Neutral Citation Number: [2026] EWCA Civ 911

Case No: CA-2025-002594

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)
HIS HONOUR JUDGE MATTHEWS (SITTING AS A JUDGE OF THE HIGH COURT)
[2025] EWHC 2765 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2026

Before:

LORD JUSTICE WARBY
LADY JUSTICE FALK
and
LORD JUSTICE MILES

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Between:

(1) E J W BUILDERS LIMITED **(2) EAMONN WYNNE**	**Claimants/ Appellants**
- and –	
(1) AUDREY MARSHALL **(2) EDWARD MARSHALL** **(3) PAUL WOOD** **(4) NEIL VINNICOMBE** **(as Joint Trustees in Bankruptcy of AUDREY MARSHALL and EDWARD MARSHALL)**	**Defendants/ Respondents**

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Jessica Powers (instructed by **Contract Answers Solicitors**) for the **Appellants**
Rory Brown KC and Rabin Kok (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **First and Second Respondents**
The Third and Fourth Respondents did not appear and were not represented

Hearing date: 8 July 2026

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Approved Judgment

This judgment was handed down remotely at 10.00am on Monday 20 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal against the dismissal of a claim that there was a partnership, or alternatively a contractual joint venture, between one or both of the Appellants and the First and Second Respondents in relation to the redevelopment of a site in Trowbridge that was previously run as the Hilbury Court Hotel. The claim was dismissed by HHJ Paul Matthews, sitting as a judge of the High Court (the "Judge"), by an *ex tempore* judgment delivered at the close of a two-day trial (the "Judgment").

2. There is no suggestion that the Judge made an error of legal principle. Rather, this is an appeal on the facts. As Nugee LJ indicated when granting permission to appeal, it therefore faces a formidable hurdle. In my judgment it has not surmounted that hurdle, and the appeal should be dismissed.

3. We heard submissions from Ms Jessica Powers for the Appellants and Mr Rory Brown KC, leading Mr Rabin Kok, for the First and Second Respondents. We are grateful for their assistance. In particular, we are grateful that Mr Brown and Mr Kok, and their instructing solicitors Morgan, Lewis & Bockius UK LLP, acted pro bono both before us and at the trial. We also wish to extend our gratitude to the Access to Justice Foundation and their solicitors Norton Rose Fulbright LLP. Pro bono assistance of this nature is of enormous assistance to the court.

The factual background

4. The Appellants (and Claimants below) are E J W Builders Limited ("EJW") and Mr Eamonn Wynne, who is EJW's sole director and shareholder. As EJW's name indicates, they are in the building trade. The First and Second Respondents are Mrs Audrey and Mr Edward Marshall, who are husband and wife and are the former owners of the hotel. Mr and Mrs Marshall were made bankrupt in 2023, shortly after the claim was served. Their joint trustees in bankruptcy are the Third and Fourth Respondents, who have taken no part in the proceedings. For ease of reference I will refer below to the Appellants as the Claimants.

5. Other particularly relevant individuals are as follows. Mr Ian Lucas is the son of Mrs Marshall. He is a plumber by trade. Mr Martin Lynch is a quantity surveyor who worked with Mr Wynne. Ms Kelly Pearce is a person who supplied secretarial services both to Mr Wynne and to Mr Lucas, but who was employed and paid by Mr Lucas. Mr Matthew Martin is a solicitor who acted for Mr and Mrs Marshall. All of these individuals apart from Ms Pearce gave evidence at the trial.

6. Mr and Mrs Marshall acquired the hotel in 2004 and largely ran it themselves, apart from a relatively short period when it was let out. By 2017, the business was reduced to a bed and breakfast operation and Mr and Mrs Marshall were looking for an exit. There were some discussions with a businessman, a Mr Steve Bygrave, about selling the hotel to him for development. Planning permission and listing building consent were obtained in November 2018 for the conversion of the hotel into three townhouses and the building of a fourth on the footprint of the hotel terrace but, by the start of February 2019, Mr Bygrave had lost interest.

7. The Claimants' first appearance on the scene was as the builders that Mr Bygrave proposed to use for the development. The Claimants instructed a quantity surveyor, a Mr Ewan Fairweather (Mr Lynch only became involved later). Mr Fairweather produced costings. These varied as planning for the project progressed. The Judge used a figure of around £851,000, based on the version included in the trial bundles. That version was produced in May 2019. A version produced on 9 January 2019, apparently before Mr Bygrave dropped out, had a figure of around £826,000. As we will see, the figures are of some relevance.

8. The Claimants' pleaded case was that, on or before 8 February 2019, either or both of them had orally agreed a partnership with Mr and Mrs Marshall under which the Claimants would do the building work on terms that they would be reimbursed the costs and Mr Wynne would receive a salary of £1,500 a week, and that they would also share profits from the development as to one third to the Claimants and two thirds to Mr and Mrs Marshall. The Claimants pleaded that the hotel property became a partnership asset at that time. The date of 8 February 2019 is derived from a WhatsApp message sent by Mr Wynne on that date, referred to further below.

9. Mr and Mrs Marshall denied the existence of any such arrangement, either in February 2019 or subsequently. Rather, they relied on a JCT form of building contract dated 17 June 2019 (the "JCT contract") which was stated to be between Mr and Mrs Marshall as customers and EJW as contractor, and which was signed by Mrs Marshall for herself and her husband, Mr Lucas as a witness to that signature, and (apparently) by Mr Wynne on behalf of EJW. It provided for a contract price of £825,000 and made no reference to a salary or profit share. The Claimants' pleaded case did not accept that any such contract had been entered into, and (in the Judge's words) Mr Wynne's evidence "chopped and changed" as to whether he had signed it, but the Judge found that it was indeed entered into by the parties on 17 June 2019, one week after building work had commenced. That finding is not challenged on appeal.

10. Work proceeded on the development. There were some financing difficulties and, in February 2020, Mr Wynne suggested alternative sources of funds, including using a property he owned as security. However, that was not proceeded with. The Judge found that from around July 2020 EJW had effectively stopped work on the project, although it seems that some more work was done by EJW thereafter, primarily between December 2020 (after a further drawdown became possible from lenders) and February 2021. Work not completed by EJW was done either by Mr and Mrs Marshall themselves using another builder or by Mr Lucas's own workers. Notice of termination of the JCT contract was served on 10 July 2021, after a warning on 2 July 2021.

11. The houses were sold between July 2021 and April 2022. The balance paid to Mr and Mrs Marshall after costs was around £438,000, which was used to pay creditors.

The Judgment

12. The Judgment is an impressive piece of work for an *ex tempore* judgment, delivered from notes in the afternoon of the second day of the trial. The first part briefly explains the issues in the case and the legal nature of a partnership, before explaining for lay readers (in a very relatable way) something about how judges decide cases on the evidence.

13. The Judge then considered the witnesses, saying this about Mr Wynne at [18]:

> "I would describe [Mr Wynne] as an unsophisticated witness, with (at best) a very poor recall of events, and someone who has difficulty even in remembering the questions that have just been asked of him. Unfortunately, he also changed the answers he did give (quite frequently), and sometimes appeared to be confused. The result is that I am unable to rely on his evidence, except where it is corroborated by an independent and objective source."

This was not a very promising start for a claim based on the existence of an oral agreement.

14. The Judge described Mr Lynch (who gave evidence for the Claimants) as a straightforward and professional witness, although the assistance he could provide was limited by the fact that most of the information he had about the events in issue had been obtained from Mr Wynne. For Mr and Mrs Marshall, Mr Lucas was a "careful and a businesslike witness", albeit with a "touch of indignation from time to time", who was telling the truth. Mrs Marshall was also a businesslike and truthful witness (Mr Marshall did not give evidence). Further, Mr Martin was a "professional and a careful witness", albeit that the distance of time meant that he was not very familiar with the documents.

15. The Judge referred to the WhatsApp message dated 8 February 2019, but stated at [27] that there was no particularity about when and where agreement was reached, and also accepted the evidence of Mr Lucas that the parties were not introduced until March 2019. (I would add that this is consistent with Mrs Marshall's oral evidence that she had seen Mr Wynne in passing prior to that time when he was at the hotel with the architect, but that they were properly introduced only in March or April 2019.) The Judge also accepted Mr and Mrs Marshall's case that, at the start of February 2019, they had only just lost the participation of Mr Bygrave and were doing a "lot of thinking" before deciding what to do, and further found that it was implausible that they would want to share profits given that the point of the development was to fund their retirement ([28]-[29]).

16. As already indicated, the Judge found that the JCT contract was entered into on 17 June 2019. Work had commenced a week earlier on 10 June, the hotel having closed the day before, 9 June ([31]). The Judge accepted the evidence of Mrs Marshall and Mr Lucas that the contract had been signed at the insistence of Mr Wynne ([32]). The judge referred to the emails of 13, 24 and 25 June 2019 referred to below. He observed that the solicitor's response to the email of 25 June advised that the parties enter into a development agreement and asked for a considerable amount of information in that connection (a request to which there is no indication of a response).

17. The Judge then addressed the meeting of 5 August and the email dated 7 August 2019 discussed below. He concluded that the email indicated that something more than the contract price was being sought and discussed, but not that it had been agreed ([37]). He also addressed the "sales to profit tracker" document prepared in January 2020 (see below), concluding that although it was seen by Mr Lucas the evidence was a "long way … from saying that Mr Lucas expressly approved it" on behalf of Mr and Mrs Marshall ([38]).

18. The Judge considered that the discussion about using Mr Wynne's own property as security to secure further funding (see [10] above) was the point at which it was proposed that Mr Wynne should have a profit share, and this helped to explain an email from Mr Martin to the Claimants' solicitor in February 2020 (see below) which referred to a split

of profits. The Judge then dealt with the remaining history of the completion of the project and the sale of the houses, before turning to consider whether there was a partnership.

19. The Judge concluded that there was no single business. The Claimants were not contributing building services to a partnership and Mr and Mrs Marshall were not contributing the land. (I pause here to note that Ms Powers submitted before us that the allegation that the hotel property became a partnership asset was not pursued at trial, but it is not apparent that this was made clear to the Judge.) The Judge considered that it was not significant that the First Claimant's registered office had been changed to the hotel or that Mr Lucas had set up an email domain and accounts for the Claimants. However, he observed that Mr Wynne had made it clear that he was not undertaking any personal liability for Mr and Mrs Marshall's debts, and added that there was no evidence that either Claimant had held themself out as a partner or had contracted on behalf of the alleged partnership ([49]-[53]).

20. The Judge then considered whether there was a contractual profit-sharing agreement, referring again to the documents. As to the documents summarised at [25] below, the Judge observed that they came from Mr Wynne or "his son" (likely a transcription error for "his side") and did not involve Mr and Mrs Marshall or, except for the January 2020 document, Mr Lucas. They expressed the Claimants' view. The 7 August 2019 email was also hard to understand, but did not show that anything had already been agreed. And the evidence that Mr Lucas saw the January 2020 document did not mean that he fully understood or agreed to it ([56]-[59]).

21. As regards later documents, the February 2020 email from Mr Martin was in the context of the proposal for Mr Wynne to put up security. Other later documents were also considered, including an email from Mr Martin in June 2020 which (as explained below) referred to the need to document a profit split and which Mr Martin could not explain. The Judge's comment on this was:

> "… if the share was one-third, two-thirds, after costs had been deducted, there would have been no need to ask for a draft in the first place. It was too easy to need a draft." ([60])

22. In respect of further emails in February and July 2021, the Judge was not satisfied that they showed that "there was anything other than a contract which the Claimants thought had been agreed at the beginning of February 2019" ([61]).

23. The Judge concluded that Mr Wynne had, first, persuaded himself by early February 2019 that Mr and Mrs Marshall were willing to give him a profit share and, secondly, had eventually persuaded himself that they had actually agreed to do so. But the Claimants had not persuaded the Judge that what would have been an "extraordinarily generous" arrangement had actually been agreed. Rather, the only contract between the parties was the JCT contract ([63]-[65]).

The grounds of appeal

24. There are five grounds of appeal. In summary:

Ground 1: The Judge made critical findings of fact that were unsupported or contradicted by the evidence, specifically his findings that it was implausible that an agreement would have been reached within days of Mr Bygrave's withdrawal or that Mr and Mrs Marshall would have agreed to share the redevelopment profits, that it would have been extraordinarily generous of them to reach agreement on the terms alleged, and that Mr Wynne had mistakenly convinced himself that such an agreement had been reached.

Grounds 2, 3 and 4: The Judge failed correctly to consider contemporaneous documentary evidence, including making critical findings based on misunderstandings of that evidence. The conclusion that there was no profit-sharing agreement was one that no reasonable tribunal could have reached having regard, in particular, to the documentary evidence.

Ground 5: The Judge erred in concluding that there was no single business and therefore no partnership.

The documents relied on by the Claimants

25. The Claimants rely on five pieces of documentary evidence which they say support their case that a profit sharing agreement had been reached by 8 February 2029, and which they say the Judge wrongly treated as irrelevant or of little weight. They are as follows:

1) A WhatsApp message from Mr Wynne to Mr Peter Opie, a finance broker, on 8 February 2019 about the project. This message referred to a build cost of £825,000 and included the words "My involvement in this is I have the build cost plus a share in the profits".

2) An email dated 13 June 2019 sent by Ms Pearce to Mr Wynne which was forwarded to Mr Wynne's solicitors on 24 June. The body of the email (which was obviously written on Mr Wynne's instructions) explains that Mr Wynne was involved in a project at the hotel and included the words "Upon completion of the project, after all bills and outgoings have been settled, there will be a three way split of the profits made." It went on to state that the profits would be split equally between Mr and Mrs Marshall, Mr Lucas and Mr Wynne and requested that the solicitors "draw up a contractual agreement to reflect this split and ensure all parties are protected".

3) An email from Ms Pearce to the solicitors on 25 June 2019 (in response to a request for more information). This again referred to the project being between three parties, namely Mr and Mrs Marshall, Mr Lucas and Mr Wynne and also referred to the signed JCT contract at a project cost of £825,000. The Claimants rely on a statement that "Once the project is completed and properties sold, all outgoings and bills have been settled on all parties, the profits are to be split equally, three ways as agreed". The email concludes that Mr Wynne "would like for this to be put into a contractual agreement to ensure that there is an equal split and to ensure that all parties are protected".

4) An email from the Claimants' solicitor, a Mr Leslie Lawrenson, dated 7 August 2019 which followed a meeting on 5 August that he attended with Mr Wynne and Mrs Marshall, with Mr Lucas present in the same room. This was a fairly lengthy email that, in short, declined to assist Mr Wynne in documenting a proposed gift to him out of the proceeds of development, on the basis that it could be viewed as a tax evasion

measure, and advising a joint venture agreement instead. Ms Powers relied on a reference to Mr Lawrenson having raised at the meeting that he anticipated drafting a joint venture agreement and a sentence that "[Mrs Marshall] mentioned that the reason for her suggesting making personal gifts to you and to [Mr Lucas] (rather than paying you a joint venture profit) on the completion of the development is to save herself some tax". Ms Powers also relied on an email from Mr Lawrenson sent on 26 July which had proposed a meeting, the purpose of which was "to discuss the document(s) required to protect your position regarding the proposed development works and profit costs".

5) A "sales to profit tracker" document prepared by Mr Lynch in January 2020 which includes a line "Partners Split" showing figures equal to one third of the projected profits on a low, mid and high basis. This document was prepared for the lenders, and was seen by Mr Lucas as well as by Mr Wynne.

26. The Claimants also maintain that the Judge misunderstood the email dated 7 August 2019 and the following further emails:

1) An email dated 27 February 2020 from Mr Martin to the Claimants' solicitor, a Ms Claire Parsloe, which referred to a "profit share agreement", with EJW "building and putting in funds" and a split of "1/3 to EJW and 2/3 to the Marshalls". This followed an email exchange the day before where Mr Martin said that he understood that "a profit share arrangement is required".

2) An email exchange between Mr Martin and Ms Parsloe in June 2020 in which, in an email dated 12 June, Mr Martin reported Mr Lucas as asking for:

> "…something to evidence the split of net profits from the project in Trowbridge. My client said he will email details of agreed deductions which can be incorporated into a letter to be signed by Mr & Mrs Marshall, Ian Lucas and Eamonn [Wynne]."

3) Further emails between Mr Martin and Ms Parsloe in February and July 2021 in which Ms Parsloe chased Mr Martin for documentation and requested "confirmation on how my client will be paid his share of the profit upon the sale of the properties", which the Claimants say needs to be understood in the light of an email from Ms Parsloe to Mr Wynne asking for more information about "the amounts that you paid in".

Discussion

The approach of this court

27. As already indicated, this is an appeal against findings of fact. The Claimants rightly accept the very high hurdle for challenging findings of fact on appeal, namely that they will not be interfered with unless the court is satisfied that they are "plainly wrong": *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2]; see also *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 ("*FAGE v Chobani*") at [114] and *Walter Lilly & Co Ltd v Clin* [2021] EWCA Civ 136, [2021] 1 WLR 2753 at [85].

28. In a little more detail, the principles have very recently been usefully summarised by Popplewell LJ in *Kerish International Motors Agency v Opel Automobile GmbH* [2026] EWCA Civ 865 (handed down since the hearing of this appeal), as follows:

> "20. … In the absence of some identifiable error such as a material error of law, an appellate court will not interfere with such findings unless the judge's decision is plainly wrong, in the sense that it was one which no reasonable judge could have reached, or (which is the same) lies outside the bounds within which reasonable disagreement is possible; if the decision does not come within that category it is irrelevant that the appellate court would have reached a different decision…
>
> 21. Four of the reasons for that restrictive approach are of relevance to the current appeal. First, where the trial court has heard evidence given orally by witnesses, tested by cross-examination, it is in a much better position to evaluate that evidence than an appeal court which does not have that advantage; a transcript of the evidence does not capture the atmosphere of the courtroom or the subtleties of the way the evidence was given. Secondly, as Lord Hoffmann said in *Piglowska v Piglowski* [1999] UKHL 27; [1999] 1 WLR 1360, 1372: '[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.' Thirdly, the trial judge has sat through the entire case and their ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for days or weeks will be far deeper than that of the appellate court whose view of the case is much more limited: *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477, at [4], as captured in Lewison LJ's memorable and oft-quoted metaphor of 'island-hopping'. Fourthly, duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case. Again to quote the memorable language of Lewison LJ in *FAGE v Chobani*: '[t]he trial is not a dress rehearsal. It is the first and last night of the show'."

29. The crux of the Claimants' complaint is that the Judge did not properly address contemporaneous documentary evidence that they say supports their case. Ms Powers relied on observations by Males LJ in *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 at [46] to [49], in particular that:

> "…fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it." ([46])

That if this (among other things) is not done:

> "…the reasoning of the judgment will need to be particularly cogent if it is to satisfy the demands of justice. Otherwise there will be a risk that an appellate court will conclude that the judge has 'plainly failed to take the evidence into account'." ([47])

And in relation to contemporaneous documents, their significance "as a means of getting at the truth" ([48]), and Males LJ's observation at [49] that it was:

> "…particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."

30. The guidance in *Simetra* at [49] should be considered in the light of the guidance in *Volpi* at [2(iii)], which reads:

> "An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it."

31. In *Sukhwinder Singh v Makhan Singh Bains & Anor* [2026] EWCA Civ 408, Miles LJ said this at [118]:

> "Hence, on the one hand, *Volpi* shows that an appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration and the mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. On the other, as *Simetra* illustrates, where the judge does not address and explain the reasons for rejecting apparently compelling evidence which is contrary to the conclusion which he proposes to reach, the appellate court may, but will not necessarily, conclude that the evidence has been overlooked."

32. I agree. For the avoidance of doubt, the guidance in *Volpi* on this point remains entirely valid, and indeed is all the more obviously pertinent in a case such as this where the Judge delivered his judgment at the close of a short trial. Males LJ was providing guidance in *Simetra* about how judges should approach their judgments. If there is cogent documentary evidence contrary to a judge's conclusion which is not expressly addressed then there is an inevitable risk that this will be, as Lewison LJ put it, a "compelling reason" to depart from the assumption that the judge has considered it.

33. A separate point that is worth emphasising is encapsulated in the well-known statement by Lord Hoffmann in *Biogen Inc v Medeva Plc* [1997] R.P.C. 1, 45:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance …, of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

This makes a similar point to Lord Hoffmann's observations in *Piglowska v Piglowski*, referred to by Popplewell LJ in the citation above.

34. A final point to make at this stage is this. Ms Powers' submission that contemporaneous documents should be given primacy by a judge is not one that I can straightforwardly accept. Of course, contemporaneous documentary evidence will very frequently be given significant weight, for well-rehearsed reasons which include the fallibility of memory and the point that evidence created before a dispute materialises may be of particular forensic value. But a judge must take all the evidence into account and make findings based not only on documentary evidence but also the witness evidence, (where relevant) the motivations of the parties, and the inherent probabilities: see for example the observations of Goff LJ to that effect in *Armagas Ltd v Mundogas SA ("The Ocean Frost")* [1985] 1 Lloyd's Rep. 1, 57 in the context of fraud, endorsed in *Central Bank of Ecuador v Conticorp SA (Bahamas)* [2015] UKPC 11 at [8]. I accept that documents may well assume a critical significance, for example in determining whether a witness is lying (which was the situation that Goff LJ was considering), but even in that case they are only part of an overall picture.

The "implausibility" challenges

35. To recap, ground 1 of the appeal challenges the Judge's findings that it was implausible that an agreement would have been reached within days of Mr Bygrave's withdrawal or that Mr and Mrs Marshall would have agreed to share the redevelopment profits, that it would have been extraordinarily generous of them to reach agreement on the terms alleged, and that Mr Wynne had mistakenly convinced himself that such an agreement had been reached.

36. In my judgment the Judge was entitled to reach the conclusions that he did on these issues.

37. The main planks of Ms Powers' submissions were that the contract price of £825,000 was a cost price that allowed no profit, that (Mr Bygrave having dropped out at some point in January 2019) Mr and Mrs Marshall did not have alternatives available, and that a two thirds share of the projected profit from the redevelopment would have provided them with significantly more than they would have realised on a sale to Mr Bygrave.

38. As to the first point, the only witness evidence to the effect that £825,000 was a cost price, excluding profit, came from Mr Wynne. The Judge's assessment of his witness evidence is set out above. The only piece of documentary evidence that arguably supported it was again from Mr Wynne, the WhatsApp message dated 8 February 2019 which referred to a "build cost". But this is, at best, ambiguous because someone seeking finance for building work would conventionally refer to what the building works would actually cost the individual or business commissioning them, which would obviously include a profit element for the builder. But much more importantly, and as the Judge pointed out at [33], the £825,000 figure was relatively close to the costings provided by the quantity surveyor. I would add that it is even closer to the figure of around £826,000 which had been provided very shortly beforehand (see [7] above). There is no indication that the quantity surveyor worked on anything other than the conventional basis that the figures will include the profit margin that any builder would reflect in their pricing.

39. Ms Powers also relied on later documentary evidence to support the Claimants' case that profit sharing was not implausible, because it was actually discussed. However, whatever the discussions at a stage when work had been continuing for some time, those emails did not require the Judge to take a different approach to the position in early 2019, based on the other evidence available to him. That evidence included the evidence of Mrs Marshall and Mr Lucas as well as the Judge's assessment of the implausibility of the pleaded agreement being reached at the time alleged.

40. As to whether Mr and Mrs Marshall had alternatives available and the relative profit from a sale and a joint venture with Mr Wynne, once Mr Bygrave had pulled out Mr and Mrs Marshall clearly had to decide what to do. The Claimants criticise the Judge's acceptance of Mrs Marshall's evidence that this involved a "lot of thinking", and her evidence that she would not have agreed anything without discussing it with Mr Marshall, but there is no proper basis for doing so. Proceeding with the development themselves was an entirely different proposition to selling the hotel to a developer. There was certainly a prospect of greater profit but also – as well illustrated by what has turned out – significant risk, to which must be added the work and stress involved in running such a project. Financing would also have to be raised. That was eventually achieved only in May 2019, before the hotel closed the following month. As to the builder, there was no obligation to use the Claimants, who it is to be noted took no risk on the loan that Mr and Mrs Marshall raised, or indeed any other risk of loss. Mr and Mrs Marshall could simply have found another builder. And the fact that Mrs Marshall was prepared to sign a building contract on behalf of Mr Marshall when work had already started casts no real light on whether she would have been prepared to do something as fundamental as agreeing to share the development profits (but not losses) without talking to him first.

41. Standing back, it is obvious that the Judge was fully entitled to treat the Claimants' claim as implausible. Their case was that, in February 2019, Mr and Mrs Marshall had agreed to give them one third of the profits plus a salary, as well as paying for the building work, while taking none of the risk of loss, whether in relation to financing the project or the ultimate sale proceeds. Indeed, on the Claimants' pleaded case the entire existing equity of the hotel (which, based on the sale price to Mr Bygrave, net of the then mortgage, was in the region of £375,000) was, effectively, to be gifted to the partnership. The justification for this is nowhere explained.

42. Further, there is no challenge to the Judge's finding that Mr Wynne was only introduced to Mr and Mrs Marshall in March 2019. Since the only pleaded case was an agreement reached in February 2019, the implausibility of the Claimants' case is only further increased. The Judge emphasised the considerable difficulty this caused at [27].

43. In addition, the Judge found that the JCT contract was entered into in June 2019 at the insistence of Mr Wynne. If profit sharing had already been agreed, one might legitimately ask why did he not similarly insist on documenting that at around the same time, and at least threaten to stop work if it was not done.

44. Added to that, there is a basic lack of certainty as to the parties to the alleged agreement. On the Claimants' side three options are offered, namely that either one of EJW or Mr Wynne, or both, were to receive a one third share. On the other side, the pleaded case was that Mr and Mrs Marshall would share the other two thirds. But Mr Lynch (the Claimants' only "independent" witness) believed that Mr Lucas was to receive a one third share, and that is also what is said in the emails sent in June 2019 ([25] above). As

discussed further below, there was also a material lack of certainty as to how the profits of the development should be determined.

45. A final point worth making about the lack of plausibility in the Claimants' case is the fact that EJW was largely absent from the site from around July 2020 (see [10] above). This is entirely consistent with the behaviour of a builder who has not been paid or has more profitable work elsewhere, but is much less consistent with the behaviour of a joint venturer who has a significant stake in the success of the project.

46. Ms Powers criticised the Judge's assessment that Mr Wynne had simply persuaded himself that a profit sharing agreement had been reached. In my judgment he was entitled to reach that conclusion. It is important to bear in mind that the Judge did not assess Mr Wynne as dishonest. The Judge considered that Mr Wynne believed that he would end up with a one third share. The documentary evidence discussed below is consistent with that, and cannot only be explained on the basis that such a share had been legally agreed in February 2019, or indeed subsequently.

The document-based challenges

47. As already explained, the Claimants say that the Judge wrongly discounted or misunderstood documentary evidence on which they relied, complaining that there was a lack of analysis and that documents were wrongly rejected as partisan or were misunderstood.

48. Despite the careful and comprehensive submissions by Ms Powers, I have not been persuaded that the Judge was not entitled to reach the conclusions that he did. It is evident from the Judgment that the Judge considered the documentary evidence, to which he had also been taken in some detail during the trial. It is not very extensive, and virtually all of it is expressly referred to in the Judgment. Further, while additional commentary on some of the documents would been desirable with the luxury of hindsight, it is important to take a realistic approach. The Judge was fully immersed in all the evidence and was giving an *ex tempore* judgment having just heard closing submissions. A focus on particular documents is a classic example of the dangers of island hopping, as compared to the sea of evidence available to the Judge: *FAGE v Chobani* at [114(iv)].

49. In my judgment, none of the pieces of documentary evidence relied on, whether alone or together, are so compelling or cogent that they render the Judge's decision one that no reasonable judge could have arrived at, or in other words, plainly wrong. Rather, and taking account of the other evidence available to the Judge and the inherent probabilities, the decision that he made was clearly open to him.

50. Ms Powers criticised the Judge's dismissal of the items listed at [25] above as coming from the Claimants and not involving the Defendants' side, other than through what the Judge described as the "tangential" involvement of Mr Lucas in the profit tracker document. But, subject to the point at [52] below, it was a fair assessment. Ms Powers relied on the fact that Ms Pearce was employed by Mr Lucas, but in this instance it is clear that she was acting for Mr Wynne. There is also no suggestion that her role went beyond a secretarial one. As to the profit tracker document, Mr Lynch (who was not involved in the project when the alleged agreement was reached) obtained his information from Mr Wynne, and the Judge was entitled to conclude that it was prepared

for the lenders and that Mr Lucas did not completely understand it, still less agree its terms on behalf of Mr and Mrs Marshall.

51. Further, it is important to take into account the Judge's assessment that Mr Wynne honestly believed that he would receive a profit share. The fact that documents from the Claimants' side reflect that belief is unsurprising. This is not a case of rejecting all documentary evidence produced by one side if it supports their case, which would obviously be wrong.

52. There is more substance to Ms Powers' criticism of the Judge's dismissal of Mr Lawrenson's email dated 7 August 2019 as coming from the Claimants' side. While it came from their solicitor it followed a meeting attended by Mrs Marshall and refers to it. It is clear from the email that there was discussion of some form of profit sharing at the meeting, as anticipated by Mr Lawrenson's earlier email of 26 July about the purpose of the meeting. Mr Lawrenson stated in the 7 August email that he had mentioned at the meeting that he anticipated drafting a joint venture agreement, but that what Mrs Marshall had suggested was "personal gifts" to Mr Wynne and Mr Lucas.

53. However, the Judge recognised this. At [57], after observing that the 7 August email was quite difficult to understand, he added that it was only evidence that "something extra to what had been contracted for was being discussed", rather than "something had *already* been agreed". That assessment was open to him. The JCT contract had been entered into, and what can be gleaned from Mr Lawrenson's email is that there were discussions about both Mr Wynne and Mr Lucas receiving more, but no agreement. Indeed, and for what it is worth, Mr Wynne's own assessment of the meeting in his witness statement was that "[w]e did not get very far in trying to agree the terms of a profit-sharing agreement". A proposal to make a gift is, of course, fundamentally different to a contractual profit-sharing agreement or a partnership. Importantly, there is no hint in the email (to which there is no indication of a response by Mr Wynne) that Mrs Marshall was thought to be reneging on what she had previously agreed, as opposed to what Mr Wynne believed that she would be willing to provide.

54. The emails in 2020 and 2021 referred to at [26] above are also consistent with discussions about profit sharing but no concluded agreement. Further, as the Judge observed, the February 2020 email was sent in the context of a proposal for Mr Wynne to put up some (relatively limited) security (see [18] above).

55. Ms Powers pointed out that, because that proposal fell through quickly, it could not explain the later emails. That is a fair point, but I do not read the Judgment as making that error. Rather, the June 2020 exchange was addressed by the observation that there was no need to ask solicitors for a draft because it was "too easy" (see [21] above).

56. That observation needs to be understood in context. When Mr Wynne first attempted to get solicitors to document in the arrangement, in June 2019, he was asked for a lengthy list of information in order to document a "development agreement" ([16] above). He made no response to that request, in circumstances where (consistently with his case) the obvious response would have been to the effect that this was a straightforward three-way split that he had already agreed.

57. Ms Powers submitted that the focus of the later emails, both in June 2020 and in 2021, was the need to document the agreed deductions in arriving at net profits, rather than the

principle of profit-sharing. However, in my judgment that just underlines the lack of certainty in the alleged agreement. Quite apart from uncertainty as to parties, the basis on which profits were to be shared is wholly unclear. This is only emphasised by the fact that the pleaded case involved the entire existing equity in the hotel being contributed to the partnership, whereas on appeal Ms Powers informed us that the Claimants had not pursued that point at the trial. That concession in turn exposes other uncertainties, including as to how financing costs for the duration of the development, whether for the build cost or for the existing mortgage, were to be addressed. These are not minor details or points that could be resolved by implication. In my view, the Judge was clearly entitled to conclude that the Claimants had not made out their case that there was a legally binding agreement at any stage, still less one entered into in February 2019 as pleaded, at a time when the alleged parties had not even properly met.

58. The Judge found that Mr Wynne had believed that Mr and Mrs Marshall were willing to share profits, and eventually and mistakenly, had persuaded himself that they had agreed to do so. The documentary evidence provides support for the genuineness of Mr Wynne's belief that Mr and Mrs Marshall were indeed willing to share profits in some way, but it does not compel the conclusion that agreement had been reached with them. In short, the Judge was entitled to conclude that, while there were discussions about profit-sharing, they never materialised into an agreement.

Partnership

59. Ms Powers accepted that ground 5 (whether there was a single business and therefore a partnership) was essentially dependent on success on the other grounds. I agree. The Claimants did not succeed in proving that they reached a contractual agreement of any kind to share profits from the development. In those circumstances it is not necessary to consider further either the factors considered by the Judge to determine whether a partnership existed, or other indicia of partnership.

Conclusion

60. In conclusion, I would dismiss the appeal. The judge was entitled to find that the Claimants had not made out their case.

Lord Justice Miles:

61. I agree.

Lord Justice Warby:

62. I also agree.