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Judgment: approved by the Court for handing down | *Delivered:* **10/05/2012**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

1. VINCENT GERARD MARKEY

2. GLENNISE MARKEY

3. HAPPYS LIMITED

Plaintiffs;

-v-

1. PATRICK McMAHON

2. ROSS CARR

3. ROBERT O'HARE

Defendants.

WEATHERUP J

[1] The plaintiffs' claim is for damages for loss and damage alleged to have been occasioned by the plaintiffs by reason of the fraud, misrepresentation, breach of contract and negligence of the defendants in relation to the lease of premises at 17 Monaghan Street, Newry for use by the plaintiffs as a restaurant. The plaintiffs have not been legally represented and the first plaintiff has acted on behalf of all three plaintiffs. The first defendant was represented by Mr Coghlin, the second defendant by Mr Coyle and the third defendant was not represented.

[2] The first plaintiff is a businessman and he opened a restaurant business known as Happys Diner on the ground floor of 17 Monaghan Street, Newry in September 2005. The second plaintiff is the wife of the first plaintiff and was also a business associate in the enterprise. The third plaintiff is a limited liability company and the first and second plaintiffs are the shareholders and directors of the company which was the trading entity for Happys Diner.

[3] The first defendant is a solicitor who acted for the first and second plaintiffs in the sale of their house to raise funds for the business and in relation to the lease of the premises. The second defendant is an estate agent and he was the leaseholder of 17 Monaghan Street, Newry in 2005 and the party from whom the first and second plaintiffs sought a sub lease. The third defendant is the owner of the premises. The third defendant has not taken any part in these proceedings. The plaintiffs have made no case against the third defendant. Accordingly judgment will be entered for the third defendant against the plaintiffs with no order as to costs.

[4] A further member of the cast is Mark McNulty, a solicitor, who in 2005 occupied the first floor of the premises for business purposes. As there are six parties to the action it may ease the reading of the text below if I refer to each by name.

[5] The Markeys had a plan for the restaurant business at 17 Monaghan Street that involved opening the ground floor as an American style Diner in September 2005. I am satisfied that the plan also involved opening part of the first floor of the premises as a restaurant later in 2005 and then expanding the first floor area in the middle of 2006. The Markeys set up Happys Limited as the trading entity for Happys Diner.

[6] By the amended Statement of Claim the plaintiffs' claim against Mr McMahon and Mr Carr is for the loss of the business which closed in June of 2006. The complaints concern the leasing arrangements for 17 Monaghan Street where the plaintiffs failed to obtain possession of the upper floors.

[7] As far as Mr Carr is concerned the plaintiffs' case is that in April/May 2005 Mr Carr told the Markeys that they could have vacant possession of all of 17 Monaghan Street, that he, Mr Carr, was moving out of the ground floor and that Mr McNulty had given notice that he was vacating the first floor. I am satisfied that Mr Carr agreed to vacate the ground floor and that, pending Mr McNultys departure, he moved to the top floor to accommodate the Markeys access to the ground floor. I am satisfied that Mr Carr had been told by Mr McNulty that he was moving out of the first floor and moving to premises that he was hoping to purchase. Neither Mr Carr nor Mr McNulty knew when Mr McNulty would complete the proposed purchase. In the event the purchase fell through and Mr McNulty then set about obtaining other premises. The purchase of the other premises did not complete until November 2006, at which time Mr McNulty eventually moved out of 17 Monaghan Street.

[8] The Markeys plans extended to the use of the whole of the premises and I am satisfied that Mr Carr knew of the Markeys' plans for the use of all of the premises. Mr Carr did not give the Markeys a date when they could have possession of all of the building. Indeed the Markeys evidence was not that Mr Carr gave them a date on which that would happen. Rather, the Markeys assumed that they would get possession by September/October or perhaps later in 2005. Mrs Markey referred to a period of 6 months, which would be the period of a business tenancy notice to determine, which would have provided possession around November 2005. I am satisfied that there was no agreement between the Markeys and Mr Carr as to a date when the Markeys would get possession of the upper floors of the building. It was agreed that the Markeys would get possession of the upper floors when Mr McNulty left. I am satisfied that there was no fraud on the part of Mr Carr, there were no misrepresentations, there was no breach of contract, there was no duty of care, no breach of any duty and no negligence on the part of Mr Carr. Judgment will be entered for Mr Carr against the plaintiffs.

[9] As far as Mr McMahon is concerned the allegations are fourfold -

(1) Express assurances were given by Mr McMahon that the Markeys would get vacant possession of all of 17 Monaghan Street, with the upper floors becoming available in the autumn of 2005. Further an express assurance was given by Mr McMahon in December 2005 that the upper floors would become available in January 2006.

(2) Mr McMahon had a conflict of interest in that he was acting as solicitor for the Markeys and for Mr O'Hare, the owner of the building.

(3) Mr McMahon did not establish the nature of the interests of Mr Carr, Mr McNulty and Mr O'Hare in 17 Monaghan Street.

(4) Mr McMahon failed to give adequate advice to the Markeys in relation to the signing of the lease on 8 August 2005.

[10] There are different phases to Mr McMahons involvement as a solicitor with the Markeys. First of all Mr McMahon was engaged in April/May 2005 in relation to the sale of the Markeys' house and this was completed in September of 2005. Secondly Mr McMahon was engaged in August 2005 in relation to the completion of the lease for the ground floor of the premises. Thirdly Mr McMahon was engaged in December 2005 in relation to a bank guarantee entered into by the Markeys of a bank loan for Happys Limited. From November 2005 Mr McMahon was acting for Mr O'Hare in relation to the leasing arrangements for 17 Monaghan Street.

[11] <u>The first complaint against Mr McMahon</u> is that he gave express assurances to the Markeys that they would obtain possession of all of 17 Monaghan Street, which

assurances are said to have been given before the lease was entered into, at the time of the signing of the lease and also after the lease had been signed. The Markeys' accounts of these assurances are inconsistent and unsatisfactory. Mr McMahon denies that any assurances were given. What is strikingly absent is any attendance note on the Markeys in relation to the lease of the premises.

[12] Mrs Markey's version of events first appears in three written statements that were put in evidence. One is a legal aid application that indicates that the Markeys told Mr McMahon what Mr Carr had said to them about access to the building, in summary that Mr Carr was leaving the ground floor and Mr McNulty had given notice that he was leaving the first floor. Before the lease was entered into the Markeys were assured by Mr McMahon that Mr McNulty was leaving the premises and as soon as the date was available it would be added to the lease agreement. In a witness statement it was stated that before the lease Mr McMahon indicated that he was happy that Mr Markey should sign the lease. No mention was made of Mr McNulty's involvement. It is also stated that on 20 December 2005 there was a meeting between the Markeys and Mr McMahon and that the solicitor assured the Markeys that he had spoken to Mr McNulty and he would have left the premises in January 2006. The third statement stated that before the lease was signed Mr McMahon expressed himself as being happy that the Markeys would sign a lease and it is stated that Mr McMahon had been asked to confirm that Mr McNulty was leaving and that Mr McMahon had stated that he had received assurances that Mr McNulty's departure was imminent and that a date would be added to the lease when he would be leaving.

[13] On the opening of the case it was stated by Mr Markey that Mr McMahon had been asked to assure himself that Mr McNulty was leaving and that Mr McMahon had stated that he had done so and would add a date to the lease. I am mindful that the Markeys are personal litigants and I do not expect an outline of the case, or indeed the completion of witness statements, in the manner that would be expected when parties have legal representation.

[14] The Markeys gave evidence. Mr Markey described how he had told Mr McMahon what Mr Carr had said to him and that he had asked Mr McMahon to get an assurance from Mr McNulty that he was leaving; that he had received such an assurance and that Mr McMahon had stated that he was happy that the lease should proceed; that on 8 August 2005, when the lease was signed, the first floor was discussed and a date for possession was to be added later and that Mr McMahon was happy for the lease to proceed on that basis. He further stated that when both Mr & Mrs Markey returned to see Mr McMahon on 11 August 2005 it was said by Mr McMahon that Mr McNulty's departure was imminent.

[15] Mr Markey's evidence was that in the Autumn of 2005 the issue of possession of the upper floors and the position of Mr McNulty were raised regularly with Mr McMahon. Then on 20 December 2005, at a meeting about the guarantee of the bank

loan, Mr Markey was said to be irate and Mr McMahon said that Mr McNulty was leaving the first floor in January2006.

[16] Mrs Markey's evidence related to the visit to Mr McMahon on 11 August 2005 when Mr McMahon stated that he had spoken to Mr McNulty, that he had obtained assurances about Mr McNulty leaving and that he was happy for the Markeys to proceed with the lease. Mrs Markey also stated that on 20 December 2005 Mr McMahon had said that Mr McNulty would be departing the premises in January 2006.

[17] In cross examination of Mr McMahon by Mr Markey two particular dates were added when it was stated that Mr McMahon had discussed Mr McNulty leaving, namely 28 June 2005 and 25 August 2005. On both of those dates there are records of meetings having taken place. I conclude that these added dates were mentioned after Mr Markey was alerted to the need to be specific about what had occurred with Mr McMahon. Mr Markey looked through the papers, found that there were meetings on those dates and stated that he must have and did raise the McNulty issue with Mr McMahon on those dates.

[18] I have not been satisfied that there is reliable evidence that express assurances were given by Mr McMahon to the Markeys that they should sign the lease and would get possession of all the building in the Autumn of 2005 or in January 2006. The evidence in this regard was contradictory and unsatisfactory.

[19] The second complaint against Mr McMahon is that his involvement with Mr O'Hare and the Markeys amounted to a conflict of interest. The Markeys' account is that Mr McMahon was acting for Mr O'Hare throughout and did not disclose this to the Markeys. They state that Mr McMahon should not have acted for the Markeys in relation to their lease of the premises while acting for the owner of the premises. Mr McMahon's evidence was that he had concluded his involvement with the Markeys in relation to the sale of their home and the lease of 17 Monaghan Street in September 2005 and did not act for Mr O'Hare until November 2005.

[20] It is apparent that in November 2005 Mr O'Hare engaged Mr McMahon in relation to the leasing arrangements at the premises. Mr McMahon gave notice to the Markeys that there was a potential conflict of interest and that the Markeys would have to go to other solicitors, which they did. Was Mr McMahon acting for the Markeys in connection with the lease of the premises and also acting for Mr O'Hare at the same time so as to create a conflict of interest? On 26 August 2005 there was an office letter purporting to be signed by Mr McMahon stating that he was acting for the Markeys in relation to the lease. I accept Mr McMahon's evidence that this letter was signed in the office and not by Mr McMahon personally and that it was a comfort letter to confirm that the Markeys had solicitors acting on their behalf.

[21] There is an attendance note of 22 November 2005 of Mr McMahon's attendance on Mr O'Hare. I conclude from the terms of the attendance note that Mr Carr had asked for and obtained consent from Mr O'Hare to sublet the upper floors of the premises to the Markeys; that Mr O'Hare had also required a rental deposit of £6,000 from Mr Carr; that the sum had not been paid; that Mr Carr's lease of the premises from Mr O'Hare had not been renewed. What is not clear is whether the renewal being referred to was in 2003 at the expiry of Mr Carr's 2000 lease or whether this was intended to refer to a renewal in 2005. The Markeys had given Mr Carr £9,500 as a rental deposit. Mr McNulty was intending to leave but no date had been identified when he would be leaving. Mr Carr had not set up a direct debit for rent and had not paid the rental deposit. Mr O'Hare went to see Mr McMahon to obtain legal advice to resolve the issues surrounding the leasing of the building.

[22] The result was that a lease was drawn up between Mr O'Hare and Mr Carr in November 2005. It was backdated to 1 July 2005 in order to seek to regularise the leasing arrangements and it was signed by Mr Carr but not signed by Mr O'Hare. By December or January of 2006 Mr O'Hare had changed his mind about Mr Carr being involved in the transaction and he proposed to deal directly with the Markeys and that meant discharging Mr Carr and Mr McNulty from their interests in the building.

[23] There are two periods to consider. The first period is from April 2005 to the attendance of Mr O'Hare with Mr McMahon on 22 November 2005. Mr McMahon was engaged in the sale of the Markey home and the lease of the premises. For that period the plaintiffs have not established to my satisfaction that Mr McMahon was acting as solicitor for Mr O'Hare when he was acting for the Markeys in relation to the lease. Thus I have not been satisfied that there was any conflict of interest in that period.

[24] The second period is from 22 November 2005. In December 2005 Mr McMahon was directly concerned with the guarantee on behalf of the Markeys and was also acting as solicitor for Mr O'Hare in relation to the leasing of the premises. The loan was for Happys Limited for £5,000 and the Markeys were acting as guarantors. Mr & Mrs Markey were each receiving independent legal advice from Mr McMahon. The bank had made arrangements for the Markeys, as guarantors, to receive advice independently of the bank providing the loan to the company. At the same time Mr McMahon was engaged by Mr O'Hare in relation to the leasing arrangements for the premises.

[25] Mr McMahon had a potential conflict of interest at that time. Advising the Markeys about a guarantee for a loan for the business conducted in the premises while advising Mr O'Hare about the leasing of part of the premises to the Markeys amounted to inconsistent engagements.

[26] Jackson and Powell on Professional Liability, 7th Edition, at paragraph 11.016 under the heading 'Fiduciary Duties' states that in addition to the contractual duties arising from his retainer and the general duty to exercise skill and care the solicitor owes fiduciary duties to his client. The fiduciary duty involves the disclosure to the client of material facts in situations where the solicitor has a personal interest in the matter or acts for another who has such interest. The categories of fiduciary duties for solicitors include at paragraph 11.023 accepting inconsistent engagements. A solicitor may not act for two clients whose interests may conflict without obtaining informed consent.

[27] The Markeys opened the business in September 2005 and had invested substantial sums from the proceeds of the sale of their house. Mr McMahon was acting as solicitor for Mr O'Hare as the owner of the building seeking to regularise the letting of the premises and to reach agreement with the Markeys for the first floor. Mr McMahon was also advising the Markeys on the bank guarantee of the company loan for the business. However there was no causal connection between the advices on the guarantee and the expenditure already incurred in setting up the business, the losses being incurred in the trading account of Happys Diner or the potential losses from the lack of expansion of the business due to the difficulties with the lease of the premises. The issue for the plaintiffs remains whether Mr McMahon had any obligation to the Markeys in relation to a lease of the upper floors. I am not satisfied that, while there were inconsistent engagements, advice on the guarantee impacted on the issue of the leasing arrangements.

[28] The third complaint against Mr McMahon concerns the failure to make enquiries into the interests in the ground floor of the premises. Mr O'Hara was the owner of the building and in 2000 Mr Carr obtained a lease of the ground floor for 3 years. Mr Carr's evidence was that there was a written lease. A copy of the lease was not produced. At the same time Mr McMahon had a lease of the first floor of the premises from Mr O'Hare, from which he ran his solicitor's practice. In 2003 Mr Carr agreed to take a lease of all of the premises. It is not clear whether the 2003 agreement became a written lease nor is it clear what the terms were in relation to subletting. In any event Mr Carr agreed a sublease to Mr McNulty of the first floor of the premises and Mr O'Hare does not appear to have raised any objection to his presence in the premises.

[29] There was evidence that Mr McNulty may have had an agreement for a sub lease of the first floor to 2006, suggesting that in 2003 he had agreed a 3 year term. Again it is not clear whether the agreement in relation to the first floor became a written lease. In 2003 Mr Carr may have agreed a 3 year lease of all of the premises or he may have agreed a 3 year lease of the upper floors and had a continuance of the business tenancy of the ground floor.

[30] In 2005 Mr Carr proposed to sublet the ground floor to the Markeys and also proposed to sublet the remainder of the building to the Markeys when Mr McNulty left. Mr Carr's lease of the ground floor to the Markeys was signed by Mr Markey on 8 August 2005. Mr Carr had consent from Mr O'Hare for the subletting and that consent was agreed on terms. It is apparent from the attendance note of 22 November 2005 that according to Mr O'Hare he had given consent and had agreed terms but Mr Carr had not complied with the terms. Mr O'Hare believed there was no formal lease between Mr O'Hare and Mr Carr. Accordingly Mr O'Hare went to Mr McMahon on 22 November 2005 to obtain a formal lease from Mr Carr and it was arranged that the lease would be backdated to July 2005 in an attempt to regularise the position with Mr Markey who had signed the sub lease.

[31] On 8 August 2005 Mr Carr agreed to a lease of the ground floor of the premises to the Markeys for a period of 5 years. The first question one might ask was what was Mr Carr's holding in the premises at that time. Did he actually have a holding for 5 years which would allow him to grant a sub lease to Mr Markey for 5 years? Did he have consent from the owner to sublet the premises or for restaurant use? No enquiries were made. This may have been because Mr McMahon was familiar with the premises, he having been a former tenant of the first floor, he knew the parties involved and perhaps did not believe he needed to make such enquiries. Had Mr Markey attended Mr McMahon in relation to a sub lease of part of premises that Mr McMahon did not know, would he not have found out whether the person who purported to give the lease had any entitlement to do so before advising the client to sign the sub lease and pay any rental deposit.

[32] Mr McMahon contends that the lack of enquiries in relation to the issues about the lease had no effect on the plaintiffs as the leasing arrangements did not impact on the business or the continued possession of the ground floor under the lease with Mr Carr. Had the issues been raised in August 2005 when Mr Markey attended to sign the sublease for the ground floor then the ground floor status would have been sorted out before the lease was signed and the necessary formalities would have been completed. I do not doubt that this was a matter of completing the necessary formalities and that that would have been achieved. No one was in occupation of the ground floor as Mr McNulty was only occupying the first floor. Accordingly I am satisfied that, while I believe there were breaches by the first defendant in not making enquiries, this has not caused any loss to the plaintiffs. The business failed, but not because of the absence of any formality about the leasing arrangements for the ground floor.

[33] <u>The fourth complaint against Mr McMahon</u> relates to the advices offered on the signing of the lease on 8 August 2005. Mr McMahon had a draft lease presented to him as drafted by or on behalf of Mr Carr. The typed draft related to the 5 year term for the ground floor with a handwritten option in relation to the upper floors. The option read as follows –

"The Tenant has 1st option to rent the 1st and 2nd floors of 17 Monaghan Street should the present tenants leave. The rent shall be no greater than the current rate of £2,700 per quarter. This shall be paid quarterly in advance as agreed."

[34] There was a dispute as to who had written the terms of the option. I do not believe that very much turns on that. I am satisfied that Mr Carr wrote the terms of the option prior to presenting the lease to Mr McMahon, who then signed the draft lease as witness to Mr Carr's signature on the lease.

[35] The lease had two parts for present purposes. First it granted a lease of the ground floor and secondly it granted an option for the upper floors. Mr McMahon contended that his instructions were limited to securing a lease of the ground floor and providing an option as drafted, there being no date provided for the exercise of the option or the obtaining of possession. Mr McMahon contended that he delivered in relation to those instructions.

[36] The terms of a retainer may extend beyond express instructions and include matters arising by necessary implication. Jackson and Powell at paragraph 11.165 under the heading "Failing to give advice" states –

"Claims for failure to give advice more commonly arise when the solicitor fails to give advice, which it was his duty to proffer, whether or not specifically requested; or where (unknown to the client) the advice given is incomplete" (underlining added).

[37] There are certain matters arising by necessary implication in relation to both aspects of this lease. In relation to the ground floor the necessary implications relate to the factors referred to above in relation to Mr Carr's interest in the ground floor, consent to subletting and permitted use of the premises. I have already discussed those matters and found that they had no effect on the development of the business. In relation to the option for the upper floors the matters arising by necessary implication must include the same factors relating to the interests in the upper floors, consent to the letting and permitted use of that part of the premises. For example did Mr Carr, who purported to grant the option, have an interest in the upper floors that permitted him to grant to the Markeys what he purported to grant? Would the Markeys have been able to enforce the option against Mr Carr? What interest did Mr McNulty have as occupier of the first floor of the premises? Did Mr McNulty have a lease from 2003 to 2006 as was suggested? Had he given notice to quit the premises? If so, when was he leaving? For what period would the Markeys be able to exercise the option and when could they expect possession of the upper floors? What were the terms of the head lease in relation to subletting or use of the upper floors? The issue is whether Mr McMahon had an obligation to investigate such matters when he was asked to deal with the lease for the Markeys which contained this option for the upper floors.

[38] At paragraph 11.173 of Jackson and Powell there is discussion of 'The Duty to Warn Against Particular Risks' and it is stated that there is generally a duty to point out hazards of the kind that should be obvious to the solicitor but which the client, as a layman, may not appreciate. Reference is made to Boyce and Rendells [1983] EG 268 where the Court of Appeal in England and Wales accepted the following as a general proposition -

> "…. if in the course of taking instructions, a professional man like a land agent or a solicitor learns of facts which reveal to him as a professional man the existence of obvious risks, then he should do more than merely advise within the strict limits of a retainer. He should call attention to and advise upon the risks."

Paragraph 11.174 headed 'Explanation of Legal Documents' states that the solicitor owes a general duty to explain legal documents to the client or at least to ensure that he understands the material parts.

[39] Thus a solicitor has obligations to the client that go beyond the express wording of the instructions as described by the client. In the present case there is a distinction between the arrangements for the ground floor and for the upper floors because, unlike the ground floor where there was no one in occupation, Mr McNulty was in occupation of the first floor and was not leaving on 8 August 2005 but at some unspecified future date. When the lease was signed by Mr Markey he could not have been satisfied with the arrangements for the upper floor had it been pointed out that it was not known if Mr Carr could grant such an option, nor whether Mr O'Hare's consent was required, nor whether he had consented, nor whether there was any restriction on restaurant use, nor that the Markeys might not have possession of the upper floors within the following year. If the appropriate issues had been raised and enquiries made and the Markeys had been told in August 2005 that Mr McNulty may be there for another year because he may have a lease to 2006 and that there was no formal lease to Mr Carr from Mr O'Hare and that no notice to quit or notice to determine the first floor tenancy had been served, I am satisfied that Mr Markey would not have signed the lease at that time. Rather I am satisfied that attempts would have been made to regularise the position and that Mr McMahon would have been engaged to advise as to how and when the Markeys' objective could have been achieved to the Markeys' satisfaction. Mr McMahon should have advised the Markeys that there were issues about the option that required resolution before Mr Markey was advised to sign any lease.

[40] In relation to the ground floor I am satisfied that on the balance of probabilities, had the issues about the ground floor been raised in August 2005, agreement could have been reached with all concerned and the leasing arrangements

regularised at that time. However in relation to the option for the upper floors, with Mr McNulty in occupation of the first floor, I am satisfied that Mr McNulty was not leaving in the short term, may indeed have had an agreement for a lease until 2006, had not given notice to quit, had not been served with a notice to determine and I am satisfied that agreement could not have been reached for vacant possession within a matter of months. Mr Markey would not have proceeded with the scheme in August 2005 had he been informed of the position in relation to the upper floors, as he should have been.

[41] In relation to Mr McMahon and the legal advice given on 8 August 2005 concerning the option for the upper floors, I am satisfied that there was no fraud or misrepresentation but I am satisfied that there was a failure to advise appropriately in relation to the terms of the draft lease and the exercise of the option and that this failure represents a breach of contract and a breach of the duty of care owed to the Markeys.

The damages recoverable by the plaintiffs against the first defendant.

[42] As Mr McMahon remains the only defendant in respect of whom any damages may be recovered I shall refer to him below as the defendant. To provide funding for the restaurant scheme the Markeys sold their home. The sale was completed on 26 August 2005 and after discharge of the mortgage and expenses yielded £73,185 paid into the Markeys joint account. Happys Limited was incorporated on 6 July 2005 and had a trading bank account. Refurbishment of the ground floor of the premises cost £40,000 and Happys Diner opened on 1 October 2005. The diner traded until June 2006. Company accounts were completed to 31 July 2006 showing net current liabilities of £78,032.

[43] The plaintiffs sought to recover seven items of claim. In due course the separate entitlement of the Markeys and the company will be addressed but the general discussion below will refer to the claim as being that of the plaintiffs. The seven items of claim were as follows -

(1) £78,262 being the liabilities of Happys Limited on 31 July 2006.

(2) £10,000 borrowed by Mr Markey from his parents and introduced into the business.

(3) £32,600 being the estimated maturity value of an endowment policy assigned by the Markeys to the bank to discharge their overdraft facility.

(4) £3,320 accountancy fees.

(5) £1,900 as the fee paid for the reinstatement of the third plaintiff on the register of companies

(6) £5,000 reimbursement of legal aid payments.

(7) Loss of profits.

[44] The measure of damages was a matter of debate. Mr Coghlin for the defendant contended in relation to the company that the company was not a client of the defendant and no liability could arise for the final liabilities of the company, that the company trading losses were not caused by any breach by the defendant, that the company trading losses were not attributable to the absence of possession of the upper floors but would have occurred in any event and that the company could not recover the costs of extrication from the venture as the company was not a party to the lease. Further it was contended in relation to the Markeys that loans to the company were lost by the trading of the company and not by any breach of the defendant or by the absence of the upper floors, nor could the loans be recovered by being characterised by the Markeys as the costs of extricating themselves from the venture, that losses claimed were not within the contemplation of the parties and were matters peculiar to the business and not brought to the knowledge of the defendant and that Mr Markey did not extricate himself from the lease but was forced out by the insolvency of the company, a matter not caused by any breach of the defendant.

[45] The fundamental principle was stated by Lord Blackburn in Livingstone v Rawyards (1880) 5 App. Cas. 25, 39 to be that the measure of damages is –

> "…. that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Thus the starting point for the measure of damages is that the plaintiffs should be put as far as possible in the position they would have been in had they not been subject to the wrong committed by the defendant. In dealing with this issue it is essential to proceed on a proper formulation of the wrong so that the consequences can be assessed in the proper setting. What was that wrong in the present case? The defendant failed to exercise reasonable care in the provision of advice about the lease and in particular the option for the upper floors. This is quite distinct from matters relating to the plaintiffs' business which were not a concern of the defendant.

[46] A comparison must then be made between the actual position of the plaintiffs and the position they would have been in had the defendant not failed in his duty to exercise reasonable care in the provision of advice about the lease. The actual position of the plaintiffs is that expenditure was incurred in the start up and conduct

of and closing down of the business. By comparison, had reasonable care been exercised by the defendant in the provision of advice about the lease, the plaintiffs would not have proceeded with the form of lease completed on 8 August 2006. The plaintiffs may have proceeded with another form of lease at a later date but only when the measures that ought to have been undertaken by the defendant on 8 August 2006 were eventually completed and reflected in a new form of lease. So had reasonable care been taken by the defendant the plaintiffs would not have incurred the expenses of fitting out the ground floor or the expenses of the business prior to knowing that they would have possession of the upper floors within a certain time that would have enabled them to make both floors operational at an early stage as planned.

[47] However a party in breach is not responsible for all consequences of the breach. There are legal restraints on recoverable damages. The restraints may be expressed in terms of duty or causation or remoteness. The damage must be within the scope of the duty. There must be a causal connection between the breach and the damage. The damage must be reasonably forseeable. The rules on remoteness of damage in contract were stated in Hadley v Baxendale [1854] 9 Exch 341.Under the first rule damages are recoverable that arise in the usual course of things or are within the contemplation of the parties. Under the second rule damages are recoverable for additional loss arising in special circumstances known to the defendant.

[48] After Mr Coghlin's erudite submissions on the import of the second rule in Hadley v Baxendale Mr Markey stated that all it meant was that a defendant was liable for what he knew would happen. To Mr Markey all the items of claim were a consequence of the defendant allowing the plaintiffs to proceed with the scheme and the defendant would have known what would happen.

[49] I refer below to two instances where the court had to consider the measure of damages where solicitors failed to exercise reasonable care in giving advice to clients in relation to the acquisition of business premises, then to consideration of the issue of the measure of damages in the House of Lords in 1997 in connection with negligent valuation and finally to a more recent example of the approach to the consequences of solicitors negligent advice in relation to the lease of property. First, Hayes v. Dodd [1990] 1 All ER 815, where the plaintiffs purchased premises after receiving the advice of the defendant solicitors that there was a right of way from the street to the premises. There was no such right of way and the plaintiffs' business was adversely affected and ultimately closed. The plaintiffs recovered damages for breach of contract on the basis of the capital expenditure thrown away in the purchase of the business and the expenses incurred. The plaintiffs were not entitled to recover the profit that would have been made if they had operated the business successfully.

[50] Staughton LJ sought to place the plaintiffs as nearly as possible in the same position as would have been the case if no wrong had been sustained. In so doing he sought to ascertain the actual situation of the plaintiffs and compare it with their situation if the breach of contract had not occurred. The breach of contract was the solicitor's promise to use reasonable skill and care in advising the clients. If they had done so they would have told the plaintiffs that there was no right of way and on that basis the plaintiffs would not have entered the transaction. The plaintiffs would have bought no property and spent no money. The plaintiffs recovered that capital expenditure and the expenses incurred.

[51] The approach adopted was described as the "no transaction method", that is, with proper advise there would have been no transaction. The alternative approach was to consider the situation that the plaintiff would have been in if the transaction had proceeded, an approach that was described as the "successful transaction method". This distinction was not to find favour with the House of Lords in 1996, as appears below. However while the distinction was not justified the outcome remains unaffected, namely the plaintiffs were entitled to recover their wasted capital expenditure and expenses incurred and not loss of profits.

[52] In County Personnel (Employment Agency) Limited v. Alan R Pulver (a firm) [1987] 1 WLR 916 the plaintiff instructed the defendant solicitors in relation to the under lease of rooms for business premises. A rent review clause provided for the rent to be increased on the same dates by the same percentages as the increase of rent under the head lease. The defendant failed to ascertain the rent payable under the head lease or to warn the plaintiff of any risks involved in the rent review clause, nor did the defendant advise the plaintiff to have the property valued before entering into the under lease. The plaintiff subsequently surrendered the under lease on payment of a premium and increased rent and claimed the cost of extricating themselves from the transaction. In addition the plaintiff claimed the loss of a prospective sale of the lease and the goodwill of the business. It was held by the Court of Appeal that the plaintiff was entitled to recover the sums paid to extricate the plaintiff from the under lease, unless it could be shown that it was not a reasonable attempt to mitigate the loss. However the plaintiff was only be entitled to damages for the loss of a prospective sale if it could be shown that, properly advised, the plaintiff could have negotiated an under lease of the same premises without the unfavourable clause. The former loss fell under the first rule in Hadley v. Baxendale and the latter loss fell under the second rule in Hadley v Baxendale, being potentially a case in which a plaintiff would not be adequately compensated unless he received damages to reflect his loss under the second rule also.

[53] The House of Lords considered the measure of damages in South Australia Asset Management Corporation v. York Montague Limited [1996] 3 All ER 365. The issue concerned the extent of the liability of a valuer who had provided a lender with a negligent over valuation of property offered as security for a mortgage advance. The lender would not have advanced funds if they had known the true value of the

property and a fall in the property market after the date of valuation had greatly increased the loss which the lenders actually suffered following the borrower's default. It was held that the valuer was not responsible for all the consequences of the negligent over value of the property but only for the foreseeable consequences of the information being wrong. The correct approach to the assessment of damages was therefore to ascertain what element of the loss suffered as a result of the transaction going ahead was attributable to inaccuracy of the information by comparing the valuation negligently provided and the correct property value at the time of the valuation. The valuer was not liable for the amount of the lender's loss attributable to the fall in the property market.

[54] Lord Hoffman began on the basis that a correct description of the loss for which the valuer was liable must precede any consideration of the measure of damages. A plaintiff who sued for breach of a duty imposed by law (whether in contract or tort or under statute) must do more than prove that the defendant had failed to comply with that duty. He must show that the duty was owed to him and that it was a duty in respect of the kind of loss that had been suffered. The scope of the duty was determined, in the case of statutory duty by deducing the purpose of the duty from the language and context of the statute, in the case of tort by the purpose of the rule imposing the duty and in the case of an implied contractual duty by the term which the law implied, ascertained by construction of the agreement as a whole. A distinction was drawn between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty was to advise whether or not a course of action should be taken the adviser must take reasonable care to consider all the potential consequences of that course of action. If he was negligent he would therefore be responsible for all the foreseeable loss which was a consequence of that course of action having been taken. If his duty was only to supply information he must take reasonable care to ensure that the information was correct and if he was negligent he would be responsible for all the foreseeable consequences of the information being wrong. The distinction between 'no transaction' and 'successful transaction' was stated not to be based on any principle and should be abandoned.

[55] Reference was made to a category of cases in which the question was whether the plaintiff's voluntary action in attempting to extricate himself from some financial predicament in which the defendant had landed him negatived the causal connection between the defendant's breach of duty and the subsequent loss. Such cases were not concerned with the scope of the defendant's duty of care. They were all cases in which the reasonably foreseeable consequences of the plaintiff's predicament were plainly within the scope of the duty. The question was rather whether the loss could be said to be a consequence of the plaintiff being placed in that predicament. The principle which they applied was that a plaintiff's reasonable attempt to cope with the consequences of the defendant's breach of duty did not negative the casual connection between that breach of duty and the ultimate loss. County Personnel

(employment agency) Limited v. Alan R Pulver (a firm) and Hayes v. Dodd were described as examples of the principles of causation being applied.

[56] In Geoffrey Funnel v. Adams [2007] EWHC 2166 the plaintiff sought the defendant solicitors advice in relation to a proposed lease of premises. The defendant failed to advise the plaintiff in relation to the potential impact of a term in the lease concerning "new works" which imposed obligations on the plaintiff and impacted on the rent review clause. The parties agreed that the measure of the plaintiff's loss was the cost of extrication from the predicament coupled with the costs wasted by embarking on a venture that had to be aborted at an early stage. The defendant contended that the plaintiff had sustained no loss because the venture would have been abandoned by the plaintiff in any event as it was said not to have been viable. The plaintiff contended that if the steps taken to extricate a plaintiff from the predicament were reasonable then the defendant would be liable for the consequences that are reasonably foreseeable. Wilkie J did not accept the plaintiff's contention –

> "20. In my judgment the defendant's contention is correct. The act of extricating oneself by taking reasonable steps from a predicament does not, merely by virtue of that, break the chain of causation. Accordingly, if the consequences flowing from the course of action were reasonably foreseeable then they are, in principle, recoverable. That, however, cannot undermine the primary principle that there has to be a causal link between the loss suffered and the fault giving rise to the claim."

[57] On the facts Wilkie J rejected the defendant's contention that there was no causal link between the defendant's negligence and the losses suffered by the plaintiff in abandoning the lease and moving to smaller premises. The plaintiff recovered the lost expenditure in acquiring the lease and completing works on the premises before abandoning the venture.

[58] Mr Coghlin, in his most able submissions on behalf of the defendant, adopted the position that the requirement for a causal link was interpreted too liberally in Geoffrey Funnell and would be capable of including items arising from the criminal conduct or insolvency of the plaintiff. I am unable to accept this criticism. Loss occasioned by criminal conduct will break the chain of causation. It will be a question of fact in each case whether the advent of insolvency has been occasioned by the breach or the lack of viability of the project.

[59] Further Mr Coghlin submitted, in effect, that the present case should be treated as an instance of restraint on damages by reference to the scope of the duty of care, as in South Australian Asset Management Corp, rather than as an instance of the plaintiffs extricating themselves from the venture, as in Geoffrey Funnell. It is suggested that the former approach protects a defendant who can establish that a

plaintiff has made a bad bargain, a position it is suggested Geoffrey Funnell does not achieve. I am unable to accept this argument. It remains the position that the plaintiffs must establish that the scope of the defendant's duty extended to the type of loss claimed by the plaintiffs. Geoffrey Funnell confirms, as must be the case, that reasonable foreseeability of damage alone is not sufficient for recovery, there must be a causal link between the breach and the damage. The scope of the duty and causation and remoteness are separate but necessary elements. The losses that are claimed must be shown to have been caused by the breach and not merely by a bad bargain. Of course the plaintiffs' bad bargain may have been brought about by the breach, being a bargain that has been rendered deficient by the actions of the defendant, in that it has become a bargain that was not that contemplated by the plaintiff. Whether the losses have been caused by the breach of the defendant or the actions of the plaintiff will have to be determined on the facts of each case. I turn to consider the position in the present case.

[60] The items of loss claimed by the plaintiffs concern first of all the expenditure in setting up and running the business, secondly a part of the first item may be regarded as involving the costs of the plaintiffs extricating themselves from the business and thirdly the loss of profits from the closure of the business. As to the first matter, this is the type of loss that is within the scope of the duty and there is a causation issue as to whether the breach caused the loss of expenditure rather than it being merely a business loss. Similarly in relation to the second matter, in so far as the items of loss include extraction costs, there would be a causation issue as to whether the extraction costs were reasonably incurred so as not to break the chain of causation. As to the third matter there is an issue as to whether loss of profits are recoverable or are too remote.

[61] The defendant challenged the feasibility of the proposed development of the upper floors on the basis that the plaintiffs did not have the capital to finance the proposed development of the upper floors and further that the business was unable to generate the income required to make it viable.

[62] In relation to the capital position, Mr Markey's plan involved the expenditure of some £40,000 on the ground floor premises. The upper floors were to be developed in two phases. The first phase of the upper floor development in the latter part of 2005 required £20,000 for refurbishment and fittings and fixtures. The second phase in the middle of 2006 was to involve an extension at the rear of the premises with a steel structure at a cost of some £30,000. The defendant challenged the plaintiffs' financial capacity to undertake such development.

[63] The proceeds of sale of the Markey home produced £73,000 of which £40,000 was required to complete the ground floor development. By 1 October 2005 the balance on the Markeys' joint account was £6,000 and the balance on the company account was £8,000. By the end of 2005 both accounts were overdrawn. The company had an agreed overdraft of £5,000 guaranteed by the Markeys. Other funds

were introduced, including a loan of £10,000 from Mr Markey's parents. Mr Markey applied for a £20,000 loan from the Northern Ireland Small Business Loan Fund through the Newry and Mourne Enterprise Agency. On 28 April 2006 the local committee of the Newry and Mourne Enterprise Agency agreed to approve the application to the steering committee subject to Mr Markey obtaining vacant possession of the upper floors of the premises. The loan was never available.

[64] I am satisfied that the development of the first floor was considered an essential element of the scheme and further that the first phase of the development of the first floor was intended and required within a matter of months of the opening. The first phase would have doubled the seating available on the premises. While there was argument about the figures I am satisfied that the cost of the first phase was to have been £20,000. With the funds that became available to the Markeys and with the loan from Newry and Mourne Enterprise Agency probably becoming available with possession of the upper floors I am satisfied that the Markeys would have been in a position to complete the first phase of the development of the first floor as planned, had they had possession of the upper floors. The second phase was a steel structure extension at the rear of the first floor at a cost of £30,000, planned for the summer of 2006. I have not been satisfied that the funds would have been available for the completion of the second phase as planned.

[65] However, even with possession of the upper floors and the funds to complete the first phase, the defendant contends that the business would have failed. Thus the defendant says that the expenses incurred by the plaintiffs would have been lost in any event as this was a bad business venture and the defendant cannot be responsible for the plaintiffs' bad business decisions.

[66] Turning to the income position, Patrick O'Connor, Chartered Accountant for the plaintiffs, prepared projected financial statements in respect of the business. The projected trading and loss account for year one showed a net profit of £3,500 and for year two a net profit of £33,000. These figures were based on certain assumptions made by Mr O'Connor about trading. It was assumed the downstairs diner had accommodation for 50 patrons open 7 days a week and serving 150 meals per day from opening increasing to 225 in year two. It was assumed that the upstairs restaurant had 60 seats open 5 days per week and serving 30 meals per day from opening increasing to 60 in year two. With an average selling price of diner meals of £4 and restaurant meals of £12 and the cost of sales of 40% of sales Mr O'Connor produced his net profit.

[67] Steven Burns, Chartered Accountant for the defendants examined actual sales during the period of trading from October 2005 to June 2006 and concluded that the business was not viable. Monthly average sales were £4,400 whereas the plaintiffs projected average monthly sales in the diner of £16,700 in year one and £24,600 in year two. Mr Burns noted that the actual average monthly sales were insufficient to

cover the actual expenses incurred in the business. The plaintiffs' projected gross profit was 60% whereas the actual gross profit was 41%.

[68] Mr Markey attributed the actual gross profit to difficulties which he considered to be temporary. One such problem was the chef who was ordering excessive quantities of food and creating excessive waste resulting in a reduced margin. The other difficulty was said to be a waitress who was feeding family and friends free of charge and this too affected the margin. Each problem persisted for some months before being identified by Mr Markey, both problems being matters he said he would have identified earlier had he not been preoccupied with start up and concerns about the upper floors.

[69] According to Mr Markey part of the income problem was the reduced volume of sales due to the absence of the upper floors. According to Mr Markey the initial business catered for a student lunchtime trade that needed the seating on both floors to cater for demand and make profits. The first floor would also have catered for a different trade and included a wine bar with increased mark up on sales.

[70] At the start up of the business the Markeys did encounter income problems. I am satisfied that had they had possession of the upper floors they would have had limited income during the initial period of trading. Mr Markey said that he expected as much. Such a business takes time to become established and the projected profits for the first year reflect this in the modest projection of £3,500. In the event income from the ground floor business was lower than expected. Part of that was due to staff problems described by Mr Markey that would have been corrected when identified. I am satisfied that part of the problem was due to operating with only a part of the planned business premises. The actual sales for the ground floor cannot show potential sales from the use of the first floor. When margins are tight at the start up of such a business the handicap of not having access to what was considered to be an essential part of the business premises must have impacted on the progress of the business. I am not satisfied, as the defendant contends, that the business was unviable and bound to fail in any event. Another restaurant scheme opened in the building after the plaintiffs left and that business continues. That of course may be down to a better business scheme than that adopted by the Markeys but it does demonstrate that such a business can succeed in the premises. In all the circumstances I am satisfied that the scheme probably failed because of an inability to obtain possession of the upper floors. I am satisfied that there is a causal connection between the breach of the defendant and the expenditure of the plaintiffs.

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[71] The Markeys were the clients of the defendant. The company is not entitled to recover damages against the defendant. It was the Markeys who took the lease of the premises and introduced the funds to the company from the sale of their house and elsewhere to allow the work to be undertaken on the premises and trading to commence. The trading entity was the company. The Markey funds became a debt due by the company. The Markeys would not have proceeded with the lease on the

terms obtained nor would they have introduced the funds to the business through the company or commenced the trading by the company had the defendant exercised reasonable care. I am satisfied that the Markeys are entitled to recover the expenses incurred in proceeding with the scheme without their having been in a position to enforce early possession of the upper floors.

[72] Mr Burns and Mr O'Connor gave concurrent evidence. This brought direct attention to the points of difference. The major debate concerned the potential profitability of the business. This was an important issue as far as determining whether the business was ever likely to be viable. Concurrent evidence proved to be a time saving, cost saving exercise. The experts' reports were admitted as the evidence of each expert. They gave evidence together in the form of a discussion between them of the strengths and weaknesses of the respective positions. I asked questions of each witness and Counsel had the opportunity to cross examine. The effect of this approach was to focus attention on the differences and to leave aside a rehearsal of the matters not in dispute.

[73] I turn to the seven heads of claim.

(1) The liabilities of the company - £78,262.

[74] The current liabilities of the company at 31 July 2006 of £78,262 were made up of a Directors Account of £53,813 due to the Markeys and the balance due to other creditors involving finance leasing, trade creditors, VAT and accruals and deferred income. Current assets of £230 related to stock and cash.

[75] The £53,813 had been introduced to the company by the Markeys and was repayable by the company. The Markeys are entitled to recover the expenses they incurred in proceeding with the scheme. Those expenses include the sums introduced to the company, as the trading agency, during the trading period, namely £53,813. Hence this sum is not being recovered as part of the liabilities of the company but as a sum representing expenditure by the Markeys caused by the action of the defendant.

[76] The balance of current liabilities amounting to £24,219 was paid off by the Markeys after the company ceased trading. Some of the company assets were salvaged and sold and the proceeds used to discharge the trade creditors. I am satisfied that a company car was sold for £600, a company trailer was sold for £200 and certain fixtures and fittings were sold for £2,000. Accordingly the Markeys introduced additional funds to pay off trade creditors to the amount of £21,419.

[77] The Markeys introduced the sum of £21,419 after the cessation of trading and thereby discharged the liabilities to trade creditors. The defendant contends that the Markeys had no legal obligation to discharge those debts incurred by the company. That is correct. However I commend the Markeys for undertaking the discharge of

the sums due to creditors in circumstances where they had already lost their investment. Had those sums been introduced to the company to discharge the creditors before the cessation of business they would have fallen under the first part of the liabilities above and would have been recovered under that part. These were liabilities it was entirely reasonable to discharge after the cessation of trading. I find that the Markeys are also entitled to recover the sum of £21,419. Again it should be said that this sum is not being recovered as part of the liabilities of the company but as a sum representing expenditure by the Markeys caused by the action of the defendant.

[78] Although I find the discharge of trade creditors an expense reasonably incurred by the Markeys in the circumstances occasioned by the defendant, that expense might also be regarded as a cost of the Markeys extricating themselves from the venture. The same causation issue arises, expressed in terms of whether the expense was reasonably incurred in the circumstances, a matter that I am satisfied was the case.

(2) Borrowings from parents - £10,000.

[79] The sum of £10,000 borrowed by Mr Markey from his parents was paid into the company to discharge trading liabilities from January to June 2006. However examination of the finances revealed that this sum of £10,000 was included in the Directors Account of £53,813 due to the Markeys. Accordingly, no additional sum is recoverable in respect of this item.

(3) Maturity value of endowment policy - £32,600.

[80] The sum of £32,600 was the projected value of an endowment policy on maturity in 2015. The Markeys assigned the policy to the bank in 2005 to discharge an overdraft in respect of debts incurred by the business. In the event the cash-in value of the policy in 2005 was £11,683. Thus the Markeys contend they have lost the difference between the surrender value in 2005 and the maturity value in 2015.

[81] In 2000 the endowment company offered a profits projection of £19,782 on 1 July 2015. The Markeys proceeded on an increase in value at 5% per annum to produce the projected value of the policy in 2015 of £32,600. The additional premiums on the policy to 2015 would have amounted to £10,000.

[82] On a wholly unscientific basis I proceed as follows. I take the projected value of the policy in 2000 as being some £20,000 on maturity in 2015. I take the projected value of the policy in 2005 as being £25,000 on maturity in 2015. I take the projected value of the policy on maturity in 2015 at £30,000. The Markeys would have paid additional premiums of £10,000 leaving a net additional value in 2015 of £20,000. The Markeys received £11,683 as the value of the policy in 2005 so the notional loss would

be £8,317. As the maturity value would not have been received until 2015 there would be a discount to reflect advanced receipt. The reduced value of the policy proceeds I would measure at £6,000.

[83] However I am not satisfied that this sum is recoverable. There is no causal connection between any difference in value and the breach of the defendant. It arises from the impecuniosity of the Markeys. It is a forced surrender of a policy to meet the demands of the bank. Any loss arises from the vagaries of the early surrender of policies. It is unlike bank borrowings to meet a shortfall. Further it is not reasonably foreseeable. Again while a defendant may be liable for borrowings to discharge expenses incurred he will not be liable for the complexities of a plaintiffs financial arrangements, unless that defendant has notice of those personal arrangements. Thus no sum is recoverable in respect of this item.

(4) *Accountancy fees - £3,320.*

[84] The £3,320 accountancy fees includes £1,900 due to the accountant in respect of fees earned while the company was trading. This sum is included in the company debts at item (1) above and is not recoverable again.

[85] The balance of £2,420 represents accountancy fees incurred after the company ceased trading and in preparation for these proceedings. Any recovery of such fees falls to be assessed with the costs of the action. Accordingly no sum is recoverable as damages under either part of this item of claim.

(5) Reinstatement of the company - £1,900.

[86] The £1,900 fee was paid for reinstatement of the company on the register of companies. The company was struck off the register for failure to make the required returns. In order to proceed with this action in the name of the company as third plaintiff Mr Markey applied for the reinstatement of the company. This is not an expense that arises from the conduct of the first defendant and no sum is recoverable under this item.

(6) Reimbursement of legal aid payments -£5,000.

[87] Mr Markey was awarded legal aid on 14 May 2009 and had legal representation for a period. However the plaintiff ceased to be legally represented. The Legal Services Commission has confirmed that a statutory charge will apply against any sums recovered in these proceedings in respect of fees paid by the Legal Services Commission while Mr Markey had legal aid. Mr Markey has obtained information that £5,000 was paid in respect of such legal fees while he had legal representation. Whatever sum was discharged by the Legal Services Commission in respect of these proceedings will be repayable by Mr Markey. The amount due to the Legal Services Commission is recoverable as part of the costs in the action.

(7) *Loss of profits*.

[88] The basis of the claim for profits was set out in Mr O'Connor's projections as discussed above, namely net profits in year one of £3,500 and in year two of £35,000. The defendant is not responsible for the trading of the business or for the loss of opportunity to earn profits that might otherwise have been earned. The plaintiffs are not entitled to recover any sum under this head.

[89] The result is as follows –

There will be judgment for the second defendant against the plaintiffs.

There will be judgment for the third defendant against the plaintiffs.

There will be judgment for the first defendant against the third plaintiff.

There will be judgment for the first and second plaintiffs against the first defendant for £75,232, being £53,813 as due under the Directors account and £21,419 for the discharge of trade creditors. Interest will be awarded at 4% from 1 January 2006. The items of claim for Accountant's fees and for legal fees discharged by the Legal Services Commission are recoverable as costs in the action, in such amount as may be determined.