he did not care about that. He was acting at the time and arguing a case in these proceedings as guardian of the Central Docks masterplan, opposed to the planning application. I am cautious about accepting his evidence, particularly his views on how the conflict emerged between the LWOPP and Romal's application, where this is inconsistent with other evidence and is not corroborated.

133. Mr Ford worked (initially under Mr Grover) as a town planner at Arup between 2014 and 2024. He had worked on behalf of Peel and on behalf of Romal in relation to Central Docks. Although called by Peel, Mr Ford showed a notable fairness in his approach to the matters that he was asked questions about and was clearly independent. He accepted that Arup thought prior to its submission that the planning application had a good chance of obtaining permission: it was "ambitious but achievable". He assumed that the masterplan would take account of Romal's development, rather than the other way round. He believed that Peel had been told by Arup of the conflict of the developing masterplan with Romal's scheme. I accept Mr Ford's evidence as being wholly truthful.

134. Mr Lawless, who replaced Mr Ashworth as the relevant property director at Peel, was not a straightforward and helpful witness. He was defensive and obdurate. I had the clear impression that he was trying to say as little as possible about what happened, and that he sensed a trap in most questions that were asked. Mr Lawless not infrequently answered

a different question from the one that was asked and tried to avoid answering difficult ones.

135. I am satisfied that I did not get the whole truth from Mr Lawless, but there were moments when he properly made admissions and concessions in answer to questions, such as that the City Council would have been concerned that Peel was not supporting Romal's planning application, and that the prospects of the application were evenly balanced. Mr Lawless was not supportive of the application and knew that the City Council was not keen on it, yet he wanted Peel to receive the premium for the leases. I have no doubt that in 2019 he was concealing the applications for NMA2 and the final CDNMP from Romal, which he knew to be inconsistent with Romal's application.

136. Some of the evidence that Mr Lawless gave was clearly wrong, including that from the time of the deal with Peel Romal was always going to provide some of the Cultural Square from its site, and that he made it clear to the City Council that Peel wanted to see Romal's application determined favourably (if by that he meant the 646 Scheme application as it was submitted). I am cautious about accepting his evidence where it does not amount to admissions and is unsupported by other evidence.

137. Ms Martindale's evidence was in the event not challenged by Romal, and Ms McCormack (Peel's planning solicitor) was therefore the last witness of fact that Peel called. I accept that she was a truthful witness. At the time when she was advising Peel about Romal's application, she had not seen the AfL. She explained that, when advising Peel on the NMAs and the CDNMP, she was focusing on the LWOPP and not on Romal's planning application, and that she did not recall anyone raising a conflict with her until the City Council first raised it (which was after the CDNMP was approved). This therefore implies that Peel did not seek advice on the implications of the CDNMP for Romal's application; rather, Ms McCormack advised it on how it should show Romal's proposed development on the CDNMP, and in the event it was not shown on it, other than in narrative form as an application relating to parcel 3b.

138. It will be apparent from this review of the witnesses that this is not a case in which I can simply accept one side's oral account of the matters in dispute. It is necessary to weigh the conflicting evidence carefully, against the undisputed facts and what reliable documents show, before reaching a conclusion on what is more probable. This is what I have done in reaching my conclusions on factual matters, where they are disputed.

Facts Relevant to the First Group of Issues

139. The starting point can be taken as the original five-finger design for the Property being created by Romal's architect, Mr Siddique, in conjunction with Peel (Mr Ashworth) and its consultants (Planit), and that it was initially liked by Peel (acting principally by Mr Ashworth until April 2018, when he stood aside) and used to good effect in its presentation at the MIPIM trade fair in Cannes, in March 2018.

140. Under clause 2.6 of the AfL, it is only initial designs for the proposed development that need to be sent for approval, not final, detailed designs. It is clear that the initial five-finger designs had been sent to Peel, either via Mr Ashworth or Peel's consultants, and that Peel had approved them, by adopting them (or approximations of them) as part of its presentation of what it intended to create on Central Docks. Although this was before the AfL was signed, clause 2.6 only requires Romal to send its design for approval "to the

extent that it has not already done so". However, Romal needed to get approval for any different design.

141. There were numerous meetings between (or involving) Romal and Peel between May and September 2018, including a presentation to Peel on 2 August 2018 (following which no comments from Peel were received), a presentation to Places Matter (at which Peel was represented) on 17 August 2018, and, following feedback from Places Matter, a meeting with Peel in mid-September 2018, at which Mr Darren Lawless, who had by then replaced Mr Ashworth, and Mr Ian Pollitt had the final designs presented to them by Mr Malouf and Mr Siddique in A3 format. Mr Lawless said to Romal on that occasion that he had been kept well informed by Mr Pollitt about progress with the City Council, expressed satisfaction with Romal's efforts, and encouraged them to continue (this was Mr Siddique's evidence, which was not disputed by Mr Lawless). This was therefore oral approval of the then design – following presentations of it and no adverse comments being made by Peel. Mr Lawless finished the meeting by saying that the planning application would be in Romal's sole name. That question only arose if the design was approved. It is not clear what else, if anything, was said about an application in Romal's sole name at that stage.

142. Between the September meeting and a meeting of the Liverpool Waters Conservation Management Board on 19 October 2018, the five-finger design evolved into the 646 Scheme. The precise circumstances in which this happened, or why it happened, are unclear. Mr Siddique said that he worked on various configurations. The five blocks became four blocks, similarly orientated, perpendicular to the River, but with the two outside blocks being of a greater height. Mr Swift of Planit confirmed that at this stage he was fully apprised of the details of the 646 Scheme. Mr Siddique distributed his final drawings package to Arup, who were Peel's planning consultants, on 5 November 2018, two days before a public consultation event to present the designs, at which Peel was represented. By this stage, there had been two formal pre-application consultations with the Council.

143. I am satisfied that Peel was kept fully apprised of progress of the designs and with the intended timeline for submission of the planning application. They were routinely copied in to emails sending further information or designs to others. As examples of this, Kate Wooff of Planit (who were engaged by Romal to deal with the landscaping of parcel 3b) sent two emails dated 16 November 2018 attaching draft landscape plans, which showed the waterfront walkway and the foundations and retaining structure design, and these were copied to Mr Phil Jones and Mr Pollitt of Peel. Ian Ford of Arup (acting on behalf of Romal) sent Mr Jones the Transport Assessment and Travel Plan for Plot C-02 on 26 November 2018. Peel's consultants, Planit and Arup, were similarly kept informed. Romal was contractually obliged to submit a planning application by 31 December 2018: if it did not the AfL would end. So there can have been no surprise on the part of Peel that Romal was aiming to obtain approval for its application at about the end of November. Indeed, Peel was expressly told that this was the target date. Mr Lawless confirmed in evidence that he expected Romal to comply with those timescales.

144. While it appears to be correct that the full suite of documents to be included in the planning application was not sent to Peel as a package until 6 December 2018, Peel had received, piecemeal, copies of the relevant documents, or at least earlier versions of them, over the weeks and months that preceded this date. It did not formally reply confirming its approval of the various parts of the design, but I find that it had encouraged Romal to

think that Peel supported its developing design, and Romal was encouraged. After the public consultation on 7 November 2018, Mr Malouf emailed Mr Lawless, Mr Pollitt and Mr Jones providing a summary of the public response:

> "Update on today's open day for C02:
> - Very positive overall
> - At least 70 people through
> - The waterfront connectivity and regeneration of dock lands highly welcome
> - Quality of Development and spaces liked by all
> - allowing views for neighbouring residents was seen as sympathetic and greatly appreciated.
>
> Arup will do complete overview for submission day.
> Thanks for coming along."

Mr Lawless replied: "Thanks for the update and well done to you and team". Mr Malouf forwarded this reply to Mr Ford with the comment: "Peel appreciation to the team below."

145. Mr Malouf said "internally looking out, Peel absolutely supported the 646", by which I understood him to mean that from Romal's perspective, Peel was being supportive of the 646 Scheme prior to the application being submitted. This was notwithstanding the indication previously made (which Mr Malouf did not fully understand at the time) that Peel had decided that the planning application was to be made in Romal's sole name. Mr Malouf did not understand its implications because he did not have the terms of the AfL in mind, other than the deadline of New Year's Eve 2018 for submission of the application.

146. Although Peel had concerns internally about the likely content and timing of the planning application, and Mr Swift at Planit was concerned at the size of the designed blocks and the number of residential units, this was not communicated to Romal prior to the submission of the application. Peel and its advisers kept their concerns to themselves.

147. Peel's position on the planning application having to be made in Romal's name only was confirmed by Mr Grover (wearing his Peel hat) in an email dated 21 November 2018:

> "After consultation with Colette McCormack the Peel team have decided that they don't want to be named as joint applicant on the CO2 application. On that basis the application will be made in the name of [Romal] and notice will instead be served on [Peel].
> To date Peel have only been joint applicants on schemes that conform with the extant outline planning consent, and the approved parameters. The decision is not a reflection on the scheme or Peel's commitment to it being delivered.
> Colette has asked whether reference is made in your legal agreement with Peel around joint applicant status. As neither Colette or I have seen your legal agreement we are unsure."

Mr Grover said that the comment about Peel's commitment was derived from what Mr Jones of Peel had told him, namely that the absence of joint names did not reflect any

absence of commitment on the part of Peel to delivery of the scheme. Mr Malouf replied to Mr Grover's email:

> "No reference is made and that sounds fine."

148. A number of findings arise from this exchange. First, Peel, acting through Mr Grover, was purporting to be supportive of the forthcoming planning application. Second, Peel knew very well, having consulted its solicitor, that the AfL required a planning application to be in joint names. Third, it did not want to be seen to be supporting the proposed development. As Mr Lawless put it, it wanted to keep Romal's proposals "at arm's length". Fourth, Peel was willing to act in disregard of its obligations when that suited it. Fifth, Mr Malouf was unaware that Peel was obliged to be a joint applicant, even though the AfL spelled that out.

149. Had Mr Malouf responded instead that Peel was required to join in the planning application, in order to be seen to support it - which is what the terms of the AfL intended - Peel might well have taken 15 days to consider the final documentation rather than agreeing to the application being submitted in Romal's name. It is impossible to predict what the outcome of that consideration might have been. But as it was, Mr Malouf agreed to proceed in Romal's sole name, and Peel agreed to its doing so. Romal thereby lost the benefit that Mr Grover recognised, in an email to Messrs Jones, Lawless and Pollitt dated 15 November 2018, was intended to flow from a joint names application:

> "This will assist with the status of the application, and give Peter Jones [the case officer for Central Docks applications] more comfort with C02 being a standalone planning application."

Mr Jones (of Peel) replied the following day:

> "We had a meeting with Peter Jones earlier who had reservations about C02 – do we want to be named on this application with this in mind?"

150. On 28 November 2018, Peel asked Arup to confirm that nothing in Romal's application would cause issues for the LWOPP or Peel's relationship with the Council or its statutory consultees. This shows that Peel knew that the planning application was about to come forward for its approval and that Peel was particularly concerned to maintain its good relationship with the Council. No reply came from Arup before, on 5 December 2018, Mr Grover (wearing his Romal hat) emailed to tell Peel that Romal intended imminently to make its planning application, and he stated that the application would not prejudice the LWOPP. Peel thereupon repeated its request of Arup.

151. Peel's response (from Mr Pollitt) was that no agreement had been given to the application being submitted, and that, to his knowledge, a full set of information had not been shared with Peel for approval. This indicated that Mr Pollitt understood that the parties were operating under the terms of the AfL. Mr Grover's reply implies that Romal was unaware of the term of the AfL requiring it to submit a planning application to Peel for its approval, and stressed that Romal had been working with Peel's consultants throughout. Peel's internal emails (including Mr Grover and Mr Ford) state in clear terms that Romal is to be told not to submit a planning application without Peel's approval. It is clear that Peel knew at that time that it had power to refuse its approval under the AfL. In a later

email to Mr Grover, Mr Pollitt said (incorrectly) that Mr Malouf was aware of the terms of the AfL in this regard, thereby again signifying and communicating to Romal's consultant that the application was being dealt with under the terms of the AfL.

152. Peel's initial insistence on a formal approval, communicated to Romal by Mr Grover, caused surprise and irritation to Mr Rowlands, on the basis that Peel had been involved in the process of working up the design throughout. The strength of Mr Rowlands' reaction, including an expletive directed at Mr Pollitt, strongly suggests that Romal had shared all the information about the scheme with Peel as it had developed, as I find that it had.

153. By the evening of the same day, Mr Pollitt appeared to be indicating that Peel would not hold up submission of the application. He suggested to Mr Grover that Romal could submit provided that Arup confirmed there was no prejudice to the LWOPP, on the basis that Peel "is not agreed to sign off – but happy for it to go in – subject to being able to raise comments once submitted".

154. It is likely that this position was facilitated by Mr Grover, who had two hats to wear. Mr Malouf confirmed his understanding to Mr Ford, copied to Mr Grover:

> "Peel aren't looking to hold up. They want link [to submission documents]. Paul will fire off cover letter confirming Arup's acceptance of planning submission in line with masterplan etc and that Peel will have rights to reserve approval."

155. Arup (Mr Grover) provided the necessary confirmation and link to the submission documents early on 6 December 2018. The covering email said:

> "… we are seeking your approval for the C02 planning application to be submitted as soon as possible. We acknowledge that approval to submit would not necessarily mean approval of the proposal from a Peel perspective. We expect Peel to reserve the right to provide formal/informal commentary on the planning application post validation."

What exactly Mr Grover meant by "formal/informal commentary" is unclear and was not explained.

156. News that Mr Hall of Planit had raised concerns about the design (which he did promptly, in advice to Peel) reached Mr Malouf, who asked Mr Swift to share with him and his team anything that he felt was outstanding. Mr Swift (who at all times was acting on behalf of Peel, not Romal) replied explaining that he had commented on the impact of Romal's scheme on the quantum caps in Central Docks (for residential space) and the consented parameters (a reference to the Parameter Plans in the LWOPP), but that there was nothing new. He added: "Rest easy – your application can go in tomorrow".

157. In response to Mr Grover's email chasing (on behalf of Romal) Peel's approval, on 7 December 2018, Mr Pollitt, for Peel, expressed concern about the extent of dock infilling and the interface with the IoMT, and then stated:

> "… Peel's preferred approach is for all matters to be resolved prior to the submission of standalone planning applications within the Liverpool Waters

> estate. However, we appreciate that your client is under considerable time pressure to submit the planning application. On the basis that there will still be opportunity to seek to resolve outstanding issues during the 16 week determination, Peel are agreed that the proposed residential planning application can be submitted. However, please note that this is not Peel's approval of the application and as issues still need resolution so as not prejudice the extant Liverpool Waters outline planning consent, we reserve the right to provide informal/formal commentary on the planning application to Liverpool City Council post validation. As the proposed residential application will be submitted without resolution on these key issues, the decision to submit remains entirely at your own risk, and any costs incurred from changes to your proposal (as well as timings/delays) to address key issues post validation will sit with your client Romal ….
>
> The Liverpool Waters case officer has made it clear to us that unless the key issues outlined above are resolved, it is unlikely that he will be in a position where he can positively determine your proposal.
>
> Given time pressures (only had two days to review documents, even though the contract allows for two weeks, to review all documentation), we reserve the right for the Liverpool Waters design team to submit their comments on the project after the application is submitted."

158. What Mr Pollitt meant by this was not explained, not least because Mr Pollitt, though a central figure in relation to a number of matters in dispute in this case, was not called as a witness. No explanation for that was given on behalf of Peel. What the email undoubtedly amounts to, in substance, is agreement to the submission of the planning application without Peel's formal prior approval pursuant to the AfL. What it is not is a refusal of approval pursuant to the AfL, as Peel belatedly argued. It records that Peel knew that Mr Peter Jones's main concerns with the design were the extent of the infilling of the historic dock and the interface with IoMT. The infill and interface would provide the waterfront connectivity from Princes Dock, nearest Pier Head to the south, and the northern half of the Central Docks area, which was proposed to be developed at a later date.

159. Beyond those points, Mr Pollitt appeared to be seeking to preserve Peel's right to raise further points during the statutory determination period, either with Romal or with the Council - i.e. Romal was not to be able to say that it did not have to address any such points because Peel had consented to the submission of the planning application. Further, if points were raised and changes were required, the cost of making those changes, and the consequences of any associated delay, would sit with Romal. Peel, however, advances a completely different interpretation from that natural reading of the words of Mr Pollitt's email, namely that approval was being refused by Peel, and that it was made plain that if Romal was to proceed with its application, it would be doing so outside the envelope of the AfL. I will give my reasons for rejecting Peel's argument after concluding my finding of the relevant facts.

160. Following this indication from Peel that Romal could submit, Mr Grover replied:

> "On behalf of [Romal], thank you to you and your team in releasing the application for submission.

> We note that release for submission is not the same as Peel signing off on the scheme. We also note your right to continue to feed back on the application post validation."

161. Romal then made its application for planning permission later on 7 December 2018 and paid the application fee, clearly in reliance on Peel's indication that it could do so. The approval of Peel was only needed because of the terms of the AfL, not otherwise. It is clear, therefore, that both Peel and Romal considered that they were giving and receiving permission respectively under the AfL, albeit on a basis different from the express terms of the AfL. I find that Peel and Romal neither expressly agreed, nor did either of them – by their officers, employees or agents – understand or believe, that they were respectively authorising and submitting a planning application outside the envelope of the AfL, i.e. one that, if granted, would not entitle Romal to a lease nor Peel to the further £2,475,000 of the agreed consideration. I will consider further below whether, as Peel submits, that is nevertheless the result of what they did.

162. I find that both parties understood that the planning application was submitted under the AfL, and that it was therefore a "Planning Application" as defined in it, subject only to the right reserved by Peel (which was not exercised) to come back during the statutory period for determination and require changes, if reasonable to do so. Peel agreed the submission but (in its own interest) on a slightly different basis from that specified in the AfL. Its agreement was communicated to Romal, through Mr Grover, which Romal acquiesced in and acted upon. Peel at that stage decided not to take any point on the absence of written approval of the initial design, or changes to it, and not to take the 15 working days that it was entitled to take before deciding whether to approve the submission.

163. Following submission and validation of the planning application (which occurred swiftly), there were few further exchanges between Peel and Romal. It was understood that the Council would first publish and consult on the application, which process would take many weeks. The statutory period for determination of the application ran until late March 2019. During this period, some contact took place between Peel and Romal relating to the application, but there was no issue raised by Peel with Romal about the design or content.

164. Mr Malouf was invited by Peel to attend the Central Docks Co-ordination Meetings (CDCMs). In response to Romal's request for regular meetings, Mr Jones said that the right forum for such meetings was the CDCMs. As previously requested by Mr Pollitt, Romal attended a meeting with Peel and the IoMT owners to discuss the interface between the developments on plots C-02 and C-01. On 6 February 2019, both Peel and Romal attended an event to discuss the application with residents at West Waterloo Dock, who were concerned about the impact. On 12 February 2019, Mr Jones (of Peel) told Mr Rowlands by email that "we are all up to speed with C02".

165. In March 2019, Peel again featured the finger block designs of Romal at MIPIM. Mr Lawless said that Peel stood on the same platform as the Council, advocating Romal's proposal. There was no indication from Peel to Romal that Peel was not supporting the 646 Scheme. Nor was there any suggestion that Romal was now proceeding at risk of obtaining a valuable planning permission but with no right to leases of the Property in those circumstances, i.e. that Romal had been proceeding at significant cost to itself for the potential benefit of Peel, as landowner. That would have been the effect of the conduct

of Romal and Peel from December 2018 to late 2020 if Peel is correct that the parties were no longer proceeding within the envelope of the AfL. But Mr Lawless confirmed in his evidence that Peel understood throughout that if a planning permission was granted, Romal would be entitled to the two leases and Peel would be entitled to the agreed consideration.

166. There was no real engagement from Mr Peter Jones or the City Council about the planning application until June 2019, so nothing for Peel and Romal to discuss in that regard. The extant application was noted at regular meetings of the LW Strategic Group and the CDCM but its content was not further discussed. Peel was in fact preoccupied in pursuing its own interests, including NMA2, which was submitted on 26 April 2019, and then in preparing and submitting for approval the CDNMP, pursuant to the terms of condition 11 of the LWOPP.

167. By June 2019, Romal was receiving feedback from the City Council. This is recorded in Arup's June 2019 monthly Consultant Executive Summary, which noted that conversations had started between the City Council and Romal about the future of C-02, and that the City Council had requested changes to the scheme in order to make sure that they were comfortable in supporting it. Greater connectivity was required in order to justify the dock infill. Ollier Smurthwaite (Mr Siddique's firm) were going to consider various design proposals to present to the City Council at the next meeting with them. Peel was recorded as having attended a meeting with Romal and the consultants to discuss potential redesign.

168. Minutes of a meeting of the LW Strategic Committee on 20 June 2019 record that the City Council was likely to reject the 646 Scheme, on the basis of infill and density, and that Romal was considering a redesign, taking the top floor off all blocks and reducing apartment numbers by 50-100. The minutes also record: "Peel needs C02 to progress as it triggers land payments on consent". These were Peel's minutes and Ian Ford of Arup was one of the attendees and who therefore probably received the minutes. I consider it likely that the redesigns had been requested by the City Council at a meeting shortly before 20 June 2019, and that the meeting with the City Council at which the redesigns were discussed was on 6 August 2019.

169. The purpose of these redesigns, from Romal's point of view, was to seek to demonstrate viability of (only) the 646 Scheme. The alternative designs (all lower and smaller) were sent to the City Council on 5 August 2019 and discussed at a meeting on the following day, at which Peter Jones and Sam Campbell of the City Council and Ian Ford and Paul Grover of Arup were present, with Romal's representatives. At that meeting, Sam Campbell, the head of the planning department at the City Council, indicated a preference for the first of various options for a redesigned scheme ("Option 1"). Mr Malouf said that she said that she would support it, if the application was amended, but that is not agreed, and I consider it probable that that was not said. The summary prepared by Ian Ford of the meeting states that she said that she would provide further comments to assist with progressing the application, but that the response to it would be dependent on the outcome of the CDNMP application of Peel that was going to be determined first.

170. Following that meeting, Mr Grover asked for a meeting with Peel to discuss the design of the revised scheme and sent it the designs for Option 1. The meeting was for the purpose of getting Peel's views on the (prototype for the) 538 Scheme before Romal's consultants were instructed to work up the details. That meeting took place on 14 August

2019. Following that meeting, Mr Grover emailed Sam Campbell and Peter Jones, copied to Peel, stating:

> "Subject to receiving a formal response from LCC that positively echoes both our conversation last week and our subsequent email exchanges, Peel have giving their blessing to proceed with the working up of Option 1 for C02 in more detail."

The evidence from Mr Malouf, Mr Grover and Mr Ford, which was not challenged, was that Peel agreed that Romal should work up Option 1 and pursue it with the Council. Mr Grover said that he then wrote to the City Council to confirm that Peel had signed off the changes that Ms Campbell had chosen (i.e. Option 1). I find that that is indeed what happened on 14 August 2019.

171. However, the City Council was unwilling to move forward with the 538 Scheme until the CDNMP had been determined, as it regarded that as providing the baseline for what was the optimum viable use of parcel 3b. Romal was still unaware at this stage, until after NMA2 had been consented, that this non-material amendment and the CDNMP would present the City Council with further reasons to object to the 538 Scheme. Consent to NMA2 was granted on 23 August 2019. Mr Malouf was told about the implications of the application to approve the CDNMP by Mr Grover at the end of that month, and there were then heated exchanges between Mr Malouf, Mr Lawless and Mr Swift as a result. Mr Swift was sent out by Peel to meet Mr Malouf to try to smooth things over.

172. On 6 October 2019, Mr Pollitt asked Mr Malouf when Peel would be receiving all documentation for the 538 Scheme for approval. Once again, Peel was therefore communicating to Romal that it was proceeding under the AfL – Peel had no other right to require documents to approve an amendment to a planning application. The response was that everyone was working hard and that the documents would be provided by around 25 October and that Romal would keep Peel updated.

173. Mr Malouf said that Peel representatives attended a design review meeting with Romal on 8 November 2019, at which a pack of documents was provided to Peel about the 538 Scheme for their approval, prior to that scheme being submitted to the Council (by which Mr Malouf must have meant, prior to the amendment to the planning application being submitted). Peel neither raised any objection to the design, nor did it give its approval in writing. A Liverpool Waters Executive Report produced by Peel dated November 2019 and emailed on 12 November 2019 with the agenda for a Liverpool Waters Executive meeting on 14 November 2019 records that revised designs were to be submitted to the City Council by the end of the month and that designs had been discussed and agreed with Peel. The minutes of the meeting state that "On consent of CO2 plot Peel are due to receive a purchase receipt". Mr Malouf confirmed that Romal proceeded on the basis of that understanding. Mr Lawless confirmed that this was Peel's understanding at the time.

174. On 14 November 2019, Mr Pollitt confirmed to Mr Malouf by email that Peel was happy for Romal to submit the 538 Scheme as a revision to the first planning application:

> "I would confirm that we are happy for Romal to submit the above planning application for residential development within plot CO2, within central docks. This is on the strict understanding that people have still to be provided with the full package of information that forms part of the planning

> application and that we reserve the right to raise any issues on these submitted documents. Until we have reviewed all documentation, we reserve the right to hold back our approval of the scheme."

That was again only consistent with Romal having the obligation to obtain Peel's consent under the AfL and Peel having the right to give or refuse approval of it. Once again, Peel tried to hedge its bets by reserving rights, which was neither a refusal of consent nor final approval in writing.

175. On 18 November 2019, Romal submitted the revised planning application and sent a full set of documents to Peel. Peel asked Romal to respond to comments made on the application by two of its consultants, including Planit, and Romal did so on 29 November 2019. There was no further comment on it from Peel, much less an objection. Mr Lawless confirmed in evidence that he understood that if planning permission was given for the 538 Scheme, that would be the trigger for the grant of the leases and the payment by Romal to Peel of the premium. It is clear that Romal had the same understanding as a result of the approval to amend that Peel had given.

176. Meantime, the CDNMP had been approved by the City Council on 12 November 2019, unknown to Romal. Although it was not appreciated by Romal at the time, this was the end of any realistic prospect of planning permission for the 538 Scheme, or as Mr Ford called it, a "show stopper", for reasons that I will explain later. But Peel did not point out to Romal, either before it applied for approval of the CDNMP or when Romal was preparing to submit the amended planning application, or when it did submit it, that this would be the consequence of the approval of the CDNMP.

177. Shortly after submission, Peter Jones indicated that the 538 Scheme as it stood did not have officer support. He pointed out six concerns that the officers had, including conflict with the CDNMP, and that "the surface car park occupies a substantial portion of the Cultural Square". That was because the CDNMP had formally moved Cultural Square onto a part of the Property. Correspondence between the City Council and Peel ensued, in which Peel gave rather less than fulsome support for the amended scheme, saying that it was "generally in accordance with the LWOPP". The City Council's unwillingness to support the 538 Scheme was restated and reinforced at a meeting between it, Peel and Romal on 13 February 2020, where lack of justification for infilling the dock was again relied upon by Mr Jones, but also height and massing. Mr Jones said that he could not support the application until the issue with the Cultural Square (which the CDNMP had created) was resolved.

178. Peel and Romal then attempted to find a way round the consequences of the CDNMP by preparing and making a third non-material amendment application ("NMA3"), which would alter the relevant parameters in the LWOPP to align with the 538 Scheme (including moving Cultural Square off the Property). But in the light of advice received from Counsel, the City Council decided that it could not override the positioning of Cultural Square partly on the Property and that it was unwilling (rather than unable) to change the height parameter on the northern part of parcel 3a to accommodate the 538 Scheme. A more modest version of NMA3 was eventually approved by the City Council in September 2020, which included moving plot C-02 58m further south, but with the height parameter on that land remaining at 12m. Throughout this process, it was mutually clear to Romal and Peel that each was working together to enable Romal to obtain planning permission which would give rise to the leases and premium under the AfL. I

find that Romal acted on the faith of that mutual understanding, believing that it was continuing to spend money on the process to obtain what the AfL provided.

179. At a meeting with the City Council on 5 November 2020, Mr Jones told Romal that it could not support the amended application, because of the Cultural Square and the height issues, and that if Romal applied instead for a scheme that respected the 12m height parameter, the City Council would look again at the Cultural Square question.

180. As a result of the NMA3 decision and this indication, Romal had the choice of appealing the non-determination by the City Council of the amended planning application or seeking to change the proposal yet again – which it eventually did by submitting the second planning application in February 2021. This reduced the number of surface car parking spaces so that the development was pulled back from parcel 3c, leaving a landscape bund to interface with Cultural Square.

181. Against the background of those principal facts, I turn to consider the group of issues identified in [118] above.

Issue 1: Did Romal's rights pursuant to the AfL ever arise?

182. Peel's case is that Romal did not satisfy the conditions in the AfL that had to be satisfied. They were described by Ms Holland as promissory conditions precedent, satisfaction of which was required before further obligations under the contract could arise. Peel maintains that the conditions that had to be satisfied were (with references to clauses of the AfL added):

    i) Romal had to send initial designs to Peel for approval (clause 2.6);

    ii) Romal had to send subsequent variations of the initial design to Peel for approval, unless they were "Minor Variations" (clause 2.7);

    iii) If the initial designs and any variations were approved, Romal had to send the planning application to Peel for approval (clause 3.1);

    iv) The planning application must:

        a) be made in joint names (clause 3.1.1),

        b) be made in accordance with the principles contained in the LWOPP to the extent that they are appropriate in relation to the Property and the Development, unless otherwise agreed (clause 3.1.2), and

        c) be in accordance with the approved initial design (clause 3.1.3);

    v) Romal had to allow Peel 15 working days to consider the proposed application before submitting it (clause 3.2);

    vi) Romal had to provide a revised application to Peel for approval if Peel did not approve the initial application (clause 3.3);

    vii) Romal had to have Peel's approval before applying to the Council for planning permission (clause 3.4);

viii) Romal had to revise any application if it appeared necessary in order to obtain a Satisfactory Planning Permission (clause 3.5).

183. Peel contends that: Romal failed to obtain written approval for the original five-finger scheme or for the 646 Scheme; the change to the 646 Scheme included an increase in height from 10 storeys to 14 storeys and a reorientation of one of the blocks, which meant that it was not a Minor Variation, as defined, and that no written approval exists for the 646 Scheme. I have found that the 646 Scheme details were sent to Peel and its consultants and were informally approved by Mr Lawless in his 7 November 2018 email, after the public presentation supported by Peel. After and in reliance on that approval, Romal proceeded to prepare the documents for the planning application. Since under clause 1.17 of the AfL any approval has to be in writing, the approval of the 646 Scheme was not obtained in strict conformity with clauses 2.6 and 3.1, but nevertheless the final designs were approved by Peel.

184. Failure to obtain written approval of the varied initial design is not one on which Peel can rely. That is for various reasons, the first of which is that it was agreed in clauses 2.6 and 2.7 that Peel's approval of the initial designs and any variation of them was not to be unreasonably withheld or delayed. If the designs were informally agreed by Peel but "approval" required written approval, then, necessarily, Peel has unreasonably withheld giving approval, and so there is no requirement for Romal to obtain written approval: Treloar v Bigge (1874) LR 9 Ex 151 ("*Treloar v Bigge*"); Sear v House Property and Investment Society (1880) 16 Ch D 387. Peel cannot sensibly argue that the varied designs were not "sent" for approval within the meaning of clause 2.7, as it is obvious in context that that was why the designs were indeed provided to Peel.

185. In any event, by proceeding to deal with the planning application and give permission for Romal to submit the application, Peel clearly waived the prior requirement for prior written approval. Unlike Romal, Peel was fully aware of the terms of the AfL and of its rights. If Peel is otherwise right and the existence of prior written approval of the initial design was a precondition for the right of Romal to seek Peel's approval of a proposed planning application, the time for Peel to make that objection was when it was asked for approval of the planning application. Its failure to do so signified to Romal that it was not taking that point, on which Romal relied by acting on Peel's permission to proceed and paying the very substantial fee for the planning application.

186. Had Peel instead said that it was not obliged to approve the planning application because Romal had not yet obtained its written approval of the initial designs, I consider that Mr Malouf would have asked Mr Lawless what on earth he meant, and whether Peel disapproved of the design. If Peel had persisted in pointing out the absence of written approval, Romal would have asked for it, which Peel could not refuse, unless it disapproved the design on reasonable and specific grounds (which it did not, despite not being keen on it). All of this would have emerged prior to submission of the planning application if Peel had not agreed to Romal submitting its application and had said instead that there was no approval of the initial design within the meaning of the AfL.

187. It would be wholly unjust if, having encouraged Romal to apply for and pursue the grant of planning permission over more than 2 years, Peel could turn round and say that the whole process was invalid, and that, although it did not realise it at the time, the AfL fell away because it did not give its approval of the 646 Scheme design in writing. One might have expected that a respectable and long-established group of companies like the Peel

group would not take and pursue such an unattractive and unmeritorious point at trial, but it did.

188. Peel's next contention is that the planning application presented to Peel for its approval was not "in accordance with the principles contained in the [LWOPP]" for the purpose of clause 3.1.2, on account of the designs significantly exceeding the building height parameters. This point is equally unmeritorious. It is an important part of the background to the AfL that both parties are taken to have known that the planning application that Peel was to approve and support would be a standalone application for a development that exceeded the parameters of the LWOPP. Buildings containing at least 600 apartments could not have been built on plot C-02 in compliance with all the parameters in the LWOPP. It was also understood from the outset that Romal's planning application would be for a standalone planning permission, for a development of at least 600 units, which would require infilling of a substantial area of West Waterloo Dock, and would not (and could not at that time) be an application for reserved matters approval pursuant to the LWOPP. That means that the terms of the LWOPP were not limiting, but were only a material planning consideration.

189. Further, the requirement for the application to be in accordance with the principles of the LWOPP is qualified in two important respects. First, the requirement to accord with the LWOPP principles is only "to the extent that they are appropriate in relation to the Property and the Development". The Development is defined as infilling the docks and building five residential buildings containing at least 600 apartments. The construction of 5 buildings containing 600 apartments was impossible if the development had to comply with the plot and height parameters set for parcel 3b on the LWOPP Parameter Plans. There would necessarily be a departure from those parameters, if Romal was to comply with the requirements of the AfL. So if "the principles contained in the [LWOPP]" did extend to everything in the Parameter Plans, the plot and height parameters were not appropriate for the Development, within the meaning of clause 3.1.2. Whatever views Mr Hall or Mr Swift of Planit may have had about what development was appropriate, they were not guided by the terms of the AfL that Peel had agreed.

190. Second, the requirement to accord with the principles in the LWOPP is expressed to be subject to reasonable agreement otherwise between Peel and Romal.

191. The words of clause 3.1.2 are not to be understood as being synonymous with an application that fully complies with all the terms of the LWOPP. In my view, what they mean is that the application had to be one that would not derogate from the main principles of the LWOPP and would not prejudice the status of that outline permission, e.g. by a development that would make it impossible to develop to a material degree other consented parts of Liverpool Waters. That is reflected by Peel's right in the AfL to give or refuse approval to the planning application, and its concern in December 2018 to have its planning consultants certify that Romal's application would not prejudice the status of the LWOPP.

192. Even if that is wrong, and clause 3.1.2 does mean that in principle the application had fully to comply with all the LWOPP parameters, the plot and height parameters were not appropriate in relation to the Property and the Development, for the reason that I have given.

193. In any event, by approving the revised initial design of the 646 Scheme (or failing to disapprove it), Peel is to be taken as having agreed otherwise in relation to divergence from the plot and height parameters, so far as this planning application was concerned.

194. Peel's next point was that Romal failed to obtain its consent to the planning application for the 646 Scheme. It has never been pleaded that Peel in fact refused its consent to that application, but Peel nevertheless asserted, in its closing submissions, that it did. It is an untenable position, for reasons that I have given. Peel consented to the planning application being submitted, but on terms reserving its right to raise objections during the statutory determination period (which it then did not in fact do).

195. In so far as the complaint is one of failure to obtain an approval in writing, Peel took another bad point in its closing submissions to the effect that Romal had not asked for approval under the AfL, despite having sent the draft planning application and a link to the full suite of documents to Peel on 6 December 2018 asking for approval to submit the application. The basis for this argument is that Mr Grover accepted, in his email of that date, that (in light of previous emails passing between them) it was understood that Peel's consent to submit would not be taken as final approval of the content of the application (i.e. Romal was acquiescing in or agreed Peel's statement that it was able to reserve the right to require changes at a later time). Although, to that extent, the parties understood that Peel was not required within 15 working days to state whether it approved or disapproved of the proposed application, that did not mean that Romal was not submitting the proposed application to Peel for approval under the AfL. As I have found, both parties clearly understood that they were working pursuant to the terms of the AfL, not outside it.

196. The principal argument of Peel on this first issue is that no approval of the planning application was given: Peel consented to its being submitted but did not approve the application. Peel did indeed make it clear that its consent to the application being submitted was not its formal approval, on the basis that outstanding issues (as it saw it) would be resolved during the 16-week determination period. The right was reserved to submit comments on the 646 Scheme after submission of the application.

197. I agree with Peel that it cannot be taken to have approved the planning application prior to its submission, but on the other hand it did consent to the submission. Peel cannot complain that Romal made its application or say that it was made outside the scheme of the AfL. It cannot therefore complain that Romal made its application without first having obtained Peel's formal approval, as it now seeks to do. Peel however contends that, absent formal approval, the application that was made was not "a Planning Application" within the meaning of the AfL, and so anything that happened with the application, in relation to the 646 Scheme, and, later, the 538 Scheme, was outside the envelope of the AfL entirely.

198. The argument deployed by Peel, namely that Mr Pollitt's indication in his email dated 7 December 2018 that the decision to submit "remains entirely at your own risk" meant that it was not an application under the AfL at all, is unconvincing. The risk that Romal was being warned that it was taking was not that it could spend months or years trying to obtain a Satisfactory Planning Permission but would have no right to leases if it did so, but only that if Peel reasonably required changes to be made to the content of the application, those changes would have to be made at Romal's expense (and at the expense of likely delay in the process, in consequence), as the words in the email immediately

following "at your own risk" make explicitly clear. Further, if the application was not a "Planning Application" within the meaning of the AfL, the AfL expired on 1 January 2019, as no Planning Application had by then been made. But Peel did not take that position at any stage (as it might have done, if its aim was to "time out" Romal, having pocketed the deposit). That was because it considered that the application was a Planning Application, which could give rise to a further £2,475,000 receipt in due course. It had nevertheless reserved its right to raise reasonable objections to the content at a later stage.

199. As for the failure to submit the Planning Application in joint names, unless there was agreement to submit this application in Romal's name alone, by way of amendment to the AfL, or Romal had waived its right, Peel was in serious breach of contract for failing to join in the application as applicant, as the AfL required it to do. Peel's case that it was entitled not to join in the application because it was not made in accordance with clause 3.1.2 is wrong, for the reasons that I have given. I agree with Romal's submission that this was not a case of Romal waiving its right to insist on joint names, because Mr Malouf and Mr Rowlands were both unaware of the term of the AfL that entitled Romal to do so. Waiver requires knowledge of the right to choose.

200. The truth was that Peel only wanted to subscribe to applications that would be seen by the City Council's planning officers as being in conformity with the conditions and parameters of the LWOPP. But, fundamentally, the AfL did not entitle Peel to take that position: it requires Peel to join in an application for a development on the Property that included at least 600 apartments. I have no doubt that the decision not to join in Romal's planning application was premeditated: it was a decision made in principle well before Romal sent the final planning application to Peel for its approval, and had been mentioned by Mr Lawless at a meeting in September 2018 and was intimated by Mr Grover (acting for Peel) in his email to Mr Malouf and Mr Rowlands dated 21 November 2018.

201. The right analysis in relation to the December 2018 application not being in joint names seems to me to be that the parties agreed that it should not be, and thereby *ad hoc* varied the AfL to that extent in relation to that application only. Peel effectively offered that, by Mr Pollitt's email dated 7 December 2018 (cited in [157] above), though it was not written in terms as an offer to vary. It was nevertheless in substance an offer to Romal to proceed in a way that was at variance with the terms agreed. The concerns that Mr Pollitt indicated that Peel had were the extent of dock infill and the design of the interface with the IoMT. Romal accepted the offer to vary by Mr Grover's email in reply on its behalf, also dated 7 December 2018, and by its conduct in making the application in its sole name later that day. The fact that neither of them may have intended to vary the AfL does not matter: objectively they intended to affect their rights, by giving rise to an agreed application under the AfL, and consideration moved from Peel in that it gave up its right to insist on 15 working days in which to consider whether to raise any objection prior to submission.

202. Alternatively, by Mr Pollitt's email, Peel represented to Romal that it was content with the arrangement that it proposed, and thereby waived its right to require the application to be in joint names (it positively did not want it to be). This was not a proposal that an application should be made which fell outside the AfL altogether. Further, Romal relied on the representation by making the application in its own name, which in reality was significantly to its prejudice, as events proved to be the case. Peel is accordingly estopped from asserting that the application was not the Planning Application because it was not made in joint names.

203. The remaining question is whether, at any stage, the content of the planning application that was made was approved by Peel in writing. It is not Romal's case that it was, nor is there any evidence of final written approval. By consenting to submission of the application on the terms agreed, in all the circumstances Peel must be taken to have waived its right to insist that written approval must be given before a Planning Application could be made. Peel did not stipulate for the need for approval at any later stage: only for the right to raise objections later. There was therefore no requirement for any later approval in writing.

204. It was certainly not agreed or understood that what was being permitted was the making of a planning application outside the AfL. On the basis of the evidence given by Mr Lawless and Mr Malouf, Romal and Peel each proceeded on the understanding that, absent any later objection raised by Peel (there was none), the application was the Planning Application that the AfL required. There is no doubt that this is what Peel believed – it believed that if and when granted, the planning permission would lead to a capital receipt under the terms of the AfL. Mr Lawless admitted that that was the case. There is equally no doubt that Romal considered that that was the position, and that it would be entitled to two leases once a Satisfactory Planning Permission was granted pursuant to its application. That was confirmed by Mr Malouf and Mr Rowlands, and it is nonsensical to suggest that they were knowingly proceeding outside the AfL.

205. Romal alternatively contends that Peel's obligation was to approve or disapprove (with reasons) in writing within 15 working days, and that it cannot rely on the non-fulfilment of a precondition to performance of the contract that is caused by its own breach: King Crude Carriers SA v Ridgebury November LLC [2024] EWCA Civ 719; [2025] KB 311 ("*King Crude*"). Peel was not entitled to do nothing in response to being provided with the draft application for planning permission: it had either to approve or refuse its approval, in which case Romal could seek to amend its application. Peel therefore cannot be heard to say that it has not given its approval, as it was validly asked for it and did not refuse it.

206. I was initially doubtful whether that was the right way to analyse the position, given that the planning application was made before time for approval had elapsed. Having considered the judgment of Popplewell LJ in *King Crude*, especially at [80] and [81], I accept Romal's submission as to the position if there was no *ad hoc* variation of the AfL. It is closely related to the principle arising from landlord and tenant cases such as *Treloar v Bigge*, and is an example of a more general principle, based on the presumed contractual intention of the parties, that a party should not be able to rely on something not having happened when they were supposed to do it (see Mackay v Dick (1881) 6 App Cas 251). Peel therefore cannot be heard to say that Romal has proceeded without agreement (because Peel agreed to the application being submitted on 7 December 2018) or that it was submitted without written approval (because Peel was required to give final approval, or refuse it with reasons, within a short period of time, and it has done neither). Even if the emails exchanged between Mr Pollitt and Mr Grover amounted to an agreement that Peel would have an extended period in which to give or refuse that consent in writing, no approval in writing or objection was received during that 16-week period.[i]

207. Accordingly, Romal's rights under clause 5 of the AfL did arise, following the submission of the Planning Application on 7 December 2018. If the Planning Application had resulted in the grant of a Satisfactory Planning Permission, as defined, Romal would

have been entitled to the grant of the leases, upon payment of the Premium on the Completion Date.

208. If that is wrong, and the planning application when made was not in compliance with the terms of the AfL and Peel did not waive its right to insist on written approval prior to submission, then in my judgment Peel is estopped by convention from relying on the absence of written approval for the reasons I give under Issue 3 below.

Issue 2: Did Peel owe any obligations to Romal under the AfL in relation to the 538 Scheme?

209. Peel contends that no application was made by Romal for approval of the amended design or for approval of the amended planning application, and no approval in writing was given by Peel prior to the amendment of the planning application in November 2019. Further, Peel contends that even if the application for the 646 Scheme was a Planning Application, no obligations under the AfL arose in relation to the 538 Scheme, because the definition of "Development" required at least 600 units, and a Satisfactory Planning Permission required the grant of written detailed Planning Permission for "the Development".

210. As a matter of interpretation of the AfL, Peel is correct that Romal was permitted to amend the Planning Application, with Peel's approval not to be unreasonably withheld, if it was necessary to obtain a Satisfactory Planning Permission, and that a 538 unit scheme does not fall within the definition of "the Development" and so is not within the definition of "Planning Permission". However, it is obviously unattractive for Peel to maintain this position when it was happy to follow Mr Swift's advice and see the application scaled back by the City Council.

211. It was known by Peel and Romal that the Development, as defined in the AfL, would exceed the parameters in the LWOPP (I have previously explained why). One realistic and foreseeable reaction to the Planning Application was therefore a disinclination on the part of the City Council to recommend the grant of planning permission unless the design was scaled back. This would inevitably mean a significant reduction in the number of apartments, very likely to below 600. Only a much smaller number of apartments could have been accommodated on plot C-02 as it stood under the LWOPP within the approved parameters. Mr Lawless said that Romal's application for the 646 Scheme was greedy but "would provide the opportunity to later reduce the number of units if that found greater favour with the Planning Authority". Peel therefore understood that it was agreeing to the planning application being submitted on the basis that it might well be scaled back later

212. Romal's case is that, in that light, if it had to change the design and reduce the number of units in order to have a realistic chance of obtaining planning permission, the varied application would remain the Planning Application within the meaning and for the purposes of the AfL, at least if Peel agreed it, which it did (or, by failing to raise any objection after submission, must be taken to have done).

213. That conclusion seems to me to be right in principle, but it does not have to depend on the operation of clause 3.5 of the AfL. The parties are able in any event to agree *ad hoc*

to amend the Planning Application, once it has been made, on the basis that, if granted (and subject to any Landlord or Tenant Unacceptable Conditions) the resulting planning permission will be a Satisfactory Planning Permission. The fact that the application is varied, by consent, does not mean that it ceases to be a Planning Application, even if, as varied, it is an application for something that is not within the definition of "the Development". In my view, the parties did agree that the application could be amended to seek permission for the 538 Scheme on the basis that it remained an application falling within the AfL. If that is wrong then, in any event, Peel is estopped by convention from asserting that the application as amended was not a Planning Application, or that a permission, if granted, could not be a Satisfactory Planning Permission because it was for fewer than 600 residential units. I explain my reasons under Issue 3 below.

214. On 14 November 2019, following the Executive meeting, Mr Pollitt emailed Mr Malouf with permission to proceed, as set out in [174] above. The full package of documents was provided to Peel, and no objection was raised. Peel's approval under clause 3.5, if it applied, was not to be unreasonably delayed or withheld, so if the point relied on is a failure to confirm unqualified approval in writing, Peel cannot rely on that, having agreed to Romal making the application without obtaining written approval in advance and then having failed to give approval in writing.

215. What Peel did was exactly what it had done with the original application. It permitted Romal to make the amendment application on the basis that Peel reserved the right to raise any issues upon review of all the documents, and until then it held back written approval. However, the AfL did not allow Peel to hold back refusal or approval indefinitely.

216. In my judgment, the same conclusions follow in relation to the amended Planning Application as from the approval of the original Planning Application with rights reserved to Peel.

217. Ms Holland submitted that Romal was now proceeding outside the AfL on the basis of two "caveats" imposed by Peel: one on 7 December 2018, which she submitted was never retracted, and the second on 14 November 2019, and accordingly Romal proceeded at its own risk (i.e. extra-contractually). For the reasons that I have given, the "caveats" were not capable of having the effect that Ms Holland wishes them to have had: they did not entitle Peel to do anything other than raise, within an appropriate timescale, any objections to the planning applications that it had. It did not do so.

Issue 3: Is Peel estopped by convention or by representation, or by promissory estoppel, from contending that the first planning application was submitted, in both its original and amended form, other than pursuant to and under the provisions of the AfL?

218. While three different kinds of estoppel are invoked in the wording of the agreed issue, they all depend on the same essential principle, which is that a party (Peel) is not permitted to deny that which, by its conduct or statements, it has led the other party (Romal) to believe is the case, in reliance on which understanding that party (Romal) has acted to its detriment. Although both parties referred me to authority, the law is not in dispute. I bear in mind in particular the statement of the Supreme Court in Tinkler v HMRC [2021] UKSC 39; [2022] AC 886 on the requirements for an estoppel by

convention to arise, to which both parties rightly referred me, the helpful summary of the requirements for promissory estoppel given by Dias J in Emirates Shipping Line DMCEST v Gold Star Line Ltd [2023] EWHC 880 (Comm) at [54], and the equally helpful summary of the requirements for estoppel by representation given by Carr J in Spliethoff's Bevrachtingskantoor BV v Bank of China Ltd [2015] EWHC 999 (Comm); [2015] 1 CLC 651, at [156], [157].

219. The case advanced by Romal is that Peel is estopped from contending that the planning application, in its original form and as amended in November 2019, was not a "Planning Application" capable of giving rise to a Satisfactory Planning Permission within the meaning of the AfL. Romal contends that (1) Peel led it to believe that it was pursuing a planning permission with Peel's agreement, which, if granted in appropriate terms, would give rise to an entitlement to leases of the Property under the terms of the AfL in return for payment of the Premium, and (2) it relied on that belief in pursuing the application at considerable cost – which it would not have done if, at the end of the protracted process, any permission obtained would have benefited Peel alone.

220. Romal contends that: both parties shared the assumption that the planning application made in December 2018 was a Planning Application for the purposes of the AfL; that both treated it that way; and that the assumption "crossed the line" between them, i.e. (materially) Peel's conduct and statements communicated to Romal that it (Peel) treated the matter in that way (estoppel by convention). Alternatively, Romal characterises the position as reliance on an assurance that certain points as to validity under the AfL would not be taken (promissory estoppel), or reliance on a representation that the planning application would be treated as a Planning Application for the purposes of the AfL (estoppel by representation).

221. Whichever form of estoppel is taken, the question of whether equity will or will not permit Peel to go back on something that it has encouraged Romal to believe and act upon is fact sensitive. The important facts, as I find them, seem to me to be the following:

    i) Shortly before the planning application was made, Mr Lawless of Peel told Mr Grover (wearing his Romal hat) in an email dated 5 December 2018 that it was definitely not agreed that a planning application could be submitted by Romal without prior approval of Peel as landowner. He required this to be stressed by Mr Grover with Mr Malouf. Mr Pollitt followed up on the same date with an email to Mr Grover, confirming that that was what the AfL required, that Peel had control of the matter under the AfL, and Romal was required to get Peel's prior approval.

    ii) Mr Grover duly forwarded those observations to Mr Malouf and Mr Rowlands, provoking an abusive outburst from Mr Rowlands, who found it astonishing that Peel was insisting on formality under the AfL when it had been involved and informed throughout the process of preparing the application. Mr Grover then (on behalf of Romal) pressed Peel to give its approval to submission of the application.

    iii) Mr Pollitt's email of 7 December 2018 giving Romal permission to submit its application refers to the time pressure that Romal was under and the terms of the AfL, and it reserves rights to raise objections in future. The email is clearly asserting the rights that Peel has under the AfL, while giving Romal permission to proceed. "At your own risk", as stated in that email, self-evidently does not mean outside the AfL.

iv) Given these indications and Peel's agreement to the submission, subject to rights reserved, Romal was entitled to consider that Peel was treating the application as the Planning Application unless it heard otherwise from Peel during the 16 week statutory period. It heard nothing during that period, or later, to suggest that the application was not acceptable or was not the application that the AfL contemplated.

v) Peel attended the public presentation of the application to WWH residents on 6 February 2019.

vi) In March 2019, Peel went again to MIPIM and, according to Mr Lawless "we stood on the same podium as the Council, advocating Romal's proposal".

vii) In May 2019, Peel was invited by Romal to a meeting with the City Council to discuss the application, then the meeting was rearranged for Peel's convenience.

viii) Consistently, from December 2018, in its open dealings with Romal (though not internally or with the City Council in private meetings), Peel was giving the impression that "the Planning Application" had been submitted and would take its course. Mr Malouf said that this was the impression he was given (*"internally looking out, Peel absolutely supported the 646*"), and I accept that is an accurate characterisation of the impression created by Peel, even though the truth is (as I shall address later) that Peel was not supportive in its dealings with the City Council.

ix) Following discussion with the City Council about revisions to the 646 Scheme, there was discussion at the Liverpool Waters Strategic Meeting on 20 June 2019, at which Ian Ford of Arup (by then Romal's planning consultants too) was present. The minutes record that Romal was considering a redesign to reduce the density and height of the scheme, and that "Peel need C02 to progress as it triggers land payments on consent". That clearly demonstrates that Peel considered the application to be one within the AfL and it was so understood by Mr Ford.

x) Romal then went to Peel for its approval of a redesign to the preferred Option 1 design, and on 14 August 2019 Peel gave its blessing to work up Option 1 in more detail, subject to a formal response from the City Council. No blessing was needed unless the parties were acting within the AfL, as each believed that they were, and this communicated to Romal that Peel considered that the matter was proceeding within the AfL.

xi) In early October 2019, Mr Pollitt and Mr Malouf set up a process for Peel reviewing the revised planning application documentation. Mr Pollitt wrote to Mr Malouf on 6 November 2019:

> "If you are looking to submit before the end of the month, when will we be presented with all documentation for approval?"

And on the following day he wrote:

> "I am keen not to have a load of information land on our desk for approval …"

Again, that is a communication to Mr Malouf for Romal by Mr Pollitt of Peel that Peel considered that the revised application was being made pursuant to the terms of the AfL.

xii) A meeting was set up for 22 October 2019 to update Peel on the latest drawings, plan of action, and timescales; a design review meeting took place on 6 November 2019 and, as previously noted, by mid-November 2019 the designs had been discussed and agreed with Peel. On 14 November 2019, Mr Pollitt confirmed that Peel was happy for Romal to submit the amendments, and Peel reserved rights to raise any issues later. This told Romal that Peel was purporting to act pursuant to the AfL, albeit with an *ad hoc* change to the way that the application was to be submitted. Romal acted on the basis of Peel's indication and permission by making the application, at its expense, to revise the planning application. Peel later asked Romal to respond to comments made on the proposed amendments, which Romal did. That could only have been on the basis that the AfL applied: Peel otherwise had no right to do so.

xiii) There was then a lengthy process of engagement with the City Council to seek to persuade the planning officers to support the 538 Scheme, in which Peel played some part, though without doing all that it reasonably could have done in that regard.

xiv) On 5 November 2020, Mr Malouf and Mr Rowlands attended a meeting with Mr Phil Jones and Mr Lawless on behalf of Peel and Mr Peter Jones and Ms Campbell of the City Council to discuss the 538 Scheme. When it became apparent that a significant reduction in height would be needed to appease the City Council, and so only a less valuable development would be possible, Romal sought compensation from Peel for failure to assist Romal and for breaches of the AfL. Mr Malouf said that he told Mr Lawless that. He said that Mr Lawless wanted progress with a development, and he said to Mr Malouf and Mr Rowlands:

> "Do you know, if you don't make a decision, we will time you out and take back the property."

That threat clearly acknowledged and represented the continued existence of the AfL and its overall time limits for obtaining a Satisfactory Planning Permission and completing the development. It reflects Mr Lawless's understanding (which he admitted in evidence) that a successful application would give rise to rights under the AfL. Romal then proceeded to work up the second planning application, at its expense. Mr Malouf clearly did so in the belief that Peel accepted that the AfL was still in force.

xv) Negotiations with Peel took place on 21 January 2021 for a reduction in the premium payable for the leases under the AfL. Mr Lawless offered £500,000; Romal wanted £1,375,000. Eventually, Romal agreed to accept a reduction of £500,000. That was an implicit recognition on both sides that the AfL still governed the dealings between the parties and would apply in the event that a planning permission for a smaller development was obtained. In the event, no deal to reduce the price was done, because Romal would not forgo its rights to sue Peel for breach of contract.

222. In some instances it is explicit and in others it is implicit in these dealings between Peel and Romal, starting at the time of and following the initial submission of Romal's planning application up to the time when the possibility of a new application for the 330 Scheme was considered, that: the rights of both parties were still governed by the AfL; the original planning application for the 646 Scheme was a Planning Application, capable of giving rise to a Satisfactory Planning Permission; and that the amended application submitted in November 2019 for the 538 Scheme was still the Planning Application and capable of giving rise to a Satisfactory Planning Permission. By the conduct and statements of its employees and agents, Peel communicated to Romal and its agents its understanding (which Romal shared) that their legal relations remained governed by the AfL, that the extant planning application was the Planning Application for the purposes of it, and that it was capable of creating a right on the one side to the leases and a right on the other side to the Premium. The conduct of Peel, which indicated the understanding that it subjectively had, crossed the line throughout, so that Romal shared it.

223. Romal certainly relied on this common understanding in expending considerable effort and large sums of money pursuing a planning permission. Had Peel decided no longer to be involved, on the basis that Romal's rights had ended and Romal was simply doing what it was entitled to do outside the AfL, it would have become clear to Romal that Peel had a different position, and Romal would not then have acted as it did.

224. Peel argued that the matters relied on by Romal as detrimental reliance are as consistent with the parties proceeding outside the envelope of the AfL as with their proceeding within it, i.e. that none of the actions of Peel or Romal points to an understanding that each was proceeding within the AfL. But in my judgment that is quite unsustainable, as Peel's actions clearly did point to its asserting control that the AfL gave it and Romal's actions demonstrate its understanding that Peel was entitled to do so. Romal would not have proceeded in the way that it did outside the AfL: the effect would have been to incur significant expenditure without a right to take advantage of the permission, when obtained, and with Peel having the ability to sell parcel 3b with full planning permission to the highest bidder. Romal's conduct is only commercially explicable on the basis that both parties were subject to the obligations and had the rights conferred by the AfL.

225. In any event, the relevant question is not whether what Romal did was consistent with proceeding outside the AfL but whether Peel sufficiently communicated to Romal its understanding that the parties were proceeding within the AfL, which Romal shared, and which Romal then relied on in pursuing planning permission for the 646 Scheme and the 538 Scheme. There is no doubt that Peel subjectively had that understanding, and by its actions and on occasions words (as summarised above), it communicated that understanding to Romal, which acted upon it, changing its position to its detriment. It is therefore inequitable for Peel to deny that the parties were acting within the scope of the AfL and that the planning application that Romal made and then varied was not one that could give rise to a Satisfactory Planning Permission within the meaning of the AfL.

226. Peel did not argue that Romal relied only on its own understanding that its application was a Planning Application within the meaning of the AfL, and did not rely on any understanding to which Peel's conduct and statements had contributed. Its case was limited to denial that any conduct or statement that had "crossed the line" and denial of conduct on Romal's part that could be said to be reliance on it.

Issue 4: Did Peel waive its right to object to the first planning application, for either the 646 Scheme or the 538 Scheme?

227. I have already dealt with the facts relating to this issue under Issues 1 and 2 above. Peel agreed to the first planning application and the subsequent variation of the application on a basis (reserving certain rights) that, when no objection to the application was made, amounted to its approval, and without taking the planning application outside the envelope of the AfL. If there was no such agreement for want of written approval then Peel is estopped in any event from contending that the planning application was not a Planning Application, either in its original form or as varied. It is unnecessary to consider any further issue of waiver.

Issues relating to Knowledge and Due Diligence

228. In their agreed list of issues for determination, the parties included four issues under this heading that relate to Romal's state of knowledge of planning matters and what it would have learned about them from the exercise of due diligence. This was because Peel's case was that the AfL imposed on Romal an obligation conscientiously to inform itself about the planning background (including constraints, material considerations and Peel's plans) relating to the Property and the Development, and that as a result, despite the obligations of cooperation contained in the AfL, Peel was not obliged to tell Romal about anything that it could have discovered for itself.

229. For the reasons I have already given, the AfL did not impose any obligation on Romal to do any due diligence other than what it considered that it needed to do prior to 31 August 2018 before signing up to the contract with Peel. The purpose of the obligation was to fix an end time for Romal committing to the AfL, not to shift the burden of compliance with Peel's obligations under it. The conclusion that Romal was fixed with constructive knowledge, so as to exonerate Peel from its obligation to cooperate with Romal in seeking and obtaining a Satisfactory Planning Permission, is a misreading of the AfL in its relevant context.

230. It is therefore unnecessary for me to address specifically the four issues that the parties agreed in their list. However, in addressing the multiple issues relating to allegations of breach of contract by Peel in the second group of issues, it will be necessary to address certain questions about what Romal did in fact know, and the extent of Peel's obligations. One of the agreed issues in this group is whether any of Peel's obligations were affected by what Romal knew or ought to have known. Romal says that the answer to this is "no", whereas Peel says "yes". Peel also contends that what Romal knew or ought to have known "placed more of the onus on Romal to request modifications of Peel's proposals, which it did not do". I will address these points in section VI below.

231. In relation to other issues, such as causation issues, the extent of Romal's knowledge of any particular matters is more appropriately addressed, where relevant, in that context.

VI. The Second Group of Issues

232. This group of issues concerns alleged breaches of Peel's obligations under the AfL relating to the preparation and progress of Romal's first planning application, on the basis

that, as I have held, Romal's planning application submitted on 7 December 2018 and amended in November 2019 falls to be treated as a Planning Application within the meaning and for the purposes of the AfL.

233. The agreed issues are:

i) Did Peel breach clause 2.8 of the Agreement (by failing to ensure that Romal's design for the Development was integrated with Peel's proposed development of the Central Docks neighbourhood) by not: (a) reducing the size of Cultural Square and keeping it outwith the Property; or (b) reducing the size and providing further public realm elsewhere; or (c) moving Cultural Square; and/or (d) making a Non-Material Amendment application to amend the LWOPP to reflect Romal's design?

ii) Did Peel breach clause 5.1 of the Agreement (by failing to use all reasonable but commercially sensible endeavours to assist Romal in obtaining a Satisfactory Planning Permission) by not: (a) reducing the size of Cultural Square and keeping it outwith the property; or (b) reducing the size and providing further public realm elsewhere; or (c) moving Cultural Square; and/or (d) making a Non-Material Amendment application to amend the LWOPP to reflect Romal's design?

iii) Did Peel breach clause 5.3 of the Agreement (by failing to use reasonable endeavours to assist Romal in pursuing a Satisfactory Planning Permission) by not: (a) reducing the size of Cultural Square and keeping it outwith the property; or (b) reducing the size and providing further public realm elsewhere; or (c) moving Cultural Square; and/or (d) making a Non-Material Amendment application to amend the LWOPP to reflect Romal's design?

iv) Did Peel act in breach of clause 3.1.1 of the Agreement by not putting its name to the First Planning Application made by Romal?

v) Did Peel fail to proactively support and promote the 646 Unit Scheme and/or the 538 Unit Scheme and fail to persuade the Council of their merits, thereby acting in breach of clause 5.1 of the Agreement?

vi) Did Peel fail to proactively support and promote the 646 Unit Scheme and/or the 538 Unit Scheme and fail to persuade the Council of their merits, thereby acting in breach of clause 5.3 of the Agreement?

vii) Did Peel make or promote or pursue the first and second non-material amendment and discharge applications ("the Applications") in conflict with the First Planning Application, and, if so, did Peel breach clause 2.8 of the Agreement?

viii) Did Peel make or promote or pursue the Applications in conflict with the First Planning Application, and, if so, did Peel breach clause 5.1 of the Agreement?

ix) Did Peel make or promote or pursue the Applications in conflict with the First Planning Application, and, if so, did Peel breach clause 5.3 of the Agreement?

x) Did Peel make, promote and pursue the Applications in conflict with the First Planning Application and thereby act in breach of an implied term that Peel would not prevent or inhibit either party fulfilling its obligations under the Agreement and

in particular, would not take any steps which would prevent, make more difficult or delay Romal from obtaining planning permission?

xi) Did Peel fail to inform Romal of its proposals to allocate Cultural Square onto the Property (or a greater part of it) and about the making of the Applications, thereby acting in breach of clause 5.1 of the Agreement?

xii) Did Peel fail to inform Romal of its proposals to allocate Cultural Square onto the Property (or a greater part of it) and about the making of the Applications, thereby acting in breach of clause 5.3 of the Agreement?

xiii) Did Peel fail to engage Romal in discussions about how best to ensure that Romal's designs were integrated with its proposals and fail to supply plans and drawings relating to the proposals, including the Applications, as they were developed, and thereby act in breach of clause 2.8 of the Agreement?

xiv) Were any of Peel's obligations under the Agreement affected by what Romal knew and/or what Romal ought to have known?

234. These issues give rise to the following general issues: what Peel was doing from 18 May 2018 to advance its own interests under the LWOPP; whether Peel kept Romal sufficiently apprised of what it was doing, so that Romal's design was appropriately integrated with Peel's proposals; whether Peel did what it could and should have done to integrate and promote Romal's design, and to pursue and try to obtain a Satisfactory Planning Permission; and whether Peel inappropriately preferred its own interests to the detriment of Romal's application.

235. Romal alleges various breaches of three separate express contract terms and one implied term, which is the reason why there are so many agreed issues. Essentially, the complaints of Romal are that Peel did not seek to integrate the designs, did not keep it informed about its own developing proposals for Central Docks, did not support and promote its design with the City Council, and instead pursued its own inconsistent plans and proposals for the Adjoining Land, so that eventually the City Council approved amendments to the LWOPP that were inconsistent with Romal's designs. Peel admits that Romal's first planning application was in direct conflict with the first non-material amendment application ("NMA1"), NMA2 and the CDNMP; though, since the applications for NMA2 and the CDNMP came after Romal's planning application, it is more accurate to say that Peel's applications were in direct conflict with Romal's application. If they were in conflict, they were not integrated.

236. I have already set out the relevant express terms, clauses 2.8, 5.1 and 5.3, in the context of the AfL (see at [98]-[102] above). I shall address first the issues that exist about the true meaning and effect of those terms, then address the implied term argument, and then set out the essential additional facts relating to this group of issues, making findings where there is dispute about them, before reaching conclusions about the extent of Peel's breaches of contract.

Interpretation of clauses 2.8, 5.1 and 5.3

237. As identified in [99] above, there is an issue about whether clause 2.8 only applies between the time of satisfaction of the Preliminary Condition (the date of payment of the

Deposit) and the date of approval of the initial designs, or whether it continues to apply beyond that time.

238. Peel's argument is that the structure of the AfL, with its sequential stages, shows that clauses 2.6, 2.7 and 2.8 apply at the first stage of the process, up to approval of the initial design, and that clause 3 then comes into effect and governs the parties' obligations thereafter, with clause 5 applying once the Planning Application has been made.

239. I reject that argument as presented, which seems to me to be too formulaic, inconsistent with the words of clause 2.8, and fails to appreciate that the distinct obligations in clauses 2, 3 and 5 address slightly different things, which are not rigidly limited to actions required at a particular time of the process towards grant of planning permission. The fact that there is an undeniable structure, largely chronological, to the different stages of the AfL does not mean that the obligations within each part must be, or are, rigidly confined in the way that Peel asserts.

240. So far as clause 2.8 is concerned, the focus is on integration of designs, and it imposes an obligation on each of the parties to use all reasonable endeavours to seek to ensure integration of the respective developments. This is not limited to servicing and access arrangements and routes. Nor is it limited to the preparation of Romal's initial design: the clause refers to Romal's "design", not, as clauses 2.6 and 2.7 do, to the "initial design".

241. Further, the obligation in clause 2.8 is not solely for Romal to perform, but requires Peel too to ensure integration. This could relate to its proposals for the Landlord's Adjoining Land that emerge after approval of the initial design, shortly before or even after the planning application. Clause 2.8, which contains the mutual obligation, is concerned with Romal's proposed development. It is not therefore the case that the mutual obligation to endeavour to integrate proposed developments ends with the approval of the initial design, or any variation of it. There is no language that so indicates, nor does it make sense that it should do so, as Romal's design will develop beyond the approved initial design, up to and potentially beyond the application for planning permission, and Peel's proposals for its future developments would have been expected to change over a longer period.

242. A further point argued by Peel was that the obligation in clause 2.8 is concerned with prioritising Peel's design for its Adjoining Land, with which Romal's design has to integrate, and that Peel is not obliged to use any endeavours to make its designs integrate with Romal's design. I reject this interpretation. Although clause 2.8 states that Romal's design is to be integrated with Peel's proposed development, rather than the other way round, that is because the focus of the AfL is the bringing forward of Romal's development in the context of Peel's proposals. The obligation is mutual: it is not limited to Romal endeavouring to make its design integrate with Peel's proposals. Peel is required to use all reasonable endeavours to ensure that there is integration.

243. The fact that a continuing obligation to use all reasonable endeavours to integrate developments may overlap, in part, other obligations to assist Romal to pursue and to obtain a Satisfactory Planning Permission is not a reason to interpret clauses 2.8, 5.1 and 5.3 as applying in a mutually exclusive way: their extent is determined by the nature of the obligations described in their express terms. Thus, clause 2.8 is concerned with integrating Romal's development and the proposed development on other parts of

Liverpool Waters, and is a mutual obligation; clause 5.1 is an obligation on Peel only, concerned with obtaining a grant of a Satisfactory Planning Permission; clause 5.3 is an obligation on Peel only, concerned with pursuing that objective.

244. Each of these obligations requires Peel to use endeavours of a different quality or extent. The question, in each case, is whether Peel was using and continuing to use endeavours of the specified quality or extent towards each specified end. Notably, clause 5.3 does not require Peel to assist Romal to pursue the Planning Application, which might imply that the obligation only arose once one was made: it requires Peel to assist Romal to pursue a Satisfactory Planning Permission, which is a broader endeavour and naturally includes earlier stages, such as pre-application meetings with the City Council.

245. Given that the planning application, once made, could be varied, it is not possible to identify an end point for performance of any of these obligations, at least before the City Council makes a resolution to grant a planning permission that would be a Satisfactory Planning Permission, at which point it is probable that only the obligation in clause 5.1 would then remain to be performed, to release the permission. Given the distinction between the wording of clauses 5.1 and 5.3 and the likelihood that they are addressing slightly different things, it is probable that the former is concerned with Peel doing what is commercially sensible and reasonable to release a Satisfactory Planning Permission, e.g. offering planning gain in one form or another, rather than assisting Romal more generally to pursue an application and seek to persuade the City Council to grant it.

246. I therefore reject Peel's arguments that the obligation in clause 2.8 ended with the approval of the initial design, or on submission of the planning application, and that the obligation in clause 5.3 only arose once a planning application had been made.

247. Romal contended that, in addition to the express obligations in the AfL, which required Peel to do various things or use various degrees of endeavour to achieve a result, there is implied a term that imposes a negative obligation on Peel, namely not to prevent or inhibit either party fulfilling its obligations under the AfL and in particular, not to take any steps which would prevent, make more difficult or delay Romal from obtaining planning permission.

248. I am unable to see why this term is necessary to make the contract work coherently (see Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742, at [14]-[31]) when there are express obligations requiring Peel to use reasonable endeavours to bring about that result. Doing something that works against Romal being able to obtain planning permission, e.g. causing delay in the progress of the application and its consideration by the City Council, is always likely to be a breach of the positive obligation to endeavour to bring it about. While I see that, in principle, an obligation to do *x* would not necessarily be breached by doing *y*, the positive obligations on Peel are not specific but general, and with the aim of bringing about a state of affairs or result. In those circumstances, if Peel did something that would tend to do the opposite, it will be a breach of the positive obligation. This is in my view underlined by the fact that the only alleged breach of the implied term in the Amended Particulars of Claim, namely by making the conflicting applications and pursuing and promoting them with the City Council, is also pleaded as a breach of clauses 2.8, 5.1 and 5.3 of the AfL.

249. In those circumstances, I am not persuaded that the test for implying a negative obligation of this kind is satisfied. Nor, in view of the conclusions that I have reached, is it necessary for Romal to rely on such an implied obligation.

The Facts: Performance of Peel's Obligations

250. Peel's arguments about alleged breaches of contract were focused on whether the obligations in question arose at all in connection with any of Romal's planning applications, and, if they did, on limits on their scope, rather than on what Peel had done to perform the obligations. In relation to scope, Peel's principal argument was that it had no obligation to inform Romal about, or assist it in relation to, any matter that Romal could by the use of appropriate due diligence have discovered and dealt with by itself. I have given my reasons for rejecting that argument, so far as constructive knowledge is concerned. Whether performance by Peel was excluded because of actual knowledge on the part of Romal is a fact specific question, which I will consider in connection with the breaches alleged.

251. As for performance of the obligations in clauses 2.8, 5.1 and 5.3, Peel did not really advance a specific case on the nature of the endeavours that it deployed to integrate Romal's design with its own designs for the remainder of Central Docks, to pursue or obtain a Satisfactory Planning Permission for the 646 Scheme or the 538 Scheme, or about how any endeavours that it did make satisfied the requirement for "all reasonable endeavours", or "all reasonable but commercially sensible endeavours", or merely "reasonable endeavours", as the case might be. As will be seen, the reason for that is that Peel did not use many endeavours at all.

252. Peel argues (see [281] below) that it discharged its obligations under clause 2.8 by sending the February 2018 plan and the March 2018 C-02 Document (see [282] below) to Romal in February and March 2018 respectively, before the AfL was signed. In fact, the March 2018 C-02 Document was not sent to Romal, it was sent only to Mr Siddique, and there is no evidence that Mr Siddique shared it with Mr Malouf or Mr Rowlands. Self-evidently, neither of these past events was what was contemplated by the obligation entered into in May 2018 to use all reasonable endeavours to ensure integration.

253. Peel's case on compliance with the other obligations is that these obligations have to be interpreted on the basis that Romal assumed full responsibility for its design, by virtue of its obligation of due diligence, that Romal failed to ensure integration with Peel's proposed development, and that accordingly Peel was not in breach of an obligation to endeavour to assist Romal. Peel also argues that it allowed Romal to use Peel's planning consultants, which performed its obligations. However, that disregards the fact that Peel's planning consultants were not permitted to share with Romal much material relating to Peel's own plans, including, most significantly, the preparation of the NMA2 application and the CDNMP condition 11 discharge application.

254. Peel argues that it "did more than could have been expected of it to ensure that Romal could be fully appraised of the overall master planning proposals". Again, that is a misunderstanding of the nature of the obligations that Peel assumed, as I have already explained. Peel was not entitled to say that it was up to Romal to pursue its ambitions, based on what it could have found out about Peel's master planning: it was for Peel positively to assist Romal to obtain a Satisfactory Planning Permission for a development of at least 600 apartments. Those obligations required Peel to share its intentions and

plans with Romal, not conceal them from Romal on the basis that documents had been provided prior to the date of the AfL that could have alerted Romal to what Peel was proposing to do, and which it could have discovered if it had made further enquiries. That would be to turn a mutual obligation into a unilateral obligation.

255. Until early 2020, when the City Council indicated that it would not support the 538 Scheme, Peel did not use any endeavours to seek to integrate the 646 Scheme design or the 538 Scheme design with its designs for its adjoining land in Central Docks, nor did it use any endeavours to cooperate with and assist Romal to pursue a planning permission for either Scheme, as it was contractually obliged to do. Peel did not support either Scheme: it was focused entirely on bringing forward changes in design for its adjoining land in Central Docks, including Cultural Square and parcel 5A, to the north of Cultural Square, which it did by means of NMA1 and NMA2 and the CDNMP application, none of which were notified to or discussed with Romal. The effect of NMA1 and NMA2 was to release more land for development by others, creating new development parcels by pushing Cultural Square down onto the top of the Property.

256. In my view, although Peel wanted Romal to be granted a planning permission for a reduced scheme, so that it could bank the premium for the leases, it was content for (and its advisers positively wished to see) the 646 Scheme and then the 538 Scheme to be opposed by the City Council, so that Romal had to scale down its ambitions, well below the 600 apartments that it had agreed with Peel. In this regard, I make the following findings.

257. Planit, in the person of Mr Peter Swift, who regarded himself as the guardian of the LWOPP, was opposed to the 646 Scheme design on grounds of size, and he advised Peel of his concerns prior to submission of the first planning application. At exactly the same time, he told Mr Malouf that he could "rest easy" in making his application with the blessing of the Peel team and advised Mr Pollitt that he was confident that the City Council would share his views, i.e. that the 646 Scheme was unsuitable for parcel 3b. To be fair to Mr Swift, he was not apprised of the content of the AfL at this time and so did not know the nature of the obligations that lay on Peel in relation to a development of at least 600 apartments.

258. Peel was nonetheless content for the application to be made, to test the water for a permissible standalone development, but was unwilling to be seen to support it. As Mr Lawless said, "Peel could not formally say that they supported Romal's proposals". Peel indeed did not say any such thing, whether formally or informally, despite the obligations that it had entered into vis-à-vis Romal in the AfL. When, understandably, Mr Peter Jones asked Mr Pollitt in an email dated 15 January 2019 whether Peel had a particular position on the application in Romal's name (and if so to table it formally), I find that he received no reply on behalf of Peel. By not replying, Peel thereby made it obvious to the City Council (if it did not tell its officers in terms, off the record) that it did not support it. Peel was content for the application to proceed without its support. As Mr Lawless put it, the 646 Scheme left the opportunity for it to be reduced in scale later, if the City Council opposed it, which he knew that it would, without Peel's backing.

259. In a number of places in his witness statement, Mr Lawless made bland assertions that he always advocated Romal's scheme to the City Council, and that Peel always supported it. No particulars of any such occasions are provided, nor were they given in answer to questions in cross-examination. I find that what Mr Lawless said in that regard is untrue.

There were ample opportunities for Peel to show its support for the 646 Scheme and the 538 Scheme, which it was contractually obliged to do, but none of them was taken. On the contrary, Peel concentrated its efforts on advancing its own design for its adjoining land on Central Docks, by way of NMA2 and the CDNMP, applied for in April and May 2019 respectively, which were inconsistent with Romal's planning application, in ways that I will explain later.

260. Romal did not allege that Peel did so deliberately, to undermine Romal's application, and I do not need to make a finding in that regard. However, Mr Swift was well aware of the conflict between what Peel was pursuing and Romal's application, and Mr Jones of Peel had sent Planit on 7 May 2019 a drawing that showed the inconsistency, and he received an email from Mr Hall of Planit on the same day (copied to Mr Swift) which stated that "the Romal Capital proposal prevents Cultural Square from being delivered as envisioned".

261. I find that Mr Lawless had not focused on the detail of Romal's application, confident that it would not find favour with Mr Jones and Ms Campbell, and was concerned at that time with advancing Peel's interests in the rest of Central Docks. I consider that Mr Pollitt probably knew about the conflict at the time when Peel was preparing NMA2 and the CDNMP, but may not have realised before Romal's application was made. Mr Pollitt was not called by Peel to give evidence, even though he was the employee of Peel who was closely involved in relation to the preparation of Romal's application.

262. Peel's primary concern as regards Romal's application was that it should not be seen to support an application that was inconsistent with the LWOPP parameters, for fear of harming its good relationship with the City Council's planning officers. While that approach would otherwise have been understandable, even sensible, the AfL required Peel to support a planning application that would inevitably be at variance with some of those parameters. Peel did not seem to understand that at the time. Mr Pollitt complained in December 2018, in sarcastic terms, about how Romal was constantly increasing the number of apartments in its proposed development, and echoed Mr Swift's concern that it was taking too great a share of the Central Docks allocation, apparently unaware that the AfL required there to be at least 600 apartments. Even at the trial, Peel did not seem to understand the nature of its obligations that it had assumed, preferring to argue that it was not bound by them, which was a position that had never occurred to it at the time, as Mr Lawless was willing to admit.

263. I find that Peel did not indicate to the City Council at any time that it supported Romal's planning application. It did not explain how such a development would play a crucial role in jump-starting the linear development in Central Docks, so justifying partial infill of West Waterloo Dock; it did not embrace the architectural merits of the design of the 646 Scheme, of which there were many, despite using the original five-finger design for its own promotion at MIPIM in 2018 and 2019. Peel did not push back against opposition from residents of WWH on grounds of loss of their views of the River, which was disproportionately concerning Mr Peter Jones (a loss of a view from a residence not being a relevant planning consideration). On 6 December 2018, shortly before Romal submitted its application, Mr Pollitt told Mr Swift that he had told Sam Campbell at the City Council that it was " a load of rubbish" that Peel had been pushing for the application to be made, and that the last thing that Peel wanted was Mr Jones and Ms Campbell being concerned about a scheme within Liverpool Waters.

264. Peel did not take any steps to assist in integrating Romal's design (to which it had raised no objection during the 16-week statutory determination period) with its own proposals for Central Docks, and parcel 3c in particular, but instead proceeded to design its development of adjoining land in such a way that the grant of planning permission for the 646 Scheme or the 538 Scheme would be substantially inconsistent with it. These proposals evolved between January and April 2019 and included discussion within the Peel team about how Romal's application should be shown on the CDNMP, but no one at Romal was invited to participate, or consulted about the proposed changes, or even told that these discussions were taking place. As Mr Grover explained, Arup and other consultants were very clear, when they were acting on Peel's instructions, about what they were and were not entitled to share with others. As a result, no consultant was conscientiously able to tell Romal what was being planned. Nor did Peel or any of the consultants send a copy of Peel's applications to Romal in April and May 2019, even when they were public documents.

265. I find that none of these discussions, not even the fact of NMA2 and the application relating to the CDNMP, were shared with Mr Malouf or Mr Rowlands by anyone on behalf of Peel. Neither of them became aware by other means (until late August 2019) that these applications had been made by Peel. So when, between June and August 2019, they were dealing with the City Council as regards the merits of the 646 Scheme and "Option 1", they were unaware that Peel had applied for approval of the final masterplan for Central Docks. This masterplan (a) did not show Romal's 646 Scheme on parcel 3b; (b) did show on parcel 3b a development plot for an alternative scheme, of lesser height and reduced massing; and (c) had moved Cultural Square substantially further south, as compared with the original LWOPP masterplan, so that a large part of it was shown on the Property (on parcel 3b as well as on the small sliver of parcel 3c that was within the Property).

266. Peel did not push back against the City Council's preference for Option 1 in place of the 646 Scheme, when Romal was seeking to establish a viability case for the 646 Scheme, nor did it support the 538 Scheme at the time when Romal amended its application in November 2019. Instead, it insisted on its right to delay giving formal approval, while permitting the amendment application to be made. This was therefore a repeat of what had happened in December 2018, except that, with the evolution of the CDNMP, Peel's positive support for the 538 Scheme was even more important if the application was to have a chance of persuading Mr Jones and Ms Campbell. Instead, Peel allowed Romal to proceed with its amended planning application for the 538 Scheme in a form that was inconsistent with its own (now consented) designs in NMA2 and the CDNMP. The inconsistency was pointed out by Peter Jones on 25 November 2019, who stated that the proposals, as they stood, did not have officer support on grounds of conflict with the CDNMP, among other reasons.

267. In a letter to Peel dated 11 December 2019, the City Council sought confirmation from Peel as to whether it was satisfied that the amended application had no implications for the delivery of the CDNMP and how the conflict with Cultural Square would be resolved, if Romal's 538 Scheme was built. Peel's reply dated 17 January 2020, signed off by Mr Lawless, finally provided a limited measure of support, stating that Peel is "in support of the amended application", which "generally conforms to most of the LW Parameter Plan Report". It claimed that justification had been provided for any non-conformity, which did not prevent further development in Central Docks from coming forward. It said that

Plot C-03 could also be developed, as could Cultural Square, and that any conflict with the CDNMP "can be avoided through careful design and consideration of the Cultural Building", without affecting the wider delivery of the CDNMP. No detail or indication was given as to how the obvious conflict with the Cultural Square could be avoided, or managed. As such, the letter was weak and unpersuasive so far as it attempted to answer Mr Jones's concern about the conflict.

268. Following the exchange of letters described above, at a meeting on 13 February 2020 with Peel and Romal Mr Jones made it clear that the City Council would not support the 538 Scheme on the basis of unjustified infill, conflict with the CDNMP and impact on Cultural Square.

269. Mr Ford confirmed the position in his oral evidence, as follows:

> "Q. This was in the context of the 330 scheme, where the Cultural Square became the key issue, and it's right, isn't it, that that 538 scheme as a bigger scheme, it had much more parking, right up to the boundaries? Do you remember that?
> A. If I recall correctly, yes.
> Q. So it's obvious maybe, Mr Ford, but its right, isn't it, that whatever other issues there were with the 538 scheme, with this Council the Cultural Square would have been a show-stopper? They would not have granted consent because of the parking on the Cultural Square?
> A. For the 538 scheme?
> Q. Correct.
> A. Yes. It was a reason for refusal, yes. The council would have refused it, yes."

270. I agree with Romal's contention that it was only at this time, in January 2020, that Peel's employees fully understood the serious impact on Romal's application of its actions with NMA2 and the CDNMP. It made it inevitable that planning permission would be refused for the 538 Scheme, as Mr Ford confirmed.

271. Thereafter, Peel did work constructively with Romal to try to mitigate the impact of the CDNMP, first by preparing NMA3. This was to align the Parameter Plans with Romal's 538 Scheme, with a view then to providing an updated plot brief for C-02 in the CDNMP. The draft NMA3 removed Cultural Square from the Property, and sought a uniform 30m height allowance across the plot. However, the City Council was advised by its retained planning QC that a reduction in Cultural Square was not a non-material amendment at this stage, and that the change in height parameter was arguably lawful but risky. Accordingly, the City Council rejected NMA3 in the terms proposed. A more modest version was submitted and eventually approved. This enabled plot C-02 to be enlarged in a southerly direction, towards the IoMT, but still subject to a height restriction of 12m on the southern part of the plot.

272. On 5 November 2020, the City Council indicated that it would not support the 538 Scheme. The reasons included excessive height and massing, and the conflict with Cultural Square, which was described by Peter Jones as "a key reason why [the City Council] couldn't support this application as presented". Mr Jones was unwilling to swallow both of these difficulties, but indicated that if the height issue was resolved, he would be willing to consider further arguments on Cultural Square.

273. On height, Mr Jones told Mr Malouf that:

> "… the closer the height gets to 12m rather than 30m, the more the LPA can justify an increase in height".

274. When, 3 weeks later, Romal brought forward as a further alternative a design that became the 330 Scheme, conforming with the height parameters, the City Council was able to derive comfort from a proposal to reduce the parking provision or provide offset elsewhere for the loss of public open space. However, the incursion onto Cultural Square was still 20m and in the end the City Council was not willing to support even the 330 Scheme with mitigation in place to limit the impact of the development. Mr Jones stated on 18 July 2021:

> "Any deviation from the approved neighbourhood masterplan and outline parameters would need a robust justification and as it stands the LPA is not convinced."

275. Despite the City Council's undue concern with justifying any infill of the dock, by the time that the officers indicated that they would refuse consent only the issues of height and Cultural Square remained as obstacles to the 538 Scheme. The 330 Scheme removed the problem with height; the problem with impact on Cultural Square remained.

276. Romal appealed against the non-determination of the second planning application for the 330 Scheme on 23 December 2021. The City Council relied on the impact on Cultural Square as its reason for refusing to grant permission.

277. Prior to determination, the Peel Group undertook to provide public open space elsewhere as mitigation for the loss of part of Cultural Square. The Planning Inspector allowed the appeal on 11 July 2022, holding that the additional open space provided as mitigation was necessary in order to make the 330 Scheme acceptable.

The Facts: the Evolution of Peel's CDNMP

278. In order to address certain specific allegations of breach of contract and in any event to determine the causation issues in the third group of issues, it is necessary to explain in a little detail the changes in the LWOPP and the discharge of condition 11 for Central Docks by the approval of the CDNMP. These were matters that Peel actioned after the date of the AfL and, in the case of NMA2 and the CDNMP, after submission of Romal's planning application.

279. The effect of the LWOPP conditions is that, until condition 11 had been discharged by the approval of a neighbourhood masterplan for the Central Docks area, the location of plot C-02, the Cultural Building and the public realm forming Culture (or Cultural) Square were not fixed. Even an application for reserved matters approval pursuant to the LWOPP had only to conform generally with the Parameter Plans for parcels, plots and heights, unless the City Council agreed otherwise: see [62] above. A standalone application was not so constrained, save that the LWOPP was a material planning consideration. As explained previously, the AfL required Romal's planning application to be made in accordance with the general principles of the LWOPP, but only to the extent that they were appropriate in relation to the Property and the Development.

280. The LWOPP Parameter Plan Report contained only an indicative masterplan. This and the relevant Parameter Plans showed a Cultural Building, and an area for Cultural Square surrounding it, on parcel 3c, to the north of an indicative C-02 plot, which was sited on the western side of parcel 3b on account of the presence of the dock. Plot C-02 was therefore limited in size.

281. Prior to the AfL, Planit had sent Romal the February 2018 Drawing, an emerging masterplan drawing that showed (consequentially on the grant of planning permission for Jesse Hartley Way ("JHW") possible changes in the location of plots C-02 and C-03, among others. The email refers to 3 possible locations of plot C-02 and states that none of the boundaries to the north, south or east were fixed. This was self-evidently provided in the context of the negotiations that were taking place between Mr Ashworth and Mr Malouf for Romal to agree, conditionally, to take leases of certain land (which had not yet been ascertained). It contains no suggestion or hint that land to be leased to Romal would have to accommodate public realm associated with the Cultural Building.

282. Then on 8 March 2018, Planit sent Romal's architect, Mr Siddique, but did not send Romal, the March 2018 C-02 Document, which was said to set out some design considerations to consider within development proposals for plot C-02, for later discussion. This showed a suggested plot C-02 boundary further south than shown on the LWOPP Parameter Plans and an area of public realm between Cultural Square and plot C-02, which the northern boundary of the building on plot C-02 was required to animate. The March 2018 C-02 Document did not show any part of Cultural Square within the proposed Plot C-02 boundary.

283. Planit produced (for Peel internal use only) versions of the draft emerging masterplan and updated parameter plans for Central Docks in August 2018, which involved the removal of Prospect Park entirely, the creation of new development parcels where Prospect Park had been, the introduction of JHW, and a consequential move southwards of Cultural Square. These were not shared with Romal, but Planit did re-send Mr Siddique in August 2018 (but not Romal) the March 2018 C-02 Document. Peel and Planit did not send Romal the version of the indicative masterplan that formed part of the NMA1 application, which was made by Peel on 19 October 2018 and published on the City Council's website on 23 October 2018. This showed that parcel 3c was reduced in size (to the northern side) but parcel 3b and plot C-02 were unchanged on the parameter plans forming part of NMA1 (save that the height parameter of plot C-02 was reduced from 30.7m to 30m).

284. NMA1 did not make any change in respect of JHW or the IoMT, though it did entirely remove Prospect Park, resulting in increased space for development land to the north of parcel 3c. An amended indicative masterplan was included, which indicated the CLT and plot C-02 in their original positions, where JHW would now pass, and a "Potential Cultural Building" on parcel 3c, with an area for locating Cultural Square wrapping around the northern end of plot C-02 and around the southern end of indicative developments on parcel 3e. Inconsistently with this, the access and movement parameter plan showed Culture Square in an unchanged position. NMA1 was granted permission on 16 November 2018 (with the inconsistency remaining).

285. Mr Malouf and Mr Rowlands said that they were unaware of the fact or content of NMA1 when they paid the deposit under the AfL at the end of September 2018 and prepared their planning application. I accept that evidence, as there is no evidence to the contrary

suggesting that anyone from Peel or its consultants told Romal or its team about it or its content.

286. Planit then started work on NMA2 and the definitive CDNMP. None of this was done in consultation with Romal. NMA2 was concerned with the change in position of the IoMT, as compared with the intended CLT, and the change in the location of the Cultural Building necessitated by the introduction of JHW. It included new plot and access and movement parameter plans, but no change to the parcels parameter plan. There was a further amended illustrative masterplan. In combination, these drawings showed plot C-02 closer to the edge of West Waterloo Dock but not further south, unlike in the March 2018 C-02 Document. It still had a height parameter of 30m. This movement allowed space for JHW to pass between plot C-02 and the River. The access and movement plan moved Cultural Square markedly to the south, so that almost one half of Cultural Square would be situated on the Property (land that Peel had agreed by the AfL to let to Romal for its own development). NMA2 contained an indicative masterplan, which showed a "Potential Cultural Building" of a different shape and size, on the northern part of Cultural Square, just to the south of where JHW would run.

287. The effect of this was that the northernmost of the four buildings in Romal's planning application would be sited almost entirely on land now designated as public realm in Cultural Square, and that the two southernmost buildings would be on land that was not designated as part of plot C-02 at all (which therefore had no height parameter attached to it).

288. Permission was granted for NMA2 on 23 August 2019. Despite the fact that Arup and Planit were engaged as consultants by Romal, nothing had been said by Peel or any of its consultants to Romal about the content or implication of NMA2 until Mr Grover broke ranks on 30 August 2019. He told Mr Malouf about what had been approved and the impact that the CDNMP was likely to have on Romal's application (which Mr Grover fully understood). Up to that point, Romal was, I find, unaware of the fact or the content of NMA2 and unaware of the content of the CDNMP.

289. By that time, Romal had been in discussion with the City Council trying to persuade it of the merits of the 646 Scheme. In July 2019, the City Council had asked Romal to prepare alternative designs, to assist the planning officers to evaluate the viability of the 646 Scheme and any alternatives. Romal presented these at the 6 August 2019 meeting

290. By the time of these meetings, Peel and its consultants had prepared a draft CDNMP and submitted it to the City Council in May 2019, as an application to discharge condition 11 for Central Docks. Again, this was done without consulting or notifying Romal, which was, I find, unaware of its content, though it must have become aware of the fact of an application at the meeting on 6 August 2019. Romal had no reason to believe that Peel would have been trying to use the Property for Cultural Square. The plans in the draft masterplan were the same as those submitted as part of NMA2, with plot C-02 in its original north-south position but moved to the east, nearer the dock wall, and with Cultural Building to the north of parcel 3c and Cultural Square principally to the south of Cultural Building, washing over the northern part of plot C-02. A significant part of the Property, as defined in the AfL, was therefore proposed to be allocated as public realm.

291. The draft masterplan noted that a planning application for plot C-02 was pending and therefore only a partial plot brief was included. The footprint strategy for plot C-02 showed 3 blocks – not the 4 blocks in Romal's planning application – with the northern of the 3 blocks along the edge of Cultural Square. The massing strategy in the draft masterplan included a building height limit of 6 storeys on the northern third of plot C-02 (which was significantly below the height parameter in the LWOPP), and a height limit of 8 storeys on the rest of it (as compared with Romal's application for a 10 storeys design). Romal was not consulted on or informed of any of the content, which flatly contradicted its planning application, nor was it aware of the fact of its submission. Peel had included in its intended approved masterplan for Central Docks a different development from that which Romal had applied for and which Peel had agreed to support.

292. On 6 August 2019, the City Council indicated that it would not determine Romal's application until condition 11 was discharged by the CDNMP. Peel had been aware of this in July 2019, but Romal had not been. When Ms Campbell indicated her preference for Option 1, subject to revisions, Mr Rowlands and Mr Malouf said that she confirmed, in answer to a direct question from Mr Rowlands, that she would recommend planning approval if the application was changed to the 538 Scheme. As I have explained, I am unable to accept that evidence. It is clear that Ms Campbell was unwilling to make any such commitment prior to the decision on whether to approve the CDNMP, which was still being evaluated in light of responses from consultees. A further meeting with the planning officers was to be arranged thereafter.

293. What was happening was that the City Council was stalling on determination of Romal's planning application until the CDNMP had been approved, which would give it a strong basis for refusing applications for reserved matters that were inconsistent with it, and a stronger basis for refusing inconsistent standalone applications. Peel was at the time pushing hard for approval of NMA2 (which came on 23 August 2019) and the CDNMP, but it was not pushing at all for approval of Romal's planning application. Both the City Council and Peel were content for that to be delayed, in the interests of first fixing the design parameters in Central Docks. Peel's internal documents from July 2019 show that it knew that the City Council had put Romal's application on hold, pending the outcome of the NMA2 and CDNMP applications.

294. Why Peel was so keen to have the design parameters fixed at this time remains unclear to me: there was no legal or tactical reason why condition 11 needed to be discharged for Central Docks in 2019, save that it seemed to be what the planning officers wanted and Peel was keen to keep on good terms with the planning officers. But Peel's condition 11 application delayed the formal consideration of Romal's planning application until a time when it was bound to fail.

295. On 12 November 2019, a revised draft CDNMP was pronounced sufficient to discharge condition 11 of the LWOPP for the Central Docks area. The approved version is the same in all material respects as the draft described above, save that the footprint strategy for plot C-02 was relaxed, and reads (so far as material):

> "Plot C-02 provides a flexibly sized plot to deliver development footprint in a number of different manners. Development within Plot C-02 is however expected to address the following key principles:
>
> - ……

- positively animate and address Cultural Square
- ……
- ensure there is a clear distinction between private and public realm to provide high quality amenity space for users of the plot

Plot C-02 had not been moved south, and the northern part of it still impinged on Cultural Square, as shown. The height restrictions (to 6 storeys) for the northern part of Plot C-02 were retained.

296. By November 2019, Romal had worked up Option 1 into a new design, the 538 Scheme, which it was willing to amend its planning application to advance. It had pre-application meetings with the planning officers on 8 and 12 November 2019. However, the CDNMP was clearly inconsistent with that design, as the (essential) car parking areas and ends of the two northern blocks would not animate Cultural Square but be placed on it, and the two southern blocks would stand mainly on an area not within plot C-02, nor within parcel 3b, where there was effectively a height parameter of 0m. The 538 Scheme was 10 storeys, not 6 or 8.

297. Following approval of the CDNMP on 12 November 2019, Mr Pollitt confirmed on 14 November 2019 that he was happy for Romal to submit the amended application for the 538 Scheme (reserving rights to raise concerns later). The amendment was submitted on 18 November 2019. Mr Pollitt must have realised then that the proposed amended application was now inconsistent with the CDNMP.

298. Peel and Romal (by now working together, as clause 2.8 intended that they should have) sought to get round the difficulty by NMA3, which would bring the parameters more into line with the 538 Scheme, and supply a more specific plot brief for (a different) plot C-02 in the CDNMP. This sought to remove Cultural Square from the Property and extend the C-02 plot southwards with a uniform 30m height parameter. However, it did not proceed, as I have described.

299. NMA3 was therefore only approved (on 18 September 2020) in a limited form, making amendments to the location of parcels 3a and 3b and extending plot C-02 south, but subject to a 12m height parameter.

300. It is therefore clear that the conflict of Romal's applications with the CDNMP would have led to refusal of planning permission irrespective of the height and massing issue. One critical question that arises under the causation issues in the third group of issues, below, is whether the converse is true, namely that regardless of the conflict with Cultural Square, planning permission would have been refused on account of the excessive height and density of the 646 Scheme and the 538 Scheme.

Conclusions on Breaches of Contract

301. Romal has pleaded its allegations of breach of contract in a general way. By way of example, it is pleaded that Peel failed to use reasonable endeavours to integrate Romal's design with Peel's proposed development, and failed to use reasonable endeavours to assist Romal to obtain a Satisfactory Planning Permission. Romal then pleads particular matters that were included in the endeavours that Peel should have used, such as designing its proposed development to be consistent with Romal's development. Romal also alleges that Peel failed pro-actively to support and promote Romal's schemes by

seeking to persuade the Council of its merits. Other allegations of breach are more specific, such as making the conflicting applications.

302. I find that Peel breached clauses 2.8 and 5.3 of the AfL in many of the ways alleged by Romal. In light of the facts set out above and my conclusions on the meaning of the relevant obligations in the AfL, these breaches were established by the following acts or omissions that fall within the scope of the breaches alleged:

    a) Failing positively to support Romal's planning application (either before the application was submitted or, thereafter, once it had had time to review the details and raise any objection with Romal), including failing to confirm to the City Council that it supported the application;

    b) Including in NMA1 a draft indicative masterplan for Central Dock that showed the area for Cultural Square overlapping the Property;

    c) Failing at any stage to attempt to integrate Romal's 646 Scheme or the 538 Scheme with its design for Central Docks, in particular the design for Cultural Square;

    d) Failing to apply at an early stage for a non-material amendment to the LWOPP to ensure that the Cultural Square and Cultural Building could be delivered entirely off the Property;

    e) Failing to tell Romal that it had included a new draft indicative masterplan in NMA1, that it was making an application for NMA2, and that it was making an application to discharge condition 11 of the LWOPP in relation to Central Docks;

    f) Making its applications for NMA2 and to discharge condition 11 in relation to Central Docks in a form whose content created a conflict with Romal's planning application for the 646 Scheme, and then agreeing with the City Council that those applications should be determined before Romal's planning application;

    g) Failing at any time to tell Romal that it had made those applications;

    h) Not opposing the City Council's attempt between June and August 2019 to persuade Romal to re-design the 646 Scheme;

    i) Putting its relationship with the planning officers of the City Council ahead of its obligation to use reasonable endeavours to assist Romal to pursue planning permission for a development of at least 600 apartments;

    j) Seeking to use part of the Property for or in connection with its own development of the Cultural Square.

303. There was a total lack of endeavour on the part of Peel to seek to integrate Romal's designs with its own designs for Central Docks. There were no significant endeavours used to assist Romal in pursuing a Satisfactory Planning Permission, at the time of its original application or in the first 3 months of the amended application, nor was there co-operation on the part of Peel to assist Romal in that endeavour.

304. Further, if I am wrong in concluding that Romal and Peel varied the AfL *ad hoc*, by agreeing that the first planning application would be submitted in Romal's name alone, Peel was in breach of contract in failing to make that application in joint names with Romal.

305. The answers to the agreed issues are that:

i) Peel breached clause 2.8 of the AfL by not making such adjustments to the design of the development on the Landlord's Adjoining Land as were reasonably necessary to ensure that it did not conflict with Romal's design. There were various ways in which Peel could have done this, such as those identified in the agreed issue, but rather than using all reasonable endeavours to integrate the designs, Peel did the opposite, by pursuing and entrenching its own designs in such a way as to create a conflict.

ii) Peel did not breach clause 5.1 of the AfL by not using all reasonable but commercially sensible endeavours to assist Romal to obtain a Satisfactory Planning Permission because the stage was not reached for Peel to use endeavours of the kind that fall within the scope of that obligation.

iii) But Peel did breach clause 5.3 of the AfL by not using reasonable endeavours to assist Romal in pursuing a Satisfactory Planning Permission by doing one or more of the things described in the agreed issue, instead of making the NMA2 and CDNMP applications that created conflict and caused difficulty for Romal in obtaining a favourable determination of its planning application.

iv) Peel did not act in breach of clause 3.1.1 of the AfL by not putting its name to the first planning application, as Peel and Romal agreed that the application would be in the name of Romal alone.

v) Peel did not breach clause 5.1 of the AfL by failing proactively to support and promote the 646 Unit Scheme and/or the 538 Unit Scheme and failing to persuade the Council of their merits because the relevant obligations are contained in clause 5.3, not clause 5.1.

vi) Peel did breach clause 5.3 of the AfL by failing proactively to support and promote the 646 Unit Scheme and/or the 538 Unit Scheme and failing to seek to persuade the Council of their merits.

vii) Peel made,promoted and pursued the Applications in conflict with the First Planning Application, in breach of clause 2.8 of the AfL.

viii) Peel made,promoted and pursued the Applications in conflict with the First Planning Application, but this was not a breach of clause 5.1 of the AfL because the stage was not reached for Peel to use endeavours that were required by that clause.

ix) Peel made, promoted and pursued the Applications in conflict with the First Planning Application and this was a breach of clause 5.3 of the AfL.

x) Peel made, promoted and pursued the Applications in conflict with the First Planning Application but there is no such implied term as that alleged and accordingly there was no breach of such a term.

xi) Peel failed to inform Romal of its proposals to allocate Cultural Square onto the Property (or a greater part of it) and about the making of the Applications, but was not thereby acting in breach of clause 5.1 of the AfL because the stage was not reached for Peel to use endeavours that were required by that clause.

xii) Peel failed to inform Romal of its proposals to allocate Cultural Square onto the Property (or a greater part of it) and about the making of the Applications, and was thereby acting in breach of clause 5.3 of the AfL. Romal was not aware of these proposals until September 2019.

xiii) Peel failed to engage Romal in discussion about how best to ensure that Romal's designs were integrated with its proposals and failed to supply plans and drawings relating to the proposals, including the Applications, as they were developed, and thereby acted in breach of clause 2.8 of the AfL.

306. It follows that I have found proved the main allegations of breach of contract made by Romal.

Did Romal's actual or constructive knowledge affect the nature of Peel's obligations

307. The parties identified this as a separate issue: see [234(xiv)] above.

308. The nature of Peel's obligations was not affected by what Romal did not know but could have found out by the use of due diligence. As I have already explained, the idea that Romal owed Peel an obligation prior to payment of the Deposit or at any time afterwards to investigate matters relating to planning, or Peel's own plans for the Landlord's Adjoining Land, is a misreading of the relevant terms of the AfL.

309. As to what Romal actually knew, it is obviously arguable that Peel's obligation to cooperate, so far as it included informing Romal about what it was intending to do, did not extend to matters that Romal actually knew, because that would be an unnecessary endeavour and therefore not a reasonable one. On the facts of this case, Romal did not know, at the relevant times, the fact and content of the Applications made by Peel until it was too late. Its late knowledge does not affect Peel's obligation much earlier to tell Peel about those matters and seek to integrate its designs with Romal's design.

310. I also reject the argument that what Romal knew placed "more of the onus on Romal to request modifications of Peel's proposals", as Peel puts it in its closing submissions. Romal did not know that Peel had made the NMA2 application and the CDNMP application until the end of August 2019 at the earliest. Romal protested about the fact that its development had been omitted from the CDNMP but Peel did not change its course. Romal did not understand the implications of the CDNMP until September 2019, which was too late to do anything about it. Peel's breaches of contract had all taken place by that time, and, as I address in Section VII below, they caused the rejection of the 646 Scheme and the failure of the 538 Scheme.

311. In its submissions about actual or constructive knowledge, Peel does not advance any separate argument beyond the points that were raised in relation to other issues, and which I have addressed above.

VII. The Third Group of Issues

312. These issues raise the following broad questions:

    i) What would the City Council have done in response to the first planning application if Peel had done what it should have done (and not done what it should not have done) to support the application and avoid conflict with its own plans?

    ii) Was there a real and substantial chance that, if Peel had performed its obligations, Romal would have been granted planning permission for the 646 Scheme or the 538 Scheme, either by the City Council or on appeal to a planning inspector?

    iii) If so, would Romal have proceeded with the consented development, and would it have sold units in time to reserve valuable ground rents in the unit leases?

313. The outcome in the counterfactual world depends in part on what Romal and Peel would have done, and in part on what third persons (namely, the City Council and the Planning Inspector) would have done, if Peel had adequately performed its contractual obligations. Questions about what Romal would have done in those circumstances fall to be assessed on the balance of probabilities: if Romal would probably have taken a particular course, then I must apply that answer in the evaluation of what would have happened. Similarly, if there is a question about what Peel would have done (other than something that it should have done, by reason of its contractual obligations), I should determine what it probably would have done, on the basis of my assessment of the evidence before me, including its evidence. If, when I come to consider the quantum issues, there are different ways in which Peel could have performed its obligations, Peel is entitled to say that it would have performed it in the way most beneficial to itself.

314. Questions about what a third person would have done in the counterfactual world have to be answered by asking, first, whether there was a real and substantial chance of that person acting in the way that Romal contends that they would have done; and then second, if there was a real and substantial chance, what was the percentage chance of the third person acting in that way: Allied Maples Group v Simmons & Simmons [1995] 1 WLR 1602 ("*Allied Maples*") at 1609H-1614E, as consistently applied in many first instance decisions since 1995.

315. There is no dispute between the parties that this is the right approach in law, though there is a difference between them as to how I should apply it to assess, cumulatively, the chance of various different outcomes.

The Agreed Issues

316. The issue and sub-issues in this group of issues that the parties have agreed are the following:

"Was Romal caused to suffer an alleged loss of any contractual chance to gain profits? Specifically:

i) Is Peel responsible for causing Romal any loss, given the terms of clause 2.1 of the Agreement and Romal's payment of the Deposit pursuant to clause 2.2?

ii) Did Romal pursue, make and revise the First Planning Application at its own risk?

iii) Is Romal entitled to contend that if Romal's rights under the Agreement did not arise (issue 1 above) or did not arise in respect of the 538 Scheme (issue 2 above), Peel would, if Romal had obtained planning permission, have granted the leases in any event, and, if so, to what effect?

iv) But for the alleged breaches of contract, on the balance of probabilities, would Romal have continued to pursue the First Planning Application as opposed to withdrawing it?

v) If, but for the alleged breaches of contract, on the balance of probabilities Romal would have continued to pursue the First Planning Application as opposed to withdrawing it, would Romal have had a real or substantial chance of obtaining planning permission for the 646 Scheme or, alternatively, the 538 Scheme?

vi) If the answer to issue 5 above is "yes", has Romal failed to plead and prove that it would have been able to take all necessary steps to proceed with the consented development?

vii) Did the alleged breaches of contract prevent Romal from selling leases of the apartments at a ground rent (ground rents having been rendered unlawful in June 2022) and (if relevant) prevent it from selling its reversion for an investment value?

viii) Did the alleged breaches of contract cause Romal to incur wasted costs in pursuing, amending and withdrawing the First Planning Application and pursuing the Second Planning Application, which it would not have otherwise incurred?"

317. As to issue vi) above, the wording of this issue was not agreed by the parties but my reformulation of their different versions of the issue – which is concerned with what Romal needed to plead and prove as to its chances of converting a planning permission into a profitable development – sufficiently identifies it.

Issues (i), (ii) and (iii)

318. The first two agreed sub-issues raise again arguments that I have already determined against Peel.

319. The first issue is based on the argument that everything that Romal did, first under the AfL and then outside it, was at its own risk, given that it knew about the LWOPP parameters and could, by due diligence, have found out about Peel's proposals for Cultural Square. As such, Peel seeks to argue that the only real and effective causes of Romal's losses are its own failures and its pursuit of an impossible goal.

320. However, as I have decided, Romal did not agree to assume the entire risk of pursuing a hopeless development or of Peel acting in such a way as to undermine its application,

and Peel was in breach of contract in the ways that I have already identified. There is no contractual estoppel based on assumed due diligence about what Peel was proposing to do.

321. The second issue overlaps the first but is based on the contention that Romal proceeded outside the scope of the AfL and therefore entirely at its own risk. I have rejected this argument. Otherwise, this issue depends on the same argument as the first issue and fails for the same reasons.

322. As for the third issue, this arises from an alternative argument raised by Romal in its Amended Reply, in response to Peel's case that Romal had no entitlement to leases under the AfL. The argument is that since Romal and Peel were proceeding between 2019 and 2021 on the shared assumption that Romal's planning applications were made within the scope of the AfL, even if strictly they were not within it, Peel would have granted Romal the leases in any event if a Satisfactory Planning Permission had been obtained, even if not obliged to do so, and so the breaches of contract did in fact cause the losses claimed. This therefore raises an interesting question about whether, in this context, it can be assumed that Peel would have given Romal something that it was not obliged to give, based on the conduct of the parties (even if that conduct falls short of creating an estoppel).

323. As I have found that Romal's original and amended planning application was made within the scope of the AfL, or alternatively that Peel is estopped from contending that it was not, the issue does not arise for decision. The factual findings that I make are that Peel at all times was proceeding on the assumption that the parties were within the scope of the AfL, that it wanted to receive the agreed premium, and that until Romal sued it for lost profits Peel had not considered that the AfL did not apply to the parties' dealings. It therefore seems unlikely that Peel would have declined to grant the leases of the Property following a Satisfactory Planning Permission.

The main causation issues: issues (iv) and (v)

324. Issues (iv) and (v) are at the heart of the causation questions that I have to decide, to which much of the evidence was directed. They give rise to factual questions about how the City Council would have dealt with the original planning application had it been fully supported by Peel and not in conflict with NMA1, NMA2 or the CDNMP, and what Romal would have done if the City Council had declined to determine or refused planning permission. What the City Council would have done depends, in part, on the correct analysis of the planning documents and policies (summarised in [32]-[90] above), as they applied in 2019-2020 to the proposed development, and to some extent on the relevant planning officers' own views of the matter (though none of them was called as a witness).

325. What Romal would have done also depends on a proper understanding of the effect of the planning documents (since Romal was advised by professionals at the time, and would also have been so advised in the counterfactual world), as well as on the wishes and motives of the directors of Romal (who did both give evidence).

326. It was common ground by the start of the trial that the relevant dates for considering what would have happened (or the chances of its happening) are November 2019 and August 2020 for the grant or refusal by the City Council of the 646 Scheme and the 538 Scheme respectively, and January 2021 and June 2021 as the dates for an appeal decision on each

Scheme respectively. These were the dates originally advanced by Mr Suckley in his expert report, and it is evident from the expert witnesses' joint statements that the November 2019 and August 2020 dates are for the planning committee meetings at which a resolution to grant or refuse planning permission would have been expected. The expert witnesses agree that it can take up to three months to negotiate planning conditions and a planning (s.106) agreement thereafter, before the planning permission is formally issued. The appeal dates are, self-evidently, the dates of expected release of the Inspector's decision.

327. The timelines for what happened in fact with the planning application and its amendment are summarised in Sections V and VI above. In the counterfactual world, it must be assumed that Peel used all reasonable endeavours to integrate Romal's proposed developments with its proposals and reasonable endeavours to assist Romal to pursue a planning permission. The obligations were broad, and were not time limited, or limited to single steps that Peel had to take, or single occasions on which it had to act.

328. In my judgment, the obligations on Peel in clauses 2.8 and 5.3 required it to have done the following things:

    i) indicated in the pre-application meetings with the City Council in July, September and/or November 2018, where appropriate to do so, its support in principle for the intended planning application for a development of at least 600 residential units in the five-finger (and then the 646 Scheme) designs;

    ii) written to the City Council reasonably promptly and formally in response to the Council's email of 15 January 2019 (once it had reviewed the planning documents and decided not to require Romal to make changes) indicating its support as landowner and as promoter of Liverpool Waters for the 646 Scheme, explaining: how it created a strong waterfront presence, which was desirable; why it was an important step in delivering the LWOPP objectives in the Central Docks phase of the LWOPP; and why non-compliance with some of the parameters in the LWOPP and any harm to heritage assets were justified, given the substantial benefits that the development would provide in terms of economic value, connectivity and momentum;

    iii) provided Romal promptly and on a continuing basis with drawings and information relating to its own proposals and developing designs for Central Docks;

    iv) considered and discussed with Romal how the removal of Prospect Park from the design of Central Docks might impact on the location and delivery of the Cultural Building, and how the design of the 646 Scheme should integrate with intended development to the north of the Property, while respecting that Peel did not have the right to require any part of the Property to be used for Cultural Square;

    v) considered and discussed with Romal prior to submission of the planning application how the 646 Scheme (or another scheme in excess of 600 units) would best sit on the Property and what (if any) non-material amendments to the parameter plans and indicative masterplan would be appropriate to facilitate Romal's development, given the location of JHW;

    vi) disclosed to Romal the draft NMA1 application prior to making it;

vii) not included in the NMA1 application an indicative masterplan showing the Cultural Square overlapping the Property;

viii) included any appropriate non-material amendments resulting from discussion with Romal in NMA1 or in another such amendment application calculated to facilitate the grant of a Satisfactory Planning Permission for the Property;

ix) consulted Romal prior to making NMA2, sharing with it all relevant drawings and text intended to be used in NMA2;

x) avoided including anything in NMA2 that was inconsistent with Romal's planning application;

xi) not made the NMA2 application in the terms in which it was made;

xii) delayed making its Central Docks condition 11 discharge application prior to determination of Romal's planning application unless Peel felt able to include Romal's design for the Property in its draft masterplan or (at least) present a masterplan that was not inconsistent with Romal's application;

xiii) continued to support the planning application during the statutory consultation and evaluation stage;

xiv) attended the meetings between the City Council and Romal in June, July and August 2019 and reiterated support for the 646 Scheme and disagreement with the City Council's suggestion that a reduced scheme (reduced below 600 residential units) should be pursued instead by way of amendment;

xv) assisted Romal to rebut the planning officers' concerns about height and massing, pointing out in particular that the impact overall on static or kinetic views from Wallasey and the River was little worse than the impact already "built in" to the LWOPP, and that any such harm was readily outweighed by the benefits of the 646 Scheme;

xvi) negotiated with the planning officers as reasonably necessary to persuade them to back the 646 Scheme, or, later, the 538 Scheme;

xvii) attended the pre-application meetings between the City Council and Romal in November 2019 (and any later meetings), making clear its support for the 538 Scheme in the event that the City Council would not support a development of at least 600 units;

xviii) continued to support the 538 Scheme application after November 2019, assisting Romal to rebut the concerns of the planning officers about dock infill and height of the development, supporting Romal's case that the impact overall on static or kinetic views from Wallasey and the River was little more than the impact already "built in" to the LWOPP, and that any such harm was outweighed by the benefits of the 538 Scheme;

xix) supported Romal in similar terms, including with evidence, in any appeal brought by Romal against non-determination or refusal of planning permission.

329. Romal's case is that if Peel had done these things, there was overall an 80% chance that it would have obtained planning permission for the 646 Scheme, or alternatively for the 538 Scheme; and Peel's case at the start of the trial was that there was no realistic or substantial chance of obtaining planning permission for either, on the basis that there were fundamental objections to both Schemes concerned with height and massing, which caused a level of harm very close to substantial harm to WWH.

330. At a more granular level, Romal's legal analysis starts with the planning officers' requests in June/July 2019 for different designs, and asks whether, in the counterfactual world, with Peel supporting the 646 Scheme, there was a real and substantial chance that they would not have requested different designs, or would not have pushed for Option 1, and would have proceeded instead to address and determine the 646 Scheme. If there was no such realistic chance, and the planning officers would still have pushed back, despite Peel's support, the question becomes one about what Romal would have done, faced with the City Council's indication that it wished to see alternatives.

331. In that scenario, Romal must persuade me that, on the balance of probabilities, it would have pressed the City Council for a decision on the 646 Scheme and then appealed, if necessary, rather than acceding to the planning officers' wishes and amending its application.

332. If, on the other hand, there was a real and substantial chance that the planning officers would not have requested alternatives, the next question is whether there was a real and substantial chance that planning permission for the 646 Scheme would have been granted, either by the City Council or on appeal.

333. If, instead, the City Council would still have sought revisions to the 646 Scheme and Romal probably would have amended its application, as it did in fact do, then Romal contends that the question is whether it would probably have pursued the amended application for the 538 Scheme to a determination, with Peel's support, or would have done as it eventually did (albeit in different circumstances in the real world) and withdrawn the application in favour of a new application for the 330 Scheme instead. If it would probably have pursued the 538 Scheme, the question is then whether there was a real and substantial chance that planning permission would have been granted, either by the City Council or on appeal.

334. Peel's case, on the right approach in principle to causation, is that the relevant questions are whether Romal would probably have proceeded with the original planning application for the 646 scheme rather than amending it, and if the latter is the case, whether it would probably have pursued the amended application rather than withdrawing it. Peel does not address the question of whether there was a real prospect that the City Council would not have required changes to the 646 Scheme – but that is because it considers that there was no such chance whatsoever, given the principled basis on height and massing issues on which the City Council was opposed to both Schemes.

335. I consider that Romal is right in principle, and that the first question to address, in the counterfactual world, is what the City Council would have done, faced with Peel supporting the original planning application. In particular, would the City Council have

taken the stance that it did take, between June and August 2019, in relation to Romal's planning application.

(1) Would the City Council have sought alternative designs?

336. I have found that the City Council took the stance that it did not only because its planning officers doubted that they would be able to recommend the grant of permission on height, massing and other grounds, but also because it did not wish to determine the application before it had decided Peel's applications for NMA2 and the CDNMP.

337. It is true that Mr Jones and Ms Campbell had expressed concern about the content of the application. These were identified first in formal feedback from Mr Jones to the first pre-application meeting on 12 July 2018. Mr Jones raised non-conformity with the LWOPP parameters generally ("some fundamental conformity issues"), which would require justification, and the infilling of the dock for a residential scheme. Mr Jones noted the fact that the approved Central Docks masterplan was not yet in place and wished to see progress in that regard. He considered that the proposed form and massing raised some questions. He also wished to see Peel involved with the application at an early stage. Liverpool Waters Strategic internal documents of Peel at that time record that Mr Jones was looking for assurance that Peel supported the proposal. (Mr Ford confirmed in evidence that Romal and Peel being on the same page, when speaking to the Council, was important.)

338. At further meetings with the City Council on 2, 20, 23 and 27 November 2018, the broad message conveyed was that there were hurdles that the application had to overcome, but none that was insurmountable. Mr Lawless, in his witness statement, said that Romal had initially received broad support and that the Council had given lots of encouragement at the pre-application stage. Mr Grover and Mr Ford both said in evidence that they considered that there was a good chance of obtaining planning permission and that any non-conformity should not prevent it. Mr Grover's email to Peel the day before the application was submitted noted that he had agreed with Ms Campbell to submit and then resolve outstanding issues relating to infill and building materials afterwards. Mr Pollitt had similarly spoken to Ms Campbell: whatever she said to him did not dissuade him from giving Peel's permission for the application to be submitted.

339. Given that the application was a standalone application that did not conform to all the parameters of the LWOPP, there were bound to be issues that needed to be justified. Although the City Council had identified some, it did not show Romal a green light or a red light. The application was filed with a Liverpool Waters Conformity Statement from Arup confirming that the application did not prejudice the delivery of the LWOPP.

340. Following submission of the application, the City Council asked Peel for its position on the application, so that this could be considered. At MIPIM in March 2019, the City Council was happy to stand alongside Peel advocating redevelopment that included Romal's scheme, or something approximately like it.

341. Shortly after the end of the statutory consultation period for Romal's application, Peel applied for NMA2 (which did not include Romal's development), and a month later it applied to discharge condition 11 for Central Docks by approving a masterplan which showed a different development from Romal's development on parcel 3b. I find that these steps probably fuelled the planning officers' preference for those matters to be

resolved first. Peel's applications would have led to identification of inconsistency between the (desired) CDNMP and the (less desirable) 646 Scheme, and made them unwilling to proceed to prepare a recommendation on the latter for the planning committee. Instead, they raised difficulties with Romal's application and agreed with Peel (though not Romal) that it would be dealt with after NMA2 and the CDNMP. I find that Peel expressly agreed this course with the planning officers.

342. The Council did not entirely stop its engagement, however. It did meet Romal in June 2019 and requested changes to the scheme: "To make sure that they are comfortable in supporting the scheme", according to Peel's consultants' executive summary note in June 2019. The focus seemed to be on the dock infill issue (with which, it is now accepted, the planning officers were unduly concerned and which could not have justified refusing planning permission, given the impact of JHW and the need for connectivity across the Central Docks). In my judgment, potential redesign was concerned primarily with that issue, namely the planning officers' need to be satisfied that a 646 unit scheme with dock infill was justified on viability grounds. There were however also concerns about height and massing.

343. When Romal reluctantly provided alternative designs to the planning officers on 6 August 2019, Ms Campbell indicated a preference for Option 1, but there is no record of exactly why that was considered preferable to the 646 Scheme. The best evidence is a detailed note of the meeting prepared by Mr Ford dated 6 August 2018, previously referred to. This records that Romal introduced various options for redesign, each of which reduced the height to between 30.5m and 34m (10-11 storeys), rather 33.6m and 47.4m for various buildings in the 646 Scheme (up to 14 storeys). It is likely therefore that height exceedance had previously been raised with Romal. Mr Jones said that the harm of the partial infill needed to be outweighed by public benefits. It is evident that, for Mr Jones and Ms Campbell, the principal harm needing to be addressed was the infill of the dock. Further justification was needed before the 646 Scheme could be considered the best solution for parcel 3b. The options provided by Romal were only being considered on the assumption that justification for infilling could be found. Of the options, Ms Campbell preferred Option 1.

344. At that point, Romal believed that there was a better chance of obtaining planning permission for Option 1, and was advised by Mr Grover that it was better to obtain a more limited planning permission than to incur the delays that would be involved in proceeding to a determination by the City Council and then appealing. As a result, Romal moved swiftly to present a fuller Option 1 to Peel on 14 August 2019 and obtained Peel's "blessing" to proceed with that design, subject to the City Council's support. Romal then procured a development viability report and a heritage review to support the case on the viability of the 538 Scheme and the need for dock infill of the kind proposed. At pre-application meetings on 8 and 12 November 2019, the City Council was positive: a Mr Kavanagh, then Head of Regeneration, indicated that a slight reduction in height would lead to support from the City Council.

345. Self-evidently, if Peel had not submitted the NMA2 application and condition 11 application in the form that it did, the City Council would not have been faced with a conflict with Romal's 646 Scheme. The request for alternative designs was not made to address the conflict with Cultural Square, but rather to assess the need for the degree of infilling, and to slow down the progress of the application, so that NMA2 and the CDNMP could be determined first.

346. In the counterfactual world, Peel would not have made applications that conflicted with Romal's application and it would have expressed its support for the 646 Scheme. It would not have agreed that its own applications (if made, consistently with Romal's application) would have been determined first. It would have urged determination of Romal's application, either first or at the same time as its own applications, if made. That would in my view have made a considerable difference to the willingness of the planning officers to engage with the application on its merits (whether ultimately granting or refusing permission), rather than making generalised requests for different designs. In reality, rather than in the counterfactual world, I consider that the City Council was encouraged to push back and seek redesign because it knew that Peel did not support the 646 Scheme and that Peel felt that its extent was excessive. The fact that Peel's own applications were inconsistent with Romal's application would have made the lack of support clear. Peel's own masterplan would only accommodate a smaller scale development on plot C-02.

347. If one takes out of the equation (for the counterfactual analysis) the motive to slow down progress with Romal's application and prioritise Peel's inconsistent applications, and substitutes for implicit disapproval of the 646 Scheme Peel's express support for it, the position would in my judgment be very different. To the question whether there was a real and substantial chance that the planning officers would not have asked for alternative designs but would have proceeded to assess and make a recommendation on the 646 Scheme as presented to them, there is a clear answer. I consider that there is a strong likelihood that they would have proceeded in that way. They would have addressed the scheme on its merits, and considered whether justification had been established for the non-conforming development. The planning officers would be unlikely to seek redesign of a scheme that Peel fully supported and could justify. I accept Mr Rhodes's opinion that the reality was that the planning officers were more likely to be persuaded of the merits of an application that Peel supported.

348. Although there were issues with the 646 Scheme in the planning officers' minds, these were issues that could be dealt with when considering the recommendation in their report. The objections on these grounds were not obviously "show stoppers", they were issues that had to be considered carefully. (My reasons for this conclusion will be apparent in the next part of the judgment, where I consider whether there was a real and substantial chance of the grant of planning permission.) Further, the City Council had not raised redesign in the pre-application meetings, even though they had identified non-conformity. The planning officers would not, in my judgment, have pushed back and sought different designs in the way that they did if Romal and Peel were united in support of the 646 Scheme, emphasising the impressive architecture, connectivity, impetus and economic benefits that it would bring.

349. The next question is whether there was at least a real and substantial chance that the planning officers would still have requested alternative designs. Given the conclusions that I have reached as to why alternative designs were sought in the real world, I do not consider that there is a real and substantial chance that, in those very different circumstances, they would still have sought alternative designs. The officers would not have believed that Peel opposed the scale of the design and wished to 'defend' the LWOPP parameters, and they would not have been seeking to delay determination of Romal's application. It is common ground that they should not have refused consent on the basis of the amount of dock infill.

350. That conclusion means that it is strictly unnecessary for me to consider what Romal would probably have done if the planning officers had still required alternative designs to be provided, as they did in fact. However, I will make brief findings, in case they become material at any later stage.

351. Assuming, on this hypothesis, that Peel's support did not persuade the City Council to proceed to deal with the application on its merits, it seems to me to be inherently likely that Romal would have done as it did in fact do in response to pushback in June and July 2019, and would have presented the smaller scheme alternatives that it did, with a view to persuading the planning officers that the scale of the 646 Scheme was necessary to make the development viable and to justifying the infilling.

352. It also seems to be most likely in those circumstances that the officers, having pushed back against the scale of the 646 Scheme, would have expressed the tentative views that they did in fact express, stressing the need to justify the infill but preferring Option 1 to the 646 Scheme. Apart from the assumed support of Peel for the 646 Scheme (which has not prevailed, on this assumption) and the absence of conflict with Peel's own applications (which is not material on the height and infill issues), there is nothing else in the counterfactual world that would have been likely to cause Mr Jones or Ms Campbell to express a different view than they did. I can discount the slight chance that they would have acted differently in these circumstances. Equally, it seems inherently likely that Romal would then have acted as it did – with the benefit of Mr Grover's commercially sensible advice and the commercial instincts of its own directors – and amend its application to pursue planning permission for the smaller 538 Scheme.

(2) Was there a real and substantial chance of planning permission for the 646 Scheme being granted?

353. On the basis of my conclusion that the City Council would not have required the submission of alternative designs but would have determined the application as it stood, I must decide whether there was a real and substantial chance of planning permission for the 646 Scheme being granted, either by the City Council or on appeal. This question falls to be assessed on the assumption that there was no conflict with any application made by Peel and that Peel was consistently supporting the application.

354. The process of determination would have involved the planning officers, specifically Mr Jones as the case officer, reviewing the application in detail against the relevant planning documents, including the LWOPP, taking account of the statutory consultation responses and other responses to the application, consulting with the head of planning and other internal consultees at the City Council, then asking himself the question whether he should recommend the grant or refusal of planning permission, and reaching a considered conclusion. This exercise was not performed in fact in relation to any of Romal's Schemes. It is not in dispute that the planning committee was very likely to follow the recommendation made by the planning officers in their report, and that it should be assumed that it would have done so.

355. More specifically, the question that Mr Jones had to decide was whether the application was in accordance with the development plan, and, to the extent that it was not, whether material considerations relating to the proposed development justified the grant of planning permission nevertheless. It is agreed that the LWOPP is an important material consideration, even where a standalone application is made for planning permission.

356. My role is not to put myself in the position of Mr Jones, the planning committee or even a Planning Inspector and decide the very question that would have been before them, but to assess, as best I can, whether there was a real and substantial chance of Romal getting a favourable decision, taking account of all relevant material and arguments that would have been before them, at the dates that the parties have agreed to be the relevant dates. If I conclude that there was a real and substantial chance then, in order to determine the quantum of Romal's claim, I shall have to decide approximately how great or small that chance was. If, on the other hand, the chance was so low as to be unrealistic, I must then conclude that the breaches of contract did not cause Romal to lose a real and substantial chance of obtaining planning permission for the 646 Scheme.

Introduction to the planning questions and evidence

357. I was assisted in considering the likelihood or otherwise of the City Council or a Planning Inspector granting planning permission for the 646 Scheme by the expert planning witnesses. Both Mr Rhodes and Mr Suckley were highly experienced and well qualified to give expert opinions on the questions put to them. Both of them had clearly done considerable work on the issues, preparing detailed reports, answering written questions and agreeing two joint statements, but also to be ready to give evidence at the trial. Each was very confident in the view that he expressed, and each was tenacious in defending his opinion that there either was or was not a real and substantial prospect of planning permission being granted.

358. Mr Rhodes was clear, careful and consistent in the evidence that he gave. The only point on which he appeared less certain and confident in his answers was when he was asked about the degree of less than substantial harm to the setting of WWH that the 646 Scheme and the 538 Scheme would cause. At one point he mistakenly thought that the Planning Inspector on the 330 Scheme appeal had concluded that that Scheme only did a low degree of less than substantial harm, whereas in fact he had concluded that a moderate degree of less than substantial harm was done.

359. Mr Rhodes's report was not explicit about the degree of less than substantial harm caused by the 646 Scheme or the 538 Scheme – principally on the basis, he said, that whatever degree of less than substantial harm was caused, that was clearly outweighed by the non-heritage public benefits of the 646 Scheme and the 538 Scheme. However, Mr Rhodes did accept in cross-examination that the degree of less than substantial harm caused by each Scheme was a moderate degree, and he had accepted in his report that each Scheme caused a greater degree of harm than the 330 Scheme did. On that basis he was asked whether he therefore agreed with Mr Suckley that the harm caused by each must be a relatively high degree of less than substantial harm, but Mr Rhodes did not agree. He maintained (and Lord Banner KC submitted) that the upper end of the range of less than substantial harm is more appropriate for cases where there was actual damage to or demolition of a heritage asset, not cases where only the setting of the asset was affected.

360. Mr Suckley was a less impressive witness than Mr Rhodes overall. It seemed to me that he pursued too vigorously arguments that were dubious or even, after careful analysis, wrong in principle. In my view, he was wrong to hold out for a borderline high level of less than substantial harm to WWH, and wrong to say that the planning policies prioritised conservation over regeneration. Those two planks of his argument enabled him to say that any benefits of the 646 Scheme or 538 Scheme could not outweigh the level of harm they did to WWH. However, he did not compare the harm to the setting of

WWH – specifically the distant views – done by Romal's Schemes in comparison with the harm done by development that was assumed in the LWOPP. Mr Suckley did however concede in cross-examination that there was a 20% chance of obtaining planning permission for either Scheme from a planning inspector.

361. Assessing the 646 Scheme against s.38(6) of the 2004 Act, Mr Suckley concluded that it did not accord with several relevant policies of the UDP, or with the emerging Local Plan, or with the principles of the LWOPP and paragraphs 127 and 196 of the NPPF. Mr Suckley accepted that there were some Scheme benefits, but considered that these were insufficient to outweigh serious non-compliance with planning policy.

362. Mr Suckley considered that a rational decision maker should have refused permission for reasons relating to: poor layout, orientation and design; excessive scale and density; heritage impact; car parking location; lack of open space; and housing mix. Although Mr Suckley itemises in his report a variety of matters that he said did not accord with the development plan's requirement for good layout and design, and similar issues, ultimately it was not contended by Peel that there were reasons other than the scale and density of the development and its impact on heritage views of WWH why there was no real and substantial chance of the grant of planning permission. In particular, Peel does not contend that a rational decision-maker would have refused permission on the basis of the adverse impact of partial infill of the dock, which was an issue that Mr Jones in particular frequently raised in the real world, perhaps because English Heritage (as it then was called) consistently objected to development in the Central Docks on that basis.

363. Mr Suckley's evidence was strongly challenged by Lord Banner on the basis that he had misunderstood the effect that the LWOPP would have on a standalone planning application, and had therefore given too much weight in his assessment to the parameters in the LWOPP Parameter Plan Report, which in the counterfactual world had not been fixed as a result of a definitive CDNMP. Mr Suckley was also challenged on the basis that he was in reality arguing a case for Peel, which was a valued client of Mr Suckley and his firm, and not giving a balanced and independent opinion to assist the court. It was suggested that he was determined to argue, contrary to the true position, that the LWOPP had fixed the plot and height parameters for parcels 3a, 3b and 3c for good reason, such that there was no prospect of a rational decision-maker granting permission for buildings on parcel 3a or 3b in excess of the building height parameters.

364. I found assistance in understanding the issues from the evidence of both experts, but I was more persuaded by Mr Rhodes's opinion than I was by Mr Suckley's, which I felt was consistently overstated, or wrong in certain respects. I will elaborate on this below by identifying the six principal areas in which the expert witnesses had a material difference of opinion.

365. I was persuaded by Mr Rhodes's opinion on the architectural and design merits of the 646 Scheme, which was consistent with Mr Swift's and Mr Ashworth's evidence about the genesis of the design – a visit to Copenhagen's regenerated docks area. I accept that the design was intended to afford views to (and from) the River from (and to) WWH, which a larger monolithic structure would not give, and that the design would indeed have provided fixed and kinetic views of WWH from the River and Wallasey, though not from every fixed viewpoint.

366. The fact that I broadly prefer Mr Rhodes's opinions to Mr Suckley's does not however mean that I accept all that he said. In particular, there are two specific points where I consider that Mr Rhodes's opinion is not fully justified by the planning documents. The first is his view that the planning documents, on their true interpretation, give priority to economic regeneration over heritage preservation. I do not consider that to be the case: in my view, the documents strive to maintain a balance between the two key considerations. They nowhere say or suggest that where they conflict, conservation should give way to regeneration. How they are applied in practice by those forming a planning judgement is of course a different matter. The second point is that I do not agree that it is likely that the height parameter for the northern part of parcel 3a (12m) signifies no more than the expected height of the CLT, and that it otherwise would have been 41m or more, consistently with the southern part of parcel 3a and parcel 3c.

367. As a consequence of these points, I consider that Mr Rhodes's opinion that there was an 80% chance of obtaining planning permission for the 646 Scheme or for the 538 Scheme is too high an assessment. That is because it rather overstates the extent to which regeneration should in principle outweigh conservation and because it understates the degree and importance of the protection of the setting of WWH that the LWOPP affords.

368. It was common ground that the proposed development in the 646 Scheme was not fully in accordance with the development plan, at least in that the buildings would not preserve the setting and important views of WWH (contrary to Policies HD5 and GEN3). Peel also relied on other policies that Mr Suckley contended that the 646 Scheme would breach, but it did not in the event contend that other material considerations could not outweigh these instances of non-conformity. The focus was therefore on the extent of harm caused to the setting of WWH by the proposal, on what other material considerations existed, and whether these justified the grant of planning permission despite the harm caused.

369. At the material times, the WWH was in the WHS area, as well as being a Grade II listed building. The setting of WWH includes its immediate setting at East Waterloo Dock and the WHS area and buffer area that surround it, but also the views of WWH from within the City, and static and kinetic views from Wallasey and the River. To the north of the area of Central Docks with which this case is concerned is the Stanley Dock Conservation Area. There was contended to be some harm to the setting of this area too, given the proximity of the proposed development (albeit the Cultural Building was to be in between parcel 3b and the Conservation Area). But again, it was not suggested that harm to it would tip the balance if the harm caused to the setting of WWH was considered to be outweighed by the public benefits of the development.

370. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 states:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses"

371. As set out in [44] above, para 193 of the NPPF at the relevant times required great weight to be given to the conservation of a designated heritage asset, with greater weight the

more important the asset is, and para 194 requires clear and convincing justification for any harm.

372. It was ultimately common ground that the harm that would be done to the setting of WWH (which, as a part of a WHS, was a very important asset) is less than substantial harm – a wide category of harm that extends from anything more than de minimis to harm just short of substantial harm. It was also agreed that even partial demolition of a listed building can be less than substantial harm, which illustrates the breadth of the category. However, there is no question here of any actual damage to or demolition of WWH: it is only its setting that is affected. This was the case when Peel applied for the LWOPP, in which a building of about the same height as WWH was identified for plot C-02, a Cultural Building of greater height than WWH on plot C-03, and the CLT, with a height of up to 47m, on plot C-01.

373. Within the wide bracket of less than substantial harm, the relevant PPG requires harm generally to be categorised as being either low, moderate or high. This was an exercise done in fact by the Planning Inspector in relation to the 330 Scheme in June 2022. The weight to be given to the harm will depend on where in the scale the harm falls and on the importance of the asset. The harm so assessed then falls to be weighed with any heritage benefits resulting from the scheme in question – sometimes a development can both harm a heritage asset in certain respects and benefit it in others. As a result, an overall net assessment in heritage terms is reached. Then, in the final analysis, if the harm is less than substantial to the significance of the heritage asset, the harm has to be weighed against the other public benefits of the scheme, pursuant to para 196 of the NPPF.

<u>The dispute on the expert planning evidence</u>

374. With that introduction of the correct approach, I turn to the six principal issues on which the planning experts differed and the parties' cases diverge. In focusing on these issues, I do not disregard the other points made in the witnesses' evidence, all of which I have re-read and taken into account.

375. The first issue is whether the decision-maker is required to prioritise conservation of Liverpool's heritage assets over economic regeneration, where the two come into conflict, and whether the expression "heritage-led regeneration", which is found in some of the planning documents, signifies that priority.

376. Mr Rhodes gave evidence that "economic regeneration is the primary driver of planning decision-making in this location". He disputed that the expression "heritage-led regeneration" means that priority is given to conservation, and indeed said that on their true interpretation the relevant planning documents are prioritising regeneration. He pointed out that the WHS SPD, which one would expect to see emphasising conservation of the WHS, is in fact mostly about encouraging regeneration of substantial parts of it.

377. Peel's case, advanced by Mr Suckley, is that the effect of the relevant planning documents, which the decision-maker would have to apply, is that the need for economic regeneration (which it accepts, and indeed is promoting) must be "heritage led", in the sense that conservation of heritage assets is to be the first consideration.

378. While an expression such as "heritage-led regeneration" can be understood, in its own terms, to emphasise heritage over regeneration, I do not consider that it is intended to

have that connotation within the planning documents. It is evident that preservation of Liverpool's heritage assets and the urgent need for economic regeneration of derelict areas of the City are considered to be two equally important drivers of planning policy. It is obvious that in certain circumstances those drivers may conflict, but the planning documents do not attempt to resolve that conflict, which is sensibly left to be resolved, if it arises, on a case by case basis. It is implicit in the development plan and later documents, even by the time of the draft Local Plan, that there is a balance to be struck between two equally important considerations. It is doubtless also the case that individuals in the City Council, whether officers or councillors, are likely to have different views about priorities, and in that sense the planning documents are, as one would expect, a political compromise.

379. Mr Suckley's opinion is that the LWOPP definitively struck the balance between regeneration and conservation, and that the LWOPP was indeed "heritage-led". I consider that this overstates the matter – it is part of Mr Suckley's mistaken view that the LWOPP made final judgements on the extent of what was to be allowed. I consider that what the LWOPP does is to balance a desire on the one hand to preserve as much as possible of Liverpool's special heritage with the need on the other hand for economic regeneration of the City, and to accommodate the aspirations of a landowner and developer. It is not possible to regenerate the Central Docks area without doing some harm to heritage assets, but regeneration was desperately needed. The buildings on plots C-01, C-02 and C-03, for which outline permission was granted, would do a moderate amount of less than substantial harm to the WHS assets, in particular to views of WWH, as well as harm to the setting of the Stanley Dock Conservation Area. But there is no basis, in my judgment, for saying that the harm "built in" to the LWOPP was at the limit of what a decision-maker could or would permit. It was the compromise that was struck in 2013, but it had flexibility built into it. The same picture emerges from the terms in which the Planning Inspector granted permission for the 330 Scheme in July 2022.

380. The second area of disagreement is whether LWOPP definitively fixed the boundaries of the parcels and plots in Central Docks and the permitted maximum heights of buildings on each plot. Peel's case is that it did, but this was based in part on a misreading by Mr Suckley of the LWOPP conditions, and a failure to acknowledge that the LWOPP is no more than one material consideration where a standalone application for planning permission is made. In that context, the principal issue would be whether the grant of planning permission could invalidate the LWOPP for the future, on *Pilkington* principles (see Pilkington v Secretary of State for the Environment [1973] 1 WLR 1527; Hillside Parks Ltd v Snowdonia National Park Authority [2022] 1 WLR 5077).

381. Mr Suckley apparently gave no weight to the terms of condition 4 of the LWOPP, which requires development to "conform generally" with the LWOPP parameters, or to its tailpiece, which gives leeway to the City Council to entertain a reserved matters application that does not conform with the parcels, plots and heights parameters. On a standalone application, the LWOPP is only a material consideration, albeit an important one, not a set of conditions subject to which any application can be made.

382. The LWOPP therefore has and was intended to have a degree of flexibility about its implementation, as shown by para 2.3.6 of the SKDP (set out at [78] above) and confirmed in the draft Local Plan at paras 6.95 and 6.96 (at [85] above). Para 6.96, which requires standalone applications to be assessed "utilising the provisions established through the [LWOPP]" was cited by the Inspector determining the 330 Scheme appeal,

which was non-compliant with the (by then fixed) height and plot parameters of the LWOPP.

383. Mr Rhodes considered that the real significance of the parameters was to establish a basis for the Environmental Impact Assessment (the *"Rochdale envelope"*, as it is known) rather than to decide what extent of development could ever be permitted. While it is true that the parameters would perform that function, it is not necessarily the case that they have no other significance. However, in the counterfactual world, the parameters were not fixed: whether a particular standalone development should be permitted, in view of all material considerations, is a matter for individual judgement, not the rigid application of the LWOPP parameters.

384. The third point of material difference is that Mr Suckley considers that at least the site of the Cultural Building and the Cultural Square were fixed by the LWOPP, even before the CDNMP, because Cultural Square was described as "a monumental square" and was required to be delivered with the Cultural Building, which was to be placed on parcel 3c. Mr Rhodes considers that the location and size of Cultural Square were not fixed and that the Square could have been delivered in a different location altogether, or to the north of JHW, partly on the new parcel 5a that Peel created as a result of removing Prospect Park by NMA1.

385. I have already indicated that I consider that Cultural Square was correctly designated as a recreational square in the Design and Access Statement, not as a monumental square. It was therefore more comparable to Prospect Park, which Peel was able to eliminate at a stroke in NMA1. Although the indicative masterplan shows the Cultural Building and Cultural Square on parcel 3c, the size and location of the parcels was not fixed by the indicative masterplan. NMA1 showed that, where appropriate and if justified, the removal of an important park could be treated as non-material, and the grant of planning permission for JHW showed that the exact location of Cultural Square was not treated as fixed in any sense.

386. Mr Suckley also relied on condition 58 and Schedule 5 to the LWOPP to support his opinion, suggesting that these mandate locating Cultural Building on parcel 3c, as shown on the indicative masterplan. I do not consider that that is the effect of these provisions, which are concerned with the timing of the delivery of the key public spaces and linkages, not with the position of the associated buildings. The effect of the condition was that if and when any Cultural Buildings were constructed on parcel 3c, the developer had to deliver Cultural Square at the same time. If these conditions were construed in the way that Mr Suckley did, the development of parcels 3a, 3b, 3c, 3d and 3f would not have been possible without the provision of Prospect Park. In short, there was nothing to prevent the Cultural Building and Cultural Square being moved by a further NMA consequent on the delivery of JHW.

387. Peel's case in closing submissions stressed that it was not contending that departures from the LWOPP were inherently unacceptable: everything depends on the facts of the particular case. However, at times, both Peel and Mr Suckley seemed to go beyond that, contending that some of the LWOPP parameters were fixed and that development inconsistent with them could not and therefore would not have been permitted. I prefer the opinion of Mr Rhodes that this is not the case. Whether a particular development proposal was inconsistent with the general scheme of the LWOPP and would prejudice

its delivery was a judgement for the decision-maker, based on the individual facts of the case.

388. The fourth and principal point of difference between the expert witnesses was the significance of the height parameters for parcels 3a and 3b. Mr Rhodes considered that the 12m parameter on the northern part of parcel 3a merely reflected the intended design of the CLT, because the shape of the building to which the parameter attaches on Parameter Plan 6 appears to be the shape of the intended terminal building. Peel's case, which Mr Suckley supported, was that the lower height parameters for parcels 3a and 3b, and greater space between Plots C-01, C-02 and C-03, indicate a deliberate decision to leave views to and from WWH, and to prevent that asset from being hidden or overborne by higher development along the waterfront at that point. Peel draws attention to the difference between the heights on parcels 3a (north) and 3b, compared with the otherwise roughly uniform 41m+ and tighter plot locations for Central Docks as a whole. Romal on the other hand points to the fact that, in relation to Tobacco Dock, the LWOPP Design and Access Statement specifically states that heights have been reduced to preserve the visibility of that historic building, whereas there is no similar statement in the section relating to WWH.

389. The matter seems to me to be resolved in Peel's favour by paras 7.4.7 to 7.4.9 of the Design and Access Statement, which specifically emphasise that the development was designed to seek to safeguard important views of key landmark buildings, including WWH, and that distant views from Magazine Promenade, Wallasey Town Hall and Woodside Ferry Terminal (identified in the WHS SPD) were important views. It says that great care was taken to preserve the views and to ensure that nearby and adjoining development was significantly lower and smaller in scale. As Mr Forsdick KC put to Mr Rhodes, "the LWOPP [height] parameters were informed by the constraints of the parts of the LWOPP [site] to which they relate". In cross-examination, it seemed to me that Mr Rhodes ultimately accepted that point, while maintaining his view that 12m related specifically to the height of the CLT.

390. The height parameter of 30.7m for plot C-02, as compared with 41m for plots C-03 and C-05 and 44.5m for the CLT at its southern end, can therefore be taken to be a height that was considered at the time of the LWOPP to be appropriate to preserve sufficient visibility of WWH, in combination with the other nearby height parameters and gaps left between the plots. No doubt the exact heights of 12m and 44.5m for plot C-01 were attributable to the actual design of the CLT, and so it does not follow that a height of 12m was also considered to be necessary to preserve sufficient visibility of WWH, or that 44.5m was considered an appropriate height in any circumstances for a building immediately next to the Conservation Area. Something between 12m and 30.7m might have been acceptable for the northern part of plot C-01 had the CLT had some additional floors built on top of its northern part, prior to the height parameters being fixed by the CDNMP.

391. The effect on fixed, distant views of WWH of what was permitted by the LWOPP is, however, striking. Photo montages and CGIs of the views from the three WHS viewpoints in Wallasey, with and without the outline consented development, show that from viewpoint 1 (Magazine Promenade) the very distant view of WWH is almost completely obscured; from viewpoint 2 (Wallasey Town Hall) there is relatively little of WWH that is visible, despite the viewpoint being much closer; and from viewpoint 3 (Woodside Ferry) the distant view is unaffected. From kinetic views moving up and

down the river path in Wallasey or from boats on the River, the views would vary, and in places the views would be good and in others partially or wholly obstructed. Only to the south of WWH, moving towards Woodside Ferry, would the views be largely unobstructed (save for the effect at low level of the existing Waterloo Quay development in front of WWH).

392. That degree of harm flowing from obstruction of heritage views of a key heritage landmark building was therefore acceptable in principle, given the public benefits of the LWOPP – and an important question for the decision-maker in the counterfactual world would be how much additional harm (if any) the 646 Scheme created, and whether any greater harm was acceptable in the ultimate balancing of heritage harm and public benefit of bringing forward valuable development in Central Docks. This was at a time some 6-8 years after the date of the LWOPP, with very little development having come forward in the meantime.

393. On the issue of height on the waterfront, Mr Rhodes's opinion was that height was an important design benefit on the waterfront, to give status to the development (as well as additional value). In relation to the 646 Scheme, he answered the following question:

> "Q. Your headline point is that height and mass here is a positive virtue and that, as long as you can get views through, that's acceptable?
> A. Yes. I think it's a very imaginative, innovative, exciting response to the site. And I note that I'm not alone in that view, because that was the view expressed at the time, for instance by Peter Swift, when he saw it."

and added:

> "Nobody could suggest it didn't pay sufficient regard to the warehouse because the whole purpose of the design and the layout of the scheme was to enable views through to the warehouse, exactly in accordance with the planning policy."

394. The policy to which Mr Rhodes was referring there was para 4.4.14 of the WHS SPD, which states that "[d]evelopments should not have a significant adverse impact on the key views to, from and within the [WHS], *by wholly obstructing* a key public view of a landmark building". Mr Rhodes further pointed out that once a certain height had been reached, it was not further height that obscured the WWH – however, greater massing could have the effect of diminishing the visual impact of WWH .

395. Mr Suckley did not disagree that height could be a benefit, though in his opinion the height in this location, in combination with the limited spaces between the buildings, meant that far greater harm was done to the setting of WWH than in the LWOPP, or in the 330 Scheme – harm that could not be outweighed by the benefits of the proposed development.

396. The fifth principal point of difference between the experts was in their assessment of the degree and extent of less than substantial harm that the 646 Scheme would cause to the setting of the WWH. As previously noted, Mr Rhodes's evidence on the degree of the harm was at times a little uncertain, but he was ultimately clear that it was a moderate degree of less than substantial harm, and higher than the moderate degree of less than substantial harm that the Inspector had found caused by the 330 Scheme. Mr Suckley

considered that it was a high degree of less than substantial harm. Although, linguistically, a casual reader might think that a degree of harm higher than a moderate degree of harm would be something more than a moderate degree of harm, in the planning world linguistics and grammar are not always the answer.

397. I accept Mr Rhodes's evidence and Lord Banner's submissions that a finding of a high level of less than substantial harm would be exceptional (if not breaking new ground) for a case in which there was no physical harm to the heritage asset itself. A conclusion of a moderate level of harm just below a high level is therefore excessive in this case, where it is really only the remote views of WWH, an aspect of its setting, that are harmed. It may be slightly unfair to categorise Mr Suckley's view as being "extreme", but he and Mr Forsdick KC were unable to provide any precedent or persuasive basis for a conclusion that there would be just less than a high level of less than substantial harm here.

398. As for the 330 Scheme, its impact on the setting of the WWH was assessed by the Inspector, who granted planning permission for it. He found that:

> "Given [the prominence and importance of the WWH as a landmark] and bearing in mind the fixed view montages in the appellant's evidence, as well as my own extensive observations, I find that a moderate level of less than substantial harm would be caused to the setting of Waterloo Warehouse and agree with the parties that a low level of less than substantial harm would be caused to the setting of the [Conservation Area]. In both instances, the harm is of considerable importance and weight."

That assessment was, of course, at a time when the WWH was no longer a WHS asset, but still a listed building, so the weight to be given to the harm would be slightly lower as a result. It was also tempered, in the ultimate assessment, by the fact that the 330 Scheme was found to provide some countervailing heritage benefit.

399. The final point on which the experts fundamentally disagreed was whether the degree of harm that they found was outweighed by the public benefit that would flow from permission for the 646 Scheme. Mr Suckley accepted that there was some benefit, but not much that would not flow from any development of the site, and not sufficient to outweigh an almost high level of less than substantial harm to the setting of the WWH. Mr Rhodes considered that, in line with the conclusions and reasoning of the Inspector, there would be very substantial public benefit from the 646 Scheme being built from about 2020 (if permission was granted by the City Council) or late 2021 (if granted on appeal) in its particular location. Mr Rhodes, while giving his own views, essentially adopts the conclusions of the Inspector in relation to the benefits conferred by the 330 Scheme significantly outweighing the harm, and says that the economic benefits would be even greater for the larger 646 Scheme, which would offset the slightly greater degree of harm flowing from that Scheme, as compared with the 330 Scheme.

400. The Inspector had agreed with Mr Burns, Romal's heritage expert witness in the inquiry, that the harm caused by the 330 Scheme should be considered in light of the equivalent harm of the LWOPP parameters, before being weighed against the public benefits of the development.

401. The Inspector found the benefits to be a clear and compelling reason to grant permission, contrary to the development plan. Since Peel argues that the Inspector's conclusion was not a decisive finding, I will set out the words that he used to express his conclusion:

> "84. I have already addressed the internal balance of heritage harms and benefits and have found that the heritage benefits of the scheme do not outweigh the heritage harms. These harms, whilst less than substantial, nevertheless carry considerable importance and weight, as previously noted. However, there is a further balance to be struck with the wider public benefits associated with this scheme. I am left in no doubt that there are very significant public benefits, specifically in relation to the provision of a development platform and the effective use of previously developed land that already has an outline permission for a similar quanta of development [*sic*].
>
> 85. I accept that the location is pivotal to unlocking the phased development of the wider Liverpool Waters scheme and I am left in little doubt that it will act as a catalyst for further schemes to come forward as well as enabling a nodal public space to be created in the form of the [Cultural Square]. This would clearly reflect the development that is sought through the development plan process. Added to this are the benefits of a new N-S route with better engagement with the [West Waterloo Dock] water space. This comes at a cost in terms of the failure to preserve the setting of Waterloo Warehouse and the Stanley Dock Conservation Area as well as the limited harm to the [West Waterloo Dock] non-designated heritage asset. Despite this cost, it seems to me that there is a clear and convincing justification for that harm to be accepted. As such, this material consideration justifies a modest departure from the associated DP policies against a background where other matters are in accord."

402. I agree with Mr Rhodes that that conclusion is clear and not marginal. The Inspector has found that the benefits significantly outweigh the harm done to an important asset, and that accordingly there is a clear and compelling justification for the grant of planning permission.

403. Accepting that the harm caused by the 646 Scheme is greater, on account of both the heritage asset being of the most valuable kind, at the relevant time, and the impact of the larger scheme being greater, there nevertheless seems to me to be a real and substantial prospect of a similar conclusion being reached in relation to the 646 Scheme. The particular benefits that the Inspector identified as flowing from the 330 Scheme would also have flowed from the 646 Scheme, but the economic benefits of the development and the effect of the catalyst for further regeneration, to which the Inspector referred, would have been greater with the larger scheme. The degree of departure from the development plan policies would have been similar, albeit the harm caused by them would have been greater.

404. Comparing the harm caused by the 646 Scheme, in terms of its impact on heritage views, with the harm already accepted in the LWOPP, the harm in terms of obstruction of the view of WWH from the key viewpoint at Wallasey Town Hall is worse but not significantly worse: a different part of WWH is visible, as compared with two smaller parts with the assumed LWOPP buildings in place. The view improves as one moves south, and the spaces between the 646 Scheme buildings open up, as the design intends,

to reveal WWH behind. Further south still, there would come a point where the angle of view changes and the spaces close up, and less of WWH is visible at that point until one reaches a point further south (well before Woodside Ferry), when WWH is again visible around the edge of the 646 Scheme's most southerly building. The view from Woodside Ferry would be as unobstructed as the view in the assumed LWOPP development. In comparison, however, the view moving south with the assumed LWOPP parameter buildings in place would become better sooner, once a line perpendicular to the original plot C-02 is passed.

405. In both examples, WWH is substantially blocked out from certain viewpoints, including the Wallasey Town Hall viewpoint, but a good view is obtained from other viewpoints. In both cases the kinetic views along the River allow good views of WWH, but the degree of visibility of WWH is better overall with the LWOPP parameters development than with the 646 Scheme.

406. The harm done by the 646 Scheme in this respect to the setting of WWH is greater than the harm accepted by the LWOPP and the harm done by the 330 Scheme, but it is not harm of a wholly different nature or scale, and is correctly assessed as moderate less than substantial harm. The public benefits of the 646 Scheme are substantial. It also, in my judgment, had the advantage over the 330 Scheme of being a striking and (in this location) innovative architectural design and so, despite its limitations in terms of car parking and open space provision, could be seen as a high quality development in accordance with policy CC12 of the emerging Local Plan.

407. The answer to issue (v) is therefore a simple "yes", Romal would have had a real and substantial chance of obtaining planning permission for the 646 Scheme.

408. If, instead of the 646 Scheme, Romal had been pursuing the 538 Scheme, with Peel's support, I would have come to the same conclusion on there being a real and substantial chance of the grant of planning permission. The issues raised are essentially the same as with the 646 Scheme. The 538 Scheme was lower in height, which reduced somewhat the impact on WWH's setting of the massing and height of the development, but this reduction in height did not affect the relevant distant views of WWH at all. Moreover, the monolithic blocks parallel to the waterfront may have the result of obscuring relatively more of WWH from the Wallasey Town Hall view point, and from the river path to the south of it, as there is only one gap between the blocks. However, WWH is not wholly obscured from any point by the 538 Scheme buildings. The 538 Scheme does not have the same architectural merits as the 646 Scheme and it provides somewhat less economic benefit, as a result of its reduced overall size. Otherwise, the issues are largely the same and so my conclusion would have been the same as with the 646 Scheme.

(3) Has Romal lost anything if Mr Rhodes's assessment is right?

409. Peel raised a further argument on causation, which arose from the assessment that Mr Rhodes, Romal's planning expert witness, made of the chances of Romal obtaining planning permission for the 538 Scheme in the counterfactual world. Mr Rhodes assessed that at 80% overall. Peel deployed this principally as an argument against Mr Rhodes's opinion being credible – since if it was right, any reasonable person would have pursued the 538 Scheme application, not withdrawn it.

410. If Mr Rhodes's opinion were accepted, however, Peel seeks to argue that any breaches of contract did not cause Romal to lose the chance of obtaining planning permission for the 538 Scheme at all, because if the chances of overcoming the objection to height and massing really were 80%, Romal itself could have applied (and could still now apply) for planning permission for the 538 Scheme, or something very similar to it, and expect to obtain it. Even now, it would be able to convert the 330 Scheme, of which only Phase 1 is virtually completed, into the 538 Scheme, with larger blocks of apartments on the southern part of the Property.

411. In the real world, the approval of the CDNMP did cause Romal to lose the chance of obtaining planning permission for the 538 Scheme at the times that Romal claims that it would have been obtained – NMA3 was not able to change the location of Cultural Square or the building height parameters on the northern part of parcel 3a. The combination of these matters made the pursuit of the amended planning application unwise. Romal therefore did lose the opportunity to carry out the development when it claims that it would have done so (which is the matter in issue on the statements of case). In my judgment, Peel's argument is therefore one about mitigation of loss, not a pure causation argument.

412. In the real world, as opposed to the counterfactual world, the impediments to the 538 Scheme remain. It was only Peel's offer of alternative public space elsewhere in Central Docks and the height reduction that facilitated the grant of planning permission for the 330 Scheme, despite the conflict with Cultural Square. It is only in the counterfactual world in 2020 and 2021, where the CDNMP does not exist, that there is an 80% chance of obtaining planning permission (according to Mr Rhodes). The planning experts did not consider the chances of the grant of permission for the 538 Scheme today, piggy backing (as it were) on the implementation of the permission for the 330 Scheme and its planning agreement, though Mr Rhodes accepted that an application could now be made. Nor did the quantum expert witnesses address whether any additional profits would be obtained by converting the current development into the 538 Scheme development at any time after the grant of the 330 Scheme planning permission.

413. That is because Peel did not plead that Romal could have and should have mitigated its loss in that way. The only mitigation issues raised in its Amended Defence relate to Romal's allegations that the costs of amending its planning application and of the second planning application and appeal were costs incurred in mitigation of its loss, and a plea that Romal failed to mitigate its losses by seeking an order for costs against the City Council (which is not now pursued).

414. Accordingly, Peel cannot pursue this argument. In any event, as I will explain, I do not consider that 80% was the appropriate assessment of the chance of obtaining planning permission even in the counterfactual world.

Issue (vi): Has Romal failed to plead and prove loss?

415. The next question is whether Romal is precluded from pursuing its claim for a lost chance because it has not sufficiently pleaded (and proved) that it could have taken all necessary steps to proceed with a consented development. This is a pure pleading point. Peel contends (in effect) that Romal has failed to allege that it was financially and practically in a position to benefit from a planning permission for the 646 Scheme or the 538 Scheme

by carrying out the development, completing it and realising the value by selling underleases of the units created.

416. Given that, before the relevant dates, Romal's sister company had successfully carried out the development of plots C-04 and C-06 pursuant to a planning permission obtained in December 2017 and sold 237 residential units in those blocks, and given that, after the relevant dates, Romal itself started to build the 330 Scheme on the Property and had almost practically completed the first (and largest) building and most of the dock infill by the start of the trial, this was a rather surprising point for Peel to have taken. Absent a particular reason known to Peel why Romal might have been in difficulty in converting a planning permission for a larger scheme into a completed development, the point looks at best speculative and at worst just a pleading trip wire for Romal's otherwise valid claim.

417. For Romal to establish its case of substantial loss caused by the lost opportunity, it needed to assert that it would have proceeded to implement the planning permission and build out the development, thereby realising the profit. (It was not Romal's pleaded case, nor was it Peel's response, that Romal's loss was diminution in value of the Property.)

418. Given the claim for lost profits, it was not necessary, in my judgment, for Romal to plead at the outset detailed matters, such as the builder that it would have employed, or the bank that would have been willing to lend it money on the security of the development, the exact amount that it would have been able to borrow, the identity of the solicitors and agents that would have been willing to act for it in selling long leases of the apartments at a premium and a ground rent, or its ability to pay those lawyers and agents, or any similar matters. It was sufficient, in the first instance at least, for Romal to plead that it would have implemented the planning permission granted and would have carried out the development and made a profit.

419. What Romal pleaded was that if Peel had complied with its contractual obligations, Romal would have had a real and substantial chance of obtaining planning permission either for the 646 Scheme of for the 538 Scheme, and that Peel's breaches caused it to lose those chances (Amended Particulars of Claim, paras 64, 65). Romal also pleaded that Peel's breaches caused delay and that, but for the breaches, development would have started in a specified month and the development would have been completed in two phases by specified months (para 66). The months pleaded in the original Particulars of Claim were varied in the Amended Particulars of Claim. It was also pleaded that, as a result of the delay, construction costs and interest rates had risen, and that Romal had become unable to sell long leases of apartments at ground rents, which became unlawful in June 2022, and as a consequence was then unable to sell its reversionary interest at an investment value. The formulation of the plea of causation was slightly amended, but not in a material way, and the Amended Particulars of Claim added that the effects of the delay would be the subject of expert evidence.

420. As to loss, Romal pleaded, in slightly different ways in the original and Amended Particulars of Claim, that it had lost the chance to make greater profits that would have flowed from carrying out the 646 Scheme, or alternatively the 538 Scheme, by starting them at the times that it pleaded that those developments would have started, as compared with the profits that it will make from carrying out the development that started on the Property in February 2023. In the Amended Particulars of Claim, Romal adds its

calculations of what those profits would have been, and the additional claim for loss of ground rents is further particularised.

421. Romal has therefore pleaded a case that, but for the breaches of contract by Peel, it would have carried out the different developments at earlier times and so would have realised greater profits, and would have obtained further value from being able to sell apartment leases subject to ground rents. That is a sufficiently pleaded counterfactual case: it was not flawed, in my view, because Romal did not plead explicitly that it *could have* carried out those developments, as well as that it would have done so.

422. Peel's pleaded case, in response, is that:

> "As a matter of law, Romal is not entitled to claim damages for loss of a chance, unless it first proves that, on the balance of probabilities, but for the alleged breaches it would not have withdrawn the First Planning Application and would have successfully proceeded with the developments therein proposed."

423. This contention of law is based solely on a judgment of Vos J, in Joyce v Bowman [2010] EWHC 251 (Ch); [2010] PNLR 22, which is said to establish that a claimant seeking damages for loss of a chance must prove, on the balance of probabilities, that but for the alleged breach it would have been able to and would have taken the necessary steps to realise those profits. In that case, a purchaser of a large house lost the opportunity to carry out a development on adjoining land, owing to solicitors' negligence, because instead of an option for the purchaser to buy the adjoining land if the vendor did not obtain planning permission for her proposed development within a year, the contract contained an option for the vendor to sell that land if she did not obtain the planning permission. Planning permission was not obtained and the vendor exercised the option to sell the land to a third person.

424. Vos J considered that for the purchaser to prove loss of a chance, he had to prove that he had a real and substantial chance of:

    i) negotiating the grant of the desired option;

    ii) the vendor not obtaining planning permission for her proposed development;

    iii) being able to obtain planning permission for his proposed development; and

    iv) being able to obtain funding to carry out that development.

    The Judge concluded that there was a real and substantial chance of the purchaser overcoming each hurdle and proceeded to evaluate the chance of his not doing so, to discount the loss of profits claimed.

425. It follows that one of the issues in *Joyce v Bowman* that the Judge had to decide was whether there was a real and substantial chance of the purchaser being financially able to carry out his development. The purchaser was a private individual, not a property developer. There is no analysis of the statements of case in the judgment. That suggests that there was no dispute about the issues that had to be decided – but it is unclear whether that was because the purchaser was expressly put to proof of his financial ability in the

statements of case or because the issue had been raised during the preparation of the claim and the parties agreed that it was a matter for the purchaser to prove. Vos J does not say it in his judgment, but Peel takes the decision as establishing that, as a matter of law, the matters identified in that case need to be pleaded and proved in every case for loss of the chance of a development opportunity.

426. I do not agree that the judgment of Vos J decides any such thing. It sets out what issues were required to be decided in that case, and then decides them. Whether the ability of a claimant in such a case to do what they say they would have done, in any respect, falls to be proved by evidence at trial depends on the issues that are raised on the pleadings and issues that are agreed to be issues for trial. The court does not proceed to decide issues that may typically arise in such a case but which do not arise on the facts as pleaded in a particular claim. For example, if the purchaser in *Joyce v Bowman* had been Lendlease plc or British Land plc, rather than Mr Joyce, it seems inherently unlikely that the fourth causation issue identified by the Judge would have arisen. The claim would not fail on that account unless the claimant had been put to proof of its ability to fund the development and had failed to do so.

427. The ability of Romal to afford the 646 Scheme in 2020 could have become an issue in this case, but it did not, because Peel neither put Romal to proof that it *could* successfully have carried out the 646 Scheme, nor pleaded specifically that Romal *could not have* raised the money to do so. Absent either plea, the specific issue of the ability of Romal to borrow money from a lender on acceptable financial terms did not arise for proof and decision.

428. Further, Ms Holland KC did not put squarely to Mr Malouf or Mr Rowlands that Romal could not have raised funding to carry out the 646 Scheme. Instead, Peel seeks to raise doubts (based largely on absence of certain documents) about how Romal is funding the 330 Scheme.

429. What Peel pleaded, as it was entitled to do, is that as a matter of law Romal had to prove that it *would have* successfully proceeded with the 646 Scheme or the 538 Scheme. The focus of that plea, *in context*, is on the question of what Romal would have done: whether it would have pushed for determination of the first planning application or would have first amended it and then withdrawn it, as happened in fact, not on the question of what Romal had the resources to do.

430. Peel's plea was in my judgment inadequate to put Romal's intended borrowing in issue. Given that Romal is in fact carrying out a smaller development on the Property (the 330 Scheme), that its sister company, Romal 04-06 Limited had carried out a successful development on plots C-04 and C-06 at Central Docks, and that Mr Malouf is an experienced international developer, if this issue was going to be raised it needed to be done expressly.

431. Peel then attempted to turn the issue into one of viability of the 646 Scheme and the 538 Scheme, and said that nothing could be inferred from the 330 Scheme because there was inadequate evidence of how that development had been funded, or of its viability. I find it difficult to follow Peel's arguments here about viability, as each side has called expert evidence – which I will address in the next section of the judgment – addressing the cost and profitability of each of the three development schemes. It is common ground that each development would have made a substantial profit. Peel complains that Romal has

failed to provide adequate disclosure of its insurance and funding arrangements (but made no application for specific disclosure). The absence of certain documents does not establish that the development that is proceeding cannot be afforded, or is unviable, but the question of the profitability of the various Schemes is ultimately a matter for expert opinion evidence. I will return to this question in the next main section of the judgment.

432. Peel also complains that Romal has not proved its entitlement to make use of the deposits paid by intending purchasers of apartments in the 330 Scheme towards construction costs. Whether the stakeholder of the 330 Scheme purchasers will be liable to make good any deficiency of funds, in the event that a purchase does not proceed, is an issue that I do not need to decide. It appears that Romal has in fact used the full deposits paid by those purchasers to fund the 330 Scheme. The question for me is whether it is right to assume, as Mr Nesbitt, Peel's valuation expert witness did, that the 646 Scheme and the 538 Scheme would be 100% debt funded. In the end, Peel conceded that 10% deposits would and could be used, backed by insurance, and the issue is whether it is right to assume that 20% deposits would be so used. I deal with that question under Section VIII below. I repeat that there is no pleaded case that Romal could not have afforded to build the 646 Scheme, nor any plea that Romal could not have built out the 646 Scheme or the 538 Scheme within the time permitted by the AfL.

433. Peel also suggested that Romal has failed to call evidence to support the viability (or profitability) of the 646 Scheme, in that the spreadsheet used by Mr Mesher (Romal's quantum/profitability expert witness) used material presented on an Excel spreadsheet compiled by a third person, a Mr Paul Hill of Fitch Capital, without Mr Hill explaining how the spreadsheet model worked, such that there could be no confidence that the profitability assessment based on those spreadsheets was reliable. I will similarly address this issue in the next part of this judgment.

Issue (vii): Did the alleged breaches of contract prevent Romal from selling leases of the apartments at a ground rent?

434. It is common ground that if Romal had been granted planning permission for the 646 Scheme by the City Council, this would have happened in November 2019, and that if it had been granted planning permission on appeal, it would have happened in January 2021. In fact, planning permission for the 330 Scheme was not granted until July 2022, and development of the Property began in February 2023.

435. At the end of June 2022, entering into a contract for the grant of a long lease of a residential flat or house at a ground rent became unlawful. Long leases at a ground rent was the model that Romal's sister company had used for the development of parcels C-04 and C-06, where ground rents of £250 per annum, increasing over time, were reserved. (In that case, the Romal company passed on the value of the ground rents to its landlord, another Peel group company). Romal's evidence is that it would have sought to use the ground rent model (but this time not paying the rents to Peel) with apartments in the 646 Scheme or 538 Scheme, but that by the time it was able to market apartments in the 330 Scheme off plan the law had already changed, thereby preventing Romal from adopting that model.

436. The change in the law does not apply to sales of leases where a binding contract for the sale and purchase of the lease had been made before 30 June 2022. The relevant factual questions are therefore whether leases would have been marketed sufficiently ahead of the end of June 2022, whether Romal would in fact have proceeded in that way (despite the fact that the impending change in the law was known some time in advance), and how many contracts would have been signed before 30 June 2022.

437. I have no doubt that Romal would have sought to proceed in that way. It negotiated with Peel that, unlike in the C-04 and C-06 developments, the ground rents would not form part of the rent that Romal paid under its leases of the Property. Ground rents were, at the time of the AfL, still a valuable asset, and transactions were still taking place in the market. Peel's internal documents did not refer to ground rents for the Property simply because they were not expecting to get the benefit of any. I find that Peel knew ful well that it was giving up any share of the ground rents as part of the deal under which Romal agreed to pay £2.75 million for a parcel that was difficult and expensive to develop.

438. Further, Romal's business model was to market and sell apartments off plan, taking substantial deposits (which it used to fund in part the building works), and the primary target for its marketing was wealthy overseas investors. The experience with C-04 and C-06 demonstrates that Romal's purchasers were unconcerned by substantial deposits and ground rents, and it seems likely that many of them would have been unaware of the political issues and publicity attached to ground rents in England and Wales prior to the eventual change in the law. Further, ground rents of £250 per annum per apartment would, if lawful, create a valuable asset that Romal could sell (as the Peel group company did with the C-04 and C-06 reversions) following completion of all the sales.

439. In a draft standard lease prepared for Romal in May 2021 in anticipation of the 330 Scheme, ground rents were to be reserved at £230 p.a. for a two bedroom apartment, £295 p.a. for a three bedroom apartment and 0.1% of the premium p.a. for a one bedroom apartment, subject to an RPI-based review every ten years. Romal's pricing schedule for the first block of the 330 Scheme dated May 2021 included ground rents at 0.1%.

440. I am therefore satisfied that Romal would have sought to sell apartment leases with ground rents for the 646 Scheme. The pleaded case is that ground rents of £250 would have been reserved for each apartment, but none of the contemporaneous documents supports that that is what Romal would have done. £250 per apartment was what Peel required for the C-04 and C-06 development. I consider it more likely that ground rents of 0.1% would have been reserved, with RPI 10 yearly rent reviews, in the interests of making the apartments more mortgageable and therefore more saleable, and, perhaps, in the hope that any legislation might not be targeted at ground rents at that level.

441. Romal was unable to advance sufficiently with the 330 Scheme ahead of July 2022 to sell any apartment leases at a ground rent. It contends that, if it had obtained planning permission for the 646 Scheme earlier, it would have been able to do so for most of the apartments. The resolution of that question depends on the likely timeline for the development following grant of planning permission in November 2019 or January 2021. The timeline is highly relevant to quantum and I will address it in detail in Section VIII below. In short, however, the timing would have enabled Romal to sell most of the leases before 30 June 2022, and I will address the exact numbers when dealing with quantum.

442. The second issue of principle raised by Peel in answer to Romal's claim is whether a claim for lost ground rents is too remote in law, on the basis that such loss was not reasonably foreseeable.

443. Peel's case on this question is based on Mr Nesbitt's evidence that by November 2019 valuers were not including ground rents in their valuations. His own firm had issued guidance on valuations in mid-2018 suggesting that it was inappropriate to include ground rent value in development appraisals, particularly where the development would not be delivered "for the next few years". In other words, the guidance assumed that within the next few years the Government would have legislated to ban ground rents for the future. Mr Nesbitt accepted that there was still an active market in the sale of ground rents in 2018-19 but said that the market was aware of the Government's intentions.

444. The relevant time to consider whether financial loss of a particular kind was too remote was the date of the AfL, May 2018. There had been no abolition by then, though there had been discussion, consultations and announcements about an intention to legislate. The negotiations between the parties leading to the AfL were on the basis that Romal would be left with any ground rents and Peel would not have a share of them. I accept Mr Rowlands' evidence that he negotiated this with Mr Ashworth, which was confirmed by Mr Ashworth. From Mr Ashworth's perspective, he also doubted that Romal would obtain any ground rents, given the proposals to abolish them, but that was only an instinct about timing.

445. In view of the ground rent arrangements with C-04 and C-06 and the discussion between Mr Ashworth and Mr Rowlands, the grant of leases at ground rents was clearly foreseeable as a possibility, and "not unlikely", even if there was a chance that they would be abolished before sales could take place. It is hardly unusual even for Government legislation in the property sphere to take a very long time to come into effect (see, for example, the delay in bringing into force legislation giving effect to cross-party support for abolition of "no fault" termination of assured tenancies). No date or even year for the legislation had been identified in May 2018. As Romal submits, it must therefore be taken to have been in the reasonable contemplation of the parties that the ability to reserve ground rents depended on timing, and therefore that if the development was delayed there was a greater chance that legislation could intervene.

446. Peel relied on the fact that Romal's own development appraisals do not attribute value to ground rents. Mr Rowlands said that this was because the appraisals were concerned with the viability of the development, not with income receivable after it was completed. Unless Romal was planning to sell the reversions following completion of all the leases, it would not naturally be included in a summary of expected sales revenue. I therefore do not attribute any weight to that point.

447. Peel also relied on Mr Nesbitt's evidence of guidance on attributing value to ground rents in development appraisals, and argues that it demonstrates that loss of ground rent income was not foreseeable at that point. I disagree. It shows that, in the interests of providing the best service to clients (developers), a valuer should not assume value attributable to ground rents when doing an appraisal for a development that is a few years away. What the parties would have had in mind in May 2018 was a development that would be marketed in 2019 or early 2020. It was foreseeable that the opportunity to extract ground rents might be lost if there was delay in obtaining planning permission.

Issue (viii) – Wasted Costs

448. Romal's claim is for £345,000 in respect of "wasted" costs (which it accepts should be reduced to £343,750) spent on the first planning application, and then on preparing and making the second planning application. The claim was pleaded on the basis that Romal would not have incurred those costs if Peel had performed its obligations, and alternatively that they were reasonable mitigation of loss.

449. However, Mr Mesher's analysis of the amount of the claim has identified the costs incurred on the 646 Scheme and the 538 Scheme which are "of no benefit to it in relation to the 330 Unit Scheme". The claim pursued is therefore, apparently, in respect of costs incurred in making the first planning application, and amending it, which were in the event wasted. Romal now disavows any claim to the costs of amendment and of the second application on the basis that it was seeking to mitigate its loss.

450. Had Peel complied with its obligations and planning permission for the 646 Scheme been granted, Romal would have had to incur the costs of making the planning application in any event, in order to realise the profits from the 646 Scheme. To recover the lost profits of that Scheme (to the extent that the claim succeeds) and recover the planning costs of obtaining the planning permission for it, would clearly be double counting.

451. To the extent that performance by Peel would have led to planning permission for the 646 Scheme, Romal might be entitled to recover the costs of amending the application and of the second planning application, either as loss caused by the breaches of contract, or as costs of mitigation – but that is not the claim that Romal pursues.

452. Peel contends first that any such claim is too remote – but that is premised on agreement that Romal's pursuit of planning permission was entirely at its own risk, an argument that I have rejected. Otherwise, it submits that Romal has failed to prove its claim that any costs were wasted as a result of its breaches of contract. That is on the basis that Mr Mesher has identified, largely from their dates, those invoices that appear to relate to the first planning application and which conferred no benefit on Romal in relation to the successful second planning application. Peel contends that it is not proved that expenditure on the first application did not confer any benefit on Romal in relation to the second application.

453. I have been troubled by this part of the claim from the outset. Romal is not claiming the additional costs of amending the first application and making the second application by way of additional damages resulting from reasonable attempts to mitigate its loss, which it could have done. Instead, it is trying to claim the abortive costs of the first application, on the basis that Peel caused that application to fail and so the costs of it were wasted. This is therefore a claim for reliance losses in addition to loss of bargain damages represented by the lost profits.

454. While in some circumstances, reliance losses can be claimed in addition to loss of bargain losses in respect of the same breach of contract (see *Chitty on Contracts* (35th ed) para 30-025), it is only possible where this does not lead to double recovery. As stated in *Chitty* at para 30-027:

> "By suing for damages for his costs in performing in reliance on the contract, the claimant cannot recover more than he would have been entitled to if the defendant had not broken the contract."

455. To make the profits on the 646 Scheme, Romal had to incur expenditure on making the planning application. To recover loss of profits as damages without taking into account the necessary costs of carrying out that development, or seeking a refund of them, amounts to over-compensation. I therefore reject this part of Romal's claim.

Additional issues

456. There is a further issue that needs to be dealt with here, which is whether, if planning permission for the 646 Scheme or the 538 Scheme had been granted, it would have been a Satisfactory Planning Permission, giving rise to Romal's right to be granted leases of the Property. As noted previously, Peel sought to argue that any such permission would not have been a Satisfactory Planning Permission because, among other reasons, it would have had an adverse impact on development (and value) of the Landlord's Adjoining Land, and that for that reason too no loss of the kind claimed by Romal was caused by any breach of contract.

457. I have explained previously why, on the true interpretation of the AfL, it is not sufficient for Peel to show that the planning permission itself has an adverse impact: it is only if a condition subject to which it is granted, or an obligation in an associated planning agreement, or a requirement to pay CIL, has that effect that there is a Landlord's Unacceptable Condition. This is a perfectly conventional understanding of the functions that planning conditions and planning obligations perform, in imposing constraints or obligations on the applicant that can go beyond the red line of the development itself. It is this type of potentially onerous requirement connected with the planning permission that this part of the definition of Landlord's Unacceptable Condition is addressing. The mere fact that a development up to the boundary of the Property might inhibit the use of immediately adjoining land could not be a Landlord's Unacceptable Condition, though it might have given rise to a reasonable objection by Peel to the proposed planning application for such a development.

458. A condition or obligation requiring part of parcel 3c to be kept undeveloped, or for a connection or walkway or other facility to be provided on parcel 3a or 3c, or one imposing phasing constraints on Peel's land, might amount to a Landlord's Unacceptable Condition, if it were likely to have an adverse effect on development of those parcels, or make it more expensive to develop them. However, Peel has not identified any such condition or obligation.

459. Peel sought to argue that the definition of Landlord's Adjoining Land was wide enough to include the Property, thereby giving Peel some overriding priority in relation to use of the Property, despite Romal's right to develop it. I reject that argument. It is clear that inclusion of the Property in the Landlord's Adjoining Land, as defined, was done for a different purpose in the draft leases, namely to identify the landlord's "Estate" for service charge purposes, and that the same definition and plans were carried through into the AfL without considering whether the same definition could always apply.

460. Despite the literal wording of the definitions, it is obvious in my judgment that the Property is not to be treated as Landlord's Adjoining Land for the purposes of the AfL,

indeed it would be nonsensical for it to be so treated, given that only Romal is to have the right to develop the Property. The acknowledgement in clause 23 of the AfL that Peel is intending to develop the whole of the Landlord's Adjoining Land and that works on it will continue after the Completion Date (which is a date shortly after the date when the planning permission becomes immune to challenge) does not imply that Peel will be developing part or parts of the Property, but rather that its own development of adjoining land may not have been delivered by the time that Romal starts its development, and that such development can be carried on at any time after the Completion Date.

461. Similarly, clause 2.8, in referring to integration of the Landlord's development of its adjoining land with the design of the Tenant's development, is not implying that the Landlord's proposed development includes development of the Property. Any interface between the two was to be resolved pursuant to the mutual reasonable endeavours required by clause 2.8, not by Peel itself doing works on the Property.

462. For these reasons, it seems to me that the inclusion of the Property in the Landlord's Adjoining Land, as defined, was simply a drafting mistake, not a means of giving Peel priority in use of the Property, and that it is properly to be understood as a reference to the Central Docks area owned by Peel other than the Property.

463. It is therefore not sufficient for Peel to argue that a Landlord's Unacceptable Condition exists because its own development plans require the use of part of the Property for Cultural Square. That is because Peel is required to use all reasonable endeavours to support Romal's application for its development of the Property. By the AfL, Peel agreed to give Romal priority in relation to the Property, subject to its right reasonably to approve or disapprove the design and planning application. In any event, a conflict of that kind would not arise as a result of a condition or obligation in Romal's planning permission but simply because the proposed development is inconsistent with use of the same land for another purpose.

VIII. The Fourth Group of Issues: Quantum

464. This part of the judgment is concerned principally with:

i) the percentage chance of each of the counterfactual scenarios happening;

ii) the profits that Romal would probably have made if it had carried out the 646 Scheme development or the 538 Scheme development, following the grant of planning permission on the various agreed dates;

iii) the profits that Romal will probably make from carrying out the 330 Scheme development (though there is only a very limited disagreement about the final figure);

iv) what number of ground rent leases Romal would probably have sold before 30 June 2022 in any of the counterfactual scenarios, and what additional value to its leases they added.

465. I will address those issues in turn.

The chances of each counterfactual scenario eventuating

466. I have decided that there was a real and substantial chance of Romal obtaining planning permission for the 646 Scheme and, in the event that Romal was persuaded to amend its planning application, for the 538 Scheme, and that it would have proceeded with those developments, if permission had been granted. I now need to assess the chance of the grant of planning permission, in accordance with the principles in *Allied Maples*, in so far as that chance depends on the actions of third parties – in this case the planning committee of the City Council and a planning inspector.

467. Although each of these decision makers is to be taken to be a rational person, this is not a case in which there is clearly only one rational decision that could have been made. Rational decision makers could have come to different conclusions, depending on their assessment of the extent of the harm and the countervailing public benefit, and the weight given to particular matters may be influenced by perception. Accordingly, the chance of obtaining planning permission from a planning committee, following a recommendation made by a planning officer with long experience and detailed knowledge of the LWOPP and its operation in practice, may be different from the chance of obtaining planning permission from a planning inspector, who comes to the issues without any such background involvement and hears oral evidence about the matter.

468. Mr Suckley considered that there was zero chance of obtaining a recommendation to grant planning permission for either Scheme from Mr Jones (who would have had regard to the view of Ms Campbell, the head of planning) but a 20% chance of obtaining planning permission for each Scheme from a planning inspector. Mr Rhodes, however, considered that the overall chance of obtaining planning permission, for each Scheme, was 80%.

469. Whether the permission in each case was granted by the City Council or on appeal makes a difference to the quantum of the claim in two respects. First, on Romal's expert evidence, the likely profits made on each of the larger Schemes were nearly £2 million greater on a development carried out following a planning appeal, on account of the time difference. Second, as already noted, the chance of Romal contracting to sell ground rent leases of all the apartments before 30 June 2022 reduces, on its own pleaded case, if planning permission is only granted on appeal.

470. In my judgment, both as respects the 646 Scheme and the 538 Scheme, there was a greater chance of planning permission being granted on appeal than by the City Council. Even in a counterfactual world where Peel is consistently supporting the planning application rather than (in the case of the 646 Scheme) indicating to the planning officer its dissatisfaction with the Scheme or (in the case of the 538 Scheme) holing it below the waterline, there is no doubt that the planning officers' instinctive reaction to the 646 Scheme was that it was excessive and unjustified, and that their reaction to the 538 Scheme was that it was preferable to the 646 Scheme but still not acceptable. This was for various reasons, not just what became the principal reason for objection to the 538 Scheme, namely inconsistency with the CDNMP.

471. As was recognised from the outset, including by Romal and its consultants, it had work to do to get the planning officers to change their minds. Peel's support would significantly have improved Romal's chances, but it would by no means have guaranteed a change of mind about the excessive height and density. Both schemes were a significant departure

from the LWOPP and had to be justified; and both schemes had a significant impact on the setting of the WWH, as I have previously explained.

472. There was, however, a good deal to be said for the benefits that the 646 Scheme in particular brought, and a real prospect that, objectively, the public benefits of the Scheme would be held to outweigh the overall heritage harm caused, and which could justify a departure from the development plan.

473. I was not persuaded by Mr Suckley's opinion. I consider that he was unrealistic in concluding that the heritage harm caused by the 646 Scheme and the 538 Scheme was very close to substantial harm: that was ultimately the lynch pin for his conclusion that public benefit could not outweigh that harm. Further, Mr Suckley was clearly wrong in concluding that the LWOPP "fixed" the parameters for parcel 3b and the location of Cultural Square in a nearly immutable way. What happened with three events shows that this view is untenable.

474. First, the City Council was granted planning permission to drive JHW through the Cultural Square location, as well as through plots C-03, C-02 and C-01 as they stood, making the outline consented development impossible. Second, NMA1 entirely removed Prospect Park, to which Cultural Square was supposed to be linked. Third, planning permission was granted for the Everton Football Stadium, in Bramley Moore Dock, on a part of the LWOPP area that was within the WHS, not just the buffer zone, and which was designated for a series of smaller buildings around a retained dock basin. These were very significant changes to what was shown in the LWOPP. There is nothing to justify Mr Suckley's view that the height parameters were in principle more sacrosanct than the parcel or plot parameters. Although Mr Suckley's evidence assisted me to understand the issues, I feel unable to rely on his opinions on the prospects of obtaining planning permission.

475. Mr Rhodes was more persuasive, and consistent, though I have already noted that he was inclined to understate the degree of heritage harm that each of the unbuilt Schemes would cause, in comparison with what was found by the Inspector on the 330 Scheme appeal, and I have explained why I consider that he is wrong to conclude that the 12m height parameter on the northern part of parcel 3a was only attributable to the design of the CLT. I accept the argument that there was a good case for a lower height on that part of parcel 3a and that that is why the CLT was designed in that way. Subject to those points, I found Mr Rhodes's evidence persuasive on the merits of the 646 Scheme in particular, and on the absence of fixed constraints (in the counterfactual world) on plot and parcel boundaries and height and massing. His assessment of 80% overall is, however, too high for each Scheme.

476. I accept that there were real issues for the decision maker about the extent of the harm caused to the setting of WWH, and that clear and convincing justification was needed for the harm caused, whatever the level of that harm was. The decision maker had to assess first whether there were any countervailing heritage benefits of the Scheme in question, and, ultimately, whether the public benefits of the Scheme outweighed the net harm to the setting of WWH. Beyond the issue of heritage harm, the decision maker also had to consider whether material considerations provided justification for a development that was not in accordance with the development plan. The LWOPP was one such material consideration, so any departure from the LWOPP needed justification.

477. It would, however, have been apparent in the counterfactual world that there had to be some departure from the LWOPP, as it stood prior to the effect of NMA2 and CDNMP, because of the impact on development parcels 3a, 3b and 3c of JHW and the IoMT, replacing the CLT. In particular, as confirmed in evidence by Mr Ford, plots C-01, C-02 and C-03 could not have been developed in the way contemplated by the LWOPP as a result of JHW carving through parcels 3a, 3b and 3c.

478. A rational decision maker could therefore have concluded that the parameters of the LWOPP were not a strong factor *as such*; rather, that change was inevitable and should be considered on a case by case basis. They might well have concluded, however, that the height parameters on parcels 3a and 3b performed a function and were relevant to the desire to protect the setting of WWH in particular. They would have borne in mind the relevant guidance in the WHS SPD as regards protection of views of WWH, which was that development should not wholly obstruct a key public view of WWH, as a landmark building.

479. It appears to me that Mr Jones was preoccupied with a different question, which is whether infilling of West Waterloo Dock was justified, in light of Heritage England's opposition to it. This was however a misplaced concern, as some infilling of that dock was necessary in any event (and was already part of the LWOPP) to facilitate plot C-02. A greater element of infilling on parcel 3b became necessary as a result of the introduction of JHW, and in order to provide the critically important pedestrian and cycle link between Victoria Dock and the full length of Central Docks. This is underscored by the fact that greater dock infilling was approved in NMA2, and by the fact that Peel does not pursue a case that dock infilling was a defensible heritage objection. I consider that with Peel's strong support for the 646 Scheme, Mr Jones and Ms Campbell would have been persuaded that more dock infilling than was shown in LWOPP was justified.

480. There were other concerns that Mr Jones had, including the height and massing of the development. This concern was bolstered by Peel's and Planit's own concern that the 646 Scheme was too large and too high, of which the planning officers must have been aware. In the counterfactual world, instead of bolstering that concern, Peel's support would have assuaged it – but I am unable to conclude that it would necessarily have dispelled it. It is reasonably clear that, despite its architectural merits, Mr Jones did not like the 646 Scheme. It is also reasonably clear that Mr Jones and Ms Campbell were wedded to the LWOPP in a way that exceeded its status as one material consideration on a standalone planning application. This is, perhaps, understandable, as the planning officers of the City Council would have spent years working on the preparation for the grant of the LWOPP and its development thereafter. It seems to me that they may have considered that it represented the optimum solution to balancing regeneration and conservation and wished to maintain that balance. However, they did not sufficiently appreciate (or if they did, they did not take into account) the impact of the changes that had already occurred by mid-2019.

481. I consider that the chance of obtaining a positive recommendation from the planning officers was therefore relatively low, but still a realistic possibility. I assess that chance at only 20%. That means that in 80% of cases, faced with a refusal, Romal would have had to decide what to do – whether to appeal or to submit a new application for the 538 Scheme or a lesser development. I am satisfied that Romal would probably (very probably) have appealed, with Peel's assumed support for the appeal. Peel did not argue otherwise.

482. The chance of obtaining a positive recommendation from a planning inspector was higher, though still with a significant risk of a conclusion (in the counterfactual but WHS-coloured world) that the public benefits of the 646 Scheme did not justify the extent of heritage harm caused. In that regard, I consider it material that, from all relevant static viewpoints on the Wallasey side, the 646 Scheme did not do significantly greater harm to the views of WWH than the LWOPP already contemplated, as shown in the CGIs of how a development in full compliance with the LWOPP parameters would have impacted on the main heritage views. The impact was somewhat worse from one viewpoint (Wallasey Town Hall) but no different from the other two. At some other static points along the river path, but by no means all, the views would also have been worse, and in some locations quite limited. However, kinetic views from the river path and from boats on the River itself would still have been available. By walking or sailing a little further south or north from a point at which the views through or past the 646 Scheme were largely obscured, a view of WWH would again have opened up. From a point on the river path a modest distance south of parcel 3b, a good, largely unobstructed view of WWH was available.

483. There is no doubt that the best views of WWH, which tell the story of its and Liverpool's heritage, are from closer to the building, on the Liverpool side, from where the fine architectural details as well as its massive scale can be appreciated. The best view of all is from the area to the south of the IoMT, near the link to Victoria Dock, to the south, and this view would have been benefited by the delivery of either Scheme, bringing with it the pedestrian walkway through the Central Docks. These views would have been unaffected by any development. In my judgment, a planning inspector, coming to the case and the location afresh, would have been impressed with these important preserved views, as I was.

484. Accordingly, in view of all these observations, I consider that the chance of success on appeal was about 50%.

485. If, contrary to my previous finding, there was a real and substantial chance of the planning officers still refusing to determine the application for the 646 Scheme and requiring changes, which Romal would then have made, I do not consider that there was a real and substantial chance that the planning officers would once again, in the face of support from Peel, have declined to determine the amended application. The 538 Scheme must be assumed to have evolved from consideration by the City Council of alternative designs, as happened in reality, and an indication by them of a preferred option. In the counterfactual world, the changes to the LWOPP and the approval of the CDNMP in terms that did not accommodate Romal's 538 Scheme development had not happened, so there was no conflict. The planning officers had, however, already demonstrated themselves to be able to resist pressure from Peel, by refusing to proceed to determine the 646 Scheme application. There was in substance little of additional merit in the 538 Scheme to persuade them to recommend the grant of planning permission, even if the reduced scale was itself an advantage.

486. Although the 538 Scheme was lower in height than the maximum height of the 646 Scheme, it was still significantly in excess of the height parameters, did not improve the preservation of the heritage views of WWH from Wallasey, and had no real architectural merit, even if the blocks were aligned parallel to the shore in imitation of the former warehouses that long ago stood between WWH and West Waterloo Dock. I would therefore assess the chance of a positive recommendation from the planning officers as

being about the same as that for the 646 Scheme, namely 20%. I would assess the chance of the grant of planning permission from a planning inspector on appeal at 50%. There does not appear to me to be any material difference that would significantly change the chances of success on appeal.

487. How then is the overall percentage chance of obtaining planning permission to be determined?

488. On my findings of fact, it would have been the 646 Scheme that would have gone forward. Had the application gone straight to a planning inspector, Romal's chances of obtaining planning permission for the 646 Scheme would have been 50% overall. However, if, in the counterfactual world, as I have found, the City Council would have determined the application, Romal effectively got two chances of a grant of planning permission: first a 20% chance of the City Council granting permission, and then a 50% chance of the appeal against refusal being granted by the inspector. That means that Romal's chance of being able to make the additional profits attributable to the 646 Scheme is 60% overall (i.e. 20% on the initial determination plus 40% (one half of 80%)). Peel did not dispute that this was the correct mathematical conclusion, as Mr Forsdick put to Mr Rhodes that the effect of there being an 80% chance of success both from the City Council and on appeal (which was what Mr Rhodes's expert report appeared to contend for) meant that overall there was a 96% chance of permission being granted overall, if there was assumed to be an appeal against initial refusal.

489. If Romal proceeded as far as a planning appeal in relation to the 646 Scheme, but the appeal had failed, it is not contended that it would then have reverted to the 538 Scheme (which on this hypothesis had not been conceived, as Option 1). There is therefore no second chance of success on the 538 Scheme application that additionally needs to be taken into account.

490. Standing back from my conclusion and considering in the round an overall chance of 60%, I bear in mind that Mr Rhodes explained in cross-examination that he considered that the chance of obtaining planning permission for the 646 Scheme by one means or another was 80% overall. I have explained why I consider that his opinion was rather too optimistic, but I found his explanation of the reasons why permission would be granted persuasive. Therefore, an overall chance of 60%, lying between a bare probability and an over-optimistic 80% strikes me as a fair assessment.

491. On the other side, Mr Suckley accepted in cross-examination that there was a real chance of obtaining planning permission on appeal, which he assessed at 20%. That is an under-assessment based on erroneous conclusions, for the reasons I have given in the section above headed "The dispute on the expert planning evidence". Once one reduces to the right level the degree of harm done to the setting of the WWH and the significance of the plot and height parameters in the LWOPP prior to NMA1, NMA2 and the CDNMP, it can be seen that there is a much greater chance of obtaining planning permission from a planning inspector, even if that chance cannot confidently be assessed at more than a fifty-fifty chance, as I consider to be the case. That being so, I am comfortable with an overall evaluation (given the successive chances for Romal of obtaining planning permission) of 60%.

The profits that Romal would have made on each counterfactual scenario

(1) The approach to evaluating loss of profits

492. The question of what profits Romal would have made is a complex, multi-faceted issue involving the assessment of likely revenue, likely construction, finance and other costs of the development, and the likely timescale for the development to take place, as well as other specific issues. The parties articulated their many differences on these matters through expert quantum witnesses, Mr Geoff Mesher, a forensic chartered accountant, on behalf of Romal, and Mr Derek Nesbitt, a chartered surveyor, on behalf of Peel.

493. The difference in the professional qualifications of these witnesses reveals a difference between the parties as to the best approach to quantifying Romal's loss of profits.

494. Romal instructed Mr Mesher to conduct a forensic analysis of the revenues, costs and timings derived from its actual developments in Central Docks: Park Central, where sales were launched in August 2018, construction started in January 2019, the units were fully sold by January 2020 and practical completion was achieved in February 2020; and the 330 Scheme, where sales were launched in August 2022, construction started in February 2023, and the units in two blocks were fully sold by August 2023. Practical completion of the 330 Scheme is expected in 2027. Mr Mesher was presented with Romal's own predicted timelines for the 646 Scheme and the 538 Scheme developments and sales, and Romal's Excel spreadsheet assessment of the profits.

495. Peel criticised Mr Mesher's reliance on Romal's modelling and projections, on the basis that they were compiled by a Mr Hill (an external consultant) outside Romal and provided to Mr Rowlands in the form of an Excel spreadsheet. I was not persuaded by this criticism. What the spreadsheet does is visible on its face – is not like Argus, where complex calculations go on unseen "inside the black box". The data put on the spreadsheet was not invented by Mr Hill but provided by Mr Rowlands and Mr Malouf, based on their experience of other developments. The contents of the spreadsheet were not assumed to be correct but were subjected to appropriately rigorous forensic analysis by Mr Mesher. I therefore do not consider it to be a valid criticism that Mr Hill was not called to explain how he compiled the spreadsheet. Peel had ample opportunity to challenge its contents.

496. Using his professional skills (which he accepted do not include the expertise of a quantity surveyor or valuation surveyor), Mr Mesher assessed the presented timelines and profits analysis and sought to adjust and apply the values, costs and rates correctly derived from the actual developments to the counterfactual schemes. This was initially done using the pleaded planning dates of April 2019 and July 2020 for the 646 Scheme and March 2020 and May 2021 for the 538 Scheme, but then re-done using the agreed planning dates of November 2019 and January 2021 for the 646 Scheme and September 2020 and June 2021 for the 538 Scheme.

497. Mr Mesher performed that exercise because Romal's case is that the right approach in law is not to ascertain what a hypothetical purchaser of the Property would have been advised, prior to purchasing it, were the profits that it could expect to make if it paid £2,750,000 for the Property, but instead to identify the profits that Romal itself probably would have made, by the time of completion of the 646 Scheme development or the 538

Scheme development, carrying out the developments with its retained contractor, Newry Construction, in a similar way to its approach to the 330 Scheme.

498. Mr Mesher has also forecast the profits that Romal will in fact make by completing the 330 Scheme development at a later time. This is self-evidently an easier exercise because many of the costs have already been incurred and the apartments in the first two (main) blocks have been sold off plan.

499. Peel instructed Mr Nesbitt to assess the profit for the counterfactual schemes by carrying out a residual valuation exercise. He confirmed that that was his specific instruction. Mr Nesbitt used industry-standard proprietary valuation software (Argus) that assists valuers to value development land. The software can identify the value of land to a prospective developer at a particular time, and so enable them to decide what to pay for it. It does that by inputting all the other variables involved in a putative development of the land. These variables include the gross development value (based on current values of the intended units, less costs of sale), the expected costs of the development, the timelines, the costs of finance, acquisition costs, and an allowance for a rate of profit. Argus assumes that the development will be 100% debt funded.

500. If the purchase price of the land is known, the same software can be used in the same way to generate a figure for profit, by inputting all the other variables and the purchase price. That is what Mr Nesbitt has done: he has thereby identified a projected profit, assessed as at the date of the valuation, based on assumed (not actual) costs, a timescale that Mr Patel informed Mr Nesbitt would be involved in the developments, and a gross development value and finance rates that Mr Nesbitt considered appropriate as at the date of the valuation. The valuation dates that he used are the agreed dates on which planning permission would have been granted, so November 2019 and January 2021 for the 646 Scheme.

501. The difference between these approaches is subtle but important: Mr Nesbitt is projecting a profit based on values at the valuation date; Ms Mesher is identifying the profit that would actually be made by Romal. One consequence of this difference in approach is that, consistently with the valuation principle that events taking place after the valuation date should not affect market value on that date, Mr Nesbitt has entirely disregarded prices derived from Romal's actual marketing and selling of apartments in the 330 Scheme over the period from September 2022 to September 2023. This was a year to two years later than the time when the majority of sales of the 646 Scheme units would have happened, if planning permission had been granted by the City Council, but at almost exactly the right time for the majority of sales if planning permission had been obtained on appeal. The likely relevance of these sales prices is obvious, even if some adjustment is required for size or time, but Mr Nesbitt took no account of them.

502. In relation to the 330 Scheme, however, the difference of approach between Mr Mesher and Mr Nesbitt does not exist, as both experts have attempted to identify the likely profits that Romal will in fact make by the completion of the 330 Scheme development in 2027. Unsurprisingly, the result of that is that there is only a relatively small difference on a few points between their assessments of the 330 Scheme profits.

503. Peel suggests that Romal has not adduced the appropriate evidence in support of its case, by failing to instruct and call a valuation surveyor to give evidence of the value of the development. It argues that *Joyce v Bowman* decides that that is the appropriate way to

prove loss in this type of case. Peel also contends that Mr Mesher has nevertheless used a residual valuation type of approach but that he has not the appropriate qualifications to do so, and so his evidence cannot be relied on. Mr Mesher accepted that he had no expertise on property values or development costs, but denied that he had done a residual valuation. Rather, he had done an analytical and comparative exercise, using the evidence from Romal's actual developments and analysing projections for the hypothetical developments that were provided by Romal.

504. Romal contends that the right approach is for the court to work out, as best it can, what profits would have been made from the developments, carried out by Romal using Newry Construction, in the counterfactual world, and compare those with the anticipated profits from the 330 Scheme development. The real world, in which Romal (or its sister company) carried out two developments in the same location at about the same time, is the best evidence of what would have happened and what profits would have been made. Mr Nesbitt's approach is flawed, Romal contends, because he has sought to identify what profit would have been forecast at the valuation dates (ranging from November 2019 to June 2021), not what profits would have been made in fact on completion of the hypothetical developments (between 2024 and 2026), and has ignored evidence after the valuation dates derived from sales in the 330 Scheme, even though that is the best evidence of value. Further, and importantly, Mr Nesbitt has approached the question of the 330 Scheme profits on a different basis from that used by him to assess the profitability of the 646 Scheme and the 538 Scheme, and so in comparing one profit with another he is not comparing like with like and his method is therefore liable to error.

505. I prefer Romal's approach in principle. No case, certainly not *Joyce v Bowman*, decides that the right way to assess loss of profits on a loss of development opportunity claim is a residual valuation. I am very surprised by Peel's submission that it does. The most appropriate method of assessment in a given case is not a question of law. Which method is appropriate depends first on what the claim is for, second, what is in dispute, and then on the facts and circumstances of the particular case. In *Joyce v Bowman*, Mr Joyce did not get the chance to carry out any development on the adjoining land because the land was lawfully sold to someone else. Whether he could have carried out a development was uncertain, and there was no evidence as to cost and value derived from someone else's actual development. Instead, the parties instructed a joint valuer to advise on the value that the new house would have had when completed. From that, the agreed costs of development were deducted, as was the purchase price, to give an overall profit figure. As Vos J noted at [116], Mr Joyce's likely profit was largely agreed. The real issues in the case were quite different and the Judge did not have to decide what was the most appropriate method of calculating loss of profit.

506. Romal's claim is not for diminution in value of its land but for loss of profits that it would have made by the end of the development. In many cases, trying to predict future costs and sales revenue is too uncertain, and another method of assessment may be more appropriate. However, in view of the hard evidence of costs and sales that was available from Romal's actual developments in Central Docks, the better approach in this case is without doubt to use that hard evidence of costs, sales and timelines and apply it to the counterfactual developments, making such reasonable adjustments as appear appropriate. While in some respects there may be imprecision, the law does not call for precision when assessing the impact of a breach of contract on a business:

> "The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill: see *Chitty on Contracts,* 32nd ed (2015), vol 1, paras 26-172 to 26-174. The assessment of damages in such circumstances often involves what Lord Shaw described in the *Watson, Laidlaw case 1914 SC (HL)* 18, 29-30 as 'the exercise of a sound imagination and the practice of the broad axe'" (*per* Lord Reed JSC in One Step (Support) Ltd v Morris-Garner [2018] UKSC 20; [2019] AC 649 at [37] ("*One Step*")).

507. The residual valuation method is often used to value larger parcels of development land because of the absence of better, directly applicable evidence in the form of comparable transactions. It is a complex valuation method that is prone to error, if not carefully used, because it is highly sensitive to variations in the inputs used by the software. If better evidence of the value of the land (such as a market transaction) existed, it would be used instead - possibly with a residual valuation being used to check the reliability of the primary evidence. The same applies if the residual valuation method is being used to identify the likely profit, if the land is purchased for a fixed price.

508. In this case, in my judgment, there was better evidence of the profits that Romal would probably have made in the form of the data capable of being extracted from the Park Central, Quay Central and 330 Scheme developments. Using a prediction of profitability, assessed in 2019 or 2020, which ignores what happened after the valuation date, as a means of identifying the profits that Romal would have made in reality by 2026, is a second best method. That is particularly so as, in this case, what is required is a comparison of the profits that Romal would have made with the profits that it will in fact make, with the damages being the right proportion of the difference between the two. If, as Mr Mesher and Mr Nesbitt have both done, the projected profits on the 330 Scheme are being assessed based on actual data from the actual development, the counterfactual profits should if possible be assessed in the same way, otherwise any comparison is liable to mislead.

509. Peel further criticises Mr Mesher's approach on the basis that it is too coarse and inexpert, particularly where the costs of the development and the values of the finished apartments are concerned. I agree that there is something broad brush about elements of the exercise that Mr Mesher has done, particularly when estimating the sales prices likely to have been achieved on the hypothetical schemes. However, when considering a counterfactual development scheme, precision is impossible, and the exercise of broader judgement is appropriate as long as it is rational and sufficiently well-based on primary evidence.

(2) The parameters of the parties' cases

510. Mr Mesher produced his expert report on 10 February 2025. He assessed the profits on the 646 Scheme as £25.812 million and £27.062 million, depending on whether planning permission was granted by the City Council or on appeal. However, the dates for the assumed planning decisions were not those eventually agreed between the parties.

511. Mr Mesher produced a first addendum report on 24 March 2025 to correct an inconsistency between the timeline he had assumed for the developments and a cash flow model that he had used to assess finance costs. That caused him slightly to amend his

profits figures. However, these were still based on different planning dates from those eventually agreed.

512. After the start of the trial but before he gave evidence, Mr Mesher produced a second addendum report, which provided his profit assessments based on the planning dates that had by then been agreed (this being the only change to his assessment made at that stage). These resulted in his profits figures for the 646 Scheme becoming £27.093 million and £28.521 million respectively. (His equivalent figures for the 538 Scheme on the agreed planning dates were £22.22 million and £23.848 million.)

513. Mr Nesbitt produced his expert report on 10 February 2025. He assessed the profits on the 646 Scheme as £8.886 million (and for the 538 Scheme as £7.034 million).

514. Mr Nesbitt then produced a supplemental expert report shortly before the start of the trial to critique the approach of Mr Mesher and make adjustments to his own models. This resulted in his profits figures for the 646 Scheme becoming £7.999 million, if planning permission was granted in November 2019, and £9.422 million, if granted on appeal in January 2021. Those figures were assessed on the basis that the development was 100% debt funded. However, on the basis that a developer could (with appropriate deposit insurance in place) use 10% deposits as funding, thereby reducing the cost of finance, the profits would rise to £11.024 million and £12.705 million respectively. This illustrates the sensitivity of the residual valuation assessment to a small change in the assumptions used as inputs.

515. There is therefore a very substantial difference between the parties' cases as to the profits that would have been made (by Romal or a hypothetical developer).

516. The difference between the parties on the assessment of likely profits made by Romal on the 330 Scheme is very small indeed – a mere £24,643, out of a profit figure of £13.391 million, as assessed by Mr Mesher. It follows that if Mr Mesher is right about the profit to be made on the 646 Scheme, the difference in profit from the 330 Scheme is up to £15 million; if Mr Nesbitt is right, the difference is a negative figure.

517. The main areas of difference in the assessment of profit for the 646 Scheme are:

    i) Over £14 million (more than 10%) difference in gross development value (GDV), with a consequential difference on sales and marketing costs;

    ii) Nearly £2.4 million difference on professional fees;

    iii) About £5.9 million difference on funding costs, which is principally the result of the much longer timeline for the development project assumed by Mr Nesbitt and the consequence of 100% debt funding.

    Before addressing those points, it is necessary to identify the correct timelines for the counterfactual developments, as this impact both GDV and funding costs.

(3) The timelines for the counterfactual developments

518. The dates that the parties were able to agree were limited to dates on which planning permission would have been granted for the 646 Scheme and the 538 Scheme, by the City Council and alternatively on appeal. These were:

646 Scheme – City Council – November 2019 ("counterfactual scenario 1(i)")

646 Scheme – Appeal – January 2021 ("counterfactual scenario 1(ii)")

538 Scheme – City Council – August 2020 ("counterfactual scenario 2(i)")

538 Scheme – Appeal – June 2021 ("counterfactual scenario 2(ii)").

However, the parties were unable to agree on the timelines thereafter, for any counterfactual scenario, including for the probable start of enabling works on site or the practical completion of the development thereafter. Neither were the timelines for entering into binding contracts of sale with purchasers of apartments agreed.

519. Romal's pleaded case on the timelines had to be adjusted during the trial, following its agreement on later planning permission dates than the dates that it had pleaded. The timelines were originally based on a document referred to as "Exhibit 24", which had been produced by Mr Malouf, with the assistance of Mr Rowlands, and was what they expected that the timings would be, based on their experience of carrying out the developments on C-04 and C-06 and the start of the development of the 330 Scheme on the Property. A revised Exhibit 24 was then produced, as an exhibit to the second addendum report of Mr Mesher, to run from the later dates for planning permission. This consequently produced later dates for the start of development and sales of apartments off plan for each of three phases of the 646 Scheme (and similarly for the 538 Scheme), and later dates for practical completion.

520. Revised Exhibit 24 shows that marketing of sales in Phase 1 of the 646 Scheme was to start within a month of the assumed grant of planning permission, with the first exchange of contracts within a further month thereafter. If permission was granted in November 2019, it is accepted that the rate of sales would have been slowed initially by the impact of the first Covid lockdown, between March and June 2020, with the final apartments in Phase 1 not being sold until May 2021. If permission was granted on appeal in January 2021, the final apartments in Phase 1 were shown as being sold in March 2022. The marketing of apartments in Phase 2 was to start once about 90% of sales of Phase 1 had been achieved, and similarly for Phase 3. This would have the effect that all apartments in those Phases would have been sold ahead of the start of construction of those Phases: by March 2022 for Phase 2 and September 2022 for Phase 3, where the planning permission was granted in November 2019, and by February 2023 and February 2024 respectively where the planning permission was granted in January 2021. This would have enabled Romal, subject to agreement with the purchasers and obtaining any required insurance, to use the deposits as finance for the construction works.

521. The build period (assuming planning permission granted in November 2019) is shown in Revised Exhibit 24 as starting with Phase 1 in March or June 2020 (depending on how one interprets an ambiguous description on the document), with enabling works complete by September 2020, building of Phase 1 starting in October 2020 and ending in March

2022, building of Phase 2 starting in April 2022 and ending in September 2023, and building of Phase 3 starting in October 2023 and ending in March 2025. The build period (assuming planning permission is granted in January 2021) is shown as starting with Phase 1 in April 2021 or July 2021, with enabling works completed in October 2021, building of Phase 1 starting in November 2021 and ending in April 2023, building of Phase 2 starting in May 2023 and ending in October 2024, and Phase 3 starting in November 2024 and ending in April 2026. In each case, the overall period is a total of 65 months.

522. Peel disputes that the build and sales periods advanced by Romal are reliable and realistic; indeed, on the basis of the views of a Mr Ilyas Patel, a chartered quantity surveyor, who provided written advice to Mr Nesbitt to include in his expert report, it contends that the build periods are "wrong". It argues that Revised Exhibit 24, like its original version, is no more than unverified assertion of opinion by Mr Malouf and/or Mr Rowlands, who were not permitted to give expert opinion evidence; and that the Court should adopt as "correct" the alternative dates for start and end of construction advanced by Mr Patel, namely September 2020 to December 2026, where planning permission is assumed to have been granted in November 2019, and November 2021 to February 2028, where planning permission is assumed to have been granted in January 2021 (in both cases, a total period of 85 months). This period is broken down in Mr Patel's second advice to Mr Nesbitt as being 9 months for procurement and negotiation of a licence to do works above the Mersey Tunnel, 10 months on the dock infill works, and then 22 months for each of the three phases of main build. These timings compare with Romal's, which allow only 10 months in total preparatory to the start of main build, and then 18 months for each phase.

523. Those timelines of Mr Patel would take Romal significantly beyond the final permitted dates in the AfL for completion of the Development, which would, on the face of it, have entitled Peel to require Romal to surrender the leases of the Property for no consideration, a point on which Romal relies for saying that Mr Patel's timelines are too long. However, I do not consider that the theoretical surrender date can drive an incorrect assessment of the build duration and associated costs. In reality, surrender would not have arisen, and Romal would not have agreed a much more expensive contract price to expedite the works because of it.

524. The dates for commencement and completion of construction for the 646 Scheme are of importance because the longer the project is and the later it starts, the greater would be the financing costs incurred by Romal, and the higher would be the costs of construction, owing to inflationary pressure on build costs.

525. In relation to the 330 Scheme, there is a greater measure of agreement between the parties. Romal's pleaded case is that construction started on 20 February 2023 and completion of all phases is anticipated in May 2027. However, its evidential case, by reference to Exhibit 24, was that infill works started in February 2023, 7 months after the planning decision date, the main build in January 2024, and that practical completion of the first phase would be in April 2025 and of the second phase in September 2026. That is a total of 50 months from the planning decision date, of which 18 months were preparation and enabling works before the main build started. However, at the date of trial in May 2025, practical completion of phase 1 had not yet been achieved, though it was close, and it was accepted that about 25% of the enabling works (those required for phase 2) had not yet been carried out.

526. On the period for building all three phases of the 330 Scheme, there is no significant difference between the parties' experts. Mr Mesher assumes a period of 67 months from the planning decision date, Mr Nesbitt considers that 64-66 months is appropriate. There are differences between them as to the amount of time required for the preliminary steps and enabling works, but these do not affect their assessments of the overall length of the project.

527. Romal argues that Mr Patel and Mr Nesbitt wrongly assume that negotiating the tunnel licence cannot overlap the initial enabling works, which in turn cannot overlap the main construction works.

528. I consider that the best evidence of the likely timescales is the evidence of what is happening with the 330 Scheme development. The time required for the procurement, preparation and enabling works would in principle be the same for the 646 Scheme, but the main build part of the construction would inevitably take longer, given the greater size of the 646 Scheme.

529. I am not persuaded that Romal could have built out the 646 Scheme in 2 fewer months than it expects that the 330 Scheme will take, which is the effect of its case. I am not persuaded that Mr Rowlands' input into the build periods, as shown in Exhibit 24 and Revised Exhibit 24, is entirely reliable. I do however consider that evidence from Romal presented in the form of these exhibits, based on an extrapolation from actual experience of other schemes, is admissible evidence, and is a good starting point for assessing the development timelines, subject to necessary adjustments. I do not consider that Mr Patel's estimates are reliable either, because they take no account of the way that Romal and its contractor work together and would have worked on the hypothetical developments. Further, WYG's 2018 and 2019 cost estimates prepared in support of viability studies, on which Mr Patel relies, are not good evidence of what would actually have been required to be done, or how long it would have taken. Mr Nesbitt, as a valuer, was unable to explain Mr Patel's timelines further, and there is therefore little explanation of why they would be significantly longer than Romal's.

530. Taking all the evidence into account, I consider that it is necessary to allow somewhere between 1-3 extra months, in addition to Romal's estimate of 7 months, for the licence negotiation and enabling works that precede the start of the main build period, in view of how long it actually took Romal to start the main build of the 330 Scheme, and additionally between 3-5 months extra for the main build duration, on top of the 54 months that Romal has allowed. I accept Romal's evidence that part of the enabling works could be done at the same time as building out another phase, and that not all such works needed to be finished before any main construction could start, because that is what has happened on the 330 Scheme. But even allowing for that (which may be partly the wisdom of hindsight) I consider that 18 months per phase for the main build is too optimistic.

531. This means that the construction periods, starting with dock infill works that can be done prior to conclusion of the Mersey Tunnel licence and ending with practical completion of the final phase, are likely to be March 2020 to September 2025 for counterfactual scenario 1(i) and April 2021 to October 2026 for counterfactual scenario 1(ii) (in each case using 2 months for the enabling works period and 4 months for the main build programme as the extra time to be allowed). The extension to Romal's own timelines

does not affect the sales dates, which are driven by the planning dates and the rates of sales, not by the rate of progress with the building works.

532. I accept Romal's evidence as to the likely rate of sales for the 646 Scheme. Romal understands its own model, which is supported by experience of Park Central and the 330 Scheme. Romal has been successful in applying it. Mr Nesbitt disagreed with the rate of sales based on general experience of sales in the L3 postcode area (of which Central Docks is a part). But L3 is a large and disparate area, with many different kinds of residential property in it. Sales of new build apartments in a regeneration project in Central Docks, which are marketed internationally, will not be likely to replicate sales experience for mostly second hand property in the L3 district generally.

533. This means that no adjustment is required to the overall timeline other than the additional period of 2 months for the enabling works and 4 months for the main build programme. The quantum experts can agree the appropriate adjustments to funding and construction costs, if any, on Mr Mesher's model, to reflect this adjustment in the build periods. The assessment of the GDV, to which I turn now, can be made on the basis of the sales timings that Romal and Mr Mesher used.

(4) Gross Development Value of the 646 Scheme

534. The gross development value ("GDV") is the aggregate value that the development will realise on its completion. This therefore depends on the amount for which the residential apartments will be sold and on additional revenue derived from leases of car parking spaces and commercial units.

535. The sales periods for 646 Scheme apartments are predicted to be from January 2020 to September 2022, where planning permission is granted by the City Council, and from February 2021 to March 2024 where planning permission is granted on appeal. There is therefore no single date at which each type of product (1-, 2- or 3-bedroom apartment) can be valued.

536. Romal's evidence is that if planning permission were granted in November 2019, 80% of the Phase 1 apartments would be sold between January and September 2020, 80% of the Phase 2 apartments would be sold between April and July 2021 and 80% of the Phase 3 apartments would be sold between September and December 2021, so 2020 and 2021 values would be achieved, for the most part. Similarly, if planning permission were granted in January 2021, the majority of sales would take place between March 2021 and July 2021, March 2022 and August 2022, and February 2023 and September 2023 – so in that case values would be more broadly spread over a 30-month period.

537. The 330 Scheme apartments that have been sold were mostly sold between September 2022 and December 2022 (Phase 1) and November 2022 and February 2023 (Phase 2). The prices achieved on actual sales would therefore be very strong evidence of likely value of the 646 Scheme apartments (subject to any appropriate adjustment for size and other qualities) where planning permission was granted on appeal, but still good evidence of value where planning permission was granted by the City Council, though needing to be adjusted for time.

538. Mr Nesbitt's valuation takes no account of the sales achieved in the 330 Scheme development. Instead, he bases his valuation on the prices obtained for apartments in Park Central, on second-hand flat sales in the Central Docks area, and on price trends in the L3 postal area as a whole. In my judgment, he was wrong to disregard the evidence of sales on the very site that is to be valued, at about the same time as Romal would have been selling the 646 Scheme apartments following a planning permission granted on appeal. Taking his valuation dates as being November 2019 and January 2021, even if the sales were initially disregarded as being post-valuation date evidence, Mr Nesbitt should have sense-checked the values that he fed into Argus against the actual sales prices for the 330 Scheme apartments sold in late 2022. In any event, for reasons that I have already given, a residual valuation was not the best way of seeking to assess the profits that Romal would have made.

539. Mr Mesher adopted a broad brush approach to assessing the GDV of the counterfactual developments. His data source was sales of apartments in Park Central, which on Romal's evidence were sold over the period September 2018 to January 2020, with the large majority (80%) having been sold by May 2019, and sales of apartments for the first two phases of the 330 Scheme, which took place between September 2022 and September 2023, with the large majority being sold in the period September 2022 to February 2023. These sales were analysed by Mr Mesher to give a blended average price of £325 per sq ft for Park Central and £417 per sq ft for the 330 Scheme. Drawing a straight line between those points, Mr Mesher could then put a figure on probable sales prices at any intermediate time along the line that represented sales in the counterfactual scenarios (assuming that prices increased at an equal rate over the period in question).

540. However, as the sales of apartments in all three developments did or would have taken place over an extended period of time, not in a single month, the question that Mr Mesher had to decide was what points on the line to take as representing the sales of the Park Central, 646 Scheme and 330 Scheme apartments. He could have taken the date of the first sale, or the date on which the sales first exceeded 50%, or 80%. 50% might appear logical, however the first half of a large number of apartments will sell much more quickly than the second half, so 50% is not a middle point of the whole sales period. 80% might have been a better choice, based on Romal's actual sales evidence relating to Park Central and the 330 Scheme.

541. Mr Mesher took instead the date of grant of planning permission, December 2017 for Park Central and July 2022 for the 330 Scheme, as providing the end points of his straight line. He took the equivalent dates for the 646 Scheme (November 2019) as providing the correct point on the line for that Scheme, which he noted was about 30% of the way along the overall timeline. On that basis, he approved the value of £355 per sq ft that Romal had used in its appraisal, even though he considered that the figure as shown by his analysis might have been higher than that, and increased it slightly in his second addendum planning report to £365 per sq ft to take account of the later agreed planning date. In that addendum report, he also identified a value of £390 per sq ft on the assumption that planning permission was obtained on appeal in January 2021.

542. Although, at first blush, planning dates might seem a peculiar date to select, as no sales at all were made in that month, Mr Mesher explained in his second addendum report that:

> "in respect of the use of planning dates as my reference point, these are used simply to establish the period of time between the evidence of an average

> sales value achieved per square foot on Park Central and an average sales value achieved per square foot on the 330 Scheme, i.e. the gap between planning dates is used as, and assumed to be, the amount of time between sales dates. I am not suggesting that sales were made on the planning dates."

Although Mr Mesher did not use these words, the planning dates are therefore being used as a proxy for the time difference between sales on the various schemes.

543. There are nevertheless obvious potential limitations to the accuracy of the exercise that Mr Mesher did, including that:

i) the value of flats in Park Central might be less overall than values in the 330 Scheme or 646 Scheme on account of the better location of the latter Schemes, being closer to the River (albeit immediately adjacent to, and separated from the River by, the road serving the IoMT);

ii) the mix and sizes of the apartments in the various schemes was not the same, though Mr Mesher considered that this was not a factor – the 330 Scheme had somewhat smaller apartments and proportionately more 1-bedroom apartments (generally, in this country, smaller properties sell for a higher rate per sq ft than larger properties, all other things being equal);

iii) prices might not have grown at an equal rate over the period in question;

iv) unless the speed of achieving sales for each scheme following the planning date was the same, or approximately the same, taking the planning date as a proxy for the times at which sales were achieved might not provide a consistent measure.

544. Peel and Mr Nesbitt were strongly critical of this approach, claiming that a serious error had been made by Mr Mesher, by taking the planning dates rather than the dates of sales, and that an assumption of straight line growth was contrary to evidence from the area that Mr Nesbitt relied upon. This was a graph produced from City Residential quarterly reports, which used Zoopla achieved sales figures for the L3 postal district to produce average sale prices for each quarter. That graph shows a dip between May and November 2019, a significant rise between February 2021 and May 2021 and a gentle fall thereafter. However, the average sales prices on this graph are significantly below the level of sale prices achieved on Park Central and the 330 Scheme.

545. Peel produced on day 9 of the trial, as a forensic tool, an expanded graph showing what it contended was a more realistic timeline, using dates of May 2019 for Park Central exchanges of contract and March 2023 for 330 Scheme exchanges: these were the mid-points in time of the sales periods for each, and so an alternative proxy for the date of sales for those schemes. (However, Mr Nesbitt did not support the use of any such approach.) Using Peel's graph, if the same mid-point dates in sales periods are taken for the 646 Scheme in counterfactual scenarios 1(i) and 1(ii), using Romal's projections of sales, the points on the timeline would be May 2021 and September 2022 respectively. On Peel's alternative timeline, therefore, the approximate values for these dates (read from its expanded graph) are £375 and £405, as compared with Mr Mesher's £365 and £390.

546. This demonstrates that Mr Mesher's approach of taking the planning dates as proxy was, if anything, generous to Peel, because the rate of sales for all phases of the larger schemes was projected to be somewhat slower than for the smaller Park Central development and 330 Scheme. It also demonstrates that Mr Mesher's use of a proxy for the difference in time between sales at different developments was not flawed in principle, as Peel suggested. The slower rates of sales in the counterfactual scenarios, as compared with Park Central and the 330 Scheme, would have resulted in higher prices on average being achieved over the period of sales, but Mr Mesher's assessment does not take this into account. His broad brush again favours Peel in this respect. While it therefore might be said that there is an imperfection in the approach that Mr Mesher used, it is not objectionable on the basis that it unfairly favours Romal.

547. As for factor (i) in [543] above (location), this seems to me to work against rather than in favour of Mr Nesbitt, as the 646 Scheme apartments would benefit from the better location just as the 330 Scheme does. That means that the starting value of £325 derived from Park Central could have been adjusted upwards, to make the developments comparable, which would have resulted in slightly higher values at points along the line.

548. The marginal inaccuracies favourable to Peel in these two points seem to me to be likely adequately to compensate for factor (ii) in [543] above (unit mix), which is likely to work in favour of Mr Nesbitt if the apartments in the 646 Scheme are larger or if there will be more 2-bed and 3-bed apartments. Although Peel emphasised that the 330 Scheme had a greater proportion of 1-bedroomed apartments and that the apartments were on average of a smaller size, no evidence was provided about the relative impact that the differences would have on average values. If this was a significant point, adjustments could and should have been made by Mr Nesbitt, in analysing the sale transactions in the 330 Scheme, to make them fully comparable. Instead, Peel simply continued to maintain that the 330 Scheme was irrelevant, and relied on Park Central and evidence of second hand sales to fix the values for the 646 Scheme and 538 Scheme.

549. That leaves the question of whether an assumption of straight line growth over the sales period was in error, as Mr Nesbitt and Peel contend, or was a reasonable, broad brush assumption to make, given that there was an extended sales period, not a single point, for sales in each development. Peel argues that, during the period in question, there were market movements caused by Covid and stamp duty changes. Mr Nesbitt suggested that the prices in the area were broadly flat otherwise, and that there was a marked spike from late 2022 (by which time almost all the 646 Scheme apartments would have been sold) into 2023, which accounts for the significantly higher prices per square foot obtained on the 330 Scheme (in addition to the smaller sizes of the apartments). He preferred to rely on sales of second hand properties in the L3 area, including at Waterloo Quay, Quay Central, Park Central and WWH, and on assumptions made (by other valuers) in viability assessments prepared for Romal (mostly after the valuation dates that he uses) to seek to establish this.

550. Mr Nesbitt was challenged about his approach in cross-examination. He said that he used the market trends, derived from sales prices, to show that the average sales prices in L3 had not increased from the start of 2019 to the end of 2022. If the rates per square foot of new apartments in Central Docks had increased in the way suggested by Mr Mesher's straight line, then Mr Nesbitt would have expected to see such an increase reflected in his graph based on general market trends. For that reason, Mr Mesher's approach was wrong.

551. That reasoning seems to me to be a back to front approach to valuing the 646 Scheme apartments and not an appropriate methodology. Mr Nesbitt accepted that he used the sales prices of the 330 Scheme apartments for the purpose of assessing the GDV of the 330 Scheme (as one would expect) but did not use them at all to assess the GDV of the 646 Scheme (not even as a sense check of his conclusion). These sales were obviously the most material and best evidence of what apartments in the 646 Scheme would have been likely to sell for. To use general average sales prices from the overall L3 index as a basis for concluding that new apartments in Central Docks would not significantly have increased in price from May 2019, by when most of the Park Central apartments had been sold, to late 2022, is unpersuasive because it fails to address the market for these new build apartments specifically. Reliance on the opinions of other valuers in viability studies is simply an abdication of Mr Nesbitt's own function and provides hearsay opinion evidence of values at one remove. Nor does Mr Nesbitt's graph justify the conclusion that there was a sharp increase in market values for new build apartments in late 2022 and early 2023 in any event. Although Mr Nesbitt says that increase in sales prices per square foot for the 330 Scheme units was attributable to smaller sizes of those units, he made no attempt to analyse the sales information (which was fully available by the date of his second expert report) of apartments in the 330 Scheme to support that conclusion.

552. I therefore reject Mr Nesbitt's opinion that there was no substantial growth, and reject his valuations. In so far as he insisted that post-valuation date evidence should be ignored in a residual valuation, I consider that the residual method was second best and the wrong approach on the facts of this case. In so far as he says that straight line growth is inconsistent with evidence of values for new build apartments in Central Docks, I do not agree that Mr Nesbitt has used the best evidence available to him. Inevitably, Mr Mesher's straight line will tend to smooth out some rises and falls in market values over the 5-year period that he has used. However, as there is no single date for assumed sales of the 646 Scheme apartments but rather a range of dates over a period of many months, even years, it was necessary to take a notional date if a hugely complicated and expensive analysis of values was to be avoided, as both sides have agreed that it should be.

553. I conclude therefore that Mr Mesher's values for 646 Scheme apartment sales of £365 in counterfactual scenario 1(i) and £390 in counterfactual scenario 1(ii) are reasonable and persuasive assessments of the average likely sales values.

554. To conclude the issues on GDV, Mr Mesher and Mr Nesbitt differed on the appropriate values for car parking spaces and the commercial space.

555. It was eventually agreed that there were 115 parking spaces, not 119, to which Mr Nesbitt applied a price of £15,000 per space (which was the projected value per space for the Park Central parking spaces). The value achieved on Park Central was in fact less - £13,841 on average – whereas £25,000 per space was achieved for the 330 Scheme. Mr Mesher has taken a value in between these two, based on the position in time of assumed sales of 646 Scheme apartments (with parking spaces) and the time of sales in the two schemes that have been built. I find no real justification for Mr Nesbitt's figure – no particulars of any other market evidence are provided – and I cannot see why the sales at the 330 Scheme should be ignored. They are plainly relevant. I therefore prefer Mr Mesher's figure of £17,189 per space, which gives total revenue of £1,976,735 for car parking.

556. As for commercial space, Mr Mesher conceded in evidence that it was appropriate to make an allowance for rental void or rent-free periods when calculating the capital value of the income stream. Mr Nesbitt considered that a rent of £12 psf was appropriate, based on viability reports; Mr Mesher considers that the rent of £15 psf agreed on the 330 Scheme commercial space is appropriate. Since Mr Nesbitt's figure is based on a mis-reading of the viability reports, which in fact include a figure of £15 psf, I consider that £15 psf is appropriate, but subject to an adjustment (as agreed) for voids and rent free periods. The two experts can calculate the appropriate figure, which I expect them to agree.

(5) Costs of development of the 646 Scheme

557. Mr Mesher considers that, assuming a development in counterfactual scenario 1(i), the total construction costs, including fees and contingency of 5%, amount to £84,259,796. In counterfactual scenario 1(ii), he considers that the total construction costs, including fees and contingency of 5%, amount to £90,018,322. Mr Mesher has extrapolated costs from the costs incurred on the Quay Central and Park Central developments and the costs that had been incurred on the 330 Scheme development to the date of his expert reports, and then adjusted for time, on a straight line basis, as he did with the increase in property values. The costs that he has assessed are therefore based on the actual costs that Romal's builder, Newry Construction, has charged it for both projects.

558. Mr Nesbitt considers that the total construction costs, including fees and contingency of 5%, amount to £91,329,160 on counterfactual scenario 1(i) and £89,941,791 on counterfactual scenario 1(ii). His valuation is based on the advice of Mr Patel as to rates applicable at the relevant times.

559. The principal differences between the experts on the counterfactual scenario 1(i) costings are: just over £1 million on the cost of the enabling works, and nearly £2.5 million on the level of fees. The difference on the rate for the main build works is only £14 per sq m, which is less than 1%, and the real question is whether Romal's rate includes a sufficient allowance for external and infrastructure works.

560. In relation to the counterfactual scenario 1(ii) costings, although there appear to be significant differences between the experts on individual components of the overall costs of development, in some cases that is because items separately priced by one expert are included within a different cost by the other expert. In any event, there is virtually no difference between the experts on the overall cost (less than 0.1%).

561. Given this, it seems to me that it is only necessary for me to determine the following issues between the experts on counterfactual scenario 1(i), and then consider whether any of them requires an adjustment to the virtually agreed cost on counterfactual scenario 1(ii):

    i) Whether the enabling works that would be needed for the 646 Scheme are the same as or different from the enabling works required for the 330 Scheme;

    ii) The best evidence of the cost of the enabling works for the 646 Scheme;

    iii) Whether Romal's main works costs adequately cover the cost of external works and infrastructure;

iv) The appropriate rate to allow for professional fees;

v) Whether a contingency should be included in the costing, and if so how much.

Enabling works

562. There is no proper evidence that different dock infill works would be required for the 646 Scheme as compared with the 330 Scheme. Romal's evidence was that they were the same. The fact that Romal had not, at the date of the trial, completed all the infill works (or superstructure infill works) is a separate issue from whether, ultimately, the same dock infill enabling works had to be done.

563. Peel's case on this item is that there would necessarily be more structural infill works required by the 646 Scheme, because of the difference in building density and massing, compared with the 330 Scheme. Mr Nesbitt had no relevant expertise on this point to offer, but contended that Mr Mesher had provided no technical reasoning to justify an assumption that the engineering solution would be the same. Mr Patel relied for his figure of £8,784,392 on a WYG estimate of costs dated November 2018, after deducting design fees and contingency (as these are included separately by Mr Patel). Mr Patel, who is not an engineer, does not put forward a case that the works priced by WYG for the 646 Scheme were different in kind or extent from the works carried out by Romal for the 330 Scheme.

564. A development viability report of David Sayer dated 26 November 2019, to which the WYG estimate was appended, considered various possible developments of different sizes, ranging from 327 to 646 apartments, and the same WYG estimate was used as the basis of the cost of enabling works for each scheme. In March 2021, TC Property's viability assessment of the 330 Scheme also used the WYG estimate and stated that although it was produced in connection with an earlier scheme "the works identified are still required for the subject scheme".

565. There is therefore clear evidence that all the enabling works would be required for the 330 Scheme as well as for the 646 Scheme. On that basis, Mr Patel was wrong to speculate that higher costs would be incurred and the appropriate amount to include for enabling works is the figure of £7.77 million used by Mr Mesher. As he said, the difference between that and the WYG estimate was the difference between the cost incurred in reality by a good contractor and an estimate, not a difference in the quantity of works.

External works and infrastructure

566. Turning to external works and infrastructure, Mr Nesbitt has allowed a price for these separately from the main works, in the sums of £2,983,242 and £1,776,500 respectively.

567. The build costs used by Mr Mesher in his report are derived from the build costs on the Park Central development and the 330 Scheme, which included external works and infrastructure, and then time adjusted on a straight line basis.

568. Peel accepts that the main build costs for Park Central and the 330 Scheme included the external works. However, it treats the external and infrastructure works as not being included for the 646 Scheme based on Romal's own initial appraisal of the 646 Scheme

in its claim documents, which treated external works (but not infrastructure works) as priced separately, at £1,500,000, and an estimate prepared by Planit in 2018, which identifies a figure of £2.847 million. However, this included the costs of a waterside walkway at £1.2 million, which is included in the enabling works. Further, the rate of £1,625 per sq m for main build costs, used in the David Sayer appraisal and which Mr Nesbitt adopts, was a price inclusive of external and infrastructure works. It was also the rate applied to the smaller possible schemes considered in that appraisal. In fact, Romal has agreed a rate with Newry Construction for the 330 Scheme which includes external works. It is clear therefore that Mr Patel and Mr Nesbitt are double counting.

569. Peel argues that there is much greater scope for external works with the 646 Scheme than with the 330 Scheme, and cites a figure of 10,416 sq m of external area for the former, as compared with 1,182 for Park Central and about 3,000 for Block C of the 330 Scheme. It is not clear where these figures come from, as Mr Patel refers to 8,500 sq m for the 646 Scheme in his first advice, and 10,146 sq m for "CO2" in his second. None of this explains why Mr Patel relies on Planit's non-expert assessment in 2018 rather than on the actual pricing by Newry Construction, who would have been the contractors in the 646 Scheme. Even if there were a proportionately larger area of external works in the 646 Scheme (which seems unconvincing, at least to the degree suggested by Mr Patel, because the footprint of the buildings would have been larger on the larger scheme), if the external works and infrastructure are included within the main works rate per square metre, a larger number of square metres of development will carry with it a larger allowance for the external works. Further, Mr Mesher has included an allowance for internet and smart home services of £1,606,739, which Mr Patel has not: he accepts that one half of Mr Mesher's allowance would be included within his own infrastructure costs assessment.

570. Although it may be assumed, as Peel urges, that greater infrastructure will be required with a larger scheme, there was no proper evidential case (only the most generalised assertion from Mr Patel) for Peel's argument that these costs would be *disproportionately* greater, such as to justify including an additional cost of more than £1,000,000 (in addition to the amount that overlaps with Mr Mesher's internet and smart home figure).

571. For these reasons, I prefer the evidence of Romal that the external works and infrastructure for the 646 Scheme would have been included within the main build rate, or are provided by the internet and smart homes cost, in the same way that they were with the Park Central and 330 Scheme contracts.

Professional fees.

572. The difference between the parties here is substantial. The fees allowed by Mr Nesbitt (£4.923 million in counterfactual scenario 1(i) and £4.85 million in counterfactual scenario 1(ii)) are almost exactly double those allowed by Mr Mesher (£2.46 million).

573. Mr Mesher worked from the fees that Romal had incurred in fact on the 330 Scheme to date (£1.545 million), which was in addition to the design fees included in the estimate of £7.77 million for the enabling works. He accepted that, as the 330 Scheme is only partly built, there may be further fees, though he could not properly estimate these. Romal's estimate for the 330 Scheme was £2.088 million, and for the 646 Scheme, £3.342 million. For the larger 646 Scheme, Mr Mesher added an uplift of 60% to the fees actually incurred on the 330 Scheme.

574. Mr Nesbitt's approach was simply to apply a flat 6% to the aggregate of the build costs, enabling works and external works in his costings. That figure came from Mr Patel, who suggested that fees typically range from 6% to 8% on comparable schemes in the region, but including building warranty fees. (Mr Mesher allowed costs for building warranty separately, at £775,200 for the 646 Scheme.) Mr Patel considered that Mr Mesher's allowance of 4 to 4.25% was insufficient.

575. On this item, I consider that Mr Patel and Mr Nesbitt are more likely to be right. Mr Mesher and Romal acknowledge that there may well be further fees to come, in the 330 Scheme, and that the estimates for the 646 Scheme and 538 Scheme may need to be increased. It seems to me that they are significantly too low for a much larger scheme. I will therefore allow 6% for fees, based on Mr Mesher's main build costs only, but deducting from the sum so calculated the £775,200 for building warranty that Mr Mesher has allowed for separately.

Contingency

576. The question here is whether a contingency should be allowed as a cost, in the 330 Scheme as well as the 646 Scheme. Both experts agreed that a contingency allowance of 5% of the cost of the main works, enabling works and internet and smart home costs should be included in principle (Mr Mesher also allowed a contingency on his marina works item). Mr Mesher said that as the 330 Scheme works remain incomplete, it was prudent to retain a 5% allowance for those works that were not completed. He therefore excluded the enabling works and marina works, believing these to have been completed. He did the same with the contingency allowed for the 646 Scheme, on the basis that the actual costs of the enabling works was known, and so no contingency was required.

577. Mr Nesbitt (though in reality Mr Patel) considers that a lower contingency of 3% is appropriate for the 330 Scheme, given the stage that the works have reached and the reduced risk profile. It is notable that Mr Nesbitt, in accepting the recommended 3%, is assessing the actual likely profits for the 330 Scheme in this and other respects. However, when he assessed the profitability of the 646 Scheme, he is looking forward from the valuation date, and therefore a full contingency of 5% is allowed.

578. The challenge raised by Romal is not to whether the 5% contingency should be allowed on all build costs (including enabling works) for the 646 Scheme but whether it should be allowed at all. Despite the fact that Mr Mesher has allowed a 5% contingency on main build and internet and smart home costs in his assessment, Romal contends that it is wrong in principle, when assessing damages. That is because the exercise is not a prediction of likely profitability on a future development, where a contingency allowance would be an essential part of a reasonable prediction, to avoid over-paying for the land, but a final and best assessment of the profits that Romal would have made. If the contingency turned out not to be drawn upon, because the other costs were accurately assessed, or over-assessed, Romal would not retain the unused contingency: it would remain permanently deducted from its lost profits. Romal submits that, in determining profitability for the purpose of an assessment of damages, the court should make the best estimate that it can of costs likely to be incurred and not add a contingency.

579. Ms Wicks' argument on behalf of Romal is built on what is called the "fair wind" approach that the court takes, where a wrongdoer has deprived the innocent party of the opportunity to proceed in a particular way that could have been profitable. If there are

uncertainties in the evaluation that are created by the wrongdoing, they should be resolved by making assumptions that are generous to the innocent party, rather than the opposite: Armory v Delamirie (1722) 1 Stra 505; Fearns (t/a Autopaint International) v Anglo-Dutch Paint & Chemical Co Ltd [2010] EWHC 1708 at [70] (*per* George Leggatt QC):

> "To assess what profits were lost as a result of the loss of the franchisees, it is necessary to consider what would have happened if the Defendants had acted lawfully and had not induced the franchisees to transfer their business to Anglo Dutch in June 2005. This necessarily involves a large element of conjecture. The need for such conjecture, however, is itself a consequence of the Defendants' conduct. It seems to me that, as in cases where the court has to form a view of what would have happened in hypothetical circumstances in order to evaluate a lost chance, the principle in *Armory* applies. In essence, this requires the court to resolve uncertainties by making assumptions generous to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

580. That approach applies equally in a claim for loss of a chance: see Browning v Brachers [2005] EWCA Civ 753 at [210], per Jonathan Parker LJ:

> "I respectfully agree that the principle in *Armory v Delamirie* is not directed at the legal burden of proof; rather it raises an evidential (i.e. rebuttable) presumption in favour of the claimant which gives him the benefit of any relevant doubt. The practical effect of that is to give the claimant a fair wind in establishing the value of what he has lost."

581. Accordingly, Ms Wicks submits that what amounts to a prudent allowance when estimating costs should not be deducted from the profits (and hence Romal's damages) where the court, with the benefit of expert evidence, has done the best that it can to assess the full costs of the development. With a fair wind, the contingency would not be called upon, and the employer would keep it. The same approach should be taken here, she submits.

582. Ms Holland, on behalf of Peel, submitted that the *Armory* approach can only be taken where it is the wrongdoer that has created the uncertainty. She submitted that, in this case, the difficulties that Romal faces in establishing what its profits would have been were caused not by Peel's breaches of contract but by its own evidential inadequacies, in particular its failure to call a valuation expert or a quantity surveyor to give evidence, and its reliance instead on a forensic accountant. The burden of proof remains on Romal to prove its loss, she said. (It is common ground that the principle does not change the legal burden of proof.)

583. In my judgment, the *Armory* principle does not apply only in a case where, as there, the defendant had deprived the claimant of a particular piece of evidence. It applies where, as a result of wrongdoing, a claimant has lost a chance to proceed in a particular potentially profitable way, which opportunity is no longer available, so that it is not possible to establish in fact what the outcome would have been. I reject the argument that any difficulty facing Romal in proving its case arises from its approach to this litigation. Romal's difficulty in establishing what the profits of the 646 Scheme would actually have been arises from the fact that Peel prevented it from having a chance to build it, and so

the build costs are unknown. Whichever witnesses Romal called, the costs could only have been a matter of opinion or extrapolation from other developments, and so could not be certain.

584. However, the *Armory* principle does not mean that Romal does not have to prove that it lost something of value: it means that if there is a difficulty in proving exactly what that value was, Romal should be given the benefit of the doubt in seeking to establish what that value is. How that principle applies depends on what uncertainty is in issue.

585. A construction contingency provides a funding margin for unforeseen expense, whether in the form of extra cost not covered by a fixed price contract, undiscovered issues that require further work, and extra time required that is not the fault of the contractor, or related matters. The amount of the contingency will depend on the riskiness of the project – i.e. the likelihood of one or other of these extra areas of expense emerging during the works. It is standard (and good) practice to include one when seeking to predict the cost (or profitability) of a project. It addresses the uncertainty of whether all costs of the project will prove to have been correctly foreseen and estimated.

586. With a fair wind, in the real world, the employer will not have to draw on the contingency fund, if the contract has been priced with care using a reasonable approach to quantities and rates. That may be because no unforeseen costs arise or, if they do, they are relatively small and are counterbalanced by savings on items that were costed but (as it turns out) were over-priced. It seems to me that that is exactly the sort of fair wind that should be applied in the assessment of Romal's damages, provided that it has enabled the court to do the best that it reasonably can to assess the costs that would have been incurred in building the 646 Scheme.

587. I have already rejected the suggestion that Romal did the wrong exercise, or failed to call essential evidence to prove its case. However, the use of Mr Mesher as an expert witness on quantum brought with it certain limitations (which he was happy to accept), as he is no expert on costs or valuation. As a result, he took an approach to assessing the lost profits that I have previously described as "broad brush", extrapolating data (using his expertise) from other development schemes, and plotting values and costs on a graph. Use of a broad brush, or "broad axe" approach to assessment of loss on a counterfactual basis is, however, supported on the highest authority: see *One Step*, at [504] above.

588. The relevant question, therefore, is whether a contingency allowance is needed on account of that evidential approach, which Romal chose to take, rather than on account of the evidential difficulty that Peel created in depriving Romal of the chance to carry out the 646 Scheme development. The answer to the question is clear: the contingency allowance is nothing to do with Mr Mesher's approach to assessing quantum: it is simply a conventional allowance made when seeking to identify an appropriate budget for the costs of building works. That is illustrated by the fact that Mr Patel, who is an expert on costs, also allows a contingency, of 5% for the 646 Scheme and 3% for the 330 Scheme. It is protection against the risk that a fair wind does not blow on the developer. It is therefore the kind of reduction in profits that should be disallowed, applying the *Armory* principle, as Romal has provided a reasonable assessment of the profitability of the 646 Scheme.

589. Since it is important (as Romal urged) that the same basis of assessment of profits is used for the 330 Scheme as for the 646 Scheme, the same conclusion in my judgment will

apply to the 330 Scheme. The actual (final) costs are unknown at the date of assessment of damages, so it is necessary to make the best estimate of those final costs that can be made at this time. Both parties have done so, and their experts are extremely close to agreement on the GDV, total costs and net profit. Having done so, there is no reason to include a further allowance for the possibility that extra costs will unexpectedly be incurred.

Finance costs

590. The extended timeline for the 646 Scheme that I have determined will have a consequence in terms of financing costs, which Mr Mesher will have to re-work and seek to agree with Mr Nesbitt (on Mr Mesher's model) after this judgment is handed down. The principal issues otherwise in dispute on finance costs are:

    i) The interest rate to be applied on the counterfactual scenarios;

    ii) Whether it should be assumed that 20% or 10% deposits can be used to fund the development (Peel no longer pursues a case based on Mr Nesbitt's original valuation approach, which assumed that the development was 100% debt funded).

591. The rate of interest applied by Mr Nesbitt in counterfactual scenario 1(i) is 7.5%. This figure is taken from Romal's own model disclosed with its claim. Mr Nesbitt used 8.5% for counterfactual scenario 1(ii) but did not explain why. Mr Mesher plotted the actual borrowing rates for Park Central and the 330 Scheme against Bank of England base rate, and produced as a result figures of 7.58% and 8.42% for the respective scenarios. I prefer Mr Mesher's approach.

592. Romal would have sold the units in the 646 Scheme on the basis of a 20% or 25% 'deposit' being paid on exchange of contracts, on the basis that the deposits were to be held by a stakeholder and only released to Romal for use if backed by insurance. The only evidence of warranty cover obtained by Romal for the 330 Scheme was in relation to 10% of the purchase prices or £100,000, whichever was the lesser sum (it would have been 10% of the purchase price in all cases).

593. Peel's case is that it would have been a breach of contract for Romal to make use of more than 10% of the price to fund the construction, and that accordingly loss arising from breach of sale and purchase contracts by Romal is not foreseeable and is therefore irrecoverable. On that basis, it submits, the correct finance model to use is one that assumes that the development is 90% debt funded. Mr Nesbitt belatedly produced a valuation on that basis, which meant that the total finance costs on his valuation amounted to £8,862,848 (rather than £11,889,147, which was the cost if 100% debt funded). Mr Mesher's equivalent costs are £6,756,237, assuming that 20% deposits are released to Romal.

594. It seemed to be accepted that Romal had in fact made use of all the deposit monies on the 330 Scheme. It was submitted on behalf of Romal that it would obviously have sought to do so on the 646 Scheme, because the saving on costs of borrowing as compared with the cost of insolvency insurance was huge. Mr Rowlands said that Romal is upfront with funders and planners about its intention to use deposits in that way, and its "initial disclosure appraisal" in this case also made that clear. What is less clear is whether apartment purchasers were aware of its practice.

595. Under the 330 Scheme, deposits were held by Romal's solicitors as stakeholders on the following terms:

> "The Deposit shall be held as stakeholders until the date that the Property has been registered with the Warranty Provider where the cover being provided by the Warranty Provider includes deposit protection cover in the event of the insolvency of the Seller or fraud by the Seller at which time it shall be released as agents for the Seller."

This clearly contemplates that the whole of the deposit would be released, but is not explicit about the extent of warranty required. The purchasers would have a claim against the stakeholder if the deposit had been incorrectly released and lost.

596. In my judgment, it is very likely that Romal would have contracted on the same terms, as regards the 646 Scheme contracts, and in assessing damages it should be assumed that Romal would have complied with its obligations rather than break them. Compliance and use of the full deposits would have come at an additional cost to Romal, over and above the cost of the insurance that it purchased for the 330 Scheme (which is not simply deposit insurance but also assures the delivery of the apartment to the purchaser in good condition, without defects).

597. The policy for one of the blocks in the 330 Scheme was for cover of £11.79 million (at a premium of £226,400) and the policy for the second block was for the sum of £14.65 million (at a premium of £287,400). The inclusive premium was therefore about 1.9% of the sums insured, but this included only 10% of the purchase price of the apartments. The residential GDV (excluding car parking) of the entire 330 Scheme development is agreed to be about £79 million, so a further 10% of the deposits paid would be a bit less than £7.9 million and could be expected to cost Romal a further £155,000, if the same premium rate applied. However, that assumed additional cost would include cover for the townhouses to be built in the third block too.

598. Mr Mesher adopted a slight lower rate (calculated on a per apartment basis) for the 646 Scheme as compared with the 330 Scheme, on the basis of an adjustment for time. His total price for warranty cover is therefore £775,200, based on £1,200 per apartment and cover for 10% deposit release.

599. There is no evidence as to the extra over cost for this further layer of cover, nor direct evidence that cover at that level exists in the market. On the other hand, there is no evidence from Peel that insurance for an additional 10% of deposits could not be obtained, or any obvious reason why it could not be. It may be, however, that an extra layer of insurance might be more expensive than the first layer.

600. It seems to me that the right approach to take, given that this is an exercise in quantifying loss, is to add an approximate cost of the additional cover that would be required to enable Romal lawfully to use the deposits in full. In this instance, Romal's evidence is deficient, so it is not entitled to a fair wind, but it is necessary to make some provision in respect of something that I am satisfied that Romal would have done. It is really not credible that Romal would have limited itself to using 10% of the deposits, contrary to what it did with the 330 Scheme, when on Mr Nesbitt's figures this would have cost it over £2 million more in financing costs. Given that the 646 Scheme contains almost twice as many apartments as the 330 Scheme, but basing myself on Mr Mesher's allowance, I will direct

the inclusion of an additional sum equal to one half of Mr Mesher's existing allowance, namely a further £387,600 for warranty cover.

601. Accordingly, I accept Mr Mesher's opinion on financing costs for both counterfactual scenario 1(i) and counterfactual scenario 1(ii) but direct an increase in his allowance for the costs of building warranty in both scenarios from £775,200 to £1,162,800.

Profitability overview

602. In any other respects that I have not specifically addressed in this judgment where Mr Mesher's opinion and Mr Nesbitt's opinion differ, I prefer Mr Mesher's costings on each of the counterfactual 646 Schemes to those of Mr Nesbitt. Mr Mesher gave considered, moderate evidence throughout, even when challenged on the basis that he had no relevant expertise and had made serious errors, and appeared to me to have exercised reasonable and sensible judgment. The exercise that Mr Nesbitt carried out, residual valuations at the planning dates, was not the best way, on the facts of this case, to try to identify the profits that Romal was likely to have made. Further, in carrying out his residual valuations, when he was dependent on the expert opinions of others for all the cost inputs, Mr Nesbitt failed to do an essential part of a valuer's task when using Argus (which is not transparent to the user, as an Excel spreadsheet is), which is to stand back from the result obtained (whether that is a land value or a profit figure) and ask oneself whether, given all the other facts known about the proposed development and other evidence available, the result appears to be a sensible one.

603. That "sense checking" in this way is an important part of the exercise is stressed by professional guidance notes produced by the Royal Institution of Chartered Surveyors: see RICS Guidance Note on Valuation of Development Property (2019 ed), paras 2.3.4 ("*Where a residual method is used, it is similarly important to cross-check the outcome with comparable market bids and transactions, where they exist*"), 2.3.6 ("*it is important to sense check the outcome before final reporting of the valuation*") and 7.1 ("*Risk analysis should be used to evaluate how changes to individual inputs, such as construction cost or sales values, might affect the valuation of development property and to help model various different scenarios*"), and RICS Professional Standard on Assessing Viability in Planning, paras 2.3.8 – 2.3.10 ("*All [Financial Viability Assessments] should include testing of alternative economic scenarios and the sensitivity of individual inputs such as projections of values and costs. The use of sensitivity testing in an FVA is a mandatory requirement …*"). The reason is that it is known that the results produced by Argus can change greatly depending on relatively small changes to certain inputs.

604. Although these guidance notes address the use of residual valuations to identify the value of the land, the same obviously applies where the same programme, whether Argus or other similar software, is being used 'in reverse' to identify the likely profit. Mr Nesbitt eventually accepted in cross-examination that, when doing a residual valuation to ascertain land value, a standard profit allowance would be 15-20% on GDV; he also accepted that he would expect the profit margins for the 646 Scheme and the 538 Scheme to be higher than for the 330 Scheme. It should therefore have come as a surprise to him, if he was doing his work independently and objectively, in order to assist the court, that his valuations produced results that projected much smaller profits for these larger and more valuable developments than the profits for either Park Central or the profits

projected (by him) for the 330 Scheme. Yet at no stage, in connection with the 646 Scheme or 538 Scheme valuations, did he address the sales figures for the 330 Scheme.

605. Instead of doing the prescribed exercise, Mr Nesbitt adhered rather stubbornly to the results that were produced, seeking to explain that "if you are happy with the sense checking you've done with the revenue and the sense checking with cost, the profit that falls out the end is inevitability", and "I think you've got it the wrong way round. If you sense check what goes in, the inevitability of what's at the bottom line is there". In my judgment, he knew that this was not correct, and that what was prescribed was a sense checking of the results, taking account of other available evidence and varying inputs, as described in the RICS guidance, not just selecting his inputs carefully.

606. As a result, Mr Nesbitt adhered to profit forecasts that were significantly out of line with the profits for the other schemes. Romal produced a telling table, in its closing submissions, which illustrated that while Mr Mesher's analysis produced results that were a comfortable fit with the known profits of Park Central and the expected profits of the 330 Scheme, Mr Nesbitt's were much too low. That table is the following, where the "profit on cost" margins exclude sales costs:

	Profit on Cost margins		**Profit on GDV margins**	
	Mr Mesher	**Mr Nesbitt**	**Mr Mesher**	**Mr Nesbitt**
Park Central	33.9%	33.9%	23.4%	23.4%
330 Unit Scheme	21.1%	20.2%	16.07%	15.47%
646 Unit Scheme - Local	28.7%	7.5%	20.5%	6.42%
646 Unit Scheme – Appeal	28.2%	8.8%	20.23%	7.46%
538 Unit Scheme – Local	28%	9.2%	20.13%	7.78%
538 Unit Scheme – Appeal	28.8%	11.4%	20.56%	9.43%

607. The consequence of this was that Mr Nesbitt's projected profits on the 646 Scheme (and the 538 Scheme too) were significantly lower than the projected profits of the 330 Scheme, even though far fewer apartments would be sold and yet the land cost and the "abnormals" costs were the same. In other words, despite the fact that Romal had been anxious to be able to build a larger development, and produced viability studies intended to show the City Council that only a development of such a scale was viable, it was in fact wrong all along, and the much smaller development that it reluctantly had to content itself with in fact would return a much higher rate of profit on cost.

608. Those highly surprising outcomes should have caused Mr Nesbitt to stop and reconsider whether he had not erred in the inputs that he used in his residual valuation. Instead, he said, it was wrong to do that, because the results were just calculations and he was satisfied with his inputs at the time when he used them. In other words, no standing back and assessing the results was required.

609. In his place, Peel's legal team offered some reasons why (they say) the profit figures were so different. These were:

    a) the use of properly derived sales values at the correct valuation dates;

    b) recognising the improving market into which the 330 Scheme units were sold;

    c) recognising the higher prices likely to be obtained for the 330 Scheme because the units were smaller, and there were more 1-bed units;

    d) higher dock infill costs for the larger Schemes;

    e) inability to use 20% deposits as funding; and

    f) longer timings for delivery.

    I have indicated already why I disagree with a) and e). There is no evidence to support b) or d). I have accepted that c) could have had some effect, but what effect was not analysed by Mr Nesbitt, and this factor was counterbalanced by two other factors in Mr Mesher's approach that operated in favour of Peel. I have accepted that Mr Mesher's timelines (derived from Romal) were too optimistic, but not to the degree suggested by Mr Nesbitt.

610. The reasons given by Peel therefore do not explain such a discrepancy or the counter-intuitive results that Mr Nesbitt obtained. Nor is there any other persuasive reason why the profit on costs and profit on GDV figures in the table above derived from Mr Nesbitt's valuations should be so low, compared with the profits on the other schemes and the standard 15-20% profit that a developer would expect to make.

611. The conclusions that I have reached on build programme, GDV, cost of works, professional fees, contingency, interest rate and cost of using 20% deposits will apply equally in relation to counterfactual scenario 1(ii).

The 538 Scheme

612. In view of the factual conclusions that I have reached, it is unnecessary to examine the profitability of the 538 Scheme in detail. I will however indicate in outline the conclusions that I would have reached.

613. The main areas of difference in the assessment of profits on the 538 Scheme (where planning permission is granted in August 2020) are:

    i) Just under £9.5 million (about 10%) difference in gross development value (GDV), with a consequential difference on sales and marketing costs;

ii) Just over £1.8 million difference on professional fees;

iii) About £2.1 million difference on funding costs, which is principally the result of the much longer timeline for the development project assumed by Mr Nesbitt and the consequence of 100% debt funding. If Mr Nesbitt's 90% debt funding model is used, the difference is reduced to only £435,000.

614. Timelines: Mr Mesher accepted figures produced by Romal, which were April 2021 to October 2021 for the enabling works and November 2021 to October 2024 for the main build programme, where planning permission is granted by the City Council, and November 2021 to May 2022 for the enabling works and June 2022 to May 2025, where planning permission is granted on appeal. The time for the main build programme was therefore 18 months for each of two phases. Mr Patel's equivalent figures were 13 months for the enabling works and 22 months for the main build programme. These are therefore the same differences as exist under the 646 Scheme, and I would therefore have made the same adjustments to Romal's timelines, adding 2 extra months for the enabling works and 4 extra months for the main build programme.

615. GDV: I accept Mr Mesher's assessment of the GDV of the apartments in the scheme, based on £380 per sq ft for the August 2020 planning date and £400 for the June 2021 date, and his figure of £19,421 for each of the 165 parking spaces. As with the 646 Scheme GDV, Mr Mesher's figure of £15 per sq ft for the commercial space should be taken, but again would require adjustment for voids and rent-free periods.

616. Costs: the conclusions that I have explained on the extent of enabling works, the cost of those works, the inclusion of external works and infrastructure costs in the main build costs, the level of professional fees, the absence of contingency and the use of deposits apply equally in relation to the 538 Scheme. I accept Mr Mesher's evidence that the appropriate interest rate for the funding is 7.88% and the appropriate additional sum for the insurance for an additional 10% of deposits is £322,800.

617. The same adjustments apply if the development is assumed to be pursuant to a planning permission granted on appeal in June 2021.

The 330 Scheme profits

618. Although there is very little difference between the parties on their assessment of the net profits likely to be made by Romal on the 330 Scheme development, it is necessary to consider – in order to be consistent with the assessment of profits on the hypothetical 646 Scheme developments – whether any of the issues that I have decided in relation to the 646 Scheme profitability should result in changes to the assessment of the 330 Scheme profits.

619. One change to Mr Mesher's figures for the 330 Scheme is now agreed: Mr Nesbitt's figure of £452,337 for commercial sales should be substituted for Mr Mesher's figure of £517,849. Subject to that, I accept Mr Mesher's figure for the net target sales revenue.

620. On construction costs, there is very little difference between the expert witnesses and I will adopt Mr Mesher's figures.

621. As for professional fees, the position with the 330 Scheme is slightly different from the larger, hypothetical 646 Scheme, as many of the fees had been incurred by Romal at the date of trial. These amounted to £1.545 million by the end of 2024. There was no updated figure as at the date of trial. It is now accepted by Romal and Mr Mesher that there will be more, but not that the fees will double (or more) as the remaining blocks are built.

622. Romal's total estimate for this smaller development was £2.088 million, including fees for the enabling works. Mr Nesbitt's figure for fees would mean a further £1.4 million approximately will be spent (less the amount already allowed by Mr Mesher in his enabling works cost), which seems unlikely. I will therefore reduce the applicable percentage to 5% of Mr Mesher's costings for main works only, as it appears that actual fees were both predicted to be and are running at less than 6%. I consider that this is justified based on the evidence from this particular development, but that it is not safe to carry a lower rate of 5% across to the 646 Scheme and the 538 Scheme. From the figure so calculated should be deducted the £462,000 for building warranty that Mr Mesher costs separately.

623. The conclusion that I have reached on contingency applies equally to the assessment of the 330 Scheme, for reasons that I have given.

624. As for finance costs, there is agreement on the finance rate of 9.75%. Romal has in fact used 20% deposits to fund the development but has not incurred the cost of insuring more than use of 10%, so the building warranty figure should remain as it is in Mr Mesher's costings.

625. The timescales for practical completion of the 330 Scheme are not fully agreed. Mr Mesher allows 67 months from the planning date in July 2022, and Mr Nesbitt allows 64 months. However, this difference includes a difference about preparation and enabling works at the outset, and a lead in period, which is now in the past. As to completion and phasing of the three blocks, the experts in their joint statement agreed Q2 2025 for practical completion of the first block and the only difference on overall delivery was a single month, Mr Mesher considering that 48 months from the start of the main build would be required and Mr Nesbitt assuming 47 months. To be consistent, I will accept Mr Mesher's evidence and direct that a main build period of 48 months should be assumed.

626. That means that the funding costs should be in accordance with Mr Mesher's final assessment (his appendix 5A), namely £4,432,423.

627. I will leave it to the experts to produce a final calculation of the Net Target Sales Revenue, Total Costs and Net Profit for the 330 Scheme, which I expect them to agree.

The loss of profit calculation

628. Having calculated the net profit for each of the counterfactuals and the net profit for the 330 Scheme, the difference between them can be determined. The loss suffered by Romal on this part of its claim will therefore be 20% of the difference on counterfactual scenario 1(i) added to 40% of the difference on counterfactual scenario 1(ii), plus any

adjustment that is appropriate for delay in receiving the profits caused by loss of the opportunity to carry out the 646 Scheme development.

629. Romal's pleaded case is that what it lost was the value of the chance to make the difference between the profits it would have made on the 646 Scheme, starting development in November 2019, and the profits that it will make from starting development of the 330 Scheme in February 2023. As I have determined, that chance was a 60% chance of being able to carry out the more valuable development. It therefore had a 40% chance of only being able to build out the 330 Scheme in any event (it not being argued that refusal of planning permission for the 646 Scheme would have prevented Romal from obtaining permission for the 330 Scheme afterwards).

630. Romal contends that in order accurately to capture this loss, it is necessary to take into account the time value of money by reflecting the fact that the profits from the 646 Scheme would have been received earlier than the profits from the 330 Scheme. It contends that the best method to capture that loss would be to use the planning dates as a proxy for the time difference between the two income streams and to discount the capital receipt from the 330 Scheme over that period.

631. In effect, this would reduce the value of the income from the 330 Scheme to be deducted from the higher profits of the 646 Scheme and increase the difference between them, before taking the appropriate percentage of that difference.

632. The question here is whether delay in receipt of profits is a part of the calculation of loss or whether it is something that is adequately compensated by an award of interest. Romal says the former; Peel says the latter. It may not matter whether an adjustment is made by way of an award of interest on a sum that would have been received earlier, or by way of discounting its real value, as long as it is not both, and as long as the interest is awarded or adjustment made only to the extent that there was a chance that the sum would have been received sooner than it was.

633. I am not persuaded by Romal's approach. First, the comparison ought to be between the dates on which practical completion of each part of each scheme was achieved, thereby releasing the purchase monies, not based on the difference in the timing of sales. Further, the benefit of 20% deposits has already been taken into account in the finance costs. Second, Romal in fact benefits from delay in carrying out the developments, as greater net revenue per square foot is achieved on later developments. There is therefore a risk of over compensating if all the receipts from the 330 Scheme are discounted in the way that Romal suggests. It seems to me that awarding interest, as appropriate, will enable a more flexible and appropriate adjustment to be made, if it is appropriate to do so.

The ground rents claim

634. As previously explained, Romal additionally claims for the loss of ground rents that (I accepted) it would have sought to obtain on sales that were exchanged before July 2022.

635. The question of how many leases of apartments Romal could have contracted to sell in time depends on two matters. First, how soon after the grant of a Satisfactory Planning Permission Romal could and would have started marketing apartments. Second, the

likely rate of take up by the market thereafter. The date on which marketing could and would probably have started is not related to the start of construction because the apartments would have been sold off plan, as was the case with C-04 and C-06 and the 330 Scheme, without regard to the progress of construction. It was related only to the planning date, and the rate of sales dictated when the next phase was marketed.

636. Romal's case (adjusted late to bring it into line with the agreed planning dates) is that, if planning permission had been granted by the City Council, it would have contracted to sell all the apartments in the 646 Scheme apart from 5% of those in the third and final phase of the development; and if planning permission had been granted on appeal, it would have contracted to sell all the apartments in phase 1, 75% of the apartments in phase 2 and none of the apartments in phase 3. In relation to the 538 Scheme, Romal's amended case is that it would have sold all the apartments except for 25% of those in the second (and final) phase of the development, if planning permission had been granted by the City Council, and all but 5% of the apartments in phase 1 and one half of the apartments in the second phase if planning permission had been granted on appeal. These dates all assume the start of marketing of apartments in Phase 1 one month after the grant of planning permission.

637. The evidence of Romal on these matters was largely unchallenged, except that Ms Holland suggested to both Mr Malouf and Mr Rowlands that ground rents was not part of their thinking when they struck the deal with Mr Ashworth, which they both denied.

638. Peel contended that Romal did not produce any evidence to support the sales rates advanced, though it is clear that these are Mr Malouf's and Mr Rowlands' own assessments based on their actual experience of selling similar apartments in the same location at the developments on C-04 and C-06 and in the 330 Scheme. I see no reason to reject their evidence and therefore accept Romal's amended case on the proportion of apartments that would have been sold before 30 June 2022.

639. The remaining questions relate to quantum. Romal claims at a rate of £7,432 per unit, assuming a ground rent of £250. Mr Ashworth said that Peel was dealing with ground rents on a valuation of 25 to 30 times the annual rent. The figure of £7,432 is 29.7 times £250. That figure derives from a valuation done by Mr Mesher, assuming that the annual rent was £250 and increasing by 20% every ten years (an estimate of the likely minimum effect of the RPI-based rent reviews), for a term of 200 years, using a discount rate of 5%.

640. It emerged in evidence that, contrary to the suggestion that there was no real market for ground rents once their abolition was proposed, a Peel group company, which owned the leasehold reversions of C-04 and C-06, had sold them in 2023 for a value equivalent to 22.4 times the ground rents (for C-04) and 25.5 times (for C-06). Mr Nesbitt, who had not been provided with this material by Peel when he prepared his written evidence, was surprised at how high the prices were. His selected yield of 5.1% (implying a multiplier of 19.4) would provide a capital value of £3,880 per apartment.

641. In my judgment, the best evidence of the appropriate multiplier is produced by the C-04 and C-06 transactions. That demonstrates that these developments are attractive and of sufficient quality to command a value higher than the national average, on which Mr Nesbitt relied. I find that, for a larger and (objectively) better scheme on the Property, a yield of 4% is appropriate (25 years' purchase). 29.7 is too high.

642. Mr Mesher's valuation does not address the value of the ground rents if, instead of £250 p.a., they are 0.1% of the price of each apartment. In order to do so, he would need to be provided with an average projected sale price for the 646 Scheme apartments.

643. I have accepted Romal's evidence about the likely rate of sales, and so the number of unit sales in each counterfactual scenario will be in accordance with the tables in paragraph 4.6 of Mr Mesher's second addendum report. I will require Mr Mesher and Mr Nesbitt to agree the average apartment value and do the arithmetic, using the 0.1% rent figure (with 10-yearly RPI rent reviews).

644. Given that there was, overall, only a 20% chance of Romal obtaining planning permission for the 646 Scheme in counterfactual scenario 1(i) and only a 50% chance in counterfactual scenario 1(ii), the appropriate proportions of the re-calculated capital values of the ground rents will need to be taken for each scenario (20% and 40% respectively), and the loss for this part of the claim is the sum of the values produced by those calculations.

IX. Disposal

645. For all the reasons given, I allow Romal's claim for damages and will enter judgment in due course for a sum to be calculated.

646. I require the parties to instruct their respective quantum experts to work together to re-calculate and quantify the matters that I have indicated. The parties should seek to agree an initial order, to be made on handing down this judgment electronically, including a timetable for that work to be done, and to hold the position until a consequentials hearing, on a date to be fixed, before the end of the Michaelmas Term. The revised calculations must be agreed at least 10 days before the consequentials hearing.

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[i] This judgment was sent out to the parties in draft before the decision of the Supreme Court on appeal from the Court of Appeal's decision in *Kings Crude* ([2025] UKSC 39). In the absence of any submission from the parties on the effect of that decision or request to reopen the matter, I have made no amendment to this part of the judgment. This part of my decision only applies if the AfL was not varied by the parties to allow Romal to submit its planning application without the prior formal approval of Peel. In the light of the Supreme Court's decision, my alternative conclusion may be right on the basis that Peel would be relying on its own wrong to assert the termination of the AfL on 31 December 2018, as no formally approved planning application had been submitted by that date.