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NO:95/1585/C

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM: QUEENS BENCH DIVISION
(MR JUSTICE TURNER)

Royal Courts of Justice
Strand
London WC2

12th May 1995

B e f o r e :

LORD JUSTICE STUART SMITH
LORD JUSTICE HOBHOUSE
and
LORD JUSTICE MILLETT

ALLIED MAPLES GROUP LTD

v.

SIMMONS & SIMMONS (a firm)

(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071 404 7464
Official Shorthand Writers to the Court)

MR R JACKSON QC and MR D HODGE (instructed by Reynolds Porter Chamberlain, Chichester House, 278 282 High Holborn WC1)) appeared on behalf of the Appellant.
MR R MOXON BROWNE QC and MS S RODWAY (instructed by Evershed Wells & Hind, 10

Newhall Street, Birmingham) appeared on behalf of the Respondent.

HTML VERSION OF JUDGMENT

Friday, 12th May 1995.

LORD JUSTICE STUART SMITH: This is an appeal by the Defendants from a judgment of Turner J given on 8 June 1993 on the trial of a preliminary issue as to liability.

The Plaintiffs are a subsidiary of Asda Group PLC and are the retailing arm of that Group which is concerned with carpets, furniture and soft furnishings. The Defendants are a well known firm of solicitors in the City of London with extensive experience in the field of company takeovers and mergers. The proceedings arise from the takeover by the Plaintiffs of assets and businesses within the Gillow Group of Companies.

The Plaintiffs brought this action complaining that in the course of the negotiation of the takeover and in the agreement itself they were insufficiently advised in respect of, and protected from, the liabilities that might and did eventuate from leases originally held by one of the companies in the Gillow Group and which had been assigned by it prior to the date of the takeover agreement. This species of liability is referred to as "first tenant liability". The problem arose in this way. The original intention of the Plaintiffs was to acquire only such properties, and the business conducted from them, as they required from the Gillow Group, a process known as "cherry picking". If this intention could have been met, there would have been no problem in relation to previously assigned leases and first tenant liability. Four of the properties which the Plaintiffs wished to acquire could not be conveyed in this manner because there were conditions against alienation or planning consents which were personal to the company, Kingsbury Warehouses Limited ("Kingsbury"), in which those properties were vested. Some other mechanism had to be found whereby the Plaintiffs could acquire the relevant properties. The mechanism which the Defendants devised, and as to which there was no theoretical objection, was for the Plaintiffs to acquire the shares in Kingsbury and to transfer out of it the unwanted properties and liabilities. This solution gives rise to the dispute in the action because some of the properties which had been previously owned by Kingsbury had first tenant liabilities which, subsequent to the acquisition, resulted in claims against Kingsbury, and hence the Plaintiffs, as a consequence of defaults by assignees. These defaults have caused the Plaintiffs to suffer substantial losses which they sought to recover as damages from the Defendants.

Prior to 1989, the Plaintiffs were primarily retailers of carpets and soft furnishings. They decided to expand the nature of their business by the acquisition of a number of furniture shops from the Gillow Group, together with well known brand names such as "Maples", "Gillow" and "Waring and Gillow". The Plaintiffs were keen to make the acquisition and had the requisite funds, while the Gillow Group was in the position of wishing to sell, albeit at a price that they would regard as satisfactory to them. If the transaction was to proceed, it was necessary that it should generate a minimum cash sum for Gillow, which was put at a figure somewhere between £25,000,000 and £26,000,000. The substantial negotiation which the parties entered into lay in the field not so much of price as in the assets which the Plaintiffs would acquire.

Before they made any move, the Plaintiffs carried out an elaborate process of appreciation and evaluation of the target companies. This process was designed to establish what were the possible benefits to the Plaintiffs if the plan was carried into effect, what was the value of the properties and business which they wished to acquire, as well as identifying other companies who might be possible competitors for the acquisition of Gillow as well as their comparative strengths.

The Plaintiff company made its formal bid by letter dated 20 February 1989. The offer was made in the alternative; the Plaintiffs would purchase either the whole of the issued share capital of Gillow PLC or the premises listed on the schedule and the business carried on from them as going concerns together

with stock and the use of the trading names. Following discussions, a revised formal offer was made by letter dated 8 March 1989.

On 22 March Gillow replied. Amongst other things, they undertook until 6 pm on 14 April not to negotiate the sale or agree to sell to any other person. But they added that the Plaintiffs should not take that as indicating that the draft purchase agreement in its present form was acceptable. The draft purchase agreement had been prepared by Mr Buckley, a partner in the Defendants' firm.

The first hint of a problem that resulted in this litigation emerged on 6 April. Next day Mr Heald, the conveyancing partner of the Defendants who was handling the matter, discovered the problems that might arise on alienation of the premises leased to Kingsbury and suggested to the Plaintiffs that the solution might be to purchase the shares in Kingsbury, with the assets, other than the four stores they required, and the other liabilities of Kingsbury hived off to another company. This solution was further discussed at a meeting on 10 April attended by Mr Harker, who was the Plaintiffs' senior director in charge of negotiations, Mr Moore, the Plaintiffs' Finance Director and Mr Buckley.

On the same day, Mr Buckley wrote to Theodore Goddard, Gillow's solicitors, as follows:

> "I understand that our.....clients agreed.....that.....(Allied) should acquire the whole of the issued share capital of Kingsbury.....the acquisition to be on the basis that all other assets and liabilities would have been removed so as to leave the company 'clean'..... confirm..... your instructions are the same as mine and let me know what will have to be taken out of Kingsbury.....and the mechanics to achieve this."

Theodore Goddard replied:

> "It is also my understanding that the proposal is now that (Allied) should acquire the whole of the issued share capital of Kingsbury..... We are investigating as a matter of urgency what is involved in extracting other assets and in particular.....whether there are any problematical restrictions on alienation of the five properties which I understand will have to be taken out of that company. .....I would just say that I understand my clients made to yours the point that if this was done in the time scale, it would not be possible for full warranty and indemnity protection to be sought. I would be grateful if you would bear this in mind in drafting the agreement which you will no doubt be preparing."

This letter elicited a response from Mr Buckley on 11 April. On 15 April the Defendants sent to Theodore Goddard a draft of Schedule 12 to the agreement, which dealt with the sale of the Kingsbury shares. The draft contained a number of warranties to be given by the vendor, Gillow, including warranty No. 29, which was in these words:

> "The Company has no existing or contingent liabilities in respect of any properties previously occupied by it or in which it owned or held any interest, including, without limitation, leasehold premises, assigned or otherwise disposed of."

It is common ground that warranty No. 29 would have provided the Plaintiffs protection against the claims that eventuated.

However, on 19 April, Theodore Goddard returned the draft of Schedule 12 to the Defendants with a considerable number of the warranties deleted, including warranty No. 29. The amended draft was received at the Defendants' office on the afternoon of 19 April; the deal as a whole was discussed at a meeting between Mr Buckley, Mr Harker and Mr Moore that evening; but the discussion did not include the amendments to Schedule 12.

On 20 April there was a meeting at the offices of Theodore Goddard attended by representatives of Gillow, Mr Moore from the Plaintiffs and their professional advisers, including Mr Buckley, and Mr Hale, another solicitor from the Defendants who handled the tax aspects. The draft amendments to Schedule 12 were discussed. In place of warranty No. 29, there had been provided a mechanism for adjusting the purchase price of the Kingsbury shares by reference to the completion accounts. Paragraph 8 of that Schedule provided:

> "In the event that it is subsequently discovered that there was at the date to which the completion accounts were made up any liability of the company which if known at the time should have been provided for in the completion balance sheet, then subject as provided in the sub paragraph below the Vendor shall pay such amount to the Purchaser in accordance with the provisions of sub paragraph (10) below."

It is common ground that clause did not in fact protect the Plaintiffs against Kingsbury's first tenant liability, because, as a matter of accountancy practice, the contingent liabilities were not such as should have been provided for.

At the meeting on 20 April, Mr Buckley told Mr Moore that the protection afforded by paragraph 8 was less than perfect. But he did not alert him to the risk that there might be contingent liabilities to the landlord, of which no one knew, resulting from leases assigned by Kingsbury as first tenant.

On 21 April, what was referred to as the "Hive down" agreement was discussed between Theodore Goddard and the Defendants. This was the agreement whereby Kingsbury sold to another subsidiary of Gillow, Kingsbury Warehouses (Bristol) Ltd, the remaining properties which the Plaintiffs did not wish to acquire. At Mr Buckley's suggestion or insistence, the draft agreement prepared by Theodore Goddard was amended so as to include a "covenant by Gillow that Kingsbury Warehouses (Bristol) would perform and observe all such covenants, liabilities and conditions on the part of the lessee contained in the assigned leases and indemnify Kingsbury in respect thereof". As will be seen, the Plaintiffs attached importance to the fact that Gillow were prepared to give this covenant and indemnity when asked to do so by the Defendants.

Contracts were exchanged on 25 April. The Plaintiffs acquired 48 stores from Gillow, including the former Kingsbury stores. The overall price was £26m, including £2.18m attributed to the Kingsbury shares. Completion took place on 15 May 1989.

In May 1990 the Plaintiffs were first alerted to a claim by the lessor of a property which had been assigned by Kingsbury. There was great apprehension on the part of both Plaintiffs and Defendants that the liabilities might be very extensive. The Defendants at first advised that a claim should be made against Gillow, presumably on the basis of the completion accounts and paragraph 8 of the 12th Schedule. However, this was quickly repudiated by Gillow and it was accepted that no claim could be made against them.

Further extensive enquiries showed that there were four properties which had previously been assigned by Kingsbury as first tenant, and in three of these cases the assignees had failed, involving Kingsbury, and hence the Plaintiffs, in very substantial liabilities.

The Plaintiffs issued proceedings in May 1991, claiming damages in respect of the Defendants' allegedly negligent advice. On 9 January 1992 a preliminary issue was directed to be tried, namely "that the question or issue of the liability of the Defendants to the Plaintiffs in these actions be tried as a preliminary issue before the question or issue of damages". The Defendants' defence at trial on the question whether or not they had been negligent was that they did not consider it necessary to advise Mr Moore, who was a qualified chartered accountant, of the effect of deleting warranty 29; he must have fully understood this and chose to take the risk, which would have been regarded as small. The Judge rejected this defence. He held not only that Mr Moore did not appreciate the risk, but also that the Defendants' representatives themselves never gave any thought to the matter. He accordingly answered the preliminary issue on the question of breach of duty in favour of the Plaintiffs. There is no appeal on that point.

It was, however, appreciated by the Judge at an early stage of the trial that in order to determine the issue of liability, it was also necessary to decide the question of causation; moreover it was convenient to do so at that stage, since much of the evidence relating to liability also had a bearing on causation. On day 3 he therefore defined the question of causation which he had to determine as follows:

> "If the Defendants had given the further advice which, on the hypothesis they should have given, whether or not Gillow would have given the warranty or what other steps the

> Plaintiffs would have taken in order to protect themselves [from the consequences of first tenant liability crystallising]."

And in his judgment he added, after quoting the above passage from the transcript:

> "Thus, what I am now concerned to do is to determine whether or not the Plaintiffs have satisfied me that they would have done anything differently had they been properly advised in accordance with my findings as above."

He determined the issue of causation in favour of the Plaintiffs. The Order drawn up on 8 June 1993 in fact misstates the preliminary issue, referring only to negligence. However, the Judge's findings on the question of causation were incorporated in the order as follows:

> "1. Because it was clearly the shared intention of Gillow and the Plaintiffs that Kingsbury should be acquired "clean" all reasonable efforts to achieve that objective would have been made by both parties to the deal.
>
> 2 (a) the strong probability is that the existence and the identity of the assigned leases would have been discovered.
>
> (b) the objection to the inclusion of a warranty in the very wide terms envisaged in the discarded warranty 29 would have disappeared.
>
> (c) any warranty could have been restricted to the assigned leases and/or alternatively could have provided for a cap on Gillow's liability or alternatively Gillow could have offered their own covenant direct to the Landlords.
>
> (d) short of the original proposal in the discarded warranty 29 itself that would not have extended their liability beyond what it was already.
>
> 3 the Plaintiffs would have been unlikely to have entertained the idea that there should have been a simple reduction in the price for Kingsbury since this would still not have met their basic objection viz. An open ended liability.
>
> 4 the Plaintiffs would not have proceeded with the deal unless the Kingsbury stores were included.
>
> 5 it is probable that Gillow would have either been prepared to provide a warranty in respect of identified properties to have offered their own covenant to the Landlords of those properties or to have agreed to indemnify the Plaintiffs against any liability if it arose up to a maximum figure of £2.18m
>
> 6 the least likely of all the possibilities and improbable is that the Plaintiffs would not have proceeded with the deal."

These findings substantially reproduce the conclusions expressed on causation at the end of his judgment. The Appellants confine their appeal to the question of causation. They specifically challenge the findings contained in paragraphs 1, 2 and 5 of the Order. They accept the finding in paragraph 3, though not the reason given for it by the Judge. They also accept the findings ion paragraphs 4 and 6.

With hindsight it is easy to see that this was not a satisfactory case for a split trial. Not only were questions of breach of duty closely related to questions of causation; but the question of causation was also closely related to the question of quantification of damages. These latter questions depend upon what (a) the Plaintiffs, and (b) Gillow, would have done in a hypothetical situation, namely if the Defendants had given the advice that they should have done to the Plaintiffs. And in the light of Mr Jackson QC's submissions, it has been necessary for this Court to analyse, as a matter of law, where the question of causation ends and quantification begins.

At the outset of this appeal, Mr Jackson did not challenge the Judge's finding, implicit in paragraph 1 of the Order, that had the correct advice been given, the Plaintiffs would have sought to negotiate with Gillow with a view to Gillow accepting in whole or in part the risk of first tenants' liabilities. His submissions were directed to challenging the Judge's findings set out in paragraphs 2 and 5 of the Order. Specifically he submitted that there was no evidence that Gillow would have given the protection sought by the Plaintiffs because neither Gillow nor Theodore Goddard gave evidence to say that they would, or alternatively that the Plaintiffs could not establish on balance of probability that Gillow would have done so, and/or that these findings of the Judge were against the weight of the evidence.

However, the Court pointed out to Mr Jackson that he might be approaching the case on the wrong basis and that once the Judge had found that the Plaintiffs would have sought to negotiate with Gillow to obtain appropriate protection, provided there was a real and not a mere speculative chance that they would have succeeded in the negotiation, that aspect of the case fell to be considered on the basis of evaluating the chance, a question of quantum, and not causation; and that issue did not depend on a balance of probability. In the light of this intervention by the Court, Mr Jackson submitted that the suggested approach of the Court was wrong, Gillow's favourable reaction had to be proved by the Plaintiffs as a matter of causation on balance of probability. But if that was incorrect, he challenged the Judge's finding No. 1, that the Plaintiffs if properly advised would have sought by negotiation to obtain full, or at least partial protection. Furthermore, he submitted that the Plaintiffs had not passed the threshold of establishing that they had a realistic chance of success in such negotiations.

In these circumstances, where the Plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.

1. What has to be proved to establish a causal link between the negligence of the Defendants and the loss sustained by the Plaintiffs depends in the first instance on whether the negligence consists on some positive act or misfeasance, or an omission or non feasance. In the former case, the question of causation is one of historical fact. The Court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.

Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party, namely the plaintiff's employer.

2. If the defendant's negligence consists of an omission, for example to provide proper equipment, given proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it. But in many cases the risk is not obvious and the precaution may be tedious or uncomfortable, for example the need to use eardefenders in noisy surroundings or breathing apparatus in dusty ones. It is unfortunately not unknown for workmen persistently not to wear them even if they are available and known to be so. A striking example of this is the case of McWilliams v. Sir William Arrol & Co. Ltd. [1962] 1 WLR 295 HL; the employers failed in breach of their statutory duty to provide a safety belt for the deceased steel

erector. But his widow failed in her claim under the Fatal Accidents Act, because there was compelling evidence that, even if it had been provided, he would not have worn it.

Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. In the present case the Plaintiffs had to prove that, if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The Judge held that they would have done so. I accept Mr Jackson's submission that since this is a matter of inference, this Court will more readily interfere with a trial judge's findings than if it was one of primary fact. But even so, this finding depends to a considerable extent on the Judge's assessment of Mr Harker and Mr Moore, both of whom he saw and heard give evidence for a considerable time. Moreover, in my judgment there was ample evidence to support the Judge's conclusion. Mr Jackson's attack on this finding was, as I have explained, something of an afterthought and not, I think, undertaken with great enthusiasm. I am quite unable to accede to it.

3. In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?

Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.

In Chaplin v. Hicks [1911] 1 KB 786 the defendant's breach of contract prevented the plaintiff from taking part in a beauty contest and deprived her of the chance of winning one of the prizes. The Court of Appeal upheld the judge's award on the basis that while there was no certainty that she would have won, she lost the chance of doing so.

In Kitchen v. RAFA & Others [1958] 1 WLR 563 the defendant solicitors negligently failed to issue a writ against the tortfeaser with the result that the plaintiff's claim was statute barred. The Court of Appeal upheld the judge's award of £2,000, which was two thirds of the full liability value of the claim. The Court firmly rejected the defendant's contention that she had to establish on a balance of probability that she would have won the action. Lord Evershed MR considered that she had "lost some right of value, some chose in action of reality and substance" p 575. But Parker LJ put the matter more generally:

> "If the plaintiff can satisfy the Court that she would have had some prospect of success, then it would be for the Court to evaluate those prospects, taking into account the difficulties that remained to be surmounted".

Mr Jackson made two submissions on those authorities. First, that they should be confined to cases where the plaintiff has lost a valuable right or chose in action; in the present case he said that the Plaintiffs had no such right. It is true that both Vaughan Williams and Fletcher Moulton LJJ referred to the plaintiff losing a valuable right, but I can see no difference in principle between the chance of gaining a benefit and the chance of avoiding a liability.

Secondly, Mr Jackson submitted that the Plaintiffs can only succeed if in fact the chance of success can be rated at over 50%. It so happened that in Kitchen, Otter v. Church [1953] 1 Ch 280 and Hall v. Meyrick [1957] 2 QB 455, to which I shall shortly refer, the plaintiff did recover more than 50% of the full value of the loss. But this is fortuitous and there is no reason in principle why it should be so. In Yardley v. Coombs [1963] 107 SJ 575, Edmund Davies J awarded one third of the full liability value of the plaintiff's claim against the negligent defendant solicitors. In Griffiths v. Evans [1953] 1 WLR 142 a solicitor failed to advise the plaintiff that he should sue his employers at common law rather than rely on his rights under the Workmans Compensation Acts. The majority of the Court of Appeal held that the solicitor was not negligent. Denning LJ dissented. He would have awarded £600 against the

solicitor, which was less than half the value of the claim on full liability. Moreover, it is clear from Davies v. Taylor [1974] AC 207 that, provided the plaintiff's chance is substantial, it may be less than 50%.

There only appear to be two reported cases in relation to solicitors' negligent advice in connection with non contentious business, both of which are at first instance. In Otter's case the defendant solicitor had failed to give proper advice to M, with the result he failed to take steps to disentail certain property before he died. The plaintiff, as administratrix of his estate, sued. Upjohn J held that the deceased had been deprived of the opportunity of disentailing the estate and awarded as damages the value of the lost property, discounted by some 10% to take account of the possibility that M might not have disentailed. This is in truth not a case involving a third party at all, since the deceased and his estate have to be regarded as the same. It is therefore a case falling under category 2 above. Moreover, the decision was doubted by Salmon LJ in Sykes v. Midland Bank [1971] 1 QB 113 at p 130 on the grounds that once the plaintiff had established causation on balance of probability there should be no discount. I respectfully agree. Mr Jackson sought to rely on Sykes case in support of his proposition. But in my judgment it does not assist him because that was a case where the plaintiffs fell at the first hurdle because they failed to prove that they would have acted differently if they had been correctly advised.

The second case is Hall v. Meyrick. The defendant, a solicitor, was instructed by the plaintiff and H to draft wills whereby each was to confer benefits on the other. Although the defendant was aware of the possibility of marriage between them, which subsequently took place, he failed to advise that marriage would revoke the wills unless they were expressed to be made in contemplation of marriage. The wills were not drawn with that term. H died and the plaintiff sued for negligence, claiming the difference between what she would have got under H's will and what she got under intestacy. Ashworth J held that although there were a number of contingencies affecting the plaintiff's claim, including the possibility that H would not have been persuaded to make a further will in her favour and not subsequently revised it, if there was a reasonable chance of those contingencies being satisfied in a manner favourable to the plaintiff, she was entitled to recover damages on the basis of the full amount of the difference discounted to take account of the contingencies. The Judge supported his conclusion by reliance on Chaplin's case and Otter's case. The Court of Appeal reversed the decision on other grounds.

Since the conclusion of the argument, Mr Jackson has drawn the Court's attention to the decision of this Court in Dunbar v. A & B Painters Ltd. [1986] 2 Lloyds Rep. 38. In that case the plaintiff, a workman employed by the defendants, had suffered serious injury when he fell from a scaffold which was more than 40 feet from the ground. The defendants were liable to the plaintiff. They sought to recover indemnity from their insurers, the first third party and, in the alternative, against their insurance brokers, the second third party. The brokers had negligently given misleading information to the insurers, such that the latter were entitled to and did avoid liability under the policy. But the policy also contained an exception excluding liability in the case of work carried out above 40 feet. The brokers contended that the insurers would or might have taken this point to avoid liability, even if there was no other ground. The appeal turned on the language used by the trial judge, which suggested that he had approached this issue on a balance of probability rather than assessing the chance that insurers would not have taken such a technical point. There was no dispute that the latter was the proper approach, so the point now taken by Mr Jackson was not in fact argued. Nevertheless, the Court, following the decision of Fraser v. B.N. Furman [1967] 2 Lloyds Rep. 1, endorsed it as correct. May LJ (at p 42) said:

> "Thus I think it is clear, on the law applicable, that the proper approach for the learned Judge to have adopted in the present case was to have assessed the chances that the insurers would have taken the height point and, having so assessed the chances, tailored his award of damages accordingly."

In Spring v. Guardian Assurance PLC [1994]

3 WLR 354 the House of Lords held that an employer who negligently gave a bad reference for the plaintiff, their ex employee, might be liable to him in damages. The case was remitted to the Court of Appeal for the assessment of damages, the plaintiff's case being in essence that he failed to obtain

employment with a third party because of the adverse reference. The defendants case was that the third party would not have employed him anyway. Lord Lowry (at p 377G) expressed the opinion obiter:

> "Once the duty of care is held to exist and the defendants' negligence is proved, the plaintiff only has to show that by reason of that negligence he has lost a reasonable chance of employment (which would have to be evaluated) and has thereby sustained loss: McGregor on Damages 14th ed. (1980), pp. 198 202, paras. 276 278 and Chaplin v. Hicks [1911] 2 KB 786. He does not have to prove that, but for the negligent reference, Scottish Amicable would have employed him,."

I respectfully agree with that statement of the law.

In my judgment, Mr Jackson's submission is inconsistent with the decision of the House of Lords in Davies v. Taylor. In that case the plaintiff sued under the Fatal Accidents Acts in respect of her husband's death. Shortly before his death she deserted her husband and he learnt of her adultery. He had tried to persuade her to return to him; but when she refused he instructed solicitors to institute divorce proceedings. The trial judge rejected the plaintiff's claim on the grounds that she had failed to discharge the onus of proof which was upon her of showing on balance of probability that she had an expectation of dependency. The House of Lords held that the judge had applied the wrong test, but nevertheless upheld the decision on the ground that the plaintiff had only a speculative and not a substantial prospect of continuing dependency. In that case, the question whether or not the plaintiff had such a prospect depended not only on the conduct of the plaintiff, but also that of the deceased. At p 213A Lord Reid said

> "But here we are not and could not be seeking a decision that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent and a probability of 49 per cent."

And at D he said:

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

In that case the Court was not concerned to distinguish between causation and quantification of loss. But, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

All that the Plaintiffs had to show on causation on this aspect of the case is that there was a substantial chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection. In his findings 2 and 5 the Judge went further than this and consequently further than he need have done, because he held that as a matter of probability the Plaintiffs would have succeeded in negotiating one of the alternative solutions. The problem about this is that there may be further evidence at the quantum hearing from Gillow or Theodore Goddard as to what the attitude of

the vendors would have been. Such evidence would be admissible, though I have some doubt how helpful it may prove to be because I suspect that Gillow or Theodore Goddard may well say that they cannot answer the hypothetical question, since it all depends on the perception of the strength of the other side's bargaining position and how strongly they felt on this point. I think the Judge may have expressed his opinion in terms of probability because he thought that both parties had invited him to do so. Be that as it may, in my opinion Mr Moxon Browne QC was correct to accept that the Judge is free on the quantum hearing to assess the chance of successful negotiation as greater or less than 50% in the light of any further evidence, and is not bound to hold that it was greater than 50%.

Mr Jackson, however, submits that the Plaintiffs do not even establish that they had a substantial chance of successful negotiation with Gillow. First, he submits that they cannot prove anything beyond a speculative chance in the absence of evidence of Gillow's and Theodore Goddard's reaction. I wholly reject this submission. The prospect of success depends on all the circumstances of the case and the third parties' attitude must be a matter of inference. In many cases direct evidence from the third party will not be available, as in the cases of the deceased husbands in Hall v. Meyrick and Davies v. Taylor. Secondly, Mr Jackson submits that the finding of substantial chance is against the weight of the evidence. He relies on the following findings of fact of the Judge to lay the ground for this submission.

1. The plaintiffs saw the overall deal as a means of achieving the growth that their main board required; of acquiring valuable brand names; of increasing the value of sales per square foot of their existing carpet only stores; and of introducing carpets into Gillow's furniture only stores.

2. Even if properly advised, it is improbable that the Plaintiffs would have pulled out of the deal as a whole. Finding No. 6.

3. There was no significant scope for renegotiation of the overall price of the deal.

4. Without the four Kingsbury stores, the deal would not have gone ahead at all. Finding No. 4.

5. In April 1989 the general view of the property market was that there was no significant risk in relation to first tenant liability. The Plaintiffs held a substantial property portfolio but had no adverse experience in that regard.

These facts all suggest, submits Mr Jackson, that the Plaintiffs would have given way in the face of refusal by Gillow to accommodate them. They would not risk losing the deal which appeared so advantageous to them for a risk which was perceived to be small. Then it is argued that Gillow's attitude and that of Theodore Goddard as manifested prior to and at the meeting of 20 April, indicates that they would not have been prepared to accept liability in whole or in part. I do not find it necessary to review the evidence on this topic since, in my judgment, there was ample evidence to support the conclusion that the Plaintiffs did have a substantial chance in the sense I have already defined of successfully negotiating. The Plaintiffs' case in essence is this:

1. Mr Harker was not prepared to accept an open ended liability and without knowing how many properties might be involved or on what terms the leases were granted, the liability was open ended.

2. The essence of the deal as originally envisaged was a purchase of the businesses conducted from the four properties. If that had gone through as planned, the Plaintiffs would have incurred no first tenant liabilities. It was only the last minute hitch because of the problem of alienation that led to the share purchase transaction. Even then it was the intention of both sides that the Plaintiffs should get a`clean' deal.

3. Although Gillow were tough negotiators, they were prepared to make concessions if they were in accordance with the spirit and principle of the agreement.

4. If the risk of first tenant liabilities was generally perceived to be small in April 1989, it must have seemed so to Gillow.

5. Gillow were taking on no greater liability than they currently had in relation to Kingsbury's contingent first tenant liabilities, since they would have stood behind their subsidiary in the event that

they materialised.

There are, in my judgment, only two aspects of the case where the Judge may have taken a view somewhat too favourable to the Plaintiffs. The first is in relation to the hive down agreement and the acceptance by Theodore Goddard of the amendment of clause 9 to give Gillow's covenant. I emphasise the word may, because, although in his submissions to the Judge and to this Court Mr Moxon Browne attached considerable importance to the readiness of Theodore Goddard to accept this amendment; it is not clear that the Judge attached any great weight to it.

The hive down agreement, by which Kingsbury agreed to assign the properties which were to be retained to an associated subsidiary of Gillow before completion of the sale to the Plaintiffs, was prepared by Theodore Goddard acting for both subsidiary companies. For this purpose they adapted the provisions of the draft Property Contract which had been prepared for the assignment of the 42 properties not owned by Kingsbury to the Plaintiffs. Clause 9 of the draft Agreement contained standard provisions dealing with the covenants by the assignee to be included in the assignment to observe and perform all liabilities and obligations owed to the reversioner and to indemnify Kingsbury in respect thereof. Clause 10 imposed obligations on both parties to use their best endeavours to obtain the reversioner's licence for the assignment of each property and required the assignee in its application for consent to the assignment of any of the properties to itself to offer to give the reversioner a direct covenant to pay the rent and perform and observe the covenants in the lease.

Theodore Goddard's clients were due to attend at their offices on the afternoon of 21st. April in order to sign the Hive Down Agreement. During the morning of the same day Theodore Goddard sent a copy of the draft Agreement to the Defendants for their consideration. The Defendants immediately asked for Clauses 9 and 10 of the draft Agreement to be amended to include covenants by Gillow as surety for the assignee. Their request was accepted and the Hive Down Agreement was amended accordingly. This was strongly relied upon by the Plaintiffs before us as evidence that Gillow were amenable to amendments which the Defendants asked for even though they potentially subjected Gillow to additional liabilities. In my judgment the incident provides little support for the Plaintiffs' case in this respect.

It has been settled since 1779 that an assignee for value of leasehold land is bound on completion to enter into a covenant with the assignor to observe and perform all the covenants of the lease and to indemnify the assignor, and that it is not necessary for the assignor to stipulate expressly in the contract for sale that the assignee shall enter into such a covenant. Today such a covenant does not even have to be expressed in the assignment; it is implied by Section 77 of the Law of Property Act 1925. Clause 9 of the draft Hive Down Agreement as originally prepared by Theodore Goddard and taken by them from the draft Property Contract was in standard form and save in minor and immaterial respects did not expose Kingsbury to any obligations to which it would not have been subject under the general law. Clause 10 was also a standard clause. It would be necessary to obtain each reversioner's licence to assign; it was highly likely that some if not all of the reversioners would require the proposed assignee to enter into direct covenants in the licence to assign; and Clause 10 was necessary to meet this situation.

The Defendants' request that the assignee's covenants should be supported by a guarantee by Gillow was also in accordance with standard practice. They would probably have been negligent if they had not asked for it. The assignee was a wholly owned subsidiary of Gillow and was only marginally solvent. Its covenant was virtually worthless without the continuing support of its parent. Any reversioner who was asked for a licence to assign to such a company could be expected to insist on the inclusion in the licence to assign not only of a direct covenant by the assignee but also of a guarantee by Gillow. By the like token, had the Hive Down Agreement been entered into between parties at arms' length instead of between two fellow subsidiaries, any assignor to a wholly owned but barely solvent subsidiary of a substantial parent company could be expected to require the covenants on the part of the assignee to be supported by the guarantee of its parent.

The Defendants' request for the inclusion of guarantees by Gillow in Clauses 9 and 10 of the Hive Down Agreement could not, therefore, properly have been resisted. Had Gillow sought advice from their solicitors, Theodore Goddard would have had to advise them that the request was a proper one

and that the inclusion of the guarantees would be in conformity with standard conveyancing practice. Indeed, the real question is why Theodore Goddard had omitted such guarantees from their original draft. In the absence of evidence from Theodore Goddard it is impossible to know the answer to this. It may have been due to simple oversight caused by the fact that the draft was prepared from the draft Property Contract for the sale of the properties to the Plaintiffs where there was no occasion for such a guarantee, even though the assignment might be made to a subsidiary of the Plaintiffs, because the Plaintiffs were the contracting party and were already subject to the necessary obligations. Or it may have been Theodore Goddard's practice not to include such a guarantee until asked to do so while being prepared to concede it at once if asked.

This may be contrasted with the situation which would have arisen if the Plaintiffs had asked for the reinstatement of warranty No. 29 or the giving of alternative protection. Gillow's indemnity in the Hive Down Agreement was given in accordance with standard conveyancing practice. It related to properties which were to be retained by their wholly owned subsidiary; so long as they were so retained, it imposed no obligation upon Gillow to which their subsidiary was not already subject; and if Gillow wished subsequently to dispose of any of the properties it was for them to satisfy themselves of the strength of the assignee's covenant. By contrast, it would not be in accordance with standard conveyancing practice to give an indemnity of the kind needed to protect the Plaintiffs against the risk of first tenant liability; such indemnities were sometimes given but often they were not; it was a matter for negotiation. The indemnity would relate to properties which had formerly been disposed of by Kingsbury; Gillow no longer derived any benefit from them or had any control over the performance of the lessee's covenants.

It is, therefore, not surprising that Gillow agreed to give the indemnity in the Hive Down Agreement when asked to do so; it does not follow that they would have been prepared to give any similar warranty in respect of the properties formerly disposed of by Kingsbury. It is, as I have already said, not clear that the judge relied on this evidence to support his conclusion that Gillow would probably have acceded to a request for such an indemnity; if he did, he was wrong. But it may well have been the source of his belief that one solution would have been for Gillow to offer to enter into direct contracts of indemnity with the reversioners. I have great difficulty with this. In the first place, it is one thing when applying for the reversioner's consent to an assignment of a lease to offer to enter into a direct covenant with him in the licence to assign; it is quite another, and wholly impracticable, to approach a reversioner out of the blue, on an occasion when no assignment is in prospect, and volunteer an indemnity. In the second place, unless the transaction took the form of a novation (which does not seem to have been suggested) it would not have the desired effect of releasing Kingsbury from its obligations. Finally, it does not seem to me to have been practical within the tight time constraints.

The second point relates to a passage in the judgment (p. 66D):

> "To counter the Defendants' valuation of the contingent liabilities of the identified leases, the Plaintiffs led evidence to show that the agreed price for Kingsbury was at or about its true value if the four properties which the Plaintiffs wished to acquire were all that was involved in the deal. It seems to me inescapable that, in these circumstances, Mr Harker's cautious approach to the valuation of the contingent liabilities would have prevailed. He would not have agreed to the purchase of Kingsbury with an open ended potential liability."

In that passage, the Judge is referring to what may be described as the objective valuation of the four Kingsbury stores, based on the value attributed to the shares and Mr Anton's assessment. I think there is force in Mr Jackson's submission that it was not so much the objective value that matters as the subjective value, that is to say how the Plaintiffs perceived the value of these particular stores. It is evident that they regarded them highly, perhaps as the plums or at least the cherries of the deal.

Apart from these points, I am not persuaded that the Judge made any error, though, as I have indicated in his findings 2 and 5, he went further than he need have done for the purpose of finding negligence and causation. Some amendment to these findings is necessary. The Judge should feel free to reconsider the degree of probability of the negotiations having a successful outcome in the light of the points to which I have referred and any further evidence. The assessment of this chance will lie

between that which just qualifies as a substantial chance and a near certainty, though, in the absence of further favourable evidence from Gillow or Theodore Goddard, that is plainly too high. The assessment is complicated by the fact that one of the possible outcomes would have been only partial protection by means of a capped liability. In as much as the Judge is assessing the chance of success, the alternative is of course failure, namely that in spite of attempts to renegotiate the Plaintiffs would not have succeeded and would have gone ahead at the same price and on the same terms.

In my judgment, paragraphs 1, 3 and 4 of the Judge's Order should stand. For paragraph 2, there should be substituted the following paragraph:

> "There was a realistic chance that such efforts would have been successful in one or other of the following ways:
>
> > (a) that Gillow would have been prepared to provide a warranty restricted to the four identified properties;
> >
> > (b) that Gillow would have been prepared to provide an indemnity to the Plaintiffs in respect of first tenant liabilities up to a maximum of £2.18m."

Paragraph 5 should be deleted. Paragraph 6 becomes paragraph 5. Subject to this, I would dismiss the appeal.

LORD JUSTICE MILLETT: I have had the advantage of reading in draft the judgment of Stuart Smith LJ. I agree with his analysis of the law and with much of his reasoning. I do not, however, accept that it was open to the Judge on the evidence before him to find that the Plaintiffs had a substantial or measurable chance of persuading Gillow to accept the reinstatement of warranty No.29 or to offer any other protection against the risk of what has been called first tenant liability; and I have the gravest doubt whether the Plaintiffs would ever be in a position to call such evidence. But for the unsatisfactory procedural history of the proceedings, I would have allowed the appeal and dismissed the Action.

It is to be observed that the expression "first tenant liability", though convenient, is misleading. The risk to which the Plaintiffs were exposed on the purchase of Kingsbury was not limited to cases where Kingsbury had disposed of a leasehold property of which it was the original tenant. Because of the normal chain of express or implied warranties on the sale of leasehold properties, Kingsbury would also be potentially liable to indemnify the assignor from which it had purchased a property if a subsequent assignee defaulted.

A plaintiff who sues for negligence must establish (i) the existence of a duty of care (ii) breach of that duty and (iii) loss resulting from that breach. The Plaintiffs came to trial prepared to prove only (i) and (ii). This was a mistake, since the Court had not ordered the trial of these as preliminary issues as it might have done. It had merely ordered that the issue of liability should be tried before the assessment of damages. In order to obtain an order for the assessment of damages (in the Queen's Bench Division) or for an inquiry as to damages (in the Chancery Division), however, it is not sufficient for the plaintiff to establish a breach of duty on the part of the defendant. He must also identify some head of loss which is alleged to have resulted from the breach and, if it is not of a kind which would naturally result from the breach, establish a causal link between the breach and the loss. Only once he has done this is he entitled to have the loss quantified.

The Plaintiffs succeeded in establishing the existence of a duty on the part of the Defendants to give them specific advice in relation to the consequences of the deletion of warranty No. 29 and breach of that duty. They also identified two possible heads of loss. The first was the net loss which the Plaintiffs had sustained by entering into the transaction. In order to recover this loss, the Plaintiffs would have to establish that, had they received proper advice from the Defendants, they would not have entered into the transaction at all unless warranty No. 29 was reinstated or replaced by some other protection whether total or partial against the risk of first tenant liability. Since this would depend on what they themselves would have done in a hypothetical situation, the Plaintiffs would have to establish this on a balance of probabilities but, if they succeeded, they would not suffer any diminution of damages to allow for the possibility that they might have proceeded with the transaction without the desired

protection: see Sykes v Midland Bank [1971] 1 QB 113; Lillicrap v Nalder & Sons [1993] 1 WLR 9,499. The Judge dismissed the Plaintiffs' claim in respect of this head of loss; he found that, if the worst had come to the worst, it was improbable that the Plaintiffs would not have proceeded with the deal even without the necessary protection.

That left the second head of loss; the chance that, if properly advised, the Plaintiffs might have succeeded in persuading the Defendants to agree to reinstate warranty No. 29 or to provide some other total or partial protection against the risk of first tenant liability. This depended on (i) whether the Plaintiffs would have sought to reopen the negotiations to obtain such protection and (ii) whether and if so how far they would have been successful. The first of these again depended on what the Plaintiffs themselves would have done in a hypothetical situation and accordingly had to be established on a balance of probabilities. The Judge thought that it had been so established, and I agree with Stuart Smith LJ that there was evidence to support his conclusion.

That, however, was all that the Plaintiffs came to court prepared to prove. They evidently believed that the question whether and to what extent Gillow would have acceded to the Plaintiffs' request could be left to the assessment of damages. In my view they were in error. It was incumbent on them to establish, at the very least, that there was a chance that Gillow would have been receptive to their request, and in my opinion this was not something which could simply be inferred.

The Judge found (or rather inferred, since no evidence from Gillow or Theodore Goddard was called by either party) that, if asked, Gillow would probably have offered some form of protection against the risk of first tenant liability. In this the Judge went further than was necessary. Since the question depended on what an independent third party would have done in a hypothetical situation, the Plaintiffs did not need to establish it on a balance of probabilities. Provided that they could demonstrate, by evidence or inference, that there was a real and substantial chance that Gillow would have offered the reinstatement of warranty No. 29 or its replacement by some other total or partial protection, they were entitled to have that chance evaluated. I agree with Stuart Smith LJ that the Judge's finding is not supported by the evidence and must be set aside; the Defendants must at least be given an opportunity to call witnesses from Gillow to say that they would not have acceded to the Plaintiffs' request. In my judgment, however, the evidence was not even sufficient to justify the inference that there was any real or substantial chance that Gillow would have acceded to the Plaintiff's request. Whether they would or would not have done is, on the evidence so far adduced, a matter of pure speculation.

The reported cases on the loss of a chance may be grouped into three categories. There are first those cases where the outcome is not dependent on the unrestricted volition of a third party, since his decision must be justifiable by objective criteria. Into this category fall the cases of the loss of the right to be a finalist in a competition (Chaplin v Hicks [1911] 2 KB 786) or to bring legal proceedings (Kitchen v RAFA & others [1958] 1 WLR 563). In these cases the plaintiff has clearly lost something of value and its value must be assessed however difficult the task may be. The prospects of ultimate success (or in the case of litigation of receiving an offer of settlement) may be less than 50 per cent but they are nevertheless capable of objective evaluation.

Secondly, there are those cases where the outcome depends upon whether a third party who had been properly advised would have acted in accordance with his own best interests. Kitchen, Otter v Church [1953] 1 Ch 280 must be classified in this category, though it was probably wrong to treat it as a case of a loss of a chance at all. In these cases there is obviously a very strong probability that the third party would have acted in his own interests, and accordingly the plaintiff is likely to be awarded the full amount of his damages less a discount to allow for the possibility that something might have occurred to prevent his doing so.

Thirdly there are cases where the outcome appears to depend on the unrestricted volition of a third party but there are objective considerations which make it possible to predicate how he would have acted. Into this category fall Hall v Meyrick [1957] 2 QB 455 (where the outcome depended on whether a man who had already made a will in favour of his fiancee would have made a fresh will in her favour after his marriage to her if advised that this had had the effect of revoking it clearly a strong likelihood and such as to make the case virtually indistinguishable from the second category); Dunbar v A & B Painters Ltd [1986] 2 Lloyds Rep. 38 (where the outcome depended on whether an

insurance company would act against its commercial interests; again unlikely and virtually in distinguishable from the second category); and Richardson v Mellish 2 Bing 229 (where evidence of the third party's customary practice was available). Spring v Guardian Assurance plc [1994] 3 WLR 354 probably falls into this category.

These cases only have to be described to demonstrate how very different is the present case. The chance of which the Plaintiffs complain they have been deprived is the chance of persuading Gillow to act against their own interests by reinstating a warranty which their own solicitors had already struck out or to give some other protection against a risk for which their own solicitors had not thought fit to provide. Gillow might have yielded to the Plaintiffs' demand, of course, particularly if they believed (wrongly) that they might lose the deal if they did not. But there are no objective criteria by which the chance can be evaluated. Gillow would no doubt have consulted their solicitors. If so, they would if correctly advised have learned that it was not standard conveyancing practice for vendors to give the protection which the Plaintiffs were seeking; vendors sometimes gave it but often did not; and the decision whether to accommodate the Plaintiffs was a commercial one for Gillow to make. The outcome would then have depended on Gillow's perception of the relative strength of the parties' bargaining positions, the extent of the risk which they were being asked to assume and the effect on the deal if they refused. These are all subjective matters; none of them is known and none can be inferred.

The judge was much affected by the consideration that the deal was originally to take the form of a property transaction and that it was only restructured as a share transaction for technical reasons. He saw great force in the Plaintiffs' claim that they were entitled to a "clean" company, and to be put by appropriate indemnities as nearly as possible in the same position that they would have enjoyed if they had acquired Kingsbury's assets instead of its shares. But the trouble is that it does not matter that the judge saw great force in this argument; the question is whether Gillow would have done so; and there is simply no way of telling. True, the deal had been restructured for purely technical reasons; but it had been restructured, and there were both advantages and disadvantages in acquiring Kingsbury rather than its assets. Gillow might well have taken the view (and could properly have been advised) that the Plaintiffs must take the rough with the smooth. Gillow had already declined to give appropriate capital gains tax warranties which would have given the Plaintiffs the same advantages for capital gains tax purposes as an acquisition of Kingsbury's assets would have done.

For the reasons given by Stuart Smith LJ, Gillow's attitude to the amendment of the Hive Down Agreement does not afford a precedent by which its reaction to the Plaintiffs' hypothetical request for protection against first tenant liability can be judged. Even the argument that Gillow would only be assuming a liability to which its own former subsidiary was subject might well not have prevailed. The restructuring of the deal meant that Gillow no longer had any commercial reason to meet its subsidiary's liabilities; why should it now for the first time assume a legal obligation to do so?

The fact is that all such considerations are no more than arguments which the Plaintiffs might or might not have advanced in an attempt to persuade Gillow to yield; and there is simply no way of telling whether such arguments would have succeeded. The Plaintiffs would have had a difficult task to persuade Gillow that the risk was sufficiently serious for the Plaintiffs to be unwilling to accept it, and yet not so serious that Gillow should refuse to indemnify the Plaintiffs against it. The Plaintiffs' real objection was that the risk was open ended and unquantified. The Judge thought that it could easily have been quantified. On the evidence it appears that, on the basis of the current market values in 1989, the Plaintiffs would probably have considered that the extent of the risk was within acceptable limits. Although the loss, if it occurred, was open ended and potentially very serious, in 1989 at the top of the property market the risk of the loss being actually incurred would have appeared remote. In a buoyant market landlords whose tenants default seek forfeiture; they do not keep the leases alive and pursue their remedies against the original tenants unless there has been a serious recession in the property market. Gillow might well have taken the view that the risk of a downturn in the property market was a risk which the Plaintiffs ought to bear.

The "chance" of which the Plaintiffs claim to have been deprived is the chance that they might have negotiated better terms from their vendors. In the absence of evidence from Gillow, what would have been the outcome of such negotiations is a matter of pure speculation. No case has gone so far as to allow damages in such a situation, and in my view it would be wrong to do so. The nearest is Davies v

Taylor [1974] AC 207, where the outcome depended on whether a married couple who had separated would have had a reconciliation; it was held that this was too speculative to sound in damages. I call to mind the words of Vaughan Williams LJ in Chaplin v Hicks at p 792:

> "There are cases, no doubt, where the loss is so dependent on the mere unrestricted volition of another that it is impossible to say that there is any assessable loss resulting from the breach."

In my judgment this is just such a case.

Accordingly, but for the unfortunate procedural history of the proceedings I would have allowed the appeal and dismissed the Action. But having regard to the way in which the proceedings were conducted below, I have no doubt that the Plaintiffs should be allowed a further opportunity to prove, if necessary by calling witnesses from Gillow and Theodore Goddard, that there was a real and substantial chance that Gillow would have yielded. It may well be that Gillow will be unable to answer the hypothetical question, in which case the Action should in my opinion be dismissed. It will not avail the Plaintiffs if Gillow say: "We might have yielded; we might not: It is really not possible to say." That does not lead to the conclusion that there was a 50% chance, or any substantial chance: It is still all speculation. Nor will it avail the Plaintiffs to obtain apparent admissions from Gillow that: "Of course we might have yielded: So there was a chance", and then to drive the witness into hazarding a percentage by asking: "A 50% chance? 40%? 30%?" Until he reluctantly accepts a figure. That would not be inviting the witness to give evidence, but to speculate.

Nevertheless, it is theoretically possible that further evidence could establish the facts one way or the other, and I agree that such evidence should not be shut out. I would for my part set aside the Judge's order and substitute declarations (i) that the Defendants were under a duty to give specific advice as to the consequences of the deletion of warranty No.29; (ii) that they were in breach of that duty; (iii) that had the Defendants given proper advice the Plaintiffs would have sought the reinstatement of the warranty or some alternative protection against first tenant liability; and (iv) that the Plaintiffs would still have gone ahead with the deal if they had not succeeded in obtaining such protection. I would restore the proceedings to the Judge to determine (i) whether there was a substantial or realistic chance that, if the Plaintiffs had sought to reopen the negotiations on this point, they would have been successful (and if so to what extent); and if so (ii) to assess the value of the lost chance in percentage terms. If the Plaintiffs succeed to this extent, the case can then proceed to an assessment of damages.

LORD JUSTICE HOBHOUSE: I agree with the Order proposed by Lord Justice Stuart Smith and the reasons which he has given for making that Order. In view of the different opinions expressed by Lord Justice Millett, whose Judgment I have read in draft, I will add a few further words.

The formal Judgment drawn up after the trial before Mr Justice Turner recited the order of Master Foster dated 9th January 1992, recorded various findings of fact made by the Judge in six paragraphs and ordered that "judgment be entered for the plaintiffs on the said preliminary issue with costs and damages to be assessed by a Judge of the High Court". Many of the problems which have arisen on this appeal have been caused by the lack of definition in the proceedings at the trial, on which Stuart Smith LJ has already commented and to which I will have to return, and the form in which the judgment was drawn up. It is accepted that it did not correctly state the issue or issues which the Judge had to try. Its declaratory character has also meant that the declared findings of fact, in so far as the Defendants wish to challenge them, have had to be the subject of specific appeal and further order by this court.

The primary questions which Turner J had to consider at the trial were whether he should make a finding that the Defendants were in breach of their duty to the Plaintiffs and, if so, whether there should be an assessment of damages. Turner J found that the Defendants were in breach of their duty: accordingly the Plaintiffs succeeded on the issue of liability. There is no appeal from that part of the Judge's decision.

Turner J then had to consider whether or not to order an assessment of damages. The Defendants contended that the Plaintiffs had suffered only nominal damages and that no assessment was necessary or appropriate. This involved two contentions. The first was that the Plaintiffs had failed to prove that the breach had had any causative effect, that is to say, that matters would have been materially different

if the Defendants had properly performed their duty to the Plaintiffs and had given them advice as to the significance of the deletion of the requested warranty No 29, the inadequacy of the completion accounts warranties and the open ended and uninvestigated liabilities which might arise from assigned leases. The Plaintiffs' primary case at the trial was that if they had been properly advised they would not have gone ahead with the transaction in the form that it was and would, if necessary, have pulled out altogether. Turner J did not accept that case.

But he did not accept either the case of the Defendants that the advice would have made no difference to the attitude of the Plaintiffs to the transaction and would not have affected their conduct. Turner J found that the Plaintiffs would not have accepted the deletion of warranty No. 29 without making some counter proposal and seeking to negotiate satisfactory protection against the open ended and unquantified contingent liability. At the relevant time various detailed aspects of the transaction were still under active negotiation and it was open to the Plaintiffs to continue to negotiate with the vendors on this aspect, as they were on others, and it was appropriate that they should do so. Turner J was entitled to make this finding of fact and in my judgment no adequate basis has been demonstrated before us for saying that he was wrong to do so.

The Defendants also challenged the need for an assessment of damages on the ground that the Plaintiffs' allegation that they had suffered financial loss was purely speculative and was inadequate to found a claim for substantial damages. Turner J rejected the Defendants' submissions on this point and made findings of fact as to what would, on the balance of probabilities, have been the position of the Plaintiffs had the Defendants performed their duty.

The difficulties in the present case stem partly from the lack of definition of the issue or issues which the Judge was trying, partly from the failure, as Stuart Smith LJ has pointed out, to distinguish between the questions of causation and quantification and partly from the fact that neither the pleadings nor the evidence were fully focused upon what, on the Judge's findings, because the critical issue the re negotiation of cover for the contingent liability on assigned leases.

The Judge was, in my judgment, entitled to make findings of fact which amounted to a rejection of the Defendants' case that the Plaintiffs' claim for substantial damages was purely speculative. It is upon this point, as I understand it, that Millett LJ disagrees with the Judge and Stuart Smith LJ. Turner J heard evidence from witnesses who were actively involved in the negotiations that were taking place, that is, from the relevant persons from the Plaintiffs' organisation and in the Defendants' firm. He did not hear evidence from any witness from the vendors, Gillows. Such evidence, if it had been given, might have been highly material to the question of quantification. Understandably in the circumstances, having regard to the terms in which the Master had ordered a split trial, neither party had come to the hearing before Turner J armed with evidence from the vendors. However this was not fatal to the Plaintiffs' case. Turner J was right to take the view that the burden or proof which rested upon the Plaintiffs was capable of being discharged without calling witnesses from the vendors. Indeed, it may be that on the assessment of damages it will still be the position that neither side calls any witness from Gillows.

Where parties are engaged in negotiations on the detailed terms of a commercial deal upon which they are both agreed in principle and from which both are expecting to gain. It is in no way unrealistic to conclude that meaningful negotiation are possible within the framework of the deal when a difficulty of this kind arises. The Judge has found that it was clearly the shared intention of the parties that Kingsbury should be acquired clean and that all reasonable efforts would therefore be made to achieve that objective. This is not a case where the Plaintiffs are having to submit that they would have been the recipient of some gratuitous favour or that the vendors would be persuaded to act contrary to their commercial interests. It is the case of the Plaintiffs, supported by evidence, that effective negotiations would have taken place and there was a basis for believing that further negotiation would have led to a worthwhile amelioration of the Plaintiffs' position.

It is possible to criticise, as have my Lords, the prominence that the Judge gave to the hive down point but it still provides an illustration of the fact that the terms of the Agreement were not at that stage finalised. Negotiations may depend upon the will of the parties and neither party was under any obligation at that stage to agree anything. But it is unrealistic to treat the outcome of further negotiation between commercial parties as arbitrary and wholly unpredictable. Those with experience of

commercial negotiation are able, with a reasonable degree of accuracy, to form a view of what can be achieved by such negotiation. The present was such a case. It is possible to make an informed judgment of what the chances were of achieving certain results. The situation is certainly less speculative than that in Chaplin v Hicks [1911] 2 KB 786 (the beauty competition case) or Dunbar v A & B Painters [1986] 2 Lloyds 38 (the underwriters' waiver case).

On the evidence before him the Judge was justified in concluding that the Defendants' breach of duty did have a causative impact upon the bargain which the Plaintiffs and the vendors struck. He was entitled to find that, if the Plaintiffs had negotiated further, they had a measurable chance of negotiating better terms which would have given them at least some protection against the liability on assigned leases which they were to assume on the draft Agreement as it then stood, and as ultimately signed. The Plaintiffs were entitled to an assessment of their damages. The Plaintiffs have satisfied the court that the loss they have suffered is not nominal. They are not obliged to prove more than that they have lost something of substance. This they have done by showing that they had a measurable chance of negotiating significantly better terms. They are entitled to an assessment of their damages.

I agree with Stuart Smith LJ that the correct approach is that summarised by Lord Reid in Davies v Taylor [1974] AC 207 at 213.

> "You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All you can do is evaluate the chance. Sometimes it is virtually 100 per cent, sometimes virtually nil. But often it is somewhere in between."

Here Turner J has done more than conclude that the chance was not nil. His findings, based on an approach of making findings on the basis of the balance of probabilities, which is the wrong approach at this stage in the exercise, is consistent with the chance being higher than 50 per cent but, in view of the confusion as to the scope of the trial and since the Judge approached the question of quantification on the wrong basis and not on the basis of the assessment of the loss of a chance, Mr Moxon Browne QC, counsel for the Plaintiffs has accepted, correctly in my judgment, that justice requires that the question of the assessment of the value of the chance be remitted to the Judge with the parties being at liberty to call such further evidence on this question of quantification as they may be advised. The parties however remain bound by the specific findings of the Judge set out in the six paragraphs in so far as they have been upheld in this court as set out in the Order proposed by Stuart Smith LJ.

The Judge will have to assess the Plaintiffs' loss on the basis of the value of the chance they have lost to negotiate better terms. This involves two elements: what better terms might have been obtained there may be more than one possibility and what were the chances of obtaining them. Their chance of obtaining some greater improvement, although significant, may be less good than the chances of obtaining some other lesser improvement. It will be a question for the Judge, on the basis of the evidence already adduced together with any further evidence which the parties place before him at the further trial, to make his assessment of the value of what the Plaintiffs lost.

Before parting with this matter, I would reiterate that wherever the trial of a preliminary issue or issues is ordered, and this includes orders for some issues to be excluded from the trial, it is essential that the issues be clearly defined and that the judgment reflect that definition. This is particularly important where there are issues of causation or of principle which may fall on the one side or the other of the line. The ability to order the trial of preliminary issues is a most valuable tool which can, when properly used, assist the achievement of justice and save costs. What went wrong in the present case was not the concept of the trial of limited issues; some postponement of questions of figures was appropriate until it was known whether it was necessary to investigate them and if so on what basis. What went wrong was that the essential disciplines of the proper trial of preliminary issues were not observed. The other matter which went wrong procedurally was the making of the declarations of fact; it is very rare that this will be appropriate within the scheme of some wider ranging litigation. They give rise to particular difficulty when only part of the relevant evidence may have been called or when appeals to this court may follow.

ORDER: Appeal dismissed. Respondents to have two thirds of their costs. Application to appeal to the House of Lords refused.