Neutral Citation Number: [2010] EWHC 2373 (QB)

Case No: TLQ/08/0846

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2010

Before :

THE HONOURABLE MR JUSTICE STADLEN

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Between :

(1) GIEDO VAN DER GARDE BV **(2) GIEDO GISBERTUS GERRIT VAN DER GARDE**	**Claimants**
- and -	
FORCE INDIA FORMULA ONE TEAM LIMITED (FORMERLY SPYKER F1 TEAM LIMITED (ENGLAND))	**Defendant**

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Mr Anthony de Garr Robinson QC and Toby Starr (instructed by **Starr and Partners LLP**) for the **Claimants**
Mr John Davies QC and Mr Francis Tregear QC (instructed by **Fladgate Fielder LLP**) for the **Defendant**

Hearing dates: 11, 12, 13, 14, 20, 21 November 2008, 29, 30 April 2009, 29 June 2009, 10 July 2009, 6 October 2009, 16, 17, 18, 26 November 2009, 1 February 2010 and 30 July 2010

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Approved Judgment

The Honourable Mr Justice Stadlen:

1. Giedo Van der Garde is a young Dutch racing driver with aspirations to become a Formula One driver. He is the second Claimant. The first Claimant is a Dutch company established by Mr Van der Garde to manage his race driving interests. Mr Van der Garde is a director of the first Claimant, as is Marcel Boekhoorn. Mr Boekhoorn, who is the father of Mr Van der Garde's long term girlfriend Denise Boekhoorn, is a rich Dutch businessman who has given very substantial financial support to Mr Van der Garde and the first Claimant with a view to advancing his career as a racing driver and in particular to becoming a Formula One driver.

2. The Defendant is an English company which owns and operates the Force India Formula One Team, one of the teams which compete in the FIA Formula One World Championship, the leading motor racing series in the world. Before 5 October 2007 the company was called Spyker F1 Team Limited and was owned by Spyker Cars NV, a Dutch public company which manufactures sports cars and specialises in very high end Ferrari-type cars. Prior to the sale of the company by Spyker Cars NV on 5 October 2007 to a consortium owned by Michael Mol, a wealthy Dutch businessman, and Vijay Millaya, an Indian entrepreneur with a keen interest in Formula One racing, the Chief Executive Officer of the Defendant was Victor Muller, a Dutch businessman, and the team principal of the Spyker F1 Team was Dr Colin Kolles. I will refer to the Defendant Company as Spyker.

3. On 28 February 2007 the Claimants and Spyker entered into two written agreements, a Service Agreement and a Fee Agreement. The Service Agreement related to the 2007 Grand Prix season. Among other things the Claimants allege that it required Spyker to permit Mr Van der Garde to drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000 kilometres (km). In consideration of Spyker entering and performing the Service Agreement, the Fee Agreement required the Claimants to pay Spyker $3million. That sum was paid to Spyker on 13 February 2007. In this action the Claimants allege breaches by Spyker of both agreements. The most significant breach alleged is that Spyker failed to permit Mr Van der Garde to drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000 km. Initially it was alleged that Spyker permitted such use of a Formula One car for no more than 1800 km. By the end of the trial however it was accepted that Mr Van der Garde was permitted to use a car for 2004 km.

4. The relief sought by the Claimants was the subject of amendments and extensive written and oral submissions. Recognising the difficulty of proving the financial benefits which would have flowed if his career had been enhanced by driving the full 6,000 km, the Claimants advanced a number of alternative claims. The principal claim was for the return of just short of $2 million or two thirds of the consideration paid pursuant to the Fee Agreement under the doctrine of failure of consideration.

5. Spyker's principal pleaded defence was that its rights and obligations under the Service Agreement and the Fee Agreement were transferred to another company called Centurium Capital Limited on 13 November 2007 so that there was no cause of action against it. This defence, which was maintained at trial and was the subject of hotly contested evidence, was ultimately abandoned by Spyker towards the end of the closing oral submissions on liability of Mr Davies QC who at that stage appeared on

its behalf. (Tragically Mr Davies died very shortly before an adjourned quantum hearing at which the Claimants' amended claims for relief were due to be argued. He was in due course replaced by Mr Tregear QC who, after a further adjournment to enable him to prepare, advanced Spyker's submissions on quantum).

6. Further or alternatively Spyker denied the alleged breach of the Service Agreement. The precise basis on which the denial rested is not easy to articulate. It was expressed in different ways in the Defence and Amended Defence and in Spyker's opening and closing written submissions and Mr Davies' closing oral submissions. In broad and general terms Spyker's main contention appeared to be to the effect that the 6,000 km which it agreed to make available to Mr Van der Garde included Friday morning test sessions at Grand Prix race meetings and that if, as happened, Mr Van der Garde failed to obtain a Super Licence without which he could not drive in Friday morning test sessions, the 6,000 km which it was required to provide fell to be reduced by the amount of kilometres which would have been available had he been eligible to drive in Friday morning test sessions.

7. Linked to this contention was the further contention that on a true construction of Clause 2 of the Service Agreement Mr Van der Garde was under an obligation to use his best endeavours to obtain a Licence from the Federation Internationale de l'Automobile ("FIA") to enable him to take part in the Grand Prix Friday morning test sessions and thereby be in a position to test for the 6,000 km referred to in the Service Agreement and that he did not use his best endeavours to obtain a Super Licence as a result of which he was unable to take part in the Friday morning sessions at which it was alleged that he would have tested for up to a further 3,400 km. In particular it was alleged that he refused to follow Spyker's advice to participate in the GP2 series of races in which he could win a race and thereby obtain an FIA Super Licence. In addition Spyker alleged that the 6,000 km which it was required to provide fell to be reduced (a) by 1500 km which it was alleged he would have driven at the Paul Ricard Circuit in May 2007 but for his refusal to take part and (b) by a further 200 km which it is alleged he would have driven during a test at Silverstone in June 2007 had he not crashed.

8. The Claimants' principal response to what, after the abandonment of the assignment defence became Spyker's main defence, was that on the proper construction of the Service Agreement and/or as an implied term Spyker was obliged to offer the full 6,000 km of driving to Mr Van der Garde, that that obligation was not conditional upon Mr Van der Garde being eligible to drive in Friday morning Grands Prix and that even if Mr Van der Garde was in breach of an obligation to use his best endeavours to obtain a Super Licence, which was denied, that did not affect Spyker's obligation to provide 6,000 km of testing. Nor did his refusal to take part in the Paul Ricard test or his crash at Silverstone.

The Service and Fee Agreements dated 28 February 2007

9. The Service Agreement contained the following among other provisions:

> "2. Participation in Test, Indemnification

Subject to the terms and conditions of this agreement and the FIA provisions and regulations and the Driver and Company complying with their obligations hereunder SPYKER hereby nominates and permits the Driver to drive the car in Tests. Tests means the testing and/or practising and/or racing with the Car of (i) a minimum of 6,000 km and (ii) subject to the Driver holding a valid FIA Super Licence, during the Grand Prix Friday morning test sessions.

Dates of the Tests to be decided by SPYKER. Such Tests to include FIA monitoring for the FIA Super Licence application. Spyker will use its best endeavours and will assist the Driver to establish eligibility for an FIA Super Licence.

Subject to the Driver holding a valid FIA Super Licence the Driver will drive at all of the Grand Prix Friday morning test sessions.

The Driver is appointed and will act as, subject to the Driver holding a valid FIA Super Licence, SPYKER's first reserve race driver for participation in races if required, unless the Driver does not perform satisfactorily in SPYKER's view with regard to the Driver's obligations set out in clause 3 and his performance as a test driver.

The Driver and the Company jointly and severally warrant and represent to SPYKER that by entering into this agreement they will not be in breach of any existing or former terms of agreement, whether express or implied, or of any other obligation binding on the Driver and/or the Company. The Driver and the Company shall severally and jointly indemnify SPYKER from any loss, costs (including but not limited to professional and lawyer's fees and/or fees in relation to the Contract Recognition Board), liabilities or claims suffered or incurred as a result of the Driver and the Company entering into this agreement, including SPYKER's costs suffered or incurred as a result of SPYKER lodging this agreement with the Contract Recognition Board.

3. Driver and Company's obligations

The Driver will:

3.1 to the best of his ability participate in and throughout each of the Tests…..

3.2 carry out the lawful and reasonable instructions of SPYKER's team manager

4. Sponsors

4.1 Except with SPYKER's prior written approval, which approval will not be unreasonably withheld, the Company and the Driver will not:

4.1.1 be party, directly or indirectly, to any personal advertising, sponsorship, licensing and merchandising agreements for the Driver. It is understood however that it is the intention of the Driver and the Company to obtain funds from personal advertising, sponsorship, licensing and merchandising agreements to be able to fund the payments of article 6.1……

4.2 SPYKER, the Company and the Driver will use their best endeavours to assist each other to seek new sponsors for either SPYKER or the Driver…..

6 Fee and expenses

6.1 The parties confirm that fee and expenses are dealt with in a separate agreement.

7 Sponsor Spaces

7.1 SPYKER will grant sponsorship spaces on the trade area of the Car, based on standard market practice and market conditions. The Driver and the Company severally warrant that the use of the Driver/Company's Logo/sticker/name does not infringe any third party's rights. The Driver and the Company shall jointly indemnify SPYKER from any loss, costs (including but not limited to professional and lawyer's fees), liabilities or claims suffered or incurred as a result of SPYKER's use (and its licencees) of the Driver/Company's Logo.

7.2 The Driver and/or Company shall inform the Team in writing no less than seven days before any event the identity of the sponsor in order to establish potential conflict with Team sponsors. The Team shall have sole discretion to declare conflict and refuse permission for each and every sponsor declared to the Team.

7.3 The Driver and the Company severally warrant that the Driver/Company's sponsors grants to SPYKER for itself and the SPYKER Group a world-wide, non-exclusive, royalty free licence to use the Driver/Company's Logos in association with other sponsors:

7.3.1 on the Sponsor Space as set out in this agreement;

7.3.2 on SPYKER Promotional Materials and communication tools;

7.3.3 to licence model makers to manufacture, market and sell replica scale models of the Cars and the Team's equipment, bearing the Driver/Company's Logo;

7.3.4 to licence video and computer games manufacture to produce, market and sell or hire video and computer games featuring the Cars and/or the Team bearing the Driver/Company's Logo; and

7.3.5 to licence to produce, market and sell any other products featuring the Driver/Company's Logos.

7.4 SPYKER grants to the Company following spaces on the Driver's race suit: one space on each upper arm and two spaces on the front. The Driver and the Company grant three sponsor spaces to SPYKER for its Team Sponsors on each side of the Driver's helmet.

8. Term and termination

8.1 Subject to the clauses set herein, this agreement shall be binding on signing and shall expire on 31 December 2007.

8.2 This agreement may be terminated by SPYKER at any time by written notice to the Driver and/or the Company upon the Driver and/or the Company:.

8.2.1 failing to pay any sum due under this agreement upon its due date; or

8.2.2 having committed a material breach of this agreement.

8.3 If this agreement is terminated in accordance with its terms, all rights and obligations of the parties will cease immediately, except for those provisions expressly stated to survive termination of this agreement. Termination of this agreement will not affect any rights or liabilities arising prior to termination.

11. General

11.1 This document is the entire agreement between the parties and supersedes all other agreements or arrangements, whether written or oral, express or implied, between the parties or any of them. No variations of this agreement are effective unless made in writing signed by all parties or their authorised agents…...

11.3 This agreement will not be assigned by any party without the prior written consent of the other. SPYKER shall be entitled to assign this agreement to a third party…...

12. Concorde agreement, disputes and law

12.1 The parties expressly agree that this agreement is (or, as the case may be, forms part of) a contract as defined by clause 6.1 of Schedule 11 of the 1998 Concorde Agreement so that the parties agree with each other to respect the terms of such schedule and in particular clause 7 of such schedule which provides for the resolution of conflicts [as to priority issues between competing teams] by the Contract Recognition Board sitting in Geneva, Switzerland. Accordingly the parties expressly submit to the exclusive jurisdiction of the Contract Recognition Board with respect to matters to be determined by such board pursuant to such clause 7 and, in particular, expressly exclude the jurisdiction of any competent judicial or other body as regards interim or conservatory measure in that respect. In this clause the expression 1998 Concorde Agreement shall include any replacement substitution or variation of such agreement.

12.2 The Interpretation, validity and performance of this agreement are governed by the laws of England and Wales.

Definitions and Interpretation

2. The following words and expressions have the following meanings:

Car – a Formula One racing car to be provided by SPYKER for use by the Driver at each of the Tests."

10. The Fee Agreement contained the following provisions:

"1.1 Reference is made to the Service Agreement dated 28 February 2007 (hereinafter referred to as "The Service Agreement") and its clause 6.1. The parties agree as follows regarding "Fees and expenses";

1.2 In consideration of SPYKER entering and performing the aforementioned Service Agreement the Company or the Driver will pay SPYKER per race season: US$3million (US Dollar three million) (plus VAT if applicable) upon signing.

SPYKER will not be liable for any costs, fees or expenses incurred by the Company and the Driver. Notwithstanding the aforementioned, SPYKER will be responsible (i) to provide solely for and on behalf of the Driver the reasonable travel expenses to places at which he participates in Tests (including transfers in relation to the respective Grand Prix location) (ii) to provide solely for and behalf of the Driver one double room with respect to the respective days on which the Driver is present at days on which he participates in Tests (iii) to pay the

> Company a management fee of a total of US$60,000 – payable by the end of each month in monthly instalments of US$5,000 – subject to SPYKER's receipt of a respective invoice and SPYKER's receipt of the amount set out in clause 1.2. SPYKER will provide the Driver with up to three paddock (for himself with pit access and two of his guests) and pit access passes subject to availability at times when the Driver is providing driving services hereunder. Additional two paddock passes will be provided for Mr Marcel Boekhoorn subject to notification by the Driver and/or Company to SPYKER in writing not less than three weeks prior to the start of the respective Grand Prix weekend. In addition SPYKER will provide the Driver during the Term with a lease/rental car in the Netherlands. SPYKER will bear the lease/rental fee. All other costs and expenses shall be borne by the Driver.
>
> Any payment owed to SPYKER under the Service Agreement or this agreement shall be effected without any deduction, right to set-off or retention. The Company and the Driver are jointly and severally responsible for any payment under the Service Agreement or this agreement. Payments once effected shall not be refundable."

Factual background

11. In January 2005 Dr Kolles had helped organise the purchase by Midland Resources (Holdings) Limited of Jordan Grand Prix Limited, which ran the Jordan F1 Team, and had been appointed team principal of what became the Midland F1 Team. That team was sold by Midland Resources (Holdings) Limited to Spyker Cars NV in 2006, Dr Kolles remaining team principal under the new ownership. Before 2005 he had had approximately 10 years experience in motor sport including running two Formula Three Euro Series teams owned by himself and his family in Germany.

12. Mr Van der Garde has been racing since he was 9 years old. He has competed in the Go-Kart mini juniors, Go-Kart Formula A, Go-Kart Super A, Dutch Formula Renault, Formula 3 Euro Series, the World Series by Renault and most recently the GP2. His goal was, and is, to become a Formula One racing driver, the Formula One series being the premier competition in international racing. To that end on 30 November 2006 the Claimants entered into an agreement with Super Aguri F1 Limited, an English company which builds and enters cars in the FIA Formula One championship. Under the agreement in consideration of a fee of US$10 million Super Aguri agreed to nominate Mr Van der Garde as a third and Friday practice driver for one of its Formula One racing cars entered in the FIA Formula One World Championship in each of the Grands Prix for the 2007 season. Super Aguri's obligation to make a car available to Mr Van der Garde for the Friday practice session of each of the 2007 Grands Prix was expressed to be subject to the grant to him of an FIA Super Licence. Possession of a Super Licence, which is granted by the FIA is a necessary condition for being permitted by the FIA to take part in Grand Prix races or to drive a car which has been entered for a Grand Prix in the Friday morning practice sessions which precede each Grand Prix race.

13. Under the agreement Super Aguri was entitled to terminate it at anytime after 28 February 2007 if Mr Van der Garde had failed to secure and was unable to demonstrate to its reasonable satisfaction that he would be able to secure FIA Super Licence accreditation. In that event Super Aguri was obliged to return the US$10 million fee less an amount of $500,000 to cover the cost of arranging a test to be undertaken for the purpose of securing an FIA super Licence for Mr Van der Garde. The $10 million fee was agreed to be payable by Prime MM Limited ("Prime"), a Swiss company which arranged finance and sponsorship for Formula One teams and provided managerial services to Mr Van der Garde, by bank transfer so as to be received by Super Aguri by no later than 26 January 2007. Under the agreement Mr Van der Garde warranted that he would remain freely able to provide his driving, testing, marketing and promotional services to Super Aguri for the term of the agreement which covered the 2007 Grand Prix season.

14. By a separate agreement dated 30 November 2006 between the same parties Super Aguri agreed to provide all reasonable assistance to Mr Van der Garde in making an application for a Super Licence. In particular it agreed that on payment of the $10 million fee payable under the first Agreement it would as soon as practicable undertake at its own expense a Formula One race track test to enable him to obtain an FIA Super Licence. Although both agreements purported to be signed on behalf of the First Claimant by Denise Boekhoorn, the First Claimant subsequently denied that it thereby became a party to the agreements on the basis that she was neither a Director of the First Claimant nor authorised to sign anything on behalf of her father Marcel Boekhoorn, who was a Director thereof.

15. On 31 January 2007 Mr Van der Garde took part in a test organised by Super Aguri in Valencia. After a few laps he was called into the pits. There is a dispute between the Claimants and Super Aguri as to what happened next. Mr Van der Garde's evidence in the trial of this action was that he was told "It's over. It's finished." He, Mr Boekhoorn and Mr Mollmann, a Director of Prime, to whom he reported the conversation, took this to be an indication that Super Aguri no longer intended to perform the two agreements and were repudiating them. In the Particulars of Claim served in proceedings commenced by Super Aguri against the Claimants in this action, Ms Boekhoorn, Prime, Spyker and two other directors of Prime in August 2007 Super Aguri alleged that Mr Taylor, an official of Super Aguri, informed Mr Van der Garde that the test had been suspended because $3million due under a variation of the November 2006 agreements had not been received. It was alleged that he was told that the test had been halted for reason of non-payment and that it would recommence as soon as payment was made. In their defence in the Super Aguri action it was alleged by the Claimants in this action and Ms Boekhoorn that having told Mr Van der Garde emphatically that "It is over" Mr Taylor said that he would not be able to drive any more because a payment of US$3million had not been made. It was alleged to be clear to Mr Van der Garde that he was not going to be able to drive again and that there was no point in staying at the track. He then spoke to Super Aguri's chief financial officer on the telephone who made it clear to him that unless US$3million was paid he was not going to be able to drive the car again. Accordingly, Mr Van der Garde changed out of his racing overalls and left the track to return to his hotel and prepare to return to The Netherlands. It was alleged that the effect of this was that Super Aguri repudiated the agreements which repudiation was accepted by the Claimants, alternatively that Super Aguri terminated the agreements.

16. The reference in the Super Aguri Particulars of Claim to the non payment of US$3 million was to two alleged variation agreements to the 30 November 2006 agreements. Under the first between Super Aguri and Prime it was allegedly agreed that Mr Van der Garde/Prime should pay US$3million for him to be a driver on 31 January 2007 and that Prime would provide sponsorship of US$7million to Super Aguri by three instalments of US$2million by 28 February 2007, US$2.5million by 31 April 2007 and US$2.5million by 30 June 2007. If Prime failed to pay any of those payments by the due dates Super Aguri was entitled to terminate the driver agreement forthwith. The second agreement was alleged to have been between Super Aguri, Prime and the Claimants in this action although the copy of the agreement attached to the pleading purported to be signed by Mr Van der Garde but not by anyone on behalf of the First Claimant. Under that agreement it was again allegedly agreed that Mr Van der Garde/Prime should pay US$3million on 31 January 2007 for Mr Van der Garde to be a driver. Super Aguri alleged that the latter variation agreement was signed by Mr Van der Garde in the morning of 31 January 2007. Mr Van der Garde in his defence to the Super Aguri action admitted that he signed a document provided to him by Super Aguri on the morning of 31 January 2007 but did not admit what that document was or that it was the document attached to the Particulars of Claim in the Super Aguri action.

17. On 31 January 2007 Mr Boekhoorn telephoned Mr Muller the Chief Executive of Spyker and of its parent company Spyker Car NV. When Spyker NV acquired Spyker in September 2006 Mr Muller and Michael Mol became Managing Directors of Spyker. Mr Muller resigned as a director of Spyker shortly before it was sold in the autumn of 2007 to Orange India Holding. At the trial Mr Muller gave evidence for the Claimants. He said that when Mr Boekhoorn called him on 31 January 2007 he told him that Mr Van der Garde had been ordered by Super Aguri to step out of his racing car and that the Super Aguri representative had told him: “It’s all over”. Mr Boekhoorn told him that in his experience that meant that the relationship and the agreement between Mr Van der Garde and Super Aguri had come to an end and that he would like to see whether there was a possibility for Mr Van der Garde to drive as a test driver with Spyker.

18. According to Mr Muller this was a period when Spyker were in the process of engaging test drivers because they bring money to a Formula One team and money was something that they were very short of. Mr Boekhoorn proposed a meeting the following day in Innsbruck between himself, Mr Muller, Dr Kolles and Mr Mol. He sent his jet to collect Mr Muller and Mr Mol from Holland. They arrived in Innsbruck on the evening of 1 February 2007 slightly ahead of Dr Kolles and began the meeting with Mr Boekhoorn in the hotel in Innsbruck where Dr Kolles was due to stay.

19. I interpose in the narrative to explain that at the outset of the evidence in chief of Mr Muller, who was the first witness called by the Claimants, an issue was raised by Mr Davies as to the extent of the admissibility of evidence as to the events between 1 February 2007 and the signing of the written agreements on 28 February 2007. He accepted that evidence of what was known to the parties prior to 28 February 2007 was capable of being admissible evidence as to the factual matrix surrounding the written agreements and thus admissible for the purpose of construing them. However, he submitted that evidence of negotiations was inadmissible for that purpose and that since there was no prior oral agreement entered into by the parties on 1 February 2007

the evidence of what was discussed between the parties on 1 February 2007 was inadmissible save in so far as it referred to facts known to the parties prior to the entering into of the written agreements on 28 February 2007.

20. Mr Starr, the Claimants' solicitor, who at that stage was representing them as advocate in the trial, pointed out that Dr Kolles in his witness statement served on behalf of Spyker asserted that, he having told Mr Boekhoorn on the telephone on 1 February 2007 that Spyker could give Mr Van der Garde 6,000 km if he drove on Friday practice and having agreed Mr Boekhoorn's counter-offer of €3million and his suggestion that they should meet later that day (Dr Kolles having initially asked for €4million as the fee), the parties agreed by the end of the meeting in Innsbruck on 1 February 2007 that Spyker would sign Mr Van der Garde on the basis that he would pay not €3 million but rather US$3million for 6,000 km for testing during 2007 and that they expressly agreed that the amount of testing was on the basis that Mr Van der Garde would obtain a Super Licence and would be Spyker's Friday test driver. In other words, so submitted Mr Starr, Dr Kolles was asserting a prior oral agreement, albeit on terms disputed by the Claimants.

21. Mr Davies in response disavowed any assertion of a legally binding oral agreement on 1 February and appeared to accept that Dr Kolles' evidence in his witness statement as to what was allegedly agreed orally was inadmissible, with the proviso that the reference to an agreement at the meeting that Mr Van der Garde would pay $3million was admissible as showing that there had been a change from the €3million agreed on the telephone and that that change had been justified by Mr Boekhoorn by reference to an unsigned copy of the Super Aguri variation agreement which he produced at the meeting which indicated that Super Aguri were prepared to accept $3million to allow Mr Van der Garde to be a driver. The logic of this proviso was not apparent to me since if what was informally agreed on 1 February 2007 was mere negotiation and thus in itself inadmissible it did not seem to me that evidence as to how and why that informal agreement had changed from a prior informal agreement on the telephone could for that reason become admissible. It would all be caught up in the general rule against the admissibility of pre-contractual negotiations.

22. Mr Starr submitted that if there was a legally binding oral agreement on 1 February 2007 evidence in relation to it would be admissible on the basis of authority that evidence of prior contracts as distinct from evidence as to negotiations is admissible. Based on what he anticipated would be Mr Muller's evidence he said that it was the Claimants' case, following exchange of witness statements, albeit unpleaded, that there was a prior oral agreement on 1 February 2007and therefore that if and to the extent that that was going to be Mr Muller's oral testimony it would be admissible and he should be allowed to give it. In those circumstances Mr Davies did not object to evidence being led from Mr Muller on this topic de bene esse, that is to say subject to his right to argue subsequently that part or parts of his evidence might be inadmissible. I will return to questions of admissibility below.

23. I have already referred to the part of Dr Kolles' witness statement in which he dealt with the 1 February 2007 discussions. In addition in that witness statement he said that he had spoken to Mr Muller in 2006 about the possibility of contracting Mr Van der Garde as a test driver. He had known Mr Van der Garde from running his Formula 3 Euro Series teams as he had taken part in the same series for three seasons. He knew that he was financially backed by his girlfriend's father, Mr Boekhoorn, a

wealthy Dutch businessman. They had not proceeded in 2006 and Dr Kolles had heard that Mr Van der Garde signed a Testing Agreement with Super Aguri. On about1 February 2007 he was contacted by Mr Boekhoorn who told him that Mr Van der Garde had had a test contract with Super Aguri for 2007 but that the contract had been terminated and he was interested in testing for Spyker. When they met at Innsbruck he again asked Mr Boekhoorn for confirmation that the contract with Super Aguri had been terminated and Mr Boekhoorn confirmed that it had. They then discussed the terms on which Mr Van der Garde would enter into a test agreement with Spyker. Dr Kolles stated that he explained to Mr Boekhoorn at the meeting that to get a Super Licence you need to show a certain level of results, drive a Formula One car for 300km and then the FIA would decide whether or not to grant the Licence. He did not guarantee that Mr Van der Garde would get a Super Licence. The meeting lasted approximately three hours.

24. Mr Boekhoorn did not give evidence at trial. Mr Van der Garde gave some hearsay evidence as to what he was told by Mr Boekhoorn on the phone as to the discussion but the only direct oral testimony as to what was said came from Dr Kolles and Mr Muller. Although they agreed on some points there were significant differences between their accounts of what was said and agreed.

25. Mr Muller said that Mr Boekhoorn explained that he had an interest in having his son-in-law continue to build up a Formula One career, to which he responded that Spyker were very anxious to have paying test drivers drive for their team. They then entered into negotiations about kilometreage and price, the initial price asked by Spyker being €3million. During the discussions it became very clear that there was a potential problem with Friday testing and Dr Kolles explained very clearly to Mr Boekhoorn that it should not be assumed that the obtaining of a Super Licence would go without any problems in the light of the rather contentious way in which the relationship with Super Aguri had ended the day before. Dr Kolles further explained that even if that relationship had terminated properly the driver, in order to obtain a Super Licence, has to undergo vetting by the FIA and having regard to Mr Van der Garde's track record it was not super clear that he would get a Super Licence. His results were not very impressive and it was not as though they were dealing with a champion. Mr Muller recalled Dr Kolles giving an example of another driver who had just been refused a Super Licence because he was just not perceived to be at the level required to be driving a Formula One car in FIA events. He recalled Dr Kolles saying that that other driver had a better track record than Mr Van der Garde at the time.

26. There were thus two threats to Mr Van der Garde obtaining a Super Licence to drive for Spyker: the prior contract with Super Aguri and his less than impressive track record. As to the former it was explained to Mr Boekhoorn that if Super Aguri were later to argue that when they told Mr Van der Garde: "It's all over" they did not mean that the contract between Super Aguri and him was terminated and were instead to claim that that contract was still in full force and effect, there was a procedure which had to be gone through if Super Aguri had registered their contract with Mr Van der Garde with the FIA Contract Recognition Board. Dr Kolles told Mr Boekhoorn that any contract with Spyker would need to be registered with the Contract Recognition Board and they might find themselves in a difficult position if the Super Aguri contract had already been registered and if Super Aguri did not agree to it being terminated. According to Mr Muller it was made very clear to Mr Boekhoorn that it

was not a done deal to get a Super Licence for Mr Van der Garde. That led to a discussion about using best efforts. Mr Boekhoorn asked if Spyker could get Mr Van der Garde a Super Licence in response to which Dr Kolles was very explicit saying: "No I cannot guarantee you that I can get that done." He did, however, say that he knew the Team Principal of Super Aguri very well and that he would use his best efforts to try to come to a settlement with Super Aguri if the situation arose. He was confident that he would be in a position to get some sort of settlement with Super Aguri but there was no warranty. Mr Boekhoorn wanted a guarantee that Mr Van der Garde could get a Super Licence but Dr Kolles very clearly stated that he could not guarantee that.

27. Mr Muller said that the discussion then focused on kilometreage and it was agreed "that 6,000 kilometres should be feasible regardless of driving on Fridays in the event that there were no – when there was no Super Licence in place. So everybody was very conscious – even if there was no Super Licence to be obtained by Mr Van der Garde… it was agreed by the parties that there would be sufficient time in the year 2007 to drive 6,000 kilometres if he could not drive on the Wednesdays – Friday mornings. Q. There would be enough time? A. Yes, in the year, testing time, to achieve 6,000 kilometres. Q. Who said that? A. This was a subject between Dr Kolles, Mr Mol, and myself. It was a very simple calculation."

28. Mr Muller added that Spyker is established at Silverstone about 500 yards away from the Formula One track which was a location where many tests are conducted and one can easily drive without any impediments between 200 and 300 kilometres in a morning or an afternoon. This was openly discussed and nobody doubted that it was feasible.

29. There was then discussion about the price per kilometre. Initially there was reference to 500 euros per kilometre. Mr Boekhoorn said: "Well this is a dollar business"; so, in the end, the parties agreed on 6,000 kilometres at $500 per kilometre that is to say a 3million dollar contract rather than a 3million Euro contract.

30. Mr Muller pointed out, as was agreed to be the case, that very soon after the 1 February 2007 meeting the full $3million was paid. He said that it was very unusual to pay the entire sum in one go. He said there were two reasons for this. The first was that Spyker needed the money. The second was that there was no uncertainty about the 6,000 kilometres. The performance was a given. That is to say it was orally agreed there and then on 1 February 2007 that Mr Van der Garde would drive 6,000 kilometres with or without a Super Licence and regardless of driving on the Fridays because it was very uncertain whether he would be able to drive on the Fridays in view of the Super Licence problems. Even though potentially Mr Van der Garde might not be able to drive on the Fridays Mr Boekhoorn had no problem with paying the entire sum within two weeks because of the agreement that Mr Van der Garde would drive 6,000 kilometres. He hoped very strongly that Mr Van der Garde would be able to drive on the Fridays but Dr Kolles made very clear to him that that was not a done deal and it would be very difficult.

31. In cross-examination Mr Muller said that in the 1 February 2007 meeting Mr Boekhoorn told the Spyker representatives that the reason why Mr Van der Garde had been told to get out of the car at Valencia was that $3million had not been paid to Super Aguri. He was shown a paragraph in the defence in the Super Aguri action of

the Claimants in this action and Ms Boekhoorn, signed with a statement of truth by Mr Van der Garde and Ms Boekhoorn, in which it was denied that Mr Van der Garde contracted with Spyker on 1 February 2007 to provide his services as a reserve and test driver for the 2007 FIA World Championship season and admitted and averred that on that day Mr Boekhoorn acting on behalf and with the authority of Mr Van der Garde entered into a non-enforceable gentlemen's agreement with Spyker subject to contract that Mr Van der Garde would be a test driver for Spyker for the 2007 season. Mr Muller's response was that there had been an oral agreement in Innsbruck, that under Dutch law an oral agreement is binding and that in the perception of Mr Boekhoorn and Mr Muller and also he was sure in the perception of Dr Kolles and Mr Mol there was a binding agreement between the parties. "You asked me what I felt that we did that day and we made there and then the deal for Giedo to drive, an oral agreement on how he would be driving for us: the price, the kilometres, everything. …I think it was a legally binding agreement."

32. Mr Muller rejected Mr Davies' suggestion that Mr Boekhoorn did not negotiate mileage without taking into account the Super Licence. He said that Mr Boekhoorn wanted Mr Van der Garde to drive 6,000 kilometres. In an optimum situation whereby Spyker using its best efforts would get him a Super Licence those kilometres would be divided between Friday mornings and regular test sessions but both the oral contract and its later written confirmation saw very clearly that it could happen that Spyker would not be successful in getting a Super Licence for Mr Van der Garde in which case there would still be 6,000 kilometres to be driven. It was for that reason that Mr Boekhoorn agreed to pay the full sum in one go prior to the written contract being signed. "Why would he pay $3million two weeks after the oral agreement but two weeks prior to the written agreement if he was not sure about what had been agreed in Innsbruck among the four of us? He would be crazy to do that and not pay in instalments, but in one go which is very unusual. Q. It shows he was sure of? A. Of having a 6,000 kilometre deal." It was very important to Spyker to be paid in one go and that was agreed as part of the oral contract. It was an absolute condition for Spyker because it was in a very dire financial situation and needed the money.

33. At this point Mr Davies put to Mr Muller that he was giving lying evidence in a way designed to lead to the result that Mr Boekhoorn wanted because he was beholden to Mr Boekhoorn. Quite how it was alleged that Mr Muller was beholden to Mr Boekhoorn was not spelled out by Mr Davies. When he first made the suggestion he showed Mr Muller a press release dated 5 April 2007 announcing that Spyker Cars NV had issued approximately 375,000 shares to Boekhoorn M&A BV at a share price of 20 euros each representing 5.7% of the issued share capital of Spyker Cars. Those shares were currently trading at 4 euros per share. Mr Davies then referred to a document dated 25 July 2008 downloaded from a website called Onestopstrategy.com suggesting that Mr Muller had been fined $150,000 for insider trading by virtue of having emailed a bank in the middle of 2007 advising it not to sell shares in Spyker because a positive press release was shortly to be released. He put it to Mr Muller that the reference to the positive press release was to the April 2007 press release about the issue of shares to Mr Boekhoorn and that the bank to whom he disclosed the information was his own bank which was holding shares owned by him as security. Mr Muller said there was no connection to the positive press release referred to in the Onestopstrategy.com document, which was in fact related to €10 million to be invested by the government of Abu Dhabi in Spyker and that it had nothing to do with

Mr Boekhoorn. He also said that the document involved a mistranslation because he had not been fined. The Dutch equivalent of the SEC had intended to fine him but he had fought against that intention and won and the Dutch equivalent of the SEC was to re-decide the case. Mr Davies did not challenge those answers or adduce any evidence to suggest that they were wrong. I set out my findings on the credibility and reliability of the principal witnesses below in more detail but for present purposes record that I reject the allegation that Mr Muller was lying and tailoring his evidence to suit the interests of Mr Boekhoorn because he was beholden to him.

34. Mr Muller added that it was agreed at the meeting on 1 February 2007 that Spyker would do everything it could to get a Super Licence for Mr Van der Garde although Dr Kolles said he could not guarantee it. He said that Dr Kolles said during the 1 February meeting that he knew Mr Audetto of Super Aguri and had leverage on him. He would try to get Super Aguri "to agree to give this up" which I took to mean to waive any prior registration of the Super Aguri / Van der Garde contract with the Contract Recognition Board. He confirmed that in due course Dr Kolles tried to mediate between Super Aguri and Mr Boekhoorn resulting in Super Aguri making an offer to settle its claim for US$1.5million, an offer rejected by Mr Boekhoorn. Mr Muller confirmed that during the meeting Mr Boekhoorn spoke on the telephone to Mr Mollmann, who was at the time Mr Van der Garde's manager and who was frantically dealing with the Super Aguri situation.

35. The Defendant's case as put to Mr Muller by Mr Davies was that it was agreed between Mr Boekhoorn, Dr Kolles and the two other Spyker representatives at the 1 February 2007 meeting that the 6,000 kilometres included Friday morning test mileage and that the problem with Super Aguri was Mr Van der Garde's to solve.

36. As mentioned above in his witness statement Dr Kolles said that by the end of the meeting on 1 February 2007 Mr Boekhoorn and the Spyker representatives had agreed that Spyker would sign Mr Van der Garde on the basis that he would pay $3million for 6,000 kilometres of testing during 2007. He said that it was expressly agreed that the amount of testing was on the basis that Mr Van der Garde would obtain a Super Licence and would be Spyker's Friday test driver. He said that he explained to Mr Boekhoorn that to get a Super Licence you needed to show a certain level of results, drive an F1 car for 300 kilometres and then the FIA would decide whether or not to grant a Licence. He did not guarantee that Mr Van der Garde would get a Super Licence.

37. In his evidence in chief at trial Dr Kolles, having adopted the contents of his witness statement as part of his evidence, said that Mr Muller's evidence that when they met Mr Boekhoorn on 1 February in Innsbruck it was agreed that 6,000 kilometres would be irrespective of whether Mr Van der Garde got a Super Licence, was not true. Mr Boekhoorn was very enthusiastic and was pushing very hard to have Mr Van der Garde on the Fridays in the car and was pushing to have him race the last three Grands Prix races. Dr Kolles said that he made him aware that the first step was to get the Super Licence which he tried to explain would not be easy. When asked if he agreed a deal on 1 February 2007 Dr Kolles replied that they agreed in principle that they would do it for $3million on the basis that Mr Boekhoorn would get a written agreement. Mr Starr put to Dr Kolles Spyker's defence in the Super Aguri action to the allegation that on 1 February 2007 Mr Van der Garde contracted with Spyker to provide his services as a reserve and test driver for the 2007 FIA World

Championship season in breach of the Super Aguri agreement. In that defence Spyker admitted that it was agreed that Spyker would appoint Mr Van der Garde and contracted to provide his services as a reserve and test driver for the 2007 FIA World Championship season and averred that the contract was finalised on 28 February 2007. It was put to him that the word finalised meant that more terms were put into a written document but that there was already an agreement on 1 February. Dr Kolles' response was that for a $3million deal you needed a written agreement and that it was not Spyker's practice to make agreements for the value of $3million or for a substantial amount without any written understanding.

38. When it was put to him that Mr Boekhoorn paid the $3million on 13 February 2007, which Dr Kolles accepted, and that it appeared that the money was paid pursuant to an agreement of some kind on 1 February 2007 Dr Kolles said that Mr Van der Garde would not have driven one metre without a written agreement. That was not possible. When it was put to him that that was not true because Mr Van der Garde drove for Spyker on 19 February 2007 he accepted that that was the case but did not explain why in that case Spyker was prepared to allow Mr Van der Garde to drive if there was no prior oral agreement.

39. Dr Kolles made it plain that in his telephone conversation with Mr Boekhoorn prior to the meeting the agreement on a basic figure of €3million was not itself a binding agreement but merely Spyker agreeing that it could be feasible to reach an agreement for Mr Van der Garde to drive. He had said that for €3million they could find a solution. On the way to Innsbruck he had several telephone calls from Mr Muller asking when he would arrive because Mr Boekhoorn was putting on a lot of pressure. Spyker might lose the money and it had to try to get this money.

40. Dr Kolles said that when he arrived at Innsbruck the price was now $3million and not €3million and the price was not for 6,000 kilometres but for the Friday driving. Mr Boekhoorn's only intention was to have Mr Van der Garde driving the Fridays and he was offering more money to have him driving the last few races. Mr Boekhoorn was just interested in the Fridays so Dr Kolles told him that Friday driving is approximately 200 kilometres so that if you have 17 races that is approximately 3,400 to 3,500 kilometres and the rest is testing part of which was the 300 kilometres for the test for the Super Licence. Dr Kolles denied saying that he did not think it was likely that Mr Van der Garde would get a Super Licence but accepted that he said that it was not that easy. He asked Mr Boekhoorn a few times if the contract with Super Aguri had been terminated and Mr Boekhoorn confirmed a few times that it was. In answer to Dr Kolles' question why the price should come down from €3million to $3million Mr Boekhoorn took out a piece of paper written by Super Aguri saying that they would take Mr Van der Garde under contract for $3million. He wanted to show Dr Kolles that the previous agreement had been terminated and that no new agreement had been signed but that he would have the chance to sign a new agreement.

41. Contrary to Mr Muller's evidence, Dr Kolles denied that Spyker needed money at that time. He did not agree with Mr Muller's evidence that Spyker was perfectly happy to do a deal for 6,000 guaranteed kilometre. He said that the deal done and the intention from the beginning was not that Mr Van der Garde would drive 6,000 kilometres of testing. Rather the intention was that he would drive on Fridays in which case a mileage of 6,000 kilometres was achievable.

42. Dr Kolles was shown a letter dated 2 February 2007 addressed to him from Mr Audetto the Managing Director of Super Aguri which started: "We are surprised to note from your media statements issued within the last 24 hours that an agreement is purported to exist between you and the above named driver (Mr Van der Garde) or between you and a third party in respect of the services of the driver for the 2007 season." Dr Kolles denied having informed Super Aguri or the press or anybody as alleged in the letter. He assumed that the press had been informed by Mr Mollmann and Mr Johl that they were negotiating with Spyker because they were calling Mr Boekhoorn in Innsbruck telling him not to make any agreement with anybody "because this might cause trouble".

43. At the Innsbruck meeting he said that he raised with Mr Boekhoorn the point that to achieve a Super Licence a driver needed to do the 300 kilometres of mileage and to have results in the previous year. He had been assured by Mr Boekhoorn that that was not a problem because Mr Van der Garde had won races in the F3 series and that he did not see any problem in Mr Van der Garde achieving a Super Licence. He later accepted that before the written agreement the parties knew that poor performance might adversely affect Mr Van der Garde's chance of a Super Licence. The parties also knew that there might be a problem with the contract although Mr Boekhoorn had first said that it had been terminated and then that he would sort it out. Dr Kolles had told Mr Boekhoorn that in relation to the 300 kilometres required to get a Super Licence Mr Van der Garde had to be not the quickest driver on the track but in a certain range.

44. In re-examination Dr Kolles said that at the Innsbruck meeting he was asking Mr Boekhoorn if he was sure that the Super Aguri contract had been terminated. As proof of his assertion that the contract had been terminated Mr Boekhoorn showed him the unsigned US $3million offer of a contract thereby giving the impression that although Super Aguri had terminated the contract with Mr Van der Garde they wanted to reinstate it. The first Super Aguri contract had been for $10 million and now Super Aguri were offering Mr Van der Garde $3 million but he had said that he did not wish to sign with Super Aguri so that it was not signed and he was free to do whatever he wanted. I note in passing that if that had been said by Mr Boekhoorn it would appear to have been very misleading in that the other variation agreement dated 31 January 2007 between Prime and Super Aguri required Prime to pay US $7million to Super Aguri as a minimum sponsorship failing which Super Aguri were entitled to terminate the 30 November 2006 driver agreement which Giedo was explicitly confirming he would abide by.

45. Although Mr Van der Garde and the first Claimant of which he and Mr Boekhoorn were directors were parties to the 28 February 2007 agreements with Spyker, it was clear from his evidence that he had very little involvement in the business side of his career and contractual involvements first with Super Aguri and then with Spyker. In relation to Super Aguri he was content to leave negotiations with Prime who provided managerial services to him. In relation to the negotiations with Spyker he relied on Mr Boekhoorn who provided the funding for the second Claimant to pay the $3million agreed with Spyker. In addition to the fact that he was not present in Innsbruck, he was not directly involved in the negotiations with Spyker. As a young man of 23 his focus was on developing and improving his skills, ability and fitness as a racing driver.

46. Such evidence as he gave on the discussions with Spyker was hearsay based principally on conversations he had with Mr Boekhoorn.

47. In his first witness statement he referred to an agreement in principle with Spyker at the beginning of February 2007 that he would drive with them in 2007. He said that the fundamental point of paying Spyker the $3million on 28 February 2007 (in fact it was paid on 13 February 2007) was for him to secure 6,000 kilometres of driving in the Spyker car in the 2007 season. That was what the Service Agreement and the Fee Agreement were about. That was the only way to progress in motor racing. He hoped given his driving skill that good experience over a good amount of mileage would lead to a Formula one place for him. He stated that he clearly remembered a conversation with Mr Boekhoorn immediately before signing the deal for 6,000 kilometres about how much mileage he was prepared to fund for him. He told Mr Boekhoorn that Lewis Hamilton had had 10,000 kilometres of testing the year before. He stated that Mr Boekhoorn came back from discussions with Spyker and told him that he could get 6,000 kilometres for $3million and that he was prepared to fund that. He stated that he was very pleased since 6,000 kilometres is a lot of driving and would have been great for his Formula One chances. These latter two references on their face suggest that no oral agreement had been reached in Innsbruck on 1 February 2007.

48. In oral testimony at trial Mr Van der Garde said that having stepped out of the car in Valencia and been told by Super Aguri that "its over" he called Mr Mollmann and asked what's going on? Mr Mollmann confirmed what Super Aguri had told him saying "It's over. It's finished. There are some difficulties." Mr Van der Garde at some point told Mr Boekhoorn that it was finished and was over with Super Aguri.

49. In that conversation it was Mr Boekhoorn who suggested Spyker as a possible team because Mr Muller was a business friend of his and Spyker was getting into Formula One.

50. Mr Van der Garde confirmed that he was not party to any negotiations between Mr Boekhoorn, Mr Muller, Dr Kolles or anyone else in Innsbruck. He said that he had two telephone conversations with Mr Boekhoorn on the night of the Innsbruck meeting. It was in the first of those conversations that, Mr Boekhoorn having asked him what would be the best amount of mileage for testing, he told him about Lewis Hamilton having had 10,000 kilometres of testing the year before and that Mr Boekhoorn told him that there was a possibility of doing 6,000 kilometres. Mr Boekhoorn told him that he could arrange 6,000 kilometres. He said that he must have made a mistake in his witness statement in saying that this conversation took place immediately before the deal was signed. He confirmed that Mr Boekhoorn told him on the phone that he could arrange 6,000 kilometres for $3million and that he was prepared to fund that. Mr Boekhoorn did not tell him that the 6,000 kilometres depended on him getting a Super Licence. He just said that there were 6,000 kilometres available to test. He did not mention Friday test driving but said that there was a possibility of a chance to be a third driver.

51. In the first of the two conversations he said that he was talking to the Spyker people and asked Mr Van der Garde how many kilometres he needed for testing to which Mr Van der Garde responded by mentioning Lewis Hamilton's 10,000 kilometres. It was in the second telephone conversation that Mr Boekhoorn told him that he could

arrange 6,000 kilometres and mentioned a possibility of becoming the reserve driver. The second conversation was half an hour to an hour later then the first. Mr Boekhoorn made no mention of advertising space, sponsorship space or paddock passes in those conversations. Some time after what he described as the handshake deal made in Innsbruck and before the written agreement on 28 February 2007 Mr Boekhoorn told Mr Van der Garde that there was also a possibility of a Friday morning test session. That was probably a few days before he signed the written agreement. In the 1 February 2007 telephone conversations Mr Boekhoorn did not tell him that he had managed to get him 6,000 kilometres including Friday testing for US$3million. It was suggested by Mr Davies that it was implausible that having agreed 6,000 kilometres for US$3million Spyker would subsequently throw in Friday morning testing for nothing. However in my judgment the tenor of Mr Van der Garde's testimony was consistent with his evidence being that when Mr Boekhoorn told him a few days later that there was also a possibility to do Friday morning testing that he was elaborating on what had been discussed or agreed in Innsbruck rather than reporting a new development agreed after Innsbruck.

52. According to Mr Van der Garde Mr Boekhoorn did not tell him that he had spent some time discussing on 1 February 2007 with Mr Muller and Dr Kolles Friday mornings and Super Licences and what was required to get a Super Licence.

53. In the letter dated 2 February 2007 addressed to Dr Kolles referred to above Mr Audetto of Super Aguri advised Spyker that "as you will no doubt have been made aware" a contract which exclusively retained the services of Mr Van der Garde to Super Aguri for the 2007 season has been entered into on 30 November 2006. It alleged that the parties to any such agreement with Mr Van der Garde as had been referred to in Spyker media statements in respect of his services for the 2007 season were acting in breach of the terms of his contract with Super Aguri and warned that any actions on the part of Spyker which may have induced a breach of that contract by any party to it might be actionable and render Spyker liable to Super Aguri in damages as a result of the significant commercial loss sustained by Super Aguri. Super Aguri reserved its right to seek interlocutory relief and required Spyker to provide it with details of the dates and parties of any agreement by reason of which Spyker maintained an entitlement to Mr Van der Garde's services for the 2007 season together with details of when and between whom any discussions leading to any such arrangement took place. In the absence of a response to that request by close of business on 6 February Super Aguri would instruct its lawyers to apply to the courts for a declaration that any agreement with Spyker in respect of Mr Van der Garde's services was invalid and to take such action as it might be advised was appropriate with respect to any inducement made by Spyker to any third party to breach the terms of its contract with Mr Van der Garde.

54. On 6 February 2007 Dr Kolles replied by fax to Mr Audetto stating that Spyker had been clearly informed and advised by Mr Van der Garde and his lawyers that any agreement relating to his services with Super Aguri had been terminated and trusting that "we have no issue in this regard".

55. On 7 February 2007 Super Aguri's English solicitors, Slater Heelis Collier Littler followed up Mr Audetto's letter of 2 February with a further letter addressed to Dr Kolles. They referred to Super Aguri's agreement dated 30 November 2006 for the exclusive driving services of Mr Van der Garde and confirmed that it precluded any

arrangement of the type disclosed by Spyker's recent press releases and announcements concerning the relationship between Spyker and Mr Van der Garde. "You have previously been put on notice of this fact." The letter expressed concern that Spyker had entered into the purported arrangement for the services of Mr Van der Garde in the knowledge that he was under contract to Super Aguri and required Spyker to furnish the information requested by Super Aguri's letter dated 1 February 2007 (this must be a reference to Mr Audetto's letter dated 2 February 2007). It required the information to be delivered no later than close of business on 9 February 2007. Again failing the delivery of such information and confirmation of Spyker's acknowledgement of the validity of Super Aguri's claim to the exclusive services of Mr Van der Garde the letter threatened to seek declaratory relief from the courts and such other remedies as they might deem appropriate and to commence appropriate proceedings against Spyker in respect of any dealings relating to Mr Van der Garde's services. Such proceedings would be carried out without further notice to Spyker.

56. On 8 February 2007 Dr Kolles responded to that letter by fax attaching a copy of his faxed letter dated 6 February 2007 to Super Aguri and again stating that he trusted that there was no issue.

57. On 7 and 8 February 2007 there was an exchange of emails between Patrick Missling of Spyker and Philip van Wijngaarden, a lawyer acting for Mr Van der Garde and Mr Boekhoorn. Mr Missling who was a qualified German Lawyer was Spyker's corporate and business director. In the first email Mr van Wijngaarden said that having checked with Mr Boekhoorn and Mr Van der Garde they had one last remark with regard to the Spyker test driver agreement. They wished to make sure that a company called Trust would not be one of the three sponsors on the driver's helmet. Besides that he said that the agreement was OK and could be signed. Mr Missling replied confirming that Trust's logo would not be displayed on Mr Van der Garde's helmet and asked Mr Wijngaarden to send the signed contract to a faxed telephone number. Mr van Wijngaarden then raised "one last question about the contract. It does not mention how long Giedo will be allowed to drive during the Friday sessions. Is that a minimum of 90 minutes? Excuse me for my complete lack of knowledge about these kinds of things."

58. Mr Missling replied in an email dated 8 February 2007 in these terms: "Subject to the provisions in the draft Giedo will drive during the Friday morning sessions. It is not possible to predict times but as you know Giedo will run a minimum of 6,000 km. On another note I understand that Super Aguri involved lawyers now and a discussion was held between Colin [Kolles] and Bernie Ecclestone. As you know the driver's agreements will be lodged with the Contract Recognition Board. It is not in the parties' interest to have a dispute involving the Contract Recognition Board and therefore we ask you to add the following provision at the end of clause two:

> 'The driver and the company jointly and severally warrant and represent to Spyker that by entering into this agreement they will not be in breach of any existing or former terms of agreement, whether express or implied, or of any other obligation binding on the Driver and/or the Company. The Driver and the Company shall severally and jointly indemnify Spyker from any loss, costs (including but not limited to professional and lawyer's fees and/or fees in relation to the

> Contract Recognition Board), liabilities or claims suffered or incurred as a result of the Driver and the Company entering into this agreement, including Spyker's costs suffered or incurred as a result of Spyker lodging this agreement with the Contract Recognition Board.'

For your convenience I inserted this clause in the attached draft."

59. Mr Starr and Mr Davies relied on different parts of this email. Mr Davies relied on the first two sentences as supporting his submission that the 6,000 kilometres which Spyker agreed to provide were agreed to include driving in Friday morning sessions. Mr Starr relied on the rest of the email as showing that before the written agreements of 28 February 2007 were signed it was known to both parties that following the involvement of Super Aguri's lawyers there was a material risk that Super Aguri might challenge the validity of those agreements including by bringing legal proceedings and/or by seeking to obstruct Mr Van der Garde's application to the Contract Recognition Board for a Super Licence, without which he would not be allowed to take part in Friday morning sessions. The fact that Spyker regarded this risk as sufficiently serious to justify requiring an indemnity in the Service Agreement supported both Mr Muller's evidence as to what was agreed in Innsbruck and the construction of the Service Agreement for which Mr Starr contended. The uncertainty surrounding the ability of Mr Van der Garde to drive in Friday morning sessions made it implausible so he submitted that Mr Boekhoorn would have been prepared to agree to pay US$3million if the availability of the 6,000 kilometres which he wished to secure for Mr Van der Garde was subject to so significant an uncertainty. Moreover, as a matter of construction of clause 2 of the agreement, if Spyker's obligation to make 6,000 kilometres available was dependent on Mr Van der Garde being eligible to drive in Friday morning sessions, given the real possibility that he might not become so eligible there would in reality be no requirement on Spyker to provide a minimum of 6,000 kilometres. That would be contrary to the express language of clause 2.

60. In my judgment the first two sentences are inadmissible for the purpose of construing the Service Agreement. They are a classic example of either or both evidence of pre-contractual negotiations or the subjective interpretation or intention of one of the parties as to what is intended to be agreed in a written agreement or draft thereof. By contrast it seems to me that the fact that Spyker had expressed to the Claimants' concern that Super Aguri's involvement of lawyers might lead to difficulties with the Contract Recognition Board and thus, by implication, difficulties in Mr Van de Garde obtaining a Super Licence is admissible evidence of matters known to both parties prior to the signing of the written agreements of 28 February 2007 and is thus admissible as part of the factual matrix for the purpose of construing them.

61. Dr Kolles, who had said in his witness statement that he had heard that Mr Van der Garde had signed a testing agreement with another Formula One Team, accepted in evidence that he was aware at this point that Super Aguri were serious about their allegations of a prior registered contract. Although he sought to play down the significance of this by emphasising that he had got confirmation from Mr Boekhoorn and Mr Van der Garde's side that the contract had been terminated and by saying that it was not up to him to decide whether the contract had been validly terminated, he had to acknowledge that Super Aguri were disputing this. Moreover, it is clear from

Mr Missling's email dated 8 February 2007 that Spyker took the threat of legal proceedings and obstruction in the Contract Recognition Board sufficiently serious to justify a successful request for a contractual indemnity from Mr Van der Garde and the second Claimant. The same emerges from a passage in Mr Missling's witness statement in which he stated that having heard that Super Aguri were contesting Mr van Wijngaarden's assertion that the Super Aguri contract had been terminated, while he was not aware of any reason to disbelieve that the contract had been terminated he decided to include the indemnity clause in the Service Agreement to protect Spyker if there was any subsequent dispute.

62. On 12 February 2007, Super Aguri's solicitor sent a further faxed response to Dr Kolles' faxed letter of 6 February 2007:

> "If it is indeed the case that you were unaware of any contractual relationship between the Driver [Mr Van der Garde] and our client, you are now aware that such relationship exists, and it is not, as we understand has been claimed, that this agreement has been terminated. Rather it remains in force, and the Driver is considered to be in breach of his obligations under its terms.
>
> Super Aguri F1 Limited has registered its agreement for the services of the Driver with the Formula One Contract Recognition Board and any attempt by you to do likewise will give rise to the convening of a resolution hearing by the Board.
>
> Please now confirm that any arrangement between yourself and the Driver will now be regarded as ineffective and incapable of performance on the basis that the Driver's services were and remain exclusively contracted to Super Aguri F1 Limited. My client has no wish to be required to commence any form of restraining action if this matter can be dealt with by way of your undertaking in this respect. We look forward to hearing from you."

63. Dr Kolles accepted in the light of this letter that he was aware of the threat of litigation from Super Aguri before the 28 February Service Agreement was signed and that that litigation challenged Spyker's entitlement to use Mr Van der Garde on Fridays and in Grands Prix. He further confirmed that it was for that reason that Mr Missling, who he described as Spyker's in-house lawyer, asked for an indemnity. Dr Kolles confirmed in evidence that he had a discussion with Mr Ecclestone in which he told him that Spyker had an issue with Mr Van der Garde's Super Aguri contract and with his Super Licence and asked for his help. However Mr Ecclestone gave no promises. Dr Kolles said that he was a realistic person and that his discussion with Mr Ecclestone was just a step in the process to achieve a Super Licence for Mr Van der Garde.

64. There was no evidence of any response by Dr Kolles to this letter and the Super Aguri threat was thus left hanging in the air by the time the Service Agreement was signed on 28 February 2007 .

65. The reference in the 12 February 2007 letter from Super Aguri's solicitors to the convening of a resolution hearing by the Contract Recognition Board was to the mechanism for resolving disputes between Formula One Teams in the case of more than one application for a Super Licence in respect of the same Driver. That mechanism was to be found in schedule 11 to the 1997 Concorde Agreement to which Formula One Teams were parties. Under that agreement contracts for the services of Formula One drivers were required to be registered with the Contract Recognition Board. Clause 7.1 of Schedule 11 provided that where contracts were concluded for services of the same driver in respect of the same period of time the question as to priority between such contracts should be exclusively, finally and conclusively determined by the Contract Recognition Board as set out in clause 7. Under clause 7.11 in making its decision the Board was required first to determine the question as to whether under the proper law of the contract applicable to the contracts concerned one or more of them was null and void, had been validly terminated in accordance with its terms or had expired. If the Board determined that one or more of the contracts was not null and void, had not been validly terminated or had not expired then such contract or contracts were to be considered valid and in force. Clause 7.13 provided that if the Board determined that more than one contract was still valid and in force then the contract whose date of registration was the earliest should be the prevailing contract regardless of any provision of any law whatsoever. Under clause 7.12 if the Board determined that only one contract was still valid and in force then that contract was to be the prevailing contract.

66. Clause 10.1 of Schedule 11 required that every contract relating in any way to the participation of a driver or reserve driver in a Grand Prix season should contain a clause in the terms set out in Schedule III thereto whereby the parties agreed with each other to respect the terms of Schedule 11 and in particular Clause 7 thereof and to submit to the exclusive jurisdiction of the Contract Recognition Board with respect to matters to be determined by it pursuant to Clause 7. In due course the clause appearing in schedule III was incorporated into the Service Agreement as Clause 12.1. Clause 10.3 of schedule 11 provided that if existing contracts which had been the subject of registration were concluded for the services of the same driver in respect of the same period of time the contract which should take priority as between such existing contracts and which should be the only contract which should be recognised for the purposes of confirmation should be that whose date of execution was the earliest.

67. The effect of these provisions in my judgment was that absent agreement between Super Aguri, Spyker and Mr Van der Garde, Mr Van der Garde's ability to obtain a Super Licence was vulnerable to a finding by the Contract Recognition Board that the 30 November 2006 Super Aguri contract had not been validly terminated. Dr Kolles in cross examination claimed that before the Service Agreement dated 28 February 2007 was signed he was 100% sure that Mr Van der Garde would get a Super Licence. When challenged as to how that could be the case given his knowledge that Super Aguri claimed to have a valid contract with a prior registration which would bar Mr Van der Garde from a Super Licence for Spyker, Dr Kolles agreed that he knew that Super Aguri claimed to have prior registration which would bar Mr Van der Garde from a Super Licence for Spyker but said that he was not aware of the facts. Despite that answer he justified his 100% certainty that Mr Van der Garde would get a Super Licence by saying that it was his view before the contract was signed that

Super Aguri's claim was a bad claim. In my judgment that answer was wholly incredible and I do not accept that it represented Dr Kolles' state of mind at the time. He had no independent basis for knowing where the truth lay as between the competing assertion of Mr Boekhoorn and Super Aguri and his answer was in my view inconsistent with the contemporary evidence, itself confirmed both by Dr Kolles and Mr Missling in oral testimony, that the indemnity which Spyker sought to include in the Service Agreement was prompted by their concerns induced by the Super Aguri correspondence asserting that the Super Aguri contract remained live and valid. It is also inconsistent with Dr Kolles' evidence that Spyker were getting a little bit nervous to ensure that they were indemnified and inconsistent with both the fact of his approach to Mr Ecclestone and the non-committal nature of Mr Ecclestone's response. Further it is clear from Mr Missling's email dated 8 February 2007 that the Claimants as well as Spyker were aware of the need to register the completed Service Agreement with the Contract Recognition Board. They were also aware by that email, if not before, that there was a risk of dispute by Super Aguri at the CRB and that it was a risk taken seriously enough by Spyker to insist on an indemnity for any loss incurred by lodging the Service Agreement with the CRB and a warranty that the Service Agreement would not place the Claimants in breach of any prior agreement, a plain reference in the contract to the Super Aguri agreement.

68. From the point of view of relevance and admissibility it seems to me that evidence that the vulnerability of Mr Van der Garde's ability to obtain a Super Licence to a dispute with Super Aguri either in the Contract Recognition Board or in litigation was known to the claimants and Spyker prior to the signing of the 28 February Agreements is admissible as part of the factual matrix for the purpose of construing the written agreements. Evidence of Dr Kolles' subjective state of mind and intentions is not in itself admissible for that purpose but the fact that he gave evidence which was in my view incredible and calculated to advance Spyker's case is in my view relevant to his overall credibility as a witness.

69. On 9 February 2007 Spyker sent Mr Van der Garde a schedule headed "Spyker F1 Team 2007 Race and Test Schedule as of 9/02/07". The schedule was sent to various addressees including Mr Van der Garde by Spyker's chief race and test engineer Dominic Harlow under cover of a letter which described it as "Issue 5 of the 2007 Spyker F1 Team Race and Test Schedule", referred to updates and said that race driver chassis allocations and testing had been updated, that test drivers had been added for Valencia and that further updates would follow in due course. The schedule set out marked red the 17 Grand Prix races for the 2007 season starting with Australia on 16 to 18 March and ending with Brazil on 19 to 21 October. It included test sessions marked green at various dates throughout the year and other test sessions marked pink which Dr Kolles, in evidence, described as shakedown tests in which the scope for test driving was lower in terms of kilometres than non-shakedown test sessions. It was Spyker's case that this schedule supported the construction of Clause 2 of the Service Agreement for which it contended. Spyker submitted that it showed that the only way in which it would be possible for Mr Van der Garde to drive 6,000 kilometres in the 2007 season would be if he drove in Friday morning sessions at the Grand Prix race meetings. Question marks were inserted on one of the three driver entries for the Friday sessions on the 17 Grand Prix entries on the schedule. Some but not all of the pink and green sessions had question marks entered in a driver column.

The initials VDG for Mr Van der Garde appeared only once in the entry for 19 February in the two car test session for Valencia.

70. In *Prenn v Simmonds* [1971] 1 WLR 1381 Lord Wilberforce held that for the purpose of construing a written agreement evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract including evidence of the "genesis" and objectively the "aim" of the transaction. Spyker relied on this authority to pray in aid the 9 February 2007 schedule as evidence known to both parties prior to the agreement being signed which objectively construed showed that it would not be possible for Mr Van der Garde to drive 6,000 kilometres in the 2007 season unless he drove in some or all of the Friday morning sessions.

71. In my judgment there are a number of fallacies in that submission. First it does not seem to me that the schedule demonstrates what Spyker submitted it shows. Dr Kolles and Mr Davies accepted that it would have been possible for Mr Van der Garde to drive 6,000 kilometres even without driving on the Friday morning sessions if the schedule had been changed so that Mr Van der Garde drove in the green and pink testing and shakedown sessions in place of drivers whose initials were inscribed in the schedule. There is no suggestion that either Mr Boekhoorn or Mr Van der Garde had any knowledge of the contractual arrangements between Spyker and its other existing drivers and in particular whether Spyker was contractually obliged to provide them with non-Friday test driving and if so how much. There is no reason why it should be assumed that Mr Van der Garde and Mr Boekhoorn are to be taken as having known that the schedule was set in stone. On the contrary the covering letter made it plain that it would be one of a number of schedules, the inference being that they were subject to change.

72. In relation to the 9 February 2007 schedule Dr Kolles accepted that it was only a provisional schedule and that, where certain drivers' names appeared in certain slots, those were only provisional entries. Dr Kolles accepted that where slots on non-Grand Prix Friday testing sessions were not yet allocated and had a question mark in them, those slots could have been given to Mr Van der Garde. The only provisos were Mr Van der Garde's availability and any competing contractual requirements that Spyker had with other drivers. However, in relation to the latter point, Dr Kolles accepted that Mr Van der Garde did not know about Spyker's agreement with other drivers or what their terms were. Indeed Dr Kolles confirmed that as at 9 February 2007 he did not think that Spyker's Head of Racing and Testing was aware that Spyker was going to sign a contract with Mr Van der Garde. The implication I took to be that it was the Head of Racing and Testing who had prepared the schedule. The point, however, goes considerably further. So far as Mr Van der Garde and Mr Boekhoorn were concerned, there is no evidence that they were told or given to believe that the names of other drivers entered in the non-Friday morning testing slots in the 9 February 2007 schedule could not be altered so as to be replaced by Mr Van der Garde if necessary for the purpose of providing him with 6,000 kilometres on non-Friday morning test sessions.

73. Second, Mr Muller's evidence, which I accept, was that, Dr Kolles having very clearly told Mr Boekhoorn in Innsbruck on 1 February 2007 that he could not guarantee that Mr Van der Garde would get a Super Licence, it was agreed that 6,000 kilometres should be feasible regardless of Friday morning session driving even if there was no Super Licence in place. It was agreed by the parties that there would be

sufficient time in the year 2007 to drive 6,000 kilometres if Mr Van der Garde could not drive on Friday mornings. This was discussed between Dr Kolles, Mr Mol and Mr Muller. According to Mr Muller it was a very simple calculation which included the fact that Spyker is established at Silverstone, about 500 yards from the Formula One track, and that one can easily drive between 200 and 300 kilometres in a morning or an afternoon so that nobody doubted that it was feasible. This was discussed at the meeting. In my judgment, even if there was no prior oral agreement reached on 1 February 2007, that evidence is admissible for the purpose of construing the Service Agreement as rebutting any inference that might otherwise be capable of being drawn from the 9 February 2007 schedule that the parties knew that 6,000 kilometres was only achievable if Friday morning sessions were included and thus that they cannot be taken to have intended to agree that Spyker should make 6,000 kilometres available even without Friday morning sessions since that would have been, to their knowledge impossible. Although Dr Kolles said in evidence that testing sessions had to be fixed long in advance because of the need to have emergency medical facilities available so that it could not be assumed that Mr Van der Garde could simply have test sessions at Silverstone on short notice, there is no evidence that this, if true, was known to Mr Van der Garde and/or Mr Boekhoorn before the agreement was signed.

74. Third, in my judgment, the proposition that it was impossible for Spyker to provide 6,000 kilometres of testing without Friday morning sessions, and that their ability to do so was dependent on Mr Van der Garde being eligible to drive in Friday morning sessions, let alone that this was known to both parties, is inconsistent with Dr Kolles' statement to Mr Boekhoorn in his letter dated 23 August 2007:

> "Giedo drove 1261 kilometres so far and I will take care that he will drive a lot of mileage to complete 6,000 kilometres (we reserve our right to deduct 1500 kilometres he would have driven if we would have had his full co-operation). However, I am not sure whether he is still committed to the team ..."

This statement was a response to Mr Boekhoorn's allegation in his faxed letter dated 21 August 2007 that Spyker was in breach of contract, having agreed that Mr Van der Garde would get at least 6,000 testing kilometres during the 2007 Formula One Season because he had not yet driven even 1,000 kilometres. Mr Boekhoorn had asked to be informed within three days how Spyker was going to fulfil its duties towards Mr Van der Garde and said he would like to receive a testing schedule plus a driver development programme for Mr Van der Garde until the end of 2007. When asked about this response in the 23 August 2007 letter in cross-examination, Dr Kolles was evasive. Despite confirming that he was not expecting Mr Van der Garde to get a Super Licence before October, by which time there were only two Grand Prix races left, he denied that when he wrote that he would "take care that Mr Van der Garde would drive a lot of mileage to complete 6,000 kilometres", he meant that he would complete it whether or not he had a Super Licence. He even denied that he was not making his promise to enable Mr Van der Garde to complete 6,000 kilometres conditional upon him having a Super Licence, even though there is nothing in the language of the letter to suggest any such condition. He also denied that he was promising to enable Mr Van der Garde to complete 6,000 kilometres by the end of 2007, even though that was the requirement in clause 2 of the Service Agreement as emphasised by Mr Boekhoorn in the letter dated 21 August 2007 to which he was

responding. I formed the clear view that Dr Kolles was deliberately straining to avoid accepting the natural and obvious interpretation of what he had written in his letter dated 23 August 2007 because he understood full well that it was inconsistent with Spyker's case and wholly supportive of the Claimants' case. I do not accept Dr Kolles' evidence in relation to that letter. Quite apart from the fact that if Dr Kolles had genuinely believed that Spyker's obligation to provide 6,000 kilometres was dependent on Mr Van der Garde being able to take part in Friday morning sessions, there is no obvious rational explanation for why he did not say so, if it had really been the position that it was impossible for Mr Van der Garde to drive 6,000 kilometres without participating in Friday morning sessions and that this was known to both parties at the time of the agreement, it is in my judgment inconceivable that Dr Kolles would not have said so in his letter dated 23 August 2007, not least because 11 of the Grand Prix Friday morning sessions had already passed and the 12th was the following day in Turkey. In my judgment Dr Kolles' letter is the strongest possible evidence that it was not impossible to drive 6,000 kilometres without Friday morning sessions, that it was not known to the parties prior to 28 February agreements that it would be impossible to do so and that the parties did not consider that they were contracting on that basis.

75. On 12 February 2007 Spyker sent an invoice for US$3million to the second Claimant and on 13 February 2007 the second Claimant sent US$3million to Spyker. On 18 February 2007 Mr Van der Garde signed an application for a 2007 Formula One World Championship FIA Super Licence to drive for Spyker. In it he confirmed that he was contractually committed to drive exclusively for Spyker in the 2007 FIA Formula One World Championship. This was, of course, 10 days before the Service Agreement and Fee Agreement were signed. On 26 February 2007 a copy of the Super Licence application form was sent to Ian Brown of the FIA by Ian Phillips of Spyker. This was two days before the Service Agreement was signed. On 27 February 2007, Dr Kolles sent Mr Van der Garde a confirmation of a bank transfer from Spyker to Mr Van der Garde for US$10,000, it is to be inferred as an initial instalment in the US$60,000 Management fee which Spyker agreed to pay to the second Claimant in the Fee Agreement dated 28 February 2007.

76. On 19 February 2007 Mr Van der Garde took part in a test at Valencia and drove 343 kilometres. Spyker had arranged for an FIA observer to be present to certify that Mr Van der Garde had driven at least 300 kilometres and to record the lap times. Under Article 5 of Chapter 1 of the International Sporting Code, a driver had to satisfy at least one of a number of requirements in order to obtain an FIA Super Licence. The requirements set out in 5.1 (a) to (f) involved either a minimum number of races or test drives for a Formula One team, having been classified in the first three of various inferior racing championships or being the current champion in one of a number of other championships. The requirement in 5.1.2(h) was that the driver had:

> "to be judged by the FIA to have consistently demonstrated outstanding ability in single-seater formula cars, but with no opportunity to qualify under any of (d) to (g) above. In this case the F1 team concerned must show that the applicant has driven at least 300 kilometres in a current Formula One car consistently at racing speeds over a maximum period of two days, completed not more than 90 days prior to the application

> and certified by the ASN of the country in which the test took place."

77. Article 5.2 required the completed application to be received by the FIA at least 14 days before scrutineering for the first FIA Formula One World Championship event in which the candidate was to compete. The ASN which issued the driver's current competition Licence had to submit to the FIA a specific recommendation, accompanied by the driver's record of results and current international A Licence number. The driver had to submit a completed Super Licence application form to the FIA and the annual Super Licence fee had to be paid to the FIA. Article 5.3.3 provided that a driver accepted under 5.1.2(h) would be on probation for a period of 12 months during which the Super Licence would be held provisionally and subject to review at any time.

78. In evidence Dr Kolles said that Mr Van der Garde drove at an appropriate speed in front of an FIA assessor for over 300 kilometres in the Valencia test. Dr Kolles then gave evidence which was hard to follow as to whether, by the end of February 2007, Mr Van der Garde's driving was not a bar to his obtaining a Super Licence. At one stage he said that the FIA still retained a discretion to withhold a Super Licence. Subsequently he said that his understanding was that if, as happened, Mr Van der Garde passed the 300 kilometres test then under 5.1.2 (h) (it subsequently changed to 5.1.2(g)) that entitled him to a Licence. However, he then qualified that evidence by saying that at around 22 March 2007, by which time the FIA had been sent Mr Van der Garde's previous racing results which were somewhat poor, although officially bad results would not disqualify him from getting a Super Licence, unofficially Spyker had been told that there would be a problem. That was communicated to Ian Phillips by Ian Brown. I have already referred to Dr Kolles' evidence that prior to the agreement between the parties it was known to both parties that poor performance might affect Mr Van der Garde's chance of a Super Licence. However, by that Dr Kolles appeared to be referring to the requirement, about which he told Mr Boekhoorn, to pass the 300 kilometre test by being within a certain range. He did not tell Mr Boekhoorn anything else about performance requirements other than the 300 kilometres test. In due course he said that Mr Van der Garde passed the test although he did not get a specific answer from the FIA in that respect. At some subsequent time after the agreement was entered in to he said that the rules were changed at the insistence of Mr Max Moseley so that passing the 300 kilometres test was not a sufficient condition for getting a Super Licence because Mr Moseley was concerned about the safety aspects of allowing people like Mr Van der Garde to get a Super Licence.

79. On 28 February 2007 the Claimants and Spyker sent a copy of the Services Agreement to the Contract Recognition Board. Also on 28 February 2007, Ian Phillips of Spyker sent Ian Brown of the FIA the signed reports of the FIA observer in relation to the Valencia tests carried out by Mr Van der Garde and Adrian Valles and Fairuz Fauzy, two other drivers with whom Spyker had a relationship. On 7 March 2007 Mr Phillips wrote to Mr Brown asking when Spyker might hear about the Super Licence applications for Messrs Winkelhock, Fauzy and Van der Garde. Mr Brown replied by email on the same day indicating that Mr Winkelhock's Super Licence had been approved, the FIA was awaiting career resumes for Mr Fauzy and that he had

received no career results at all to date for Mr Van der Garde. The FIA also needed originals of the application forms for all three.

80. On 8 March 2007 Mr André Slotboom, the General Manager of the KNAF, the Dutch Racing Licensing Authority, sent Mr Brown Mr Van der Garde's career racing results from 2000 to 2007. On 13 March Mr Slotboom wrote to Mr Brown of the FIA saying that Spyker had planned to let Mr Van der Garde participate in the practice of the Grand Prix in Australia and were asking the KNAF when they could expect a decision from the FIA for Mr Van der Garde's Licence and asking if he could inform him. By email on the same date Mr Brown replied saying that Mr Van der Garde's application for a Super Licence had not been received in time for the Australian Grand Prix. He referred to Article 5.1.3(h) which required the application to be received at least 14 days before the first event in which the candidate was to compete. He added:

> "In order to put it to the vote of the F1 Bureau we also await confirmation of the agreement to drive for Spyker."

On 22 March 2007 Mr Phillips forwarded Mr Brown's response to Dr Kolles explaining that:

> "The final sentence refers to the fact that they are waiting for confirmation from the CRB that he has a valid agreement to drive for Spyker."

81. Between 19 February 2007 and 7 December 2007 Mr Van der Garde, as was agreed between the parties, drove 2,004 kilometres in non-Friday morning test sessions as follows:

DATE	CIRCUIT	MILEAGE [km]	LAPS
19/02/2007	VALENCIA	343	86
27/02/2009	BARCELONA	19	4
30/04/2007	BARCELONA	172	37
19/06/2007	SILVERSTONE	144	28
21/06/2007	SILVERSTONE	26	5
10/07/2007	SPA	370	53
25/07/2007	STOWE	188	150
13/11/2007	BARCELONA	391	84
07/12/2007	JEREZ	351	81
	TOTAL	2004	528

82. Dr Kolles accepted that, with the exception of Paul Ricard, Mr Van der Garde was invited by Spyker's Chief of Racing and Testing to drive only in the non-Grand Prix tests in which he actually drove. That is to say that he was not invited to any of the other non-Friday morning test sessions in the 9 February 2007 schedule and the subsequent updates thereto. He also accepted that there was nothing to stop Mr Van der Garde driving, for example, in the Barcelona non-Friday morning two-day test session other than Spyker's agreements with other drivers, the existence and content of which were not known to Mr Van der Garde or Mr Boekhoorn before the Service Agreement was entered into.

83. On 8 May 2007 Mr Van der Garde sent Dr Kolles an email confirming that he would not be testing in Paul Ricard the following week because he wanted to get really fit for his next race in Monaco, as his last two races had not been good and he needed to work really hard for Monaco. He said he also had the following week to test a kind of shakedown. Dr Kolles claimed that if Mr Van der Garde had driven at Paul Ricard he could have driven 1500 kilometres. This was denied by the Claimants.

84. On 14 August 2007 Super Aguri issued proceedings in the Chancery Division against the Claimants in this action, Prime and three of its Directors, Ms Boekhoorn and Spyker. In that action Super Aguri claimed damages in excess of US$10 million against Spyker, Ms Boekhoorn and the second Claimant in this action for inducing a breach of contract by Mr Van der Garde with Super Aguri. It alleged that Spyker acted with the intention of procuring the breach of Mr Van der Garde's contractual relations with Super Aguri and actively induced or procured that breach by engaging in a contract for Mr Van der Garde's services with "such speed" on 1 February 2007. It was Super Aguri's pleaded case that Spyker actively encouraged the breach of contract by Mr Van der Garde in the negotiations which preceded the alleged contract between them on 1 February 2007. Spyker was alleged to have known that Mr Van der Garde was contracted to Super Aguri, both because it was common knowledge and had been advertised within the Formula One Press and because Mr Van der Garde and his lawyers disclosed the existence of the contract. It alleged that Spyker made no attempt to satisfy itself of the merits of Super Aguri's contention that the Super Aguri contract was still alive by ascertaining from Mr Van der Garde and his lawyers how the alleged termination had come about or, if it did make such an attempt, Spyker should have realised that the argument that it had been terminated was specious in the extreme and unlikely to succeed. If Spyker had made contact with the FIA Contracts Recognition Board it would have discovered that Super Aguri's application to register Mr Van der Garde as its driver, pursuant to the November 2006 agreement, had been received and was in process of registration. In any event, from 2 February 2007 Super Aguri alleged that Spyker was aware that Super Aguri had a prior contract with Mr Van der Garde that had not been terminated and so, in continuing to engage Mr Van der Garde thereafter, Spyker was alleged to be liable to Super Aguri for procuring a continuing breach of contract by Mr Van der Garde of his contract with Super Aguri. Spyker's defence in that action was served on 11 October 2007.

85. On 21 August 2007 Mr Boekhoorn commenced a chain of correspondence with Dr Kolles complaining that Spyker had only provided 1,000 km to Mr Van der Garde to date and pressing Dr Kolles to come up with a plan as to how Spyker was going to fulfil its contractual obligation to provide 6,000 km. In the letter dated 21 August 2007, Mr Boekhoorn alleged that Spyker was in breach of the Service Agreement. He asserted that the parties had agreed that Mr Van der Garde would get at least 6,000 testing kilometres in the 2007 F1 season in the latest F1 Spyker car. So far he had not driven even 1,000km. He asserted that the Spyker team had also committed itself to preparing Mr Van der Garde as well as possible to become a Formula One racing driver in 2008. Nothing had happened. Beyond that:

> "Spyker F1 would solve the problems with Super Aguri. These problems have not yet been solved in a proper way. Same for the Super Licence."

Mr Boekhoorn asked Dr Kolles to let him know before 24 August how the team was going to fulfil the duties towards Mr Van der Garde.

> "We paid a lot of money in advance and we expect to be treated in a fair way. We like to receive a testing schedule plus a driver development programme for Giedo till the end of 2007 and we would prefer to see Giedo in the car as Friday tester/reserve driver as soon as possible during the final races of the 2007 F1 season".

It is noteworthy that whereas Mr Boekhoorn asserted that it had been agreed that Mr Van der Garde would get at least 6,000 testing kilometres during the 2007 season and that Spyker's breach of contract consisted of only having given him less than 1,000 km, he did not allege that it had been agreed that Spyker would provide Friday morning testing or that its failure to do so constituted a breach of contract. On the contrary, in referring to Mr Van der Garde's participation in future Friday morning testing, Mr Boekhoorn described this as a preference as distinct from a contractual entitlement.

86. In his reply, dated 23 August 2007, from which I have already quoted an extract, Dr Kolles wrote:

> "I refer to your fax of yesterday which surprised me quite a lot. Apparently you are not informed correctly. First of all, to reach a testing mileage of 6,000 km requires the full co-operation on the part of Giedo which we did not receive. On occasions, for instance with regards to the test in Paul Ricard in May 2007 he stayed away although I intended to involve him in the tests for at least two days which equals 1,500 km. For your convenience I attach Giedo's email in which he informs me about his absence from the test. Also be aware that the mileage depends upon his performance as for instance in the case of a crash his scheduled testing programme comes to an abrupt end. This happened during the test in Silverstone on 21 June 2007 which "cost" him at least 200 km of mileage.
>
> Giedo drove 1,261 km so far and I will take care that he will drive a lot of mileage to complete 6,000 km (we reserve our right to deduct 1,500 km he would have driven if we would have had his full co-operation). However, I am not sure whether he is still committed to the team as Clause 3.1 of the Service Agreement requires since I have just been informed that Giedo seems to talk in a negative way about us in the public and even worse to other potential test drivers. This is a serious matter which we will investigate further but be assured that this is not a professional attitude if this turns out to be confirmed. Giedo apparently complained that we would not provide him with enough new tyres and that our car is "crap" etc. Apart from the fact that Giedo is wrong here, Clause 3.3 of the Service Agreement clearly sets out that he shall do nothing to injure or bring into disrepute, ridicule or lessen the public

> reputation, goodwill or favourable image of Spyker F1 Team, its team personnel and/or any team sponsor.
>
> Similarly Giedo showed a lack of understanding regarding his commitment towards the team and our team sponsors when he was asked to attend a PR event in July in Barcelona of one of our sponsors (Quick) and bluntly informed us that he would not come since he would go to his 'new house in England (sic)'.
>
> I again attach the respective email correspondence for your confirmation.
>
> Also let me point out that in Sydney, during the race weekend in Australia, he requested four Paddock passes which he received but, instead of presenting himself as test driver and part of the team in the Paddock wearing the team clothing, he gave interviews in the Super Aguri hospitality area and disappeared with the passes.
>
> Rest assured that it is up to Giedo himself to co-operate with us in receiving a good preparation to become a good F1 race driver. We did and will do our part. This is also true with regards to the Super Licence which was not granted due to lack of performance by Giedo. I even recently suggested to Giedo to get involved in GP2 to eventually win a race and consequently obtain the Super Licence.
>
> As to the issue with Super Aguri, I clarify that this is entirely an issue to be resolved by Giedo and yourself. We just gave you assistance as per your request, resulting Super Aguri to make an offer for settlement in the amount of EUR 1.5 million. Since you rejected that proposal and offered EUR 500,000 instead, Super Aguri was fully put off and is now no longer prepared to settle for the initial amount but asks for at least EUR 2 million, as you know. The problem with Super Aguri is Giedo's and yours and we were asked to help, which we tried to do".

87. I have already drawn attention to the fact that it is, in my view, implicit in Dr Kolles' reply that it was possible between 23 August 2007 and the end of the year for Mr Van der Garde to drive a further 4,750 km or at least 3,250 km (given his reservation of the right to deduct 1,500 km which he said would have been driven if Mr Van der Garde had co-operated) even though on his own evidence no more than about 1,000 km would have been available in the Friday morning sessions of the remaining five Grands Prix. In reality of those five the one in Turkey, which was the following morning, was too late and Dr Kolles' evidence was that he had no reason to believe that Mr Van der Garde would get a Super Licence before October so that he could not have been taking into account the two September Grands Prix. That left the two Grands Prix in October which would, on Dr Kolles' evidence, yield no more than about 400 km. His reply to Mr Boekhoorn is thus in my view wholly inconsistent with the proposition that the ability of Spyker to provide 6,000 km was dependent on

Mr Van der Garde being able to participate in Friday morning sessions and with the proposition that this was known to both parties before the agreement.

88. It is also, in my view, significant that although Dr Kolles referred to the fact that Mr Van der Garde had not been granted a Super Licence, that fact is conspicuously absent from the list of factors cited by Dr Kolles as explaining and justifying Spyker's failure to provide more than 1261 km by the date of the letter. He cited the failure of Mr Van der Garde to attend at Paul Ricard, his crash at Silverstone and his general lack of commitment to, and derogatory remarks about, Spyker which he suggested might be a breach of Clauses 3.1 and 3.3 of the Service Agreement. Having consulted the terms of the Service Agreement, apparently in search of defences to the allegation of breach of contract, it is in my view striking that he did not assert that, as is now Spyker's case, the obligation to provide 6,000 km was dependent on Mr Van der Garde participating or at least using his best endeavours to enable himself to be eligible to participate in Friday morning sessions. It is also of note that he did not assert that Mr Van der Garde was in breach of contract by virtue of the fact that the Super Aguri contract was alleged by Super Aguri to have been still valid at the date of the Services Agreement or the fact that he was thereby prevented from obtaining a Super Licence due to prior registration of the Super Aguri contract.

89. Mr Boekhoorn replied by fax dated 3 September 2007. He stated:

> "Given the trust and good faith that I showed by wiring a very substantial amount to Spyker F1 even before Giedo's contract was signed, based on oral agreements, I was expecting a less defensive and more co-operative attitude from Spyker's side. I totally disagree with your statements and suggestion that it is because of Giedo's attitude that he drove a very limited number of kilometres so far. Giedo is as dedicated as can be to get on the track."

He said that he would phone Dr Kolles to discuss a solution and in the meantime asked Dr Kolles to prepare a testing schedule for Mr Van der Garde. There is more than a flavour in this letter of a belief on the part of Mr Boekhoorn that the February 2007 Agreement was indeed more of a gentleman's agreement, as asserted in Mr Van der Garde's defence in the Super Aguri action, than a binding legal agreement. Had it been the latter, the transfer of the US$3 million before the Service Agreement was signed, would not have been so obviously an act of trust and good faith.

90. On 29 October 2007 Mr Missling sent an email to Mr Van der Garde copied to Dr Kolles referring to the Super Aguri action against, among others, Spyker and the indemnity in Spyker's favour in respect of costs incurred as a result of Spyker entering into the Service Agreement. He attached an invoice from Spyker's solicitors, Fladgate, Fielder, for £250,000 plus VAT "for acting on your behalf in connection with the entirety of [the Super Aguri] matter payable on account", and asked one or other of the Claimants to settle the invoice within 7 days.

91. On 8 November 2007 Mr Knighton of Spyker emailed Mr Van der Garde telling him that, as Spyker's team name had now changed to Force India, they needed him to sign some new driver injury waivers before he drove in the Barcelona test session which was due to commence on 13 November 2007. He attached the waivers in case Mr

Van der Garde wanted to have them checked before he signed them and said he would have copies in Barcelona which he could sign. Copies of the three waivers signed by Mr Van der Garde, witnessed by Mr Lambiase, a Spyker engineer, and dated 12 November 2007, were produced at trial.

92. It was Spyker's case that on 13 November 2007 Mr Van der Garde, on his own behalf and on behalf of the first Claimant, signed in Barcelona a one-page agreement which it referred to in the pleadings and at trial as the Novation Agreement. Spyker alleged that, pursuant to the Novation Agreement, the Claimants agreed that Spyker's rights and obligations under the Service Agreement and the Fee Agreement be transferred to another company called Centurium Capital Limited so that the claimants had no cause of action against Spyker. In Spyker's Defence it was alleged that the reason why the Claimants entered into the Novation Agreement was because on 14 August 2007 Super Aguri had issued its claim against, among others, the Claimants and Spyker, claiming damages of up to US$10 million as a result of the parties entering into the Service Agreement and on 29 October 2007 Spyker had requested the Claimants to comply with their obligations in the Indemnity Clause in the Service Agreement by lodging £250,000 plus VAT in respect of Spyker's anticipated lawyer's fees in connection with the Super Aguri action. It was alleged that, having failed to comply with their obligations to transfer that sum pursuant to the Indemnity Clause, the Claimants instead agreed to and did enter into the Novation Agreement.

93. The alleged Novation Agreement, the parties to which were said to be the Claimants in this action (referred to in the agreement respectively as the Company and the Driver) and Force India Formula One Team Limited, was in the following terms:

> "1.1 Reference is made to the Service Agreement dated 28 February 2007 and the agreement dated of the same day [hereinafter collectively referred to as "the Agreements"].
>
> 1.2 The Driver and the Company hereby consent that FORCE INDIA assigns its rights and its obligations under the Agreements [hereinafter referred to as "Transfer of Agreement"] to Centurium Capital Limited (BVI company number 1436225) of 48 East Street, Bella Visia, Sucre Building P.O Box 6277, Panama 5, Panama. This Transfer of Agreement shall become effective on 30 December 2007. The parties agree that this Transfer of Agreement shall not inhibit FORCE INDIA to permit the Driver to drive the car in tests beyond the aforementioned date, especially in the context of an amicable settlement of any dispute, however FORCE INDIA shall have no liability anymore towards the Driver and/or the Company and Centurium Capital Limited shall be solely responsible and liable for any loss, costs, liabilities, damages or claims of the Driver and/or the Company. This shall not apply if death or personal injury is caused to the Driver by FORCE INDIA's negligence or wilful misconduct.
>
> 1.3 This agreement is entered by the Driver and the Company with due consideration of GBP1 payable by FORCE

> INDIA and the Driver and the Company hereby confirm the receipt of GBP1.
>
> 1.4 The interpretation, validity and performance of this agreement are governed by the laws of England and Wales. Any dispute relating hereto will be decided exclusively by the English courts."

94. There was a fundamental conflict of evidence between Dr Kolles and Mr Van der Garde in relation to the Novation Agreement. Dr Kolles in his Witness Statement said that when he arrived at the test in Barcelona on 13 November 2007 he had with him a document prepared by Mr Missling pursuant to which all the rights and obligations of the Claimants under the Service Agreement and the Fee Agreement were transferred to a BVI company called Centurium Capital Limited which he had previously incorporated but which was dormant. He stated that the reason for the Novation Agreement was the potential impact on the team of the Super Aguri action. He had become increasingly concerned by the tone of Mr Boekhoorn's comments and by Mr Van der Garde's attitude. He was also concerned that Mr Van der Garde had not complied with his contractual obligation to indemnify Force India in respect of the Super Aguri action. On the other hand he wanted to find a solution for Mr Van der Garde to be able to complete his testing, albeit that it would have to be done during 2008.

95. He stated that, during the course of 13 November 2007, he spoke to Mr Van der Garde and told him that he would have to speak to Mr Boekhoorn to find a compromise. He stated that Mr Van der Garde told him that he wanted to carry on testing, to which he replied that he would have to sign this piece of paper "because of the Super Aguri situation". He said he gave Mr Van der Garde the Novation Agreement in the Force India Hospitality Unit at the circuit where they were having their discussion. Mr Van der Garde took it away. They met again about two hours later in the Force India trailer. He again said that Mr Van der Garde had to sign the document "as we had a big problem with Super Aguri". He stated that he told Mr Van der Garde that Super Aguri had even threatened to sue him personally. He stated that Mr Van der Garde then signed the document and he witnessed Mr Van der Garde's signature. He stated that he made a copy of the document on the photocopier in the trailer, handed the original to Mr Van der Garde and retained the copy. After the test he stated that he returned to his home in Munich.

96. The only version of the alleged Novation Agreement adduced in evidence at trial was a copy with a fax header dated 16/11/2007 – 11.40, with the header name KODEWA. It purported to have been signed by Dr Kolles on behalf of Force India Formula One Team Limited and by Mr Van der Garde on his own behalf and on behalf of the second Claimant. There was no signature by Dr Kolles purporting to have witnessed the signature of Mr Van der Garde. In his Witness Statement Dr Kolles stated that after the test he returned to his home in Munich and that it appeared that he faxed the copy of the Agreement to someone, most likely Mr Missling, at Force India on 16 November 2007. The fax header "KODEWA" was the fax machine of his family company - KODEWA GmbH and Co KG in Germany.

97. The Claimants in their reply denied that they signed the Novation Agreement or that they had ever seen the original of it. Alternatively, they averred that if they did sign

the document they were misled into signing it. The only circumstances of which they were aware which might have been the occasion for the alleged Novation Agreement to be put before them for signature was the signing on 12 November 2007 by Mr Van der Garde of the three waivers referred to above. They were told on 12 November 2007 that the documents for signature were those three waivers.

98. In his first witness statement which he adopted in oral testimony Mr Van der Garde denied having signed the Novation Agreement. He stated that the first time he became aware of it was some time after his lawyers in Holland were sent it by email by Spyker in March 2008. His Dutch lawyers had been attempting to place a charge on Spyker's assets in order to protect his right to get compensation over Spyker's failure to fulfil its part of the Service Agreement. He stated that when his lawyers asked to see the original it was not provided. He stated that he had never seen any original or indeed any other documents relating to the alleged agreement. He denied having received any invitation to a meeting to discuss it and stated that he was not sent any letter, email or anything else sending him a draft or explaining the terms of the draft agreement or enclosing a copy for his or the second Claimant's records and nor had any of his advisers. He stated that on 13 November 2007 he was driving in Barcelona and he did not get out of his car dressed in his race suit to sign any agreement. He also denied that he or the Second Claimant received the £1 referred to in the Novation agreement as the consideration. He stated that he had never heard of Centurium Capital Limited and had never had a conversation with anyone at Spyker about them. He said it was not feasible that he would knowingly sign any rights away to Centurium particularly at a time when he was already concerned about the lack of testing which he had been doing.

99. He accepted that at the foot of the Novation agreement in the trial bundle was what appeared to be his signature on behalf of himself and the Second Claimant. It was the same as his signature. However he stated that he did not put it there and his guess was that it must have been copied onto the document from another copy of his signature which Spyker had. He also stated that on 12 November 2007 he signed three waivers relating to Force India, Bridgestone and Ferrari. They had been emailed to him before the meeting and he had read through them and discussed them with one of his advisers. When Mr Knighton gave them to him to sign at the Spyker office on 12 November he said: "These are the waivers can you sign them please?" To which he replied "These are the ones you sent me?" When Mr Knighton confirmed that they were he read them to make sure. They were the same as the waivers he had been sent by e-mail and so he signed them.

100. He rejected the suggestion that he felt under any pressure to pay the Fladgate Fielder invoice or to do a deal with Spyker to avoid paying it. It was far less than the value of the mileage which Spyker had failed to give him and in any event he and his advisers did not believe that Fladgate Fielder could have done £250,000 worth of work on proceedings which had only recently begun. He stated that in Spyker's allocation questionnaire in the Super Aguri proceedings on 1 November 2007 it showed that Spyker had in fact incurred fees of only £8,000 by that date to Fladgate Fielder. Given the size of Spyker's failure to grant him driving kilometreage the suggestion of a liability to Spyker under the indemnity in the Service Agreement was never and would never have been a motivation for him to sign away his rights against Spyker.

101. Since, as I have mentioned, Mr Davies on behalf of Spyker withdrew the Novation Agreement defence at the end of his closing oral submissions on liability (after I had asked some searching questions about it in the course of those submissions), it ceased to be a live issue between the parties requiring judicial determination. However there were a number of aspects of the evidence in relation to it which in my judgment throw some light on the attitude and reliability of witnesses whose evidence is or may be relevant to issues which do remain live between the parties.

102. There were in my judgment a number of features of Spyker's case on the Novation Agreement which were inherently implausible or unsatisfactory. On its face the Novation Agreement purported to assign the obligations of Spyker (by now renamed Force India Formula 1 Team Limited) to the Claimants under the Service and Fee Agreements to a BVI company with an address in Panama. It purported to extinguish Spyker's liability to the Claimants and replace it with liability on the part of the BVI company for damages of the Claimants. Indeed that was alleged to be the legal effect of the Novation Agreement by Spyker in its defence. This gives rise to a number of puzzling consequences. First Dr Kolles' evidence was that the reason for the Novation Agreement was the potential impact on the Spyker team of the Super Aguri action. In oral testimony he emphasised that its purpose was to protect Force India from the Super Aguri claim and not to protect it from the Claimants. He explicitly denied that the purpose was to relieve Spyker from liability to the Claimants in respect of their claim for kilometres not provided under the Service Agreement. That he said was definitely not the intention behind the Novation Agreement and it was a co-incidental side effect of the Novation Agreement that Spyker was able to raise it as a defence to the claims in this action.

103. There were at least two difficulties with that evidence. The first was that it was inconsistent with Spyker's main defence in this action, namely that the effect of the Novation Agreement was to do precisely what he denied was its purpose, namely to relieve Spyker from liability to the Claimants. The second is that there is nothing on the face of the Novation Agreement which purported to or could, in my view, reasonably be construed as protecting Spyker from any liability it had incurred to Super Aguri. In the Super Aguri action the claim for US$10million damages against Spyker was a claim for inducing breach of the 13 November 2006 Super Aguri agreement by the parties thereto. Spyker was unable to explain how such liability could be extinguished by a novation agreement between the Claimants and Spyker to which Super Aguri was not a party, and which contained no reference to and did not purport to assign to any third party any liability of Spyker to Super Aguri. Nor was it explained how the clause which purported to assign Spyker's obligations to the Claimants to the BVI company and declared that Spyker should have no further liability towards the Claimants and that the BVI company should be solely responsible for any damage of the Claimants could have the effect of protecting Spyker from any liability it might have had to Super Aguri. When it was put to Dr Kolles in cross-examination that the effect of the Novation Agreement was that Spyker was no longer a party to an agreement with Mr Van der Garde, he accepted that that could be the case but was wholly unable to explain the glaring disparity between what he claimed was the purpose of the agreement and its effect.

104. When asked if he believed that the Novation Agreement was effective to transfer away Spyker's responsibility to Mr Van der Garde, Dr Kolles said that he was not

thinking about that. Given the language used and the fact that he said that he had suggested to Mr Missling that they should find a solution as to how to protect Spyker from Super Aguri's claims and that he read the unsigned agreement after Mr Missling had drafted it, I found that evidence surprising. When asked what he thought the agreement meant when he read it his answer was:

> "To shift liabilities, but to be honest with you I still do not understand, you know, how you shift the liabilities and the whole claim of Super Aguri because I – to be honest I did not read the claim of Super Aguri so it was not for me to decide what is in the text of this Novation Agreement."

When asked how he thought the agreement transferred any liabilities Spyker may have had to Super Aguri when Super Aguri was not mentioned, he accepted that it was not mentioned but said that he asked Mr Missling to draft the agreement to protect Spyker and he trusted Mr Missling 100%.

105. Allied to this point is the fact that although Dr Kolles said that the idea of the Novation Agreement was his and that he was concerned to protect Spyker from liability to Super Aguri, he said in evidence that he could not remember what it was that suddenly made him think that it was very urgent to secure such protection by getting Mr Van der Garde to sign an agreement in Barcelona. This too I found surprising.

106. Mr Missling in his witness statement made no specific reference to the Novation Agreement. His evidence on this point was confined therein to the general confirmation that the contents of Dr Kolles' draft witness statement had been seen by him and were correct to the best of his knowledge and belief. In oral testimony he said that he had considered giving evidence about the Novation Agreement in his witness statement but did not explain why he had not done so. He said in oral evidence that he was the corporate and business director of Spyker and as part of that he took care as far as he could of legal matters as well as other matters. He also confirmed that he was a German lawyer. Despite having read Dr Kolles' witness statement Mr Missling said that he was not aware that the Novation Agreement was central to Spyker's case in this action and said he did not think the matter important enough to deal with specifically in his witness statement.

107. Mr Missling confirmed that when he became aware in 2008 that the Claimants were threatening legal action against Spyker in Holland he did not recall telling Spyker's lawyers that the Claimants had got the wrong people because Spyker was not liable as a result of the Novation Agreement. He said that he and Dr Kolles who had offices next to each other at Spyker's premises in Silverstone had a meeting in one of their offices on 12 November 2007. Dr Kolles he said was concerned about the Super Aguri claim. He told Mr Missling that Spyker should have something to fall back upon if something went wrong with that claim because it was a huge liability and the US$10million claim was a considerable amount. He mentioned that he owned the shares in a dormant BVI company and suggested that they should try to use that company to transfer the agreements which Spyker had with Mr Van der Garde. That was not consistent with Dr Kolles' evidence that when he drew up the Novation Agreement with Mr Missling there was no wish or intention to protect Spyker from a mileage claim from Mr Van der Garde. However Mr Missling agreed with Dr Kolles

that the purpose of the agreement was to protect Spyker in relation to Super Aguri. Dr Kolles' concern was about Super Aguri's US$10million claim. They were not expecting a claim from Mr Van der Garde, although he accepted that there was a dispute with Mr Van der Garde.

108. According to Mr Missling, Dr Kolles and he then had a brain storming session in which Dr Kolles had some input as well. Dr Kolles said "Why can we not transfer the agreements from Mr Van der Garde?" because his idea was, and Mr Missling confirmed, that the ground for Super Aguri's US$10million claim was Spyker's relationship with Mr Van der Garde. If Mr Van der Garde had not signed an agreement with Spyker there would be no claim by Super Aguri for US$10million. Dr Kolles told Mr Missling that he understood that the reason for Super Aguri's US$10million was the fact that there was an agreement in place between Spyker and the Claimants in this action. And Mr Missling confirmed that understating to Dr Kolles.

109. Mr Missling denied that the purpose of the document was to enable Spyker to get out of obligations to Mr Van der Garde for the remainder of 2007. When asked to explain how the Novation Agreement had the effect which he and Dr Kolles desired his answer was that if Super Aguri succeeded in their claim against Spyker, Spyker could refer to the Novation Agreement to argue that it no longer had any obligations rights or any other relationship with Mr Van der Garde and the Second Claimant so that in that context the basis of their claim no longer existed. Given that Mr Missling was a trained German lawyer and in charge of legal affairs for Spyker I found that an extraordinary answer. By the time Mr Missling drafted the Novation Agreement Super Aguri had already brought its action against Spyker in the Chancery Division claiming US$10million for inducing breach of its November 2006 agreement by virtue of having contracted with Mr Van der Garde for his services as a driver in February 2007. The proposition that such liability as might otherwise exist if that claim was well founded could be avoided by transferring as of the end of December 2007 Spyker's obligations to Mr Van der Garde under the Service Agreement to a BVI company and declaring that Spyker should have no liability anymore to Mr Van der Garde is in my judgment fanciful. This is all the more so given that Centurium Capital Limited was not a party to the draft agreement by which the mutual rights and obligations of the Claimants and Spyker were to be assigned to Centurium Capital Limited. When he was asked why there was no signature of Centurium Capital Limited on the document Mr Missling was forced to agree that that was a good question. The only substantive answer he could give was that it was all done in a rush because Dr Kolles had to go to a test in Spain the same day or the next day where he wanted to meet Mr Van der Garde. That answer did not of course address the substantive point.

110. The next puzzling aspect of Dr Kolles' evidence was that in his account of his meeting with Mr Van der Garde in Barcelona on 13 November 2007 there was no suggestion that Mr Van der Garde spoke to or consulted Mr Boekhoorn or his business manager before signing the document. Dr Kolles merely told Mr Van der Garde that he would have to sign it because of the Super Aguri situation and gave it to him in the Force India hospitality unit at the circuit where they were talking, Mr Van der Garde took it away and when they met two hours later in the Force India trailer he repeated to Mr Van der Garde that he had to sign the document as Spyker had a big

problem with Super Aguri, and told him that they had even threatened to sue him personally. At that according to him Mr Van der Garde signed the document and he witnessed his signature.

111. In oral testimony he said that he had a 15 minute discussion with Mr Van der Garde over lunch in the Spyker hospitality unit in between his morning and afternoon testing sessions. Having stepped out of the racing car and spoken to the engineers during the midday break Mr Van der Garde sat with Dr Kolles over lunch. At first they discussed Mr Van der Garde's desire to continue testing and Mr Boekhoorn's unwillingness to continue to support his motor sport career. Dr Kolles then gave the document to Mr Van der Garde saying that Force India needed it to protect the company against Super Aguri's US$10million claim. He also explained that Super Aguri was claiming US$10million against him personally.

> "So I gave him the paper and some time later we met in the trailer and then we signed the papers."

112. Asked if he told Mr Van der Garde what the document was or described it to him Dr Kolles answered that he just told him that the piece of paper protected Force India from the Super Aguri claim. Mr Van der Garde did not read the document whilst they were having lunch. After Dr Kolles told him he wanted him to sign it to protect Force India from claims by Super Aguri Mr Van der Garde said OK and took it. Dr Kolles said "Look at it, speak to who you want to speak or whatever. It would be nice if you could give me this." Dr Kolles then left the hospitality unit. About 1 hour or 1½ hours later they met in the Force India trailer. Dr Kolles asked him if he could sign it at which Mr Van der Garde took the document out from underneath his clothes and said "Yeah, I sign it" and then signed it. There was no other conversation about the piece of paper. Neither of them asked the other any questions about it.

113. This is in my view an inherently extremely implausible scenario. Mr Van der Garde was a 23-year-old Dutch racing driver whose first language was not English. The negotiations before and at Innsbruck had been conducted with Mr Boekhoorn, who was well known by Dr Kolles to be Mr Van der Garde's financial backer. E-mail correspondence leading up to the Service and Fee Agreements was between Mr Missling on behalf of Spyker and the lawyer acting for Mr Van der Garde and Mr Boekhoorn who made it clear that he checked points on the draft agreement with Mr Boekhoorn as well as Mr Van der Garde. The correspondence in August and September about the incomplete kilometreage was between Dr Kolles and Mr Boekhoorn and the 29 October 2007 demand that the Claimants settle the Fladgate Fielder invoice was sent by Mr Missling to Mr Van der Garde with a copy to Dr Kolles. It is in my view extremely unlikely that Mr Van der Garde would have knowingly signed the draft Novation Agreement without consulting either Mr Boekhoorn or his lawyers or his business advisers or some or all of them. This is particularly so if, as claimed by Dr Kolles, he had told him that he would have to sign it because of the Super Aguri situation and advised him to speak to whoever he wanted to speak to about it and that he would have to speak to Mr Boekhoorn to find a compromise.

114. Mr Missling said in evidence that he told Dr Kolles that he would not be surprised if Mr Van der Garde did not sign the draft Novation Agreement straightaway or if he contacted some of his people. Mr Van der Garde was by then himself a Defendant in

the Super Aguri action and the defence in that action of the Claimants in this action and on behalf of Mr Boekhoorn was settled by English counsel with an address for service at Addleshaw Goddard LLP and Statements of Truth signed by Mr Van der Garde, Ms Boekhoorn and, in the case of the Second Claimant, by Mr Wijngaarden, Mr Boekhoorn's Dutch lawyer, on behalf of Mr Boekhoorn. Told that the document was somehow intended to protect Force India from a US$10million claim from Super Aguri, the notion that Mr Van der Garde would have been prepared to sign a legal contract in English off his own bat without first discussing it with Mr Boekhoorn, his lawyers, or his business manager, thus disregarding Dr Kolles' advice to do so, is in my view wholly implausible. It is in marked contrast to Mr Van der Garde's evidence which I accept that when he received the three waivers from Mr Knighton in his email, dated 8 November 2007, "in case you want to have them checked before you sign", he forwarded them to Mr Schorthorst, who was then his business manager before signing them and that before he signed them Mr Schorthorst had reassured him that there would be standard waiver contracts for the new Force India team and that there was no problem in him signing them.

115. It is, of course, implicit in Mr Van der Garde's evidence in his witness statement which he confirmed in his oral testimony that he did not sign the Novation Agreement in Barcelona and indeed that he did not see Dr Kolles in Barcelona, and his evidence that he never saw the unsigned Novation Agreement, that he did not discuss its contents with Mr Boekhoorn, Mr Schorthorst or their lawyers. Moreover, the inference that he did not consult any of those people about the Novation Agreement is, in my view, corroborated by the fact that had he done so it is in my view inconceivable that they would not have advised him in the strongest possible terms not to sign it. Any lawyer, or indeed sophisticated businessman, having been told by Mr Van der Garde that Dr Kolles had told him that the purpose of the Novation Agreement was to protect Spyker from Super Aguri's damages claim, would in my view have reacted, at the very least, with extreme scepticism and suspicion. On its face, as already discussed, the Novation Agreement purported to do no such thing. What it did purport to do however was to extinguish all the rights of the Claimants in this action against Spyker under the Service and Fee Agreements and assign them to a BVI company about whom nothing was known to them and which, in fact, was worthless. Coming as it did shortly after Mr Boekhoorn's assertion of Spyker's obligations to provide a further 5,000 kilometres under the Service Agreement, any natural response on reading the draft Novation Agreement would be to conclude that Dr Kolles had misled Mr Van der Garde as to the nature of the draft Novation Agreement and that on no account should he sign it. Moreover, since such a reaction was, in my view, wholly predictable it is for that reason all the more implausible that Dr Kolles, if he wanted Mr Van der Garde to sign the Agreement, would have advised Mr Van der Garde to speak to whoever he wished to about it before signing it.

116. A further troubling feature of Dr Kolles' evidence was that according to him he left the original signed agreement, of which there was only one, with Mr Van der Garde who was about to get back into the racing car before the afternoon test session. Moreover, he did not even retain, or at any rate was unable to find, the only copy of the signed Novation Agreement which he says he made on a photocopier in the Force India trailer. The only version which was available at trial was what appeared to be a fax of the copy which he said he made in the trailer which he said he sent from his home fax machine to Mr Missling on 16 November 2007. It is also puzzling that on

Dr Kolles' case, having made a photocopy in the Force India trailer after Mr Van der Garde signed it, rather than use the fax machine which Mr Burr, a Spyker witness, said was in the Force India trailer, to fax it to Mr Missling, he took the only copy back home to Munich and waited three days before faxing it to Mr Missling.

117. Dr Kolles' evidence was also inconsistent with that of Mr Missling who said that at some point he asked Dr Kolles for the original of the Novation Agreement and that Dr Kolles replied that he had given it to Mr Missling.

118. Dr Kolles' account of the origin of the draft Novation Agreement is in my view further undermined by the fact that Mr Missling was a trained German lawyer and in charge of legal affairs for Spyker. If, as Dr Kolles and Mr Missling said, the purpose of the draft agreement which Dr Kolles asked Mr Missling to draft was to protect Spyker against Super Aguri's claim, and not to protect Spyker against claims by the Claimants in this action, it is very difficult to understand how or why Mr Missling could have come up with a draft which on its face purported to achieve the latter undesired result but failed to achieve the former desired result. Spyker was now under new ownership and the inadequacy of the draft to achieve the protection which Dr Kolles claimed it was designed to achieve would have been readily apparent to the new owners if and when reliance was sought to be placed on it in the Super Aguri litigation. Indeed, the complete absence of any internal documents relating to this agreement and correspondence in relation to it with Mr Boekhoorn and the Claimants' lawyers is in marked contrast with the events leading up to the signing of the Service and Fee Agreements.

119. Spyker called David Burr, a Force India Formula One Team Limited Parts Co-ordinator. In a brief Witness Statement, which he adopted as his evidence, he stated that he recalled seeing Dr Kolles and Mr Van der Garde in the Force India truck several times during the day when he attended a test in Barcelona in November 2007. He said that he saw them discussing a piece of paper, although he qualified this by saying that he was not specifically watching them and did not know what the paper was. In oral testimony there were some inconsistencies between his evidence and that of Dr Kolles. For example, he said that the second time he saw them together was several hours after the first, whereas Dr Kolles said it was between 1 and 1 ½ hours. He also said that he had no recollection of seeing Dr Kolles and Mr Van der Garde together at lunch whereas Dr Kolles said that it was at lunch that they first discussed the Novation Agreement. His statement in his witness statement, that he recalled seeing Dr Kolles and Mr Van der Garde in the truck several times during the day, was in contrast to Dr Kolles' evidence that after the lunch discussion they met only once. In oral testimony Mr Burr said that he had a radio headset on so that he switched off from what was going on around him. As to the reference to papers, he said that he did not see Mr Van der Garde sign any paper and that he did not see anything to connect the conversation they were having with any of the papers which he saw on the table in front of them. He thus accepted that it was possible that they were not discussing papers. Thus, the only point on which his evidence gave support to that of Dr Kolles was his evidence that he saw Mr Van der Garde and Dr Kolles together. However, even as to that, he was not 100% sure that it was on the day which Dr Kolles said it was. He also said that he would have thought that Dr Kolles was in Barcelona for three days whereas Dr Kolles said that he arrived on 13 November which was

confirmed by Mr Missling, who said that he was due to go on 13 November and left that day.

120. Spyker also called Mr Gian Piero Lambiase, an engineer employed by them. In his Witness Statement he said that on 12 November 2007 he gave copies of the waivers which had been emailed to Mr Van der Garde by Mr Knighton and asked him to sign them which he did. He stated that he witnessed his signature. In their Reply the Claimants pleaded that the relevant members of Spyker's staff who produced the waivers and said anything to them were Mr Knighton and one other, who was subsequently described in response to a request for further information as, on the basis of the best particulars which they could give, a data engineer, male around 28 years old of approximately 1.76 metres tall with short brown hair and balding.

121. In oral testimony Mr Lambiase confirmed that he dared say that there were some other engineers, as well as himself, present in the truck office when he handed over the waivers as he had been asked to do by Mr Knighton. He stated that he looked over the documents before giving them to Mr Van der Garde and there were no other documents with them. He had no recollection of seeing Dr Kolles with Mr Van der Garde on 13 November 2007 in Barcelona. Mr Knighton was present in Barcelona on 12 November. Mr Lambiase said that he was physically present when Mr Van der Garde signed the waivers in the Force India trailer, but he had no recollection of any conversation with Mr Van der Garde.

122. In oral testimony Mr Van der Garde said that he was given the waivers by Oliver Nitin or Robin Sattlir. He agreed with Mr Lambiase that he signed them in the presence of Mr Lambiase and Mr Sattlir. Although he gave the waivers back to Mr Sattlir, he accepted that Mr Lambiase was present as well. He did not see anybody write a witness signature in his presence although he accepted that Mr Lambiase was present.

123. Mr Lambiase was no doubt called by Spyker to rebut the suggestion canvassed as a possible explanation for Mr Van der Garde's signature if it was indeed his signature being on the Novation Agreement, namely that it was signed by him without realising what it was when he signed the waivers. Although there were some differences between Mr Lambiase's evidence and that of Mr Van der Garde on the circumstances surrounding the signing of the waivers, I do not regard them as critical and they certainly did not lead me to conclude that Mr Van der Garde was lying about not having consciously signed the Novation Agreement or at all.

124. A further curiosity emerges from a faxed letter from Dr Kolles to Mr Boekhoorn dated 27 December 2007. This was in response to an email on the same day from Mr Boekhoorn to Mr Mallya claiming that Force India (formerly Spyker) had failed to fulfil its obligations during 2007 with regard to Mr Van der Garde's Test Driver/Service Agreement of February 2007. In that email, Mr Boekhoorn asserted that Force India had effected less than 35% of the agreed minimum of 6,000 test kilometres that should have been effected. As a result he said that they were seeking reimbursement by Force India of at least US$2m and looked forward to receiving a proposal no later than 29 December, and would do what they deemed necessary to protect their interests. Mr Mallya replied saying that Mr Boekhoorn had misstated the position and that he was asking Dr Kolles to send a detailed reply on behalf of Force India.

125. In Dr Kolles' letter dated 27 December 2007, he asserted for the first time that the main reason Spyker could not cover the agreed mileage was that Mr Van der Garde had not received his Super Licence and Spyker could not therefore run him during each Friday Grand Prix testing session. Mr Van der Garde had not received the Super Licence because he had signed a valid contract with Super Aguri which had been signed by Ms Boekhoorn and Mr Van der Garde's management as well. It was Mr Boekhoorn who had confirmed to Spyker that Mr Van der Garde had no valid contract with Super Aguri. That was, unfortunately, not true and the Contract Recognition Board had objected to the release of the Super Licence. He concluded:

> "In addition to the above mentioned points, I kindly remind you that we are indemnified from all the costs related to the Giedo/Super Aguri matter. As you know we have incurred costs. We are looking to find an amicable solution and to promote Giedo's career. I hope you agree!"

126. This latter reference is, on its face, inconsistent with the terms of the Novation Agreement. At any rate it is inconsistent with the position adopted by Spyker in its defence in this action that the effect of the Novation Agreement was to extinguish all obligations owed by Spyker to the Claimants under the Services and Fee Agreements and to assign them to the BVI Company. The reference to the Claimants' liability to indemnify Spyker is inconsistent with Dr Kolles' evidence that the Novation Agreement was an alternative to the Claimants paying Spyker pursuant to the indemnity in the Service Agreement. Most bizarre is the lack of any reference in Dr Kolles' letter to the Novation Agreement, which if it had been signed and in existence would have been, according to the position adopted later by Spyker in its defence in this action, a complete answer to Mr Boekhoorn's email.

127. By the end of the evidence, it was hard to envisage a determination of the issues raised by the Novation Agreement defence which would not cause considerable problems for Spyker. If, as Mr Van der Garde said, he did not sign the Agreement, Dr Kolles' evidence to contrary effect must have been incorrect and it would be hard to conclude that that could have been the result of inadvertence or mistake. On the other hand if, as Dr Kolles claimed, Mr Van der Garde did sign it, it would be hard to escape the conclusion that he did so following a material misrepresentation by Dr Kolles as to its contents. It was after all Dr Kolles who said in evidence that he told Mr Van der Garde that the purpose of the Agreement was to protect Spyker, not from the Claimant but from Super Aguri. Either way, by the time of the trial both Dr Kolles and Mr Missling gave clear evidence to the effect that it was not their intention, in drafting the Novation Agreement, that it should protect Spyker from claims advanced by the Claimants and it was not their understanding that it had had that effect. That being so Spyker's reliance on the Novation Agreement for precisely that purpose as a defence to the Claimants' claims against it in this action was wholly inconsistent with the understanding and intention of the only two employees who on its case had any involvement in the Novation Agreement.

128. Since, as I have already mentioned, Spyker withdrew the Novation Agreement defence at the eleventh hour, it is not necessary for me to resolve the issues raised by that defence or to make specific findings as to what occurred. In particular, it is not necessary for me to make findings as to how Mr Van der Garde's signature or a copy or facsimile thereof appeared on the Novation Agreement. However as appears from

what I have already said, there were important aspects of Dr Kolles' evidence on this aspect of the case which I was unable to accept as a straightforward and comprehensive account of what actually transpired. In that regard his evidence on this aspect reinforced my overall impression of his evidence on the other matters to which I have referred above as unreliable. Even without his evidence on the Novation Agreement, I would have preferred the evidence of Mr Muller to that of Dr Kolles where it conflicted in the context of their differing accounts of what was said, known and understood by the parties before and at Innsbruck and in the period leading up to the signing of the Services and Fee Agreements on 28 February 2007. I regarded Mr Muller as a straightforward, reliable witness doing his best to assist the court and record his recollection of what was said and done. My impression of Dr Kolles was that he was parti pris and it was impossible wholly to avoid the feeling that from time to time he answered questions with half an eye to the effect his answers might have. As to Mr Van der Garde, I regarded him as a truthful witness, albeit one who did not have a sophisticated understanding of many of the issues arising in this case. I did not find that surprising. He was, by his own admission, pre-occupied with his career as a racing driver and left negotiations and legal agreements to Mr Boekhoorn and/or his business managers.

Findings on Liability

129. With the last minute collapse of the Novation Agreement defence, the issue of liability assumed a comparatively narrow compass. Was the failure of Spyker to provide more than 2,004 out of the contracted 6,000 minimum kilometres a breach of the Services Agreement of 28 February 2007? In its Defence, Spyker pleaded that on a true construction of Clause 2 of the Service Agreement, Mr Van der Garde was under an obligation to use his best endeavours to obtain an FIA Super Licence to enable him to take part in the Grand Prix Friday morning test sessions and thereby be in a position to test for the 6,000 km referred to in the Service Agreement. Both Claimants were alleged also to be under an obligation to indemnify Spyker in respect of, amongst other things, legal costs it incurred as a result of entering into the Service Agreement, although it is not clear to me in what way this allegation was intended to support Spyker's defence.

130. Spyker denied the allegation that in breach of Clause 2 of the Service Agreement it did not permit Mr Van der Garde to drive a Formula One racing car in testing and/or practising and/or racing for a minimum of 6,000 km, and only permitted such use of a car for no more than 1,800 km. In support of that denial it relied on the following matters:

    (1) Mr Van der Garde refused to take part in a test at the Paul Ricard Circuit in May 2007 at which he would have tested for 1,500 km;

    (2) He crashed during a test at Silverstone in June 2007 at which he would have tested for a further 200 km; and

    (3) He did not use his best endeavours to obtain an FIA Super Licence to enable him to take part in Grands Prix Friday morning sessions at which he would have tested for up to a further 3,400 km. In particular, he refused to follow Spyker's advice to participate in the Grand Prix 2 Series in which he could win a race and thereby obtain an FIA Super Licence.

Of these three matters, the third was the most important and I will deal with it first. Before doing so I record the Claimants' response to these matters in its reply.

131. In response to the third matter relied on by Spyker, the Claimants averred that Spyker was in breach of its obligations under the Service Agreement to put forward Mr Van der Garde for tests including FIA monitoring for an FIA Super Licence application and to use its best efforts and to assist Mr Van der Garde to establish eligibility for an FIA Super Licence in each case in that it did nothing. In response to the first matter, the Paul Ricard defence, the Claimants asserted an implied term that Spyker would not select dates for tests which conflicted with Mr Van der Garde's other driving commitments or which were otherwise unreasonable. The proposed Paul Ricard test date was said to be too close to a race in Monaco which Mr Van der Garde was to take part in. Further, Mr Van der Garde it was asserted would not possibly have tested for 1,500km at the Paul Ricard Circuit in any event. He would have completed 300 km per full day and Spyker's offer was for two days shared with another driver or one full day equivalent.

132. As to the third matter, the Silverstone test, the Claimants, in their reply, asserted that the Silverstone Test was for 20 laps. Each lap at Silverstone is 4km. Mr Van der Garde crashed after 10 laps, foregoing 40 km of that test.

133. Further, in relation to all three matters, the Claimants averred that subject to and on the proper construction of the terms of the Contract and/or as an implied term, Spyker was obliged to offer the full 6,000 km of driving to Mr Van der Garde. The alleged failures by Mr Van der Garde in the three matters relied on by Spyker in its Defence did not affect Spyker's obligation.

134. Spyker served a rejoinder in which it responded to the allegation that it did nothing to put forward Mr Van der Garde for tests, including FIA monitoring for an FIA Super Licence Application, and to use its best efforts and to assist him to establish eligibility for such a licence. Spyker averred that the obligation to obtain an FIA Super Licence rested with the Claimants alone. Further, it alleged that the reason why Mr Van der Garde did not and/or could not obtain a Super Licence was that there was another driver contract with Super Aguri F1 Limited in respect of Mr Van der Garde registered with the Contract Recognition Board. The Board would not register a second contract (namely that between the Claimants and Spyker) while there was an existing contract registered in respect of the same driver. Accordingly, no Super Licence for Mr Van der Garde to drive for Spyker could be (or was) obtained. Further, and in any event, Spyker did all it could to assist Mr Van der Garde in obtaining a Super Licence. It duly organised the required 300km test observed by the ASN of the circuit at which the test was held (namely Valencia on 19 February 2007). Spyker then submitted a copy of the certificate confirming that Mr Van der Garde had completed the test satisfactorily to the FIA in support of the Super Licence application dated 18 February 2007 of which Mr Phillips sent a copy to Mr Brown by email on 26 February 2007.

135. Further, by email dated 7 March 2007, Mr Phillips chased Mr Brown about, amongst other things, a Super Licence for the Second Claimant for Mr Van der Garde. By his email reply also dated 7 March 2007 Mr Brown informed Mr Phillips that in relation to Mr Van der Garde: (a) he had not received the original of the application form which was the responsibility of the Claimants to submit, and (b) he had received no

career results at all for Mr Van der Garde (it further being the responsibility of the Claimants to submit such results).

136. Further, after the required documents had been submitted as a result of Mr Phillips' involvement, he was orally informed by Mr Brown that the Super Licence application to allow Mr Van der Garde to drive for Spyker could not proceed because there was already a contract lodged with the Contracts Recognition Board relating to Mr Van der Garde. Mr Phillips informed Mr Van der Garde of the difficulty and that it was the Claimants' responsibility to sort it out by getting the other team who had registered a contract to inform the Contracts Recognition Board that it was no longer valid. To the best of the Defendant's knowledge and belief that never occurred. Accordingly it was averred that Spyker did all that it could to assist Mr Van der Garde to obtain the required Super Licence.

137. When Spyker amended its Defence to respond to the Amended Particulars of Claim in which the Claimants widened their claim for relief it made no changes to its defences on liability.

138. Because of Mr Starr's submission, which was challenged by Mr Davies, that there was a legally binding oral agreement made at Innsbruck on 1 February 2007 and Mr Muller's evidence that that was his belief and understanding it is necessary for me to decide that issue. For that purpose I make the following findings in relation to the discussions leading up to and at Innsbruck. However as I explain below, although I have considered evidence of what was discussed at Innsbruck for the limited purpose of deciding that issue, it does not follow that it is all admissible for the distinct purpose of construing the written agreements made on 28 February 2007. There was in my judgment no binding legal oral contract arrived at at the Innsbruck meeting. There was however an agreement in principle or a gentleman's agreement. The fact that it was not intended to be legally binding is supported both by that description of it in Mr Van der Garde's defence in the Super Aguri action and by Mr Boekhoorn's reference in his fax to Dr Kolles dated 3 September 2007 to having shown trust and good faith by wiring a very substantial amount to Spyker even before Mr Van der Garde's contract was signed based on "oral agreements". As previously mentioned the implication was that it would have been open to Spyker not to honour the oral agreements on the basis that they were not legally binding. The fact that Spyker was prepared to let Mr Van de Garde drive in the Valencia test without a legally binding agreement is no doubt explicable by the fact that unusually the Claimants had paid the whole $3 million consideration not only in one lump sum rather than by instalments but in advance of the written agreement on the strength of a gentleman's agreement.

139. The essence of the gentleman's' agreement was that Spyker would provide 6,000 kilometres of testing for Mr Van der Garde for $3 million. It was not expressly agreed between the parties that the amount of testing was on the basis that Mr Van der Garde would obtain a super licence and would be Spyker's Friday test driver or that it was dependent on that happening. The agreement in principle was that Spyker would provide 6,000 kilometres even if Mr Van der Garde did not get a super licence and thus did not drive in Friday morning test sessions.

140. Mr Boekhoorn confirmed that Mr Van der Garde had been told by Super Aguri in Valencia: "It's all over". Mr Boekhoorn expressed the opinion that that meant that the contract with Super Aguri was terminated but it was recognised by all those

present that it was not a foregone conclusion that Mr Van der Garde would obtain a super licence. There were two problems which had to be overcome: first if Super Aguri did not accept that its contract with Mr Van der Garde had been terminated, there could be a problem with the Contract Recognition Board. Second Mr Van der Garde would have to pass an FIA test and might also have to satisfy the FIA as to his previous racing results.

141. Mr Boekhoorn made it clear that ideally he would wish Mr Van der Garde to be able to drive in Friday morning practice sessions and also to be a third Grand Prix driver. Spyker agreed that it would do its best to try to ensure that Mr Van der Garde obtained a super licence. However it was recognised by both sides that this might not happen. The gentleman's agreement for the 6,000 kilometres was not conditional upon it happening. Spyker was short of money and agreed to provide 6,000 kilometres irrespective of Friday morning sessions. I do not accept Dr Kolles' evidence that Mr Boekhoorn's only expressed intention was to have Mr Van der Garde driving the Friday sessions and that that was his only interest. Nor do I accept his evidence that he told Mr Boekhoorn that the 6000 kilometres would be made up of approximately 3,400 kilometres over 17 Grand Prix Friday morning sessions with the rest being testing including the 300 kilometres Super Licence test.

142. I do find that Mr Boekhoorn said that ideally he would wish Mr Van der Garde to be able to drive in Friday morning sessions and that if he got a Super Licence it was agreed that the 6,000 kilometres would be divided between the Grand Prix Friday morning sessions and other testings. However his willingness to transfer to Spyker $3 million 13 February 2007 before a written agreement had been signed and before the Valencia test reflected the fact that it had been agreed in principle that Mr Van der Garde would be provided with 6,000 kilometres of testing irrespective of whether he obtained a Super Licence. I do not accept that Mr Boekhoorn agreed that Spyker's obligation to provide 6,000 kilometres was dependent on Mr Van der Garde obtaining a Super Licence and that the problem with Super Aguri was Mr Van der Garde's to solve. In view of the two potential problems which had been identified by Dr Kolles (a dispute with Super Aguri at the Contract Recognition Board and the performance requirements of the FIA) in my judgment Mr Boekhoorn would have been unlikely to make an unconditional agreement to pay $3 million for 6,000 kilometres if(on Spyker's case) over half that amount or(on the Claimants' case) a significant proportion of the 6000 kilometres might be unachievable. I note that in the Super Aguri contract the vast majority of the price was repayable in the event of Mr Van der Garde failing to obtain a Super Licence. I further find that, as Mr Muller said, the Spyker representatives told Mr Boekhoorn that 6,000 kilometres would be feasible regardless of driving on Fridays in the event of Mr Van der Garde not getting a super licence. That was in my judgment a critical part of the factual background known to both parties prior to the 28 February 2007 written agreements as well as prior to the oral agreement in principle on 1 February 2007. In my judgment it was also known to both parties that, Mr Van der Garde having been told by Super Aguri that "It's over", although it was Mr Boekhoorn's contention that the Super Aguri contract had thereby been terminated, there was a possibility that that might be disputed by Super Aguri and thus that there was a distinct possibility that for that reason Mr Van der Garde might not obtain a Super Licence. It was also known to both parties that either his previous year's results or a failure to pass the 300 kilometre FIA test might prevent him from obtaining a Super Licence. I find that Dr Kolles made it very clear to Mr

Boekhoorn that he could not guarantee that Mr Van der Garde would get a Super Licence and that it would be difficult for him to drive on Friday mornings. Although in making this finding I do not rely on or take into account the expert evidence, I note that both experts agreed that in their opinion it was unlikely that Mr Van der Garde would obtain a Super Licence in 2007.

143. By the time the written agreements were signed on 28 February 2007 it was well known both to the Claimants and to Spyker, as appears from Mr Missling's email dated 8 February 2007, that there was a real possibility that, by reason of Super Aguri's assertion that its ageeement with Mr Van der Garde had not been terminated, there would be a dispute at the Contract Recognition Board which might prevent Mr Van der Garde obtaining a Super Licence. Although Mr Van der Garde had completed his Valencia test in front of an FIA observer at Valencia, his prior results had not been sent to the FIA and no confirmation had been received by the FIA or the Contract Recognition Board that Mr Van der Garde satisfied the racing requirements of Article 5 of Chapter 1 of the International Sporting Code.

144. Despite these uncertainties as to the ability of Mr Van der Garde to obtain a Super Licence and thus be eligible for Friday morning testing sessions, and despite the absence of a legally binding agreement between the parties, the first Claimant sent $3 million to Spyker on 13 February 2007. As at 28 February 2007 it was neither known to nor agreed between the parties to the Service Agreement and the Fee Agreement that the only way in which Spyker could provide 6,000 kilometres of testing would be if Mr Van der Garde drove in the 17 Grand Prix Friday morning sessions or that the ability of Spyker to make such provision was dependent upon Mr Van der Garde being eligible to drive and driving in those Friday morning Grand Prix test sessions. On the contrary the shared understanding of the parties, based on what had been said by the Spyker representatives at the 1 February 2007 Innsbruck meeting, was that there would be sufficient time in 2007 for Mr Van der Garde to drive 6,000 kilometres even if he could not drive on Friday mornings.

145. The 9 February 2007 schedule which was sent to Mr Van der Garde did not in my judgement prove either that it would be impossible for Spyker to provide 6,000 kilometres of testing unless Mr Van der Garde drove on the Grand Prix Friday morning test sessions or that this was known to both parties prior to 28 February 2007. (By definition it could not prove that this was known to the claimants on 1 February 2007 when the gentleman's agreement in principle was arrived at.) I have already given my reason for reaching this conclusion. It is fortified by Dr Kolles' faxed letter dated 23 August 2007 which made it clear that even as late on in the year as late August, he still regarded it as possible for Spyker to provide a further 4,740 odd kilometres (or at least a further 3,240 odd kilometres allowing for Paul Ricard). Given how few Grands Prix were still left in the season and Dr Kolles's lack of expectation that Mr Van der Garde would be ready to drive in any Grands Prix prior to October, it was implicit in that letter that Dr Kolles did not consider that Spyker's ability to provide the necessary kilometres was dependent on Mr Van der Garde driving in Friday morning sessions.

146. Before turning to the construction of the Service Agreement and Fee Agreement dated 28 February 2007 and the parties' submissions in relation thereto it is necessary to address the question of what is and what is not admissible evidence for the purpose of the construing the agreement.

147. In *Reardon Smith Line Limited v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 995-996. Lord Wilberforce said: "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating." However as is pointed out by the editors of Chitty on Contracts on 30th edition 12-118 he further stated that, just as the intention of the parties is to be ascertained objectively, so also: "… When one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

148. To like effect are the comments of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381: "In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of [the claimant's] intentions, ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction."

149. Against this background it was not surprisingly common ground between the parties that evidence of the state of knowledge to be attributed to the parties up to the time of contracting is admissible but that evidence of negotiations and the subjective intentions of the parties was not. It seems to me clear that in construing the Service Agreement the court is entitled to consider as admissible evidence the circumstances to which I have referred and in respect of which I have made findings which were known to both parties to the contract in relation to the uncertainties and potential problems surrounding the prospects of Mr Van der Garde obtaining a Super Licence and the shared understanding of the parties to the contract that it would be possible for Mr Van der Garde to drive 6,000 kilometres without a Super Licence and thus without driving on Friday morning Grand Prix morning test sessions.

150. The existence of that mutual understanding is in my view supported by the testimony of Mr Muller and Dr Kolles' faxed letter dated 23 August 2007. The 9 February 2007 schedule is not inconsistent with that mutual understanding. On the contrary, on the assumption, which there was no evidence that the Claimants were not entitled to make prior to the Service Agreement, that Spyker could substitute Mr Van der Garde for drivers whose names appeared in the pink and green non-Grand Prix testing slots on that schedule, Mr Van der Garde could have completed 6,000 kilometres by driving in those non-Grand Prix Friday morning test sessions. Dr Kolles accepted that Mr Van der Garde could have driven on consecutive days at any given test throughout the year. On the basis of Dr Kolles' evidence of an average of 450 kilometres per non-Grand Prix test-day the 24 days of non-Grands Prix testing shown on the schedule after 28 February 2007 came to 10,800 kilometres. To that could be added 6 shake down days at 50 kilometres each. Further in evidence adduced during the trial it appeared that Spyker did not test on all the days which it could have done in the 2007 season. Had it done so there were further additional days of non-Grand Prix possible testing. There was no evidence that the parties' mutual understanding was that the ability of Spyker to make testing opportunities available to Mr Van der Garde was limited to those set out in the 9 February 2007 schedule and Dr Kolles' letter dated 23 August 2007 points strongly in the opposite direction. There was no evidence that Dr Kolles' point that opportunities for additional private testing at the Stowe circuit at Silverstone could not be made available to Mr Van der Garde because of the need to

have a large emergency services apparatus present was known by or communicated to the claimant prior to the Service Agreement. In any event it is to be inferred that those services were present during all the Silverstone test days in 2007 of which there were four non-shake down days and six Silverstone shake down days.

151. So far as the commercial purpose of the contract is concerned it seems to me that the evidence on this is probably neutral. From Mr Van der Garde's point of view it was plainly to provide him with experience of driving a Formula One car with a view to promoting his career as a racing driver and in particular enhancing his prospects of breaking into Formula One as a racing driver. Although Mr Van der Garde in his witness statement and in oral testimony said that as far as he was concerned the experience of taking part in non-Grand Prix testing sessions over large distances was more valuable to him than the higher profile associated with taking part in Friday morning Grand Prix test sessions, it is not clear that this was explicitly communicated by Mr Boekhoorn to the Spyker representatives at Innsbruck or subsequently. In principle an agreement entitling him to participate in Friday morning Grand Prix test sessions or indeed as a third reserve driver in Grand Prix races themselves could be capable of achieving the commercial purpose of enhancing his career prospects. Indeed that is the inference to be drawn from the terms of his contract in November 2006 with Super Aguri.

152. In principle as already mentioned evidence of what was said in the negotiations is not, unless it is evidence of facts or circumstances known to both parties, admissible for the purpose of construing the written agreements. Nor is evidence as to the subjective intentions of the parties admissible for the purpose of construing the written agreements (although such evidence is admissible for the distinct and logically prior purpose of proving whether there was a legally binding oral agreement or a gentleman's agreement on 1 February 2007 and if so on what terms because such evidence is potentially relevant in assessing the plausibility and credibility of the testimony of the witnesses as to what they did and did not agree to in Innsbruck). There is thus a distinction between those things said during the negotiations which are admissible for the purpose of construing the written agreement and those which are not. Thus for example as already discussed, evidence as to the facts relevant to Mr Van der Garde's prospects of getting a Super Licence which were discussed between the parties in Innsbruck and in correspondence is admissible. So is what was said by the Spyker representatives in relation to the possibility of achieving 6,000 kilometres without Friday morning test sessions.

153. However Mr Starr on behalf of the claimants submitted that the written agreements dated 28 February 2007 were intended to incorporate an oral agreement which had been made on 1 February 2007 in Innsbruck. The written agreements he submitted should be read in the light of and consistently with the oral Innsbruck agreement. That agreement he submitted was a binding legal agreement which fully guaranteed 6,000 kilometres. The parties had expressly discussed whether or not 6,000 kilometres was possible without a Super Licence and discussed a rate of $500 per kilometre. It was usual to pay in instalments and unusual to pay in one lump sum up front. Spyker needed the money and for the certainty of 6,000 kilometres the claimants were willing to pay up front. Further Mr Van der Garde had spoken to Lewis Hamilton about the benefits of 10,000 kilometres of testing (not Friday driving) and Mr Boekhoorn had been discussing and agreed with Spyker 6,000 kilometres of

testing at Innsbruck. In support of this submission Mr Starr prayed in aid dicta of Rix LJ in *HIH Casualty and General Insurance Limited v New Hampshire Insurance Company and Others* [2001] EWCA siv 735; 2001 – Lloyds Law Reports 161 at 178–179. Rix LJ's dicta were in the context of considering in an insurance case whether the policy wording superseded the original slip policy. In answering that question Rix LJ held:

> "Where however it is not even common ground that the later contract is intended to supersede the earlier contract I do not see how it can ever be permissible to exclude reference to the earlier contract. I do not see how the relationship of the two contracts can be decided without considering both of them. In essence there are, it seems to me, three possibilities. Either the later contract is intended to supersede the earlier, in which case the above principles apply. Or, the later contract is intended to live together with the earlier contract, to the extent that that is possible, but where that is not possible it may well be proper to regard the later contract as superseding the earlier. Or the later contract is intended to be incorporated into the earlier contract, in which case it is prima facie the second contract which may have to give way to the first in the event of inconsistency. I doubt that it is in any event possible to be dogmatic about these matters." (para 84 page 179).

154. The issue with which Rix LJ was dealing was whether the later policy wording did or did not supersede the prior slip policy. That is not an issue which arises in this case. If there was a binding oral agreement on 1 February 2007 it was not contended by Mr Starr that the Service Agreement and Fee Agreement did not supersede it. The question which would rise in this case if there was a binding oral agreement on 1 February 2007 is whether that contract is admissible as evidence for the purpose of construing the written agreements which superseded it. That was an issue on which Rix LJ expressed views in the immediately preceding passage of his judgment in which he set out the principles to which he referred in the passage cited.

155. Having referred to the cases of *Youell v Bland Welch and Co. Ltd.* [1992] Lloyds rep 423, *Punjab National Bank v de Boonville* [1992] 1 Lloyds rep 7, *St Paul Fire and Marine Insurance Company UK Ltd v McConnell Dowell Constructions Limited* [1993] 2 Lloyds rep 503 and *New Hampshire Insurance Co. v MGM Limited* [1997] 1 LRLR 24, Rix LJ held:

> "81. In my judgment, there is nothing in these citations which binds this Court to rule that where a prior contract has been followed by a further contract, or where in an insurance context a slip contract has been followed by a policy, there is a rule of law which makes it inadmissible to consider the terms of the prior contract, or that the parol evidence rule has the same effect. That is because all passages in prior cases in this Court are only obiter dicta. Moreover, in *Youell v. Bland Welch* and *Punjab National Bank v. de Boinville* it was common ground that the policies in question were intended to supersede the slips. Where it is common ground that one contract has been

> intended to supersede an earlier contract, it must follow that the parties' contract must be found exclusively in the later contract. Thus the earlier contract cannot be used to add to, or modify, the later contract.
>
> 82. But does it follow that the earlier contract cannot even be looked at for the purposes of construing the later contract?
>
> 83. In principle, it would seem to me that it is always admissible to look at prior *contracts* as part of the matrix or surrounding circumstances of a later contract. I do not see how the parol evidence rule can exclude prior contracts, as distinct from mere negotiations. The difficulty of course is that, where the later contract is intended to *supersede* the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore the be of much, if any, assistane. Where the later contract is identical, its construction can stand on its own feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance. Therefore a cautious and sceptical approach to finding any assistance in the earlier contract seems to me to be a sound principle. What I doubt, however, is that such a principle can be elevated into a conclusive rule of law." (emphasis added).

156. In this passage of his judgment, with which judgment Mummery LJ and Peter Gibson LJ agreed, Rix LJ, while confirming that the parol evidence rule excludes mere negotiations for the purposes of construing a written agreement, expressed the view that that rule does not exclude prior contracts to which it is always admissible to look as part of the matrix of surrounding circumstances of a later contract. The passage in which that view was expressed was in my judgment obiter dicta for two reasons. First in that case it was not common ground that the later contract was intended to supersede the earlier contract and it was for the purpose of deciding whether that was the case or not that he held it was both permissible and indeed necessary to consider both contracts. Second on the facts of that case he concluded that the original slip policy was never superseded and it was for that reason that he held that the policy wording could be and ought to be construed against the background of the original slip policy. It was thus not an example of a case in which a prior contract was used for the purpose of construing a later written contract which superseded it. Third as Rix LJ pointed out in paragraph 69 of his judgment the very question whether the policy wording superseded the original slip policy in that case was one which the decision of the court on a previous question made it unnecessary to determine.

157. In *Youell v Bland Welch and Co Limited*, one of the authorities referred to by Rix LJ, Phillips J at first instance, in a case in which it was common ground that a slip had

been superseded by a formal policy, held that the parol evidence rule made the slip inadmissible for the purpose of construing the formal policy. He held:

> "I do not consider Mr. Mance's submission to be sound in law. The drafting of the slip formed no part of the relevant matrix of this case. That matrix was the background to the commercial adventure that formed the subject matter of the contract, not the mechanism by which the parties set about negotiating and reaching agreement. The reason that Mr. Mance wished me to look at the slip was not so that I could inform myself of relevant background, but because he hoped that, by considering somewhat different words used by the parties in an earlier version of the contract, I would deduce the agreement reached as being that for which he contended and construe the policy so as to reproduce that agreement. This approach to construction is one which has its attractions and which in some cases might result in the court construing an unclear written agreement so as to give effect to the intentions of the parties where it might not otherwise do so. But if prior written agreements or drafts were admitted in evidence as an aid to construction the result would be that the Courts would often be called upon to consider a profusion of documents in cases where there was an issue as to the true construction of the final version of the contract. The English Court has firmly set its face against such a practice. It has done so by adopting the so-called parol evidence rule…"

158. As Rix LJ pointed out in *HIH v New Hampshire*, the observations of the Court of Appeal in *Youell* on the question of whether a prior contract is admissible for the purpose of construing a later one were themselves obiter dicta. Staughton LJ did not express a view one way or the other but emphasised the possibility if not probability that the parties wished to alter the meaning of what appeared in the first contract in the second contract:

> "Even if one could confidently discern what the words meant in the slip - which I do not think one can – there would remain the possibility, and perhaps even a probability, that the parties wished to alter that meaning when they prepared and agreed the policy. It is not argued that the leading underwriter had no authority to do so on behalf of others. I would accordingly hold that the slip, **whether admissible or not, is of no assistance in this case**." (At page 134). (emphasis added).

159. Beldam LJ referred to the case of *Ionides v The Pacific Fire and Marine Insurance Company* [1873] LR7QB 157:

> "Kelly C.B. stated that the slip was admissible, for example to show that the policy had been procured by misrepresentation or by non-disclosure, and he added:
>
> > It is quite enough therefore to say that here it was not given in evidence to prove a binding contract between the parties

> or to contradict or explain, or in any way affect the construction of the policy in question; but it was given in evidence only to shew what their intention was in preparing the policy.
>
> The implication seems clearly to be that it would not have been admissible to affect the construction of the policy. If prior to the passing of the Marine Insurance Act 1906 the slip was not admissible to explain or in any way affect the construction of the policy… in my judgment it was not admissible for the purpose of affecting the construction of the policy in question in this case." (page 141). As Lord Justice Rix pointed out in *HIH v New Hampshire*: " Lord Justice Fox merely agreed that the appeal should be dismissed for the reasons give by Lord Justice Staughton and Lord Justice Beldam (at pg 141). So nothing said by this Court in that case about the problem of a slip followed by a policy is binding authority." (para 76 pg 178).

160. Thus in *Youell*, Phillips J explicitly held that the parol evidence rule extends to the exclusion of prior written agreements as well as drafts for the purpose of construing a subsequent written agreement. Staughton LJ expressed no view on whether a prior contract is admissible for the purpose of construing a later one, Beldam LJ, to use the language of Rix LJ in *HIH v New Hampshire* "stated his preference, for a rule of law founded in the parol evidence rule." (pg 177). Fox LJ did not address the issue.

161. The position thus appears to be that there is no authority binding on me either for or against the proposition that a prior written agreement is admissible for the purpose of construing a subsequent written agreement. I would however observe that Rix LJ was at pains to emphasise that even if a prior written agreement is, as he held to be the case, admissible for the purpose of construing a later one its usefulness as an aid to construction is likely to be limited in most cases. Where the language in the two documents is identical, the former is unlikely to add anything to the exercise of construing the latter. If the wording in the later contract is different the prima facie influence is that the difference is a deliberate decision to depart from the earlier wording which thus provides no assistance. Hence his emphasis for the need for a cautious and sceptical approach to finding any assistance in the earlier contract.

162. Subject to those caveats, it seems to me that the carefully reasoned views expressed by the Court of Appeal in *HIH v New Hampshire*, which came later in time than Beldam LJ's views in Youell and which, unlike those views were unanimous, represent the current state of the law on this topic. I am fortified in this view by the passage in the 30th edition of Chitty on Contracts para 12-119 at footnote 521 where the editors cite *HIH v New Hampshire* as authority for the proposition that

> "An earlier contract may be looked at for the purpose of interpreting a later contract, although this may be of limited utility where the later contract is intended to supersede the earlier one."

163. In this case of course the earlier contract relied on by Mr Starr on behalf of the claimants as an admissible aid for construing the Service Agreement and Fee Agreement was an oral one and not one in writing. Although neither *HIH v New Hampshire* nor the authorities referred to by Rix LJ therein considered the case of a prior oral as distinct from written contract, in principle it seems to me that nothing turns on the distinction and that if and to the extent that the obiter dicta of Rix LJ represents the law they apply with equal force to the case of a prior oral contract. I would however add this practical qualification. Where an oral agreement is made on the basis that it is anticipated that it will be replaced by a more detailed written agreement in due course, the fact that the anticipated subsequent written agreement is likely to cover more points and in greater detail than the oral agreement, the scope for the inference referred to by Rix LJ that the parties intended in the latter written agreement to depart from the prior oral agreement may be all the greater.

164. However I have found that there was no legally binding agreement reached between the parties on 1 February 2007 at Innsbruck. There was rather in my judgment what was described in Mr Van der Garde's defence in the Super Aguri action as a gentleman's agreement.

165. The question therefore arises whether the principle enunciated by the Court of Appeal in *HIH v New Hampshire* extends to making a non-binding prior oral gentleman's agreement admissible for the purpose of construing a later written agreement. In my judgment although I can see arguments both ways the answer is that it does not. In my view a non-binding gentleman's agreement or agreement in principle falls on the other side of the line and is akin to or indeed to be treated as part of the pre-contractual negotiations leading up to a written agreement which are inadmissible for the purpose of construing the later written agreement. If I were wrong in that conclusion and a prior gentleman's agreement is admissible for the purpose of construing a later written agreement, in my judgment the need for caution emphasised by Lord Justice Rix would be all the greater since the inference that the parties intended or may have intended to depart in their written agreement from their earlier gentleman's agreement would be all the greater. The hesitation I have in reaching my conclusion on this point is based in part on the consideration that it might offend common sense, in a case where a written agreement departs radically from a prior non-binding agreement in principle or gentleman's agreement if the court were not permitted to take the former into account when construing the latter. However in my judgment the answer to that is that where there is such a radical departure the aggrieved party may resort to the doctrine of rectification, for which purpose it is not necessary to show that there was a binding legal agreement prior to the execution of the original document sought to be rectified.

166. Accordingly in construing the 28 February 2007 Service Agreement and Fee Agreement I do not take into account what I have found was agreed in principle by way of a gentleman's agreement between the parties on 1 February 2007 in Innsbruck. However in case I am wrong either in my finding that there was no legally binding agreement on 1 February 2007 or in my conclusion that a non-binding gentleman's agreement is not admissible for the purpose of construing a written agreement or both I record the fact that if for either of the above reasons what was agreed on 1 February 2007 is admissible in construing the 28 February 2007 written agreements in my judgment it would support the conclusions which I reach below. What I have found

was agreed on 1 February 2007 in principle was that Spyker would provide Mr Van der Garde with 6,000 kilometres of testing in consideration of $3 million. I have also found that the non-binding agreement reached on 1 February 2007 was not expressed to be subject to or dependent upon Mr Van der Garde obtaining a Super Licence or being available and eligible to drive in the Grand Prix Friday morning test sessions. Nor was it agreed that the 6,000 kilometres which Spyker were to provide were dependent on Mr Van der Garde being able to participate in to include Friday morning sessions or that the 6,000 kilometres which Spyker was to provide would be reduced by the amount of kilometres available on Grand Prix Friday morning sessions in the event that he did not drive in them, was not eligible to drive in them or failed to use reasonable endeavours to obtain a Super Licence.

167. Clause 11.1 of the Service Agreement provided: "This document is the entire agreement between the parties and supersedes all other agreement or arrangements, whether written or oral, express or implied, between the parties or any of them." In my view this makes it clear beyond argument that if contrary to what I have held there was a legally binding oral contract on 1 February 2007 it was superseded by the Service Agreement. It also in my judgment underlines the importance of the need for caution emphasised by Rix LJ in *CIH* before using the agreement on 1 February 2007, even if it was, contrary to my finding, a legally binding contract, as an aide to construing the Service Agreement. That is because the clause supports the inference that whatever may have been agreed on 1 February in Innsbruck the parties intended to depart at least in some respects from what was agreed and thus did not wish their final written agreement to be construed or qualified by reference to what was agreed on 1 February 2007.

168. I find that the evidence of the negotiations before and at Innsbruck and the evidence of Mr Van der Garde's and Mr Boekhoorn's intentions is not admissible for the purpose of construing the written agreements. However some of what was said is in my view admissible as evidence from which inferences may be drawn for the separate and distinct purpose of assessing in the context of *Wrotham Park* damages what the Claimants would reasonably have demanded in hypothetical negotiations in exchange for releasing Spyker from its obligations to provide the outstanding kilometresand associated benefits which were not provided, as I find, in breach of contract. I have in mind in particular Mr Muller's evidence that in the Innsbruck negotiations there was discussion about the price per kilometre.

169. In his opening skeleton argument and closing written submissions Mr Davies submitted that based on the factual matrix upon which he relied and given that clause 2 of the Service Agreement opens with the words:

> "subject to the terms and conditions of this Agreement and the FIA provision and regulations and the Driver and Company complying with their obligations here under" there could be no doubt that the Service Agreement
>
> "is to be construed in the way advocated by the Defendant, namely as including the Friday morning test sessions in the 6,000 kilometres to be driven. One of the obligations of [Mr Van der Garde] was to be the defendant's first reserve race

> driver – see paragraph 2 - which obviously should only occur if an FIA super licence was held."

This way of putting Spyker's case is in my view not the same as that set out in paragraphs 14 and 16 of the defence and amended defence which were to the effect that Mr Van der Garde was under an obligation to use his best endeavours to obtain a super licence to enable him to take part in the Grand Prix Friday morning test sessions and thereby be in a position to test for the 6,000 kilometres referred to in the Service Agreement and that he did not use his best endeavours. Had he done so he would have tested for up to a further 3,400 kilometres. In particular he refused to follow Spyker's advice to participate in the Grand Prix 2 series in which he could win a race and thereby obtain a FIA super licence.

170. Included in the factual matrix which Mr Davies submitted was admissible and upon which he relied was the proposition that it was obvious from the 9 February 2007 test schedule that the only way in which Mr Van der Garde would ever have a hope of driving 6,000 kilometres would be if he drove at the Friday morning test sessions at Grand Prix weekends. I have already given my reasons for rejecting the submission that that was obvious from the schedule. Mr Davies also relied on the proposition that it was known at the time the Service Agreement was signed what the 2007 Spyker test schedule would be. Again I have found that this was not identified by Spyker to the claimants as being fixed and immutable either in respect of the dates and locations where Spyker would be testing in 2007 or as to the identity of the drivers who would be testing in individual slots on individual testing days.

171. Mr Davies also relied as part of the admissible factual matrix on the fact that the Contract Recognition Board would not register a driver contract in the event of the second contract being registered in which event it would not grant a Super Licence.

172. As to this the evidence did not establish the precise extent of the claimants' knowledge of the detail of Schedule 11 of the 1998 Concorde Agreement. However clause 12.1 of the Service Agreement expressly agreed that it formed part of a contract as defined by clause 6.1 of Schedule 11 so that the parties agreed to respect the terms of the Schedule and in particular clause 7 which provided for the resolution of conflicts as to priority issues between competing teams by the Contract Recognition Board. It seems to me to be implicit or to arise as a matter of inference that both parties are to be treated as being aware of the provisions of Schedule 11. This is further supported by the opening words of clause 2 of the Service Agreement: "subject to the terms and conditions of this agreement **and the FIA provisions and regulations**…" (emphasis added). What the evidence did show was that the claimants' attention had been specifically drawn by Spyker in Mr Missling's email dated 8 February 2007 to the involvement of Super Aguri's lawyers, the need to lodge the Service Agreement with the Contract Recognition Board and Spyker's view that it was not in the interest of the parties to have a dispute involving the Contract Recognition Board which prompted them to request the insertion into the Service Agreement of the warranty and indemnity that became the fifth paragraph of clause 2 of the Service Agreement.

173. It follows in my judgment that part of the factual matrix against which the Service Agreement was entered into was an awareness of both parties that (a) if Super Aguri persisted in asserting that Mr Van der Garde's contract with Super Aguri had not been

terminated there was a very real prospect of a dispute at the Contract Recognition Board which could jeopardise and at least delay Mr Van der Garde's ability to obtain a Super Licence and (b) if the Contract Recognition Board were to hold that Mr Van der Garde's contract with Super Aguri had not been terminated and remained in force there was a strong possibility if not a probability that Mr Van der Garde would not obtain a Super Licence.

174. The critical provision which falls to be construed is the first paragraph in clause 2 of the Service Agreement and in particular the second sentence thereof.

175. In my judgment it is not possible to construe that provision in the way contended for by Mr Davies. As I understood his submission it was that Spyker's obligation to provide a minimum of 6,000 kilometres was qualified in that because the 6,000 kilometres included the Friday morning test sessions if Mr Van der Garde did not for whatever reason drive at all or any of the Friday morning test sessions the minimum number of kilometres which Spyker was obliged to provide fell to be reduced by the number of kilometres which Mr Van der Garde failed to drive on Friday morning test sessions. On that construction there was no absolute obligation on Spyker to provide a minimum of 6,000 kilometres. The obligation was to provide 6,000 kilometres less however many kilometres Mr Van der Garde could have driven in those of the Friday morning test sessions which he did not drive in. Put another way Spyker's obligation to provide a minimum of 6,000 kilometres was subject to Mr Van der Garde holding a valid FIA Super Licence and driving at all the Grand Prix Friday morning test sessions.

176. In my judgment that construction is not only not supported by the language in the first paragraph of clause 2 but it is inconsistent with it. In particular it ignores the fact that the definition in the second sentence of the Tests which Spyker agreed to nominate and permit Mr Van der Garde to drive in comprised two distinct elements. The first element was "(1) a minimum of 6,000 km". That is unqualified and absolute. Unlike the second element it was not qualified by the words "subject to the Driver holding a valid FIA Super Licence". On the contrary in my judgment the irresistible inference from the existence of the qualification in the second element, namely participating during the Grands Prix Friday morning test sessions, is that the intention of the parties was that no similar qualification was to attach to the first element. Had that been the intention there was nothing to stop the parties inserting an identical or similar express qualification in the first element and that is what one would have expected them to do.

177. In my view the intention of the parties which is evinced from the language is clear. The first paragraph of clause 2 conferred on Mr Van der Garde two benefits and imposed on Spyker two correlative obligations. The first obligation on Spyker was to provide an unqualified minimum of 6,000 kilometres of driving the Car. That obligation was not dependent on or qualified by the ability of Mr Van der Garde to drive during the Grand Prix Friday morning test sessions or obtaining a valid FIA Super Licence. Thus come what may the benefit to Mr Van der Garde was the certainty that he would be able to have 6,000 kilometres of driving whether or not he was able to obtain a Super Licence and thus whether or not he was able to drive in any or all of the Grand Prix Friday morning test sessions. The second obligation on Spyker was to nominate and permit Mr Van der Garde to drive the car during the Grand Prix Friday morning test sessions. Unlike the first obligation however this obligation was qualified and conditional. It arose if but only if Mr Van der Garde

obtained an FIA Super Licence. This latter obligation was further spelled out explicitly in the third paragraph: "Subject to the Driver holding a valid FIA Super Licence the Driver will drive at all of the Grands Prix Friday morning test sessions." Again the conditional nature of Mr Van der Garde's right to drive in Friday morning test sessions was spelled out explicitly.

178. Clause 2 of the Service Agreement went to the heart of the commercial bargain between the parties. It identified the principal benefit to be conferred on the claimants and the principal obligations imposed on Spyker. It is clear on the face of Clause 2 that the parties had well in mind that there was uncertainty as to whether Mr Van der Garde would obtain a Super Licence. That they had this well in mind was of course confirmed by the factual matrix to which I have referred and in particular the two potential problems in the form of the threat from Super Aguri and the need for Mr Van der Garde to satisfy the performance requirement in Article 5. However even without the factual matrix it is clear on the face of the language in clause 2 itself. Thus in the first paragraph Spyker's obligation to permit and nominate Mr Van der Garde to drive the car in the Grand Prix Friday morning test sessions was qualified by the words "subject to the Driver holding a valid FIA Super Licence.". In the second paragraph Spyker was expressly obliged to use its best endeavours and to assist Mr Van der Garde to establish eligibility for an FIA Super Licence. In the third paragraph Mr Van der Garde's right to drive at all of the Grands Prix Friday morning test sessions was again made subject to the express proviso "subject to the Driver holding a valid FIA Super Licence."

179. In the fourth paragraph Mr Van der Garde's appointment and right to act as Spyker's first reserve race driver for participation in races was again explicitly qualified by the words "subject to the Driver holding a valid FIA Super Licence." Finally the fifth paragraph was concerned with the Super Aguri threat. The warranty that the claimants would not be in breach of any existing or former agreement by entering into the Service Agreement was plainly referable to the assertion by Super Aguri that the November 2006 contract with Mr Van der Garde was still alive (see in particular Mr Missling's email to the Mr van Wijngaarden dated 8 February 2007).

180. On Dr Kolles' evidence it would have been possible for Mr Van der Garde to drive approximately 3,400 kilometres if he had driven in all the Grand Prix Friday morning test sessions. I do not accept his evidence that he gave that figure to Mr Boekhoorn on 1 February 2007 or to the Claimants thereafter. However it would have been obvious to the Claimants that driving in all 17 Friday morning test sessions would be likely to involve a significant number of kilometres. Given the attention to detail apparent in the drafting of clause 2 it is in my view implausible that if the parties had intended the principal benefit to be conferred on the claimants under the Service Agreement to be qualified and conditional in the way contended by Spyker that this would not have been spelled out explicitly. Commercially there was obviously a huge difference between an unqualified minimum of 6,000 kilometres of driving on the one hand and a provision which could have the effect of ensuring a minimum of only 2,600 kilometres (on Dr Kolles' evidence) or some similar figure. In truth on Mr Davies' construction the minimum kilometres guaranteed to the claimants were not 6,000 but 2,600 or some similar figure. Put another way the minimum of 6,000 kilometres was not a minimum at all. On Mr Davies' suggested construction Spyker was obliged to permit Mr Van der Garde to drive a guaranteed minimum of 2,600 kilometres and a

further possible 3,400 kilometres which was not guaranteed at all but dependent on his ability to obtain a Super Licence and drive in the Friday morning sessions, something which was known to both parties to be at the very least uncertain and more realistically subject to significant problems. That would in commercial terms lead to such a significantly different outcome that it is in my judgment wholly implausible and incredible that the parties would not have spelled this out explicitly had that been their intention. It is also implausible and incredible that if that had been their intention they would have used, as in fact they did, the language of "a minimum of 6,000 km".

181. There is in my judgment nothing in the surrounding circumstances or factual matrix to which I have referred which would support still less compel such an artificial construction, dependent as it would be on ignoring the clear language of the contract. Had it been known to the parties that it would not be possible for Spyker to provide 6,000 kilometres of driving unless Mr Van der Garde participated in all the Friday morning sessions the position might be different. But for the reasons I have given I am not satisfied that that was the case. To the contrary it was made plain by the Spyker representative on 1 February 2007 that there would be every possibility of providing 6,000 kilometres even if Mr Van der Garde did not participate in the Friday morning sessions. It is clear that Mr Boekhoorn was content and indeed keen to proceed on the basis of the gentleman's agreement reached on 1 February 2007 which preceded the 9 February 2007 schedule relied on by Mr Davies. There is no suggestion in the evidence that receipt of that schedule evinced any response or question on the part of the claimants. On the contrary four days later the full consideration of $3million agreed in principle on 1 February 2007 was paid to Spyker.

182. Given the difficulties associated with the obtaining of a Super Licence, which had been highlighted by Spyker both in Innsbruck and in Mr Missling's email dated 8 February 2007, it was plainly known to the Claimants that any benefit flowing from driving in Friday morning test sessions was at best conditional and contingent. Any benefit flowing from his appointment as Spyker's first reserve race driver was even more contingent and conditional. It depended not only on Mr Van der Garde obtaining a Super Licence but also on (a) Spyker requiring him and (b) Spyker forming the view that he performed satisfactorily not only as a test driver but with regard to his obligations set out in clause 3. In effect the benefit was subject to a very large element of discretion on the part of Spyker. In those circumstances the principle guaranteed benefit to Mr Spyker was the guaranteed minimum kilometres. While it is not logically impossible that Mr Boekhoorn and the claimants would have been prepared to settle for a guaranteed minimum of 2,600 kilometres with a possible contingent addition of a further 3,400 kilometres if Mr Van der Garde got a Super Licence, there is nothing in the evidence as to the factual matrix to suggest that that was the case or that it was known to both parties to be the case. If that really had been the intention of the parties there is in my view no rational explanation as to why it was not explicitly spelled out. Looked at from Spyker's point of view the provision of test driving was very expensive. The claimants' expert Mr Mark Gallagher said that from the point of view of a Formula One Team "in motor racing the first thing you do is look to cover your costs. In a pay to drive arrangement for a testing programme the objective will be to use the income from the driver to mitigate some or all of the costs associated with running the car. The main aim in testing a paid driver particularly one who is as yet unproven is not to lose money and of course a team will look to make a profit as with any normal business. It is difficult to determine what the costs per kilometres

come to as teams have differing levels of overheads, supplier costs and so on to amortize across testing costs. However typically I would expect the costs to be in the region of $500 per kilometre." While these figures,which were not challenged by Spyker's expert Mr Zecchi were not precise, it is obvious that the costs to Spyker of providing Mr Van der Garde with a minimum of 6,000 kilometres would have been likely to be significantly greater than the costs of providing him with only a minimum of 2,600 kilometres. Since on Spyker's case the intention was that Spyker should only be obliged to provide 2,600 kilometres if Mr Van der Garde failed to obtain a Super Licence, it is in my judgment to be inferred that Spyker would have insisted that this should be spelled out in the agreement and that they would not have agreed to provide a minimum of 6,000 kilometres.

183. It follows from my findings as to what was agreed in principle but not on the basis of a binding legal agreement on 1 February 2007 that if, contrary to what I have held, it were permissible to refer to that agreement for the purpose of construing the Service Agreement, the oral agreement would support the conclusion which I come to on the proper construction of Clause 2. What was agreed on 1 February 2007 was that Spyker would provide 6,000 kilometres of testing and there was no condition that Mr Van der Garde should obtain a Super Licence or participate in the Friday morning test sessions. Nor was it agreed that Spyker's obligation to provide 6,000 kilometres was dependent on Mr Van der Garde obtaining a Super Licence.

184. A further factor pointing against Spyker's submission that it was obvious to the parties from the 9 February 2007 test schedule that the only way in which Mr Van der Garde would ever have a hope of driving 6,000 kilometres would be if he drove at the Friday morning test sessions at Grand Prix weekends and thus that clause 2 of the Service Agreement should be construed so that Spyker's obligations to provide a minimum of 6,000 kilometres was dependent on Mr Van der Garde driving at all 17 Friday morning test sessions which would have enabled him to drive some 3,400 kilometres is that the third paragraph of clause 2 did not in my judgment provide that Mr Van der Garde would drive for the whole of every Friday morning test session. Mr Davies' submission to the contrary in his skeleton argument on remedies was in my view wrong. It was based on the submission that if the provision did not entitle Mr Van der Garde to participate during the whole of the Friday morning sessions at all Grands Prix the word "all" would not be given meaning. In my judgment it is clear that the word "all" in paragraph 3 of clause 2 was intended to have the same meaning as if it had been "each". In other words he was to drive at each of the Friday morning test sessions as distinct from merely at some of them. If the intention had been that he should drive during the whole of each of the Friday morning sessions in my view this would have been spelled out expressly by some such words as "for the whole of all of the Grand Prix Friday morning test sessions." Given the importance to Spyker of Friday morning test sessions as an opportunity for their drivers who would participate in the ensuing Grands Prix to get as much driving as possible before the race and in particular in the individual car which each individual driver was due to race in, the allocation of the right to drive one of Spyker's two race cars throughout the whole of each of the 17 Grands Prix morning sessions to a test driver such as Mr Van der Garde would have represented a significant fetter on Spyker's business. If it had been the intention of the parties to agree such an outcome it is to be expected that it would have been spelled out explicitly.

185. As already mentioned the principal pleaded defence on the construction of clause 2 of the Service Agreement was that Mr Van der Garde was under an obligation to use his best endeavours to obtain an FIA Super Licence to enable him to take part in the Grands Prix Friday morning test sessions and thereby be in a position to test for the 6,000 kilometres referred to in the Service Agreement; and that Mr Van der Garde did not use his best endeavours to obtain an FIA Super Licence to enable him to take part in the Grand Prix Friday morning sessions at which he would have tested for up to a further 3,400 kilometres. In particular he refused to follow the defendant's advice to participate in the GP2 series in which he could win a race and thereby obtain an FIA Super Licence. I note that the obligation contended for was not put forward as an implied term. This no doubt reflected a recognition on the part of Spyker that it could not realistically be contended that the implication of such an obligation is necessary to give the agreement business efficiacy. The contention that such an obligation arose not as an implied term but as a matter of construing clause 2 of the Service Agreement is in my judgment hopeless.

186. The starting point is the simple one that no such obligation is expressed in clause 2. Nor is it in my judgment impossible to give meaning to the express provision of clause 2 without the existence of such an obligation. The premise on which the contention appeared to be based was that (contrary to Mr Davies' written submissions) Spyker's obligation to provide the minimum 6,000 kilometres was not dependent on Mr Van der Garde obtaining a Super Licence and being able to drive in all the Grands Prix Friday morning sessions. If it were so dependent it would be a matter of indifference to Spyker if Mr Van der Garde failed to obtain a Super Licence since such failure would merely reduce the number of kilometres it was obliged to provide him. There would thus be no need for an obligation on Mr Van der Garde to use his best endeavours to obtain a Super Licence. However even assuming that, as I have found, Spyker's obligation under clause 2 to provide 6,000 kilometres was not dependent on Mr Van der Garde getting a Super Licence and being able to drive in Friday morning sessions, so that Spyker under clause 2 had an absolute obligation to provide an minimum of 6,000 kilometres whether or not Mr Van der Garde was able to drive in Friday morning test sessions, it is impossible to see how the existence of an unexpressed obligation on Mr Van der Garde to use his best endeavours to obtain a Super Licence was necessary to enable Spyker to provide 6,000 kilometres. I refer to my findings above to the effect that it was not known to or agreed by the parties prior to the Service Agreement that it would be impossible for Spyker to provide 6,000 kilometres without Mr Van der Garde taking part in some let alone all of the 17 Friday morning sessions, let alone for the entirety for each of them.

187. If that had been known to and agreed between the parties it is far from clear that the Service Agreeement would have taken the form it did. First the known uncertainities as to whether Mr Van der Garde would obtain a Super Licence and Dr Kolles' expressed doubts in relation thereto were such that it would be surprising if Spyker had been prepared to commit itself to providing a guaranteed 6,000 kilometres in circumstances where a failure on the part of Mr Van der Garde to obtain a Super Licence would put it in breach of the obligation to provide 6,000 kilometres. A mere obligation on the part of Mr Van der Garde to use his best endeavours to obtain a Super Licence would not have offered very robust protection to Spyker. If, contrary to the view expressed by Mr Boekhoorn at Innsbruck on 1 February 2007, the Super Aguri contract had not been validly terminated and remained in force no amount of

best endeavours on the part of Mr Van der Garde could guarantee that Super Aguri would not insist on asserting the validity of its agreement with him at the Contract Recognition Board thereby preventing him from obtaining a Super Licence as part of the Spyker team. Similarly in relation to Mr Van der Garde satisfying the FIA as to performance, no amount of best endeavours on the part of Mr Van der Garde could have guranteed that he would satisfy the FIA requirements.

188. Second if it was known to and agreed between the parties that 6,000 kilometres would be impossible without Friday morning sessions one would have expected the contract to provide for a minimum number of kilometres which could be guaranteed without Friday morning sessions together with a separate obligation to provide Friday morning test driving subject to Mr Van der Garde obtaining a Super Licence. Third if Spyker was prepared to guarantee 6,000 kilometres knowing that it could only perform that obligation if Mr Van der Garde drove throughout each of the 17 Friday morning sessions provided that Mr Van der Garde was prepared to use his best endeavours to obtain a Super Licence, one would have expected the agreement both to specify that Mr Van der Garde was to drive for the whole of each of the Friday morning sessions and also to include an express obligation on Mr Van der Garde's part to use his best endeavours to obtain a Super Licence.

189. As it is, on my findings and construction of the Service Agreement, Spyker's obligation under clause 2 to provide 6,000 kilometres was not dependent on Mr Van der Garde driving on some or all of the Friday morning test sessions. It is thus not self evident that it would have been understood to both parties to be in Spyker's interests to ensure that Mr Van der Garde was eligible to drive in Friday morning test sessions. That being so it is not self evident that an obligation on Mr Van der Garde to use his best endeavours to obtain a Super Licence would be necessary, since its only function would be to protect Spyker's commercial interest.

190. It is of course Spyker's case that the (albeit contingent) right to drive during the Friday morning sessions was a valuable benefit conferred by the management agreement on the Claimants. It is striking that the second paragraph of clause 2 contains an express obligation on Spyker (as distinct from the claimants) to use its best endeavours and to assist Mr Van der Garde to establish eligibility for an FIA Super Licence. It seems to be implicit in the existence of that express obligation that it was contemplated by the parties that obtaining a Super Licence and thus being able to drive in Friday morning test sessions was in the commercial interests of the claimants as distinct from Spyker. Had it been contemplated that it was also in the interests of Spyker no reason was advanced as to why an equivalent obligation on Mr Van der Garde to use his best endeavours to obtain a Super Licence was not expressly included. In my judgment if anything the absence of such an express provision suggests that it did not occur to the parties that it would be necessary since it was assumed that it was in the Claimants' own self interest for Mr Van der Garde to use his best endeavours to obtain a Super Licence. At best from Spyker's point of view the absence of an express provision is in my judgment neutral. Again the absence of an express provision of the sort argued by Spyker to be buried in clause 2 as a matter of construction is in striking contrast to the express obligation under clause 3.1 to participate to the best of his ability in and throughout each of the Tests. The same can be said of clause 4.2 which imposed an obligation on all parties to use their best

endeavours to assist each other to seek new sponsors for either Spyker or Mr Van der Garde.

191. I should add that the definition of Tests in clause 2 is "testing and/or **practising** and/or racing" (emphasis added). Dr Kolles in oral testimony suggested that practising added nothing to the opportunities for Mr Van der Garde to drive under the Agreement because it referred to Friday morning test sessions. He said that "'we' use the word 'practise' only in the context of free practise…and we use the word 'test' in context with tests which are organised apart from the race weekends. So basically the Friday sessions are the free practise sessions and the tests during the week or away from the Grand Prix weekend these are not called practice session they are called test sessions." In other words the suggestion was that practising was a term of art referring only to Friday morning test sessions. However he had no recollection of mentioning "practising" to Mr Boekhoorn and there was no other evidence that if there was such a term of art it was known to the claimants or Mr Boekhoorn. Accordingly in my view it is to be construed not as a term of art referring exclusively to Friday morning test sessions but rather to any practising anywhere. Although there was no evidence as to whether and if so in what form there might be practising outside the non-Friday morning test sessions, the addition of this third part of the definition of Tests is a further, albeit lesser, argument against the proposition that it was known to and understood by both parties that 6,000 kilometres could only be achieved if Mr Van der Garde drove in Friday morning sessions.

192. It does not seem to me that the introductory words of the first paragraph of clause 2 ("subject to the terms and condition of this Agreement and the FIA provisions and regulations and the Driver and company complying with their obligation hereunder") advance either Mr Davies' submissions or the pleaded defence on this point. The reference to the Claimants' obligations under the management agreement begs the question whether they include the unwritten obligation contended for by Spyker. If anything the explicit reference to "obligations hereunder" would tend to argue against spelling out of clause 2 any additional obligation on the part of the claimants beyond those expressed in the agreement as a condition precedent to Spyker's obligation to provide a minimum of 6,000 kilometres.

193. In any event the premise of the obligation contended for by Spyker must be that it was contemplated by the parties that if Mr Van der Garde did not take part in the Friday morning test sessions he would not be in a position to test for the 6,000 kilometres referred to in the Service Agreement. For the reasons already given in my judgment that is an invalid premise.

194. If I were wrong in my conclusion that the Service Agreement contained no obligation on Mr Van der Garde to use his best endeavours to obtain a Super Licence, the questions would arise whether he was in breach of that obligation and whether, as alleged in Spyker's Defence if he had taken part in the Friday morning sessions he would have tested for "up to a further 3,400 kilometres". As to the first question the only particular pleaded as to his failure to use his best endeavours to obtain a Super Licence was the allegation that he refused to follow Spyker's advice to participate in the GP2 series in which he could win a race and thereby obtain an FIA Super Licence. The only reference in the documents to such advice having been given by Spyker is in Dr Kolles' letter dated 23 August 2007 to Mr Boekhoorn in which he wrote: "Rest assured that it is up to Giedo himself to co-operate with us in receiving a good

preparation to become an F1 race driver. We did and will do our part. This is also true with regards to the Super Licence which was not granted due to lack of performance by Giedo. I even recently suggested to Giedo to get involved in GP2 to eventually win a race and consequently obtain the Super Licence." The inference from the last sentence quoted is first that no such advice was given until shortly before 23 August 2007 and second that Dr Kolles did not expect that if Mr Van der Garde had taken up this advice or even if he were to take it up at the time of writing the letter there was any realistic prospect that it would lead to Mr Van der Garde winning a GP2 race and thus obtaining a Super Licence in time to enable him to take part in the 2007 Grands Prix morning sessions. It is flatly inconsistent with the pleaded allegation that if he had followed the advice he would have tested "for up to a further 3,400 kilometres." As already mentioned 11 of the 17 Grands Prix had already taken place. On Dr Kolles' evidence that there are approximately 200 kilometres on a Friday morning session, that meant that of a notional 3,400 kilometres available in the 2007 season on Friday morning sessions 2,200 were no longer available. As already mentioned Dr Kolles said that he did not have an expectation when he wrote that letter that Mr Van der Garde would obtain a Super Licence before October thus leaving a maximum of 400 kilometres available if in the few weeks between 23 August and the China Grand Prix on 5 October and the Brazil Grand Prix on 10 October 2007 Mr Van der Garde had succeeded in applying to take part in the GP2 series, winning a GP2 race and obtaining a Super Licence on the back of it.

195. In my view there is nothing to suggest that this was a realistic possibility let alone a probability. Apart from anything else it ignores the fact that the Super Aguri dispute had not been resolved and remained a bar to Mr Van der Garde obtaining a Super Licence. Contrary to Dr Kolles' assertion in the letter that the Super Licence was not granted due to Mr Van der Garde's lack of performance, in evidence he said that as well as Mr Van der Garde's inadequate racing results the contractual problem flowing from the Super Aguri dispute was also a sticking point. Dr Kolles said that to get a Super Licence by the GP2 route a Driver had to be in the top four in the championship "and you have to win races". Article 5.12(c) of the Sporting Code provided a requirement to have been classified in the first four of the final classification of the GP2 series within the previous two years. This was plainly not an available route between 23 August 2007 and October 2007. Thus even if Mr Van der Garde had shortly before 23 August 2007 followed Dr Kolles' advice and sought to enter the GP2 series there is in my judgment no probability that he would thereby have enabled himself to drive in any of the remaining Grand Prix Friday morning sessions of the 2007 season. His failure to do so cannot therefore have had an impact on Spyker's ability to comply with its obligation to provide him with 6,000 kilometres even if that ability was dependent on Mr Van der Garde participating in Friday morning sessions. In any event Mr Van der Garde gave evidence which I accept that Dr Kolles did not suggest prior to the 23 August 2007 letter that he should enter the GP2 series in the middle of the 2007 season. Spyker knew that he already had a contract to drive in the World Series by Renault for the Renault team. He said that Dr Kolles did phone him and ask if he wanted to drive in GP2 because there was a seat change but Mr Van der Garde was advised by his managers, Mr Mulleman and Mr Yoell that he would have no chance of coming within the top 10 in the GP2 series if he entered in the middle of the 2007 season. All the other Drivers in the GP2 series had a lot of experience already whereas he would have only 30 minutes practice before having to take part in two races.

196. For all these reasons I do not consider either that Mr Van der Garde had the obligation contended for by Spyker or that if he did that he was in breach of it or that if he was in breach of it it had the effect of preventing him from participating in Friday morning sessions which he would otherwise have participated in.

197. In these circumstances it is not necessary for me to take time on the allegation in the Claimants' Reply that Spyker was itself in breach of its express obligation to use its best endeavours and assist Mr Van der Garde to establish eligibility for the FIA Super Licence. In short in my view the evidence to which I have referred does not support that allegation. Although obtaining a Super Licence was a necessary precondition not only for enabling Mr Van der Garde to benefit from the contingent right to participate in Friday morning test sessions but also for enabling him to break through more substantively into Formula One racing, which was the commercial objective of the Service Agreement, there was in reality very little on the evidence that Spyker could do to assist him to establish eligibility for a Super Licence beyond honouring its express contractual obligation to make available 6000 kilometres of test driving which it was hoped would have the effect of improving his driving skills at least to the level where he would satisfy one or other of the FIA performance conditioons for obtaining a Super Licence. The one thing which it could and did do, namely to organise the Valencia test drive with an FIA monitor, was a comparatively minor administrative task. As to helping resolve the dispute with Super Aguri I am satisfied neither that Spyker had a contractual obligation to do so nor that if it did have such an obligation it was in breach of it. The evidence showed that Dr Kolles had conversations with both Max Mosley and his contact at Super Aguri, albeit to no avail. (In the different context of the argument as to whether apportionment of the $3 million is impossible by reason of the existence of other contractual obligations on Spyker in addition to providing 6000 kilometres of test driving which were part of the essential bargain contracted for, Mr Tregear submitted that a significant part of Spyker's contractual obligations comprised assisting Mr Van Der Garde obtaining a Super Licence and that that obligation was performed to a significant degree. I do not accept that submission. As just explained, in my judgment the arranging of the Valencia test was not part of the essential bargain contratced for-it was merely a mechanical means to an end-and the conversations with Mr Mosley and Super Aguri were not a contractual obligation imposed on Spyker by the Service Agreement or if they were they were again not part of the essential bargain contracted for.)

198. Although it was not pleaded by Spyker that Mr Van der Garde failed to use his best endeavours to get a Super Licence by reason of anything done or not done in relation to the Super Aguri dispute, I would add for completeness that it is hard to identify any failure on his part which could be said to be a breach of such an obligation if it existed. According to Dr Kolles Mr Boekhoorn and Mr Audetto of Super Aguri held negotiations in which money was offered from the Van der Garde side of the table to resolve the dispute. There was no evidence that negotiations were held in bad faith or lacked proper effort on the part of Mr Boekhoorn or Mr Van der Garde. In any event even if a compromise had been successfully negotiated to the dispute with Super Aguri, it is noteworthy that in its defence in the Super Aguri action Spyker pleaded that there would inevitably have been a time lag between Mr Van der Garde being released from his obligations to Super Aguri by virtue of the termination of his agreement with Super Aguri and the registration at the Contracts Recognition Board lapsing. As to the FIA test, Mr Van der Garde took the test in Valencia on 19

February 2007 and on the available evidence drove well, beating a driver who had a place in Spyker's Formula One Team. There was no suggestion by Spyker that his performance in the Valencia test constituted a breach of an implied obligation to use his best endeavours to obtain a Super Licence and it would be hard to see how such an argument could be advanced or sustained. As to the processing of the FIA Super Licence application, that was organised by Spyker.

199. Spyker's next pleaded defence to the allegation that it failed to permit Mr Van der Garde to drive for a minimum of 6,000 kilometres in breach of clause 2 of the Service Agreeement was the allegation that he refused to take part in a test at the Paul Ricard circuit in May 2007 at which he would have tested for 1,500 kilometres. I have already referred to Mr Van der Garde's email dated 8 May 2007 to Dr Kolles confirming that he was not testing at Paul Ricard the following week because he wanted to get really fit for his next race in Monaco because his last two races were not good so that he needed to work really hard for it and because he had to test in the following week in a shake down.

200. The Claimants' pleaded response in the Reply was that there was an implied term that Spyker would not select dates for tests which conflicted with Mr Van der Garde's other driving commitments or which were otherwise unreasonable. The proposed Paul Ricard test date was too close to a race in Monaco which Mr Van der Garde was to take part in. It was also averred that Mr Van der Garde would not possibly have tested for 1,500 kilometres at the Ricard circuit in any event. He would have completed 300 kilometres per full day and Spyker's offer was for two days shared with another driver or one full day equivalent.

201. In my judgment there was no implied term that Spyker would not select dates for tests which conflicted with Mr Van der Garde's other driving commitments. Mr Van der Garde's case was that it was known to Spyker that he was driving in the World Series for Renault. Even assuming that this was known to Spyker before the Service Agreement was entered into, that does not seem to me to support such an implied term. It was expressly agreed in clause 2 that dates of the tests were to be decided by Spyker. The parties thus specifically addressed their minds to the question of when the tests were to take place and the mechanism by which the test dates were to be selected. In my judgment it was to be expected that if the Claimants considered both that there was a material risk of a clash between testing dates selected by Spyker and that it was commercially or professionally important for Mr Van der Garde that such clashes should be avoided that would have been a matter for which express provision would have been made. Certainly it could have been made. Given what I have found to be the absolute obligation imposed by the Service Agreement on Spyker to provide a minimum of 6,000 kilometres of testing it was plainly important that they should be in a position to enable themselves to perform that obligation by specifying a sufficient number of test dates. It was known to the Claimants from the 9 February 2007 testing schedule if not also from the discussions in Innsbruck that Spyker had other test drivers for whom no doubt it would wish to make testing provision. An implied term in these terms would or at least might have inhibited Spyker's freedom of manoeuvre in planning its testing season and absent express provision in my judgment there is no reason why in order to give business efficacy to the contract it should be assumed that the parties are to be taken as having agreed that Mr Van der Garde's other racing commitments were to take priority. If it had been the Claimants' wish to secure that

objective, it would in my view have had to be done by an express contractual provision. The additional words in the implied term contended for by the Claimants "or which were otherwise unreasonable" do not in my view assist them. In so far as the unreasonableness relied on by the Claimants was the conflict with Mr Van der Garde's other driving commitments in my judgment that was not unreasonable. In any event there was no direct conflict between the two dates. The Paul Ricard test schedule was for 15 to 17 May 2007 whereas Mr Van der Garde's WSR race in Monaco was on 27 May 2007. If it were a sufficient reason for Spyker to be prevented from specifying a test date that it occurred 10 to 12 days before a WSR race, given the number of tests which it is to be inferred Spyker would have to arrange in the 2007 season to comply with its 6,000 kilometres minimum obligation, it is not hard to imagine that this could have made it difficult if not impossible for Spyker to comply with its contractual obligation.

202. The importance which is to be inferred the parties agreed to attach to Mr Van der Garde racing on the dates specified by Spyker is further supported by clause 3.1 of the Service Agreement which provided that Mr Van der Garde would to the best of his ability participate in and throughout each of the Tests. The inference in my view is that Spyker needed to have autonomy in selecting and ensuring full participation in all the test dates. Accordingly in my judgment there was no implied term to the effect contended for by the Claimants. Alternatively if I am wrong in that, it was not breached by Spyker in nominating Paul Ricard as one of the test dates.

203. There was dispute between the parties as to how many kilometres Mr Van der Garde would probably have driven if he had taken part in the Paul Ricard test. Spyker's assertion in its Defence that he would have driven 1,500 kilometres reflected the assertion by Dr Kolles in his letter dated 23 August 2007 that he intended to involve Mr Van der Garde in the Paul Ricard tests for at least two days which he stated equals 1,500 kilometres. The Claimants' pleaded response in the Reply was that Mr Van der Garde would have completed 300 kilometres per full day, Spyker's offer having been for two days shared with another driver which was thus the equivalent of one full day. The dispute was thus both as to how much time Mr Van der Garde would have been given and as to the amount of kilometres he would probably have driven within that time.

204. On the first issue in my judgment the best evidence was to be found in the series of updated Spyker test schedules. The schedule dated 9 February 2007 showed 3 days of testing with one car. The second and third days were allocated to Messers Albers and Sutil. The first day had question marks. There was no reference to Mr Van der Garde. On the schedule dated 27 March 2007 a fourth day was added to the Ricard test. The third day was allocated to Mr Albers, the fourth to Mr Sutil, the second and third to both of them and the first (which was only half a day) was divided between Mr Fauzy, another Spyker test driver, and PM. Again there was no mention of Mr Van der Garde. This schedule was produced before Mr Van der Garde informed Dr Kolles that he would not attend the test. In the schedule dated 20 April 2007 Mr Van der Garde was put down to share the third day with Mr Albers and a further test driver Mr Winklehock was down to share the fourth day with Mr Sutil. Although no date was given by Dr Kolles or Mr Van der Garde for the telephone conversation in which Mr Van der Garde said he would not be attending, it is to be inferred that this schedule was prepared before it since Mr Van der Garde's name appeared on it.

205. In my judgment the schedules are inconsistent with Dr Kolles' assertion in his letter dated 23 August 2007 that he intended to involve Mr Van der Garde for at least two days of testing which would equal 1,500 kilometres. Nor is there any support for Dr Kolles' assertion in the record of the amount of kilometres which Mr Van der Garde actually drove in the nine tests in which he did drive. In none of those did he drive more than 391 kilometres and Dr Kolles' protestation that he would have given Mr Van der Garde two days so as to boost his mileage and attain the 6,000 kilometres is not supported by the fact that in the six tests which took place after Paul Ricard Mr Van der Garde drove respectively 144, 26, 370, 188, 391 and 351 kilometres. The inference from the objective evidence would seem to be that Spyker was juggling the available test spaces between a number of drivers and prior to Mr Boekhoorn's complaint in August 2007 there was no evidence of Spyker making available to Mr van der Garde testing slots of the order of two whole days. In the event it appears that Mr Fauzy drove for a whole day instead of the half day allocated to him on the 20 April 2007 schedule. While this is not conclusive in my view it is a reasonable inference that Mr Fauzy was allocated the additional half day which had been allocated to Mr Van der Garde and which he would have driven if he had attended the Ricard test. That would on its face suggest that if Mr Van der Garde had attended the Ricard test he would have driven for half a day. However the inference to be drawn from the schedules that Spyker's offer was for two days shared with another driver or one full day equivalent. Since that pleading must have been based on instructions from Mr Van der Garde who did not explicitly contradict it in his evidence, doing the best I can I consider that the probability is that Mr Van der Garde would have driven for one whole day at the Ricard test circuit

206. As to the second dispute, again in my view Dr Kolles' evidence that it was possible for Mr Van der Garde to drive 750 kilometres a day at Ricard was self serving. The average per day on other circuits he put at 450 kilometres. The Ricard track was built for testing and the area around the track was quite wide so that the risk of incident which costs time was much less. Against that Mr Van der Garde said that the Ricard circuit was configured to the same conditions as Monaco with lots of small corners which made it impossible to do a lot of miles because it was slower. In my view the best evidence is to be found in the fact that Mr Fauzy drove 266 kilometres in a whole day at the Ricard test. Mr Van der Garde's evidence was that a technical problem with the car meant that Mr Fauzy did not reach the target of 300 kilometres. Although Dr Kolles suggested that the 266 kilometre achieved by Mr Fauzy might have been because he reached a limit in his contract, he accepted that he could not remember why Mr Fauzy stopped at that figure. In my view Mr Van der Garde's evidence on this is more reliable. Since he would have been using the same car as Mr Fauzy in my view it is a reasonable inference that if he had participated at Paul Ricard the probabilitiy is that he would have driven 266 kilometres.

207. A question therefore arises as to what is the effect of this finding. In my view the answer is to be found in the opening qualifying words of clause 2 "subject to the terms and conditions of this Agreement… and the Driver and Company complying with their obligations hereunder." The terms and conditions of the Service Agreement included the provision that Spyker was to decide the dates of the tests, that Mr Van der Garde would to the best of his ability participate in and throughout each of the tests decided by Spyker and that he would carry out the lawful and reasonable instruction of Spyker's team manager (Clause3.2), which in my view would include

an instruction to participate in a nominated test. Thus in my view Spyker's obligation to permit Mr Van der Garde to drive its car for a minimum of 6,000 kilometres was subject to Mr Van der Garde agreeing to drive at the Ricard circuit test and doing his best to participate in it. In so far as his failure to do so had the consequence that he drove for 266 kilometres less than he would have done if he had complied with those obligations, in my view the effect is that the minimum number of kilometres which Spyker was obliged to provide fell to be reduced by 266 kilometres. Thus Spyker's obligation under the Service Agreement in the events that happened was to provide a minimum of 5,734 kilometres in addition to the 266 kilometres which would have been available to Mr Van der Garde if he had availed himself of the Ricard offer. Put another way Spyker was released from or discharged its obligation to provide 266 of the contracted minimum 6,000 kilometres by offering Mr Van der Garde one day's test driving at Paul Ricard.

208. In relation to Mr Van der Garde's crash in the Silverstone test in June 2007 Spyker's Defence asserted that he would have tested for a further 200 kilometres but for the crash. The Claimants' response in their Reply was that the Silverstone test was for 20 laps. Each lap at Silverstone is 4 kilometres. The crash was after 10 laps so that 40 kilometres of that test were forgone. Dr Kolles' evidence was that the lap distance for Silverstone published by the FIA is 5.141 kilometres, that Mr Van der Garde crashed after 4 laps not 10 so that he lost over 80 kilometres. In his witness Mr Van der Garde put the "lost" mileage at about 54 kilometres. He estimated that he would have driven 80 kilometres in total that day if he had not crashed. The agreed schedule which I have set out earlier shows the actual kilometres driven as 26.

209. In my view the effect of the crash at Silverstone is different to the effect of Mr Van der Garde declining to participate in the Ricard test. Spyker did not contend that by reason of his crash Mr Van der Garde was in breach of any obligation under the Service Agreement. On its face Spyker's obligation was to permit Mr Van der Garde to drive a minimum of 6,000 kilometres. Whatever might have been the position if Spyker's ability to provide 6,000 kilometres was and was known to the parties to be dependent on Mr Van der Garde driving the whole of the Silverstone test, the reality on the evidence is that it was not so dependent and was not known to the parties to be so dependent. I can see that difficult questions might have arisen if for example Spyker had made available sufficient tests to have enabled Mr Van der Garde to complete 6,000 kilometres and he had crashed in all or most of them thereby making it impossible for Spyker to provide 6,000 kilometres. The crash at Silverstone was not close to such a hypothetical situation.

210. The upshot is that in my judgment in the events which happened, including the offer of test driving at Paul Ricard, Spyker's obligation under the Service Agreement was to permit Mr Van der Garde to drive for a minimum of 5,734 kilometres on top of the 266 kilometres which he would have driven if he had availed himself of the offer to test at Paul Ricard. As appears in the agreed schedule set out earlier in fact he drove only 2,004 kilometres leaving a short fall of 3,730 kilometres. I therefore find that Spyker was in breach of its obligation under the Service Agreement with the effect that whereas it should have permitted Mr Van der Garde to drive a minimum of 5734 kilometres (in addition to making the offer of one day's test driving at Paul Ricard) it only permitted him to drive 2,004 kilometres, a shortfall of 3730 kilometres.

211. The question therefore arises as to what if any relief the claimants are entitled to by reason of this breach.

Damages and Remedies

212. The formulation of the Claimants' claim for relief evolved both as a matter of pleading and as a matter of submission. By the time of the final closing skeleton argument dated 7 August 2009 and the oral hearing which began on 16 November 2009 it crystallised into four alternative claims. They were, in descending order of priority, as follows: (1) restitution of the net amount paid to the defendant under the Fee Agreement attributable to the test drive kilometres of which Guido was wrongfully deprived on the basis of a failure of consideration ("the restitution claim"); (2) in the alternative, damages for breach of contract consisting of the value of the performance that the defendant failed to render ("the performance interest damages claim"); (3) in the further alternative an award of damages for breach of contract to compensate the claimants for lost income from salary, winnings, sponsorship and merchandising suffered as a result of the defendant's breach of contract or the loss of the opportunities of obtaining such a salary, winnings, sponsorship and merchandising ("the career damages claim"); (4) as a final alternative an award of damages of the sort made in *Wrotham Park Estate Company Limited v Parkside Homes Limited* [1974] All 1 WLR 798 ("the Wrotham Park Claim").

213. Before considering those four heads of claim it is appropriate to chart the course of events which culminated in that formulation of the claimants' claims for relief. .

214. In the original Particulars of Claim it was alleged in paragraph 13 that in breach of the Fee Agreement the defendant failed to pay the first Claimant $60,000 or any part thereof. (By the time of the trial it was accepted that in fact $45,000 had been paid). In paragraph 14 the following was pleaded: "The claimants claim restitution and/or damages for breach of contract, alternatively claim to recover in equity, the sum of US$2,100,000(£1,072,796.93). This is calculated as follows: US$3 million(£1,532,567.05) for 6,000 km = US$500 (£255.43)for 1 km; 4,200 km not made available X US$500(£255.43) = US$2,100,000. (£1,072,796.93)" Under paragraph 15 the first Claimant also claimed the sum of $60,000. The prayer for relief was in the following terms:

> "AND THE CLAIMANTS CLAIM:
>
> (1) Damages for breach of contract;
>
> (2) Alternatively $2,100,000 (£1,072,796.93) in equity;".

215. This pleading was not very illuminating and in due course when the claimants applied for permission to amend it there was some debate as to what it did and did not encompass. What it did not encompass, as was acknowledged by Mr Starr who at that stage appeared as the Claimants' solicitor advocate, was a claim for career damages. In his opening submissions Mr Starr said that the Claimants did not advance a claim for damages for breach of contract on the basis of the value of the benefit to the second Claimant's career which would have followed if he had been provided the full 6,000 kilometres of testing, racing and driving. He accepted that it was impossible or at least very difficult to say what might have become of Mr Van der Garde's career

had there been no breach of contract and he was not advancing a claim for damages for breach of contract on that basis. Mr Starr also accepted that the Claimants could not quantify the benefits in terms of the enhancement of Mr Van Der Garde's career prospects which would have followed had the contract been performed. Indeed he not only accepted this but positively averred it as a reason why this was a suitable case for the court to make an award of damages for breach of contract calculated not so as to enable the claimant to recoup financial loss caused by the breach of contract but rather measured by the benefit gained by the wrongdoer from the breach of contract.

216. This latter basis was said by Mr Starr to be the primary basis on which damages for breach of contract were sought in the Particulars of Claim. Reliance was placed on passages in the well-known speech of Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 where the availability of damages measured in this way in a suitable case was confirmed by the House of Lords. Further reliance was placed on a passage in the decision of Peter Gibson LJ in *Experience Hendrix LLC v PPX Enterprises Inc and another* [2003] FSR 46 at paragraph 58 where one of the three reasons identified as making the case a suitable one as envisaged by Lord Nicholls in *Attorney-General v Blake* for damages for breach of contract to be measured by the benefits gained by the wrongdoer from the breach was said to be the fact that the Claimant would have difficulty in establishing financial loss therefrom.

217. At the hearing on 20 November 2008 when Mr Starr advanced his application for permission to amend there was an element of confusion as to what was intended to be embraced in the existing claim for damages for breach of contract. At one point Mr Starr said that it was confined to a gains-based approach, that is to say a claim for damages measured by the gain made by the defendant. That gain was said to be US$2.1 million, being the amount of the US$3 million price paid to the defendant which represented the gain to it flowing from its failure to make available 4,000 odd kilometres of testing. Subsequently he stated that it had also been intended to embrace a claim for damages to compensate the Claimants for the loss of the services to which they were entitled namely the 4,000 odd kilometres, the best evidence of the value of which to the Claimants was the contract price or rather two thirds thereof.

218. On 14 November 2008 during the course of Mr Van der Garde's oral testimony I raised the question through counsel as to what the position would be if the outcome of the case were that the Claimants succeeded on liability in establishing a breach of contract but failed to establish that this was a case in which they were entitled to or it would be appropriate to give them damages calculated by reference to the benefit retained by the Defendant. I invited written submission on damages which were received together with reply submissions by 18 November 2008, there having been an adjournment for the conclusion of Mr Van der Garde's evidence between 14 November and 20 November 2008 occasioned by his having to take part in testing for another Formula One Team.

219. When the court reconvened on 20 November 2008 Mr Starr confirmed that the original pleaded claim in equity was no longer being pursued. It followed that if the claim for damages for breach of contract in the Particulars of Claim properly construed was confined to a claim measured by the benefit retained by the Defendant, the answer to the question I had raised would appear to be that even if the defendant were to be found in breach of contract it would be under no obligation to pay anything by way of substantial damages for breach of contract and the claimants would be left

in effect with no remedy. On the second basis which Mr Starr said that the damages claim was intended to embrace the Claimants would have been left with a claim for damages measured by the value to them of the services not provided under the Service Agreement. At the hearing on 20 November 2008 Mr Starr applied for permission to amend the Particulars of Claim to advance as an alternative a claim for damages for breach of contract by reference to the financial loss allegedly suffered by the claimants. He handed in in manuscript an alternative paragraph 14(a) in these terms: "alternatively the claimants claim for breach of contract:

i) The claimants' costs incurred as a result of the breach (including but not limited to McLaren consultancy fees, fee in 2007 and 2008 for participation in world series by Renault and fee for GP2 in 2009); and

ii) Claimants' lost income from salary, winnings, sponsorship and merchandising suffered as a result of the breach or lost opportunities thereof"

220. This appeared to be intended only as a draft. Mr Starr indicated that the intention was to make a claim for compensatory damages in respect of benefits that would have flowed had the contract been performed or if they were too uncertain for the opportunity of obtaining them which was lost by reason of the breach of contract. As to the claim for costs this appeared to be on examination a combination of wasted expenditure in relation to the 2007 fees and the cost of mitigating the claimants' loss in respect of the 2008 and 2009 fees.

221. Following argument I gave the Claimants permission to amend their Particulars of Claim so as to include claims for whatever relief or remedies they considered they were entitled to on the assumption that they succeeded in establishing liability for breach of contract. In my judgment it was in the interest of justice that all the issues between the parties should be resolved in this action and any prejudice to the defendant arising either in relation to costs or in relation to payment in could adequately be avoided by an appropriate order. Accordingly I gave directions for the service of Amended Particulars of Claim, Amended Defence and Amended Reply, further factual and expert evidence on Formula One racing and the management of racing drivers, and further disclosure on issues raised by the amended pleadings. I further made a costs order designed to protect the defendant against the costs consequences of allowing an amendment to be made at that late stage.

222. On 2 December 2008 the Claimants served amended Particulars of Claim signed by Mr de Garr Robinson QC, who had by now been instructed by the Claimants as well as by Mr Starr. Paragraph 14 of the original Particulars of Claim was repeated. (The alternative claim to recover in equity remained, not withstanding that Mr Starr had told me on 20 November 2008 that that claim was no longer being pursued.) Paragraph 15 was also retained. In addition there was added to paragraph 14 the following plea which was said to be "further or alternatively" to the original plea in paragraph 14:

> "Further or alternatively, the claimants claim for breach of contract:
>
> (a) the claimants' costs incurred as a result of the breach of contract, including but not limited to fees incurred for

participation in the World Series by Renault competition in 2008 and fees incurred for participation in the GP2 competition in 2009; and

(b) the claimants' lost income from salary, winnings, sponsorship and merchandising suffered as a result of the breach, or lost opportunities therefor; or

(c) the fees paid by the claimants for driving in the Car in Tests and for participating in the World Series by Renault competition in 2007 as wasted expenditure."

Particulars

(1) The claimants' primary case is that they have paid US$2,100,000 for a consideration which has wholly failed and that they are entitled to restitution in this amount as money had and received plus compound interest thereon pursuant to the principle established in *Sempra Metals v. Inland Revenue Commissioners* [2008] 1 A.C. 561.

(2) Alternatively to paragraph (1) above, and without prejudice to the burden of proof, the claimants contend that the value of each kilometre to be driven in the Car in Tests was no less than US$500, and the claimants claim damages of US$2,100,000 accordingly. In support of this case, the claimants will rely on the price paid pursuant to the Fees Agreement as evidence of the value of the kilometres to be driven.

(3) Further to paragraphs (1) or (2) above, the claimants have suffered consequential losses, in that they have lost an opportunity of enhancing the second claimant's experience and reputation in the field of motor racing and thereby his ability to participate in remunerative Formula 1 testing and racing competitions. Consequently, they have lost and/or will lose, or have lost opportunities of earning, salary, race winnings, sponsorship and merchandising income.

The best particulars that the claimants can give of these losses prior to witness statements and/or expert evidence are that, had the second claimant been permitted to drive the Car in Tests for the full 6,000 km in 2007, he would have been, or would have had a real opportunity of being, offered a Grand Prix testing seat in a Formula 1 car with a Formula 1 team for 2008 and thereby attracted (a) a substantial salary, (b) sponsorship revenue and (c) merchandising revenue. He would also have been, or would have had a real opportunity of being, a reserve race driver with the opportunity of gaining at least 2 experiences of racing in Formula 1 during the season. In 2009, this pattern would have been repeated, or the second claimant

would have had a real opportunity of repeating it. From 2010 onwards, the second claimant would have been, or would have had a real opportunity of being, a racing driver in a Formula 1 team, earning salary, merchandising and sponsorship income.

In fact, as a result of the defendant's breach of contract, the second claimant was limited to competing in World Series by Renault in 2008 and he may be limited to competing in GP2 in 2009. Further, if and when he obtains a Formula 1 test seat, it will be after a delay of 1 or 2 years compared to the position he would have been in, or would have had real opportunity of being in, had the defendant permitted 6000km of driving in 2007.

In the premises, the claimants aver that the damage they suffer by reason of the defendant's breach of contract will continue to be felt and that the future income they earn from salary, sponsorship, merchandising and racing will have been delayed by 1 to 2 years. Their claim includes damages in respect (a) of 1 or 2 years' interest on delayed receipt of such earnings over the second claimant's race driving career and (b) of career earnings shortened by 1 or 2 years.

The claimants claim damages in respect of all these losses, or losses of opportunity, accordingly. These losses will be the subject of witness statements and expert evidence in due course.

(4) Further, in reasonable mitigation of their losses, the claimants have incurred and will incur the following costs in seeking to maintain the second defendant's experience and reputation in the field of motor racing and his ability to participate in remunerative motor racing:

(a) In respect of the 2008 season, the claimants paid €950,000 for the right to race in the World Series by Renault competition. They obtained sponsorship of €300,000 in this season and the costs incurred by the claimants in 2008 were no less than €650,000, plus ancillary costs of participating in the competition.

(b) In respect of the 2009 season, the claimants have paid €1,900,000 for the right to compete in the GP2 competition. The claimants did not obtain sponsorship for 2009 and the costs incurred in 2009 will be €1,900,000 plus ancillary costs of participating in the competition.

(5) Alternatively to paragraphs (1) to (4) above, the claimants will contend that, by reason of the defendant's breach of contract:

> (a) the US$3 million fee that the claimants paid to the defendant as set out in paragraph 11 above in order to drive the Car in Tests in 2007;
>
> (b) the €950,000 fee that the claimants paid in order to participate in the World Series by Renault in 2007; and
>
> (c) ancillary expenditure incurred by the claimants in pursuing the above activities
>
> were rendered futile and wasted. In the alternative to the claims set out in paragraphs (1) to (4) above, the claimants reserve the right to claim damages in the amount of this wasted expenditure.
>
> The claimants will seek judgment in the currencies in which the relevant amounts were paid and the relevant losses were suffered."

223. The prayer for relief in the original Particulars of Claim was repeated but added to it was the following additional plea: 1A restitution in the amounts of $2,100,000 and compound interest on $2,100,000 at a commercial rate.

224. The new claims in paragraph 14(a-c) reflected the manuscript amendment handed in by Mr Starr on 20 November 2008. The claim in (b) was for career damages, the claim in (a) was in effect for the cost of attempts to mitigate the Claimants' loss and the claim in (c) was a claim for wasted expenditure. As to the Particulars, (1) asserted a claim for restitution based on a total failure of consideration. On its face this would not appear to be a particular of the new claim for damages for breach of contract. However it may have been intended as a particular of the retained claim to recover $2,100,000 "in equity". The contention in (2) is not a particular of the new claim for career damages, but rather a spelling out of a claim for performance interest damages for the value of the services allegedly wrongly withheld from the claimants, such as Mr Starr had at one point contended on 20 November 2008 was intended to be embraced in the original claim for damages for breach of contract in paragraph 14 of the un-amended Particulars of Claim. The matters in (3) were particulars of the new claim for career damages. The matters in (4) were particulars of the claim for the costs incurred in mitigation asserted in paragraph 14 (a) and the matters in (5) were particulars of the claim in paragraph 14 (c) for wasted expenditure.

225. On 27 January 2009 the Claimants served a third witness statement of Mr Van der Garde dealing with loss allegedly arising out of the Defendant's breach of contract. On 23 January 2009 the Claimants served an expert report prepared by Mark Gallagher dealing with various issues relating to loss. On 1 April 2009 the defendant served an expert report from Marco Zecchi dealing with the same. The two experts had a telephone conversation on 7 April 2009 following which they prepared a brief undated joint statement.

226. On 28 April 2009 Mr de Garr Robinson QC served a skeleton argument for the Claimants on remedies. This made clear that the claimants were no longer pursuing their claim for wasted expenditure set out in paragraph 14(5) of the amended Particulars of Claim. Although it did not say so in terms the effect of this was also to abandon the claim for wasted expenditure (of which paragraph 14(5) were particulars) in Paragraph 14(c) of the Amended Particulars of Claim. According to the Defendant's skeleton argument relating to remedies dated 8 November 2009, the Claimants also withdrew their claim for the costs of mitigation advanced in paragraph 14(a) as particularised in paragraph 14(4) of the Amended Particulars of Claim by a letter from Mr Starr dated 23 June 2009.

227. Thus it came about that by the time of the hearing on 16 November 2009 the live claims for remedies were as set out in paragraph 212 above. Prior to that hearing further evidence on matters arising out of his third witness statement and the amended pleadings on loss had been given by Mr Van der Garde on 30 April 2009. It had originally been intended that this evidence should be heard together with that of the two experts but by reason of personal matters relating to Mr Gallagher that evidence had to be deferred until 10 July 2009.

General overview

228. Spyker's case was that even if, as I have found, it was in breach of contract by failing to provide the minimum kilometres required by the Service Agreement, the Claimants are entitled to only nominal damages. Mr de Garr Robinson characterised that contention as Spyker thumbing its nose at Mr Van der Garde and the court in circumstances where it provided only a fraction of the benefits it contracted to provide. One way or another he submitted that cannot be right. Although the Claimants maintained a claim for damages for consequential financial loss based on loss of earnings Mr de Garr Robinson accepted that it is not possible to quantify a specific series of benefits which Mr Van der Garde might have enjoyed in his career or to assess a specific percentage figure representating the chance that he would have had of obtaining those benefits if Spyker had performed its obligations under the Service Agreement.

229. He thus submitted that, although the Claimants tried hard to prove their loss of earnings claim, because of factors which would have been obvious to the parties when they signed the Service Agreement that claim is an inadequate remedy on the facts of this case.

230. In 2007 Mr Van der Garde was a young driver trying to break into Formula One. That is a difficult thing to do. It is an extremely competitive environment with many aspirant drivers striving for few places and it had no youth academy or other regular form of career progression. Moreover in their joint statement the experts agreed that Mr Van der Garde's previous results did not qualify him for a Super Licence.

231. Mr de Garr Robinson submitted that by the very nature of the business any attempt to prove a particular driver's chances of obtaining a Formula One race seat faces formidable problems. Those problems increase when it comes to proving what the driver would have earned had he obtained such a seat. Thus a loss of earnings claim by someone in Mr Van der Garde's position was always bound to face extraordinary difficulties. It was against that background that Spyker entered into the Service

Agreement with and accepted a $3 million payment from the claimants. The experts further agreed that a $3 million fee represented very good value to the driver for a testing programme of 6,000 kilometres with or without Friday testing at Grands Prix. The claimants thus paid a large sum of money for valuable contractual benefits. Having accepted that sum on the footing that it would provide those benefits Spyker contended that the claimants are entitled only to nominal damages notwithstanding that it provided only about a third of the kilometres which it contracted to provide. Mr de Garr Robinson characterised this position as effectively arguing that the Service Agreement was not worth the paper it was written on. Such a result he submitted would defeat the reasonable expectations of the parties and indeed would be an affront to justice. It would he submitted be a reproach to the law if Spyker's arguments on remedies were correct.

232. It was against this background that Mr de Garr Robinson developed his submissions on the alternative remedies ultimately sought by the claimants. He recognised that none of them is without significant difficulties and in some cases involved areas of the law which are still evolving. That evolution is in part he submitted a reflection of the natural inclination of the courts to achieve just outcomes even in the face of technical rules or principles which may appear to lie in their path. Given the findings which I have made it is difficult not to feel some sympathy with these submissions. It would in my view be a sad reflection of the state of the law if it was unable to grant the Claimants more than nominal damages by way of relief in these circumstances. Whether that is the case I consider below.

The claim for restitution

233. The principle that a party to a contract is entitled to restitution of the contractual price paid if there has been a total failure of consideration is well established. The existence of this principle was not in issue between the parties. What was in issue was whether it was applicable on the facts of this case. At least looked at in one way the failure of consideration and Spyker's failure to provide the contracted services and benefits was only partial. Clause 2 of the Service Agreement required Spyker to nominate and permit Mr Van der Garde to test and/or practice and/or race with the Car for a minimum of 6,000 kilometres. In the event, while it did not do so, it did permit him to test and/or race the car for 2,004 kilometres (and offered him the opportunity of test driving for 266 kilometres at Paul Ricard). It is also alleged that some at least of the other benefits which the defendant was required to provide under the Service Agreement and/or Fee Agreement were provided.

234. In those circumstances two principal questions arise. First does the fact that the defendant permitted Mr Van der Garde to drive 2,004 kilometres mean that the failure of consideration was partial rather than total such as to exclude the availability of restitution? Second, if and to the extent that other benefits were received by Mr Van der Garde does that fact and/or the fact that the consideration payable under the Fee Agreement was intended to cover additional benefits to the Claimants preclude the availability of restitution?

235. On the first question the Claimants submit that in a contract for the provision of services it is possible to invoke the doctrine of total failure of consideration even where some services have been provided, so long as it is possible to separate the contractual obligations to provide those services which were provided from those

services which were not. On the second question the Claimants submit that the receipt of benefits by a claimant does not preclude reliance on the doctrine of total failure of consideration where the benefits received were delivered pursuant to obligations which did not constitute the essence of the contract. Further or alternatively the Claimants submit that even if a contract entitles the claimant to substantial additional benefits of a different kind to those which were in part received, that entitlement does not preclude reliance on the doctrine of total failure of consideration where such benefits were not in fact received. Further or alternatively the claimants submit that where collateral benefits are required to be delivered pursuant to the contract but are only capable of being enjoyed together with the main services to be provided the fact that some of those collateral benefits were received does not prevent the severance or separation of those services which were provided from those which were not. Those collateral benefits are to be treated as an integral part of the main contracted for services and are to be disregarded for the purpose of deciding whether failure of consideration has been total or partial.

236. While reserving the right to argue the contrary in a higher court, Mr de Garr Robinson accepted that for present purposes it was not in dispute that in order to engage the doctrine of failure of consideration the failure of consideration must be total. However he submitted the law is not an ass. The right to restitution exists in order to prevent people taking benefits without paying for them. An unthinking application of an arbitrary rule would be in danger of defeating the object of the jurisdiction itself which is to prevent people from enjoying contractual benefits without paying for them. Thus, as often happens in the common law, the rule is mitigated by principles which have evolved that govern the treatment of incidental benefits and benefits which can be apportioned to discrete parts of the consideration paid and payable under a contract. The first mitigating principle is that there are benefits which even if they flow under the contract are incidental such that their receipt is not treated as a bar to restitution. The second allows for the apportionment of consideration between benefits so that even where some benefits have been received pursuant to a contract it can be said that although there is not a total failure of the entire consideration due to pass under the contract there has nevertheless been a total failure as to part such that restitution is still possible. Both principles are still developing. Although they may one day grow to the point where they cause the rule itself to be overturned, for present purposes it was Mr de Garr Robinson's case that they are sufficiently developed and flexible to entitle the Claimants to restitution on the facts of this case.

237. In written submissions Mr Davies had submitted that it is only in very rare cases that there may be a total failure of consideration in relation to part of a contract. He relied on a passage from the judgment of Lord Goff in *Goss v Chilcott* [1966] AC 788 at 797 E-F in support of the submission that it is only where apportionment can be carried out without difficulty that partial repayment of a capital amount in a loan agreement would not be a bar to a resitutionary remedy. This is not such a case. There is every difficulty in apportioning the $3 million not least because this was a one-off contract and there was no reliable market value capable of being attributed to various parts of what he described as the basket of rights which the Claimants acquired under the Service Agremeent and Fee Agreement in return for the $3 million. On its face he submitted that the consideration of $3 million was indivisible. Although Mr Davies supported that submission by the submission that both parties believed that Mr Van der Garde would qualify for a Super Licence at the time the contract was entered into,

a submission which I have rejected, it was not wholly dependent on it. It was he submitted impossible to find a divisible part of the consideration and there was no market value which the court could assume any part of the package had in the minds of the parties.

238. In his skeleton argument Mr Tregear QC, who succeeded Mr Davies after his untimely death, adopted the written submissions made in Mr Davies' skeleton argument and advanced additional submissions of his own. Where, as in this case, claimants have paid money in advance pursuant to an agreement he submitted that they have two remedial options open to them which are incompatible and must be advanced as alternatives: to sue for compensatory damages which have nothing to do with the reversal of an unjust enrichment or to recover the advance payment by virtue of the doctrine of total failure of consideration. He cited *Baltic Shipping v Dillon* [1993] 176 CLR 344 for the proposition that the usual function of damages is to fulfil the claimant's expectations by placing him in the position he would have been in had the contract not been breached whereas the restitutionary remedy is intended to return the claimant to the position he would have been in before the contract was breached. It is that difference he submitted that lies at the heart of the incompatibility between the two remedies. In fact in the case of *Ferguson v Sohl* [1992] 62 Build LR 95 the Court of Appeal awarded £1 nominal damages in addition to ordering restitution of money paid on the ground of total failure of consideration. However Mr de Garr Robinson did not contend before me that both remedies are available on a cumulative basis and the Claimants' claim for restitution was advanced in this case as an alternative to the other claims advanced.

239. Mr Tregear submitted that in order to succeed in its restitution claim the Claimants must establish (a) that there were no "essential" benefits under the Service Agreement other than testing kilometrage, (b) that no value was attributable to the benefits under the Service Agreement other than testing kilometrage and (c) that it is right and possible to apportion the contract in order to be able to say that although 2,004 kilometres of testing was provided there was a total failure of consideration as to the other 3,996 kilometres of testing (which I have found to be 3,730 kilometres of testing). He characterised the Claimants' submissions as an attempt to manipulate the concept of when consideration can be considered to have failed totally so as to avoid the reality that this is a case of only partial failure of consideration.

240. Mr Tregear submitted that the test for determining whether consideration has failed which must be applied is that stated by Lord Goff in *Stocznia Gdanska v Latvian Shipping Company* [1998] 1 WLR 574: "The test is not whether the promisee has received a special benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due" (at page 588). He submitted that whether the test is satisfied will depend on the terms of the contract so that restitutionary relief claimed is circumscribed by the terms of the contract. Where the contract involves the provision of services (as with the Service Agreement and the Fee Agreement), a claimant will not be able to rely on the ground of total failure of consideration if he has benefited from the service(s) in any way: see *Hunt v Silk* [1804] 5 East 449; 102 ER 1142. He submitted that under "the contract" the performance to be provided by Spyker was not limited to nominating and permitting Mr Van der Garde to drive the car in tests under clause 2. There were the following other benefits or services to be provided by Spyker:

"(1)The grant of sponsor spaces on the trade area of the car and the race suit. These spaces were available to third party sponsors and thus could be sold by the Claimants to third parties to help defray the costs of the Fee Agreement – see clause 7 of the Service Agreement.

(2) Entering into the Service Agreement (and performing it) – see clause 1.2 of the Fees Agreement.

(3) Travel expenses for Mr Van der Garde for getting to tests – see clause 1.3 of the Fee Agreement.

(4) Accomodation when Mr Van der Garde was driving in tests – see clause 1.3 of the Fee Agreement.

(5) A management fee of $60,000 per annum to Mr Van der Garde – see clause 1.3 of the Fees Agreement.

(6) Up to 5 paddock and pit access passes when Mr Van der Garde was providing services and two additional paddock passes for Mr Boekhoorn on request prior to a Grand Prix weekend – see clause 1.3 of the Fee Agreement.

(25.7) A rental car in the Netherlands – see clause 1.3 of the Fees Agreement."

241. Since Spyker provided (1) testing kilometrage (2) sponsor places on the car and race suit (3) travel expenses, accommodation and rental cars (4) paddock passes and (5) management fee / salary Mr Tregear submitted that on the basis of the test in *Stocznia Gdanska* there has been no total failure of consideration.

242. In order to avoid that conclusion Mr Tregear submitted that the Claimants would need to show that the following questions can both be answered in the affirmative: (1) are there any benefits which can be disregarded? and (2) can the consideration be apportioned between contractual benefits so that it is possible to identify consideration for the missing benefits? The Claimants would have to establish that the apportionment question could be answered in the affirmative in respect of the 2,004 kilometres and the management fees / salary and that the disregarded benefits question could be answered in the affirmative in respect of all the other benefits available under both agreements. On analysis, he submitted, both questions must in fact be answered in the negative.

243. In relation to the first question Mr Tregear submitted that there is a flavour to the cases relied on by the Claimants which is open to the criticism that the facts of the cases were being manipulated in a way that could lead to a result which the court considered appropriate on the merits and consistent with the law. To that extent they are unsatisfactory. The only example he gave was the discussion relied on by Mr de Garr Robinson in *Warman v Southern Counties Car Finance Company* [1949] 2KB 577. That was a case relied on by Mr de Garr Robinson in support of the proposition that receipt of some consideration even if it is significant and even if it is a benefit which has real commercial value and which was provided for in the contract does not

prevent there being a total failure of consideration where the benefit received was not part of the foundation or essence of the contract. I consider *Warman* below. In any event Mr Tregear submitted that all the benefits in the two agreements were integral to the development of Mr Van der Garde's pospects as a Formula One racing driver and each had its part to play.

244. Mr Tregear submitted that it is not legitimate to disregard the benefit to Mr Van der Garde of Friday testing and a Super Licence. As to the former he submitted that it is the pinnacle of testing and exposes the driver to a huge audience which has an independent value over and above mere distance and is of greater significance than or at least equal significance to private testing away from the full glare of global publicity. As to the latter Spyker not only contracted to provide but did provide services with a view to assisting Mr Van der Garde in obtaining a Super Licence. A Super Licence was a critical part of the plan for Mr Van der Garde to have a serious shot at being a racing driver in Formula One races. The Valencia test was arranged by Spyker to enable him to drive in Friday testing in the Australian Grand Prix.

245. It was suggested by Mr Tregear that the evidence of Mr Gallagher, the Claimants' expert, appeared to have placed a value of $1 million to $1.5 million "on this aspect of the contract." It was not clear whether the words in quotation marks were intended to refer to the obtaining of a Super Licence or participation in Friday testing. In fact Mr Gallagher's evidence was to different effect. In his written report in answer to the question whether the opportunity for Friday driving at Grands Prix in the contract was worth $500,000 he stated that if the parties expected that Mr Van der Garde would participate in Friday driving at events then as an independent benefit it was worth at least that figure. If the parties did not expect him to participate in Friday testing then it had little value. Based on his career progression prior to 2007 and the absence of a Super Licence at the time the agreement was struck Friday driving seemed to Mr Gallagher unlikely. He said it was very difficult to comment on the value of Friday driving in the absence of a Super Licence qualification particularly following the outcome of the Valencia test prior to the agreements being signed.

246. In oral testimony Mr Gallagher was asked about two passages in the joint experts report. The first said that a $3 million fee was agreed by the experts to "represent very good value to the driver for a testing programme of 6,000 kilometres with or without Friday testing at Grands Prix and inclusive benefits, particularly those of FIA passes and access at Grands Prix are very useful to any driver at this stage in his career." (sic). The agreement therefore represented a credible one with value for money. The second was that Mr Gallagher's view was that how the 6,000 kilometres was split i.e over a number of days made no difference whereas Mr Zecchi felt that this was critical because the value of the kilometres would be significantly lower [the word 'lower' was omitted by error in the report] where it is not possible for [Mr Van der Garde] to take part in Friday testing."

247. Mr Gallager in oral testimony said that in his view if Friday testing had been guaranteed in the contract the fee would have been much higher. If a driver came to a team without a Super Licence looking for testing and was prepared to pay $3 million for testing given that he did not have a Super Licence that would be a deal worth considering by the team. If Spyker could have given an absolute guarantee that Mr Van der Garde was going to participate in Friday testing Mr Gallagher put a value of $1.5million to $2 million on Friday testing. Asked whether it is possible to break

down the $3 million fee in the Fee Agreement as between the absolute right to 6,000 kilometres and the contingent right to Friday testing he said that he had some difficulty breaking it down because of the fact that when the contract was entered into Mr Van der Garde did not have a Super Licence. If he had secured a Super Licence and thus been able to participate in Friday testing that would have been an added bonus and an enormous additional benefit. If that had happened and Mr Van der Garde had therefore been able to act as the Friday driver and also to fulfil the role of the third driver in deputising for race drivers if they were unavailable that would have been a significant added value to the $3 million. He put that value at at least half a million dollars. That was in contrast to his figure of $1.5 million to $2 million for guaranteed Friday testings.

248. Mr Tregear submitted that the benefit to the Claimants of the sponsor spaces to which they were entitled under clause 7 of the Service Agreement cannot be disregarded. They were not inseparable from the testing rights and did not relate only to testing. Moreover they were not a collateral benefit. It was clear from the terms of clause 4.1.1 of the Service Agreement that the parties regarded the sponsor spaces as being a benefit which could be sold in order that the fee payable under the Fee Agreement could be recouped.

249. As to accommodation and travel expenses they were benefits and the fact that they were payable in respect of testing occasions did not mean that they could be disregarded. They were nonetheless benefits which followed not from the fact that Mr Van der Garde attended various sites for testing purposes but rather from the agreement of the parties to provide specifically for the benefits to be conferred. As to the paddock passes they had a clear value financially and in terms of career development and it was submitted that since the Fee Agreement provided for paddock passes for Mr Boekhoorn as well as for Mr Van der Garde it was clear that as a matter of contractual construction they were not solely related to testing occasions. As to the management fee there was no dispute that this was a benefit received by the Claimants and they fell foul of the apportionment rule.

250. In relation to the second question (apportionment) it was submitted that the Claimants' reliance on *Goss v Chilcot* was misconceived. In that case apportionment was permissible and possible because although the obligation to repay interest and capital arose under the same contract they arose for different reasons, the interest payments relating to the use of the capital and the repayment of capital relating to the return of the capital. That it was submitted did not assist the Claimants who are seeking to apportion in a situation where the consideration has been provided pursuant to the same obligation to provide testing kilometrage.

251. As to Lord Goff's obiter dictum to the effect that there would have been a total failure of consideration even if payments of capital had been made it was submitted that as an obiter dictum in the Privy Council this did not represent binding English law. If correct it would render the doctrine of total failure of consideration effectively extinct which would be inconsistent with the affirmation of the doctrine by the House of Lords in *Stocznia Gdanska*. Moreover the Privy Council itself in *Goss v Chilcot* affirmed that consideration must fail totally (see page 797).

252. A finding of total failure of consideration could only be correct in this case if the contract had provided for payments for kilometres in instalments referable to tranches

of distance. Reliance was placed on the High Court of Australia decision in *David Securities PTY Limited v Commonwealth Bank of Australia* [1992] 175 CLR 353 at 383 which was said to have held that it is only in cases where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction that apportionment will be possible. In such a case if only two out of six tranches of 1,000 kilometres had been provided it might be possible to argue that there had been a total failure of consideration in respect of the outstanding four tranches.

253. The judgment of the Court of Appeal in *Ferguson v Sohl* was said not to relieve the Claimants from the fact that the doctrine of partial failure of consideration remains good law and that it remains necessary to show a total failure of consideration. This submission did not however address the fact that Hirst LJ in that case held that there had been a total failure of consideration in respect of an overpayment in the context of a partially completed building contract.

254. In relation to the apportionment issue, the Claimants relied on *Goss v Chilcot Ferguson v Sohl* and *Ebrahim Dawood Limited v Health (Est 1927) Ltd* 1961 2 Lloyds Rep 512 at 518-520 as authority for the proposition that restitution may be ordered even where there has been partial performance of a contract including a contract for the provision of services and receipt of benefits pursuant to it on the basis that there has been total failure of consideration in respect of money overpaid and that in this case there should be no difficulty in apportioning the $3 million received by Spyker between the perforamce provided by it and the performace which it wholly failed to provide. It is possible to identify the money attributable to the test driving kilometres which were provided to Mr Van der Garde. It is thus also possible to identify the money attributable to the test driving kilometres of which he was deprived and for that money the consideration has wholly failed. Whether that submission is well founded is central to this aspect of the case.

255. Mr de Garr Robinson submitted that apportionment is the classic means by which the courts have dealt with short delivery in the sale of goods, on which aspect he relied on *Ebrahim Dawood Limited*. *Ferguson v Sohl* was said to be binding Court of Appeal authority for the proposition that the appointionment approach can be applied in cases of short delivery of services. It was denied that there is any suggestion in *Goss v Chilcot* that the apportionment approach is only possible in very rare cases. If there were such a restriction *Goss v Chilcot* would itself have fallen on the other side of the line, there being nothing rare about the cirsumstances discussed in that case. Nor did Lord Goff in *Goss v Chilcot* say that this approach is restricted to cases where apportionment can be undertaken without difficulty. He said that the court will allow partial recovery **at least** in such cases. Mr de Garr Robinson submitted that the ability of the court to apply the apportionment approach is not limited to cases where the contract itself apportions the consideration and thus is not dependent on the contract apportioning the consideration. If that were a requirement *Goss v Chilcot* would again fall on the wrong side of the line.

256. *Whincup v Hughes* [1871] LR 6 CP 78 was relied on by Mr Tregear in support of the proposition that in a contract for the supply of services apportionment is not possible either at all or at any rate where the detriment to the defendant in supplying the services is not spread equally over the duration of the contractual period. That was a case where a watchmaker to whom a premium had been paid for a 6 year

apprenticeship died after the first year. It was held that no part of the premium could be recovered on the ground of total failure of consideration because in the early part of the term the teaching would have been most onerous to the watchmaker and the services of the apprentice of little value to him whereas as time went on his services would probably be worth more and he would require less teaching. Mr de Garr Robinson submitted that that case is distinguishable on the ground that there was no evidence to suggest that the burden to Spyker in providing 6,000 kilometres was not evenly spread throughout the 6,000 kilometres.

257. As I understood Mr de Garr Robinson's submission that in determining whether there has been a total failure of consideration all benefits other than the 6,000 kilometres can be disregarded it was based on four propositions. First incidental benefits, that is to say those not flowing from the essential purpose or foundation of the Service Agreement are to be disregarded (see *Rover International Limited v Cannon Film Sales Limited* [1989] 1 WLR 912, *Warman v Southern Counties Car Finance* [1949] 2 KB 577, *Barber v NWS Bank [1996] 1 WLR 641 at 646G* and *Baltic Shipping v Dhillon [1993] 176 CLR 344*. Second benefits under the Fee Agreement are to be disregarded. Clause. 1.2 of the Fee Agreement provided that the $3 million fee payable by the claimants was in consideration of Spyker entering into and performing the Service Agreement. Thus the only consideration for the $3 million payment was the benefits due to the Claimants under the Service Agreement. The benefits due to them under the Fee Agreement were not expressed to be benefits due under the Service Agreement and were thus not any part of that consideration. Third most of the so-called additional benefits said by Spyker to defeat the doctrine of total failure of consideration were in truth on analysis not additional at all, but merely aspects of or part and parcel of the basic benefits provided for in clause 2 of the Service Agreement. They were only intended to be or capable of being enjoyed if and to the extent that Mr Van der Garde drove testing kilometres. Mr Van der Garde's right to paddock passes under clause 1.3 of the Fee Agreement was "at times when the Driver is providing driving services hereunder." It was submitted that the additional two passes for Mr Boekhoorn would be provided only where Mr Van der Garde was driving and where such passes were available. Reliance was placed on a suggestion by Dr Kolles that paddock passes tend to be thrown in once a deal is done. In any event they were never provided and were an incidental benefit to which the *Warman* principle applies. Mr de Garr Robinson described these benefits as icing on the cake. They were all part and parcel of the test driving process, provisions dealing with circumstances in which the driving was to be performed. If a cake is sold with icing on top he submitted that it is no answer to a claim for restitution on the basis of total failure of consideration for the defendant seller to say it is not possible to apportion the purchase price between the cake and the icing. Icing on the cake was indeed an expression used by the experts in their joint report when they described the space on the car, the space on the suit and/or helmet and paddock passes as "an inclusive part of the driver testing agreement and would not have been paid for by [Mr Van der Garde] separately i.e. they came with the testing, as icing on the cake." This was on one view an apportionment argument as much as a benefit to be disregarded argument. Fourth Mr de Garr Robinson submitted that the benefits for which Mr Van der Garde never qualified also fall to be disregarded. These were the contingent Friday testing and reserve driver rights.

258. Mr de Garr Robinson described these contingent rights as not separate to but aspects of Mr Van der Garde's basic clause 2 right which was defined as including Friday practice driving and race driving: "Spyker hereby nominates and permits the Driver to drive the car in tests. Tests means the testing **and/or** practising and/or racing with the car of (i) of a minimum of 6,000 km and (ii) subject to the Driver holding a valid FIA Super Licence, during the Grands Prix for Friday morning test sessions" (emphasis added). He submitted that if Mr Van der Garde obtained a Super Licence although his clause 2 right would have been enhanced the possibility of such an enhancement makes no difference to any failure of consideration analysis. If none of the benefits to which he was entitled under the Service Agreement had been provided there would have been a total failure of consideration. It would have made no difference that, had circumstances been different, the contractual benefits to which he was entitled would also have been different.

259. He gave two analogies. First a sale of goods contract under which in return for a fixed price paid up front the buyer is entitled to apples or pears depending on a contingency: for example if the buyer becomes one of the largest five supermarkets in the country it is entitled to 6,000 pears which usually cost more but if it does not it is entitled to 6,000 apples. If the seller fails to supply any apples it would be no answer to the buyer's claim for total failure of consideration that if the buyer had become one of the five largest supermarkets it would have been entitled to pears. There has been a total failure of consideration and the seller cannot avoid the consequences for his default by asking the court to assume that if the facts had been different his obligation would have been different. The position he submitted would be the same if the seller supplied 2,000 apples and then failed to supply any more. (Mr de Garr Robinson did not address what would be the position if at the time the right to restitution is asserted there remained a possibility of the buyer becoming one of the five largest supermarkets in the country.) His other analogy was a contract for the sale of a cake which provides that in certain circumstances the cake will also have candles on it. If when restitution is claimed the contingency upon which the right to candles depended has not occurred, it would be no answer for the seller to assert that apportionment is impossible because it is not known how much of the consideration is attributable under the contract to the cake and how much to the contingent right to the candles.

260. The only truly additional rights according to Mr de Garr Robinson were the right to a management fee and the right to a lease/rental car for Mr Van der Garde's use in the Netherlands. In so far as they were provided for in the Fee Agreement Mr de Garr Robinson's primary submission was that they did not form part of the consideration for the $3 million pursuant to clause 1.2 of the Fee Agreement. In addition as to the car rental, if it had been supplied it would have been an incidental benefit to which the *Warman* principle applies. But in the event the car was never actually provided so that there was a total failure of consideration in relation to the car. As to the $60,000 management fee on analysis this was a fee payable in consideration for work done and should thus be treated in the same way as interest payments were treated by Lord Goff in *Goss v Chilcott*. On the *Goss v Chilcott* analysis the consideration for the management fee was separate from and had nothing to do with the $3 million fee paid by the claimants and, in *Warman* terms was not an essential part of the Service Agreement. If that was not right this was a classic case where counter-restitution could be required from the Claimants in respect of the $45,000 actually received for the management fee with a possible deduction of the $15,000 not paid: see Goff and

Jones *The Law of Restitution* 7th Edition 19-005 "The proper enquiry is whether the claimant who claims restitution has received any part of the bargained for performance (consideration). If he has and he is not in a position to make counter-restitution, then his restitutionary claim must fail. Conversely, if he has received no part of the consideration, or if it is still possible for him to make counter-restitution in respect of the part which he received, then his restitutionary claim should succeed."

261. In considering these competing submissions the starting point is the general principle formulated by the editors of Goff and Jones in these terms: "The case law holds that a restitutionary claim, based on failure of consideration, will, therefore, succeed only if the failure is total." (ibid 19-009). Although the doctrine is commonly referred to as failure of consideration it is, as appears from the extract from Goff and Jones cited earlier in this judgment, based on a failure not of consideration but of performance: "In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled." (*Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Limted* [1943] AC 32 per Viscount Simon LC at page 48).

262. In *Fibrosa* the House of Lords held that money paid on a total failure of consideration can be recovered. "What is being now decided is that the application of an old-establised principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended." (Per Lord Atkin at page 55). There were also obiter dicta supporting the proposition that money cannot be recovered in the event of mere partial failure of consideration. "Nor could moneys paid before frustration be recovered if the person making the payment has received some part of the consideration moving from the other party for which the payment was made." (Per Lord Russell of Killowen page 56). (The position in the case of frustration was reversed by the Law Reform (Frustrated Contracts) Act 1943) "…Money had and received to the plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless the contract is divisible into separate parts it is the whole money not part of it, which can be recovered. If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered, but unless this be so there is no room for restitution under a claim in indebitatus assumpsit. A partial failure of consideration gives rise to no claim for recovery of part of what has been paid. Indeed, the contrary has not been contended." (Per Lord Porter at page 77). Thus at the same time as denying the existence of a right to recover in the event of partial failure of consideration Lord Porter recognised the possibility of applying the doctrine of total failure of consideration in a case where even though there has been some performance under a contract there has been total failure to perform a divisible part of it provided that part of the consideration or money paid can be attributed to that part of the contract. There is thus in this dictum support for the concept of apportionment as a means by which the full rigour of the general principle may be mitigated. Lord Porter did not however indicate what he meant by divisible and in

particular by what means it is to be decided whether a contract is divisible. Is it dependent on an express or implied term of the contract or is there some additional basis on which the court can decide that a contract is divisible?

263. *Stocznia* was a case in which it was assumed by both parties that the asserted right to recover moneys paid depended on whether there had been a total failure of consideration. Lord Goff of Chieveley stated the test as being "not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due." (Page 588 D). On its face this supports the proposition that performance of even a part of the relevant contractual duties will disentitle the claimant from restitution. However that begs the question of what are the contractual duties in respect of which the payment is due. Where it is possible to apportion different parts of a contractual price to the performace of different contractual duties under a contract it is not in my judgment inconsistent with the proposition that there may be a total failure to perform contractual duties in respect of which payment is due that there has been performance of part or all of contractual duties in respect of which the payment is not due.

264. I note in passing that Mr Tregear relied on this dictum of Lord Goff as holding that the question whether there has been total or partial failure of consideration is to be assessed by reference not to benefits received by the claimant but by reference to contractual performance by the defendant. In my judgment the dictum does not support so wide a proposition. *Stocznia* was a case in which under the contracts in question the shipyard was bound not merely to deliver and transfer the property in vessels when built to the buyers but in addition to design and build them. They were thus not contracts of sales simpliciter, but "contracts for work and materials". It was in my view for that reason that Lord Goff held: "I start from the position that failure of consideration does not depend upon the question of whether the promisee has or has not **received** anything under the contract, like for example the property in the ships being built under contracts one and two in the present case. Indeed if that were so, in cases in which the promisor undertakes to do work or render services which confer no direct benefit on the promisee, for example where he undertakes to paint the promisee's daughter's house, no consideration would ever be furnished for the promisee's payment." (Page 588 C-D). Having stated the test mentioned above Lord Goff continued: "The present case cannot, therefore, be approached by asking the simple question whether the property in the vessel or any part of it has passed to the buyers. **That test would be apposite if the contract in question was a contract for the sale of goods (or indeed a contract for the sale of land) simpliciter under which the consideration for the price would be the passing of the property in the goods (or land).** (page 588 D-E).(emphasis added). Lord Goff thus appeared to contemplate that in an appropriate case the test could be stated by reference to the receipt of a benefit by the claimant rather than by reference to contractual performance by the defendant. Put another way the focus of enquiry is the receipt by the promisee of a benefit under the contract which may be established in an appropriate case where the promisee has not directly received anything the benefit in such a case consisting of the performance by the promisor of an obligation whose performance is in some other way of advantage to the promisee. Support for this analysis is in my view to be found in the judgment of Kerr LJ in *Rover International* to which I refer below.

265. In *Whincup v Hughes* Bovill CJ held: "The general rule of law is that where a contract has been in part performed no part of the money paid under such contract can be recovered back." (page 81). However to this general rule he held that there are exceptions. "There may be some cases of partial performace which form exceptions to this rule, as for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable…The contract having been in part performed it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principle such apportionment could be made. It could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous and the services of the apprentice of little value; as time went on his services would probably be worth more and he would require less teaching. There appears to be no instance of a similar nature to the present in which an action for the return of a part of the premium has been brought." (Page 81). Montague Smith J referred to a "rule of law that an action for money had and received can only be brought when there is a total failure of consideration with the exception of a few cases which on being analysed hardly proved to be exceptions…Moreover it appears to me clear that the action for money received cannot lie where the contract has been partly performed on both sides. To ascertain the amount which in equity in such a case requires to be returned it would be necessary to go into a great variety of considerations, the relevant weight of which it would be almost impossible correctly to estimate: e.g. the value of the service lost to the master, and the degree to which the apprentice had profited by the instruction. It would be impossible to take merely the proportion of the time which had elapsed to the whole term as the standard of measurement." (page 85-86). While restating the general rule the court in *Whincup v Hughes* expressly contemplated the existence of exceptions where the consideration is "in its nature apportionable" or "severable". On the facts of that case the reason why the consideration was held to be not in its nature apportionable was that the benefits and burdens to the parties varied over time. In principle no such problem would arise in the case of delivery of six out of ten sacks of wheat.

266. In *Minister of Sound (Ireland) Limited v World Online Limited* [2003] EWHC 2178, Ch, [2003] 2 All ER (Com) 823 Nicholas Strauss QC sitting as a deputy judge of the High Court stated: "Whilst the traditional view is that a party to a contract (whether the innocent party or the contract-breaker) can only recover payments made under it where there has been a total failure of consideration, the dictum of Lord Goff in *Goss v Chilcott* referred to at [42], above, suggests that this may no longer be so, and recent authority suggests that there may be circumstances in which recovery for partial failure may be allowed: See DO *Ferguson v Sohl* [1992] 62 BLR 95 in which as the editorial note indicates, Hirst LJ "robustly" described as a total failure of consideration what might more conventionally have been seen as a partial failure. See also *White Arrow Express Limited v Lamey's Distribution Limited* [1995] NLJR 1504 and *Baltic Shipping Co. v Dillon the Michael Lermontov* [1993] 176 CLR 344." (845 B-E). Referring to those dicta and in particular their reliance on Lord Goff's dictum in *Goss v Chilcott* the editors of Goff and Jones point out that it was made in the hypothetical context of facts where the borrowers had repaid part of the capital sum and expressed the view that "what is more doubtful is whether a restitutionary claim

will lie if there has been a partial failure and the counter-performance is not the payment of money but the rendering of services."

267. As already mentioned the editors of Goff and Jones regard the general rule as regrettable. They refer to welcome indications that English Courts are more ready to interpret the doctrine of total failure of consideration more sympathetically and to allow recovery in restitution even though the claimant has received a momentary benefit from the defendant and even, exceptionally, if the benefit received is services rendered (See *Ferguson v Sohl*). For present purposes the question is not whether recovery for partial failure should be permissible but rather whether by reference to authority including that cited by Mr Strauss QC the recognised exceptions and qualifications to the rule are broad enough to be applicable in the present case.

268. In considering the extent to which the general rule may be departed from or qualified as to its scope and extent, courts have tended to focus on two separate but sometimes related questions: (1) apportionment and (2) whether for the purpose of deciding whether there has been total or partial failure of consideration certain benefits received by the claimant can be disregarded.

269. On the second question perhaps the leading English authority is the decision of the Court of Appeal in *Rover International*. In that case the Court of Appeal allowed a restitutionary claim for return of instalments paid under a contract, holding that there had been a total failure of consideration notwithstanding that the plaintiff had received some benefit under the contract and the defendant had performed some part of the contract. Under the contract EMI (who were later taken over by Cannon, the defendant) were to supply master Prints of films to the plaintiff for dubbing and distributing in Italy. The gross receipts were to be split in agreed proportions. Prints were duly delivered by EMI and Rover commenced the work of dubbing and paid five instalments of pre-payments due to EMI as an advance under the contract. Harman J at first instance rejected the claim for repayment of the five instalments on the ground that the consideration had not failed at all. Rover had had several films and distributed them in Italy "for payment no doubt of substantial sums". To allow it to get back the monies which it paid to Cannon would be grossly unjust. He held that there was no claim in law for monies had and received to the use of Rover.

270. Allowing Rover's appeal Kerr LJ held: "The question whether there has been a total failure of consideration is not answered by considering whether there was any consideration sufficient to support a contract or purported contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract". (923 G). Central to Kerr LJ's decision was his conclusion that in order to defeat a claim of total failure of consideration is it not sufficient to show that the promisee has received any benefit or even any benefit due under the contract. What must be proved is receipt of "any part of the benefit bargained for under the contract or purported contract". In reaching this conclusion Kerr LJ relied on a passage from Chitty on Contracts, 5th Ed (1983) Vol , pp 1091-1092, para 1964 and the authorities there cited. It is striking that although one of the passages from Chitty cited by Kerr LJ included the quotation from Viscount Simon LC in *Fibrosa* to which I have referred to the effect that "when one is considering the law of failure of consideration…it is generally speaking…the performance of the promise", the editors of Chitty emphasised that failure of consideration is judged from the point of view of the payer. "In that context failure of

consideration occurs where the payer has not enjoyed the benefit of any part of what he bargained for. Thus, the failure is judged from the payer's point of view…the failure has to be total…thus any performance of the actual thing promised, as *determined by the contract*, is fatal to recovery under this heading. The role of the contractual specification means that it is not true to say that there can be a total failure of consideration only where the payer received no benefit at all in return for the payment. The concept of total failure of consideration can ignore real benefits received by the payer if they are not the benefits bargained for…"

271. This latter point was also emphasised in the majority judgment of Mason CJ, Deane J, Toohey J, Gaudaron J and McHugh J in the decision of the High Court of Australia in *David Securities PTY Limited v Commonwealth Bank of Australia* 175 CLR 353 at 382: "So, in the context of failure of consideration, the failure is judged from the perspective of the payer." [Reference was then made to Kerr LJ's test in *Rover International*]. In the immediately preceding passage of their judgment the majority arguably went further than the Court of Appeal in Rover in holding that the question of failure is judged not just from the perspective of the payer but by reference to the subjective understanding of the payer as to what it thought it was receiving as consideration.

> "The respondent, taking a different view of the contractual arrangements, asserts that all its pre-contractual statements concerning payment of withholding tax simply took the form of a contractual offer, which the appellants were at liberty to accept or to reject. Viewed from the angle of contract formation between equal and experienced parties, this is undoubtedly true. But we are not concerned in this case with what a hypothetical, experienced commercial person believed he/she was contracting for; in order to decide whether the appellants in this case have received consideration for payment of the additional moneys, **we must ask what these particular appellants, in all the circumstances, thought they were receiving as consideration**. In this context, consideration means the matter considered in forming the decision to do the act, "the state of affairs contemplated as the basis or reason for the payment." And, as we have stated, the "state of affairs" existing in the appellants' minds was that the withholding tax was their liability." (381-382). (emphasis added).

272. On its face there is a tension, if not an apparent inconsistency, between on the one hand the approach of Kerr LJ (with whose reasoning Nicholls LJ agreed), in *Rover International* and of the majority of the High Court in *David Securities* and on the other hand the dictum of Lord Goff in *Stocznia* to which I have referred that: "In truth the test is not whether the promise has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due." Mr Tregear suggested that the two approaches are reconcilable on the basis that if the promisor has provided some performance, prima facie there is no total failure of consideration. If however the performance which has been provided is, judged from the perspective of the promisee, not what he really bargained for so that it is collateral then it is still possible for there to be total failure of consideration. In

my view if there is a real inconsistency between the two sets of dicta then there is some force in Mr Tregear's suggested way of reconciling the two. However I am not convinced that the inconsistency is real rather than apparent. Although on Lord Goff's test the question is whether the promisor has performed any part of the contractual duties in respect of which the payment is due, that leaves open the question of how the court is to identify the contractual duties in respect of which the payment is due. If, as held by the Court of Appeal in *Rover International* and the High Court in *David Securities*, the answer to that question is to be determined by reference to identifying "the benefit bargained for under the contract or purported contract" and ignoring real benefits received by the payer if they are not the benefit bargained for, there is no inconsistency between the dicta of the Court of Appeal and the High Court on the one hand and Lord Goff's test on the other.

273. In support of his conclusion that receipt of benefits which are merely incidental to the performance of a contract is not inconsistent with total failure of consideration Kerr LJ in *Rover International* cited the cases of *Rowland v Divall* [1923] 2 KB 500 and *Warman v Southern Counties Car Finance Corporation Limited*.

> "In *Rowland v Divall* [1923] 2K.B 500 the plaintiff bought a car from the defendants. He had the use of it for several months but then discovered that the seller had no title, with the result that he had to surrender the car to the true owner. He sued for the return of the price on the ground that there had been a total failure of consideration. The defendant denied this, pointing out that the plaintiff had had the use of the car for a substantial time. This contention succeeded at first instance, leaving the plaintiff only with a claim for damages, but this court unanimously upheld the plaintiff's claim. The consideration for which he had bargained was lawful possession of the car and a good title to it, neither of which he got. Although the car had been delivered to him pursuant to the contract and he had had its use and enjoyment for a considerable time, there was a total failure of consideration because he had not got any part of what he had bargained for.
>
> The decision of Finnemore J in *Warman v Southern Counties Car Finance Corporation Ltd* [1949] 2 KB 576 was to the same effect. The plaintiff was buying a car on hire purchase when he became aware that a third party was claiming to be the true owner of the car. But he nevertheless went on paying the remaining instalments and then the necessary nominal sum to exercise his option to purchase. When the true owner then claimed the car he surrendered it and sued the finance company for the return of everything he had paid. He succeeded on the ground that there had been a total failure of consideration. He had not bargained for having the use of the car without the option to purchase it.
>
> The position of Rover in the present case is a fortiori to these cases. Admittedly, as the judge said, they had several films from Cannon. But the possession of the films was merely

> incidental to the performance of the contract in the sense that it enabled Rover/Monitor to render services in relation to the films by dubbing them, preparing them for release on the Italian market and releasing them. These were onerous incidents associated with the delivery of the films to them. And delivery and possession were not what Rover had bargained for. The relevant bargain, at any rate for present purposes, was the opportunity to earn a substantial share of the gross receipts pursuant to clause 6 of the schedule, with the certainty of at least breaking even by recouping their advance. Due to the invalidity of the agreement Rover got nothing of what they had bargained for, and there was clearly a total failure of consideration.

274. In *Warman* Finnemore J said:

> "A hire purchase agreement is in law an agreement in two parts. It is an agreement to rent a particular chattel for a certain length of time. If during the period or at the end of the period the hirer does not wish to buy the chattel he is not bound to do so. On the other hand the essential part of the agreement is that the hirer has the option of purchase and it is common knowledge – and I suppose common sense – that when people enter into a hire purchase agreement they enter into it not so much for the purpose of hiring, but for the purpose of purchasing, by a certain method by what is, in effect, deferred payments, and that is done by the special kind of agreement known as a hire purchase agreement, the whole object of which is to acquire the option to purchase the chattel when certain payments have been made.
>
> Now I think it might well be right to say if at any stage the option to purchase goes, the whole value of the agreement to the hirer has gone with it. If he wanted to make an agreement merely to hire a car he would make it, but he enters into a hire purchase agreement because he wants to have the right to purchase the car; that is the whole basis of the agreement, the very foundation of it. I should have thought, even on that broad principle, that if the defendants break the contract or are unable to carry it out they are not entitled to claim on a sort of quantum meruit and say "anyhow, although I could not carry out the agreement and could not give you the title to this car, you have the use of it for 6 or 7 months, and you must pay the hiring charges for those month." (582).

275. Mr Tregear's response to *Warman*, apart from his criticism that it was a case in which the facts were being manipulated in a way that could lead to a result that the court considered appropriate on the merits and consistent with law, was that it should be contrasted with the decision of the Court of Appeal in *Yeoman Credit v Apps* [1962] 2 QB 508 where the defendant entered into a contract for the hire purchase of the car with the claimant. The car was in an un-roadworthy condition when the defendant

took possession of it. The defendant failed to keep up with payments, the claimant recovered it and sued for arrears and the defendant counter-claimed for the return of his payments on the basis of a total failure of consideration. The counter-claim failed and the earlier case of *Rowland v Divall* was distinguished on the basis that it was a case of a purchase of a car where the passing of title was the essence of the agreement whereas under a hire purchase agreement use of the car was part of the essence of the contract. Mr Tregear submitted that the claimants' reliance on *Warman* is strained. The passage from the judgment of Finnemore J referred to was very much based on the judge's own assessment of what is the essence of a hire purchase agreement which was not apparently shared by the court in *Yeoman*.

276. In my judgment that is not an adequate response. It is true that in *Yeoman* Holroyd Pearce LJ held that "this hire-purchase agreement was, at the material time, more analogous to a special hiring than to a purchase. It had a contingent option to purchase of which the defendant might have availed himself in two years time; but in September the defendant could, as a hirer, refuse to go on with the transaction since the plaintiffs, in spite of repeated requests,were still consistently refusing to honour their obligations." However in my judgment the significance of Finnemore J's judgment in *Warman* and the significance attached to it by the Court of Appeal in *Rover Internatioanl* lies not in the particular finding, relevant only to that case, that the essence of the hire purchase agreement was the purchase rather than the hire. Rather it was the conclusion that receipt of a benefit under a contract which on analysis is not any part of the essential bargain contracted for is not a bar to restitution on the basis of total consideration. The fact that the Court of Appeal in *Yeoman* took a different view on whether the hiring aspect in that case was part of the essential bargain contracted for is not inconsistent with and does not undermine the significance of Finnemore J's statement of the general principle by reference to which the court is to decide whether receipt of a contractual benefit is a bar to restitution. That was certainly the view taken by the Court of Appeal in *Rover International*.

277. In my view it was also the view taken by the Court of Appeal in *Barber v NWS Bank Plc* 1 WLR 641. In that case the plaintiff entered into a conditional sale agreement to purchase a car from the defendant finance company. After paying instalments he discovered that the car was subject to a prior registered finance agreement, whereupon he purported to rescind the agreement and sought to recover the instalments. The Court of Appeal held that he was entitled at common law to recover from the defendant all sums paid under the agreement notwithstanding that he had enjoyed unimpeded use of the car for a substantial period. Sir Roger Parker in a judgment with which the other two members of the Court of Appeal agreed, held that "it was fundamental to the transaction that the bank had the property in the Honda at the time of the agreement and would retain it until paid in full the moneys due under the agreement. Only on this basis could the agreement operate. My conclusion follows the decisions in *Karflex Limited v Pool* [1933] 2 KB 25 and *Warman v Southern Counties Car Finance Corporation Limited* [1949] 2 KB 576. These cases are not binding on us but in my opinion are plainly right." (646 F-G). Accordingly Sir Roger Parker held that on the established authorities the plaintiff was entitled to recover all moneys paid under the agreement notwithstanding that he had the use of the car for a considerable time without let or hindrance. (647 G-H). The authorities referred to included *Warman*. In my judgment *Barber v NWS Bank* is thus further authority binding on me for the proposition that receipt of a benefit provided pursuant to a contract is not

incompatible with establishing total failure of consideration and thus is not a bar to restitution if it is not a part of the essential bargain contracted for by the payer.

278. Mr Tregear relied on the old case of *Hunt v Silk* [1804] 5 East 449 [102 E.R 1142]. In that case the defendant agreed in consideration of £10 to let a house to the plaintiff on terms that the defendant was to repair the house and execute a lease within 10 days but the plaintiff was to have immediate possession and pay the rent. The plaintiff took possession and paid £10 immediately but the defendant failed to execute the lease and make the repairs beyond the period of 10 days. Some days after the end of the 10 day period, the works not having been done, the plaintiff left the house and sued for rescission of the agreement and recovery of the £10 in an action for money had and received. The action failed but it is not entirely clear whether this was on the ground that rescission was impossible because the agreement had been in part performed, or whether it was because the receipt by the plaintiff for a few days of possession of the house was inconsistent with proof of total failure of consideration. The short judgment of Lord Ellenborough CJ with which Grose J agreed suggests that it may have been the former. The judgment of Lawrence J suggests that it may have been a mixture of the former and the latter. In relation to failure of consideration Lawrence J stated: "If indeed the £10 had been paid specifically for the repairs and they had not been done within the time specified, on which the plaintiff had thrown up the premises, there might have been some ground for the plaintiff's argument that the consideration had wholly failed: but the money was paid generally on the agreement, and the plaintiff continued in possession after the 10 days, which can only be referred to the agreement." (1144). There is some support in Lawrence J's obiter dictum on what the position would have been in his hypothetical situation for the proposition that receipt of a benefit is not necessarily incompatible with total failure of consideration, on the basis that receipt of the benefit of possession of the house would have been a collateral benefit and not the bargain contracted for, namely the carrying out of the repairs.

279. Although *Hunt v Silk* supports the proposition that receipt of even a small amount of the bargained for benefit is enough to defeat a claim for restitution, it did not, except in Lawrence J's obiter dictum, address the question raised in *Rover International* and *Rowland v Divall* whether the benefit received, however small, must be part of the essential bargain contracted for as distinct from an incidental or collateral benefit. That distinction did not need to be addressed since possession of the premises was plainly part of the bargain contracted for by the plaintiff.

280. As the majority of the High Court in *David Securities* held:

> "The law has traditionally not allowed recovery of money if the person who made the payment has received any part of the "benefit" provided for in the contract: see *Hunt v Silk*. However as the passage already quoted from *Rover International Limited* demonstrates, the notion of total failure of consideration now looks to the benefit bargained for by the plaintiff rather than any benefit which might have been received in fact. Thus, in *Rowland v Divall*, the plaintiff succeeded in an action for repayment of the purchase price of a car he had brought from the defendant unaware that the car had been stolen before it came into the defendant's possession. The defendant resisted

> the claim with the argument that the plaintiff could not prove total failure of consideration because he had used the car for several months. The Court of Appeal however dismissed the argument on the ground that the plaintiff had not received "any part of that which he contracted to receive – namely the property and right to possession. Similarly in *Rover International Limited* itself the plaintiff succeeded in its claim for restitution of payments made to the defendant even though the defendant had performed some of its obligations under the contract. The plaintiff was to dub and distribute films provided to it by the defendant and receive a share of the box office receipts as its payment. The plaintiff was also required to make substantial payments to the defendant in advance of recovering its share of the receipts. The defendant supplied the films to the plaintiff and the plaintiff made the pre-payments before breaching the contract. The plaintiff was then able to recover the pre-payments on the basis that the delivery and possession of the films were not what the plaintiff had bargained for; the "relevant bargain" was the opportunity to earn a substantial share of the gross receipts." (Page 382-383).

281. It is thus clear that the majority of the High Court in *David Securities* were of the view that the decision in *Hunt v Silk* is not inconsistent with subsequent Court of Appeal authority in *Rover International* and *Rowland v Divall* which in any event represents the current state of law. I share that view.

282. Further support for the proposition that receipt of a benefit which is not part of the benefit bargained for under the contract is not inconsistent with total failure of consideration is to be found in the decision of the High Court of Australia in *Baltic Shipping Company v Dillon* 176 CLR 344. In his judgment Mason CJ formulated or approved the test of what is required to negate an assertion of total failure of consideration variously as "receiving and retaining any substantial part of the benefit expected under the contract", "receipt and retention by the plaintiff of any part of the bargained-for benefit" and "the benefit bargained for by the plaintiff rather than any benefit which might have been received in fact" (Pages 350 and 351). Thus he held:

> "When, however, an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract-breaker of its obligation under the contract and the contract-breaker renders an incomplete performance, in general, the innocent party cannot recover unless there has been a total failure of consideration. If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract, there will not be a total failure of consideration.
>
> In the context of the recovery of money paid on the footing that there has been a total failure of consideration, it is the performance of the defendant's promise, not the promise itself, which is the relevant consideration. In that context, the receipt and retention by the plaintiff of any part of the bargained-for

> benefit will preclude recovery, unless the contract otherwise provides or the circumstances give rise to a fresh contract. So in *Whincup v Hughes*, the plaintiff apprenticed his son to a watchmaker for six years for a premium which was paid. The watchmaker died after one year. No part of the premium could be recovered. That was because there was not a total failure of consideration. A qualification to this general rule, more apparent than real, has been introduced in the case of contracts where a seller is bound to vest title to chattels or goods in a buyer and the buyer seeks to recover the price paid when it turns out that the title has not been passed. Even if the buyer has had the use and enjoyment of chattels or goods purportedly supplied under the contract for a limited time, the use and enjoyment of the chattels or goods has been held not to amount to the receipt of part of the contractual consideration. Where the buyer is entitled under the contract to good title and lawful possession but receives only unlawful possession, he or she does not receive any part of what he or she bargained for. And thus, it is held, there is a total failure of consideration. As this Court stated in *David Securities Pty v Commonwealth Bank of Australia*: "the notion of total failure of consideration now looks to the benefit bargained for by the plaintiff rather than any benefit which might have been received in fact.""

283. In one of the passages cited Mason CJ referred to **any** part of the bargained for benefit whereas in another he referred to any **substantial** part of the benefit expected under the contract. No explanation was given as to why he used these two different formulations, whether he considered them to be the same and if not which of them he considered to be the true test. It is not difficult to imagine circumstances in which the difference could assume significance.

284. Mr Tregear submitted that the reference to substantial part of the benefit expected was not intended to introduce a quantitave qualification such that receipt of a small proportion of the bargained-for benefit is not a bar to restitution. Rather he submitted it was intended to exclude as a bar to restitution receipt of a benefit which was merely incidental to the benefit bargained for such as the receipt by Rover of the film prints. The reason the Court of Appeal held that receipt of the prints did not disentitle Rover from seeking restitution was not that it formed a small part of the benefit bargained for under the contract but rather because it did not form any part of the bargained for benefit.

285. This analysis reinforces the central importance in the test of identifying the essential purpose of the contract. Thus a contract may confer the right to receive and impose an obligation to provide a number of benefits. The test as to whether receipt of any one or more of those benefits is inconsistent with total failure of consideration is not whether they are large or small in the context of the entirety of the benefits to be conferred but whether they are the whole or part of the main benefit expected or bargained for or merely incidental or collateral thereto. It is no doubt for that reason that the High Court in *David Securities* and *Baltic Shipping* and the Court of Appeal in *Rowland v Divall* and *Rover International* held that the answer to that question is to

be approached from the perspective of the payer rather than the payee. It is normally the payer who has entered into the contract in order to obtain certain benefits. The payee's objective is normally just to receive payment. In considering whether a particular benefit to which the payer is entitled under the contract is part of the essential bargain contracted for or merely incidental or collateral thereto there is a logic to addressing that question from the prespective of the payer and identifying what was his purpose in entering the contract. That raises the further issue as to whether the question of what was the essential purpose of the contract or more accurately which of the benefits were the essential bargain contracted for is to be answered by an objective process of the court drawing inferences from the nature of the transaction and the language of the contract or whether evidence as to the payer's subjective purpose or motive for entering the contract is admissible. In *Rowland v Divall*, *Rover International* and *Warman* the court appeared to have approached the question as a matter of objective analysis without reference to the subjective purpose or motive of the payer. In *David Securities* on the other hand the High Court, as mentioned above, appears to have approached the question by reference to the state of mind and purpose of the payer.

286. Under ordinary principles of construing a written agreement the normal rule is that evidence of the subjective intentions of either or both parties is inadmissible. Does it make a difference that the exercise in which the court is engaged is one of considering whether one party to the contract is entitled to restitution rather than any question of the rights of either party to relief by way of enforcing the contract or damages for breach of it? There does not seem to be an obvious answer to this question. On the one hand it could be said that in answering the question of what is the essential bargain contracted for the court is necessarily involved in a process of construing the agreement and the presumed intentions of the parties thereto. On the other hand the reason the court is asking the question is not for the purpose of enforcing the agreement but in order to decide whether the payer is entitled to return of money had and received on principles of unjust enrichment. On balance in my view although the question is to be answered from the perspective of the payer in the sense of identifying the essential bargain for which he contracted or, to use the language of the majority in *David Securities*, the matter considered in forming the decision to do the act and the state of affairs comtemplated as the basis or reason for the payment it is a question be answered objectively rather than by reference to evidence of his subjective motives. However that is not to say that evidence of the payer's subjective motive or purpose for entering the agreement is inadmissible if those intentions or motives were communicated to the payee before the contract was entered into. Applying that distinction to the facts of this case I do not think that Mr Van der Garde's evidence that as far as he was concerned the main or only benefit of the Service Agreement was testing kilometres rather than the possibility of Friday morning testing would be admissible unless that purpose had been communicated to Spyker by him or by Mr Boekhoorn on his behalf prior to the agreement, which it was not.

287. Against Mr Tregear's suggested analysis of the significance of Mason CJ's reference to substantial benefit as distinct from any benefit is the fact that the distinction between the essential bargain contracted for and benefits which are merely incidental thereto was already made by Mason CJ's reference to "part of the benefit expected under the contract." While that is undoubtedly a difficulty in Mr Tregear's suggested

analysis, in my view the difficulty disappears when one considers the fact that in a separate passage in the extract of his judgment Mason CJ referred to the receipt and retention of **any** part of the bargained-for benefit. Moreover and in any event the introduction into the test of a quantitave element would in my view be inconsistent with Lord Goff's formulation of the test in *Stocznia* which refers to whether the promisor has performed **any** part of the contractual duties in respect of which the payment is due. Given that the very nature of the rule is that there must be total and not merely partial failure of consideration it is difficult to see how a de minimis exception could be reconciled with the rule. As Lord Ellenborough CJ said in *Hunt v Silk* "if the plaintiff might occupy the premise two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a 12 month on the same account. This objection cannot be gotten rid of: the parties cannot be put in statu quo." (Page 1144). Although that was said in the context of rescission rather than total failure of consideration the logic is in my view equally applicable to the latter.

288. However given the existence of the collateral or incidental benefit exception to the rule it may be that in an appropriate case the receipt of a small benefit may be held not to be a bar to restitution, not by reference to a de mininis principle but on the basis that properly analysed it is a collateral or incidental benefit.

289. A good illustration of the collateral benefit exception to the rule appears in the judgment of Deane J and Dawson J in *Baltic Shipping*:

> "There can be circumstances in which there is, for relevant purposes, a complete failure of consideration under a contract of transportation notwithstanding that the carrier has provided sustenance, entertainment and carriage of the passenger during part of the stipulated journey. For example, the consideration for which the fare is paid under a contract for the transportation of a passenger by air from Sydney to London would, at least prima facie, wholly fail if, after dinner and the inflight film, the aircraft were forced to turn back due to negligent maintenance on the part of the carrier and if the passenger were disembarked at the starting-point in Sydney and informed that no alternative transportation would be provided. Thus in *Heywood v Wellers* [a firm] [1976] QB 446 at pp 458-459, Lord Denning MR regarded it as self evident that, in some circumstances where a part of a journey had been completed, money paid to the carrier or "driver" was recoverable "as of right" for the reason that it was "money paid on a consideration which had wholly failed"."(page 378).

290. Although the meal and the in flight film formed part of the benefits to which the passenger was entitled under his contract with the carrier, viewed from the prespective of the passenger it was merely an incidental or collateral benefit and not a part, even a small part, of "the consideration for which the fare is paid". The essential bargain contracted for was transportation to London. This is to be contrasted with the essential bargain contracted for in *Baltic Shipping* itself, which was a 14 day cruise. In the context of rejecting an alternative submission that the advance payment of the cruise fare created in the shipping company no more than a right to retain the payment

conditional upon its complete performance of its entire obligations under the contract, Mason CJ held:

> "As the contract called for performance by the appellant of its contractual obligations from the very commencement of the voyage and continuously thereafter, the advance payment should be regarded as the provision of consideration for each and every substantial benefit expected under the contract. It would not be reasonable to treat the appellant's right to retain the fare as conditional upon complete performance when the appellant is under a liability to provide substantial benefit to the respondent during the course of the voyage. After all, the return of the respondent to Sydney at the end of the voyage, though an important element in the performance in the appellant's obligations, was but one of many elements. In order to illustrate the magnitude of the step which the respondent asks the court to take, it is sufficient to pose two questions, putting to one side clause 9 of the printed ticket terms and conditions. Would the respondent be entitled to a return of the fare if, owing to failure of the ship's engines, the ship was unable to proceed on the last leg of the cruise to Sydney and it became necessary to airlift the respondent to Sydney? Would the fare be recoverable if, owing to a hurricane the ship was compelled to omit a visit to one of the schedules ports of call? The answer in each case must be a resounding negative." (Page 353).

In short whereas the only essential bargain contracted for by the air passenger in Deane and Dawson JJ's hypothetical example was transportation to London, and in flight food and entertainment was only incidental thereto, return to Sydney was not the sole or essential bargain contracted for by the purchaser of the cruise and the on-ship services such as food and entertainment and any port stop offs during the voyage were integral parts of the essential bargain contracted for.

291. Before leaving *Baltic Shipping* I draw attention to the fact that as recorded in the head note, four and possibly five of the judges held that a claim for restitution can only succeed as an alternative to a claim for damages for breach of contract and that the two claims cannot both succeed. On its face this view is inconsistent with the decision of the Court of Appeal in *Ferguson v Sohl* in which the court held that the employer who overpaid the builder for works to his house was entitled both to restitution of the amount overpaid on the basis of total failure of consideration and nominal damages in the amount of £1 for breach of the building contract. Had the point been live before me I would have considered myself bound by the decision of the Court of Appeal to hold that it is open to me to award both restitution and at least nominal damages for breach of contract. However the claims for damages for breach of contract are pleaded in this case only as alternatives to the primary claim for restitution and, as I have mentioned, Mr de Garr Robinson expressly confirmed that the Claimants put the claims forward as alternatives and do not seek an award of damages as well as an order for restitution.

292. In relation to apportionment it was common ground between the parties that the authorities show that there is a principle by reference to which performance of even a

non-incidental or non-collateral obligation under a contract by a payee may in certain circumstances not be inconsistent with an entitlement on the part of the payer to restitution on the basis of total failure of consideration. Where they differed was as to the nature and ambit of the circumstances in which the principle is engaged.

293. For Spyker Mr Davies submitted that there is no authority for the proposition that one can recover pro tanto for a partial failure of consideration. Even if testing was the very foundation of the contract the claim for restitution must still fail because Mr Van der Garde was on any view allowed to test for 2,004 kilometres. That he submitted was fatal to recovery under this head relying on the passage from Chitty which was cited with approval by Kerr LJ in *Rover International*: "The failure has to be total…thus any performance of the actual thing promised, as determined by the contract, is fatal to recovery under this heading." (Page 924 B). Additional issues which arise are whether apportionment is only applicable where performance has been provided pursuant to separate contractual obligations and whether it is only applicable in cases where the parties have expressly or impliedly acknowledged that the consideration may be apportioned by the structure of the transaction. Mr Tregear submitted that there could only have been a finding of total failure of consideration in this case if the contract had provided for payment for kilometres in instalments referable to tranches of distance. In such a case if only two out of six tranches of 1,000 kilometres had been provided it might be possible to argue that there had been a total failure of consideration in respect of the outstanding four tranches. A further issue is whether apportionment is possible in circumstances where in addition to unconditional rights a contract creates contingent rights (a) where part of the contingent right is provided by the payee or (b) where it is not.

294. Heavy reliance was placed by Mr de Garr Robinson on the dicta of Lord Goff in *Goss v Chilcott*. In that case the capital sum advanced under a defective loan agreement was held to be recoverable because consideration for it had wholly failed. There had been two repayments of interest to the lender, but the Privy Council held that as their function had been to pay for the use of the sum rather than for the advance itself, the two repayments of interest did not prevent a finding that there had been a total failure of consideration for the capital sum advanced. However the Privy Council went on to hold obiter that even if part of the capital sum had been repaid the balance of the loan outstanding would have been recoverable on the ground of total failure of consideration.

295. Lord Goff, delivering the unanimous judgment of the Privy Council, held:

> "Let it however be supposed that in the present case the defendants had been so discharged from liability at a time when they had paid nothing, by way of principal or interest, to the company. In such circumstances their Lordships can see no reason in principle why the company should not be able to recover the amount of the advance made by them to the defendants on the ground that the money had been paid for a consideration which had failed, the failure of the defendants to perform their contractual obligation to repay the loan, there being no suggestion of any illegality or other ground of policy which precluded recovery in restitution in such circumstances.

In the present case however, although no part of the principal sum had been repaid by the defendants, two instalments of interest had been paid; and the question arises whether these two payments of interest precluded recovery on the basis that in such circumstances the failure of consideration for the advanced was not total. Their Lordships do not think so. The function of the interest payments was to pay for the use of the capital sum over the period for which the loan was outstanding, which was separate and distinct from the obligation to repay the capital sum itself. In these circumstances it is, in their Lordships' opinion, both legitimate and appropriate for present purposes to consider the two separately. In the present case, since it is unknown when the mortgage instrument was altered, it cannot be known whether, in particular, the second interest instalment was due before the defendants were discharged from their obligations under the instrument. Let it be supposed however that both interest payments had fallen due before the event occurred. In such circumstances, there would have been no failure of consideration in respect of the interest payments rendering them recoverable by the defendants; but that would not affect the conclusion that there had been a total failure of consideration in respect of the capital sum, so that the latter would be recoverable by the company in full on that ground. Then let it be supposed instead that the second interest payment did not fall due until after the avoidance of the instrument. In such circumstances the consideration for that interest payment would have failed (at least if it was payable in advance), and it would prima facie be recoverable by the defendants on the ground of failure of consideration; but that would not affect the conclusion that the capital sum would be recoverable by the company also on that ground. In such a case, therefore, the capital sum would be recoverable by the lender, and the interest payment would be recoverable by the borrower; and doubtless judgment would, in the event, be given for the balance with interest at the appropriate rate: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 W.L.R 938. In either event, therefore, the amount of the loan would be recoverable on the ground of failure of consideration. In the present case, since no part of the capital sum had been repaid, the failure of consideration for the capital sum would plainly have been total. But even if part of the capital sum had been repaid, the law would not hesitate to hold that the balance of the loan outstanding would be recoverable on the ground of failure of consideration; for at least in those cases in which apportionment can be carried out with difficulty, the law will allow partial recovery on this ground: see *David Securities Pty. Ltd. v Commonwealth Bank of Australia* [1992] 175 C.L.R 353,383."

296. Mr Tregear accepted that the ratio in *Goss v Chilcott* was that there was a total failure of consideration as to the discrete part of the contract being sued upon namely the advance of the capital which had not been repaid in whole or part. On its face there is nothing in Lord Goff's judgment to suggest that the contract itself severed the defendant's obligations to repay the advance and to pay interest instalments or that it apportioned the former to the advance of the loan and the latter to the use of the loan. To that extent it does not support Mr Tregear's submission that apportionment is possible only where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction.

297. Moreover Lord Goff's obiter dictum that even if part of the capital sum had been repaid the law would not hesitate to hold that the balance of the loan outstanding would be recoverable on the ground of failure of consideration was not expressed to be conditional upon the existence in the hypothetical contract in this example of express or implied terms stipulating separate obligations to advance and repay each distinct instalment of the loan advanced. This perhaps suggests that it was not Lord Goff's view that apportionment is permissible only where it is expressly or impliedly provided for in the contract. Indeed his conclusion that the law will allow partial recovery at least in those cases in which apportionment can be carried out without difficulty suggests, in my view, that the question whether apportionment can be carried out turns not on whether apportionment is provided for either expressly or even by implication by the contract but rather on whether as a matter of practical common sense the court considers that it is able to apportion on objective analysis of the nature of the contract and the consideration.

298. Mr Tregear submitted that Lord Goff's conclusion that there would have been a total failure of consideration even if there had been repayments of capital was not only obiter but, as a decision of the Privy Council, does not necessarily represent a binding statement of English law. If it were to be taken to be representative of English law it would mean that the doctrine of total failure of consideration is effectively extinct. That would be inconsistent with the decision of the House of Lords in *Stocznia* in which the doctrine was affirmed.

299. It must of course be right that if there is an irreconcilable difference between Lord Goff's obiter dictum in *Goss v Chilcott* and the affirmation of the requirement of total failure of consideration as a condition for restitution by the House of Lords in *Stocznia* the latter would prevail and would certainly be binding on me. It is however striking that the allegedly inconsistent dicta both appeared in respectively a speech and a judgment of Lord Goff, the decision in *Goss v Chilcott* having been handed down in May 1996 not much more than a year before the hearing in June 1997 in *Stocznia*. Although *Goss v Chilcott* was not referred to either in the speeches or in argument in *Stocznia*, it is hardly to be supposed that Lord Goff had forgotten what he said in *Goss v Chilcott* and it would be suprising if he had changed his mind on a significant aspect of the doctrine of total failure of consideration between the two cases without saying so and explaining his reasons. Particularly when read against that background in my view there is no inconsistency between the two dicta. As I have already indicated in my view the test formulated by Lord Goff in *Stocznia* "whether the promisor has performed any part of the contractual duties in respect of which the payment is due" leaves open the question of how the court identifies the contractual duties in respect of which the payment is due. In a case where, to use Lord

Goff's language in *Goss v Chilcott*, apportionment can be carried out without difficulty there is no reason why the court cannot conclude that, even where contractual duties have been performed by the payee, they are not contractual duties in respect of which the relevant payment is due. That is not to say that it follows that the House of Lords in *Stocznia* approved the obiter dictum in *Goss v Chilcott* but merely that the latter is not inconsistent with the decision in the former.

300. In *David Securities*, to which Lord Goff in *Goss v Chilcott* referred as supporting the proposition that at least in those cases in which apportionment can be carried out without difficulty the law will allow partial recovery on the ground of failure of consideration, the majority judgment did not specifically address the question of what is the test as to whether for these purposes consideration can be apportioned. However there is in my view a flavour of the court approaching this as a matter of common sense rather than regarding it as dependent on an express or implied agreement in the contract that different parts of a purchase price are referable to different contractual obligations. Thus the majority held:

> "In cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing. In the present case for instance it is relatively simple to relate the additional amounts paid by the appellants to the supposed obligation under clause 8(b) of the loan agreements. The appellants were told that they were required to pay withholding tax and the payments that they made were predicated on the fact that, by so doing, they were discharging their obligation…In this case the bank must prove that the appellants are not entitled to restitution because they received consideration for the *payments which they seek to recover*. It does not avail the bank to argue that the appellants were provided with the loan moneys agreed. Indeed the severability of the loan agreement into its relevant parts seems to be accepted by the bank for it is admitted that the appellants' consideration for agreeing to pay the additional amounts under clause 8(b) was the bank's agreement not to charge a higher interest rate. In circumstances where both parties have impliedly acknowledged that the consideration can be "broken up" or apportioned in this way, any rationale for adhering to the traditional rule requiring total failure of consideration disappears." (Page 383).

In my view the majority in the High Court was not saying that it is only in cases where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction that apportionment will be possible. It merely noted that in that particular case the parties had so acknowledged, not in the sense that such a term was to be implied into the contract but merely in the very different sense that they so acknowledged in their submissions.

301. In *Baltic Shipping v Dillon* a passenger on a cruise vessel suffered injury when the vessel sank 10 days into a 14 day cruise. The High Court of Australia held that the

passenger was not entitled to a refund of the fare because there had not been a total failure of consideration. Mason CJ held:

> "I have come to the conclusion in the present case that the respondent is not entitled to recover the cruise fare on either of the grounds just discussed. The consequence of the respondent's enjoyment of the benefits provided under the contract during the first eight full days of the cruise is that the failure of consideration was partial, not total. I do not understand how, viewed from the perspective of failure of consideration, the enjoyment of those benefits was "entirely negated by the catastrophe which occurred upon depature from Pickon" to repeat the words of the primary judge." (Page 353).

Although Mason CJ in an earlier part of his judgment referred to the case of *Whincup v Hughes*, he did not elaborate on his reasons for reaching his conclusion. In particular he did not address the question whether it was possible to apportion the cruise fare between the benefits which were conferred during the first 8 or 10 days of cruise and the benefits which were not conferred after the ship sank. Mr Tregear submitted that even if the ship owner had calculated the cost of providing the cruise on a dollar per day basis it would not follow from that that the contract could be severed or that the fare could be apportioned between benefits to be conferred on a daily basis.

302. In *Whincup v Hughes* Bovill CJ explicitly held that there may be some cases of partial performance which form exceptions to the general rule that where a contract has been in part performed no part of the money paid under the contract can be recovered back "as for instance if there were a contract to deliver 10 sacks of wheat and 6 only were delivered, the price of the remaining 4 might be recovered back. But there the consideration is clearly severable." (Page 81) (emphasis added). In my view that conclusion does not support Mr Tregear's submission that a finding to the effect that there has been a total failure of consideration could only be correct in this case if the contract had provided for payments for kilometres in instalments referable to tranches of distance. Bovill CJ's formulation left it open whether in the hypothetical example the contract provided an overall price for the delivery of 10 sacks or specified the delivery of 10 sacks at a specific price per sack. It follows in my view that his conclusion that in such a case the consideration is clearly severable was not dependent on there being in the contract a specified price per sack of wheat rather than a global price for all 10 sacks. In this case there is the complication that as well as the minimum of 6,000 kilometres which Spyker were obliged to provide there were other contractual obligations. I consider below whether they can be disregarded by reference to one or more of Mr de Garr Robinson's other submissions. But in a hypothetical case where the contract had been confined to an obligation on the part of Spyker to provide 6,000 kilometres of which only, for the sake of simplicity, 2,000 had been made available, it does not seem to me that the question whether there had been total failure of consideration would necessarily turn on whether the Service Agreement had specified an overall price of $3 million or a rate of $500 per kilometre.

303. Later in his judgment Bovill CJ used a different expression. He said: "The contract having been in part performed, it would seem that the general rule must apply unless the consideration be **in its nature** apportionable." (Page 81) (emphasis added.) The

question whether in any case the consideration is in its nature apportionable is one to which, in my view, the definitive answer is not necessarily supplied by any express stipulation in the contract. In a straightforward contract to deliver 10 sacks of wheat the nature of the obligation, namely to deliver sacks of wheat, would in my view prima facie, be apportionable. Each bag of wheat being the same as the others and the delivery of it involving the seller in no greater or lesser burden than the others, there is no reason why the obligation to deliver one bag of wheat cannot be apportioned to the arithmetically appropriate portion of the purchase price. That remains the case whether the purchase price is expressed as £10 for the delivery of 10 sacks of wheat or 10 sacks at £1 per sack.

304. In *Fibrosa* Lord Porter said that "unless the contract is divisible into separate parts it is the whole money, not part of it, which can be recovered. If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered…" (Page 77). Lord Porter gave no guidance as to how the court is to determine whether a contract is divisible into separate parts or whether part of the consideration can be attributed to the divisible part which has failed. However it seems to me implicit in his posing the question whether part of the consideration can be attributed to a divisible part of the contract that it is open to a court to hold that part of the consideration can be so attributed even if such attribution is not spelled out expressly in the contract itself. That again in my view supports the proposition that in the hypothetical example the mere fact that the contract specified a global fee of $3 million for 6,000 kilometres rather than $500 per kilometre would not mean that where 4,000 kilometres have not been provided part of the $3 million consideration cannot be attributed to the part of the contract under which those 4,000 kilometres were required to be made available. In my view the question whether consideration is in its nature apportionable may turn on an analysis of the nature of the subject matter of the consideration and the circumstances in which it is to be delivered or performed rather than just on whether or not the contract allocates it to a particular part of the purchase price.

305. That of course is not the end of the matter. There are other factors which on the authorites fall to be considered in deciding whether a contract is severable and the consideration apportionable. Although in *Whincup v Hughes* the contract provided for a payment of £25 for the 6 year apprenticeship, the court's reasons for concluding that the contract was not severable and the consideration was not in its nature apportionable did not turn on that fact or on the fact that it was not expressed as a rate per year. Rather it was based on an analysis of the services to be provided by the watchmaker and the usefulness to the watchmaker of the services to be provided by the apprentice. It was the uneven nature of those services throughtout the term of the contract during which they were to be provided that led to the conclusion that the consideration was not apportionable. It was for that reason that Bovill CJ held that apportionment could not properly be made by reference to the proportion which the period during which the apprentice was instructed bore to the whole term. In the early part of the term the teaching would be most onerous and the services of the apprentice of little value, whereas as time went on the value of the services provided by the apprentice would probably be greater and he would require less teaching. Thus in contrast to the hypothetical sacks of wheat, where there was no reason to suppose that the burden to the seller of providing sack five would be any greater or lesser than the burden of providing sack one, it was intrinsic to the nature of the apprenticeship that

the burden of teaching the apprentice would be likely to be greater in year one than in year five and the usefulness of the apprentice to the watchmaker would be greater in year five than in year one. To similar effect were the reasons given by Montague Smith J. "To ascertain the amount which equity in such a case requires to be returned it would be necessary to go into a great variety of considerations, the relative weight of which it would be almost impossible correctly to estimate: i.e, the value of the service lost to the master and the degree to which the apprentice had profited by the instruction. It would be impossible to take merely the proportion of the time which had elapsed to the whole term as the standard of measurement." (Page 85-86). In my view the analysis of the court in *Whincup v Hughes* provides valuable guidance to the approach which the court should adopt when considing whether consideration is apportionable.

306. In *Ebrahim Dawood Limited v Heath (Est. 1927) Limited* McNair J held that buyers of 50 tons of galvanized steel sheets at £73 10 shillings per ton were entitled to recover four fifths of the purchase price as money paid on a consideration which had wholly failed because they had been entitled under section 30(3) of the Sale of Goods Act 1893 to reject four fifths of the delivered sheets as not complying with the contractual specification.

> "Now there are cases where the payment of the contract price has been made in advance for a total contracted number of articles, and there has then been failure by the seller to deliver the whole of those contracted quantities. In those circumstances, it is clear on the authority to which I shall refer in a moment, that the buyer's right of recovering so much of the purchase price as relates to the quantity short delivered, is a right to recover money paid to his use or money paid for a consideration which has wholly failed." (Pages 518-519).

307. As stated by McNair J the buyer's right is to recover "so much of the purchase price as relates to the quantity short delivered". In theory that formulation of the right is not confined to a case where the contract specifies a purchase price per unit to be delivered. If a contract for the supply of 10 sacks of wheat specifies a price of £1 per sack and only 3 sacks are delivered it is easy to say that £7 of the £10 purchase price paid in advance relate to the 7 sacks not delivered. In principle in my view there is no reason why it could not equally be said in a contract for the delivery of 10 sacks of wheat which specifies a global consideration of £10 that £7 of the £10 prepayment relates to the 7 undelivered sacks. Whether McNair J intended or contemplated that the right would extend to the latter case is not clear.

308. Of the cases on which he relied in support of his proposition *Biggerstaff v Rowatt's Wharf Limited* [1896] 2 Ch 93 was one where the purchase price was defined as 3s 6d per barrel. 7,000 barrels having been purchased but only 4,000 delivered, the Court of Appeal held that the purchaser was entitled to return of 3s 6d for each of the 3,000 barrels contracted for but not delivered. Lindley LJ held that "on the company failing to deliver any more, Harvey Brand and Co who had paid for the whole number became creditors of the company to the amount of 3s 6d for each barrel not delivered, there being as regards these barrels a total failure of consideration, which entitled them to have the price back…" (Page 100). Kay LJ held: "As to those barrels there was a total failure of consideration and Harvey Brand and Co had a liquidated claim

for money had and received…" (Page 105). Like *Ebrahim Dawood Limited* however *Biggerstaff* was a case in which the price was calculated per unit.

309. The same is true of *Behrend and Co v Produce Brokers Co.* [1920] 530 KB to which McNair J referred, albeit that does not appear from his description of the case or his citation of the judgment of Bailhache J. It was a case of short delivery in respect of two contracts for the sale respectively of 200 tons and 500 tons of Egyptian cotton. In both contracts the price specified was a set amount per ton. Bailhace J held that the buyer was entitled to reject the parcels of cotton seed which were not delivered and recover the price paid in advance. Thus the case is, like *Biggerstaff* and *Dawood,* itself inconclusive on whether the apportionment principle extends beyond a contract where the price is expressly stipulated as a price per unit of commodity to be delivered.

310. In his written submissions Mr Tregear submitted that a finding to the effect that there was a total failure of consideration would only have been possible in this case if the contract had provided for payments for kilometres in instalments referable to tranches of distance. He submitted that in *David Securities* the High Court said that it was only in cases where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction that apportionment will be possible. In such cases if only two out of six tranches of 1,000 kilometres had been provided it might be possible to argue that there had been a total failure of consideration in respect of the outstanding four tranches. At first sight this appeared to be a submission to the effect that it is only where a contract specifies a purchase price referable to so much per unit or instalments referable to tranches of unit delivered that there could be a total failure of consideration in a case of short delivery whether of goods or services. However at trial Mr Tregear clarified that he accepted that it is not necessary for the contract itself to provide for a specific price per unit and that the principle of apportionment set out in *Dawood*, *Bickerstaff* and *Behrend* is not confined to such cases. Although he maintained the position, which I have said I do not consider to be correct, that in *David Securities* the High Court said that it is only in cases where the parties have impliedly acknowledged that the consideration may be apportioned by the structure of the transaction that apportionment will be possible, the point he was seeking to make in his written submissions was that in this case the reason that apportionment is impossible is not that the Fee Agreement did not specify a price of $500 per kilometre but rather that the $3 million consideration was referable not just to the 6,000 kilometres but also to other benefits including in particular the contingent right to Friday testing which he submitted was not an incidental or collateral benefit. Thus on the narrow question of whether the *Dawood* apportionment principle is not confined to contracts where the price is expressed as so much per unit but is capable of applying to contracts where the consideration is expressed as a lump sum for delivery of a number of goods or services the parties were in agreement, rightly in my view, that that is indeed the position.

311. In *Ferguson v Sohl* there was a building contract for work to shop premises owned by the defendant. The works were set out in a price specification and the final price was £32,194.25. Work commenced in March 1988 and after a number of disagreements between the parties came to a halt in about June 1988. The plaintiff builder left the site at the end of July 1988 by which time the works had only been partly completed. The amount which the defendant had paid by that time amounted to £20,470.

However at about the same time as the issue of the writ there was a further payment of £6,268.75 so that the defendant had paid £26,738.75. The County Court judge found, as recorded in the judgment of Hirst LJ in the Court of Appeal, that the value of the work which the builders had actually done was £22,065.75. The judge thus found that there had been an overpayment of £4,673 representing the difference between the value of the work done and the total money paid. By the date of trial the defendant building owner had completed the works presumably using other builders at a cost which was less than the balance of the contract price still due, that being an express finding by the County Court judge. The judge awarded the defendant building owner £4,673 as money had and received in a restitutionary claim which was advanced as one for repayment of an overpayment made to the builder. In addition the County Court judge awarded the building owner £1 nominal damages for breach of contract, having found that having been able to complete the works cheaper than the costs that would have been incurred if the contract had been completed he had suffered no damage recoverable at common law.

312. The question which Hirst LJ said arose for decision for the Court of Appeal was whether the judge was right to award the defendant a refund of £4,673 for the money overpaid, as the judge held it had been, or whether his correct claim was solely one for common law damages as he did not have a valid cause of action for restitution. The Court of Appeal, dismissing the builder's appeal, held that the building owner was entitled to both nominal damages and restitution. Hirst LJ held:

> "Finally, there are a number of passages on which Mr Armstrong relies from the leading textbook on restitution (that is the textbook of Lord Goff of Chieveley and Professor Gareth Jones on *Restitution* in the third and current edition), stating the well-known principle (which is strongly criticised by the editors as worthy of reform) that where there is only a partial failure of consideration then, as the law at present stands, an injured party cannot claim restitution, but is only entitled to claim for general damages for breach of contract.
>
> But here again Mr Armstrong, in my judgment, derives no assistance because, ex hypothesi, the learned judge's finding is in that for the £4,673 there was indeed a total failure of consideration because £4,673 was paid by the defendant for work that was never done at all. The plaintiffs rightly recovered their £22,000 odd for work which they had done, including their profit, and there is no question of rolling back the carpet so far as that payment is concerned. But for the sum actually claimed in restitution there was, in my judgment, no consideration at all, and its matters not, though Mr Armstrong sought to argue the contrary, that at some stage or other that sum of money formed part of a larger instalment.
>
> In those circumstances the learned judge was, in my judgment, correct in upholding two separate causes of action, and awarding restitution in the amount that he did on the first, and only moninal damages on the second."

313. Nourse LJ the other member of the two judge constitution of the Court of Appeal, agreed that the appeal should be dismissed for the reasons given by Hirst LJ and added some observations of his own:

> "As a result of the judge's findings, the position became a very simple one. The plaintiff had done work to a value of £22,065.75. The defendant had made payments to him under the contract amounting to £26,738.75, an overpayment of $4,673. The plaintiff then repudiated the contract, the repudiation being accepted by the defendant. That meant that the plaintiff could recover nothing more from the defendant. On his side the defendant became prima facie entitled to recover, by way of damages, the cost of completing the works in a reasonable manner, less the amount of the contract price remaining unpaid. As it happened, and this is the unusual feature of the case which may have been responsible for it having been brought as far as this court, the defendant was able to complete the works for less than the amount of the contract price remaining unpaid. That meant that he could only recover nominal damages for £1 for breach of contract. But why should it also mean that he is unable to recover the overpayment of £4,673? That is a question which the well-sustained argument of Mr Armstrong, for the plaintiff, has been unable to answer.
>
> I do not think that any unseful purpose is served by making too elaborate an analysis of the legal principles which may here be in play. The plaintiff had been found to be entitled to £22,065.75 for the work done and, by virtue of his repudiataion of the contract, to nothing more. Pursuant to the contract he had been paid £26,738.75. If the basis of his right to retain the £22,065.75 is that he has done the work to that value, by what possible right can be claim to retain £4,673 for work which, in breach of contracat, he has not done? I think that it would be a sorry state of affairs if the defendant was unable to recover that amount. I am quite satisfied that he can. If it is necessary, out of respect for well-established principles in the law of contract and restitution, to base our decision on the proposition that there was a total failure of consideration in regard to the £4,673, so be it. For myself, I would have held that simple common sense was every bit as sure a foundation.
>
> In a quite admirable judgment Judge Hicks came to an entirely correct decision. I too would affirm it accordingly."

314. *Ferguson v Sohl* is a difficult case. In *Minister of Sound (Ireland) Limited* Mr Strauss QC, echoing the editorial note accompanying the report of the decision, said that Hirst LJ "robustly" described as a total failure of consideration what might more conventionally have been seen as a partial failure. (845 B-E). There was a single building contract for work to be done on the shop premises. Most of the work was done (no doubt involving the supply of both labour and materials) and there was certainly no reference in the report or the judgments to any contractual term providing

for apportionment. The head note stated that the contract was contained in a priced specification and that the price was £32,104.25, in other words a global price and Hirst LJ stated that the works were set out in a priced specification and that the final price was £32,194.25.

315. If and to the extent that the decision of the Court of Appeal is properly to be regarded as holding that there can be restitution in the absence of total failure of consideration it would be inconsistent with the test laid down by Lord Goff in *Stocznia* at page 588 D, "Whether the promisor has performed any part of the contractual duties in respect of which the payment is due" which in my view formed part of the ratio decidendi of that decision of the House of Lords. It would also be inconsistent with the obiter dicta in *Fibrosa* cited above to the effect that partial failure of consideration is insufficient to found a claim for restitution.(see for example per Lord Porter at page 77: " A partial failure of consideration gives rise to no claim for recovery of part of what has been paid.").

316. However in terms both Hirst LJ and Nourse LJ expressly based their decision on findings that there had been a total failure of consideration. Moreover as appears from Hirst LJ's judgment it is clear that they had well in mind what he referred to as the well-known principle that where there is only a partial failure of consideration as the law at present stands an injured party cannot claim restitution. It is thus clear that they considered that their decision was consistent with rather than seeking to depart from the general rule that there must be total failure of consideration. The important questions are what was the analytical basis on which the Court of Appeal felt able to find that there had been a total rather than partial failure of consideration and for what if any general propositions is the decision authority binding on me?

317. Hirst LJ said: "*Ex hypothesi* the learned judge's finding is that for the £4,673 there was indeed a total failure of consideration because £4,673 was paid by the defendant for work that was never done at all. The plaintiffs rightly recovered their £22,000 odd for work which they had done, including their profit, and there is no question of rolling back the carpet so far as that payment is concerned". It is in my view clear that Hirst LJ was there apportioning the £26,738.75 which had been paid to the builder between that part of the contract price for which the shop owner had received a benefit in the form of work done and that part in respect of which he had received no benefit because no work had been done.

318. The finding of the County Court judge to which Hirst LJ referred in that passage and on which he appeared to base his implicit view that apportionment was possible and his explicit finding that there had been a total failure of consideration in respect of the £4,673 was his finding that "the value of the work which the plaintiffs had actually done was £22,065.75. (Page 102). "Subtracting that, therefore, from the total payment (including the August 1988 payment contemporaneous with the writ) of £26,738.75, the judge found that there had been an overpayment as to the difference – that is, the sum of £4,673." (Page 102). Although Hirst LJ used the word "value" Mr de Garr Robinson submitted, on balance rightly in my view, that this was intended to be shorthand for saying that the judge had found that the contract price referable in the contractual price specification to those items of work which he found had been completed amounted to £22,065.75. In other words the judge had not embarked on an exercise based on expert evidence of putting a commercial value on the items of work which had been completed. Although Hirst LJ said that the final price was £32,194.25

it is in my view to be inferred that the price specification in which he said that the works were set out allocated a specific price to individual items or groups of items of work. It is otherwise impossible to see how the judge could have made the finding which Hirst LJ said he had made unless he had embarked on the kind of fresh valuation exercise to which there is no reference in the report of the case.

319. Having thus identified that portion of the £26,738.75 payment which constituted payment in respect of the completed items as specified in the contract (£22,065.75), it followed that for the balance of the payment (£4,673) "there was indeed a total failure of consideration because £4,673 was paid by the defendant for work that was never done at all." Moreover the fact that that overpayment of £4,673 had been mixed up as part of the instalment of £6,268.75 with part of the payment for completed works for which there had been no failure of consideration did not preclude a finding that in respect of the £4,673 there had been a total failure of consideration.

320. Nourse LJ's rhetorical question: "If the basis of his right to retain the £22,065.75 is that he has done work to that value, by what possible right can he claim to retain £4,673 for work which, in breach of contract, he has not done?" is an eloquent statement of the rationale for the doctrine of restitution in the event of failure of consideration. Indeed it no doubt explains why the rule requiring total failure of consideration has been subjected to sustained criticism at the highest judicial and academic levels. As the editors of Goff and Jones third edition put it in a passage quoted in the commentary in *Ferguson v Sohl*: "To allow the defendant to retain the whole or part of the contract price on the ground that the plaintiff had made a losing contract would be to allow him to retain a benefit which he is in a position to restore and to profit from his breach of contract. Furthermore, for similar reasons, even if the consideration for the innocent party's payment has only partially failed, he should, in our view, be entitled to restitution, although an allowance should be given for any benefit received from the party in breach. However, at common law the innocent party is, at present, denied recovery in these circumstances…" (Page 99).

321. Given the accepted constraint of the requirement to show a total rather than partial failure of consideration, apportionment is a necessary tool to enable the court to find that the payee has no right to retain the sum claimed for work which, in breach of contract, he has not done. In my view for work done one could equally substitute goods delivered and/or services provided.

322. There may of course be cases where it is clear on the evidence that there has been some maybe even very considerable overpayment for which there has been no consideration but it is impossible because of difficulties of apportionment to identify the precise amount of the payment for which there has been no consideration. So for example in this case if the Claimants are right on all their collateral benefit arguments but it were held that part of the $3 million consideration in the Fee Agreement was attributable to Friday testing as a freestanding contingent right to which the parties attributed a modest but unquantified value when striking their bargain, it might in practice be difficult if not impossible to apportion a fixed sum to the 6,000 kilometres of testing or in consequence to the 2,004 kilometres actually provided. It would in those circumstances be plain that if Spyker were to retain the entire $3 million prepaid by the Claimants there would be some unidentifiable part thereof for which Spyker had provided no services. That would be the part of the $3 million referable to the balance of testing kilometres not provided by Spyker. On the current state of the law it

would appear that because of the difficulty of apportionment the court would be powerless to order restitution notwithstanding the probability if not certainty that for some and possibly a large proportion of the money retained by Spyker there had been a total failure of consideration. It would be for consideration whether in such circumstances the court should have the power to identify some portion of the sum paid in respect of which even on a view most favourable to the payee it could not seriously be denied that there had been a total failure of consideration because it represented the minimum amount of the overall consideration specified in the contract which is attributable to the services which were not provided.

323. For present purposes there are a number of features of the decision in *Ferguson v Sohl* to which I would draw attention. It is in my view authority binding on me for the following propositions. The principle of apportionment referred to by Lord Goff in *Goss v Chilcott* is capable of applying in contracts for the provision of services. In such a contract the fact that some of the services contracted for have been provided is not a necessary bar to restitution or to a finding of total failure of consideration. That is the case even where the contract does not expressly provide for apportionment and even where the services to be provided under the contract and/or actually provided pursuant to the contract are different in kind or degree and where the proportion of the contractual consideration attributable to individual services to be provided and/or actually provided differs according to the size, nature or extent of the individual services. Where in such a case the court can identify by the process of apportionment a payment for which there has been no consideration in the form of services provided the payer is entitled to an order for the restitution of that sum. I would further observe that although this is not in my view binding on me, *Ferguson v Sohl* is a good example of the willingness of the court to adopt a flexible and robust approach so as to avoid, if consistent with existing principle, leaving a victim of unjust enrichment without an effective remedy.

324. The question that falls to be determined is whether application of the legal principles set out in the authorities to which I have referred to the facts of this case entitles the Claimants to restitution. It is convenient to address this question by reference to Mr de Garr Robinson's submission that the requirement of total failure of consideration is satisfied because (a) all benefits other than the 6,000 kilometres can be disregarded and (b) the $3 million paid by the claimants to Spyker can be apportioned between the 2,004 kilometres provided (plus the 266 kilometres which I have held are to be treated as having been provided by the offer to participate in the Paul Ricard test) on the one hand and the balance of kilometres which Spyker failed to provide (which I have held to be 3,730 kilometres) on the other. The apportionment he submitted can be done simply on a pro-rata dollar per kilometre basis so that it is clear that in respect of $1.865 million paid to Spyker there was a total failure of consideration.

325. It will be recalled that in support of the first point Mr de Garr Robinson relied on four propositions. The first is what he called his icing on the cake point: most of the so-called additional benefits said by Spyker to defeat the doctrine of total failure of consideration were in truth on analysis not additional at all, but merely aspects of or part and parcel of the basic benefits provided for in clause 2 of the Service Agreement. They were only intended to be or capable of being enjoyed if and to the extent that Mr Van der Garde drove testing kilometres. In this category he placed the right to sponsor space on the car provided for in clause 7.1 of the Service Agreement

and the right to space on Mr Van der Garde's suit and his helmet provided for in clause 7.4. He submitted that these sponsor space rights were inseparable from the testing rights conferred under clause 2 of the Service Agreement. Mr Van der Garde did not acquire a right to do testing and an additional right to advertise his sponsors. Rather he acquired a right to do testing in a way which allowed him to advertise his sponsors. Mr Gallagher and Mr Zecchi agreed that the sponsor space rights (together indeed with the paddock passes) were an inclusive part of the driver testing agreement and that they came with the testing as icing on the cake.

326. There is in my view force in Mr de Garr Robinson's submission. By clause 7.1 Spyker granted sponsor space on the trade area of the Car which was defined in the Service Agreement as "a Formula One racing car to be provided by Spyker for use by the Driver at each of the Tests." In my view construed in the context of that definition the right conferred by clause 7.1 on the Claimants was a right to require that while Mr Van der Garde was driving the car the trade area would be covered with any sponsor material that the Claimants might have. It did not require Spyker to have to run a car in races driven by other drivers containing Mr Van der Garde's sponsorship. Clause 7.4 granted the first Claimants spaces on Mr Van der Garde's race suit. Although this was not expressly qualified as was clause 7.1 by the words "for use by the driver and each of the tests" Mr de Garr Robinson was in my view correct to submit that as a matter of common sense the right granted by clause 7.4 related to what Mr Van der Garde could do while he was driving Spyker's racing car. The right to have his own advertising for which he or the first Claimants could charge money on his race suit was of no practical use to him sitting at home. Indeed that was something he was entitled to without the consent of Spyker. The rights conferred by Clause 7.1 and 7.4 were thus part and parcel of the rights conferred by clause 2. Mr Tregear submitted that it is clear from the terms of clause 4.1.1 of the Service Agreement that the parties regarded the sponsor spaces as being a benefit which could be sold in order that the fees payable under the Fee Agreement could be recouped. He thus submitted that the benefits conferred by clause 7.1 and 7.4 were not limited to the use of the spaces at events where Mr Van der Garde was driving. In my view that is not right. It is true that clause 4.1.1 confirmed that it was understood that the laimants intended to fund the $3 million payment due under the Fee Agreement by inter alia sponsorship agreements. No doubt the rights conferred by clauses 7.1 and 7.4 had some value to the Claimants in enhancing their abilty to negotiate such agreements. It does not, however, in my view follow either that any such agreements would have involved the resale by the Claimants of their clause 7.1 and/or 7.4 rights or that the rights so conferred were not limited to the use of the spaces at events where Mr Van der Garde was driving.

327. On the assumption that apportionment of the $3 million received by Spyker is otherwise apportionable between the kilometres provided and those not provided does the fact that the contract conferred clause 7.1 and 7.4 rights on the claimants prevent apportionment? In my view the answer to that question is no. Although there was some evidence that in principle sponsorship rights could in certain circumstances have a value and could be sold by a Formula One Team to advertisers or companies wishing to advertise their products, it does not seem to me that inability or difficulty in apportioning the $3 million as between the provision of kilometres and the provision of sponsorship rights is a bar to restitution. Given that without receiving the benefit of being able to test drive the racing car the sponsorship rights were of no

benefit to the claimants, it is in my view artificial to treat them as separate benefits to each of which a notional part of the contract price was attributable. Had that been the case I can see that apportionment would be difficult if not impossible.

328. In oral argument Mr de Garr Robinson accepted that if Spyker had for example allowed Mr Van der Garde to drive 6,000 kilometres but refused to allow him to have the space on the car and the suit in breach of clauses 7.1 and 7.4 restitution would have been impossible because there would have been no total failure of consideration. The Claimants would have had to fall back on a contractual claim for damages for breach of the obligation to provide sponsorship space. To use his analogy if the seller provides cakes but the icing is missing the buyer cannot seek restitution of part of the purchase price because of the inability to apportion the consideration attributable to the cake and the consideration attributable to the icing. But that is because on analysis that would be a case of partial failure of consideration, the consideration succeeding to the extent of providing a cake and failing only to the extent of providing a defective cake without icing. It does not follow he submitted that where only three out of ten cakes are delivered the fact that it was agreed that the cakes would come with icing means that there has not been total failure of consideration in respect of seven tenths of the purchase price. It remains possible and indeed easy to apportion the purchase price between the delivered and undelivered cakes. This would be the case irrespective of whether some or all of the three delivered cakes came with icing. In my view that is right.

329. However even if that analysis is wrong, in my view the answer to the question posed above remains no. That is because in my view the sponsorship rights conferred by clauses 7.1 and 7.4 are collateral or incidental to the essential bargain contracted for by the Claimants, in the sense discussed in *Rover International*, *David Securities*, *Rowland v Divall* and *Warman*. In this conclusion I am fortified by the evidence of the two experts to which I have referred that space on the car, space on the suit and paddock passes "was an inclusive part of the driver testing agreement and would not have been paid by Mr Van der Garde separately i.e they came with the testing, as icing on the cake." Plainly if and to the extent that that view was intended to be a construction of the Services Agreement and the Fee Agreement it would be inadmissible. However I did not read it in that way. I took it to be a general statement as to the practice by which such benefits are treated as between Formula One Teams and test drivers when negotiating and agreeing test driving agreements.

330. If the subjective views of Mr Van der Garde were admissible for the purpose of identifying the essential bargain contracted for then I would be further fortified in my conclusion by his evidence. In his first witness statement he said that the fundamental point of paying Spyker the $3 million was for him to secure 6,000 kilometres of driving in the Spyker car in the 2007 season. That was what the Service Agreement and the Fee Agreement were about. That is the only way to progress in motor racing. In his third witness statement he added that he was not interested in getting anything else out of the contract other than the 6,000 kilometres of testing in a Formula One car. If he had been offered the paddock passes, the Friday driving, and the Sponsorship space and asked if he wanted that he would have refused. He referred to his earlier mention of Lewis Hamilton having told him of the benefit he had derived from getting 10,000 kilometres of test driving. The other things in the Service Agreement and Fee Agreement he said were just standard and of no value to him

without the 6,000 kilometres of driving. With the 6,000 kilometres they were still not independently valuable. Without accepting the latter comment about the lack of value in all the other rights conferred by the two agreements, not least in relation to the Friday morning contingent right, and bearing in mind that this comment did not address the value to the first Claimant, I did accept as truthful and credible his evidence as to what he regarded as peripheral or incidental to the main purpose of the agreement.

331. However my conclusion is not in any way dependent on the evidence of Mr Van der Garde as to his subjective views. Standing back from the two agreements and looking at them as a matter of common sense against the matrix of circumstances in which they were entered into, it seems to be obvious as a matter of common sense that the essential bargain for which the Claimants contracted were the rights conferred by clause 2 of the Service Agreement. Mr Van der Garde was an aspirant Formula One driver and the essential commercial purpose of the Service Agreement was to provide him with experience driving a Formula One car for a Formula One Team. In my view it is clear that the right to sponsorship spaces on the car and the racing suit were entirely incidental to that essential purpose. Indeed the very fact to which Mr Tregear drew attention that it was understood by both parties that the Claimants intended to obtain funds from sponsorship to be able to fund the payment of the $3 million itself underlines that the sponsorship rights were if anything a means to an end, the end being to enable Mr Van der Garde to pay the $3 million needed to provide him with the driving experience.

332. I would add that Mr Van der Garde's evidence was that before signing up with Spyker he did not have a sponsor and that after the agreement was signed the Claimants were not given any practical means of using any sponsorship space on the car. It would thus appear that in any event Mr Van der Garde did not receive any concrete benefit from clause 7.1 or 7.4 such as could defeat a claim of total failure of consideration even if, contrary to what I have held, those rights were part of the essential bargain contracted for.

333. Mr de Garr Robinson's second point was that the benefits due to the Claimants under the Fee Agreement were not expressed to be benefits due under the Service Agreement and were thus not any part of that consideration. His third point was that most of those benefits were not part of the essential purpose or foundation of the Service Agreement and are thus to be disregarded. It is convenient to address these two points together. It is in my view clear that none of the benefits to which the Claimants were entitled under the Fee Agreement constituted part of the relevant bargain to use Hirst LJ's language in *Rover International*. That is to say none of them constituted part of what the claimants bargained for they were merely incidental or collateral to the essential bargain which was the right to drive Spyker's car in the circumstances provided for in clause 2 of the Service Agreement.

334. This conclusion is supported by the structure of the Service Agreement and Fee Agreement. In clause 6.1 of the former the parties confirmed that fee and expenses were dealt with in a separate agreement. Clause 1.1 of the latter provided: "The parties agree as follows regarding "Fee and expenses". Clause 1.2 provided: "In consideration of Spyker entering and performing the aforementioned Service Agreement the Company or Driver will pay Spyker per race season: US$ 3million (plus VAT if applicable) upon signing." In relation to clause 1.2 Mr de Garr Robinson

submitted: "In other words the benefits due to the claimants under the Service Agreement constituted the consideration for the $3 million payment. The benefits due to the Claimants under the Fee Agreement were not expressed to be any part of that consideration". If and to the extent that he thereby intended to submit that in the context of contract formation the benefits due to the Claimants under the Fee Agreement were not part of the consideration for the $3 million payment I am not persuaded that that is right. If it were right, it is not clear what other consideration passing from the Claimants to Spyker could be identified as supporting a contractual obligation on the part of Spyker to provide the benefits due to the Claimants under the Fee Agreement. If the Claimants had sued Spyker for breach of contract in failing to provide the benefits due under the Fee Agreement it would seem a little unreal to suppose that Spyker could have defeated such a claim in limine on the basis that there being no consideration for those benefits there was no legally enforceable agreement to provide them. And yet it is not easy to identify any consideration for those benefits other than the Claimants' agreement in clause 1.2 to pay Spyker $3 million. A possible exception to this is the obligation on Spyker to pay the first Claimant a management fee of US$ 60,000 for which the consideration could be said to be the provision by the second claimant of management services.

335. However I do accept Mr de Garr Robinson's submission that the structure of the two agreements underlines the fact that the principal benefits to which the claimants were entitled were those provided for in the Service Agreement and that in relation to the Claimants' benefits the Fee Agreement was subsidiary and dealt with incidental matters. That is in my view supported both by the structure of there being two separate agreements and the fact that the consideration for the $3 million payment was expressed to be Spyker entering and performing the Service Agreement. The inference from both these elements in my view is clearly that the essential bargain for which the Claimants agreed to pay $3 million are to be found in the Service Agreement and not in the Fee Agreement.

336. This conclusion is also in my view supported by a common sense objective analysis of the commercial purpose of an aspirant Formula One driver in the position of Mr Van der Garde in entering into an agreement such as the Service Agreement. I refer again to the joint expert's opinion quoted above. In addition in his expert report Mr Gallagher accepted that paddock passes branding on a race car and on a suit/helmet could be bundled as a package and sold independently to sponsors: "However the agreement appears to me to be first and foremost a driver agreement with the principal benefit being to test the Spyker car, and the benefits as listed above would typically be inclusive of such a deal. At the centre of this agreement is the fee and the testing mileage, and the additional benefits are required merely to oil the machinery of this deal to make it happen. To put it simply had [Mr Van der Garde] been asked to put a value on these benefits and disregard the driving aspect, the value - from a driver's perspective – would be zero." Subject to the question of the significance of the contingent right to Friday testing with which I deal below I accept that evidence of Mr Gallagher as reflecting the commercial reality. Just as a test driver enters into a test driving agreement such as this in order to gain experience of driving a Formula One racing car and not for the purpose of obtaining the right to sell sponsorships rights on the car or his suit, so in my view it is clear that he does not enter into such an agreement for the purpose of being provided with travel expenses or accommodation when attending races, obtaining paddock passes (whether or not they are limited to

races where he is participating) the use of a hire car when at home or a management fee for his company.

337. Mr Tregear submitted that all the benefits in both agreements were integral to the development of Mr Van der Garde's prospects as a Formula One racing driver and each had its part to play. Thus it was a mistake to approach the question solely through the prism of the distinction drawn in *Warman* between acquiring title of a car and its mere use. I do not agree. It does not seem to me for example that use of a double room on days when Mr Van der Garde participated in Tests had a part to play in the development of Mr Van der Garde's prospects as a Formula One racing driver. The same in my view is true of sponsorship places on the racing car and the driver's suit, travel expenses and paddock passes. Although the latter may well have an element of promoting the driver's profile in the racing world, the evidence in my view showed that on balance their principal function was ancillary to and partly to facilitate the driver's participation in Friday morning testing and as an attractive bonus for the driver's sponsor (in this case Mr Boekhoorn). However even if that is wrong, it is nonetheless in my view clear that paddock passes are an incidental or collateral benefit rather than part of the essential bargain contracted for in the sense identified by the courts in *Rover International*, *David Securities*, *Rowland v Divall* and *Warman*.

338. In my view this is also the case in relation to Spyker's obligation in clause 2 of the Service Agreement to use its best endeavours and to assist Mr Van der Garde to establish eligibility for an FIA Super Licence. Mr Tregear submitted that the Super Licence was a critical part of the plan to have a serious shot at being a racing driver in Formula One races. That is true in one sense in that without a Super Licence Mr Van der Garde was ineligible to drive in Formula One races or even Friday morning testing. However in my view Mr Tregear's submission confuses the importance to Mr Van der Garde of the contingent right to participate in Friday morning tests and Spyker's obligation to use best endeavours and assist him to obtain a Super Licence. The former was a potentially important benefit in terms of promoting his race driving career. The latter was in my view merely incidental to putting Mr Van der Garde in a position where he could avail himself of the benefit of the contingent right to participate in Friday morning testing and becoming a reserve driver. This is illustrated by the steps actually taken by Spyker to perform its obligation to use best endeavours and assist Mr Van der Garde in obtaining a Super Licence. They took the form principally of arranging for an FIA monitor to attend Mr Van der Garde's Valencia test and processing the paperwork in relation to his application for a Super Licence. Even if, contrary to what I have held, the obligation extended in addition to Dr Kolles talking to his contact at Super Aguri with a view to resolving the impediment in the Super Licence application being processed by the Contract Recongition Board, these were not in my view part of the essential bargain for which the Claimants contracted in the Service Agreement. The purpose of the Service Agreement was not to promote Mr Van der Garde's Formula One prospects by putting him in a position where he could obtain a Super Licence. Indeed Mr Tregear's submission that that was a principal purpose of the Service Agreement was inconsistent in my view with Spyker's case that it was assumed before the agreement was signed that Mr Van der Garde would obtain a Super Licence.

339. No distinction was taken by Mr Tregear in argument in the context of the debate about whether benefits were or were not incidental or collateral in the *Rover International/Warman* sense as between benefits that were actually received and benefits that were not. *Rover International*, *David Securities*, *Rowland v Divall* and *Warman* were all cases where the benefit which was found to be collateral had been received. The context in which the issue was discussed in those cases was reliance by the payee on the fact that the benefit in question had been received such that its receipt and payment would constitute partial performance or consideration for the money sought to be recovered in restitution. The effect of the finding in each case that the benefit was incidental rather than part of the essential bargain contracted for was that it fell to be ignored when considering the question whether any consideration had been received by the payer so as to preclude a right to restitution. There was thus no discussion in those cases of whether the right on the part of the payer to collateral benefits in the contract and the obligation of the payee to deliver such benefits could defeat an argument of total failure of consideration by rendering impossible or too difficult apportionment that would otherwise be possible as between those of the principal benefits due under the contract which were delivered and those which were not. In the case of some of the benefits due under the Fee Agreement, all of which I have held to be collateral or incidental in the *Rover International* sense, some were not delivered. Thus the rental car in the Netherlands was not made use of and with the exception of paddock passes at the Australian Grand Prix in Melbourne and on one occasion at Silverstone where Mr Van der Garde participated in a GP2 race, paddock passes were not made available to Mr Van der Garde or Mr Boekhoorn pursuant to the Fee Agreement. In my view it makes no difference for the purpose of the principle established in those cases that benefits which are incidental or collateral to the essential bargain contracted for are to be disregarded for the purpose of assessing whether there has been a total failure of consideration that the benefit in question has not been received. It is in my view implicit in the findings in those cases that receipt of an incidental benefit did not prevent total failure of consideration that the fact that a contract provides for incidental benefits is to be disregarded when considering whether apportionment can be performed relatively simply. If the fact that the contracts in question provided for use of the hire car in *Warman*, receipt of the films for dubbing in *Rover International* and receipt of the money due under clause 8b in *David Securities* had been considered to make apportionment impossible or possible only with difficulty, one would have expected the assertions in those cases that there had been a total failure of consideration to be rejected by the courts.

340. In the case of the travel expenses, the free accommodation and the paddock passes I would hold that they do not defeat the claimant's claim for restitution even if I am wrong in my finding that they are collateral benefits. That is because, as with the sponsorship spaces on the racing car and driving suit, in my view they were part and parcel of the rights conferred by clause 2 of the Service Agreement, in which context I refer to my conclusions in that regard. There was some debate as to the significance of the fact that paddock passes were actually received in respect of the Australian Grand Prix and the one event at Silverstone. In relation to the latter Mr Van der Garde's evidence which I accept was that although he was given four paddock passes for a Grand Prix weekend where he was not driving, they were not given to him pursuant to Spyker's obligation under the Fee Agreement. Mr Van der Garde was at Silverstone to watch a GP2 race. He was telephoned by an employee of a marketing management company who was a friend of Mr Mol, then the owner of Spyker who said he could

and did organise a few paddock passes for Mr Van der Garde, Mr and Ms Boekhoorn and Mr Van der Garde's mental coach. He believed it was organised through Mr Mol. I find that the Silverstone paddock passes were not provided pursuant to Spyker's obligations under the Fee Agreement and are thus for present purposes irrelevant. As to the Melbourne paddock passes, Mr Van der Garde had been invited to attend the Melbourne Grand Prix by Dr Kolles on the basis that if he obtained a Super Licence following his Valencia test in time he could participate in the Friday morning session. In the event he did not participate because he did not get the Super Licence. If anything this in my view illustrates that the paddock passes were intended to be part and parcel of the clause 2 driving rights. As Mr Van der Garde said: "I did not receive any other paddock passes as I was not invited to any other Grand Prix. This meant that the real benefits of the paddock passes mainly being seen in the paddock as a driver (i.e in a race suit and also preferably in a car) was lost to me. I could not use the paddock passes if I was not at a race. They were part of the deal as a driver, not as spectator." To the limited extent that the paddock passes were intended to be part of the promotion of Mr Van der Garde's careers, in my view that was limited to the context of being able to use a paddock pass at a race in which he was a driver, the kudos and profile raising involved being dependent on his being seen to be a participating driver or test driving. As to the paddock passes to be provided to Mr Boekhoorn in my view Mr de Garr Robinson was correct to submit that on the true construction of clause 1.3 of the Fee Agreement the additional two passes for Mr Boekhoorn would be provided only where Mr Van der Garde was driving and where such passes were available. To that extent they were also part and parcel of the clause 2 rights.

341. As to the obligation under clause 1.3 of the Fee Agreement on Spyker to provide the first Claimant with a management fee of $60,000 payable by the end of each month in monthly instalments of $5,000, in addition to being in my view a classic example of a collateral or incidental benefit far removed from the essential bargain contracted for by the Claimants in the Service Agreement, the $45,000 received by the first Claimant would not defeat the Claimants' claim to restitution. Taken at face value the payment was received by the first Claimant not as part of the consideration for the $3 million paid to Spyker but rather as part consideration for the separate obligation on the part of the first Claimant implicitly requested by Spyker to provide management services by the first Claimant in managing Mr Van der Garde's services during 2007. It was thus attributable to a severable part of the contractual arragements between the parties. In my view that is the correct analysis.

342. There remains what in my view is conceptually the most difficult aspect of this part of the claim, namely the contingent right to drive one of Spyker's Formula One racing cars during Grand Prix Friday morning testing sessions and the contingent right to act as Spyker's first reserve race driver. Both rights were contingent on Mr Van der Garde holding a valid Super Licence and the latter right was subject to the two additional contingencies of his being required by Spyker and Spyker not taking the view that his performance was unsatisfactory,both of which involved a subjective element.

343. Mr Van der Garde's evidence was to the effect that so far as he was concerned the essential benefit flowing from the Service Agreement was the 6,000 kilometres of testing and not the contingent right to participate in Friday morning testing. In his first

witness statement he said that the fundamental point of paying Spyker the $3 million was for him to secure 6,000 kilometres of driving in the Spyker car in the 2007 season. That was what the Service Agreement and the Fee Agreement were about. That is the only way to progress in motor racing. In his third witness statement he said that it would have been good to participate in Friday morning testing but that in reality that was something that was more part of networking than getting better at driving. After half an hour or an hour the racing drivers who were driving in the actual Grand Prix race for Spyker would have had the cars for most of the time. The benefit was worthless without the full testing commitment of 6,000 kilometres because networking will only enhance your credibility if you have the credibility as a driver. The whole point of 6,000 kilometres of testing was that he would get enough driving and personal attention at the circuit to make it as a Formula One driver. There was no way an up and coming driver would give a value of $500,000 out of $3 million to Friday morning Grand Prix testing. He accepted that Friday morning testing is of great value to some drivers. However:

> "If you've made it already it is a great bonus to do Friday driving at Grands Prix. But I had not made it as a Formula One drvier at that time. I was not at all experienced in a Formula One car. For me, I needed to make it to that stage, where I have proved the potential as a F1 driver. For me that meant 6,000 kilometres of testing. Other people might pay that much for driving on a Friday, but the agreement was between me and the defendant. I wanted test driving miles and so driving on Fridays was not what I felt I was paying for. The most important thing is to have time in the car, on the track, in the pit lane and in the garages with an engineer who is dealing only with me. That is how you get better at driving. On Fridays, the team tests the car and all attention is devoted to the race drivers, which is understandable. At other testing they test the driver. As a driver you obviously get much more out of driving at other tests than you do on Fridays because the car is set up for the individual driver and changes are made according to that driver's specification. Additionally testing provides the benefit of spending time with the team and building proper relations with them. This is important for your career. The feedback a driver receives is also of a better standard. Also, when a team see you testing at your best, with the car set up for your specifications, they are more likely to be impressed with your driving. In turn, this would mean that if a place as a paid test driver or a race driver became available I would have been more likely to be given it....."

344. I have already quoted another extract from his third witness statement in which he said that the point of the contract was 6,000 kilometres of driving and that the other things in the Service Agreement and Fee Agreement were just standard and of no value to him without the 6,000 kilometres of driving. They were more of a commitment from Spyker to treat him seriously as part of the team.

345. Although I broadly accept that that evidence was a genuine reflection of Mr Van der Garde's subjective view as to the benefit which he expected to get from the Service and Fee agreements, I have already expressed my view that for the purpose of deciding whether a benefit is collateral in the *Rover International* sense the subjective views of one of the parties to an agreement is inadmissible. If I am wrong about that those subjective views would not in my view be decisive . Moreover and even if it is right that Mr Van der Garde would not have been interested in buying a contingent right to Friday morning testing without also having an actual right to 6,000 kilometres of testing or that without the 6,000 kilometres the contingent right to Friday morning testing was of no value to him, it does not follow that as part of a package in which he was entitled to 6,000 kilometres the contingent right to Friday morning testing was no more than incidental or collateral. Indeed in oral argument Mr de Garr Robinson accepted that however much Mr Van der Garde's focus might have been on midweek testing the existence of the contingent right to do Friday testing was relevant in the sense of not being a collateral benefit. In my view that concession was realistically made. Although, as Mr de Garr Robinson emphasised, the contingent right to be a reserve race driver was not only contingent but so hedged about by qualifications by reference to the subjective views of Spyker as to Mr Van der Garde's performance as to be of much less value, it cannot be said that taken together the two contingent rights conferred by clause 2 in respect of Friday morning testing and third race driver status were collateral in the *Rover International* sense such that they fall to be disregarded for that reason. Thus in order to show that the existence of the contingent rights to Friday morning testing and reserve driver status is not inconsistent with there having been a total failure of consideration the Claimants cannot rely on the *Rover International* principle of collateral benefits.

346. Mr de Garr Robinson further accepted that if the Service Agreement had given Mr Van der Garde was not a contingent but an actual cast iron guaranteed right to participate in Friday morning testing as well as a right to a minimum of 6,000 kilometres of testing and he had been provided with say 2,000 kilometres of testing including some Friday morning testing, a restitutionary claim would not be maintainable because it would not be easy to perform an apportionment exercise as between the kilometres element and the Friday morning element. In his words one would be trying to compare apples and pears in a way that is not explained by the contract so that there would be no obvious principle by reference to which one could determine which consideration was referable to which benefit. There would thus be both a problem of apportionment and a problem of a more than collateral benefit having been received by the Claimants.

347. However, and this was key to Mr de Garr Robinson's case, in his submission the critical fact is that the contract did not give him a right to Friday morning testing in the first place and he did not actually receive the benefit of any Friday morning testing. The effect of the latter point was that the Claimants received no benefit which could be said to constitute part of the consideration for which the $3 million was paid apart from the easily apportionable 2,004 kilometres . The effect of the former point, as I understood the submission, was that because the right to Friday morning testing was merely contingent it should be ignored. This was the candles or apples and pears argument. In his hypothetical example where the buyer's right to pears was dependent on its becoming one of the largest five supermarkets in the country, an event which as things turned out did not occur, if the seller failed to supply any apples it would be no

answer to the buyer's claim for total failure of consideration to point out that if the buyer had become one of the five largest supermarkets it would have been entitled to pears. There was a total failure of consideration and the seller cannot avoid the consequences of his default by asking the court to assume that if the facts had been different his obligation would have been different. The position he submitted would be the same if the seller supplied 2,000 apples and then failed to supply any more.

348. It seems to me important to distinguish between on the one hand the question of the value of the contract to the Claimants and in particular of its constituent elements and on the other hand the question whether apportionment is possible. On the former I am prepared to accept that an unquantifiable element of the value to the Claimants of the Service Agreement was the contingent right to participate in Friday morning testing (and to a significantly lesser extent the contingent right to reserve driver status). Even if Mr Boeckhoorn would have been prepared to pay (and the Claimants would have been prepared to enter the Agreement for) $3 million without the contingent rights it does not follow that the inclusion of that contingent rights in the Service Agreement did not enhance the value of it to the Claimants. However even if, based on the expert evidence, it might be possible to attribute an estimated value to that element of the benefit due under the agreement to the Claimants, it does not in my view follow that for that reason it would be a simple matter to apportion the $3 million consideration as between kilometres provided and Friday morning sessions provided if the latter had indeed been provided. Indeed that seems to me implicit in Mr de Garr Robinson's concession that one would be trying to compare apples and pears in a way that is not explained by the contract so that there would be no obvious principle by reference to which one could determine which consideration was referable to which benefit. In other words for the purpose of apportionment it is necessary to be able to attribute to the part of the contract which has wholly failed (in this case the obligation to provide 3730 kilometres) and which is alleged to be divisible not a value but a part of the consideration which has been paid pursuant to the contract (see Lord Porter at page 77 of *Fibrosa*). While that would in my view be possible if the only essential bargained for benefit was 6000 kilometres it would not be possible if the essential bargained for benefits included Friday morning testing.

349. However the fact is that because Mr van Der Garde did not obtain a Super Licence he never became entitled under the Service Agreement to participate in Friday morning test sessions (or to become a reserve driver) and no Friday morning testing or reserve driving was provided pursuant to the Service Agreement. The only part of the essential bargain contracted for which was delivered was 2,004 kilometres of midweek testing (plus the offer of the Paul Ricard kilometres). The critical question in my view is whether it is possible to apportion the $3 million fee payable under the Fee Agreement and in fact paid to Spyker between the 2,004 kilometres that were delivered (plus the 266 kilometres offered at Paul Ricard) on the one hand and the balance of the 6,000 kilometres which were not delivered on the other. In particular is the simplicity of that apportionment exercise defeated by the fact that the contract conferred a contingent right to participate,as part of the minimum of 6000 kilometres to which Mr Van der Garde was absolutely entitled, in all Friday morning Grand Prix sessions as well as a contingent right to become a reserve driver which rights were never exercised and never became capable of being exercised because he never obtained a Super Licence?

350. For the purpose of considering whether apportionment can be simply performed, must regard be had only to the relationship between on the one hand the fee paid and on the other hand those benefits which were received and those benefits which should have been received but which were wrongfully withheld in breach of contract? Is it only by reference to those two elements that the question must be answered as to whether there is a part of the fee paid in respect of which there has been a total failure of consideration and if so what is that part or is it necessary to have regard also to benefits to which the Claimants were contingently entitled under the Service Agreement? Given that Mr Van Der Garde did not obtain a Super Licence the benefits which should have been received but which were wrongfully withheld in breach of contract did not include driving in Friday morning test sessions. For this purpose it is in my view irrelevant to ask whether the $3 million fee would have been less if the contingent right to Friday morning testing had not been included. It is also irrelevant if it be the case that the value to the Claimants of the Service Agreement would have been less had the contingent right to Friday morning testing not been included.

351. As I construe the Service Agreement Mr Van der Garde's contingent right to participate in Friday morning test sessions was not cumulative to his right to a minimum of 6,000 kilometres of testing in the sense that it entitled him if he had a Super Licence to more than a total of 6,000 kilometres of test driving. What he was entitled to was a minimum of 6,000 kilometres of test driving. If he got a Super Licence part of the 6,000 kilometres which Spyker were required to provide had to include some driving in each of the Grand Prix Friday morning test sessions. But that did not entitle Mr Van der Garde to more than a total of 6,000 kilometres. The only difference resulting from whether or not he obtained a Super Licence was that if he did the 6,000 kilometres would be made up of both midweek and Friday morning driving and if he did not it would be confined to midweek driving. Either way the fee payable was $3 million and he was entitled to 6,000 kilometres of driving. It is tempting for that reason to conclude that it follows that either way there would only be one essential benefit, namely 6000 kilometres of test driving, the question whether those kilometres were driven exclusively midweek or partly midweek and in Friday morning test sessions affecting only the manner in which the benefits were received. However in my view that would be a false conclusion. Just as the right to drive a Mini would be a different kind of benefit to the right to drive a Rolls Royce so the right to test drive midweek would in my view be a qualitatively different right to the right to participate in Friday morning test sessions. Again this seems to me implicit in Mr de Garr Robinson's concession.

352. A question which has troubled me is whether it could be said that the question of apportionment and severability of the contract is to be addressed not at the time when restitution is sought but at the time the contract is entered into. If it is the latter, then in a case such as this, where part of the benefit is a contingent right, if it is the case that judged at that time it is impossible to sever the contract and apportion the price payable as between the actual rights conferred and the contingent right conferred does that provide a complete answer to a claim for restitution where in the events that subsequently happened the contingent right never materialises and is not in any way performed? If that is the correct analysis, does the fact that the contingent right did not materialise or that the benefits flowing therefrom were not actually received fail to affect the conclusion that judged as at the time the contract was entered into apportionment could not be carried out without difficulty?

353. Put another way how can one identify how much of the $3 million is apportionable to the kilometres wrongfully withheld without knowing how much of the $3 million is apportionable to the balance of the benefits due under the agreement? If the latter include not only the 2,004 kilometres delivered (and the 266 kilometres offered at Paul Ricard) but also the contingent right to participate in Friday morning testing in the event of a Super Licence being obtained, unless it is possible to attribute a fixed proportion of the $3 million to the contingent right it is not possible to attribute a fixed proportion of the $3million and thus a figure on the delivered kilometres and thus not possible to attribute a proportion of the $3 million and thus a figure on the undelivered kilometres. If it is necessary to attribute a proportion of the $3million to the contingent right the apportionment exercise becomes impossible unless the proportion is nil because there is no mechanism either in the contract or otherwise by which it is possible to attribute a proportion of the $3million to the contingent right. By way of further complication does it make a difference whether at the time restitution is sought it is clear that the contingent right could not ever be exercised or whether there remains a possibility of it being exercised? On the facts of this case does it make a difference whether there was still a possibility of Mr Van der Garde obtaining a Super Licence while there were Friday morning tests sessions still available in the 2007 Grand Prix season or whether it was too late?

354. In my view the answer to the first question is that the question whether the contract is severable or divisble so that apportionment can be carried out without difficulty is to be answered as at the time when the contract is entered into and not at the time when restitution is sought. The question whether apportionment is possible arises in the context of deciding whether there has been a total failure of consideration for the money paid by the claimant pursuant to the contract so that he is entitled to restitution. Where money paid and sought to be recovered is paid pursuant to a contract the question whether there has been partial or total failure of consideration for that money falls to be answered in my view by reference to the consideration for which provision is made in the contract. That provision is made in the contract at the time it is entered into.

355. Some examples may help to illustrate the point. Suppose the contract had provided for a fee of $2.4million for the absolute right to a minimum of 6000 kilometres and an additional fee of $600,000 for the contingent right to drive further kilometres by participating in every Friday morning session during the Grand Prix season subject to Mr Van der Garde holding a Super Licence. It would be simple in the events which occurred to apportion the $2.4 million fee as between the 2004 kilometres provided (and the 266 kilometres offered at Paul Ricard) and the 3730 kilometres wrongfully withheld on a pro rata basis. For 3730 six thousandths of the $2.4 million paid for the 6000 kilometres there would have been a total failure of consideration. The fact that the Claimants also paid $600,000 for a contingent right which in the events that subsequently occurred they were unable to make use of would be irrelevant. The $600,000 fee was paid under a divisble part of the contract. If on that example Mr Van der Garde had obtained a Super Licence and, in addition to being provided 2004 kilometres of midweek testing (and the Paul Ricard offer) had been allowed to participate in all the Friday morning test sessions, the receipt by the Claimants of the latter benefit would not defeat a claim for restitution in respect of the proportion of the $2.4million attributable to the 3730 kilometres as the Friday morning testing

would have been received pursuant to a divisible part of the contract and would not constitute partial receipt of consideration for the $2.4 million.

356. Now suppose that the contract had provided for a $12million fee for a contingent right to be one of Spyker's main race drivers in every Grand Prix race in the season subject to him holding a Super Licence and an absolute right to a minimum of 6000 kilometres of midweek test driving.Suppose also that at the time the contract was entered into Mr Van der Garde had already satisfied the FIA performance criteria for a Super Licence and the only remaining obstacle was the dispute with Super Aguri. At the time the contract was entered into it would be impossible to apportion the $12million fee as between the absolute right to 6000 kilometres of midweek test driving and the contingent right to drive in all the Grand Prix races of the season. A suggestion that the whole of the $12 million fee was attributable to the 6000 kilometres would be absurd: commercially the contingent right would be far more valuable and the absolute right would be seen as a consolation prize. In the events which happened it would in my view be wholly unrealistic to suggest that ,because the contingent right to be one of Spyker's main drivers in all of the 2007 Grands Prix never materialised because the Contract Recognition Board declined to rule that the Super Aguri contract had been validly terminated, the whole of the $12 million fee could simply be apportioned as between the 2004 midweek kilometres (plus the 266 Paul Ricard kilometres) which were provided or offered and the 3730 kilometres wrongfully withheld so that there had been a total failure of consideration.

357. What the last example illustrates in my view is that where a contract provides for a single fee or price in consideration for an absolute right together with a contingent right the presumption is that the price is referable to both rights and does not cease to be so referable if at a later stage when the benefit of the absolute right or part of it has been wrongfully withheld the contingent right has become unable to be taken advantage of. In other words the claimant has paid a single price for a mixture of rights and if at the time of contracting it is impossible simply to apportion the contract price as between the absolute and contingent rights, the contract price does not change its nature and become apportionable in its entirety as between those of the benefits to which the claimant was absolutely enetitled which were delivered and those which were not delivered by reason of the fact that in the meanwhile the contingency on which enjoyment of the benefit of the contingent right depended did not materialise.

358. In my judgment in answering these difficult questions it is important to keep in mind (a) why it is that partial failure of consideration is a bar to restitution and (b) what is the role of the concept of apportionment in deciding whether the claimant is entitled to restitution.

359. As to (a) the reason is in my view that entitlement to restitution depends on proof that the claimant has received no consideration for the payment he made and which he seeks to recover. Receipt of even a small part of that consideration is inconsistent with such proof. As the majority of the High Court in *David Securities* put it: "….the Bank must prove that the appellants are not entitled to restitution because they received consideration for *the payments which they seek to recover*" (page 388). Or as Mason CJ put it in *Baltic Shipping*: "… the receipt and retention by the plaintiff of any part of the bargained- for benefit will preclude recovery, unless the contract otherwise provides…"(page 351) .

360. As to (b) the answer is not so straightforward. At least part of the significance of whether apportionment is possible relates to the question whether the receipt by the claimant of part of the bargained for benefits under the contract which would prima facie preclude recovery can be ignored on the ground that on analysis they are not part of the consideration for the money paid by the claimant and which he now seeks to recover. In this context the question whether the consideration is apportionable turns on whether it is possible to say that the retained benefit in question is indeed part of the consideration for the money sought to be recovered, in which case restitution is precluded, or whether in fact it is part or all of the consideration for another part of the money paid by the claimant pursuant to a different part of or obligation under the contract, in which case it is not a bar to restitution.

361. In relation to that aspect of apportionment, on the facts of this case the question would be whether the 2004 kilometres (and Paul Ricard offer) were part of the benefits received by the Claimants in consideration for the payment which they seek to recover in this action, in which case there has not been total failure of consideration and restitution is precluded or whether those kilometres were on analysis received in consideration for different discrete parts of the contract in which case the Claimants have received no consideration for the payment they seek to recover. In the language of the majority in *David Securities* : "In circumstances where both parties have impliedly acknowledged that consideration can be "broken up" or apportioned in this way, any rationale for adhering to the traditional rule requiring total failure of consideration disappears." (page 383).

362. The Claimants are seeking restitution for that part of the $3million paid to Spyker which they say is the consideration for the 3730 kilometres wrongfully withheld, that is to say 3730 kilometres at $500 per kilometre or $1,865,000. For that money they say there has been total failure of consideration because they received no part of the 3730 kilometres bargained for. Their receipt of the 2004 kilometres (plus the notional recipt of the 266 kilometres offered at Paul Ricard) was not provided by Spyker as part of the consideration for the $1,865,000. Rather it was provided as consideration for $1,135,000 of the $3million fee attributable to those kilometres. In other words because the payment of the $3million can properly be apportioned as a series of payments for each kilometre on a pro rata $500 per kilometre basis, it is possible to sever or break the contract up into a series of $500 payments for each of the 6000 kilometres to be provided. The 2004 (plus266) kilometres provided were consideration received for those payments made under the parts of the contract which were referable to them, and thus for the $1,865,000 sought to be recovered the Claimants have received no consideration.

363. However there is a suggestion in *Fibrosa* that apportionment has another function in deciding whether the claimant is entitled to restitution. In *Fibrosa* Lord Porter said: " If a divisible part of the contract has wholly failed **and part of the consideration can be attributed to that part**, that portion of the money so paid can be recovered,but unless this be so there is no room for restitution under a claim in indebitatus assumpsit."(page 77) (emphasis added) . This would suggest that there are not one but two questions to be answered in the affirmative if restitution is to be awarded. First, has there been a total failure of a divisible part of the contract? Second,if so can part of the consideration be attributed to that part? On the facts of this case, this would suggest that in order to be entitled to restitution the Claimants would need to show

that part of the $3million can be attributed to the part or parts of the contract under which Spyker were obliged to provide the withheld 3730 kilometres.

364. It is at the stage of answering the second question that the issue arises most starkly as to what is the significance of the contingent right to drive, as part of the 6000 kilometres, in Friday morning test sessions. If the existence of that contingent right makes it impossible to attribute an identifiable part of the $3million to the part or parts of the contract under which Spyker were obliged to provide the 3730 kilometres, it would appear that on the authority of *Fibrosa* there can be no restitution. In order to attribute an identifiable part of the $3million to the parts of the contract under which Spyker were obliged to provide the 3730 kilometres it would be necessary to analyse the Service and Fee Agreements as agreements to provide 6000 kilometres and associated benefits at $500 per kilometre. This would only be possible if the contingent obligation to allow Mr Van der Garde to drive in Friday morning test sessions is properly to be analysed as part and parcel of the obligation to provide a minimum of 6000 kilometres, or put another way as one of the ways in which, in certain circumstances,the obligation to provide 6000 kilometres was to be performed.

365. If by contrast it were to be analysed as an additional and free standing obligation, albeit a contingent one, the presumption would be that some part of the $3million fee must have been in consideration of and referable to it, in which case, in the absence of any indication in the Agreements as to how much of the $3million was attributed to it, it would be impossible to attributre an identifiable part of the $3million to the 3730 kilometres. In short does the existence of the contingent right make it impossible to analyse the Agreements as requiring Spyker to provide the Claimants with 6000 kilometres at $500 per kilometre? For the reasons set out above in my view it does.

366. In those circumstances in my view it is not a matter of simplicity to apportion the $3 million paid by the Claimants to Spyker as between the 2,004 kilometres provided (and 266 kilometres offered at Paul Ricard) and the balance of 3,730 kilometres not provided. If it were possible to exclude all other benefits as either collateral to the essential bargain contracted for and/or as part and parcel of that essential bargain, there would in my judgment be no reason why the consideration could not simply be apportioned on a dollar per kilometre basis, just as if the consideration had been expressed not as $3 million for a minimum of 6,000 kilometres but as $500 per kilometre for a minimum of 6,000 kilometres. However in my judgment it is not possible to exclude the contingent rights to Friday morning testing and reserve driver status in that way. Mr de Garr Robinson conceded that the contingent right to Friday morning testing was not collateral to the essential bargain contracted for and in my view neither of the contingent rights were merely part and parcel of the right to 6000 kilometres of test driving. Nor is it possible to attribute to those rights an identifiable proportion of the $3million fee which would enable the balance of the $3million simply to be apportioned as between the delivered and withheld kilometres.

367. It follows that in my judgment the claim for restitution must fail. I am bound to say that I reach this conclusion with considerable regret, joining as I do the growing list of judges and academic writers who have expressed the view that the requirement of proof of total failure of consideration as a necessary condition for an award of restitution is unsatisfactory and liable in certain cases to work injustice.

368. If I had reached the contrary conclusion on the effect of the contingent rights it would have been necessary for me finally to consider the question whether apportionment is not possible or appropriate in this case for reasons analogous to those which led the court in *Whincup v Hughes* to hold that it was impossible. In case it should be held hereafter that I am wrong not to reach the contrary conclusion, it seems to me right that I should state how I would answer that remaining question and why. Was it to be expected that the burden to Spyker and/or the benefit to the Claimants would be so unevenly distributed between the 6,000 kilometres as to make apportionment unfair or impossible? In my view the answer to that question is no. In *Whincup v Hughes* there was an express finding by Bovill CJ that in the early part of the term of apprenticeship the teaching would be most onerous and the services of the apprentice of little value whereas as time went on his services would probably be worth more and he would require less teaching. In this case there was no evidence such as to justify equivalent findings of fact. So far as benefit to Spyker is concerned, Mr Tregear submitted that it is to be inferred that Spyker would derive some benefit from Mr Van der Garde testing their racing car in the form of the acquisition of useful data as to how the car performed in different conditions and circumstances. Even on the assumption that that is the case, there was no evidence to suggest that the benefit to Spyker of such information would increase disproportionately as the test driving kilometres were driven by Mr Van der Garde. There was no evidence of any increasing benefit expected to be derived by Spyker flowing from the increasing experience of Mr Van der Garde as the contract progressed. In that respect in my view the contract differed from the apprenticeship in *Whincup v Hughes*. It was in the nature of the apprenticeship that it was not a simple or straightforward contract for the provision of services by the watchmaker to the apprentice. Rather it was a two way relationship in which in addition to the watchmaker teaching and training the apprentice in the skills of the trade, the apprentice was to work as an assistant to the watchmaker carrying out tasks and providing services to him. This was reflected in the fact that the watchmaker agreed to pay the apprentice wages on a sliding scale commencing at 4 shillings per week during the first year and ending at 10 shillings per week in the last year of the term. This sliding scale was not only evidence of a direct increasing benefit to the apprentice in financial terms as the term of the apprenticeship progressed. It also gave rise to an inference that the increasing value to the watchmaker of the services of the apprentice towards the end of the term itself reflected the fact that by that stage of the term the enhanced levels of skill acquired by the apprentice as a result of more intensive and burdensome teaching by the watchmaker in the early part of the term meant that there would be less need for training and teaching so that the burden on the watchmaker was significantly reduced. A modern equivalent might be found in a training contract for a trainee solicitor, although of course in that case the payment is to the trainee rather than from him. Nonetheless it is to be expected that throughout the term of the contract the trainee will perform services for his principal. At the beginning the principal is likely to have to spend more time showing him the ropes and correcting his work and the value to the principal of the trainee's services is likely to be limited. Towards the end of the period the principal is likely to have to spend significantly less time instructing the trainee and checking his work whereas the value to the principal of the trainee's work is likely to be significantly enhanced.

369. In my judgment there was no equivalent two way relationship contemplated by the Service Agreement. Moreover even leaving to one side the absence of evidence of materially increasing benefit to Spyker from Mr Van der Garde's participation in

testing, there was in my view no evidence to justify a finding that the burden to Spyker of providing the test driving was expected to be materially disproportionately lesser in respect of the 3,730 kilometres not provided than in respect of the 2,004 plus 266 Paul Ricard kilometres provided/offered.

370. Mr Tregear submitted that as Mr Van der Garde got more experienced the feedback he gave which would enable the Spyker team to make adjustments to the car in a way which would make it a better racing machine than if he had not done the testing was likely to be more useful to Spyker. However that submission was not supported by the evidence nor was the submission that a very inexperienced driver might crash the car in the first 100 kilometres and require far more care from engineers. Indeed Mr Tregear accepted in oral argument on instructions that there was no evidence that from the point of view of the burden to Spyker the provision of testing was more expensive in the earlier than the later part of the 6,000 kilometres to be provided. Mr Tregear accepted that in anwering the question whether in the context of apportionment the provision of 1,000 kilometres of test driving was more akin to the delivery of a sack of wheat than a year's apprenticeship, one is looking not at the benefit to the Claimants but at the burden to the Defendant. In my view although there might be cases where a different approach was appropriate that is correct. In a contract for the provision of 10 skiing lessons for €300, it would in my view in principle be no defence for a claim for repayment of €150 if the teacher failed to provide the last five lessons that most of the benefit would already have been derived by the pupil in the first five lessons. The burden to the teacher in terms of allocating five hours of his time exclusively to the pupil would in the ordinary course be the same. If on the other hand the teacher could prove that in a group lesson the time devoted to the pupil was likely to be so much less in the last five lessons that he was able to take extra new pupils in his class, simple apportionment might not be possible.

371. I am fortified in my conclusion by the fact that Mr Zecchi, Spyker's expert, agreed in oral evidence with Mr Gallagher, the Claimants' expert, that the cost to Formula One teams of providing testing was around $500 per kilometre. The significance of this evidence in my view is not so much in the figure as in the inference that the cost to a Formula One team of providing test driving is in principle calculated on a flat rate dollar per kilometre basis. If the cost to a Formula One team of providing test driving varied significantly at different stages of a contract, one might expect the cost to depend on the length of any individual contract period and thus that there would not be a standard dollar per kilometre formula applicable in all contracts.

372. In a written document supplied after the close of the oral hearing Mr Tregear submitted that the fact that the driver is on a learning curve and is likely to require less intensive supervision and to be more useful to the team as his experience grows is evidenced by a number of paragraphs from Mr Gallagher's report and one paragraph in Mr Zecchi's report. In my view those paragraphs do not show that a driver is likely to require less intensive supervision as his experience grows, nor to the extent that it were relevant that he is likely to be more useful to the team as his experience grows. The fact that a driver is on a learning curve is in a sense inherent in any training contract, albeit the extent of the curve may vary, but that fact does not in my view prove that the burden to the Formula One team providing the test driving is greater towards the beginning than the end or that it is inconsistent with the ability to effect simple apportionment.

373. For these reasons in my view if, contrary to what I have held, it were permissible to ignore the effect of the contingent rights to Friday morning testing and reserve driver status, it would be possible to effect simple apportionment on a dollar per kilometre basis. Of the 6,000 minimum kilometres which Spyker was obliged under the Service Agreement to provide only 2,270 were provided or offered. In my view of the $3 million fee paid to Spyker $1,135,000 would have been attributable to the provision of those 2,270 kilometres. In respect of the remaining $1,865,000 of the $3 million paid to Spyker there would in my view have been a total failure of consideration. That sum would in my view have been apportionable to the 3,730 kilometres of test driving which Spyker failed to provide and in respect of that sum there would in my view have been a total failure of consideration. It follows that in my view the Claimants would have been entitled to be paid $1,865,000 by Spyker as a restitutionary payment.

374. As it is, however, in the light of my conclusion as to the effect of the contingent rights to Friday morning testing and reserve driver status, in my judgment the Claimants are not entitled to an award of restitution.

375. Accordingly it is now necessary for me to consider the damages claims which were advanced by the Claimants in the alternative to their primary claim for restitution. Although the career damages claim is advanced by the claimants only as their second fall back claim in damages, it is nonetheless convenient to deal with it first. That is because in the ordinary case it would represent the conventional claim for damages for breach of contract. It is only because of the difficulties which the claimants openingly acknowledge in identifying a substantial loss which can be proved under this head that they elect to promote in their batting order two claims which are, as they also acknowledge, more unusual and associated with no small degree of conceptual difficulty.

Career Damages

376. Under this alternative head the claimants claim consequential losses. As pleaded in the Amended Particulars of Claim the losses are said to consist of the loss of an opportunity of enhancing Mr Van der Garde's experience and reputation in the field of motor racing and thereby his ability to participate in remunerative Formula One testing and racing competitions. Consequently it is alleged that they have lost and/or will lose opportunities of earning salary race winnings sponsorship and merchandising income. In particular it is alleged that Mr Van der Garde would have been or would have had a real opportunity of being offered a Grand Prix testing seat in a Formula One car with a Formula One Team for 2008 and thereby attracted a substantial salary, sponsorship revenue and merchandising revenue. He would also have been or would have had a real opportunity of being a reserve race driver with the opportunity of gaining at least two experiences of racing in Formula One during the season. In 2009 this pattern would have been repeated or Mr Van der Garde would have had a real opportunity of repeating it. From 2010 onwards he would have been or would have had a real opportunity of being a racing driver in a Formula One Team earning salary, merchandising and sponsorship income. In fact as a result of Spyker's breach of contract he was limited to competing in World Series by Renault and, it was alleged, might be limited to competing in GP2 in 2009. Further if and when he obtains a Formula One test seat it will be after a delay of one or two years compared to the position he would have been in or would have had a real opportunity of being in had

Spyker permitted 6,000 kilometres of driving in 2007. Thus it is alleged that the damages the claimants will suffer will continue to be felt and that the future income they earn from salaries, sponsporship, merchandising and racing will have been delayed by one to two years. The claim is thus said to include damages in respect of one or two years interest on delayed receipt of such earnings over Mr Van der Garde's race driving career and career earning shortened by one or two years.

377. The claim is thus advanced in two alternative ways: damages for loss of financial benefits which would probably have been received but for the breach of contract and in the alternative loss of the opportunity of obtaining such benefits caused by the breach.

378. Mr de Garr Robinson accepted that it was not open to him on the evidence to submit that on the balance of probabilities Mr Van der Garde would have been offered a Grand Prix testing seat or position as reserve race driver in 2008 or 2009 or that from 2010 onwards he would have become a racing driver in a Formula One Team. The claim by the time of closing submissions was thus confined to one of damages for loss of the opportunity of obtaining those benefits.

379. In relation to the claim for damages for loss of opportunity concessions were made on both sides. For his part Mr de Garr Robinson accepted that on the evidence it was not possible to quantify a specific series of benefits that Mr Van der Garde might have enjoyed in his career or to identify a specific percentage figure representing the chance that he would have had of obtaining those benefits if Spyker had performed its obligations under the Service Agreement. For his part Mr Tregear accepted that in principle it was open to the claimants to advance a claim for damages for loss of opportunity as a matter of law. This was not a case such as the misdiagnosis case considered by the House of Lords in *Gregg v Scott* [2005] 2 AC 176 in which it was held that a claim for damages for clinical negligence requires proof on a balance of probability that the negligence was the cause of the adverse consequences complained of and that an exception does not exist to that requirement so as to allow a percentage reduction in the prospects of a favourable outcome as a recoverable head of damage. Given that the very purpose of the Service Agreement was to enhance Mr Van der Garde's racing career prospects, there was no legal impediment as a matter of principle to the recovery of damages for loss of a chance of enhanced earnings resulting from the failure to provide him with 4,000 odd kilometres of test driving, subject to identifying a substantial chance of such enhanced earnings which was lost as a result of the breach of contract.

380. In *Chaplin v Hicks* [1911] 2 KB 786 the plaintiff had a contractual right to be one of fifty women from whose number the defendant, a theatrical manager, would choose twelve, to the first four of whom he would give an acting engagement for three years at £5 a week, to the second four of whom an engagement for three years at £4 a week and to the third four an engagement for three years at £3 a week. She was thus deprived of an approximately one in four chance of being selected for an engagement the average value of which was about £200. The jury awarded her £100 damages. The Court of Appeal upheld the award and rejected the contention of the defendant that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for anyone, even after arriving at the conclusion that she had lost her opportunity by the breach, to say that there was any assessable value of that loss.

381. Vaughan Williams LJ accepted that the presence of all the contingencies upon which the gaining of the prize might depend made the calculation not only difficult but incapable of being carried out with certainity or precision but did not accept the contention that if certainity is impossible of attainment damages for breach of contract are unassessable. He held that the jury were right to conclude that depriving the plaintiff of the opportunity of competing as one of a body fifty for twelve prizes deprived her of something which had a monetary value. (791, 793).

382. Fletcher Moulton LJ rejected a submission that the damages were too remote:

> "The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize winner and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intentions of the parties can well be found." (795).

He also rejected the submission that exclusion from a limited class of competitors was not an injury.

> "It is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff being a prize winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case." (795).

He had earlier rejected the submission that where the expectation of the plaintiff depends upon a contingency only nominal damages are recoverable:

> "Upon examination this principle is obviously much too wide; everything that can happen in the future depends on a contingency and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy." (794).

> "Where by contract a man has a right to belong to a limited class of competitors, he is possessed of something of value, and it is the duty of the jury to estimate the pecuniary value of that advantage if it is taken from him. The present case is a typical one. From a body of 6,000 who sent in their photographs a smaller body of 50 was formed, of which the plaintiff was one, and among that smaller body twelve prizes were allotted for

> distribution; by reason of the defendant's breach of contract she has lost all the advantage of being in the limited competition and she is entitled to have her loss estimated. I cannot lay down any rule as for the measure of damages in such a case; this must be left to the good sense of the jury. They must of course give effect to the consideration that the plaintiff's chance is only one out of four and that they cannot tell whether she would have ultimately proved to be the winner. But having considered all this they may well think that it is of considerable pecuniary value to have got into so small a class, and they must assess the damages accordingly." (796 to 797).

383. Farwell LJ held: "In my opinion the existence of a contingency which is dependent on the volition of a third person is not enough to justify us in saying that the damages are incapable of assessment." (799).

384. In *Allied Maples Group Limited v Simmons and Simmons* [1995] 1 WLR 1602 the Court of Appeal, in the context of a solicitor's negligence case, held that where the plaintiff's loss depends on the hypothetical action of a third party either in addition to action by the plaintiff or independently of it he does not have to prove on the balance of probability that the third party would have acted so as to confer the benefit on him. It is sufficient for the plaintiff to show that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages. Reliance was placed on *Chaplin v Hicks* and the decision of the Court of Appeal in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 where, the defendant solicitors having negligently failed to issue a writ against a tortfeasor 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 at page 575 that she had "lost some right of value, some chose in action of reality and substance." But Parker LJ put the matter more generally at page 576: "If the plaintiff can satify the court that she would have had some prospect of success, then it would be for the court to evaluate those prospects, taking into consideration the difficulties that remained to be surmounted." (Per Stuart - Smith LJ) (1611 D-E).

Stuart-Smith LJ, with whose analysis of the law the other two members of the Court of Appeal agreed, rejected the submission that the plaintiff could only succeed if the chance of success could be rated at over 50%:

> "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". (1611 G), (1614 D).

385. In *Gregg v Scott* Lord Hoffmann suggested that part of the explanation for why in some cases damages are awarded for the loss of a chance of gaining an advantage or avoiding such as *Allied Maples* and cases there cited, a disadvantage which depends upon the independent action of another person may be that the law treates human beings as having free will and the ability to choose between different courses of action, however strong may be the reasons for them to choose one course rather than another. In addition however he held that there is a policy reason why the law distinguishes between cases in which the outcome depends upon what the claimant himself or someone for whom the defendant is responsible would have done and cases in which it depends upon what some third party would have done.

> "This apparently arbitrary distinction obviously rests on ground of policy. In addition most of the cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can itself plausibly be characterised as an item of property, like a lottery ticket." (197 A-D).

386. The claim in this case is not on all fours with that successfully advanced by Ms Chaplin. As held by Fletcher Moulton LJ she had a contractual right to belong to a limited class of fifty competitors to twelve of whom the defendant was contractually obliged to give twelve prizes of predetermined but varying amounts. Being deprived of that right was an injury and the difficulty of quantifying it, even the impossibility of assessing it with mathematical precision or certainity was no bar to her right to have the loss assessed and reflected in an award of damages. Mr Van der Garde's contractual right to 6,000 of kilometres of testing did not thereby confer upon him a right to belong to a limited class of competitors from whose number either Spyker or other Formula One teams were contractually obliged to award either testing or racing contracts with or without salaries.

387. It does not however follow from that in my view that the claimants are not entitled to recover damages under this head. Mr Van der Garde's rights were more akin to those of the plaintiffs in *Kitchen* and *Allied Maples Group Limited*. In *Kitchen*, as held by the Court of Appeal in *Allied Maples*, the plaintiff who was deprived by the defendant's wrongful act of the ability to pursue a claim against a tortfeasor was entitled to be compensated in damages for the loss of the opportunity to recover damages from the tortfeasor provided that she could satisfy the court that she had a real or substantial chance of success as opposed to a speculative one.

388. In *Chaplin v Hicks* the prizes, albeit they were in three different amounts, were arithmetically identifiable. In this case not surprisingly the evidence was that the financial benefits to Formula One drivers in the form of salaries, sponsorship and merchandising income, are both hard to establish because of confidentiality and fall within a range as distinct from specific financial categories. In principle this consideration does not in my view of itself preclude an award of damages any more than in a solicitor's negligence case the fact that the underlying claim of which the claimant was deprived was for damages to be assessed rather than debt or loss of a contractual right to a specific sum or commodity. Provided that a claimant can

establish on the balance of probabilities that he has been deprived of a real or substantial as opposed to a speculative chance to which he was entitled of obtaining a financial benefit, difficulty or even impossibility of identifying the financial benefit with mathematical precision or certainty is in my view no more a bar to recovery than is difficulty or impossibility of identifying with certainty or mathematical precision the percentage chance of obtaining the benefit. As Fletcher Moulton LJ said in *Chaplin v Hicks*, where there has been actual loss resulting from the breach of contract which it is difficult to estimate in money it is for the tribunal of fact to do its best to estimate: it is not necessary that there should be an absolute measure of damages in each case.

389. In his written submissions Mr de Garr Robinson accepted that it is not possible to be scientific in assessing damages under this head because there are too many imponderables. In response Mr Tregear submitted that the acceptance by the claimants that there are too many imponderables amounted to a concession that the lost chance or damage to Mr Van der Garde's prospects cannot be given substantial value. It is of course inherent in any claim for damages based on the loss of a chance or opportunity that it involves an element of the imponderable, if by that is meant the uncertain or unpredictable. That element gives rise to two separate questions. First, is it so great that the chance or opportunity of which the claimant has probably been deprived is merely speculative? If the answer is yes the claims fails at that stage. Second if the answer to the first question is no, having regard to the nature and number of imponderable factors, what is the value of the chance or opportunity of which the claimant has been deprived? That is a question that goes to the assessment of damages but not to the entitlement to damages. Plainly as a matter of common sense the greater is the number of imponderable factors upon which the chance or opportunity being converted into concrete financial benefit depended the smaller is likely to be the assessable value of the loss. But provided that the court is satisfied that the chance or opportunity of obtaining financial benefit of which the claimant has been deprived is real and substantial rather than speculative, the presence of imponderables neither deprives the claimant of his entitlement to an award of damages nor relieves the court of the duty to assess the value of the claimant's loss and reflect it in an award of damages.

390. The consequence of this in my view is that there is nothing in principle objectionable to an award of damages under this head merely because it is not possible on the evidence to identify with precision the financial benefit which the claimant would have obtained if the opportunity of which he was deprived had materialised or to identify the precise percentage chance of it materialising. In *Chaplin v Hicks* the plaintiff's statistical chance of getting an engagement whose average value was about £200 was about one in four. That did not stop the jury awarding her £100, roughly twice the amount which would have been suggested by a purely statistical approach. Whether it arrived at that figure because it considered that her qualities were twice as good as the average of the qualities of the remaining competitors or simply on a broad brush basis is unknown. What is known is that the award was upheld by the Court of Appeal.

391. On the evidence upon which he relied Mr de Garr Robinson invited me to adopt a broad brush approach and award the Claimants $500,000 as damages to compensate them for the loss of the opportunity of financial benefits and damage to Mr Van der

Garde's career prospects caused by Spyker's breach of contract. He accepted that he could not justify that figure in the mathematical sense in which the answer to a mathematical question can be explained or justified by a series of intermediate calculations. He accepted that if for example the defendants had submitted that the correct figure was $400,000 or $450,000 or $300,000 he could not identify a flaw in the chain of reasoning used to justify that figure which was absent in the chain of reasoning used to justify the figure of $500,000. That he submitted is the inevitable consequence of the fact that in certain situations the court in order to do proper justice is required to adopt a broad brush approach.

392. In fact Mr Tregear did not come up with an alternative figure for the damages to which he submitted the evidence showed that the Claimants were entitled. His principal submission was that the claim under this head is highly speculative and incapable of justifying any award of damages. In his submission additional mileage is only one of a wide range factors which may or may not assist a driver to achieve success. Luck and the inherent volatility of a sport like Formula One motor racing are other factors. Although he accepted that Mr Van der Garde in due course won the World Series Renault competition in 2008, the unpredictability of sport in general and Formula One in particular was one of the reasons why too much account should not be taken of that success. There was an immense number of variables which combined to mean that the lost chance or damage to Mr Van der Garde's prospects could not be given any substantial value. Those variables included the need to obtain a Super Licence, the uncertainty of getting a race seat at all, the uncertainty even if that uncertainty is resolved in Mr Van der Garde's favour of whether such a race seat would be paid for. It might well have been one that involved payments being made to the team. If an unpaid race seat was capable of being achieved there would be no net value to Mr Van der Garde of sponsorship since such sponsorship would be needed to defray the cost of the race seat. In addition the duration of a driver's career in Formula One is particularly uncertain given that the number of teams is in decline.

393. Reliance was placed on Mr Zecchi's view that Mr Van der Garde did not need more than a few hundred kilometres of testing in order for a team to judge whether or not he was worthy of a Formula One race seat and his view that damage to Mr Van der Garde's reputation was caused not by his failure to complete 3,996 kilometres of additional testing but by his entering into exclusive driver agreements with two Formula One teams in 2007 without securing the release of the first agreement. That together with an email sent to Spyker's solicitors for the purpose of this action recording that Mr Van der Garde's prior results (sixth in the F3 Euro Series in 2006 and sixth in the World Series by Renault in 2007) meant that he would not have been issued with a Super Licence in 2008 showed that it was highly unrealistic for Mr Van der Garde to expect to have been offered either a test seat or a race seat in 2008 that paid benefits. Indeed in his initial report Mr Zecchi expressed the view that Mr Van der Garde's performance in the Renault Formula One test which he secured as a result of winning the World Series by Renault competition in 2008 was unimpressive and that unless a test driver can demonstrate remarkable ability and pace a team will not pay that driver to race. In the joint experts report he said that Mr Van der Garde's Renault Formula One test was ultimately a demonstration of the fact that he did not have the necessary ability.

394. Thus Mr Tregear's primary case was that Mr Van der Garde's chances were really nil, not because he was not getting benefit out of the testing but because the other drivers were so much better than he was. Pressed to identify what if any figure he submitted should be put on Mr Van der Garde's chances if, contrary to his primary case, it were held that they were more than speculative, Mr Tregear submitted that it could be no more than $50,000. That was on the basis, as I understood it, of a 10% increased chance had he completed the 6,000 kilometres test driving of obtaining $500,000 sponsorship in 2008. That figure in turn was based on Mr Gallagher's evidence that as a paid driver in Formula One in 2008 Mr Van der Garde could realistically have hoped to generate between $250,000 and $1 million. Since the claim was advanced on the basis that Mr Van der Garde was deprived of the opportunity of becoming in 2008 not a paid driver but rather a paid test driver he submitted that it is hard to imagine that the sponsorship figure for a test driver would have been more than $500,000.

395. It was common ground between the two experts that competition to obtain a race seat for a Formula One team is intense. In 2008 there were 35 Formula One test drivers of whom only one secured a race seat with a Formula One Team for the 2009 World Championship whether paid or unpaid. The experts also agreed that a test driving contract for Mr Van der Garde in 2007 was premature given that he had yet to succeed in the less demanding World Series by Renault or GP2 competitions. Mr Van der Garde's performance record in the years leading up to 2007 was not spectacular. In the years 2000, 2001 and 2002 he came respectively sixth, fifth and first in the World Go-Karting Championship. He started his career in Formula Cars in 2003 after being elected by the Dutch KNAF as the winner of the KNAF talent first selection. In 2004, 2005 and 2006 he came respectively ninth, ninth and sixth in the Formula 3 Euro Series. The experts also agreed that his results were insufficient for Mr Van der Garde to be granted a Super Licence in either 2007 or 2008 and that it would have required a win in either World Series by Renault or GP2 to change that outcome.

396. However the experts differed as to Mr Van der Garde's prospects of progressing in Formula One to the point of obtaining an unpaid testing or subsequently race driving seat with a Formula One team. In his written report Mr Zecchi expressed the view that it was not possible for Mr Van der Garde to have secured a position as a Formula One race driver in 2008 because he would not have been granted a Super Licence. Unless a test driver can demonstrate remarkable ability and pace a team will not pay that driver to race. In his view Mr Van der Garde did not demonstrate that ability. His lap times during his Valencia test with Spyker in 2007 were towards the lower end of the range of times posted by other drivers and he fared poorly against his team-mate who was driving an identical car. Given his inability to obtain a Super Licence in 2007 Mr Zecchi considered it unlikely that Mr Van der Garde would have secured a test seat with a Formula One team in 2008 that would have paid benefits. In his experience as an ex-team manager of Ferrari in the early 1990s it is possible to spot talented Formula One drivers from an early stage of testing. Although 6,000 kilometres of testing is useful to a test driver it should not take more than 200 to 300 kilometres for a driver to demonstrate his skill. He considered Mr Van der Garde's failure to obtain a Super Licence in 2007 as a result of entering into two exclusive driver agreement with different Formula One teams had a significant impact on the progression of his career. That together with the FIA statement that he would not have been issued with a Super Licence in 2008 owing to his poor results meant that it was higly unrealistic for him to expect to have been offered either a test seat or a race seat in 2008 that paid benefits.

In the joint experts report Mr Zecchi expressed the view that Mr Van der Garde's results in his Formula One test for Renault in November 2008, which he secured by reason of having won the World Series by Renault in 2008, was an ultimate demonstration of the fact that he did not have the necessary ability.

397. The Claimant's expert Mr Gallagher painted a more positive picture. In his view an extra 4,000 odd kilometres would have been hugely beneficial to Mr Van der Garde's career. The performance differential between lower formulae cars such as GP2 or World Series by Renault and a Formula One car is significant. Even the most capable driver in lower formulae will find the step up to Formula One a significant challenge because of the performance of brakes, tyres and aerodynamics which combine to make cornering speeds very high and impact overall performance over the course of the laps. Testing a lower formula car is useful primarily only for that Formula so that if the target is to race in Formula One there is no substitute for testing a Formula One car. Testing for that reason has been a vital part of the learning curve for any prospective Formula One driver. From World Series by Renault to Formula One the difference is not between the Championship and the Premiership but between school soccer and the Premiership. The dymanics of a Formula One car are so much higher than anything Mr Van der Garde would have experienced before. A testing mileage of 6,000 kilometres is significant. During the course of such testing any number of technical or human issues can be sorted out, that being the point of testing.

398. Mr Van der Garde's winning of the the World Series by Renault in 2008 shows that he has potential. Although he described it as "pure speculation" in his report, he said that 6,000 kilometres of testing in a Formula One car in 2007 if it had been successful might well have allowed a dramatic career step up for Mr Van der Garde such as entry to Formula One. The granting of a test drive with Renault in November 2008 was a very important career milestone. Moreover the window for Mr Van der Garde to show his potential is closing as the number of laps allowed for testing has been diminishing so that the opportunity to drive in a Formula One car is now more limited than before, there being none during the 2009 Grand Prix season. He agreed with Mr Zecchi that it is difficult to get into Formula One as a test driver and even more difficult for a test driver to become a race driver. The absence of any in-season testing at all once the Grand Prix season has started has had a dramatic effect on any driver's chances of becoming a racing driver in Formula One. Thus the value to Mr Van der Garde of miles in a Formula One car in 2007 was in retrospect very high. There was only one more year left of testing durng the season. Losing 4,000 odd kilometres was detrimental to his chances in Formula One not just because of the opportunity to drive the car but because it would have meant days in the car and the associated exposure to the Formula One world generally – people, teams and sponsors. In his view the momentum of Mr Van der Garde's career was adversely affected by the loss of 4,000 odd kilometres.

399. Mr Gallagher's view was that Mr Van der Garde's poor showing in the November 2008 Renault Formula One team test was less significant than suggested by Mr Zecchi. Although he was well out of the running at two seconds behind Nelson Piquet Junior, Mr Piquet had raced for the Renault Formula One team throughout 2008 and undertaken substantial testing for them in 2007 when he was an official test driver. He therefore knew the car and the team inside out whereas Mr Van der Garde had not driven it before and it was unlikely that he was testing the car with the same

specification set up and thus performance potential as that of Mr Piquet. He said it is notoriously difficult to draw conclusions from lap times achieved in testing without knowing precisely what specification each car was running.

400. On this topic I preferred the evidence of Mr Gallagher to that of Mr Zecchi. Mr Gallagher had a long background in the commercial aspects of motor racing in particular Formula One racing. This included working both for Formula One teams and for the Formula One driver Jenson Button. Mr Zecchi also had a long background in the commercial aspects of motor racing and in particular Formula One, working both for racing teams including Ferrari and for racing drivers as well as for the Imola circuit and as the assistant of the President of the Italian Motor Sports Federation.

401. Mr Zecchi whose negative view of Mr Van der Garde's abilities as a racing driver appeared to be based in no small part on his November 2008 test with Renault accepted in cross-examination that he had not witnessed the test himself and that his view was based on hearsay reports from unidentified other people. He had not made that clear in his report. I was also unpersuaded by Mr Zecchi's view that damage to Mr Van der Garde's reputation has been caused not by his failure to complete the 4,000 odd kilometres of additional testing but by his entering into exclusive driver agreements with two Formula One teams in 2007 without securing the release of the first agreement.

402. Mr Gallagher's evidence was that controversy would normally only affect a driver's sponsorship finding ability if the controversy undermines his image or reputation such as being prosecuted for a criminal offence or similar. A driver being involved in a commercial dispute with a team is not that uncommon in the sport. In his opinion the Super Aguri litigation and this litigation do not affect Mr Van der Garde's status or reputation in Formula One except to the extent that they impacted on his relationship with those two teams.

403. In his report Mr Gallagher said that if Mr Van der Garde had won World Series Renault in 2007 and driven the full 6,000 kilometres with Spyker he believed that he would have been in a very strong position to negotiate a race or test position in Formula One in 2008. Of course as well as not driving 6,000 kilometres in 2007 Mr Van der Garde did not win the World Series in Renault in that year either. He did however win it in 2008. Mr Gallagher considered that the testing opportunity with Spyker was a good opportunity to prove Mr Van der Garde's abilities and had he completed three times the amount of testing he was actually able to complete he would undoubtedly have learned a great deal more about driving a Formula One car working with the technicians understanding the complexity of the car and so forth. Mr Zecchi agreed with that.

404. If Mr Van der Garde had completed all 6,000 kilometres of testing Mr Gallagher considered that it would have improved his chances of doing well or at least better. It would have increased his media profile and demonstrated a stronger likely return for sponsors. However the rider to that was that it would have only translated into further testing or racing in Formula One in 2008 or 2009 if his Formula One testing performance was determined by the Spyker team, its rivals and the media observing the tests to be very strong. 6,000 kilometres would have provided him with the opportunity to develop. In the joint experts report Mr Gallagher said that he felt that

Mr Van der Garde's success in World Series for Renault in 2008 and subsequently the Renault Formula One testing demonstrated good potential and underlined the fact that if he had had more testing with Force India he could have done even better.

405. As to the financial benefits enjoyed by Formula One drivers, Mr Zecchi and Mr Gallagher agreed that it is difficult to be precise because the financial agreements between driver teams and sponsors are not published. Mr Zecchi stated that the financial benefits enjoyed by Formula One drivers range from zero to over fifty million dollars a year depending on the driver, team and sponsors according to speculative press reports. Mr Gallagher said that the leading drivers for the time being will continue to earn in the region of $30 to 50 million a year with mid-field drivers in the $8-20 million region and the lowest paid in the low single figure millions of dollars. In his report he said that if Mr Van der Garde had established a sufficient reputation during testing to be awarded a paid for race seat in Formula One in 2008 he would expect that he would have earned $750,000 to $1.5 million, probably with a performance related element on top. A higher figure would be possible if he had brought a major sponsor with him.

406. However the Claimants' pleaded case was that Mr Van der Garde had a real opportunity of being offered not a paid for race seat but a testing seat with a Formula One team for 2008 and 2009 and only a real opportunity of being a racing driver from 2010. In his report Mr Gallagher said that it was impossible to say how much Mr Van der Garde would have earned as a paid driver across a Formula One career as much would depend on his performance and ability to sustain his career in Formula One. Statistically of every four drivers who make their Formula One race debut only one will sustain his career beyond a second year and thus earn significantly from a career as a Formula One driver. Moreover driver salaries do not relate to the amount of testing a driver has completed so much as to the driver's capability, track record in lower formulae and particular his proven ability in a Formula One car during races. Teams are typically conservative unless they have been able to establish that a driver has strong ability. Teams are mainly concerned about ability when deciding who they put in the car. Given the nature of the business teams have to be very conservative. They would be concerned about unproven drivers or those who they do not have faith in. The worst situation you can have is a driver who gets poor results and causes crashes. Any earnings Mr Van der Garde would have received in a first year as a paid driver would not have been at the top end. Unless you happen to be a Lewis Hamilton you don't get a driver earning many millions early in his Formula One career. Generally they would get a lower salary and a very high win bonus. Drivers for less well funded teams will often accept a deal whereby they earn much smaller salaries than would typically be the case yet have significant bonuses should they win.

407. As to bonuses for winning races, Mr Gallagher's view was that it is impossible to say to what degree the limit on his testing at Spyker affected an outcome which is hard to achieve with or without an extensive testing. His potential for securing race winning performances was impossible to determine given the huge competition that exists for driver contracts among the three or four leading teams capable of winning races each season. As to driver sponsorship income, Mr Gallagher said that as a paid driver in Formula One in 2008 Mr Van der Garde could realistically have hoped to generate between $250,000 and $1 million in personal sponsorships. Figures in excess of that level would have been untypical for a young rookie driver in his first year unless he

had a major sponsor keen to back him in Formula One. In his opinion Mr Van der Garde's results in the lower formulae prior to 2007 were not top-end and it is likely that on balance sponsors would not have been seeking to back him purely on the basis of results achieved. However his success in winning the 2008 World Series by Renault demonstrated his growth as a driver and raised his profile significantly which would probably encourage more sponsorship for him.

408. In cross-examination Mr Gallagher accepted that based on his on-line review of Mr Van der Garde's test results for Spyker it appeared that he was struggling in those tests. He also accepted that Mr Van der Garde's initial results in the 2009 GP2 Series were unimpressive (although he subsequently came first in one of the races). Mr Gallagher accepted that if Mr Van der Garde had completed 6,000 kilometres a salaried race seat was unlikely and that it is unlikely that he would have earned anything in the first year. However it was in his view still worth Mr Van der Garde paying $3 million for the 6,000 kilometres because it would have enhanced his chances of eventually making the step into a Formula One race seat by improving his performance sufficiently to improve his performances in the World Series by Renault season, by improving his performance behind the wheel of the Formula One car and by improving his prospects of getting a Super Licence.

409. Mr Gallagher's view was that Mr Van der Garde is a driver who takes time to come to grips with the dynamics of each formula that he races in and that this is quite common with some professional racing drivers. Asked if he could put a percentage figure on Mr Van der Garde's chance of becoming a Formula One driver if he had had a further 4,000 odd kilometres Mr Gallagher said he thought it would have doubled his chances. As to what his chances were without the 4,000 kilometres he accepted that they would be a low percentage. He did not accept that it was zero but found it very difficult to put a percentage on it. Elsewhere he described it as a good low chance, but he found it difficult to put a mathematical percentage figure on it. Asked what were Mr Van der Garde's chances of getting a paid for race seat as distinct from one for which he paid, he accepted that without the extra 4,000 odd kilometres it would be less than 20% but not less than 10% and that with the extra 4,000 odd kilometres it would be double that.

410. Standing back from the detail of this evidence a number of things emerge in my view. It is plainly not possible to identify a multipler and multiplicand in the form of a precise percentage chance of Mr Van der Garde obtaining a specific financial benefit whether in the form of salary, sponsorship income or a mixture of the two. Indeed there was no specific evidence as to financial benefits earned by test drivers as distinct from race drivers. It is unlikely that Mr Van der Garde would have obtained a full racing seat with a Formula One team in 2008. In the highly competitive world of Formula One his performance results did not mark him out by 2007 as a superstar. On the other hand in my view it is probable that if he had had the benefit of the 3,730 testing kilometres of which I have found he was deprived by Spyker in breach of contract his chances of ultimately obtaining a paid race seat in a Formula One team would have been materially increased. He came first in the World Series by Renault competition in 2008 earning himself a Formula One test with the Renault team. It must not be forgotten that the Claimants were prepared to pay $3 million (and Mr Boekhoorn was prepared to fund $3 million) to obtain the benefit of 6,000 kilometres of testing. That fact does not of course of itself come close to proving what if any was

the value of the enhanced chance of obtaining financial benefits as a Formula One driver which he thereby hoped to secure. Nor does it alter the striking statistic that only one of the thirty-five test drivers in 2008 obtained a race seat the following year. The experts agreed that Formula One teams would look at least to cover their costs in agreeing a pay-to-drive agreement and Mr Gallagher's evidence was that $500 per kilometre would roughly approximate to such costs. The inference is thus that a sum in the order of $3 million was the least an aspirant Formula One driver in the position of Mr Van der Garde would have expected to pay in order to seek to enhance his prospects of a Formula One career by obtaining 6,000 kilometres of test driving. That does not however in itself show whether, looked at as an investment, it was speculative or a calculated business risk.

411. I am persuaded by the evidence that the claim for a loss of opportunity crosses the threshold that separates the speculative from the real and substantial. I broadly accept Mr Gallagher's evidence that Mr Van der Garde's chances of ultimately obtaining a paid Formula One race seat would have been doubled had he been able to complete the 6,000 odd kilometres to which he was entitled. It is clear to me that it is not possible on the evidence to put a precise or even ballpark figure on the financial benefits which he would have received or to be precise about when he would have received them if the chance the doubling of which he was deprived of had materialised. It does not however in my judgment follow from that that he is entitled only to nominal damages under this head. It having been established on the balance of probabilities that he was deprived by Spyker's breach of contract of a real and substantial chance of obtaining financial benefit, his entitlement to an award of damages to reflect the loss of that chance is not in my view extinguished or frustrated by the inability to assess it by means of a precise mathematical formula. There is in my view clear evidence that if Mr Van der Garde had succeeded in obtaining a paid test seat and thereafter a paid racing seat he would have earned significant sums by way of salary and sponsorship income.

412. It does on the other hand seem to me that the large number of imponderables requires the court to exercise caution and restraint in assessing an amount of damages which fairly reflects the claimant's loss. In my view the $500,000 contended for by Mr de Garr Robinson is considerably too high. It does not adequately reflect the fact that the experts considered it unlikely that he would have obtained a Super Licence in 2007 or 2008 or the fact that if he obtained a seat at all in 2008 it would have been likely to be a testing seat rather than a race seat, for which it is to be inferred that the financial benefits would have been considerably less than for a race seat. Nor does it adequately reflect the intense competition for both testing and race seats and the even greater competition for paid seats. Given the inability to calculate damages by a precise mathematical formula any sum awarded must necessarily be the result of a broad brush approach. As in other areas of the law of damages that is not in itself in my view a bar to making an award. Doing the best I can to reflect the totality of the evidence on this point I consider that an award of $100,000 would most fairly compensate the Claimants for their loss under this head.

The claim for loss of the value of the performance due under the Service Agreement

413. The Claimants' primary claim for damages in the event of their claim for restitution failing is for damages reflecting the value of Spyker's promised performance which Mr Van der Garde was wrongfully denied. That performance was identified in Mr de

Garr Robinson's initial written submissions as consisting of the right to test drive about 4,000 kilometres but in his closing submissions it was said to include also the value of the sponsorship rights and paddock passes to which the Claimants were entitled while Mr Van der Garde was doing his test driving.

414. The value of the promised performance which has been denied to the claimant is said by the Claimants to be the normal measure of damages, a proposition for which reliance is placed on McGregor on Damages (17th Ed., 2003; at paragraph 1-036):

> "In contract the normal loss can generally be stated as the market value of the property, money or service that the claimant should have received under the contract, less either the market value of what he does receive or the market value of what he would have transferred but for the breach. Consequential losses are anything beyond this normal measure, such as profits lost or expenses incurred through the breach, and are recoverable if not too remote. …The distinction is brought out by ss50 and 51 of the Sale of Goods Act 1893 dealing with damages for non-acceptance and non-delivery of goods sold respectively. The second subsection of each section states the general measure of damages as the loss directly and naturally resulting in the ordinary course of events from the particular breach: this includes both normal and consequential losses. The third subsection of each section states the prima facie measure of damages to be the difference between contract price and market price: this is the normal loss."

415. Section 51(2) of the Sale of Goods Act 1979 provides that where the seller wrongfully neglects or refuses to deliver goods to the buyer the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. Section 51(3) provides: "Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver." Section 53(2) provides that where there is a breach of warranty by the seller the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty. Section 53(3) provides that in the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

416. Mr de Garr Robinson submitted that although in relation to the sale of goods it is enshrined in statute that damages should reflect the failure to obtain the value bargained for that measure of damages is not a creature of statute. The principle was applied long before the sale of goods was codified by statute: see for example *Mondel v Steel* [1841] 8 M&W 858: "In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject matter of the action was worth by reason of the breach of contract: and to the extent that he obtains, or is capable of obtaining, an abatement of price on that

account, he must be considered as having received satisfaction for the breach of contract." In fact as appears from that citation the principle in *Mondel v Steel* was not expressed as being confined to the sale of goods but extended to agreements for the provision of services.

417. That this is so was confirmed by Lord Nicholls of Birkenhead in his famous tour d'horizon of the law of remedies in *Attorney General v Blake* [2001] 1 AC 268 . At 286 C he referred to the suggestion made by Lord Woolf MR in the Court of Appeal in that case that there are at least two situations in which justice requires the award of restitutionary damages where compensatory damages would be inadequate.

> "The first suggested category was the case of 'skimped' performance, where the defendant fails to provide the full extent of services he has contracted to provide. He should be liable to pay back the amount of expenditure he saved by the breach. This is a much discussed problem but a part refund of the price agreed for services would not fall within the scope of an account of profits as ordinarly understood nor does an account of profits seem to be needed in this context. The resolution of the problem of cases of skimped performance, where the plaintiff does not get what was agreed, may best be found elsewhere. If a shop keeper supplies inferior and cheaper goods than those ordered and paid for, he has to refund the difference in price. That would be the outcome of a claim for damages for breach of contract. That would be so irrespective of whether the goods in fact served the intended purpose. There must be scope for a similar approach without any straining of principle in cases where the defendant provided inferior and cheaper services than those contracted for."

418. Although Lord Nicholls in terms related the approach of refunding the buyer the difference in price to cases of the supply of inferior and cheaper services to those contracted for, his description of the case of skimped performance was a failure to provide "the full extent" of services which the defendant has contracted to provide. Mr de Garr Robinson submitted that this is apt to describe a case of short delivery as well as delivery of inferior goods or services. Alternatively even if Lord Nicholls did not intend to extend the principle which he laid down to short delivery there is in principle no reason why the same approach should not apply.

419. Reliance was further placed on dicta of Sir Thomas Bingham MR in *White Arrow Express Limited v Lamey's Distribution Limited* [1995] 15 Tr L 69:

> "It is… obvious that in the ordinary way a party who contracts and pays for a superior service or superior goods and receives a substantially inferior service or inferior goods has suffered loss. If A hires and pays in advance for a 4-door saloon at £200 per day and receives delivery of a 2-door saloon available for £100 per day, he has suffered loss. If B orders and pays in advance for a 5-course meal costing £50 and is served a 3-course meal costing £30, he has suffered loss. If C agrees and pays in advance to be taught the volin by a world famous celebrity at

> £500 per hour, and is in the event taught by a musical nonentity whose charging rate is £25 per hour, he has suffered loss. It is irrelevant whether A,B or C might have been entitled to reject the goods or services tendered if they in fact accept them. It would defy common sense to suggest that A,B and C have suffered no loss, and are not financially disadvantaged by the breach. The measure of damage in each of these cases is the difference between the price paid (or, if it is lower, the market value of what was contracted for) and the market value of what was obtained."

420. Mr de Garr Robinson relied on a series of cases in which he said that this approach had been applied to cases involving the provision of services. They were all employment cases: *National Coal Board v Galley* [1958] 1 All ER 91, *Royle v Trafford Borough Council* [1984] IRL 184 and *Miles v Wakefield MDC* [1987] AC 539 at 560 D-E and 568 B. All three were cases where it was held that the employer was entitled to recover damages representing the value of work not done which the employee was contracted to provide and for which he was paid notwithstanding the absence of proof of consequential financial loss in the sense of additional profits that would have been made by the employer if the work had been carried out.

421. In *Miles v Wakefield* the House of Lords held that a council was entitled to deduct three thirty sevenths from the salary of the plaintiff, a registrar of marriages, by reason of his breach of contract in refusing to officiate at weddings on Saturday mornings and thereby withholding three out of the thirty seven hours a week which he was contracted to work. The House of Lords rejected the plaintiff's argument that the council had suffered no damage, the only effect of his refusal to conduct wedding ceremonies on Saturdays being that members of the public who wished to be married on that day at the Wakefield District Registry would be disappointed. Lord Templeman said:

> "A strike may involve the employer in a loss of profits but it is impossible to show that any particular proportion of loss is attributable to the industrial action of any individual worker. If a chauffeur goes on strike for one day, his employer may only suffer the inconvenience or enjoyment of driving his own car for once. My Lords an employer always suffers damage from the industrial action of an individual worker. The employer suffers the loss of the services of the worker. The value of those services to the employer cannot be less than the salary payable for those services, otherwise most employers would become insolvent. In the present case if the council were obliged to pay for the services of the plaintiff on Saturday morning, the council would suffer the loss of the money thus paid for services to the public which the plaintiff declined to perform. A man who pays something for nothing truly incurs a loss. The value of the lost services cannot be less than the value attributable to the lost hours of work. Indeed the plaintiff embarked on industrial action because his union believed the value of his services exceeded his current salary." (560 B-F).

422. Lord Oliver of Aylmerton held:

> "If, as a matter of law, [the plaintiff] were employed by the council I do not, for my part, see any difficulty in finding a juristic basis for the retention of salary which the council has made. The simple fact would be that the council had suffered damage to the extent that it was liable to pay for what was, in effect, a period of voluntary absence from work and I see no particular difficulty in quantifying that damage, since the employee could hardly contend successfully that that of which his employer had been deprived by his absence (i.e. his services) was worth less than the sum which he was claiming to be paid for them." (568 A-B).

423. In *National Coal Board v Galley* [1958] 1 All ER 91 a deputy was held to be in breach of contract by refusing over several months to work on Saturdays. His refusal was part of wider industrial action involving several other deputies. Although the combined effect of the refusal to work by the defendant and the other deputies was that no productive work was possible at the colliery on a Saturday for some two months until the plaintiffs succeeded in obtaining substitute deputies at a cost of £3 18s 2d for each substitute per Saturday shift and the plaintiffs suffered a loss of production of nearly £4,000 until the substitute deputies were obtained, the Court of Appeal held that it could not be shown that the plaintiffs' loss of production had been caused or contributed to by the defendant's breach of contract. That is because he would not have worked at a coal face if he had presented himself for work on the Saturdays. As Pearce LJ, who gave the judgment of the court, asked: "How then can it be said that loss of output is any measure of his liability?" (103 H). However and critically for present purposes the failure of the plaintiffs to prove that they had suffered any consequent financial loss in the form of loss of profits as a result of the defendant's breach of contract was not held by the Court of Appeal to dis-entitle them from recovering damages for the loss they suffered as a result of the defendant's breach of contract. The measure of that loss was held to be the value to the plaintiffs of the work which the defendant was contracted to but failed to provide.

> "The last point which arises concerns the measure of damages. The learned judge found that the plaintiffs had proved a loss of profit of £535 due to the impossibility of working the Saturday voluntary shift on June 16 1956. He then went on to hold that the defendant and others – namely all the deputies and shotfirers concerned with the loss – should be treated as being responsible for that loss and that the defendant was liable to the plaintiffs for his share. …What then is the measure of damages in this particular case? If the defendant alone and on his own initative had failed to work the Saturday voluntary shift on June 16 the measure of damages would have been the net value to the plaintiffs of the work which he would have performed if he had worked that shift as he ought to have done. …The question still is: What loss of output did the absence of the particular deputy charged with breach of his contract entail? The question in each case must be: What would his services have contributed

> to the net value of the output of the shift if the deputy concered had duly worked it? That is in each case a question of fact. In the present case, though the defendant was undoubtedly acting in concert with others, it is not shown that his breach contributed to the loss. He would not, as we understand it, have worked at a coal face, but would have been doing safety work. How then can it be said that loss of output is in any measure of his liability? In these circumstances we do not think it can be said that any damages has been proved against him beyond the cost of a substitute, say £318s 2d." (102 C-D, 103 C-H).

424. Thus the measure of damages was held to be the net value to the plaintiffs of the work which the defendant would have performed if he had worked as he ought to have done. Despite the fact that his failure to work was not proved to have caused or contributed to the plaintiffs' loss of profit, the plaintiffs were still held to be entitled to damages reflecting the net value to them of the work which the defendant would have performed. On the facts of the case that value was assessed by reference to what it cost the plaintiff to employ a substitute for the defendant. In fact it appears that the damages were awarded for the period before the plaintiffs obtained a substitute employee, that rate being assumed to be the rate which would have been applicable if they had in fact obtained a substitute for the period in respect of which damages were awarded. Mr de Garr Robinson submitted that *National Coal Board v Galley* is authority for the proposition that in the case of an employment contract, which is perhaps a paradigm example of a contract for services, where no consequential damage has been suffered by the non-performance in breach of contract of the contracted services, the defendant is nonetheless liable for the notional cost of employing a substitute which is another way of saying for the value of the services which were not provided. In my judgment a more precise formulation of the proposition for which it is authority is that in a contract for services where there is no proof of consequential financial loss by reason of the breach, the claimant is nonetheless entitled to damages for breach of contract, the measure for which is the value to the claimant of the services which were not provided. In an appropriate case the measure of the value to the claimant of the services which should have been but were not provided may be the notional cost to the claimant of obtaining those services elsewhere, it not being a conditional precedent for the award of such damages that equivalent services were in fact purchased elsewhere.

425. In *Miles v Wakefield* Lord Templeman having cited Pearce LJ's conclusion that the plaintiffs in *National Coal Board v Galley* were entitled to "the costs of a substitute, **say** £318s 2d" (emphasis added) said: "The costs of a substitute will not be less than the value placed by the contract on the services of the worker". (560 D-E). Although Lord Templeman was approving the decision in *National Coal Board v Galley* on this point, he gave no explanation as to the sentence which I have quoted. It may be that he intended no more than to make the point that in the context of an industrial dispute where an employee withholds his labour on the ground that it is undervalued it would not lie in the employee's mouth to contend that the value to his employer of his services is less than he is claiming to be paid for them. In other words the same point as was made by Lord Oliver when he said: "I see no particular difficulty in quantifying that damage since the employee could hardly contend successfully that that of which his employer had been deprived by his absence (i.e. his services) was

worth less than the sum whiche he was claiming to be paid for them" (588 B). It is in my view not likely that Lord Templeman intended to lay down a general rule that the value of services not provided in breach of contract can never be less than the value placed on them by the contract. Such a principle would overcompensate a claimant in a case where the market value of the services contracted for were lower than the contract price for them. That would be contrary to the basis on which damages are measured for non-delivery of goods by section 51(3) of the Sale of Goods Act 1979, namely, where there is an available market for the goods in question, the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed at the time of refusal to deliver. It would be also be contrary to what Sir Thomas Bingham MR held to be the correct measure of damages in *White Arrow Express* for the provision of inferior goods or services namely: "The difference between the price paid (or if it is lower the market value of what was contracted for) and the market value of what was obtained. (9H -10 A).

426. *Minster v Traps Tractors Limited* [1954] 3 All ER 136 at 156 is an example of a case where, in the context of a claim for damages for the sale of goods of inferior quality the value of the goods as they should have been delivered was equated by the court to the contract price. However it is clear from Devlin J's judgment that this was not the result of the application of a general principle but merely the court's acceptance of the contract price, in the absence of any other evidence as to value, as the best evidence of the value of the goods as they should have been delivered: "The third question is as to the ascertainment of the value the machinery would have had if fully re-conditioned at the time of sale. As to this, the only evidence of value is the contract price, and that can be accepted subject to one [irrelevant for present purpose] qualification."

427. In *Royle v Trafford Borough Council* [1984] IRLR 1 84 a teacher with a class of 31 pupils had, in breach of contract, refused an instruction to take a further five pupils. The employer had suffered no consequential loss as a result of this breach but, following *National Coal Board v Galley* and *Miles v Wakefield* Park J awarded to the employer five thirty sixths of the teacher's salary, which he regarded as representing the notional value of the services which the teacher had not rendered

> "On the other hand in my opinion the plaintiff is entitled to be paid his full salary only if he has properly and fully performed his duties under his contract of employment. For a period of nearly six months, in breach of his contract, he has failed to teach five children whom he otherwise would have taught. Thus, there is no reason why he should receive his full salary for that period. I think I am entitled to make a deduction representing the notional value of the services he has not rendered.
>
> Miss Caws suggested that, if I were minded to make such a deduction, the fraction five thirty sixths of the salary over the relevant period, while being a far from perfect assessment, would probably represent the justice of the case, bearing in mind that the plaintiff carried out in full a number of extra-curricular acitivites.

> …The defendants have not suffered any financial loss by reason of the plaintiff's breaches of contract; for example they have not incurred the costs of employing a teacher to teach the children whom the plaintiff has refused to teach: if they had done so they might well have succeeded in recovering the cost of such employment [see *National Coal Board v Galley* [1958] 1 WLR 16]; nor have they been required to meet any claim by a parent for their failure to educate a child. In those circumstances I have decided to follow the decison of Mr Justice Nicholls in the recent case of *Miles v Wakefield Metropolitan District Council* reported in the Times Newspaper on 22.11.83 and to give judgment for the plaintiff for the amount of his salary between 7.1.79 and 30.6.79 less a proportion thereof amounting to five thirty sixths…" (paras 53-56).

428. Thus *Royle v Trafford* like *National Coal Board v Galley* was a case in which in a contract for services damages for breach of contract were awarded despite the absence of consequential financial loss and were assessed by reference to the value to the plaintiffs of the services contracted for but not delivered. Like *Miles v Wakefield* the value was assessed by reference to the proportion of the contract price of the services which reflected the proportion of the services not provided and like *National Coal Board v Galley* and *Miles v Wakefield* damages were awarded despite the fact that the plaintiffs did not in fact incur the cost of purchasing equivalent services elsewhere. (Park J appears to have assumed that the award of damages to the employer in *National Coal Board v Galley* in the amount of the cost of employing a substitute employee was to compensate it for the financial loss it suffered in having to employ a substitute.In fact, as mentioned above, it had not incurred the cost of employing a substitute during the period in respect of which it was held to be entitled to damages for breach of contract and the Court of Appeal in that case held that, even though the employer had suffered no financial loss as a result of the employee's breach of contract, it was entitled to an award of damages, calculated by reference to the notional cost of employing a substitute as representing the value to the employer of the services wrongly withheld.)

429. Mr de Garr Robinson submitted that *Royle v Trafford* illustrates the robust approach which courts can adopt where there are difficulties in quantifying damages. He also relied on a dictum of Lord Hobhouse of Woodborough in *Attorney-General v Blake*, commenting on the case of *Ruxley Electronics and Construction Limited v Forsyth* [1996] AC 344. That was a case in which the defendant in breach of contract failed to build a swimming pool to the specified depth. Although the plaintiff was entitled to a deeper pool and the prima facie measure of damage would have been the cost of increasing the depth of the pool to the stipulated depth, that sum, which was considerable, was so disproportionate that the court refused to award it. "It would be unreasonable for the plaintiff to incur that expense. His damages must be assessed at a lower figure. The speech of Lord Mustill, at pp 359- 361, is illuminating. The loss is a reasonable valuation of what the plaintiff ought to have had but did not get. It is not just the amount (if any) by which his property has a lower market value than that it would have had if the contract had been performed." (298 C-D).

430. In *White Arrow Express v Lamey's Distribution* Sir Thomas Bingham MR reviewed *National Coal Board v Galley*, *Royle v Trafford* and *Miles v Wakefield* among other cases. He held that *National Coal Board v Galley* is some authority for the proposition that on a claim for damages by an employer who has paid the employee for work the employee has not done, the employee is liable for the value of the services he has failed to render, which may be quantified by assessing the cost of employing a substitute, even if a substitute has not in fact been employed. To that extent he appeared to endorse the principle that the measure of damages for non-delivery of services is the value of the services not provided and that it is not a necessary bar to recovery of damages assessed by reference to the cost of obtaining those services elsewhere that in fact the claimant did not obtain such services.

431. He also held that the other cases show that where an employee's failure to work or make himself available to work is not treated as repudiatory he must forego a part of his salary proportionate to his failure or refusal to work. However he pointed out that in none of those cases does it appear that there was any persisting argument about how the proportionate deductions should be quantified. (Page 12 B-F). In that case the claim was for damages for failure to provide enhanced services. Sir Thomas Bingham MR held: "It is not the law that an innocent party who contracts for a deluxe service and receives a sub-standard service is in principle denied a claim to more than nominal damages. If such were the law it would be defective. But it is the law that an innocent party in such a position must quantify, or at least provide evidence from which the court can draw an inference as to, the difference between the value (usually the market value) of what was contracted and the value (again usually the market value) of what was provided. (13 D-F)." On the facts of the case the Master of the Rolls held that the plaintiffs had not attempted to do that. Instead "they have made a sophisticated attempt to calculate the fraction of the contract consideration properly attributable to the breaches of which they complain. But this is, as the judge held, no more than an attempt to make good a partial failure of consideration under the guise of a claim for damages. It may be that the plaintiffs have not attempted to make the right comparison because they cannot. It may even be (I express no view whether this would be permitted at this stage) that they can re-formulate their claim so as to found a claim for substantial damages. But I do not think the present basis, founded on the report, is sustainable and on the basis of the present pleading I do not think the court could properly award more than nominal damages." (13G – 14C).

432. Thus although on the facts of the case the Master of the Rolls held that the plaintiffs were only entitled to nominal damages that was only because they had made the mistake of basing their claim as one for a proportion of the contract price referable to the provision of inferior services. Had they adduced evidence from which the court could draw an inference as to the difference between the value, usually the market value, of what was contracted for and the value, again usually the market value, of what was provided then, if that evidence had been accepted, they would have recovered that difference as an award of damages.

433. It is thus important in my view to keep clearly in mind, when assessing damages whether for short delivery or breach of warranty of quality, the difference between price and value. Unlike in a claim for restitution, the contract price forms no part of the relief or remedy to which the claimant is entitled. In so far as it is relevant its relevance is evidential in the sense that in an appropriate case an inference may be

drawn from the contract price as to the value of the services to which the claimant was entitled and for whose value he is entitled to be compensated. In my view this emerges from the judgment of Morritt LJ in *White Arrow Express*. "It may be that there are cases in which because there is no readily identified market the contractual price for the benefit promised but not provided is adopted as the best evidence of the market value of that benefit. Such cases are likely to be limited to those in which the price has not been paid for if it has the deduction necessary for the computation of the net loss will be of an equivalent amount. But if it is it is because it is accepted as the market value and not because it is the contract price." (19E-F)).

434. This is perhaps an appropriate point at which to refer to obiter dicta of Lord Woolf MR in *Attorney-General v Blake* in the Court of Appeal to which Lord Nicholls referred in his speech in the House of Lords quoted above. Lord Woolf identified two situations in which the Court of Appeal considered that justice requires the award of restitutionary damages "where compensatory damages would be inadequate."

> "The first may be described as the case of skimped performance. This is where the defendant fails to provide the full extent of the services which he has contracted to provide and for which he has charged the plaintiff. Professor Jones cites the Louisiana case of *City of New Orleans v. Firemen's Charitable Association* (1891) 9 So. 486 as an example. The defendant contracted with the plaintiff to provide a firefighting service and was paid the full contract price. After the expiry of the contract the plaintiff discovered that the defendant had not provided the stipulated number of firemen or horses or the promised length of hosepipe. The defendant had saved itself substantial expense by that breach, but had not failed to put out any fires in consequence. The court ruled that the plaintiff had not proved it had suffered any loss and was unable to recover more than nominal damages. Justice surely demands an award of substantial damages in such a case, and the amount of expenditure which the defendant has saved by the breach provides an appropriate measure of damages. This could be achieved by presuming that the plaintiff has suffered a loss of an amount corresponding to the amount by which he has been overcharged for the service actually provided; and the presumption could be justified by invoking the notion of "the consumer surplus." But it would surely be preferable, as well as simpler and more open, to award restitutionary damages."

435. As already mentioned Lord Nicholls did not consider that cases of skimped performance justify the creation of a novel right of restitutionary damages or an account of profits. Of relevance for present purposes however is the apparent assumption made by Lord Woolf that the ordinary measure of compensatory damages in a case of skimped performance would be inadequate. The New Orleans case cited as an example appeared in the description of it to be unusal in that the breach of contract not only caused the plaintiff no consequential financial loss but did not even reduce the value to the plaintiff of the service it contracted to supply. The purpose of the firefighting service contracted for was presumably to put out all the fires which

occurred in New Orleans. In the event the defendant was able to achieve that purpose despite providing fewer fireman and horses and less hose pipes than it had agreed to supply. On the facts of the case somewhat unusually it might be said that the value to the city of New Orleans of the skimped performance was not less than the performance that should have been supplied. It does not in my view follow that the ordinary measure of compensatory damages identified and approved by Lord Nicholls in the House of Lords is inadequate in all cases of skimped performance. Where the skimped performance consists of the supply of inferior and cheaper goods than those ordered and paid for the shopkeeper has to refund the difference in price as damages for breach of contract. Where the defendant provides inferior and cheaper services then those contracted for the approach prescribed by Lord Nicholls presumably involves refunding the difference in price between the inferior and cheaper services supplied and those which the defendant agreed to supply.

436. Since in every case the loss for which the claimant is entitled to be compensated by damages is the difference between the value of what the defendant agreed to supply and what he did supply one can see that if the inferior (or insufficient) services actually supplied can be proved to have been no less effective in securing the objective which the superior (or larger number of) services contracted for were intended to achieve, a court might readily accept that the breach of contract did not result in any diminution in the value of the services contracted for.

437. It does not in my judgment follow from that that in a case such as this where a claimant has evidential difficulty in establishing substantial consequential financial loss in the form of loss of future earnings or profits that it follows that there has been no substantial diminution in the value of the services contracted for but not supplied. Indeed in my view this case is a very good illustration of the point. The Claimants paid $3 million for 6,000 kilometres of testing with the object of improving Mr Van der Garde's career prospects and in particular his chances of obtaining a paid testing and ultimately a paid racing seat with a Formula One team. If the full 6,000 kilometres had been provided and had succeeded in securing that objective it might have led to very significant earnings possibly running into millions of pounds. I have held that for a variety of reasons including the intense competition for such seats and the difficulty of assessing Mr Van der Garde's chances of obtaining such financial benefits, his damages for loss of opportunity are limited to the comparatively modest (in the context of the potential financial benefits available to a successful Formula One driver) sum of $100,000. In my view it by no means follows from that that the value to the Claimants of the 4,000 odd kilometres of which he was unlawfully deprived must have been modest or even nominal. If a man who has failed the driving test ten times buys and pays for twenty driving lessons but is only given six lessons he may be awarded only nominal damages in a claim for damages for consequential loss of the opportunity of passing the driving test and obtaining the benefits following therefrom. If a court made such an award, it would not in my judgment follow that there is no significant difference in the value to the claimant between the twenty lessons which the defendant agreed to supply and the six lessons actually supplied. In principle I see no reason why the claimant should not recover as damages for breach of contract the value of the fourteen lessons of which he was deprived. In the ordinary course that value would be assessed by reference to the market price of driving lessons as at the dates on which the contract provided that they should have been supplied.

438. In Sir Thomas Bingham's hypothetical example in *White Arrow Express* of the person who agrees and pays in advance to be taught to play the violin by a world famous celebrity for £500 per hour and is in the event taught by a musical non-entity whose charging rate is £25 per hour there was no suggestion that the measure of loss, namely the difference between the price paid for (or if lower, the market value of what was contracted for) and the market value of what was obtained was dependent on proof that the claimant had suffered consequential financial loss in the form of the loss of opportunities of himself earning money as a professional violinist. Loss of the enhanced service was itself a loss measurable by the difference between the value of the celebrity lesson and the value of a musical non-entity lesson. If in that example no lesson had been provided at all there is in my view no reason why the claimant could not recover as the normal measure of his loss the market value of what he contracted for, that is to say a lesson from a celebrity. The same would apply if he agreed to buy three lessons and was only given one. If £500 an hour was a good deal for the claimant and the market value of a celebrity violin lesson was £1,000 there is in my view no reason why he could not recover £1,000 in the former example and £2,000 in the latter as damages for breach of contract rather than seeking restitution of the money paid in advance

439. As to value, the missing performance for whose value the Claimants seek compensation is the 4,000 odd kilometres of mid-week test driving to which they were entitled but which were not provided plus the ancillary benefits that went with that driving namely sponsorship space, travel expenses, the provision of a hotel room and paddock passes. Since Mr Van der Garde did not obtain a Super Licence in 2007 no claim is made for the value of Friday morning testing since he would not have been eligible to participate in it.

440. Mr de Garr Robinson accepted that there was no evidence of a going or standard rate for the provision by Formula One teams of paid testing in a Formula One car. However he submitted that the effect of the evidence of both experts was that such services were at the time freely and regularly commercially negotiated and that a deal for 4,000 kilometres of testing was worth at least $2 million in the sense that it would have cost at least that much for the Claimants to purchase 4,000 odd kilometres of test driving from another Formula One team in 2007.

441. In his report Mr Gallagher said that in motor racing the first thing a team does is to look to cover its costs. In a pay-to-drive arrangement for a testing programme the objective will be to use the income from the driver to mitigate some or all of the costs associated with running the car. Testing costs are treated separately from racing costs and form an important element of any team's budget. The main aim in testing a paying driver, particularly one who is as yet unproven, is not to lose money and of course the team will look to make a profit as with any normal business. While it is difficult to determine costs per kilometre as teams have differing levels of overhead, supply costs and so on to amortize across testing costs, typically he would except the cost to be in the region of $500 per kilometre. Discussions with two engineers who worked for a Formula One team which approximated to Spyker in the 2007 and 2008 seasons confirmed his view that testing would cost £320 to £340 per kilometre including engine mileage, which supported his view that the cost to a team in 2007 per kilometre was $500. He said that it is impossible to put a figure on what a Formula One team would sell 3,996 kilometres of testing for other than to say that the

starting price for a team committing to such a level of testing should be at least $2 million up to whatever price the driver and his sponsors were prepared to pay. In terms of minimum figures for pay to drive teams would clearly not want to sell testing opportunities for less than the cost price. From the perspective of a driver a $1.5 to $2 million package would be attractive to a driver aiming to make the final step towards Formula One. He said that there is always a ready market for drivers with money in Formula One albeit with the less well funded teams of which there were two or three in 2007.

442. Mr Zecchi did not address the value of the missing kilometres in his report but paradoxically his evidence in oral testimony was that it would probably have cost Mr Van der Garde $3-4 million to buy 4,000 kilometres of testing from a Formula One team comparable to Spyker. That reflected his view that the Service Agreement was an incredible deal for the Claimants and would even have been an incredible deal if Spyker had only provided 3,000 to 4,000 kilometres under it. Even at 2,000 kilometres a fee of $3 million would not be too bad. Some teams sell one day of testing for around €350,000 to €400,000 or $400,000 to $450,000.

443. I have already referred to Mr Davies' challenge to Mr Gallagher's evidence on the $500 per kilometre cost based on the fluctuating sterling-dollar exchange rate. In the context of Mr Zecchi's evidence that challenge seemed to me not only weak but in the current context of marginal relevance given that Mr Zecchi's evidence was that a comparable team would have charged up to twice as much as the figure suggested by Mr Gallagher.

444. Mr de Garr Robinson submitted that the cumulative effect of the experts' evidence was that the market value of the kilometres which were not provided by Spyker was considerably more than $2 million. However although that would mean that the value of the missing performance was greater than the contract price he indicated that the Claimants were content to confine their claim for the missing kilometres to $2 million and invited me to proceed on that basis which he submitted was both safe and conservative.

445. The experts in their joint report agreed that it would have been possible for Mr Van der Garde to buy testing at the end of the 2007 season but not during the middle of it. Again Mr de Garr Robinson submitted that if Mr Van der Garde had sought a test driving deal from another Formula One team in circumstances where it would have been obvious that Spyker had not provided the full 6,000 kilometres so that he was a distressed buyer, no doubt the price would have gone up against him. However he did not invite me to value the missing kilometres on that basis.

446. Mr de Garr Robinson further submitted that since the experts agreed that the sponsorship rights and paddock passes to which the claimants were entitled while Mr Van der Garde was doing his mid-week driving were worth $100-200,000 for 6,000 kilometres of mid-week testing it followed that for 4,000 kilometres they would be no less than $66,000. Thus there should be an additional award of $64,000 taking those figures into account and correcting for the fact that as he submitted 3,996 kilometres were missing rather than 4,000 kilometres. In my view this latter submission was inconsistent with his case in the context of restitution that the sponsorship and paddock passes were "icing on the cake" and also with the agreed evidence of the experts in their joint report that although the package of benefits including space on

the car, space on the suit and/or helmet and paddock passes could be sold independently to sponsors for $1-1.5 million (in respect of the Service Agreement) they were an inclusive part of the driver testing agreement and would not have been paid by Mr Van der Garde separately: that is to say they came with the testing as icing on the cake.

447. In his initial skeleton argument on remedies, Mr Davies submitted that there was and is no market value for any of the rights made available to Mr Van der Garde. The price was negotiated downwards from €4 million to €3 million and then to US$3 million thereby indicating that there was no market rate. Moreover the contract price was not evidence of the value of the lost kilometres because the contract price was paid for a package of rights and benefits of which the right to test driving was only one constituent part. It offends common sense to suggest that the other benefits had no value.

448. In my view Mr de Garr Robinson was right to submit that although the negotiations showed that there was no standard or going rate it did not follow from that there was no market value or market rate for testing kilometres. As to Mr Davies' second point it seemed to me that there was force in it to the extent that the focus of the inquiry with which I am currently concerned is limited to assessing the value of those services under the Service Agreement which should have been provided but were not. That does not include Friday morning testing for the reasons discussed. Although it does include paddock passes and sponsorship rights for the reason just given in my view the evidence showed that they were thrown in with the kilometres as icing on the cake in test driving deals.

449. In Mr Davies' later written submissions, which Mr Tregear in due course adopted, he submitted that it follows from the fact that there can be no apportionment of the price paid that there is no market value of the benefit that Mr Van der Garde did not receive under the contract. In my judgment that is a non sequitur. Quite apart from the findings I have made on the topic of apportionment, that is an issue relevant to the question whether the claimants are entitled to restitution on the basis of total failure of consideration. The question whether there is a market value of the services which were unlawfully withheld by Spyker is a pure question of evidence which is not affected by that issue.

450. Mr Tregear in his own closing written submissions made a similar point to that of Mr Davies. He submitted that the Claimants' concentration on the lost kilometres loses sight of the fact that value is to be attributed to all the benefits under the Service Agreement and Fee Agreement and in particular that the Claimants are wrong to write out of account as reducing the value of what they say was lost to them as a result of Spyker's breach of contract the potential for Friday testing which was not lost to them by Spyker's breach of contract and which was worth at least $500,000 if not more. In my view this submission no less than that of Mr Davies sought to meet an argument which Mr de Garr Robinson was not in fact advancing. It assumed that the Claimants' argument as to the value of the lost kilometres, paddock passes and sponsorship rights was based on the proposition that the contract price was to be equated with or at any rate the best evidence of the value of the lost kilometres, paddock passes and sponsorship rights. In fact Mr de Garr Robinson was at pains to emphasize that the value of the withheld services is not to be equated with the contract price for the reasons articulated by Sir Thomas Bingham MR in *White Arrow Express*. As to the

evidence of the value of the withheld services Mr de Garr Robinson relied not on the contract price but on the evidence of the two experts.

451. Mr Davies further submitted that the true analogy is with the claim in *White Arrow Express* as it was found by Sir Thomas Bingham MR to be, namely "no more than an attempt to make good a partial failure of consideration under the guise of a claim for damages." I do not accept that submission. In *White Arrow Express* the claimants sought to justify their claim for damages by reference to a proportion of the contract price referable to the enhanced services not provided. In this case Mr de Garr Robinson sought to justify the claim for damages by reference to the evidence as to the market value of the services unlawfully withheld by Spyker. In principle that approach is in my view wholly consistent with that identified by Sir Thomas Bingham MR in *White Arrow Express* as the correct approach for measuring damages for breach of contract where the breach found is the provision of inferior services. That of course leaves open the question whether the same approach is correct in assessing damages for short delivery.

452. In his written closing submissions Mr Tregear appeared to direct much of his fire against an argument which was not in fact advanced by Mr de Garr Robinson, namely that this case falls within the exceptional category of case identified by Lord Nicholls in *Attorney-General v Blake* in which an account of profits may be awarded as a remedy for breach of contract. No such argument was advanced by Mr de Garr Robinson. The argument he did advance, as an alternative to his claim for damages for compensation for the loss of the value of the services withheld by Spyker, was an alternative claim for compensatory damages such as were awarded in *Wrotham Park* by Brightman J and held by Lord Nicholls in *Attorney-General v Blake* to be available in suitable circumstances. I deal with the *Wrotham Park* claim below.

453. Mr Tregear submitted that the skimped performances cases such as *White Arrow Express* and the hypothetical examples postulated by Sir Thomas Bingham therein do not provide the answer in this case because they relate to the provision of services of the nature and quantity of those contracted for but lacking the superior quality contracted for. That he submitted is significantly different from the situation in this case where the performance provided for was not skimped in that testing kilometerage was provided as to the quality of which there are and have been no complaints. He added that it was not therefore part of Spyker's case to argue that Lord Nicholls was wrong about skimped performance in *Blake* or that Sir Thomas Bingham M.R.'s observations in *White Arrow Express* are wrong or even that the cases relied on by the Claimants were wrongly decided. However beyond making the point that this is in effect a case of short delivery rather than skimped performance he did not appear to submit that in principle damages for short delivery of services are not recoverable. Nor did he appear to take issue with the measure of damage contended for by Mr de Garr Robinson based on the analogy of damages for non-delivery of goods, namely the market price or value of the withheld services.

454. Indeed the concession that the cases relied on by the Claimants were not wrongly decided appeared to accept the correctness of that measure of damage since they included a number of cases such as *National Coal Board v Galley*, *Royle v Trafford* and *Miles v Wakefield* which were in my view in effect cases of short delivery rather than skimped performance. The registrar in *Miles v Wakefield* and the deputy in *National Coal Board v Galley* who did not work on Saturdays were in effect

withholding a proportion of the services they were contracted to provide. In my judgment it is more realistic to analyse those cases as claims for short delivery rather than skimped performance in the sense of providing an inferior service to that contracted for by working fewer hours a week than agreed. Similarly in *Royle v Trafford* the teacher was under a contractual obligation to teach 36 pupils but only taught 31. It is in my view reasonable to analyse the failure to teach the additional five pupils as a short delivery of teaching services rather than the provision of inferior services.

455. Indeed in oral submissions I understood Mr Tregear to accept that even if the claim for consequential financial loss fails the Claimants are entitled to damages compensating them for the value of the 4,000 odd kilometres of which they were deprived assessed by applying the principles set out in the passage from McGregor relied on by Mr de Garr Robinson set out above.

456. While he did not criticise the decisions or awards of damages in *Miles v Wakefield*, *National Coal Board v Galley* or *Royle v Trafford* his essential point appeared to be that whereas identifying the employers' loss in those cases was comparatively straight forward, in this case the absence of a standard going rate and the disparity between the views of the experts as to the market value of the withheld kilometres makes it difficult for the court to assess a market value for them.

457. Before turning to the question of market value it is necessary to deal with a legal issue which was raised for the first time in oral closing submissions. The issue was first raised by Mr de Garr Robinson not because he relied on it to support his claim but, as he put it, because it would be wrong for me to proceed without it being drawn to my attention. The issue can be shortly stated. Does the fact that the Claimants did not purchase from an alternative source in the form of another Formula One team the kilometres (and paddock passes and sponsorship rights) wrongly withheld by Spyker disentitle them to an award under this head of anything more than nominal damages? Mr de Garr Robinson submitted that it does not principally because in a case such as this where the claimant has been wrongfully deprived of services the correct measure of damage is compensation for the loss of those services assessed by reference to their value. The fact that the best evidence of that value may lie in evidence as to what it would have cost the claimant to purchase the withheld services elsewhere does not mean that if the claimant does not in fact purchase the services elsewhere he has suffered no loss. As a matter of principle is seems to me that Mr de Garr Robinson's submission is correct and should be applied unless there is binding authority to contrary effect.

458. In my hypothetical example of the claimant who bought and paid for twenty driving lessons but was only provided with six in my view application of fundamental principles of contractual damages entitles him to compensation for the loss of the missing fourteen lessons. The loss is assessed by the value of those lessons. The best evidence of that value is likely to be the market price of driving lessons at the date of breach. His entitlement to be placed by an award of damages so far as is possible in the position he would have been in if he had been given the extra fourteen lessons should in the ordinary course lead to an award of damages in the amount of the market price of the fourteen missing lessons. Principle does not in my view make his entitlement to compensation dependent on his having gone into the market and purchased lessons elsewhere. It is in my view wholly unrealistic to suggest that if he

does not do so he has suffered no loss or that the fourteen lessons of which he has been deprived were of no value to him. Suppose in the example it is only the last of the twenty lessons which is withheld and that it was due to be given in the evening before the claimant was due to take his driving test. It would be impossible for him to buy the twentieth lesson from another driving instructor before he took his test. Is it to be said that his failure to do so demonstrates that the twentieth lesson had no value or that his failure to buy a twentieth elsewhere deprives him of an entitlement to damages assessed by reference to the market value of a single lesson? In my view principle clearly suggests that the answer to those questions is no.

459. The argument to the contrary which was advanced by Mr Tregear was based on a line of authorities to which Mr de Garr Robinson drew my attention in which the question was discussed whether a claimant who has contracted for something which will benefit a third person is entitled to more than nominal damages in the event of non-performance by the defendant and if so whether his entitlement to substantial damages is dependent on his having incurred the cost of undertaking the work himself or having paid someone else to do it. This is a topic on which judicial opinion at the highest levels has been divided. For reasons which I shall explain it is an issue which does not in my opinion arise in this case. The suggestion that it does is I think based on the fact that in some of the judicial and academic discussion of this topic the argument that there should in such cases be recovery has made reference to the concept that, in the words of Lord Nicholls in *Attorney-General v Blake* "a party to a contract may have an interest in performance which is not readily measurable in terms of money." (at 282 B). Reliance on the proposition that a claimant may have an interest in the performance of his contract even where he has suffered no identifiable loss by its breach highlights the fact that the cases in which this proposition has been advanced have been cases where performance of the contract would have conferred no direct benefit on the claimant so that its being withheld has caused him no direct loss. An example was postulated by Lord Griffiths in *Linden Gardens Limited v Lenesta Limited* [1994] 1 AC 85 at 96G to 97D.

> "I cannot accept that in a contract of this nature, namely for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract is dependent upon the plaintiff having a proprietary interest in the subject matter of the contract at the date of breach. In everyday life contracts for work and labour are constantly being placed by those who have no proprietary interest in the subject matter of the contract. To take a common example, the matrimonial home is owned by the wife and the couple's remaining assets are owned by the husband and he is the sole earner. The house requires a new roof and the husband places a contract with a builder to carry out the work. The husband is not acting as agent for his wife, he makes the contract as principal because only he can pay for it. The builder fails to replace the roof properly and the husband has to call in and pay another builder to compete the work. Is it to be said that the husband has suffered no damage because he does not own the property? Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which

> he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder. To put this simple example closer to the facts of this appeal – at the time the husband employs the builder he owns the house but just after the builder starts work the couple are advised to divide their assets so the husband transfers the house to his wife. This is no concern of the builder whose bargain is with the husband. If the roof turns out to be defective the husband can recover from the builder the cost of putting it right and thus obtain the benefit of the bargain that the builder had promised to deliver. It was suggested in argument that the answer to the example I have given is that the husband could assign the benefit of the contract to the wife. But what if, as in this case, the builder has a clause in the contract forbidding assignment without his consent and refuses to give consent as McAlpine has done. It is then said that neither husband nor wife can recover damages; this seems to me to be so unjust a result that the law cannot tolerate it."

460. Lord Griffiths went on to say: "In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant has promised but failed to deliver. I therefore cannot accept that it is a condition of recovery in such cases that the plaintiff has a proprietary right in the subject matter of the contract at the date of breach." (97F). In Lord Griffiths' hypothetical example, although in the latter passage he stated that the husband suffered financial loss because he had to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver, he suffered no direct loss in the sense of being deprived of the benefit of the roof repairs or in the diminution of the value of the house by reason of the repairs not being done.

461. Lord Griffiths went on to say:

> " The second ground upon which the recovery of damages is resisted is that Investments in fact reimbursed Corporation for the money they spent on the repairs. But here again in my view who actually pays for the repairs is no concern of the defendant who broke the contract. The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract" (97G–H)."

Reliance was placed by Mr Tregear on that dictum as supporting the proposition that in a claim for performance interest damages it is a condition precedent that the claimant has actually incurred the expense of purchasing the withheld services elsewhere. The question whether even with Lord Griffiths' proviso that recovery is dependent on the withheld services having been obtained elsewhere his general proposition that a claimant can recover damages for the defendant's failure to provide benefit to a third party is good law was in controversy between the parties.

462. In *Linden Garden* itself the ratio of the majority was based on a separate ground to that expounded by Lord Griffiths. However both Lord Keith and Lord Bridge in obiter dicta indicated cautious support for it in principle. Lord Keith said: "I have much sympathy with the view that where a building contractor is in breach of his contract he should not be relieved of liability to pay substantial damages for his breach merely by reason that the other contracting party had no proprietary interest in the works at the time when the breach occurred. There is much force in the analysis that the party who contracted for the works to be done has suffered loss because he did not receive the performance he had bargained for and in order to remedy that has been required to pay for the defects to be put right by another builder. However the matter was not fully explored in argument before your lordships, and the possible effects upon other forms of commercial contract remain uncertain. While in some future case the view expressed by my noble and learned friend Lord Griffiths may well prevail, the present case can be disposed of in favour of the respondents without the necessity of deciding upon its correctness." (95E-G). It will be noted that the analysis with which Lord Keith had sympathy included as part of the conclusion that the party who contracted for the works to be done has suffered loss the fact that in order to remedy the failure of performace he in fact paid for the defects to be put right by another builder.

463. Lord Bridge said that he was much attracted by the broad principle favoured by Lord Griffiths but was content for the purpose of the present proceedings to adopt the narrower ground for dismissal of the *McAlpine* appeal on which Lord Browne-Wilkinson rested his decision.(95 H)

464. Lord Browne-Wilkinson stated:

> "If the law were to be established that damages for breach of a supply contract were not quantifiable by reference to the beneficial ownership of the goods or enjoyment of the services contracted for but by reference to the difference in value between that which was contracted for and that which is in fact supplied, it might also provide a satisfactory answer to the problems raised where a man contracts and pays for a supply to others, e.g. a man contracts with a restaurant for a meal for himself and his guests or with a travel company for a holiday for his family. It is apparently established that, if a defective meal or holiday is supplied, the contracting party can recover damages not only for his own bad meal or unhappy holiday but also for that of his guests or family: see *Jackson v. Horizon Holidays Ltd.* [1975] 1 WLR 1468 as explained in *Woodar Investment Development Ltd. v. Wimpey Construction UK Ltd.* [1980] 1 WLR 277, 283-284, 293-294, 297, 300-301.
>
> There is therefore much to be said for drawing a distinction between cases where the ownership of goods or property is relevant to prove that the plaintiff has suffered loss through the breach of a contract other than a contract to supply those goods or property and the measure of damages in a supply contract where the contractual obligation itself requires the provision of those goods or services. I am reluctant to express a concluded view on this point since it may have profound effects on

> commercial contracts which effects were not fully explored in argument. In my view the point merits exposure to academic consideration before it is decided by this House. Nor do I find it necessary to decide the point since, on any view, the facts of this case bring it within the class of exceptions to the general rule to which Lord Diplock referred in *The Albazero*." (112 C-F)

465. In *Darlington Borough Council v Wiltshire Northern Limited* [1995] 1 WLR 68 Steyn LJ expressed respectful agreement with the wider principle expanded by Lord Griffiths in *Linden Gardens* with the qualification that in his view it is not a precondition to the recovery of substantial damages in the field of building contracts or sale of goods that the plaintiff does propose to undertake the necessary repairs:

"*The exception contained in Lord Griffiths's speech.*

> The rationale of Lord Griffiths's wider principle is essentially that, if a party engages a builder to perform specified work and the builder fails to render the contractual service, the employer suffers a loss. He suffers a loss of bargain or of expectation interest. And that loss can be recovered on the basis of what it would cost to put right the defects. While other members of the House of Lords expressed sympathy with this view they did not decide the point. The point has now been argued in some depth before us. We have also had the benefit of some academic comment on the point: John Cartwright, '*Remedies in Respect of Defective Buildings and Linden Gardens'* (1993) 9 Constr.L.J. 281 and I.N. Duncan Wallace, '*Assignment of Rights to Sue: Half a Loaf*' (1994) 110 LQR. 42. Subject to one qualification, it will be clear from what I said earlier that I am in respectful agreement with the wider principle. It seems to me that Lord Griffiths based his principle on classic contractual theory.
>
> The qualification is, however, important. Lord Griffiths observed, at p.97:
>
> "The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract."
>
> There was apparently no argument on this point in the House of Lords. For my part, I would hold that in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages. It is also no precondition to the recovery of substantial damages that the plaintiff does propose to undertake the necessary repairs. In this field English law adopts an objective approach to the ascertainment of damages for breach of contract. On this point I am in agreement with the observations of Kerr LJ in *Dean v*

> *Ainley* [1987] 1 WLR 1729, 1737H-1738A and Staughton LJ in *Ruxley Electronics and Construction Ltd. V Forsyth* [1984] 1 WLR 650, 656A-657D. Subject to this qualification, I am in respectful agreement with Lord Griffiths's wider principle and I gratefully adopt it as part of my reasoning." (80)

466. In obiter dicta Dillon LJ while expressing no view on Lord Griffiths' wider principle also drew attention to suggestions that his qualification that the court would wish to be satisfied that the repairs have been or are likely to be carried out was not the subject of argument during the hearing of the appeal of the *Linden Gardens* case and was in fact contrary to two Court of Appeal authorities:

> "In the *McAlpine* case Lord Griffiths suggested a wider principle which received a measure of support obiter from Lord Keith of Kinkel and Lord Bridge of Harwich. Mr Furst urged us to decide this case on Lord Griffiths's wider principle. But I do not find it necessary to consider Lord Griffiths's principle, and I prefer not to, since it has been suggested that Lord Griffiths' formulation is, at least in one respect, still too narrow. It seems that Lord Griffiths' formulation was not the subject of argument during the hearing of the *McAlpine* appeal. It includes the statement, at p.97:
>
> "who actually pays for the repairs is no concern of the defendant who broke the contract. The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract."
>
> This wording seems to be founded on the judgment of Neill LJ in *Jones v Stroud District Council* [1986] 1 WLR 1141, 1150H. But in *Dean v Ainley* [1987] 1 WLR 1729, 1737-1738. Kerr LJ thought it unnecessary for a plaintiff claiming the cost of making food as damages for defective work to show that he intended to make good the defects, and in *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 1 WLR 650, 657F Staughton LJ agreed with Kerr LJ. "

467. In *Alfred McAlpine Construction Limted v Panatown Limited* [2001] 1 AC 518 a building contractor entered into a contract with an employer for the construction of an office block and car park on a site owned by another company in the same group as the employer. In addition to the contract with the employer the building contractor also entered into a duty of care deed with the owner of the site by which the owner acquired a direct remedy against the contractor in respect of any failure by the contractor to exercise reasonable skill care and attention to any matter within the scope of the contractor's responsibilities under the contract. Serious defects were found in the building and the employer served notice of arbitration claiming damages for defective work and delay. The arbitrator rejected the building contractor's preliminary objection that the employer having suffered no loss was not entitled to recover substantial damages under the contract and made an interim award. The House of Lords held by a majority of three to two that since the duty of care deed

provided the owner with a direct remedy against the contractor for the losses resulting from the contractor's defective performance of the contract with the employer there were no grounds upon which the employer, having suffered no financial loss, was entitled to anything more than nominal damages.

468. There was much discussion by their Lordships of Lord Griffiths' speech in *Linden Gardens* and to a lesser extent the judgment of Steyn LJ in *Darlington.* However before turning to that discussion I draw attention to two facts. First the ratio of the decision of the majority was based on the narrow ground that by reason of the duty of care deed between the contractor and the owner of the site, the owner had a direct remedy against the contractor for the losses resulting from his defective performance of the contract with the employer so that the employer suffered no financial loss. This was not a case in which the effect of the decision was that there was no party who had a remedy arising out of the defective performance. Second the claimant was not and was not intended to be the beneficiary of the services which the defendant agreed to supply. Neither of these factors is applicable or present in the case which I have to decide. Moreover it follows from the former that in my view the observations made by the majority on Lord Griffiths' wider principle were obiter dicta.

469. The majority comprised Lords Clyde, Jauncey of Tullichettle and Browne-Wilkinson. Lord Clyde expressed the view that it should not be a ground of escaping liability that the party who instructed the work was not the one who sustained the loss or all of the loss which in whole or part has fallen on another member or members of the group:

> "But the resolution of the problem in any particular case has to be reached in light of its own circumstances… Where for its own purposes a group of companies decides which of its members is to be the contracting party in a project which is of concern and interest to the whole group I should be reluctant to refuse an entitlement to sue on the contract on the grounds simply that the member who entered the contract was not the party who suffered the loss on a breach of the contract. But whether such an entitlement is to be admitted must depend upon the arrangements which the group and its members have decided to make both among themselves and with the other party to the contract. In the present case there was a plain and deliberate course adopted whereby the company with the potential risk of loss was given a distinct entitlement directly to sue the contractor and the professional advisers. In the light of such a clear and deliberate course I do not consider that an exception can be admitted to the general rule that substantial damage can only be claimed by a party who has suffered substantial loss"(536A-E).

470. It is clear from this extract both that the ratio of Lord Clyde's decision was the narrow ground to which I have referred and also that without that peculiar feature of the case he would have been sympathetic to an entitlement to sue on the part of a party who did not suffer the loss on the breach of contract.

471. Lord Jauncey decided the case on similar grounds:

> "However there is a further matter to be considered in this case, namely the DCDE [the deed] in favour of UIPL [the owner]. This, in my view is equally relevant to the broader as to the narrow ground. The former as does the latter seeks to find a rational way of avoiding the "black hole". What is the justification for allowing A to recover from B as his own loss, a loss which is truly that of C when C has his own remedy against B. I would submit none. The complications and anomalies to which Lord Diplock referred in *The Albazero* [1977] AC 774, 848 F as arising from two contracts of carriage for the same goods could arise equally if not more sharply were Panatown entitled to claim substantial damages on the broader ground. If Panatown have a claim for loss of expectation of interest measured by the cost of achieving what they contracted for and UIPL have a separate claim in relation to the same defects McAlpine cannot be mulcted twice over in damages. Panatown's claim for loss of expectation of interest can have only nominal value when UIPL has an enforceable claim and Panatown has no intention of taking steps to remedy the breach. Were it otherwise the great practical difficulties referred to by my noble and learned friend Lord Browne-Wilkinson at the end of his speech would arise. Lord Griffiths [1994] 1AC 85, 1997 E in a passage to which I have already referred accepted that A should not have a remedy for loss of cargo which had caused him no financial loss when C had a direct right of action. It would be surprising if he had taken a different view of the position of *Panatown* and UIPL. I therefore consider that Panatown is not entitled to recover under Mr Friedman's broader ground not only because they have suffered no financial loss but also because UIPL have a direct right of action against McAlpine under the DCDE". (574 E-H).

472. Lord Browne-Wilkinson also reached his decision on similar grounds: see 576H - 577B.

473. Turning to the discussion of Lord Griffiths' broad proposition Lord Clyde stated:

> "I turn accordingly to what was referred to in the argument as the broader ground. But the label requires more careful consideration. The approach under *The Albazero* exception has been one of recognising an entitlement to sue by the innocent party to a contract which has been breached, where the innocent party is treated as suing on behalf of or for the benefit of some other person or persons, not parties to the contract, who have sustained loss as a result of the breach. In such a case the innocent party to the contract is bound to account to the person suffering the loss for the damages which the former has recovered for the benefit of the latter. But the so-called broader grounds involves a significantly different approach. What it proposes is that the innocent party to the contract

should recover damages for himself as a compensation for what is seen to be his own loss. In this context no question of accounting to anyone else arises. This approach however seems to me to have been developed into two formulations.

The first formulation, and the seeds of the second, are found in the speech of Lord Griffiths in the *St Martins* case [1994] 1 AC 85, 96. At the outset his Lordship expressed the opinion that Corporation, faced with a breach by McAlpine of their contractual duty to perform the contract with sound materials and with all reasonable skill and care, would be entitled to recover from McAlpine the cost of remedying the defect in the work as the normal measure of damages. He then dealt with two possible objections. First, it should not matter that the work was not being done on property owned by Corporation. Where a husband instructs repairs to the roof of the matrimonial home it cannot be said that he has not suffered damage because he did not own the property. He suffers the damage measured by the cost of a proper completion of the repair:

"In cases such as the present the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver." (see p.97.)

The second objection, that Corporation had in fact been reimbursed for the cost of the repairs was answered by the consideration that the person who actually pays for the repairs is of no concern to the party who broke the contract. But Lord Griffiths added, at p.97:

"The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract."

In the first formulation this approach can be seen as identifying a loss upon the innocent party who requires to instruct the remedial work. That loss is, or may be measured by, the cost of the repair. The essential for this formulation appears to be that the repair work is to be, or at least is likely to be, carried out. This consideration does not appear to be simply relevant to the reasonableness of allowing the damages to be measured by the cost of repair. It is an essential condition for the application of the approach, so as to establish a loss on the part of the plaintiff. Thus far the approach appears to be consistent with principle, and in particular with the principle of privity. It can cover the case where A contracts with B to pay a sum of money to C and B fails to do so. The loss to A is in the necessity to find other funds to pay to C and provided that he is going to

pay C, or indeed has done so, he should be able to recover the sum by way of damages for breach of contract from B. If it was evident that A had no intention to pay C, having perhaps changed his mind, then he would not be able to recover the amount from B because he would have sustained no loss, and his damages would at best be nominal.

But there can also be found in Lord Griffiths's speech the idea that the loss is not just constituted by the failure in performance but indeed consists in that failure. This is the 'second formulation'. In relation to the suggestion that the husband who instructs repair work to the roof of his wife's house and has to pay for another builder to make good the faulty repair work has sustained no damage Lord Griffiths observed, at p.97:

"Such a result would in my view be absurd and the answer is that the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder."

That is to say that the fact that the innocent party did not receive the bargain for which he contracted is itself a loss. As Steyn LJ put it in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, 80: "He suffers a loss of bargain or of expectation interest." In this more radical formulation it does not matter whether the repairs are or are not carried out, and indeed in the *Darlington* case that qualification is seen as unnecessary. In that respect the disposal of the damages is treated as *res inter alios acta*. Nevertheless on this approach the intention to repair may cast light on the reasonableness of the measure of damages adopted. In order to follow through this aspect of the second formulation in Lord Griffiths's speech it would be necessary to understand his references to the carrying out of the repairs to be relevant only to that consideration.

I find some difficulty in adopting the second formulation as a sound way forward. First, if the loss is the disappointment at there not being provided what was contracted for, it seems to me difficult to measure that loss by consideration of the cost of repair. A more apt assessment of the compensation for the loss of what was expected should rather be the difference in value between what was contracted for and what was supplied. Secondly, the loss constituted by the supposed disappointment may well not include all the loss which the breach of contract has caused. It may not be able to embrace consequential losses, or losses falling within the second head of *Hadley v Baxendale* 9 Exch 341. The inability of the wife to let one of the rooms in the house cased by the inadequacy of the repair, does not seem

readily to be something for which the husband could claim as his loss. Thirdly, there is no obligation on the successful plaintiff to account to anyone who may have sustained actual loss as a result of the faulty performance. Some further mechanism would then be required for the court to achieve the proper disposal of the monies awarded to avoid a double jeopardy. Alternatively, in order to achieve an effective solution, it would seem to be necessary to add an obligation to account on the part of the person recovering the damages. But once that step is taken the approach begins to approximate to *The Albazero* exception. Fourthly, the "loss" constituted by a breach of contract has usually been recognised as calling for an award of nominal damages, not substantial damages.

The loss of an expectation which is here referred to seems to me to be coming very close to a way of describing a breach of contract. A breach of contract may cause a loss, but is not in itself a loss in any meaningful sense. When one refers to a loss in the context of a breach of contract, one is in my view referring to the incidence of some personal or patrimonial damage. A loss of expectation might be a loss in the proper sense if damages were awarded for the distress or inconvenience caused by the disappointment. Professor Coote ("Contract Damages, *Ruxley* and the Performance Interest" [1997] CLJ 537) draws a distinction between the benefits in law, that is bargained-for contractual rights, and benefits in fact, that is the enjoyment of the fruits of performance. Certainly the former may constitute an asset with a commercial value. But while frustration may destroy the rights altogether so that the contract is no longer enforceable, a failure in the obligation to perform does not destroy the asset. On the contrary it remains as the necessary legal basis for a remedy. A failure in performance of a contractual obligation does not entail a loss of the bargained-for contractual rights. Those rights remain so as to enable performance of the contract to be enforced, as by an order for specific performance. If one party to a contract repudiates it and that repudiation is accepted, then, to quote Lord Porter in *Heyman v Darwins Ltd* [1942] AC 356, 399, "By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded." The primary obligations under the contract may come to an end, but secondary obligations then arise, among them being the obligation to compensate the innocent party. The original rights may not then be enforced. But a consequential right arises in the innocent party to obtain a remedy from the party who repudiated the contract for his failure in performance.

Both of these two formulations seek to remedy the problem of the legal black hole. At the heart of the problem is the doctrine

> of privity of contract which excludes the ready development of a solution along the lines of a *jus quaesitum tertio*. It might well be though that such a solution would be more direct and simple." (532D-534H)

474. As appears from the above extract, the requirement in the first formulation that the repairs should actually be carried out arises from the fact that without the claimant undertaking the expense of paying for the repairs it is impossible to identify a substantial loss which he has suffered. That problem arises out of the particular difficulties which arise where A contracts with B to provide services for the exclusive benefit of C. No such problem exists in this case where the Claimants have been deprived of 4,000 odd kilometres of test driving and the associated benefits. As to the second formulation Lord Clyde appears to have assumed Steyn LJ's gloss to it that it does not matter whether the repairs are or are not carried out. Lord Clyde did not adopt that second formulation together with Steyn LJ's gloss. However as he pointed out both formulations seek to remedy problem of the legal black hole at whose heart is the doctrine of privity of contract. In my view this illustrates that the problem which their Lordships were addressing is not one which arises in this case. It is because in such cases as *Linden Gardens*, *Darlington* and *Panatown* the claimants did not stand to benefit directly under the contract from the services to be provided that resort was had to the concept of the interest in the performance of the contract as a right giving rise where performance is not carried out to a loss in itself. In this case the Claimants do not need to resort to such a principle or to the assertion of a performance interest. In my view this is a simple case of faulty or rather short delivery where the loss consists of being deprived of the services which should have supplied and the assessment of the loss for the purpose of calculating damages is by reference to the value of the services which should have been provided. To adopt Professor Coote's language the Claimants have been deprived of benefits in fact in the form of the enjoyment of the fruits of performance of the Service Agreement.

475. Both Lord Goff and Lord Millett, in dissenting speeches, expressed their approval of Lord Griffiths' wider principle and also of Steyn LJ's gloss to the effect that in the situation contemplated by Lord Griffiths' principle there is no requirement that the claimant should have incurred the expense of employing someone else to carry out the repairs. Lord Goff stated:

> "In the light of this preamble I wish to state that I find persuasive the reasoning and conclusion expressed by Lord Griffiths in his opinion in the *St Martins* case [1994] 1 AC 85 that the employer under a building contract may in principle recover substantial damages from the building contractor, because he has not received the performance which he was entitled to receive from the contractor under the contract, notwithstanding that the property in the building site was vested in a third party. The example given by Lord Griffiths of a husband contracting for repairs to the matrimonial home which is owned by his wife is most telling. It is not difficult to imagine other examples, not only within the family, but also, for example, where work is done for charitable purposes – as where a wealthy man who lives in a village decides to carry out

at his own expense major repairs to, or renovation or even reconstruction of, the village hall, and himself enters into a contract with a local builder to carry out the work to the existing building which belongs to another, for example to trustees, or to the parish council. Nobody in such circumstances would imagine that there could be any legal obstacle in the way of the charitable donor enforcing the contract against the builder by recovering damages from him if he failed to perform his obligations under the building contract, for example because his work failed to comply with the contract specification.

At this stage I find it necessary to return to the opinion of Lord Griffiths in the *St Martins* case. In the passage from his opinion [1994] 1 AC 85, 96-97 which I have already quoted, he gave the example of a husband placing a contract with a builder for the replacement of the roof of the matrimonial home which belonged to his wife. The work proved to be defective. Lord Griffiths expressed the opinion that, in such a case, it would be absurd to say that the husband has suffered no damage because he does not own the property. I wish now to draw attention to the fact that, in his statement of the facts of his example, Lord Griffiths included the fact that the husband had to call in and pay another builder to complete the work. It might perhaps be thought that Lord Griffiths regarded that fact as critical to the husband's cause of action against the builder, on the basis that the husband only has such a cause of action in respect of defective work on another person's property if he himself has actually sustained financial loss, in this example by having paid the second builder. In my opinion, however, such a conclusion is not justified on a fair reading of Lord Griffiths's opinion. This is because he stated the answer to be that

"the husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of that bargain by completing the roof repairs properly by the second builder."

It is plain, therefore, that the payment to the second builder was not regarded by Lord Griffiths as essential to the husband's cause of action.

The point can perhaps be made more clearly by taking a different example, of the wealthy philanthropist who contracts for work to be done to the village hall. The work is defective; and the trustees who own the hall suggest that he should recover damages from the builder and hand the damages over to them, and they will then instruct another builder, well known to them, who, they are confident, will do the work well. The philanthropist agrees, and starts an action against the first

> builder. Is it really to be suggested that his action will fail, because he does not own the hall, and because he has not incurred the expense of himself employing another builder to do the remedial work? Echoing the words of Lord Griffiths, I regard such a conclusion as absurd. The philanthropist's cause of action does not depend on his having actually incurred financial expense; as Lord Griffiths said of the husband in his example. He "has suffered loss because he did not receive the bargain for which he had contracted with the first builder"." (547A-548B).

476. Lord Goff in support of his overall conclusion referred to the decision of Oliver J in *Radford v DeFroberville* [1977] 1 WLR 1262 which he considered supported it:

> "I turn next to the authoritative judgment of Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262, for which I wish to express my respectful admiration. The case was concerned with a contract for the sale of a plot of land adjoining a house belonging to the plaintiff (the vendor) but occupied by his tenants, under which the defendant (the purchaser) undertook to build a house on the plot and also to erect a wall to a certain specification on the plot so as to separate it from the plaintiff's land. The plaintiff obtained judgment against the defendant for damages for breach of contract by reason of her failure to erect the dividing wall, but an issue arose as to the measure of the damages. The defendant having failed to build the dividing wall on the land purchased from the plaintiff, the plaintiff proposed to build a dividing wall on his own land, and claimed the cost of doing so from the defendant; whereas the defendant maintained that the appropriate measure of damages was the consequent diminution in the value of the plaintiff's property, which was nil. Oliver J rejected the defendant's contention. He held that the plaintiff had a genuine and serious intention of building the wall on his own land, and that this was a reasonable course of action for him to take. With regard to an argument by the defendant that, since the plaintiff did not himself occupy the property, he could not be said to have himself suffered damage by reason of the defendant's failure to build the wall, because he was not there to enjoy it, and that his only loss, therefore, was the diminution of the value of his reversion, Oliver J gave the following answer [1977] 1 WLR 1262, 1285:
>
> "Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff had a contractual right to have the work done and does in fact want to do it … As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions."

Oliver J here referred to *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468. The reference in this passage to the persons who would benefit by the building of the wall was a reference to the plaintiff's tenants.

Oliver J's reliance on the simple fact that the plaintiff had a contractual right to have the wall built constitutes a plain assertion of the plaintiff's right to recover damages on the basis of damage to his performance interest, and is surely inconsistent with the submission of McAlpine, in the present case, that the mere fact that the buildings were to be constructed on the land of UIPL, rather than on the land of Panatown, debars Panatown from recovering substantial damages for the defective performance of McAlpine in the construction of the buildings. Indeed the decision of Oliver J that the plaintiff in the case before him was entitled to substantial damages is of itself inconsistent with McAlpine's submission, since the damages were awarded in respect of a failure by the defendant to build on land which was not the property of the plaintiff.

In the course of his judgment Oliver J, relying on a passage from the judgment of Sir Robert Megarry V-C in *Tito v Waddell (No.2)* [1977] Ch 106, 331-334, concluded [1977] 1 WLR 1262, 1238 that there were three questions which he had to answer:

"First, am I satisfied on the evidence that the plaintiff has a genuine and serious intention of doing the work? Secondly, is the carrying out of the work on his own land a reasonable think for the plaintiff to do? Thirdly, does it make any difference that the plaintiff is not personally in occupation of the land but desires to do the work for the benefit of his tenants?"

The first two questions he answered in the affirmative; the third he answered in the negative. I think it right however to record that the issue of reasonableness which arose in the second question was not the same issues as that raised in Lord Cohen's statement of principle in *East Ham Corpn v Bernard Sunley & Sons* [1996] AC 406; it arose because Oliver J had to consider whether, although the defendant's breach of contract related to a failure to build the wall on her land which she had purchased from the plaintiff, the plaintiff was entitled to claim the cost of building a similar wall on his own land. It followed that the second question was, as Oliver J said (see [1977] 1 WLR 1262, 1284E-F) "really one of mitigation", and that it was in that context that he had to consider whether the proposed action of the plaintiff was a reasonable step for him to take.

In *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, the defendants contracted to construct a swimming

pool on the plaintiff's land. The contract specification required that the deep end of the pool should be 7 feet 6 inches deep. The pool was constructed, but the deep end was only 6 feet deep. The plaintiff claimed damages in the sum required to reconstruct the pool to the specified depth, viz £21,560. The trial judge rejected that claim, but awarded the plaintiff damages in the sum of £2,500 for loss of amenity. The Court of Appeal allowed the plaintiff's appeal from that decision, and awarded him the full sum claimed by him. The House of Lords allowed the defendant's appeal from the decision of the Court of Appeal, on the ground that the expenditure required to reconstruct the pool to the specified depth was out of all proportion to the benefit to be obtained, and restored the judgment of the trial judge. The plaintiff invoked the decision of Oliver J in *Radford v De Froberville* as showing that he was entitled to damages for failure to comply with the contract to provide a swimming pool to his specification, notwithstanding that the extra depth was of no objective value; but on the facts of the case your Lordships' House held that the award of damages which the plaintiff sought was unreasonable and so could not be upheld. In support of this conclusion, the House was able to invoke not only English authority, notably the speech of Lord Cohen in *East Ham Corpn v Bernard Sunley & Sons Ltd*, but also authoritative statements of principle from the High Court of Australia (viz *Bellgrove v Eldridge* (1954) 90 CLR 613, 617-618) and the United States (viz *Jacob & Youngs Inc v Kent* (1921) 129 NE 889, 891-892, per Cardozo J). It is however plain from the opinions of the Appellate Committee that they regarded Oliver J's judgment in *Radford v De Froberville* [1977] 1 WLR 1262 as an authoritative and useful statement of legal principle: see, e.g., the *Ruxley* case [1996] AC 344, 360, per Lord Mustill. And, as Oliver J said in *Radford v De Froberville* [1977] 1 WLR 1262, 1270:

"If [the plaintiff] contracts for the supply of that which he thinks serves his interests—be they commercial, aesthetic or merely eccentric—then if that which he contracts for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."

I respectfully agree with this proposition, the last few words of which can be regarded as concerned with the issue of reasonableness which arose in the *Ruxley Electronics* case [1996] AC 344. It cannot be said that, in the present case, the breach of contract alleged by Panatown is "technical", or that Panatown is seeking an "uncovenanted" profit. Moreover

Oliver J's proposition, and indeed his decision, are, as I have already indicated, inconsistent with the argument now advanced on behalf of McAlpine that the employer under a building contract is unable to recover substantial damages for breach of the contract if the work in question is to be performed on land or buildings which are not his property. Oliver J's proposition is, in my opinion, equally applicable where the work contracted for is to be performed on another person's property for family reasons, or (as in the present case) for the benefit of a group of companies of which the plaintiff is a member, or for purely charitable reasons, or for any other reason for which the plaintiff thinks it appropriate to enter into such a contract—as for example in the case of a contract by the defendant to build a wall on her own land, as in *Radford v De Froberville* itself." (549C-551F)….

"I would however go further. I do not regard Lord Griffiths's broader ground as a departure from existing authority, but as a reaffirmation of existing legal principle. Indeed, I know of no authority which stands in its way. On the contrary, there have been statements in the cases which provide support for his view. Thus in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] I WLR 68, 80, Steyn LJ described Lord Griffiths's broader ground as based on classic contractual theory, a statement with which I respectfully agree. Moreover, Lord Griffiths's reasoning was foreshadowed in the opinions of members of the Appellate Committee in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] I WLR 277; see especially the opinion of Lord Keith of Kinkel, at pp 297-298, and in addition the more tentative statements of Lord Salmon, at p 291, and Lord Scarman, at pp 300- 301. Furthermore, as I have just indicated, full recognition of the importance of the performance interest will open the way to principled solution of other well-known problems in the law of contract, notably those relating to package holidays which are booked by one person for the benefit not only of himself but of others, normally members of his family (as to which see *Jackson v Horizon Holidays Ltd* [1975] I WLR 1468), and other cases of a similar kind referred to by Lord Wilberforce in his opinion in the *Woodar Investment* case [1980] I WLR 277, 283 – cases of an everyday kind which are calling out for a sensible solution on a principled basis. Even if it is not thought, as I think, that the solution which I prefer is in accordance with existing principle, nevertheless it is surely within the scope of the type of development of the common law which, especially in the law of obligations, is habitually undertaken by appellate judges as part of their ordinary judicial function." (552H-553D).

477. Of particular significance in the present context is the fact that Lord Goff in approving Lord Griffiths' opinion considered that the payment to the second builder was rightly not regarded by Lord Griffiths as essential to the husband's cause of action and that he saw no inconsistency between that proposition on the one hand and the decision of Oliver J in *Radford v DeFroberville* which he also approved on the other. The significance of this lies in the fact that Mr Tregear relied on the passage of Oliver J's judgment quoted by Lord Goff as authority for the proposition that the claimants in this case have suffered no substantial loss because they did not purchase the withheld kilometres elsewhere. Mr Tregear relied on Oliver J's first question as to whether he was satisfied on the evidence that the plaintiff had a genuine and serious intention of doing the work and his finding that he was entirely satisfied that the plaintiff genuinely wanted the work done and intended to expend any damages awarded on carrying it out. It was on that basis that he held that the damages ought to be measured by the cost of the work unless there were other considerations pointing to a different measure [1977] 1 WLR 1262 at 1284 E. If the view of Lord Goff and Lord Millett, who in the passage of his speech cited below agreed with Lord Goff on this point, represents the current state of the law it is clear that even where a claimant contracts for the provision of services which confer no direct benefit on him or his property he may recover damages for breach of contract measured by the cost of obtaining those services elsewhere (at least in the context of a building contract and other contracts for the supply of work) and materials where the claim is in respect of defective or incomplete work (see per Lord Millett 591 B), even if he has not incurred the cost of purchasing the services elsewhere. As I understand Lord Goff's and Lord Millett's speeches that is because in their view the claimant's right to damages is based on his interest in performance of the contract and because he has suffered loss because he did not receive the bargain for which he had contracted with the defendant.

478. It is notable in my view that Lord Goff considered that it could not be said in the context of *Panatown* that the breach of contract alleged was "technical" or that *Panatown* was seeking an "uncovenanted" profit. In my view not only could the same things not be said in this case, that is so even if the views of Lord Goff and Lord Millett on this point do not represent the current state of the law. That is because they were addressing the problem raised where the services for which the claimant paid were not contracted to be provided to him for his personal benefit. In the present case the 4,000 kilometres were purchased by the Claimants for their own benefit. In *Linden Gardens* Lord Griffiths said that in cases such as the one he was dealing with the person who places the contract has suffered financial loss because he has to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver. In this case in my view the Claimants have suffered financial loss because they purchased among other things the right to 4000 odd kilometres of test driving which had a value of which they have been deprived. Their loss is not dependent on them having spent money buying those kilometres elsewhere.

479. Lord Millett held:

> "My Lords, Lord Griffiths was not proposing to depart from the general rule that a plaintiff can only recover compensatory damages for breach of contract in respect of a loss which he has himself sustained. He was insisting that, in certain kinds of

contract at least, the right to performance has a value which is capable of being measured by the cost of obtaining it from a third party. In the *Darlington Borough Council* case [1995] I WLR 68 Steyn LJ expressed himself as being in agreement with Lord Griffiths's broad principle, which he considered to be based on classic contractual theory. Indeed, he adopted it as part of his reasoning. But he held that the case was also covered by the rule in *Dunlop v Lambert*, and I have a difficulty with this I do not think that it can be both. The rule in *Dunlop v Lambert* is an (incidental) exception to the general rule that a plaintiff can only recover damages for his own loss. Lord Griffiths's broader principle treats the plaintiff as recovering for his own loss, and is thus an application of the general rule and not an exception to it. For the same reason I cannot accept the Court of Appeal's attempt in the present case to unify the narrow and broad grounds by treating the broad ground as "the underlying principle" of the narrow. If the House had felt itself free to adopt the broad ground in the *St Martins* case, then logic would have required it to adopt it in place of and not in addition to the narrow ground." (587B-E)…

"Whether the law should take account of the performance interest when considering the measure of damages for breach of contract arose clearly in the seminal case of *Radford v De Froberville* [1977] I WLR 1262. The landlord of premises let to tenants had obtained a covenant from the owner of neighbouring land to build a garden wall on the neighbour's side of the boundary. The wall was not built. The landlord sued on the covenant for damages, claiming the cost of building a similar wall on his own side of the boundary. Oliver J found that the absence of the wall caused no reduction in value to the landlord's reversionary interest, and that the landlord (as opposed to his tenants) would derive no amenity or other advantage from having the wall built. The defendant contended that, since the landlord had suffered no loss, he was entitled to nominal damages only. The judge found that the landlord intended to apply the damages in building the wall in order to provide his tenants with the amenity which the promised wall would have done, and that this was a reasonable course for him to take. On these findings Oliver J awarded the landlord the cost of building the wall. He said, at p 1270:

"Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his

interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."

This is the language of Lord Griffiths's broad ground. Moreover, Oliver J raised the question of the tenants' interest, recalling the defendant's argument that the landlord was merely a landlord with an investment property and that he was not entitled to damages for a loss suffered by his tenants who were strangers to the contract. He dealt with the point, at p 1285:

"Whilst I see the force of this, I do not think that it really meets the point that, whatever his status, the plaintiff had a contractual right to have the work done and does in fact want to do it. I refrain from expressing any view about what the position would be if his motives were merely capricious, for there is no suggestion of anything of that sort. As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions. The recent case of *Jackson v Horizon Holidays Ltd* [1075] I WLR 1468 demonstrates that the plaintiff may obtain damages for breach of a contract entered into for the benefit of himself and other persons not parties to the contract."

This is the language of defeated expectation with substantial damages being awarded for the loss of the performance interest.

My Lords, Oliver J's judgment has been very influential. His test of reasonableness was approved and applied by your Lordships' House in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. I believe that it provides the key to the present case. The similarity of the two cases is striking. Both are concerned with building contracts in circumstances where performance would benefit a third party to the contract but not the promisee. I would draw particular attention to the fact that in *Radford v De Foberville* [1977] I WLR 1262 the proper measure of damages was taken to be the cost of doing the promised work (ie fulfilling the landlord's contractual expectation) and not the tenants' loss of amenity. No independent attempt was made to evaluate this.

The seed was planted more than 20 years ago. It has been long in germination, but it has been watered and nurtured by favourable judicial and academic commentators in the meantime. I think the time has come to give it the imprimatur

of your Lordships' House. I am not impressed by the argument that such a radical change, with the attendant risk of opening the floodgates to capricious and complex claims to damages in unforeseen situations of every kind, should be left to Parliament. In the first place, I do not think that it is a radical change. I respectfully agree with Steyn LJ in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] I WLR 68 that it is based on orthodox contractual principles. And in the second place, the development of the remedial response to civil wrongs and the appropriate measure of damages are matters which have traditionally been the province of the judiciary. For the present I would restrict the broad ground to building contracts and other contracts for the supply of work and materials where the claim is in respect of defective or incomplete work or delay in completing it. I would not exclude the claim for damages for delay, since the performance interest extends to having the work done timeously as well as properly. There is no difficulty in quantifying the loss due to delay, at least in the family or group context. In the case of building contracts the broad ground is in line with the principle that the prima facie measure of damages is the cost of repair rather than the reduction in the market value of the property or any loss of amenity, even where the cost of repair is substantially greater, subject only to the qualification that the carrying out of the repairs must be a reasonable course to adopt: see *Bellgrove v Eldridge* [1954] 90 CLR 613 and *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406.

…

Moreover, the question must be considered from a wider perspective than merely defective work. As my noble and learned friend, Lord Goff, observes, unless the law recognises the performance interest it can provide no remedy to the building employer if the contractor repudiates the contract before he has done any work at all, and the building employer has to engage another contractor to do the work at a higher price. This would be manifestly unjust, and to defend it by saying that the loss is suffered by the building owner (who in fact has suffered none) and not by the building employer is nothing short of absurd.

The broad ground may be more readily applicable where the contracting party had a legitimate interest, though not necessarily a commercial one, in placing the order for the services to be supplied to the third party. Where there is a family or commercial relationship between them, as in the present case, any such requirement is easily satisfied, though it would not be right to limit the application of the principle to cases where such a relationship exists. The charitable donor

> has a legitimate interest in the object of his charity. But I do not think that the existence of such an interest should be seen as a separate or necessary requirement. It is rather an aspect of the test adopted by Oliver J, that is to say, reasonableness. There is much to be said for the view expressed by Lord Scarman in the *Woodar* case that the fact that a contracting party has required services to be supplied at his own cost to a third party is at least prima facie evidence of the value of those services to the party who placed the order.
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> *Must the building employer intend to carry out the work?*
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> Where the broad ground applies, the plaintiff recovers damages for his own loss, and accordingly in my opinion there can be no question of requiring him to account for them to the third party. In the *St Martins* case Lord Griffiths drew attention to the fact that the person who places the contract suffers loss because he has to spend money to obtain the benefit of the bargain which the defendant had promised but failed to deliver. He added that the court would wish to be satisfied that the repairs had been or would be carried out. Professor Treitel has argued that Lord Griffiths was merely saying that the plaintiff could recover damages in respect of his own loss in making alternative arrangements. I do not think that this can be right. If the making of such arrangements were a precondition of recovery, it would follow that in their absence no such damages would be recoverable. But a plaintiff is bound to mitigate his loss. He cannot increase it by entering into other arrangements. I respectfully agree with Steyn LJ in the *Darlington Borough Council* case [1995] I WLR 68 that what the plaintiff proposes to do with his damages is of no more concern to the party in breach in a three-party case than it is in a two-party case. In my opinion, it may be evidence of the reasonableness or otherwise of the plaintiff's claim to damages, but it cannot be conclusive."(589F-591C, 591H-592G).

480. Lord Jauncey did not consider that Lord Griffiths intended to hold that a plaintiff who had neither incurred expenditure on a third party's property nor had any interest in so doing was nevertheless entitled to recover substantial damages for breach of contract by the contractor. Moreover he doubted if Lord Griffiths would have expressed the views he did if he had been required to address the situation where *Panatown* had neither spent money in entering into the contract nor intended to do so in remedying the breach and had therefore suffered no loss thereby. Moreover while agreeing with Lord Goff that an employer under a building contract is able to recover substantial damages for breach of the contract if the work in question is to be performed on land or buildings which are not his property, he expressed the view that in such a case the employer's right to substantial damages will depend upon whether he has made good or intends to make good the effects of the breach. "This appears to be implicit in the speech of Lord Griffiths at page 97E and of Lord Keith of Kinkel at page 95F, to which I have already referred and the two passages in the judgment of Oliver J in

Radford v DeFroberville [1977] 1 WLR 1262, 1283 and 1285 to which my noble and learned friend has referred. This produces a sensible result and avoids the recovery of an "uncovenanted" profit by an employer who does not intend to take steps to remedy the breach (574C-D).

481. His views as to what Lord Griffiths intended were expressed in the following passage:

> "I do not find it entirely easy to reconcile Lord Griffiths's last observation with his reference to the promisee, St Martins, having suffered financial loss because they had to spend money. It is true that they did initially pay for the remedial work but they were reimbursed in full and cannot therefore be said to have suffered financial loss in the end of the day. Can it matter that they were reimbursed afterwards rather than being put in funds before they made payment? Lord Griffiths vouched his remarks about the second defence by reference to *Jones v Stroud District Council* [1986] 1 WLR 1141, in which the plaintiffs were unable to prove that they had paid for repair (sic) carried out to their building and rendered necessary by the defendant's negligence. In the *Jones* case Neill LJ, at pp 1150-1151, after referring to the general principle that a plaintiff who seeks to recover damages must prove that he has suffered loss continued:
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> "but if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired I do not consider that the court is further concerned with the question whether the owner has had to pay for repairs out of his own pocket or whether the funds have come from some other source."
>
> Such a case must be distinguished from that where the defect is in the property of a third party and the cost is met by that party or someone other than the plaintiff. In the latter case it is the third party rather than the plaintiff who has suffered financial loss. Given the detailed reasoning of Lord Griffiths in relation to McAlpine's first defence which proceeded upon the footing that the plaintiff although not the proprietor of the subjects had incurred or would have to incur expenditure to remedy the defect I do not think that he can have intended his remarks on the second defence to be taken as authority for the proposition that a plaintiff who had neither incurred expenditure on a third party's property nor had any interest in so doing was nevertheless entitled to recover substantial damages for breach of contract by the contractor. Indeed his comments on *The Albazero* would suggest that a plaintiff should not recover substantial damages for breach of contract when he had suffered no financial loss and when the third party had an independent right of action against the promisor. This would appear to be how Lord Keith of Kinkel understood Lord Griffiths' position because having expressed sympathy with the

view that a building contractor in breach of his contract should not be relieved of liability to pay substantial damages merely by reason that the other contracting party had no proprietary interest in the works at the time of the breach continued, at p 95:

"There is much force in the analysis that the party who contracted for the works to be done has suffered loss because he did not receive the performance he had bargained for and in order to remedy that has been required to pay for the defects to be put right by another builder."

It was not mere lack of performance but lack of performance plus the requirement to incur expenditure by the promisee which impressed Lord Keith. In my view Mr Friedman's definition of the broader ground goes far beyond what Lord Griffiths said in the *St Martins* case and consequently is not supported by his speech in that case.

In *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, where A entered into a contract with B for an erection of a building on C's land the Court of Appeal applied the narrow ground in the *St Martins* case. However, Steyn LJ, at p 80E, expressed his agreement with Lord Griffiths' wider principle which he defined as where a builder fails to render the contractual serve the employer suffers a loss of bargain or expectation of interest which loss can be recovered on the basis of what it would cost to remedy the defect. Steyn LJ went on to express the view that "in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages", thereby rejecting Lord Griffiths' qualification that the court would wish to be satisfied that the repairs have been or are likely to be carried out. *Darlington Borough Council v Wiltshier Northern Ltd* was a case in which the employer suffered no financial loss by reason of the contractors' breach and the third party, for whose benefit the works were to be varied out, had no independent right of action. On the reasoning of Steyn LJ it would appear that the employer in such a case could recover the cost of effecting the necessary repairs and then put the money in his own pocket. This would be a particularly unattractive result and certainly not one which Lord Griffiths would have advocated. Indeed it would seem to raise very sharply the question of whether the employer had suffered any financial loss at all.

Mr Friedman sought further support for the broader ground in the authoritative judgment of Oliver J, in *Radford v De Froberville* [1977] 1 WLR 1262. The plaintiff owned a large house and garden in Holland Park. The house was divided into six flats all of which were let and the tenants had the right to

> use the garden so far as not used for building. The plaintiffs sold part of the garden as a building plot for a consideration which included a covenant by the purchaser to build a dividing wall on the plot sold. The purchaser failed to build the wall and sold the plot. In an action for breach of contract Oliver J, being satisfied that the plaintiff intended to build a wall on his own side of the boundary, awarded him damages measured by the cost of carrying out this work. In response to the argument that the only loss which the plaintiff had sustained as a result of the breach was the diminution in the value of the property, which was little or nothing, Oliver J pointed out that the plaintiff had a contractual right to have the work done and did in fact want to do it and continued, at p 1285:
>
> "As it seems to me, the fact that his motive may be to confer what he conceives to be a benefit on persons who have no contractual rights to demand it cannot alter the genuineness of his intentions."
>
> The facts in *Radford* were far removed from those in the *St Martins* case or in the present case. The plaintiff conveying the plot to the purchaser in consideration *inter alia* of the covenant had effectively paid for the works. These works were for the benefit of his property and the tenants therein and he proposed to carry out substitute works on his own property at his own expense. Oliver J's dictum that the plaintiff had a contractual right to have the work done was thus made in circumstances different from those addressed by Lord Griffiths. The plaintiffs' loss was not merely one of bargain or expectation of interest—it was the loss of the covenanted and paid for works with their aforementioned benefits. I do not therefore consider that it supports the broader ground as advanced by Mr Friedman."

482. It is thus apparent that Lord Jauncey neither supported Lord Griffiths' broader principle nor considered that it was in any event subject to Steyn LJ's gloss. Further it is apparent that he considered that the employer's right to substantial damages for breach of contract where the work was to be performed on land or buildings which were not his property depends on whether he has made good or intends to make good the effects of the breach. To that extent he agreed with Lord Clyde and disagreed with Lords Goff and Millett. It is however in my view of significance that he cited with approval the dicta of Neill LJ in *Jones v Stroud District Council* [1986] 1 WLR 1141 at 1150-1151, after referring to the general principle that a plaintiff who seeks to recover damages must prove that he has suffered loss:

> "But if property belonging to him has been damaged to an extent which is proved and the court is satisfied that the property has been or will be repaired, I do not consider that the court is further concerned with the question whether the owner has had to pay for repairs out of his own pocket or whether the funds have come from some other source."

Lord Jauncey said that such a case must be distinguished from that where the defect is in the property of the third party and the cost is met by that party or someone other than the plaintiff. In the latter case he said it is the third party rather than the plaintiff who has suffered financial loss (570E-F). This further illustrates the fact that in my view the conclusions which he reached were addressing a wholly different issue and factual situation from the one with which I am concerned. That is in my view further illustrated by his emphasising that the plaintiff's loss in *Radford* was not merely one of bargain or expectation of interest. Rather it was the loss of the covenanted and paid-for works. It is true that he also emphasised that the plaintiff in *Radford* proposed to carry out substitute works on his own property at his own expense, but it does not seem to me to follow from that that Lord Jauncey was thereby intending to lay down a general rule that in a contract for provision of services intended to confer a direct benefit on the claimant, his right to compensation in the event of non-delivery or short delivery is dependent on his having acquired or intending to acquire the services elsewhere. In my view this illustrates that the nature of the loss in *Radford* and *Panatown* was conceptually different from the nature of the loss in this case. In the former it was the cost of paying for the contracted-for work or remedial works to be carried out by an alternative builder. In the latter the loss is the loss of the value of the services which the claimants would have enjoyed if Spyker had provided them.

483. Lord Browne-Wilkinson decided the case on the narrow ground that, unusually, the third party who was intended to benefit from the contracted-for building works had an independent cause of action enabling it to recover the cost of repairs directly from the contractor. His remarks on Lord Griffiths' wider principle were thus also obiter. He said that he would assume that Lord Griffiths' broader ground is sound in law and that in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B), A can recover damages from B on the broader ground. To that extent he would appear to have sided with Lord Goff and Lord Millett on whether Lord Griffiths' wider principle is correct. Tantalisingly, however, although he referred to the division of opinion as to whether the contracting party A is accountable to the third party C for the damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide, and expressed the view that Lord Griffiths took that view, he did not express his own opinion on whether that view (the Steyn LJ gloss) was correct or not:

> "I turn now to the broader ground on which Lord Griffiths decided the *St Martins* case. He held that the building contractor (B) was liable to the promisee (A) for more than nominal damages even though A did not own the land at the date of breach. He held in effect that by reason of the breach A had himself suffered damage, being the loss of the value to him of the performance of the contract. On this view even though A might not be legally liable to C to provide him with the benefit which the performance of the contract by B would have provided, A has lost his "performance interest" and will therefore be entitled to substantial damages being, in Lord Griffiths's view, the cost to A of providing C with the benefit. In the *St Martins* case Lord Keith of Kinkel, Lord Bridge of Harwich and I all expressed sympathy with Lord Griffiths's broader view. However, I declined to adopt the broader ground

> until the possible consequences of doing so had been examined by academic writers. That has now happened and no serious difficulties have been disclosed. However, there is a division of opinion as to whether the contracting party, A, is accountable to the third party, C, for the damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide. Lord Griffiths in the *St Martins* case, at p 97G, took that view. But as I understand them Lord Goff of Chieveley and Lord Millett in the present case (in agreement with Steyn LJ in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, 80H) would hold that, in the absence of the specific circumstances of the present case A, is not accountable to C for any damages recovered by A from B.
>
> I will assume that the broader ground is sound in law and that in the ordinary case where the third party (C) has no direct cause of action against the building contractor (B) A can recover damages from B on the broader ground. Even on that assumption, in my judgment Panatown has no right to substantial damages in this case because UIPL (the owner of the land) has a direct cause of action under the DCD."(577C-G).

484. It would appear from the above analysis that:

i) The views expressed by all of their Lordships on Lord Griffiths' wider principle were obiter.

ii) There was majority support (Lords Goff, Millett and Browne-Wilkinson) for the view that Lord Griffiths' wider principle is correct.

iii) On the question whether Steyn LJ's gloss on Lord Griffiths' wider principle, namely that in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages and also no precondition to the recovery of substantial damages that the plaintiff does propose to undertake the necessary repairs, is correct, there was no majority either way. The view of Lords Goff and Millett was that it is correct. The view of Lords Clyde and Jauncey was that it is incorrect. Lord Browne-Wilkinson appeared to express no view either way.

iv) The decision in *Panatown* is not authority for the proposition that it is a precondition of recovering damages for failure to supply services to the claimant in breach of contract that the claimant must have purchased, or at least expressed an intention to purchase, elsewhere the services wrongly withheld.

485. Accordingly it does not seem to me that I am constrained by any of the authorities relied on by Mr Tregear to hold that the failure of the Claimants in this case to buy in from another Formula One team the kilometres withheld by Spyker in breach of contract is a bar to their recovering substantial damages for loss of the value of those

withheld kilometres or that it is inconsistent with proof of them having suffered substantial loss which is capable of being reflected in an award of more than nominal damages.

486. In my view the Claimants' entitlement to damages, assessed by reference to the value of the benefits wrongly withheld by Spyker, is supported by the principles classically stated in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 and *Robinson v Harman* (1848) 1 Ex. 850: namely, that they are entitled to be put in the same position as far as money can do it as they would have been in if the contract had been performed. It is supported by the approach to the assessment of damages for non-delivery of goods in section 51(3) Sale of Goods Act 1979 and the old common law authorities which that section reflects. It is supported by the decisions and approach in *Miles v Wakefield*, *National Coal Board v Galley* and *Royle v Trafford*. It is supported by analogy by the approach to the assessment of damage for delivery of inferior quality goods and services articulated by Sir Thomas Bingham MR in *Arrow Express Limited*. It is supported by the speech of Lord Nicholls in *Attorney-General v Blake*. Finally it is not in my view prohibited by or inconsistent with any authority which has been drawn to my attention by Mr Tregear.

487. In my view Mr de Garr Robinson is right in his submission that in principle the Claimants are entitled to be compensated by an award of damages for the loss suffered by them by reason of the failure of Spyker to provide 4,000-odd kilometres of test driving and the associated paddock pass and sponsorship benefits. That loss is to be assessed by reference to the value of the kilometres and associated benefits which should have been but were not provided. The assessment of that value is a matter of evidence. The value of the withheld benefits is not the same as or determined by, and is indeed conceptually quite distinct from, the contract price. The contract price may in an appropriate case be part of the evidence from which an inference may be capable of being drawn as to the value of the withheld services, but it may not. If there is evidence that the contract represented a good deal for the claimant, in that he acquired the right to the services contracted for for a price lower than the market price or their market value, any inference as to market value that might otherwise be drawn from the contract price must yield to such evidence and the inferences to be drawn from it. Equally if the evidence shows that it was a bad deal for the claimant the contract price must yield to such evidence as the more reliable source from which to draw inferences as to value.

488. Turning to the evidence in this case, in so far as Mr Tregear's submission as to the value of Friday morning testing is concerned, and in particular the proportion, if any, of the contract price attributable to Friday morning testing, its function should in my view be to serve as a warning to exercise caution when assessing the evidence as to the value of the missing kilometres and associated benefits. Given that the $3m payable under the Service Agreement included a contingent right to Friday morning testing subject to the acquisition of a Super Licence (and a contingent right to reserve driver status subject to the same and other conditions), evidence as to the value of 4,000 kilometres which produces a figure that is the same *pro rata* as the consideration in the Fee Agreement raises the forensic question as to why the *pro rata* rate should be the same for 4,000 kilometres without a contingent right to Friday morning testing and reserve driver status as the rate for 6,000 kilometres with such contingent rights.

489. I have considered that question when considering the evidence of the experts. Plainly Mr Zecchi's view that the value of 4,000 kilometres was probably $3-4 million reflected a view that the $3 million fee payable under the Fee Agreement was itself a very good deal for the Claimants. Indeed he described it as a good market price even for a rookie driver who does not qualify for a Super Licence. If the driver had a Super Licence and the unqualified right to do Friday testing, 6,000 kilometres would have been worth $6 million or $7 million in his view. In my view it is clear from Mr Zecchi's evidence that he considered the $3 million contract price as representing a very good deal for the Claimants, even on the assumption that there would be no Friday morning testing.

490. Mr Davies made reference to the $10 million fee provided for in the Super Aguri contract under which Mr Van der Garde was nominated as a third and Friday practice driver in each of the 2007 season Grands Prix. Even allowing for the fact that the Super Aguri contract nominated Mr Van der Garde as a third and Friday practice driver for each of the Grands Prix, Mr Davies submitted that the disparity between the figure of $10 million and Mr Gallagher's view that, with guaranteed Friday testing, the Spyker Service Agreement would have been worth $4.5-5 million, is too great to allow for any sensible appreciation to be made of "market value". In my view what this shows is that each contract is a bespoke negotiation and will depend on a number of circumstances including the financial position and needs of the parties at the relevant time. It certainly reinforces the importance of exercising caution.

491. It was also a feature of Mr Zecchi's evidence that he tended to bandy figures in rather general terms. However, I am struck by the coincidence between Mr Gallagher's view that at $3million the Spyker Agreement provided very good value to the Claimants and Mr Zecchi's view that even for a rookie driver without a Super Licence $3 million was a very good price for 6,000 kilometres of testing. (With an unqualified right to do Friday testing he put the market value at $6 million or $7 million.) It was a true coincidence of views in that Mr Gallagher was of the view (as was Mr Zecchi) that it was unlikely, based on Mr Van der Garde's performance, that he would obtain a Super Licence in 2007. Although their views on that matter were in my view inadmissible in construing the contract, they are in my view admissible and relevant in the context of weighing their evidence as to the market value both of the rights acquired under the Service and Fee Agreements and of the rights wrongly withheld.

492. I am also struck by the force of Mr Gallagher's evidence that a Formula One team in negotiating a pay-to-test drive agreement will at least seek to recover its costs and that those costs were typically in the order of $500 per kilometre. Although Mr Davies challenged that evidence on the basis that Mr Gallagher also put the figure at £320 to £340 per kilometre which did not take account of dollar sterling fluctuation, Mr Gallagher's answer to that was that Formula One Teams have to budget in advance and make their budgets on a fixed sterling dollar calculation, taking a view on likely exchange rates at the beginning of the season. Although I accept Mr Gallagher's answer to Mr Davies' challenge on the exchange rate point, the effect of Mr Davies' point, if it were a good one, would be to increase the cost per kilometre to $650 per kilometre, based on the engineers who confirmed to Mr Gallagher that testing costs £320 to £340 per kilometre. Thus, if anything, that would push up the costs and the

strong desire of any Formula One team to recover at least its costs in the price agreed with the driver.

493. In these circumstances, and bearing in mind the necessary imprecision in the exercise, I am persuaded by Mr de Garr Robinson's submission that it would be safe to conclude that the value of 4,000 kilometres in 2007 would have been at least US $2 million. It may well have been more than that. Given that at the time Mr Van der Garde would have had to negotiate a deal with another Formula One team, it would have been known that he had failed to obtain the necessary kilometres from Spyker, it may very well have been that he would have been seen as a distressed buyer. As already mentioned Mr de Garr Robinson did not invite me to take that into account in assessing value.

494. Any deal might well have arrived at a round figure. However, Mr de Garr Robinson was content to accept a *pro rata* reduction from $2 million to reflect the actual number of withheld kilometres. I have held that the number of withheld kilometres was in fact 3,730. Accordingly, in my judgment the value of the withheld kilometres was no less than US $1,865,000.

495. There was some discussion as to the correct date at which the value of the withheld kilometres should be assessed and the significance, if any, of that date. In principle it seems to me that the relevant date is the date on which the kilometres should have been provided. The Fee Agreement did not specify dates on which Spyker was required to make testing available. On the contrary, it was for Spyker to specify the dates. In those circumstances it is somewhat artificial to identify a date or dates when the kilometres should have been supplied. It is apparently the case that as it turned out, but unknown to the parties at the time the agreements were entered into, the availability of test driving kilometres was significantly reduced in 2008 by the FIA. It was also apparently the case that negotiating a test driving deal in the middle of the season was difficult. It does not seem to me that this reduces the value of the withheld kilometres. If anything, it might increase the value, but Mr de Garr Robinson disavowed reliance on any such increase.

496. If it be the case that by the time Spyker put it beyond its powers to provide the Claimants with the outstanding balance of 3730 kilometres it was too late for the Claimants to buy them in elsewhere, either because of the difficulty of buying kilometres in the middle of a Grand Prix season or because of the unanticipated contraction in the number of available test driving kilometres permitted by the FIA in 2008, it seems to me that it would be perverse and contrary to common sense and basic principles of the function and assessment of damages for breach of contract if for that reason the Claimants could be denied the right to compensation for loss of the value of the withheld kilometres either on the ground that they did not go into the market to buy them elsewhere or on the ground that that there was no market price for for the withheld kilometres. As to the former in my view the Claimants' loss for which they are entitled to be compensated is the loss of 3730 kilometres of test driving rather than the loss of any money spent on buying them in elsewhere. As to the latter the evidence to which I have referred enables the court to be satisfied that the value of the withheld kilometres was no less than $1,865,000 irrespective of whether it was too late for the Claimants to buy them in elsewhere.

497. I have already expressed my view that, notwithstanding Mr Gallagher's evidence that the package of paddock passes, space on the car suit and helmet associated with non-race weekend testing could be sold for between $100,000 and $200,000, the value of the benefits withheld by Spyker was not increased by any such amount, because I accept the evidence of both experts that those benefits are normally thrown in with the kilometres as part of a test driving package.

498. Accordingly, in my view the Claimants are entitled under this head of damages to an award of $1,865,000 to compensate them for the failure of Spyker to provide Mr Van der Garde with 3,730 kilometres of test driving and associated benefits.

Wrotham Park damages

499. This is the Claimants' second fall back claim. It is relied on by them only as an alternative to their primary claim for restitution and their secondary claim for damages for breach of contract assessed by reference to the value of the benefits wrongly withheld by Spyker. It thus falls for consideration only in the event that my conclusion on the second claim is wrong.

500. Two questions arise. First is this a suitable case for the award of *Wrotham Park* damages? Second if so how should the award of damages be calculated and in what amount?

501. In the Claimants' skeleton argument on remedies Mr de Garr Robinson submitted that the key principles to be distilled from the authorities in relation to *Wrotham Park* damages are:

i) Where a defendant has breached a contractual covenant the claimant may claim as damages a reasonable payment as a "quid pro quo" in respect of the hypothetical release of the covenant

ii) This claim is generally available and is not limited to the situation where damages are awarded in lieu of an injunction.

iii) The claim may be made even where it seems inapt in that the claimant would not have released the covenant if it had had the opportunity to do so. Such claims are allowed where to refuse them would perpetrate an injustice in that the claimant would receive no compensation even though his rights have been infringed and the defendant would be allowed to enjoy the fruits of his wrongdoing.

iv) The amount of the reasonable payment is to be assessed by reference, inter alia to the benefit the defendant expected to make from his breach.

In his skeleton Mr Davies accepted the first three principles. As to the fourth he drew attention to the fact that the reasonable payment in *Wrotham Park* itself was assessed at a very modest percentage (5%) of the benefit the defendant expected to make from his breach.

In his skeleton argument Mr Tregear questioned whether *Wrotham Park* damages are compensatory in nature and submitted that even if they are the scope for their

application is limited to cases involving the invasion of property rights and does not extend to cases involving a breach of contractual rights. He submitted that *Experience Hendrix v PPX* [2003] SFR 853 is consistent with that narrower approach to *Wrotham Park* since it concerned an invasion of the claimant's intellecutal property rights. He submitted that this species of award is not available in a case such as the present. There is no question of an invasion of property rights in this case which would justify such an approach. Further, and in any event, to hypothesise a negotiation for Spyker's release from the obligation to provide the balance of kilometrage is not only unjustified but also highly artificial.

502. In oral submission Mr Tregear significantly modified his submissions. He did not seek to maintain the submission that *Wrotham Park* damages are limited to cases involving the invasion of property rights and do not extend to cases involving a breach of contractual rights. This concession was in my view rightly and inevitably made. It is clear beyond argument that in his speech in *Attorney-General v Blake* Lord Nicholls in approving Brightman J's decision in *Wrotham Park* itself expressly held that an award of damages such as he made is available as a remedy for breach of contract.

503. Indeed Mr Tregear conceded that he could not submit that an award of *Wrotham Park* damages is not open to the court as an approach to quantum in this case. However he did submit that this is not a suitable case for such an award. In his submission the principle established by Brightman J was designed to address very particular and narrow circumstances in which the nature of the claimant's right which has been infringed is not one which, if not interfered with, would confer a financial benefit on the claimant so that an award of damages assessed by reference to financial loss would be inadequate as a remedy. Such is the case where the right which has been infringed is a restrictive covenant prohibiting the defendant from doing an act which, if done, would cause the claimant no financial loss. Although the nature of *Wrotham Park* damages has been analysed as compensating the claimant for breach of a secondary contractual right to insist on payment for releasing the defendant from his restricted covenant, application of that principle indiscriminately to any and every case where a positive covenant has been breached would subvert the expectation of the parties and undermine the established principles by reference to which damages for breach of a primary positive covenant are dependent on proof that they are necessary in order to restore the claimant, so far as can be achieved by a payment of money, to the same financial position he would have been in or even to the same general position he would have been in had it not been breached.

504. In response Mr de Garr Robinson submitted that whatever may be the origins of the principle there is nothing in the terms in which it has been formulated in the authorities to confine its application to cases of breach of restrictive covenants, invasion of property rights or damages in lieu of an injunction under Lord Cairns's Act. The test which has to be satisfied is whether it would be unjust to leave the claimant with no redress for an established breach of contract beyond nominal damages. There is no reason why such an outcome is restricted to cases of breach of a restrictive covenant, invasion of a property right or a case where damages are awarded only in lieu of an injunction. As to unsettling the legitimate commercial expectations of the parties, that he submitted would be the consequence of refusing a *Wrotham Park* award in a case such as this if neither restitution nor conventional damages to

compensate the claimant for financial loss are available. It would affront justice and commercial common sense if, having been paid $3 million for supplying the Claimants with 6,000 kilometres of test driving, Spyker were to be free to withhold 4,000 kilometres and retain the whole of the $3 million with no substantive legal redress available to the Claimants.

505. I am bound to say that I see force in the submissions of both Mr Tregear and Mr de Garr Robinson. Although the *Wrotham Park* award is now firmly established, its application in reported authorities appears to have been concentrated in cases involving either breach of restrictive covenant or invasion of property right or both and mostly in cases where damages have been sought in lieu of an injunction, although the Court of Appeal in *World Wide Fund for Nature v World Wrestling Federation Inc*. [2007] EWCH Civ 286; [2008] 1 WLR 445 held obiter in relation to the latter point that in a case where a covenantor has acted in breach of a restrictive covenant the court may award damages on the *Wrotham Park* basis notwithstanding that there is no claim for an injunction and that there could be no claim for an injunction. (473G Para 54 per Chadwick LJ with whom the other two members of the court agreed). This prompts the question why the principle has not been more widely applied to cases not involving property rights and not involving a breach of a restrictive covenant. Is it merely because it is predominantly in such cases that conventional compensatory damages for breach of contract are likely to prove an inadequate remedy? Or is it, as Mr Tregear would submit, because its wider application to claims for breach of a positive covenant not involving invasion of property rights or breach of a restrictive covenant would subvert the long established framework of compensatory damages for breach of contract?

506. In addressing these questions I have to proceed on the assumption that, contrary to what I have found, the claimants are not entitled to substantial damages for the failure of Spyker to supply 3,730 kilometres and associated benefits. I find that a difficult assumption to make on the facts of this case since it seems to me clear that the services withheld by Spyker had a significant value measurable in financial terms. But let it be assumed for the sake of argument that in fact the Claimants had made a catastrophically bad bargain and that the market value of 4,000 kilometres and associated benefits was a few hundred or a few thousand pounds. Let it further be assumed that Mr Van der Garde, having won $3 million in the lottery, had decided as an extravagant and irrational act to pay $3 million for what he could have purchased for a few hundred or thousand pounds. Or let it be supposed, contrary to what I have also found, that the fact that the Claimants did not purchase 3,730 kilometres and associated benefits elsewhere operates as a bar to recovery of substantial damages and demonstrates that they suffered no financial loss. In either of those hypothetical scenarios it would in my view in principle be no less unjust to confine the Claimants to an award of nominal damages than it would in the case of the plaintiffs in *Wrotham Park*. In both cases the contractual right infringed by the defendant would have had no financial value capable of attracting a conventional award of substantial compensatory damages. Does it make a difference that in *Wrotham Park* the financially valueless right which prevented recovery of conventional damages was a right to prevent the erection of houses on adjoining land whereas in my postulated example it would be the right to drive a Formula One car for 3,730 kilometres which had been purchased at an extravagant and irrational price or alternatively the Claimants' failure to buy in 3730 kilometres from an alternative source which acted

as a bar to recovering what would otherwise be substantial damages capable of being measured in financial terms?

507. It could be said that there is a generic difference between the two cases. In the case of the right of the plaintiffs in *Wrotham Park* – or indeed the plaintiff in *Radford v Defrobeville* the reason why the plaintiffs' rights were incapable of attracting more than nominal damages for their breach was that it was inherent in them that they were not designed to confer a direct benefit on the plaintiffs. The same is not necessarily the case in my postulated example. The purpose of the Service Agreeement was to further Mr Van der Garde's career prospects and, if performed, it would have conferred on him the benefit of driving a Formula One car for 3,730 kilometres and the opportunity thereby to improve his driving skills and to obtain financial benefits by obtaining a Formula One seat in subsequent years. In that case the reason why he would only recover nominal damages would not be intrinsic to the nature of the right itself but rather the result of the fact that he made a bad bargain or failed to buy in from elesewhere the services which were wrongfully withheld by Spyker. If unconstrained by authority I would not consider that this difference of itself would justify automatically disqualifying the Claimants in my hypothetical example from recovering *Wrotham Park* damages. Given the provenance of the *Wortham Park* principle, however, it seems to me that its application to a case such as this should not be countenanced without very great caution. It may be that for the very reason why a conventional award of compensatory damages is not available, a *Wrotham Park* award if granted would be unlikely to be substantial. Given that it presupposes a reasonable approach to the negotiation of the release of the defendant from performance of his contractual obligation, if the value to the claimant of performance of the obligation was modest it may be that that would be reflected in the outcome of a hypothetical reasonable negotiation. But that does not necessarily follow since the process of calculating *Wrotham Park* damages can include an element of reflecting the defendant's anticipated profits (or, as I would hold saving of expense) in the event of his being released from further performance of the contract and logically there is no necessary correlation between the latter and the value to the claimant of the contract being performed.

508. It is therefore necessary to decide whether the conclusion I would reach if unconstrained by authority is in fact so constrained.

509. Lord Nicholls summarised the decision in *Wrotham Park* in his speech in *Attorney-General v Blake*. "For social and economic reasons the court refused to make a mandatory order for the demolition of houses built on land burdened with a restrictive covenant. Instead, Brightman J made an award of damages under the jurisdiction which originated with Lord Cairns's Act. The existence of the new houses did not diminish the value of the benefited land by one farthing. The judge considered that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. He assessed the damages at 5% of the developer's anticipated profit, this being the amount of money which could reasonably have been demanded for a relaxation of the covenant." (282H-283B).

510. In *Wrotham Park* Brightman J refused to grant a mandatory injunction requiring the defendant to pull down houses built in breach of the restricted covenant in favour of the plaintiff on the ground that that would be an unpardonable waste of much needed houses. He therefore awarded damages under the jurisdiction which originated with

the Chancery Amendment Act 1858 (Lord Cairns's Act) to award damages in substitution for an injunction. The defendants argued that application of the basic rule in contract to measure damages by that sum of money which will put the plaintiff in the same position as he would have been in if the contract had not been broken would lead to nil or purely nominal damages because as the plaintiff conceded the value of the *Wrotham Park Estate* was not diminished by one farthing in consequence of the construction of a road and the erection of fourteen houses on the allotment site. If therefore he refused an injunction he ought to award no damages in lieu. Brightman J said that "that would seem, on the face of it, a result of questionable fairness on the facts of this case. …If for social and economic reasons, the court does not see fit in the exercise of its discretion to order demolition of the fourteen houses is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seems to demand a negative answer to this question." (812G-H).

511. Brightman J then considered cases in the fields of wayleave, infringement of patent and wrongful detention and use of goods. In each case the infringement caused no loss to the plaintiff who was nonetheless awarded damages assessed by reference to a reasonable sum which could have been charged if permission had been sought by the defendant to do the prohibited act. Brightman J asked himself the forensic question whether, as invited by the plaintiffs, he should apply a like principle "to a case where the defendant Parkside in defiance of protest and writ has invaded the plaintiff's rights in order to reap a financial profit for itself" (814H). The formulation of that question was couched not in terms of breach of contract but rather of invasion of the plaintiffs' rights. However the wrong as to which he was considering what was the appropriate remedy was not an unlawful interference with the plaintiffs' property. It was a breach of contract in the form of a restrictive covenant to the benefit of which the plaintiffs were entitled by reason of their ownership of property. This is reflected in the fact that the analysis on which he embarked was based on the extent and nature of the damages for breach of contract to which the plaintiffs were entitled.

> "In the present case I am faced with the problem what damages ought to be awarded to the plaintiffs in the place of mandatory injunctions which would have restored the plaintiff's rights. If the plaintiffs are merely given a nominal sum, or no sum, in substitution for injunctions, it seems to me that justice will manifestly not have been done.
>
> As I have said, the general rule would be to measure damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken. *Parkside* and the individual purchasers could have avoided breaking the covenant in two ways. One course would have been not to develop the allotment site. The other course would have been for *Parkside* to have sought from the plaintiffs a relaxation of the covenant. On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation, but for present purposes I must assume that they could have been induced to do so .In my judgment a just substitute for a mandatory

> injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from *Parkside* as a quid pro quo for relaxing the covenant."

512. The factual background in *Wrotham Park* involved a restrictive covenant designed to protect the plaintiffs' land and the legal background involved the inability of the plaintiffs to protect their rights by injunction so that the question of damages arose in the context of the jurisdiction to award damages under Lord Cairns' Act in lieu of injunction. However Brightman J did not in terms state that the award he made was confined to a situation in which those three circumstances were present or that his decision to award damages was dependent on them. In fact the cause of action was for remedies for breach of contract and as it seems to me the reason for his decision was his judgment that application of the general rule for measuring damages for breach of contract by reference to that sum which would place the plaintiff in the same position as if the covenant had not been broken, that is to say by an award of no or a nominal sum would result in a manifest injustice.

513. In *Attorney-General v Blake* Lord Nicholls made it clear that he considered *Wrotham Park* to be a case establishing the availability of a particular form of damages for breach of contract, albeit drawn by analogy from cases concerning the assessment of damages for invasion of property rights. He cited it with approval in the part of his speech which dealt with breach of contract as an example of a case where an award of damages assessed by reference to financial loss is not always "adequate" as a remedy for a breach of contract. He said:

> "In reaching this conclusion the judge applied by analogy the cases mentioned above concerning the assessment of damages when a defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights. As Lionel D Simth has pointed out in his article "*Disgorgement of profits of Breach of Contract: Property, Contract and 'Efficient Breach'*" (1995) 24 Can BLJ 121, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights…..
>
> "The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained." (283B-D, 283H-284A).

514. In a later passage he said: "Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the

circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract." (285B-C). In these passages in my view Lord Nicholls was making general statements of principle capable of being applied to any suitable case where a breach of contract has been proved and no financial loss flows from the breach. Although in the first passage he referred to the element of the absence of a diminution of the value of the claimant's property, it is clear from the second passage that he considered the principle applicable in any suitable case where recoupment of financial loss may not provide an adequate remedy. Earlier in the context of his review of damages under Lord Cairns's Act he said: "The question under discussion is whether the court will award substantial damages for an infringement when no financial loss flows from the infringement and, moreover, in a suitable case will assess the damages by reference to the defendant's profit obtained from the infringement. The cases mentioned above show that the courts habitually do that very thing." (281 H). The test identified by Lord Nicholls as to whether this approach to damages for breach of contract is appropriate was identified variously as "in a suitable case" and "when the circumstances require" (281H, 283H, 285B). He also approved Brightman J's decision in *Wrotham Park* that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. (283A).

515. Lord Nicholls began his analysis of the remedies available for breach of contract with Baron Parke's much quoted words that the rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as if the contract has been performed: *Robinson v Harman* [1848] 1 Exch 850, 855. Leaving aside the anomalous exception of punitive damages he said that damages are compensatory:

> "It is equally well established that an award of damages, assessed by reference to financial loss, is not always "adequate" as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate.
>
> The classic example of this type of case, as every law student knows, is a contract for the sale of land. The buyer of a house may be attracted by features which have little or no impact on the value of the house. An award of damages, based on strictly financial criteria, would fail to recompense a disappointed buyer for this head of loss. The primary response of the law to this type of case is to ensure, if possible, that the contract is performed in accordance with its terms. The court may make orders compelling the party who has committed a breach of contract, or is threatening to do so, to carry out his contractual

> obligations. To this end the court has wide powers to grant injunctive relief. The court will, for instance, readily make orders for the specific performance of contracts for the sale of goods. In *Beswick v Beswick* [1968] AC 58 the court made an order for the specific performance of a contract to make payments of money to a third party. The law recognised that the innocent party to the breach of contract had a legitimate interest in having the contract performed even though he himself would suffer no financial loss from its breach. Likewise, the court will compel the observance of negative obligations by granting injunctions. This may include a mandatory order to undo an existing breach, as where the court orders the defendant to pull down building works carried out in breach of covenant.
>
> All this is trite law. In practice, these specific remedies go a long way towards proving suitable protection for innocent parties who will suffer loss from breaches of contract which are not adequately remediable by an award of damages. But these remedies are not always available. For instance, confidential information may be published in breach of a non-disclosure agreement before the innocent party has time to apply to the court for urgent relief. Then the breach is irreversible. Further, these specific remedies are discretionary. Contractual obligations vary infinitely. So do the circumstances in which breaches occur, and the circumstances in which remedies are sought. The court may, for instance decline to grant specific relief on the ground that this would be oppressive.
>
> An instance of this nature occurred in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] I WLR 798." (282B-H)

516. The reference to publication of confidential information in breach of contract before the innocent party has time to apply to the court for urgent relief suggests that Lord Nicholls did not intend to confine the special award of damages of which he cited *Wrotham Park* as an example to cases where damages are awarded in lieu of an injunction under Lord Cairns's Act. As to whether he intended the principle to be confined to cases like *Wrotham Park* where the nature of the claimant's infringed right was such that financial loss was incapable of being caused in the event of breach or whether he intended to extend it to any case where for whatever reason the breach of contract caused no financial loss, although there are indications pointing in both ways in my judgment the latter was his intention. The reference to an interest in performance which is not readily measurable in terms of money might suggest the former. The references to an award of damages assessed by reference to financial loss not always being adequate as a remedy for breach of contract and his example of the buyer of a house attracted by features which have little or not impact on the value of the house suggest the latter. Someone who agrees to buy and pays for a worthless object on a whim because he likes the look of it would have an interest in performance which is not readily measurable in terms of money. If he fails to obtain the benefit promised by the other party to the contract he would suffer a loss which to

him may be as important as financially measurable loss or more so and an award of damages assessed by reference to financial loss would not be adequate as a remedy for the breach. If he were left with no remedy beyond nominal damages justice would manifestly not have been done. In my view he would satisfy the indicia identified by Lord Nicholls notwithstanding that an award of Wrotham Park damages would not be in lieu of an injunction or an order for specific performance (if for example the seller had long since sold the object to a third party or destroyed it) and would not compensate him for breach of a restrictive covenant or an invasion of his property rights.

517. Lord Nicholls' speech in *Attorney-General v Blake* was considered by the Court of Appeal in *Experience Hendrix*. The claim in that case was brought by a company effectively owned by Jimi Hendrix's father to whom the Hendrix estate had assigned the benefit of a restrictive covenant by which the defendant had agreed not to grant any futher licences or contracts without the consent of the estate. The defendant breached the restrictive covenant and granted a further licence from which he obtained payments. The Court of Appeal held that the claimant was entitled to damages for breach of contract in the form of the payment of a reasonable sum for the use by the defendant of material in breach of the covenant despite the claimant conceding that it had no evidence to show or quantify any financial loss as a result of the breaches. It was a case in which there were present both the element of a restrictive covenant and of the damages being awarded in addition to an injunction and thus, as held by Peter Gibson LJ pursuant to the jurisdiction of Lord Cairns's Act. However there were dicta suggesting a wider availability of the *Wrotham Park* remedy for breach of contract.

518. Peter Gibson LJ said:

> "It is apparent from Lord Nicholls speech that he regarded the decision of Brightman J in *Wrotham Park*…as a crucial stepping stone in his reasoning as to why the absence of financially measurable loss flowing from a breach of contract was not necessarily fatal to a claimant's claim for compensation. …Although the *Wrotham Park* case related to an infringement of a property right, there having been a breach of a restrictive covenant imposed for the benefit of an estate, it is noticeable that Lord Nicholls did not treat the significance of the case as so limited. He discussed the case in the section of his judgment (commencing at p282) dealing with breach of contract. It is apparent that he regarded the case as a guiding authority on compensation of breach of a contractual obligation. True it is that the action was brought against the successor in title of the original covenantor; but it could hardly be suggested that the result would have been different if the parties would have been the original contracting parties. (paragraph 56).
>
> Lord Nicholls was clearly of the view that Brightman J was right not to decide the case on the basis that the breach of covenant did not diminish the value of the houses in the estate at all. As Lord Nicholls said (at p283 A), if the estate company

> was given a nominal or no sum by way of compensation justice would manifestly not have been done. The same in my judgment applies to the present case. …
>
> In my judgment because (1) there has been a deliberate breach by PPX of its contractual obligation for its own reward, (2) the claimant would have difficulty in establishing financial loss therefrom and (3) the claimant has a legitimate interest in preventing PPX's profit making activity carried out in breach of PPX's contractual obligations, the present case is a suitable one (as invisaged by Lord Nicholls [2001] 1 AC pp283H – 284A) in which damages for breach of contract may be measured by benefits gained by the wrongdoer from the breach. To avoid injustice I would require PPX to make a reasonable payment in respect of the benefit it has gained." (paras 56,57,58).

519. Peter Gibson LJ's insistence that the fact that *Wrotham Park* related to an infringement of a property right was not essential to the plaintiffs' entitlement to damages echoed the view of Lord Woolf MR in the Court of Appeal in *Attorney-General v Blake* 1998 Ch 439. He cited *Wrotham Park* and the cases which followed it as examples of the fact that the exclusively compensatory basis for damages for breach of contract is subject to exceptions "for the gain (or saving of expense) made by the defendant is sometimes used as the measure of the plaintiff's loss. …In such cases the measure of damages is the same, whether they are calculated by reference to the loss sustained by the plaintiff or to the saving of expense by the defendant, with the result that their classification as compensatory or restitutionary has been controversial. Those who insist that they are restitutionary but reject any further departure from the general rule, justify them by reference to the proprietary nature of a claim to enforce restricted covenants annexed to land. This is hardly convincing, seeing that the measure of damages cannot depend on whether the proceedings are between the original parties to the contract or their successors in title." (457B-D).

520. Mr de Garr Robinson submitted that it would be arbitrary if entitlement to *Wrotham Park* damages depended on whether the contract broken was positive or negative. In many contracts imposing positive obligations it may be possible to imply a negative obligation not to do an act inconsistent with the positive obligation. It would be a triumph of form over substance if there were such a rule. In my view there is force in that submission. The significant feature in the *Hendrix* case in my view was not that the contractual provision breached was a restrictive covenant but rather that there was no evidence that performance of it would have conferred a measurable financial benefit to the claimant and that the claimant would have had difficulty in establishing that breach of it resulted in a financially measurable loss. That feature is capable of applying to a contractual obligation to perform a positive act.

521. Mance LJ as he then was identified the issue raised by the appeal "as a matter of principle whether the Court can and should order the recovery of any damages or an account of profits in circumstances where the appellant has not proved that it has suffered any financial loss." (para 15). The issue thus defined was not formulated by reference to restrictive covenants. In his analysis of Lord Nicholls' speech in *Attorney-General v Blake* Mance LJ drew attention to the fact that whereas Lord

Nicholls emphasised that an award of an account of profits was only appropriate in exceptional circumstances (285D-E and F-G and 286 F-G cf: also p292E per Steyn L), he did not apply the same epithet or qualification to an award of damages of the nature ordered in *Wrotham Park*. (para 24). The clear inference is that in his view there is no requirement to establish the existence of exceptional circumstances in order to jusifty an award of *Wrotham Park* damages. Mance LJ also drew attention to Lord Hobhouses's view in his dissenting judgment in *Attorney General v Blake* that Wrotham Park was a case of compensatory damages, the plaintiffs' loss being the sum which they could have extracted from the defendant as the price of their consent to the development (page 289 F-G). That analysis was the same as the analysis which Lord Nicholls approved as correct in respect of the measure of damages awarded under Lord Cairns' Act which he held may include damages measured by reference to the benefits likely to be obtained in the future by the defendant. "The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right." (281 G) That is, of course, the measure of damages which Lord Nicholls held had been correctly applied by Brightman J in *Wrotham Park* and which he held is applicable in contract.

522. This was also the view of Chadwick LJ in *Worldwide Fund for Nature*.

> ""I am not persuaded that, on a true analysis, the outcome in the *Experience Hendrix* case provides support for the proposition that an award of damages on the *Wrotham Park* basis is to be characterised as a gains-based remedy. I think that it is clear from the speeches in the House of Lords in *Blake's* case that it is not. The rationale which underlies the outcome in the *Experience Hendrix* case is, I think, helpfully summarised in the final sentences of para 26 in the judgment of Mance LJ (which follow the passage which I have just cited):
>
> "In such a context" – where the instinctive reaction is that, whether or not the claimant would have been better off if the wrong had not been committed, the wrongdoer should make some reasonable recompense – "it is natural to pay regard to any profit made by the wrongdoer ….The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source."
>
> In the *Experience Hendrix* case there were compelling reasons why the appropriate order was for payment over of a percentage of turnover (by way of royalty); but that outcome does not lead to the conclusion that this court saw the remedy as other than compensatory in nature.
>
> It follows that I would hold that the premise on which the contentions in para 4 of the amended application notice are based – that an award of damages on the *Wrotham Park* basis is

> not an award of compensatory damages, but is properly to be characterised as a gains-based award – is not made out."…
>
> "When the court makes an award of damages on the *Wrotham Park* basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Lord Nicholls's analysis in *Blake's* case demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the *Wrotham Park* basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree. But the underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. To label an award of damages on the *Wrotham Park* basis as a "compensatory" remedy and an order for an account of profits as a "gains-based" remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him."(paras. 56, 57, 59).

523. I would draw attention to the general nature of the circumstances in which Chadwick LJ considered, based on Lord Nicholls' analysis, that *Wrotham Park* damages are available, namely where it is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Further, Chadwick LJ identified as the underlying feature of an award of *Wrotham Park* damages that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. That feature may be present in a claim for breach of a positive contractual obligation to confer a benefit on the claimant.

524. Chadwick LJ's test of whether a *Wrotham Park* award is a just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss echoes Mance LJ's view that, "Since *Blake* I see no reason why, if the beneficiary of a restrictive covenant is unaware of its infringement in time to obtain an injunction immediately… [he] should be precluded from obtaining… if justice requires a reasonable sum to compensate for the past infringement even though he may not be able to show any financial loss to himself." (para. 34). It also echoes his statement that, "In the light of this background and in the light of the terms of the settlement agreement itself, I consider that any reasonable observer of the situation would conclude that, as a matter of practical justice, PPX should make (at the least) reasonable payment for its use of masters in breach of the settlement agreement." (para. 42). Mance LJ's reference to practical

justice itself echoes Brightman J's test, approved by Lord Nicholls, of whether depriving the claimant of a remedy would be manifestly unjust.

525. The topic of *Wrotham Park* damages was considered by the Privy Council in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited and others* [2009] UKPC Case ref. 45. Delivering the judgment of the Privy Council, Lord Walker of Gestingthorpe reviewed the authorities and identified a number of general principles which he held they establish.

> "46. In their written and oral submissions to the Board both sides (following the lead given by the courts below) made frequent references to "*Wrotham Park* damages" (see *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 – "*Wrotham Park*"). That may be a convenient shorthand expression, but it can become misleading if it is not made clear (as it was not always made clear in the courts below) whether it refers to
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> (1) every type of compensatory damages which exceed the actual financial loss caused to the claimant by an actionable breach of duty; or
>
> (2) damages awarded (in lieu of specific performance or an injunction) under the jurisdiction created by section 2 of the Chancery Amendment Act 1858 ("Lord Cairns's Act"); or
>
> (3) damages awarded under Lord Cairns's Act in respect of a non-proprietary breach of contract (that is, breach of contract not involving the invasion of a property right).
>
> The expression is probably most helpful as a description of the second, intermediate category, which includes but is not limited to the third, narrow category into which this appeal falls. Both courts below seem to have assumed without argument that the jurisdiction conferred by Lord Cairns's Act is exercisable (presumably by analogy) by the Royal Court of Jersey. That view is given some slight support by the decision in *Benest v Langlois* [1993] JLR 117, in which numerous English authorities on breach of confidence were cited and followed (but the decision was concerned only with liability, not remedy).
>
> 47. The topic of *Wrotham Park* damages has been discussed in a number of important judgments. Some quite recent, of which the most illuminating (apart from the judgment of Brightman J in *Wrotham Park* itself) are those of Nourse LJ and Nicholls LJ in *Stoke on Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 ("*Stoke*"); Sir Thomas Bingham MR and Millett LJ in *Jaggard v Sawyer* [1995] 1 WLR 269 *("Jaggard")*; Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 ("*Blake*");Mance LJ (and the short concurring judgment of

> Peter Gibson LJ) in *Experience Hendrix Plc v PPX Enterprises* [2003] FSR 853 ("*Experience Hendrix*"); Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* (2006) 25 EG 210 ("*Lunn Poly*") Warren J in *Field Common Ltd v Elmbridge Borough Council* [2007] EWHC 2079 (Ch); and Arden LJ in *Devenish Nutrition v Sanofi-Aventis* [2009] 3 All ER 27.(paras. 46-49)."

526. The question arises whether in this passage of Lord Walker's judgment the Privy Council intended to confine the availability of damages which are not calculated by reference to the claimant's financial loss to damages under Lord Cairns' Act and whether it considered that that is the effect of *Wrotham Park* itself and the authorities which he reviewed in which *Wrotham Park* was considered. Although the matter is not free from doubt, in my view the answer is that it did not. The first category of damages referred to by Lord Walker as Wrotham Park damages was "every type of compensatory damages which exceed the actual financial loss caused to the claimant by an actionable breach of duty". By definition that category is wider than his other two categories which were confined to damages under Lord Cairns' Act. Lord Walker did not suggest that the first category does not exist or that it excludes damages for breach of contract. It is not clear whether when he said that "the topic of Wrotham Park damages has been discussed in a number of important judgments", he was there referring to all three categories or only the second, which he earlier said that the expression "Wrotham Park damages" was probably most helpful as a description of. The matter is complicated by the fact that in the passage in brackets in the third general principle which Lord Walker held was established by the authorities, he found it a little surprising that Lord Nicholls in *Blake* referred to Wrotham Park as a "solitary beacon" concerned with breach of contract since that case was concerned with the breach of a restrictive covenant to which neither the plaintiff nor the defendant was a party, although he added that the decision of the House of Lords in *Blake* decisively covers "what their Lordships have referred to as a non-proprietary breach of contract." That would appear to be a reference back to Lord Walker's third category and thus might be taken as interpreting the decision of the House of Lords in *Blake* as confined to damages awarded under Lord Cairns' Act in respect of a non-proprietary breach of contract and not extending to damages awarded at common law for breach of a contract not involving the invasion of a property right.

527. In my judgment Lord Walker was not interpreting Lord Nicholls' speech in *Blake* in that way. His conclusion that the decision in *Blake* decisively covers "what their Lordships referred to as a non-proprietary breach of contract" was in terms not confined to damages under Lord Cairns' Act.

528. If I am wrong about that, then in my respectful opinion the conclusion of the Privy Council on this point would be inconsistent with the decision of the House of Lords in *Blake* which is binding on me. Surprising or not, the fact is that Lord Nicholls in *Blake* held that Wrotham Park shows that, in contract as well as tort, damages are not always narrowly confined to recoupment of financial loss and that in a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. Those conclusions were in terms expressed as applicable generally to damages for breach of contract with no limitation or qualification by

reference to Lord Cairns' Act. Moreover, as pointed out by Peter Gibson LJ in *Hendrix*, they appeared in the section of his judgment dealing with breach of contract.

529. The matter is further complicated by the fact that Lord Walker cited the judgment of Chadwick LJ in *Worldwide Fund for Nature* as supporting the proposition that, although damages under Lord Cairns' Act are awarded in lieu of an injunction, it is not necessary that an injunction should actually have been claimed in the proceedings or that there should have been any prospect on the facts of it being granted. In the passage of his judgment referred to by Lord Walker, Chadwick LJ, with whom the other two members of the Court of Appeal agreed, expressed the explicit view, albeit obiter, that the power to award damages on a Wrotham Park basis does not depend on Lord Cairns' Act: it exists at common law.

> "54. I should add, for completeness, that (if it were necessary to decide the point) I would hold that, in a case where a covenantor has acted in breach of a restrictive covenant, the court may award damages on the *Wrotham Park* basis, notwithstanding that there is no claim for an injunction–and notwithstanding that there could be no claim for an injunction. In my view, the analysis in the speech of Lord Nicholls in *Blake's* case compels that conclusion. The power to award damages on a *Wrotham Park* basis does not depend on Lord Cairns's Act: it exists at common law. Further, as it seems to me, the power to award damages on the basis of what it would have been reasonable for the covenantor to pay for a hypothetical release does not depend on the covenantee establishing (as a factual premise) that, absent a release, the covenant could have been enforced by injunction. That, I think, is what Mance LJ had in mind when he said in the *Experience Hendrix* case [2003] I All ER (Comm) 830, para 16, that the decision in *Blake's* case had freed this court from constraints imposed by the reasoning in the *Bredero Homes* case and "some of the reasoning in *Jaggard v Sawyer*". But it is not necessary to decide that point in this appeal. As I have said, this is a case in which – as in the *Experience Hendrix* case– the claimant was in a position to, and did, seek an injunction to restrain further breaches. In this case the claimant could rely on the judgment conferred by Lord Cairns's Act–as Peter Gibson LJ explained [2003] I All ER (Comm) 830, para 56." (473G to 474G (para. 54).

530. Although in the first sentence Chadwick LJ expressed his opinion by reference only to a case of breach of a restrictive covenant, his conclusion that the power to award damages on a Wrotham Park basis exists at common law and does not depend on Lord Cairns' Act was not so confined. Moreover, in so far as his earlier conclusion was said to be compelled by the analysis of Lord Nicholls' speech in *Blake*, in my opinion it was not intended to be so confined since, as discussed, Lord Nicholls' analysis was based on a general review of damages for breach of contract.

531. It is also pertinent in this context to refer to the fact that Lord Nicholls in *Blake* held that in so far as the decision in *Surrey County Council v Bredero Homes Limited*

[1993] 1WLR 1361 is inconsistent with the approach adopted in the *Wrotham Park* case, the latter approach is to be preferred. (283). As pointed out by Sir Thomas Bingham MR in *Jaggard v Sawyer* [1995] 1WLR 269 at 281 B-D:

> "Fundamental to the judgment of Dillon LJ, as I read it, is his conclusion that the plaintiffs had never sought an injunction but only common law damages, not damages in equity under Lord Cairns' Act: see [1993] 1 WLR 1361, 1364A, 1368G. It therefore followed that since the plaintiffs' damages were to be assessed on ordinary common law principles, and since they could show no damage, only nominal damages could be awarded. Dillon LJ questioned whether the *Wrotham Park* case was consistent with *Johnson v Agnew* [1980] AC 367, but thought it unnecessary to reach a conclusion since *Wrotham Park* was a case falling under Lord Cairns's Act and the case before the court was not: see p1367B He was not willing to countenance the possibility of awarding, as common law damages, the gain which the defendant had earned by his breach of contract: see [1993] 1 WLR 1361, 1367E. "(281 B-D).

532. It is in my view implicit in Lord Nicholls' conclusion that the approach adopted in Wrotham Park is to be preferred to the decision in *Bredero* in so far as the latter is inconsistent with the former that his conclusion in the immediately following sentences that Wrotham Park shows that in a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach was not intended to be confined to claims for damages under Lord Cairns's Act.

533. As I hope emerges from this review of the authorities, I do not consider that there is authority binding on me which would preclude the award of *Wrotham Park* damages as defined in Lord Walker's first category. In particular, I do not consider that such an award is precluded by any of the following factors:

i) that the claimants advanced no claim for an injunction or specific performance, or the fact that there would have been no prospect of such an order being granted;

ii) the fact that damages are not claimed under Lord Cairns' Act in lieu of an injunction;

iii) the fact that the claim is not based on a breach of a restrictive covenant; and

iv) the fact that the claim is based on breach of contract rather than invasion of property rights.

534. As to the first two factors, in my view *Attorney General v Blake* is authority for the proposition that they are not a precondition for the award of such damages. Even if it is not binding authority to the effect that those factors are not a precondition for the award of such damages, that is in my judgment the view expressed by Lord Nicholls. Nor do I consider that it was the view of the Privy Council in *Pell Frischmann* that the first two factors preclude such an award. I draw attention in particular to the fifth

general principle which Lord Walker held was established by the authorities: "Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospects, on the facts, of it being granted…" (para 48) and note that in any event even though the Claimants did not bring a claim for specific performance the court had theoretical jurisdiction to entertain such a claim.

535. If, contrary to my view, the view of the Privy Council in *Pell Frischmann* was that the absence of these two factors precludes the award of such damages, that view is not binding on me and is in my view inconsistent with the view of the House of Lords in *Blake* which either is binding on me or is, in any event, in my view to be followed by a first instance judge faced with opposing views expressed (albeit obiter) by the House of Lords and the Privy Council. Such a view would also in my view be inconsistent with the unanimous view of the Court of Appeal in *Worldwide Wrestling Federation*, also obiter, which in my view would also be appropriate to be followed.

536. As to the third factor, there is no authority of which I am aware whose ratio is that the award of such damages is confined to claims for breach of restrictive covenants and does not extend to claims for breach of positive contractual obligations. It is notable that one of the obligations said to have been breached by the defendants in *Pell Frischmann* was a positive contractual obligation. In my view the principles established by Lord Nicholls in *Blake* were intended to be of general application to claims for breach of contract.

537. As to the fourth factor, no authority was cited to me whose ratio was that the award of such damages is confined to claims for invasion of property rights. That the reverse is the case I consider to be part of the ratio of Lord Nicholls' speech in *Blake*. It is also supported by the judgments of Lord Woolf MR in the Court of Appeal in *Blake* and by Peter Gibson LJ in *Hendrix*.

538. Accordingly, I conclude that it is open to me on the authorities to make a *Wrotham Park* award of damages in this case, subject to being satisfied that it is a suitable case for such an award, and that it would be manifestly unjust to leave the Claimants with an award for no or nominal damages. Having said that, I recognise that an award of such damages in a case such as the present would represent an application of the general principle to circumstances which are not the same as those in which it has previously been applied. Accordingly, I recognise the force of Mr Tregear's submission that, while he accepted that such an award is open to me to make on the authorities, I should proceed with caution and that any development or extension of the law in this area should be incremental.

539. Bearing these considerations well in mind, I nonetheless consider that, if I am wrong in my conclusion that the Claimants are entitled to substantial damages to compensate them for the value of the benefits withheld by Spyker, this is a case in which *Wrotham Park* damages should be awarded. Adopting the language of Mance LJ in *Hendrix*, I consider that any reasonable observer of the situation would conclude that as a matter of practical justice, Spyker should make reasonable payment for its failure to provide the benefits which it agreed to provide to the Claimants. In circumstances where the Claimants paid $3 million for which they were entitled, as I have held, to a minimum of 5,734 kilometres and associated benefits but were provided with only 2004 kilometres and associated benefits, it would in my view be manifestly unjust if the

only remedy available to them in law was an award of no or nominal damages, or an award of very modest damages for consequential loss of opportunity. If it had been suggested to the parties before the Service Agreement and Fee Agreement were signed that such would be the position in the event of the Claimants paying the full $3million in advance but Spyker providing only 2,004 kilometres and associated benefits (plus the Paul Ricard offer) in my view it is plain that they would have considered that to be an absurd proposition. I do not consider that such an award would disturb or unsettle their legitimate expectations.

540. I turn to the approach to be adopted in assessing and quantifying the *Wrotham Park* damages. In *Wrotham Park* itself Brightman J held that the plaintiffs were entitled to such a sum of money as might reasonably have been demanded by the plaintiffs from the defendant as a quid pro quo for relaxing the covenant. As has been pointed out in subsequent authorities there is an artificiality to a hypothetical exercise which assumes that the claimant would have been prepared to sell his contractual right to insist on performance by the defendant of his contractual oblgation . In most cases including this one there is no warrant for such an assumption. Nonetheless that artificiality is inherent in the analytical basis of the nature of the right to *Wrotham Park* damages approved by the House of Lords in *Attorney General v Blake*. In previous cases including in particular *Bredero* there had been a division of judicial opinion as to whether *Wrotham Park* damages were essentially compensatory or restitutionary. In *Blake* Lord Nicholls approved Brightman J's assessment of damages which he described as being the amount of money which could reasonably have been demanded for a relaxation of the covenant. (283B). Although elsewhere he said that in a suitable case damages for breach of contract may be measured by the benefit gained from the breach by the wrongdoer who must make a reasonable payment in respect of the benefit he has gained (283H-284A) and that under Lord Cairns's Act damages may include damages measured by reference to the benefits likely to be obtained in future by the defendant (281F), this must in my view be seen in the context of his statement in reference to damages under Lord Cairns' Act that:

> "The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right. This analysis is correct." (281G).

541. With this analysis Lord Hobhouse concurred:

> "What has happened in such cases is that there has either actually or in effect been a compulsory purchase of the plaintiff's right of refusal. What the plaintiff has lost is the sum which he could have exacted from the defendant as the price of his consent to the development. This is an example of compensatory damages. They are damages for breach. They do not involve any concept of restitution and so to describe them is an error. … It is for this reason that I agree with my noble and learned friend Lord Nicholls that the decision in *Wrotham Park*… is to be preferred to that in … Bredero…. I would however add that the order proposed by your Lordships does not reflect this principle: it goes further. It does not award to the Crown damages for breach of contract assessed by

> reference to what would be the reasonable price to pay for permission to publish." (298E-H).

542. Although Lord Hobhouse dissented on the availability of an account of profits as a remedy for breach of contract, he thus agreed with Lord Nicholls on the availability of *Wrotham Park* damages for breach of contract and with his conclusion that they are compensatory in nature.

543. In *Hendrix* Peter Gibson LJ held that the judge in that case had been wrong to think it relevant that the claimant would never have agreed to release the defendant from its contractual obligations and to reject a wholly fictional approach.

> "But *Wrotham Park* itself demonstrated that it is irrelevant, in assessing compensation on the basis adopted by Brightman J, that in reality there would have been no relaxation of the relevant obligation because of the opposition of the person entitled to the benefit of that obligation."

544. As Brightman J said in *Wrotham Park* itself at p815C:

> "on the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation, but for present purposes I must assume that they could have been induced to do so." (Paragraph 57).

545. In *Hendrix* Mance LJ held that since *Attorney General v Blake* in appropriate circumstances a court could award a reasonable sum having regard to any benefit made by the infringement even though the claimant cannot prove any financial loss. (Paragraph 35). As already mentioned he considered that any reasonable observer of the situation would conclude that as a matter of practical justice the defendant should make (at least) reasonable payment for its use of masters in breach of the Settlement Agreement. Later he said:

> "For the past, in the absence of any proven loss, I would confine any financial remedy to an order that PPX pay a reasonable sum for its use of material in breach of the Settlement Agreement. That sum can properly be described as being "such sum as might reasonably have been demanded" by Jimmy Hendrix's estate "as a quid pro quo for agreeing to permit the two licences into which PPX entered in breach of the Settlement Agreement" which was the approach adopted by Brightman J in W*rotham Park*. This involves an element of artificiality, if, as in *Wrotham Park,* no permission would ever have been given on any terms. And, where no injunction is possible, even the value of a bargaining opportunity depends on the value that the court puts on the right infringed (cf paragraph 19 above, citing Lord Nichols in *Blake*). That said, the approach adopted by Brightman J has the merit of directing the court's attention to the commercial value of the right infringed and of enabling it to asses the sum payable by reference to the

> fees that might in other contexts be demanded and paid between willing parties. It points in the present case towards orders that PPX pay over, by way of damages, a proportion of each of the advances received to date and (subject to deduction of such proportion) an appropriate royalty rate on retail selling prices." (Paragraph 45).

546. In *Worldwide Fund for Nature* Chadwick LJ in the passage cited above considered that although in *Hendrix* Mance LJ said that "it is natural to pay regard to profit made by the wrongdoer" an award of damages on the *Wrotham Park* basis is an award of compensatory damages and is not properly to be characterised as a gains-based award. (Paragraph 57).

547. In *Jaggard v Sawyer* both Sir Thomas Bingham MR and Millet LJ held that Brightman J's award of damages in Wr*otham Park* was compensatory. Sir Thomas Bingham MR said:

> "[Brightman J] paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant. I am reassured to find that this is the view taken of the *Wrotham Park* case by Sir Robert McGarry VC in *Tito v Waddle (No. 2)* [1977] CH 106, 335 when he said:
>
> Brightman J resolved the difficult question of the appropriate quantum of damages by holding that the plaintiffs should recover 5 percent of the defendant's expected profit from their venture. In *Bracewell v Appleby*, Graham J applied the same principle where the right in question was not a consent under a restrictive covenant, but an easement of way. I find great difficulty in seeing how these cases help Mr Macdonald. If the plaintiff has the right to prevent some act being done without his consent, and the defendant does the act without seeking that consent, the plaintiff has suffered a loss in that the defendant has taken without paying for it something for which the plaintiff could have required payment, namely, the right to do the act. The court therefore makes the defendant pay what he ought to have paid the plaintiff, for that is what the plaintiff has lost. The basis of computation is not, it will be observed, in any way directly related to wasted expenditure or other loss that the defendant is escaping by reason of an injunction being refused: it is the loss that the plaintiff has suffered by the defendant not having observed the obligation to obtain the plaintiff's consent. Where the obligation is contractual, that loss is the loss caused to the plaintiff by the breach of contract."

548. Millet LJ in *Jaggard* said:

> "It is plain from his judgment in the *Wrotham Park* case that Brightman J's approach was compensatory, not restitutionary. He sought to measure the damages by reference to what the plaintiff had lost, not by reference to what the defendant had gained. He did not award the plaintiff the profit which the defendant had made by the breach, but the amount which he judged the plaintiff might have obtained as the price of giving its consent. The amount of the profit which the defendant expected to make was a relevant factor in that assessment. But that was all." (291D).

549. Accordingly, in my view the question to be answered is how much would the Claimants have obtained following a hypothetical negotiation in which they had made reasonable demands as a quid pro quo for releasing Spyker from its obligation to provide 3,730 kilometres and associated benefits? This is of course a fact-specific exercise. In most of the reported cases the court has had regard as a relevant as distinct from determining factor to the profits which could be anticipated at the date of breach that the defendant would earn if he were released from his contractual obligation. However, as a matter of logic and principle it seems to me that in an appropriate case, particularly where there is no evidence of the amount of anticipated profits, that the court may equally have regard to the amount of anticipated costs which the defendant would save in the event of being released from its contractual obligations. Express support for that view is to be found in the judgment of Lord Woolf MR in *Blake* in the Court of Appeal and the judgment of Chadwick LJ in *Worldwide Fund for Nature*:

> "In such cases the measure of damages is the same, whether they are calculated by reference to the loss sustained by the plaintiff or to the saving of expense by the defendant…" per Lord Woolf MR in *Blake* (457C)

"The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source." (per Chadwick LJ in *Worldwide Fund for Nature (para 56)*

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550. In the reported cases which have addressed the approach to be adopted by the court in assessing the outcome of the hypothetical negotiations for release of the defendant from his outstanding obligations and in which the focus of the enquiry has been on what would have been a reasonable demand by the claimant, there has been no need to consider such a demand from the point of view of the value to the claimant of the future performance he would be giving up since they have been cases in which the nature of the claimant's rights has not involved any financial value. A peculiarity of this case is that, unlike in most of the reported cases, the Claimants considered that the benefits withheld had substantial financial value. In that view I have held that they were correct. However, I am required for the purpose of assessing the appropriate level of *Wrotham Park* damages to imagine hypothetical negotiations and it seems to me more than artificial to ignore what I believe would have been the state of mind of the Claimants in such negotiations. In my view, they would have sought a sum of

money which reflected the value of the outstanding kilometres and associated benefits. It is at this point that I confess to finding difficulty in identifying what would be a reasonable demand in the circumstances in so far as it was entitled to take account the anticipated value to the Claimants of performance of Spyker's outstanding contractual obligations as well as the anticipated benefit to Spyker of being released from performing them. This may depend on the basis on which I have to assume that I am wrong in my conclusion that the value of the withheld benefits was substantial. On that assumption it might be said that it would be unreasonable for the Claimants to demand a sum reflecting their own view of the value of those benefits which ex hypothesi would have been found to be inflated. If I were allowed to take their views as to value into account, it seems to me plain having regard to the evidence to which I have referred in the previous section, that they would have considered that the outstanding kilometres and associated benefits were worth at least $500 per kilometre.

551. The unreality of disregarding the Claimant's views as to the value of the outstanding kilometres is highlighted by the fact that the expert evidence in my view confirmed that objectively it would have cost the Claimants at least $500 per kilometre to purchase the same benefits from another Formula One team. The notion that it would have been unreasonable for the Claimants to rely on such evidence in hypothetical negotiations seems to me unreal. That may, however, merely reflect the fact that in my view they are entitled to damages under the previous head so that no question of *Wrotham Park* damages arises.

552. However as I have already held based on the agreed evidence of the experts, the cost to a Formula One team of providing test driving was in the order of $500 per kilometre. It follows in my view that even if the hypothetical negotiations had focused exclusively on the anticipated benefit to Spyker of being released from providing the outstanding kilometres and associated benefits, it would have been reasonable for the Claimants to demand at least such a sum as reflected the anticipated cost to Spyker of providing the outstanding kilometres: that is to say 3,730 kilometres at $500 per kilometre or $1,865,000. Even if Spyker had plausibly been able to persuade the Claimants that they did not anticipate making and/or had not already made a profit by selling to other drivers kilometres which should have gone to Mr Van der Garde, I can see no reasonable justification which they could have put forward for refusing to agree to a demand that they should pay a sum to reflect the expenses which, if they were not released from their contractual obligations, they would have had to incur in performing them. This approach seems to me to draw support from the passages of the judgments of Lord Woolf in *Blake* and Chadwick in *World Widelife Fund* cite above. Accordingly in my view the likely outcome of hypothetical negotiations for the release of Spyker from providing the outstanding 3730 kilometres and associated benefits would have been an agreement to pay the Claimants $1,865,000.

553. It follows that irrespective of whether it is legitimate to take into account the Claimants' views of the value of the outstanding kilometres in deciding what would have been a reasonable payment for them to demand in hypothetical negotiations, the result would be the same. The unreality of disregarding the Claimants' views as to the value of the outstanding kilometres is highlighted by the fact that the expert evidence in my view confirmed that objectively it would have cost the Claimants at least $500 per kilometre to purchase the same benefits from another Formula One team. The

notion that it would have been unreasonable for the Claimants to rely on such evidence in hypothetical negotiations seems to me unreal. That may, however, merely reflect the fact that in my view they are entitled to damages under the previous head so that no question of *Wrotham Park* damages arises.

554. The fact that in *Wrotham Park* the damages were only a small percentage of the defendant's anticipated profits was in my view attributable to factors not present in this case. By their inaction, Brightman J held that the plaintiffs had acquiesced in significant expenditure by the defendant. Moreover, in *Wrotham Park* the plaintiffs had not, unlike the Claimants in this case, already paid the defendant a large sum of money which the defendant would have had to spend if it performed its outstanding obligations but which it would have saved if it was released from performing them. Brightman J also took into account the fact that the covenant was not an asset which the estate owner ever contemplated he would have either the opportunity or the desire to turn to account. That is because he was assessing the appropriate percentage of the profit which it was anticipated the defendant would make. On my analysis the focus would have been not on the profits which Spyker anticipated it would make but rather on the expenses it anticipated it would save.

555. Mr Tregear submitted that the hypothetical negotiations for the release of Spyker from the contract would have involved consideration of the extent to which each party had received the benefit of the obligations in the contract. In his submission, the parties would reasonably have attributed half the $3 million payment made by the Claimants to what he called the opportunity benefits in the Service Agreement, which he summarised as those calculated to enhance Mr Van der Garde's career. Since he had had the full benefit of those benefits including the contingent right to Friday testing and first reserve driver status as well as the right to sponsorship co-operation, the benefit of sponsor spaces and Spyker's obligation to use best endeavours to establish his eligibility for a Super Licence, the parties would have attributed $1.5 million to those benefits which would be treated as having been received under the contract. On the basis that Mr Van der Garde could have driven 1500 kilometres at Paul Ricard and 200 kilometres had he not crashed at Silverstone he submitted the parties would reasonably have worked on the basis that 3704 of testing kilometres had been provided which is a little more than 60% of the total provided for in the contract. Thus a reasonable approach for the parties to have taken would be to take the balancing $1.5 million and deduct 60% thus leaving $600,000 notionally attributable to testing kilometres which the Claimants had either not driven or not had the opportunity of driving.

556. In my view his approach is conceptually flawed. It assumes that the parties would have focussed on the contract price and a comparison of the value of those benefits which the Claimants had already received under the contract with those not yet received, rather than just on the value of the outstanding benefits. If $500 per kilometre represented both the cost to Spyker of performing its outstanding obligations and the minimum cost to the Claimants of obtaining those benefits elsewhere in the market, it seems to me that the contract price is irrelevant save as possible evidence as to market value. Mr Tregear ignored the evidence of the experts that the claimants had obtained a real bargain.

557. Mr Tregear submitted that the parties would have made a further deduction for financial benefits received under the contract. In my view, this proceeded on the same false basis as the submission in relation to opportunity benefits in the contract. The starting point would not have been the contract price and how many benefits had been provided by Spyker pursuant to the Service and Fee Agrements. It would have been the anticipated cost to Spyker of performing its outstanding obligations under the contract and the potential value to the Claimants of their doing so and the cost to the Claimants of their not doing so. It also proceeds on what I have held to be the mistaken assumption that the midweek sponsorship rights had a value over and above the dollar per kilometre value of the kilometres. Finally, Mr Tregear submitted that the parties would have agreed to deduct a further $312,000 in respect of the claimant's liability to indemnify Spyker in respect of any liability Spyker had to Super Aguri for inducing Mr Van der Garde to breach his contract with Super Aguri. This too, in my view, is misconceived.

558. The obligation which Spyker breached and for which the claimants are entitled to damages was the obligation to provide the outstanding kilometres and associated benefits. The Claimants' indemnity to Spyker is a separate and distinct matter. I am in no position to assess the value of that indemnity to Spyker if any. That would involve a mini trial as to the merits of Super Aguri's claims and the irrecoverable costs which it was anticipated Spyker would incur even if successful. Such a mini trial would have been inappropriate and I did not nor was I asked to conduct it. There was no evidence on which it could have been conducted. Although a £250,000 invoice from Fladgates was produced at trial the evidence was that it was never paid. More fundamentally the fact remains that whereas Spyker put it beyond its ability to perform its outstanding obligations under the Service Agreement, the same is not true of the Claimants and their outstanding obligations under the indemnity clause in the Service Agreement. It remained open to Spyker to sue the claimants on the indemnity. In my view it is a red herring.

559. In these circumstances for the above reasons in my view if I am right that the Claimants are not entitled to restitution but wrong that they are entitled to substantial damages to compensate them for the loss of the benefits withheld by Spyker then in my view they are entitled to a *Wrotham Park* award for damages in the amount of $1,865,000.

Conclusion

560. For the reasons set out above in my view Spyker is liable to the Claimants for breach of its obligations under the Service Agreement. The Claimants are not in my view entitled to an order for restitution. However they are in my view entitled to damages for breach of contract to compensate them for the loss of the value of the benefits withheld by Spyker in the amount of $1,865,000. If I am wrong about that they are in my view entitled to an award of *Wrotham Park* damages in the amount of $1,865,000. If I am wrong about that as well in my view Spyker are liable to the Claimants for damages for breach of contract to compensate them for the damage to Mr Van der Garde's career prospects and his opportunity of obtaining financial benefits in Formula One in the amount of $100,000.

Post script

561. I should like to pay tribute and express gradtitude to Mr de Garr Robinson and Mr Tregear for the skill, erudition and research which informed and underlay their submissions and the persuasive and moderate way in which those submissions were presented both orally and in writing. Mr Tregear had the unenviable task of picking up the baton on remedies without the benefit of having heard the evidence of the experts or the factual witnesses. Mr de Garr Robinson, although he heard the experts, bore the heavy burden of navigating me through many deep and choppy jurisprudential waters which seemed at times to cover almost every controversial aspect of the law of remedies. It was a task he discharged with great ability and lightness of touch.