Neutral Citation Number: [2011] EWHC 1451 (Ch)

Case No: HC08C01253

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2011

Before :

MR JUSTICE ROTH

- -

Between :

ALEXANDER LANGSAM	**Claimant**
- and -	
BEACHCROFT LLP	**Defendant/ First Counterclaimant**
PAUL MURRAY	**Second Counterclaimant**
SIMON HODSON	**Third Counterclaimant**

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John Wardell QC and Rupert Reed (instructed by **Davies Arnold Cooper LLP**) for the **Claimant**
Stephen Moriarty QC and Derrick Dale QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant/Counterclaimants**

Hearing dates: 11 to 13, 16 to 19, 22 to 26 and 29 November and, 6 to 8 December 2010

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ROTH

Mr Justice Roth :

1. In this action, the Claimant, Mr Langsam, seeks damages for professional negligence against his former solicitors, Beachcroft LLP ("Beachcroft"). Beachcroft acted for Mr Langsam in a previous professional negligence claim that he brought against his former accountants, Hacker Young ("HY"). That action ("the HY proceedings") settled very shortly before trial with a payment to Mr Langsam of £1 million. In summary, Mr Langsam contends that if Beachcroft had not been negligent, he would have recovered some £3 million in the HY proceedings, either at trial or, possibly, by way of enhanced settlement.

2. Beachcroft acted for Mr Langsam for most of the HY proceedings under a conditional fee arrangement. Beachcroft has counterclaimed for its outstanding fees, in the sum of close to £214,000 (plus interest), which it asserts are owing under the final conditional fee agreement ("the 2nd CFA"); but Mr Langsam submits he is not liable to pay those fees because the 2nd CFA is unenforceable.

1. THE CLAIM

INTRODUCTION AND SUMMARY

3. Mr Langsam's claim against HY was that they had negligently failed to advise him that he was entitled to be treated as having non-domicile status and should seek confirmation of that status from the Inland Revenue ("the Revenue"). He alleged that if he had received such advice, he would have been able to obtain that confirmation and would have put in place an "equity release arrangement" ("ERA") whereby a bank would lend money to the business partnership that he had with Mr Michael Morton ("the Partnership") so that Mr Langsam could withdraw his equity and invest the funds so released off-shore. As a non-domiciliary, Mr Langsam would not have been taxed on the interest earned off-shore; whereas the interest payments on the loan made to the Partnership would be eligible for tax relief. Following assistance from other accountants, Mr Langsam was confirmed as non-domiciled by the Revenue on 2 September 1999 and he successfully implemented an ERA in 2000. Accordingly, in the HY proceedings Mr Langsam claimed the financial benefit that he would have received if he had implemented an ERA on that basis several years earlier.

4. The HY proceedings were commenced by a claim form issued on 22 July 2002. The trial of the action ("the HY trial") was due to commence on 30 January 2006. On 27 January 2006, the proceedings were settled, as mentioned above, and the terms of the settlement were set out in a 'Tomlin' order made by Patten J on 30 January 2006, recording that HY would pay Mr Langsam £1 million, with no order for costs.

5. The allegations made in the present action against Beachcroft regarding its conduct of the HY proceedings fall into two broad categories: negligence as regards advice and negligence as regards gathering and preparation of the evidence. As the trial progressed, it became clear that the key allegations under these heads were:

    i) that Beachcroft gave advice as to settlement which was unduly pessimistic and involved an estimate of damages that was outside any reasonable bracket for what Mr Langsam was likely to recover; and

ii) that Beachcroft failed appropriately to advise on the importance of Mr Morton as a witness, or of the need to take and serve a supplementary statement from Mr Morton; or to obtain timely valuations of the International Hotel owned by the Partnership so as to ensure that these were admitted in evidence.

I shall refer for convenience to these two categories as advisory negligence and evidentiary negligence, respectively. In addition, there were various other allegations of negligence which (save in one respect) were not formally abandoned but some of which were not particularly pursued, and which it is necessary to address in this judgment.

6. Beachcroft instructed Leading Counsel to act on behalf of Mr Langsam in the HY proceedings; save for the very limited involvement of a junior in commenting on the draft Particulars of Claim, no junior Counsel was ever instructed. Three Queen's Counsel were, successively, involved, and for the critical period the Leading Counsel was Mr Bartley Jones QC. Much of the advice from Beachcroft followed, or adopted, the advice of Mr Bartley Jones. Insofar as it is alleged that Beachcroft were negligent, in many respects it follows that it is implicitly alleged that Mr Bartley Jones was also negligent, and Mr Wardell QC, appearing for Mr Langsam in these proceedings, did not shrink from that implication. Indeed, it was submitted that Beachcroft's negligence included a failure to disagree with parts of Mr Bartley Jones' advice. But Mr Langsam, as he was entitled to do, did not join Mr Bartley Jones as a defendant, nor was he called as a witness by Beachcroft. Therefore I should emphasise at the outset that insofar as it is necessary for the purpose of this judgment to make findings regarding what Mr Bartley Jones did or should have done, not only do those findings not bind Mr Bartley Jones but they are made without his having had the opportunity to put his own account before the Court or to explain his process of reasoning.

WITNESSES

7. The evidence at trial comprised a mass of documents, including many internal attendance notes from Beachcroft and all the witness statements, experts' reports and documents from the HY trial. In addition to Mr Langsam himself, the Claimant had four other witnesses, three of whom testified at trial. There were two witnesses for Beachcroft: Mr Peter Southeran, the partner who handled the HY proceedings for Mr Langsam throughout, and an assistant solicitor, Mr Harald Loeffler, who was heavily involved at the later stages before trial. It is appropriate to set out my assessment of the witnesses which informs my analysis and findings of fact.

(i) The Claimant's witnesses

8. Mr Alexander (Alex) Langsam is a self-made and highly successful entrepreneur who has built up a hotel business in partnership with Mr Morton. Some of the hotel assets are held in the Partnership and others are in at least two companies, Britannia Hotels Ltd ("BHL") and Britannia Country House Hotel Ltd ("BCHHL").[1] Mr Langsam is a very wealthy man with what can be described as a "large personality": he is clearly used to getting his way and dominating those around him. I have no doubt that he

[1] It appears that there was a third company, Britannia Hotel Wolverhampton Ltd, but this is not referred to in the reports of the bank lending experts.

genuinely feels strongly that he was let down by Beachcroft, and in particular by Mr Southeran, in the handling of his claim against HY. He commenced the HY proceedings after receiving favourable advice from Mr Southeran of his prospects and I fully accept that the level of final recovery was for him a serious disappointment.

9. Mr Langsam is in his early seventies, and following surgery for a tumour that he had in 2008, he is now under strong medication and sometimes finds concentration difficult. I take this into account in assessing the way he gave his evidence, but he did not suggest that it has impaired his memory of the events to which he positively testified. Making every allowance for this, as Mr Langsam's evidence proceeded (he was in the witness box for over two days) I increasingly formed the view that he has now persuaded himself of a version of events whereby Mr Southeran was at fault on almost every occasion. Either that has distorted his recollection or he deliberately embellished his account at various points to advance his case, or, as I consider more likely, there is some combination of the two. Accordingly, I approach much of his evidence with caution and consider that it has to be scrutinised carefully against the contemporary documents. His disappointment at the outcome has led him to fail to distinguish between the inevitable hazards that arise in litigation and matters that could constitute justifiable grounds for criticism of his solicitor. In general, I find that when he was advised in the run-up to trial of risks in certain aspects of his case, he could not accept that this might represent simply cautious advice: since he was confident that he was right, Mr Langsam was quick to attribute such advice to incompetence and defeatism on the part of his lawyers.

10. Mr Robert Ferrari is a chartered accountant and the Finance Director of the Britannia Hotels Group. He has worked very closely with Mr Langsam for over 24 years. Since Mr Morton's retirement in 2004, Mr Ferrari is, in effect, Mr Langsam's right-hand man in the business. He acted as Mr Langsam's intermediary in dealing with Beachcroft and the experts, and was much more directly involved in the preparation of Mr Langsam's claim than Mr Langsam himself. That said, he would refer to Mr Langsam for any important decision. I found him on many issues to be an evasive witness, who was in his evidence seeking to do all he could to advance Mr Langsam's case.

11. Ms Susan Ashton worked for many years as in-house lawyer for Britannia Hotels and hence, effectively, for Mr Langsam. She took early retirement some two years ago. She answered questions clearly and directly, acknowledging when she could not be sure in her recollection. Moreover, unlike Mr Ferrari, she did not give me the impression that she felt that she needed to favour Mr Langsam: indeed she volunteered the information that he was on one occasion extremely rude to Mr Bartley Jones. I found her to be a very honest witness and since she – unlike almost all the other witnesses in this case – had very limited involvement in the HY proceedings I consider that reinforces the reliability of her account of what happened on one of those occasions which I address below.

12. Mr. Michael Warburton was the senior tax partner at Grant Thornton, the well-known accountancy firm, until June 2009, and continues to act as a tax director in the firm's national tax group. He is an accountant of considerable experience, has appeared as an expert witness on several occasions, and was instructed as an expert witness in the HY proceedings on behalf of Mr Langsam, whom he had not encountered previously. His evidence in the present case concerned essentially the advice and position that he

adopted in the HY proceedings and what he would have said had a trial taken place. Although not appearing as an expert witness in the present case, his evidence here was therefore directly related to his evidence in the capacity of an expert. He gave clear and direct evidence, and I found him to have a good recollection of his involvement in the HY proceedings. Since 2006, he has acted as a personal tax advisor to Mr Langsam but I see no basis for considering that this coloured his evidence to this court. He was, in my view, clearly an honest witness.

13. The fifth witness for Mr Langsam was Michael Morton, whose statement was covered by a notice under the Civil Evidence Act 1995 since he has become afflicted by Alzheimer's dementia since signing that statement on 15 January 2009. I shall refer to Mr Morton's statement below. His statement was based on an interview he had with Brian White, a partner in Deloitte LLP who acts as the accountant to both Mr Morton and Mr Langsam. I should add that there was also a witness statement from Mr White that was provided to Beachcroft regarding the circumstances of that interview and how Mr Morton's statement came to be made; but Mr White's statement was not formally part of Mr Langsam's evidence at trial and was only introduced by Mr Moriarty QC on behalf of Beachcroft in the course of cross-examination.

(ii) The Defendant's witnesses

14. Mr Peter Southeran qualified as a solicitor in 1987 and has been a partner based in Manchester of substantial solicitors' firms since the early 1990s, practising as a commercial litigator. He joined the Manchester office of Beachcroft (then called Beachcroft Wansboroughs) in 2007 and left Beachcroft in 2009 to set up a new firm of solicitors. He was in the witness box for almost three days, in a case where his professional conduct of a major piece of litigation was under sustained attack. I found him to be a frank and honest witness, who readily accepted that he did not have a precise recollection of certain matters that were put to him, sometimes in exhaustive detail, and I consider that he made every effort to give a full and honest account of events. Unsurprisingly, he was reliant to some degree on his attendance notes, or the detailed notes taken by his assistant Mr Loeffler at the few meetings where the latter was present. Clearly, where a meeting of several hours is the subject of an attendance note of only a few pages, the note is not a complete record of everything that was said. In determining disputes regarding particular meetings, I make allowance also for the fact that such notes inevitably present only Mr Southeran's perspective on the discussions. Nonetheless, I found that, in general, the notes appeared a reliable indication of what occurred, prepared by a solicitor who was working hard on behalf of a very demanding client.

15. Mr Harald Loeffler qualified as a solicitor in October 2003, having previously studied law in his native Austria. He remains a solicitor at Beachcroft. He worked as an assistant to Mr Southeran in the HY case, with increasing involvement after January 2004. His principal evidence concerned a few critical meetings which he attended in January 2006 (including a consultation with Mr Bartley Jones and the mediation) where he took a detailed manuscript note, and his work with the banking expert and preparation of various schedules concerning quantum. In my view, he manifestly gave entirely honest evidence.

THE FACTS

Introduction

16. HY acted as the accountants to Mr Langsam's businesses from some time in the 1980s and in March 1996 they became his personal accountants. The partner at HY who primarily dealt with his affairs was Mr Michael Grundy. As mentioned above, Mr Langsam only received confirmation from the Revenue that he was entitled to be treated as a non-domiciliary by letter dated 2 September 1999, when another firm of accountants, Peter Lobbenberg & Co ("Lobbenbergs") was acting for him in that regard. Mr Langsam then consulted Arthur Andersen and on the advice of Mr Brian White, who was then at that firm, instructed them in late 2000 to effect an ERA. This was established by arranging for the Partnership to have a £40 million overdraft facility with the Israel Discount Bank ("IDB") that was to be matched by deposits to be made in the IDB's overseas subsidiaries. On that basis, Mr Langsam and Mr Morton each withdrew £20 million from the Partnership capital account in December 2000, invested those monies with the IDB's overseas subsidiaries, and the IDB then granted an equivalent loan to the Partnership. This "back-to-back" lending was replaced, on Mr White's advice, in July 2001 by loans advanced from a number of banks (principally Bank Leumi) secured on the property assets of the Partnership, which gave Mr Morton access to some of the released funds. Accordingly, Mr Morton agreed to and participated in the ERA that was put in place ("the 2000 ERA").

17. Mr Langsam alleged against HY that they should have advised him of his potential entitlement to non-domicile status and of this tax planning opportunity, in which case he would have obtained confirmation from the Revenue earlier and been able to withdraw some £18 million from the business under an ERA implemented several years before the 2000 ERA. Although his primary case was that such advice should have been given once HY became his personal accountants in March 1996, he also advanced what has been described as a secondary claim that HY should have given him such advice already in 1993, when he raised the issue of being a non-domiciliary in discussion with Mr Grundy, who allegedly agreed to look into the matter.

18. HY never admitted liability in the proceedings against them, but the present case proceeded on the basis that it was not seriously in issue that HY were negligent as from the commencement of their personal retainer by Mr Langsam in March 1996. That was the consistent advice which Mr Langsam received from Mr Southeran, and Beachcroft has not sought to fight the present action on any other basis, save to submit that in considering the HY proceedings, as with any complex claim, there should be some discount for overall imponderables. Mr Langsam for his part, although he never abandoned the secondary claim against HY, recognised that it was a weak claim and it has not been suggested on his behalf that it should have featured in the advice on settlement or, indeed, that it should feature in the assessment of the damages now sought.

19. Leaving aside, therefore, the secondary claim, there were six main issues in the HY proceedings on causation and quantum:

    i) The "domicile issue": whether Mr Langsam would have obtained confirmation of his non-domicile status if HY had applied to the Revenue in 1996. By an amendment to their Defence, HY contended that Mr Langsam was not entitled to non-domicile status on the facts.

ii) Whether, if Mr Langsam had been advised of this possibility, he would in fact have gone down this avenue at the time, given that Mr Grundy said in his evidence for the HY trial that he would have advised Mr Langsam that he believed the Revenue would seek to disallow tax relief on the interest paid on the Partnership borrowing and that he was particularly concerned about the implementation of an ERA while the Revenue's Special Compliance Office ("SCO") was conducting an enquiry into the Partnership's tax matters. The SCO inquiry began in March 1995 and was not completed until March 2000;

iii) The "Start Date" for damages: how long it would reasonably have taken to obtain confirmation from the Revenue and set up an ERA;

iv) The "Morton issue": whether Mr Morton would have agreed to an ERA in 1996 and, as this involves the hypothetical action of a third party, whether any, and if so what, discount should be applied on that account.

v) The "lending issue": to what extent banks would have provided a loan to the Partnership to replace capital withdrawn and whether that would have been on the basis of back-to-back lending or secured lending; and whether that had implications as to whether the ERA might be at risk of challenge by the Revenue;

vi) The "compounding issue": how the loss should be calculated in terms of interest and, in particular, whether the interest that would have been earned on the off-shore investment and the interest that would have been charged on the Partnership borrowing should respectively be compound or simple interest.

20. Not all of these issues were clear from the outset. Some emerged very late in the day as the HY proceedings approached trial, as is often the case in litigation. A mediation took place shortly before the trial date, on 20 January 2006, and that served to clarify some of the points being taken by HY.

21. The matters in the HY proceedings alleged to constitute negligence by Beachcroft arose in the final few months before the case was settled on 27 January 2006. Indeed, in my view, the core allegations depend on the events of the last 10 days. Although it is necessary to go through that period in detail, it is appropriate to set out what happened beforehand as that is important for the context of the final, critical period, and was relied on by both sides.

Initial contact and instructions

22. It was through Mr Brian White that Mr Langsam was initially referred to Peter Southeran who was at that time a partner based at the Manchester office of Garretts, the solicitors affiliated to Arthur Andersen. Mr White considered that Mr Langsam might have a claim against HY, and based on what he heard from Mr White, Mr Southeran wrote to Mr Ferrari on 3 January 2001 to introduce himself and give a very preliminary overall view. The fact that Mr Southeran addressed this letter to Mr Ferrari is not insignificant. He did so because Mr White told him that Mr Ferrari dealt with matters generally on behalf of Mr Langsam and acted as the main point of contact. That was fully borne out by the way Mr Southeran received instructions throughout.

23. In his initial letter, Mr Southeran said that he considered that there appeared to be a claim worth investigating. He explained the various steps involved in the issue of proceedings and the possibility of mediation. As regards costs, he explained the difficulty of assessing the costs to trial on the limited information available but put forward a very broad indication, on the basis of an average case, that they might be in the range £52,000 to £92,000. He stated:

> "In the event that any claim is successful, it is likely that an order for costs will be made in favour of Mr Langsam which will result in the recovery of approximately 75% of the costs actually incurred."

24. Following that letter, Mr Southeran went to see Mr Ferrari and Mr Langsam, and Mr Ferrari sent Mr Southeran various documentation so that he could consider the matter further. On 9 April 2001, Mr Southeran wrote a 9-page letter to Mr Ferrari. In his letter, he distinguished between the primary claim and the secondary claim, and as regards the primary claim he wrote:

> "I can see no excuse for Mr Grundys [sic] failure to resolve this important matter in a timely fashion. If I am correct about this, there appears to be an attractive claim in respect of all losses incurred from September 1996 (accepting it would have taken approximately six months to progress the application if Mr Grundy had immediately commenced work on it in 1996) to September 1999 when in fact the matter was resolved. This equates to a period of at least three years."

25. Mr Southeran explained that calculation of the claim is likely to be a complex exercise in forensic accountancy but under the heading of "Quantum", he stated:

> "Whilst there may be argument about the precise basis on which the calculation should be carried out, I take the view the amount of Mr Langsam's claim is the actual loss as a result of the loss of the opportunity to avoid payment of United Kingdom tax. In short, the loss is the amount of additional tax paid which would otherwise have been avoided had appropriate advice been given."

26. Mr Southeran explained the working of the six-year limitation period and its possible extension in circumstances of 'concealed' damage, which had been discussed at their meeting (where Mr Langsam had referred to a report suggesting that the six-year limit would not apply in a case of this kind). On the issue of costs, which had also been highlighted at the meeting, he said that he was prepared to commit to specified costs limits for the various stages of the matter.

27. The next substantial contact on this matter came from Mr Ferrari in mid-August 2001 when he asked Mr Southeran to reconsider the proposed level of fees. As a result, Mr Southeran sent revised fee proposals to Mr Ferrari on 15 August 2001. These proposed total fees for the six stages to the end of trial of £44,500 (plus VAT and disbursements) as regards the primary claim, plus a "success fee" which Mr Southeran suggested should be £10,000. Mr Southeran explained in evidence that in

view of Mr Langsam's potential value as a client, he was prepared to undertake the work at a reduced rate as a 'loss leader'. Following further discussion with Mr Ferrari, Mr Southeran agreed to include the secondary claim within those costs caps provided that the work on it did not prove to be particularly substantial. I shall return to the issue of costs when considering the counterclaim.

28. In October 2001, Mr Ferrari called Mr Southeran to say that Mr Langsam wished to proceed with both the primary and secondary claims. Over the following two months there were various exchanges regarding the question of limitation. It became clear to Mr Southeran that Mr Langsam was keen to delay the issue of proceedings for as long as possible and Mr Southeran wrote formally setting out his views on limitation in a letter of 18 December 2001, in which he advised that while the period in respect of the primary claim might start after 15 March 1996, "it would be unsafe to allow the issue of proceedings to be delayed past [14 March 2002]". In mid-February 2002, Mr Ferrari contacted Mr Southeran to confirm that the matter was proceeding but that service of proceedings should be delayed for as long as possible. To protect Mr Langsam's position, Mr Southeran arranged for a claim form to be issued in March 2002 but it was not served and was allowed to lapse in July, after Mr Southeran had given a warning about the limitation risk. Even after a second claim form was served in November 2002, Mr Langsam was keen to slow down the initial stages of the proceedings.

29. Mr Southeran was clearly given to understand that the reason for the delay was that various matters were being considered by the Revenue and Mr Langsam wanted those resolved before the HY proceedings were progressed. Mr Southeran believed that Mr Langsam was concerned in particular that airing these matters in public might lead the Revenue to challenge the 2000 ERA. Mr Langsam and Mr Ferrari accepted that Mr Southeran was given the impression that the instructions to delay were because of concerns about the Revenue, but they insisted that this was not the real reason. They said it was because they were busy at this period dealing with various hotel acquisitions and, more particularly, that Mr Langsam's long-time partner was critically ill so that he was preoccupied by that and spent much time away from the office looking after her, and after she passed away in 2003 he was very distressed. Neither of them mentioned this to Mr Southeran since it was a personal matter and Mr Langsam is a very private person.

30. Although I of course recognise that his partner's illness was very distressing for Mr Langsam, I cannot accept that this, and the demands of running a substantial business with a small team, is the main reason for the delay. I consider that if it had been, Mr Ferrari, if not Mr Langsam himself, would have said something to Mr Southeran, who was pressing his concern about issuing proceedings, to the effect that Mr Langsam had personal reasons that were preoccupying him and so could not attend for a while to major litigation - even if neither would have wanted to spell out to Mr Southeran what those reasons were. Mr Ferrari indeed accepted in his evidence that he could be an intermediary who told Mr Southeran what was going on in some circumstances where Mr Langsam would not mention it himself. But on the question of delay, about which Mr Southeran as their solicitor was clearly concerned, Mr Ferrari never sought to indicate that there was some other reason. Instead, he and Mr Langsam both clearly said that their concern was regarding the Revenue, and indeed it was agreed that Mr Southeran would contact Mr White to see how long it might take for the tax

investigation by the SCO to be determined. Therefore I do not accept that the explanation which they gave to Mr Southeran was in effect a façade: I consider that it was a very real factor in Mr Langsam's mind at the time, irrespective of whether he was aware of all the details of the SCO investigation. I find that he took, understandably, a very cautious approach where the Revenue was concerned.

Commencement of Proceedings

31. In July 2002, Mr Southeran moved to Beachcroft. There was discussion between him and Mr Ferrari regarding the level of fees for the case, and Mr Southeran agreed to reduce the stage fee caps further. The second claim form had been issued on 22 July 2002 and so needed to be served by 21 November. Mr Southeran consulted Mr Anthony Elleray QC in order to finalise the Particulars of Claim (which had been drafted before the expiry of the previous claim form) and on 15 November 2002 Mr Southeran wrote to Mr Ferrari relaying various aspects of his advice. Specifically regarding quantum, he said this:

> "Counsel agrees that the quantum of this claim is the value (as assessed by the court) of the lost opportunity to invest of[f] shore and enjoy tax free income. This is not necessarily the value of the lost income. In valuing lost opportunities the court takes into account all the circumstances and applies a discount to reflect the risk and uncertainty which is an aspect of all hypothetical "loss of chance" claims. It is difficult at this stage to be precise about this as the figures provided to date are rather broad brush, but assuming it can be shown an opportunity to make substantial tax savings has been lost, any award should be a substantial proportion of the top line figures."

32. The claim form and Particulars of Claim were served on HY on 21 November 2002. As regards quantum, the Particulars of Claim stated that figures will be provided in the form of an expert's report and that the best estimate that the claimant could give was that a sum in excess of £10 million would have been withdrawn from "his various business interests within the United Kingdom" and expatriated. No reference was made to the manner in which this withdrawal would have been achieved. In accordance with his client's instructions, Mr Southeran sought to delay further progress in the proceedings and HY, through their solicitors, agreed to a stay of the proceedings until 12 March 2003, and the time for service of a defence was then extended to 11 April 2003.

33. Following service of the Defence, Beachcroft proceeded with preparation of draft witness statements and consideration of disclosure. In the course of that, and at Mr Langsam's insistence, Mr Southeran went to take a statement from Mr Morton on 9 July 2003. Mr Southeran gained the impression in that meeting that Mr Morton and Mr Langsam were not close, although they had been business partners for many years. When Mr Southeran sent the draft statement which he had prepared for Mr Morton to Mr Ferrari, he was told that he and Mr Langsam were dissatisfied with it and would prepare an amended version. That was signed by Mr Morton on 24 July 2003. Both the draft prepared by Mr Southeran and the final version concerned only the question of whether Mr Langsam had raised the issue of domicile with Mr Grundy prior to

March 1996 (i.e. the secondary claim), and whether Mr Grundy had comprehensively advised Mr Langsam on domicile in February 1997. The statement did not address the question of whether Mr Morton would have agreed to an ERA at any time before 2000.

34. On 27 October 2003, Mr Southeran attended a consultation with Mr Elleray QC for advice in general and more specifically with regard to the drafting of a Reply. In that consultation, Mr Southeran explained the sensitivity over giving details of the ERA until the Revenue confirmed the tax planning as viable. Mr Langsam's Reply was served on 31 October 2003. Mr Southeran was from late November 2003 being pressed by HY's solicitors over disclosure, and on 9 June 2004 HY issued an application to strike out the claim for lack of proper disclosure but that was withdrawn following negotiations. Also over this period, there was discussion between Mr Southeran on the one side and Mr Ferrari and Mr Langsam on the other regarding funding the claim and the possibility of a CFA. Such an agreement was eventually signed by Mr Langsam on 29 April 2004 ("the 1st CFA"). It will be necessary to refer to this in the context of the counterclaim.

35. On 24 March 2004, a further consultation took place with Mr Elleray QC at which Mr Southeran was accompanied by Mr Loeffler, who had begun to assist on the case. Neither Mr Langsam nor Mr Ferrari attended. The instructions enclosed the draft witness statements (including that of Mr Morton) and counsel was specifically instructed to consider whether they were adequate. A large number of specific evidential points were raised by Mr Elleray that required attention but he did not suggest that Mr Morton's statement was not adequate. Witness statements were exchanged on 28 May 2004. In his witness statement, Mr Langsam stated that the amount available on his capital account in the Partnership, as shown in the Partnership accounts, in 1995 was £18,753,500.

36. On 29 July 2004, HY served a draft Amended Defence which introduced a detailed challenge to Mr Langsam's non-domicile status, alleging that the Revenue's acceptance of Mr Langsam as a non-domiciliary was incorrect. Their contention was based on the argument that Mr Langsam's late father had acquired an English domicile of choice after he came to England from Austria, such that Mr Langsam had acquired an English domicile of dependency by the time of his majority. In sending that pleading to his client, Mr Southeran asked whom Mr Langsam wished to instruct as leading counsel for the trial, and suggested either Mr Elleray QC or Mr Giles Wingate-Saul QC. Mr Langsam made it clear that he did not want to go on using Mr Elleray and chose Mr Wingate-Saul.

The accounting experts and calculations of loss

37. As regards the accountancy evidence, which would clearly play an important role in the case, Mr Ferrari and Mr Langsam took an active part in selecting the accountancy expert. In June 2004, they chose Mr Michael Warburton of Grant Thornton, who was instructed accordingly. HY instructed Mr Andrew Lowden of Baker Tilly. The accountants' first expert's reports were served in early July 2004.

38. In his first report, Mr Warburton expressed the view that an accountant should reasonably establish within a month of his engagement whether domicile was an issue, and if so he should then have collected the necessary evidence and submitted a

DOM1 application to the Revenue, and received confirmation of his client's position within a further five months. Hence if HY's retainer had commenced on 15 March 1996, Mr Warburton considered that the issue of Mr Langsam's domicile should have been concluded "by at the latest October 1996." As regards the benefit that would result from appropriate tax planning, this was the difference between the gross interest that would be received on the surplus capital withdrawn from the Partnership and invested overseas, and the cost of borrowing by the Partnership after allowing for tax relief against Partnership profits. Mr Warburton also stated that because there was a good chance of Mr Langsam's domicile being accepted by the Revenue, the tax planning arrangements could have been put in place while the application to the Revenue was being made. On that alternative approach, the Start Date for the calculation of loss was April 1996.

39. Mr Lowden's first report was largely devoted to the secondary claim, but in a second report served on 3 September 2004, he expressed the view that the process of determining Mr Langsam's domicile should have started by September 1996 and been concluded by September 1997. This produced a Start Date for the loss of October 1997.

40. In the schedule of loss prepared by Mr Warburton and served on behalf of Mr Langsam on 5 October 2004, the loss under the primary claim was therefore calculated on the basis of three alternative Start Dates: April 1996, October 1996 and (the defendant's case) October 1997. The loss was calculated to end November 2000 (i.e. to the date of the 2000 ERA). Moreover, alternative calculations were made on the basis that the interest charged on the loan would have been at the rates supplied by Mr Ferrari (which Mr Warburton had not independently verified) or at what were described as "Independent figures", being the higher rates which Mr Warburton derived from LIBOR. The resulting figures were as follows:

	Claimant's figures	*Independent figures*
April 1996-Nov 2000	£3,409,076	£3,132,022
Oct 1996 – Nov 2000	£2,959,295	£2,747,994
Oct 1997 – Nov 2000	£2,082,220	£1,964,147

41. In making these calculations, Mr Warburton compounded the interest earned off-shore, on the basis that it would have accumulated. However, for the cost of borrowing that was subtracted he used simple interest on the basis that the accounts of the Partnership indicated sufficient funding to service the loan out of the profits of the business.

42. Mr Lowden in his second report set out significantly lower figures for the hypothetical loss and he also questioned whether Mr Langsam would in fact have been able to release his equity of £18.75 million from the Partnership in 1996. Although as a tax accountant he did not feel able to express a concluded view, he said that putting into effect an ERA was dependent upon a number of factors, including that there was a lender willing to provide the funds; that the borrowing would not be prejudicial to the business of the Partnership; and that the borrowing would be acceptable to Mr Langsam's business partner, Mr Morton.

43. Mr Lowden's second report was considered at a consultation with Mr Wingate-Saul on 27 September 2004, attended by Mr Southeran and Mr Loeffler. There was a full review with leading counsel of the issues of evidence, liability and quantum. Mr Wingate-Saul noted that, unless the Partnership had been dissolved, Mr Morton's consent to the withdrawal of the funds would have been required and that it was necessary to show that the value in the business was sufficient to persuade a bank to lend close to £19 million. He advised that a witness statement should be prepared for Mr Ferrari setting out the financial position in 2000, when an ERA was effected, and any differences in the position over previous years. He also advised that a letter should be obtained from a bank that such monies would have been lent and a supplementary report prepared by Mr Warburton stating that the transaction would have been achievable. Mr Wingate-Saul did not advise that a further statement should be taken from Mr Morton regarding his consent to an ERA.

44. Mr Wingate-Saul also advised that he would expect HY to make a payment into court in due course. His view in that regard was summarised in a full letter that Mr Southeran wrote to Mr Ferrari on 11 October 2004 as follows:

> "Whilst acknowledging that there are a number of issues which remain to be dealt with … Giles' view was that there were good prospects of success and in response to a direct question from me, expressed a view that if he were advising the Defendant he would advise them to make a payment into court and, if they wished that payment to give any realistic measure of protection, he would advise them to pay £2m.
>
> I want to avoid setting any hares running about this. His comments do not necessarily mean he takes the view the claim is worth at least £2m. There are many reasons why a payment in might be made. One of them is a tactical device to clarify whether you would be prepared to settle for a relatively modest payment. That is the most frequent basis upon which payments in are made. The figure mentioned above is the figure which Counsel would advise the opposition to pay in if, instead of making a tactical payment, they wished to make a payment which gave them some cost protection at trial."

45. In his seven-page letter, Mr Southeran thoroughly reviewed the current position on the case and the further work that needed to be done, and he discussed how the issue of costs should be dealt with going forward. That discussion, which was taken up at a meeting with the clients on 21 October, led eventually to the signing of a further conditional fee agreement ("the 2nd CFA") in mid-December. It will be necessary to refer to those discussions and the 2nd CFA in detail in the context of the counterclaim.

46. Over the period October 2004-January 2005, there were discussions between Mr Southeran and both Mr Warburton and Messrs Langsam and Ferrari regarding what was required to demonstrate that the necessary lending would have been available to the Partnership in 1996, which Mr Warburton would address in a supplementary report. Work was also carried out to rebut the case on domicile raised by HY's Amended Defence, and drafting an Amended Reply. This was served in December 2004. The Amended Reply disputed that Mr Langsam's father had ever acquired an

English domicile of choice, asserting that he never regarded England as his permanent home; that he returned to Austria as soon as practicable after the end of World War II, initially for up to three months a year; and that he subsequently lived there for about six months a year.

47. It is clear from the contemporary documents that, far from being inhibited in expressing their views, Messrs Ferrari and Langsam were very insistent in doing so. On the lending issue, it was agreed that an approach would be made through Mr Ferrari to banks, in particular the bank that made the loan in 2000, to see if they would supply a letter that they would have been willing to lend at the earlier date on a back-to-back basis as happened in 2000. Hence, on 6 January 2005, Mr Ferrari sent an email to Mr Southeran, stating:

> "We've spoken to 4 Banks and have 3 meetings scheduled between 17 and 24th January. Looks very promising."

48. However, Mr Southeran was concerned about the evidential position if no satisfactory letters were forthcoming (as indeed proved to be the case) and also whether HY's argument on domicile that the Revenue 'got it wrong' was a sustainable approach on which they could resist the claim. In a note sent by Mr Wingate-Saul on 20 January 2005 responding to Mr Southeran's queries on these points, he advised:

> "The fact that Mr Langsam was eventually able to borrow the money is good evidence but of course was something that he achieved at a later date than we contend for … We have to show that he could have borrowed money (in different financial circumstances) at the earlier date. His own bank would produce the most compelling evidence. This would be supported by Mr Warburton's expert evidence as a result of his market research. Mr Warburton's expert evidence alone might make the point but (a) the absence of evidence from Mr Langsam's bank …might turn the point from a virtual certainty (a 100% recovery) to a "chance" case. …
>
> On the domicile point, it seems to me that the point is not "What is Mr Langsam's domicile?" but "What domicile would the IR have regarded Mr Langsam as having for tax purposes if an application had been made at the appropriate time?" In this context the actual decision is evidence (and strong evidence) as to what the decision would have been (if perhaps made by a different employee of the IR) if made at an earlier date. I have no doubt that if it is held that important information was withheld from the IR then the court would disregard the actual IR decision and make a finding as to domicile. Even this (if adverse) might still allow for an argument that there remained a chance that the IR would still have made a favourable decision."

49. Subsequently, when Mr Southeran raised with Mr Wingate-Saul the concern voiced by Mr Ferrari as to any risk of Mr Langsam losing his non-domicile status as a result

of the case, Mr Wingate-Saul confirmed the opinion of Mr Warburton that in the unlikely event of the Revenue taking such a decision, it would not be retrospective.

50. Mr Warburton's supplementary report was served on 31 January 2005. A substantial part was dedicated to rebutting the case on domicile put forward in the Amended Defence. As regards the lending issue, Mr Warburton set out the basis of the 2000 ERA when £40 million was withdrawn by Mr Langsam and Mr Morton, and noted that the financial position of the Partnership was not dissimilar in the period from 1994 through to 2000. He said:

> "It is my view that at any time between 1994 and 2000 the partners could have withdrawn from the Partnership funds of £36 million in total which could have been invested in offshore bank deposits. It is my view that banks would have been prepared to advance funds…at this time on exactly the same basis as they actually advanced funds in November 2000 to enable Partnership capital to be withdrawn in this way. I reach this conclusion because the financial circumstances of the Partnership and the Claimant from 1994 was broadly the same as that prevailing in November 2000 when the transactions actually took place. In particular, it is my view that the availability of security to the banks over the funds deposited in the offshore accounts would have been sufficient for banking purposes irrespective of other security arrangements within the Partnership."

51. In the alternative, Mr Warburton considered that banks would have been willing to lend up to 70-75% of the valuation of freehold property if the business was operating sufficiently profitably to fund the interest. Taking 70% of the book value (as approximately the market value) of the property, and deducting existing bank debt, would produce a borrowing capacity of about £28.9 million. Mr Warburton observed that very wealthy individuals like Mr Langsam are able to negotiate arrangements with banks that are not typically available to individuals and businesses of lesser means.

52. A meeting had taken place between Mr Warburton and Mr Lowden on 21 October 2004, and following Mr Warburton's supplementary report, the two accountancy experts produced their joint statement in February 2005. On domicile, this recorded their agreement that:

> "The Inland Revenue has determined on the basis of the appropriate information disclosed that Mr Langsam is not UK domiciled, following a review of his and his fathers circumstances at a high level within the Inland Revenue."

53. The statement clarified that the main points of dispute between them were as to the "Start Date" and as to quantification of the amount which might have been borrowed at dates earlier than December 2000. On the latter, Mr Warburton had set out his opinion in his supplementary report but Mr Lowden stated that he considered that this was a banking matter on which a banking expert should be asked to advise and that as an accountant he was not qualified to give an opinion.

54. In February 2005 HY's solicitors pressed for information and disclosure of matters concerning Mr Langsam's family history as relevant to their domicile argument, something which Mr Langsam acknowledged he found irritating.

55. On 21 March 2005, HY served their counter-schedule of loss prepared by Mr Lowden. Their figures were as follows:

April 1996-Nov 2000	£1,567,428
Oct 1996 – Nov 2000	£1,414,000
Oct 1997 – Nov 2000	£1,290,444

56. The explanation for this great divergence from the claimant's figures, as clarified by Mr Warburton with Mr Lowden, was that the figures calculated by Mr Lowden for HY did not compound the interest off-shore but applied simple interest both to the off-shore deposit and the on-shore borrowing. Mr Lowden described his approach to Mr Warburton as a "short-cut" so that the final figures would take account in a broad way of the impact on the business of the on-shore borrowing. Mr Warburton remained confident that it was appropriate to apply compound interest to the offshore deposits, since the interest would have accumulated there, as happened after the 2000 ERA. Nonetheless, he acknowledged that there was "some merit" in Mr Lowden's argument. As he explained it in an email to Mr Southeran on 27 April 2005:

> "[Mr Lowden] would be correct in saying that without the additional borrowings in the Partnership, greater cash flow would have accrued to the business which could have been extracted by the partners in the UK for personal spending. Alternatively, they could have used the funds progressively to reduce partnership borrowings. I think it would be helpful if you could have a word with Counsel and see whether, in his opinion, I am correct to make the assumption that I have about the treatment of interest costs within the Partnership. If he decides that there is merit in the proposition being put by Andrew Lowden, I would then need to carry out calculations to identify the extent to which greater borrowings in the UK, as a result of accumulated interest, would affect the loss. This may, or may not, finish up with the quantification bearing some resemblance to the calculations performed by Andrew Lowden. His shortcut may not give the same answer."

57. On this issue, Mr Wingate-Saul advised by telephone (on 11 May 2005) that Mr Warburton's approach appeared to be correct in principle but that Mr Lowden had a point that if only simple interest was charged on the Partnership borrowing, some credit may have to be given for the expense of servicing the interest. HY's solicitors had indicated that HY would seek to adduce expert evidence on bank lending, and Mr Wingate-Saul advised that in the absence of clear and favourable evidence from the banks as to the availability of the necessary lending to the Partnership at the earlier date, an expert on bank lending should be instructed. (The earlier dates being considered were March 1994 as well as 1996, because of the secondary claim.) The letter that was eventually obtained from Bank Leumi in 22 July 2005 was not

unhelpful but insufficiently definite, and it was finally agreed that an expert on bank lending should be instructed.

Change of Counsel

58. Also in May 2005, Mr Wingate-Saul informed Mr Southeran that he would be retiring at the end of July. He continued to be consulted until his retirement, particularly on issues of disclosure regarding Mr Langsam's father's circumstances on which HY were pressing hard and on which Mr Langsam was very resistant. Mr Langsam was particularly indignant that HY's solicitors were making inquiries and seeking evidence from his parents' former neighbours in Salford, and Mr Southeran had to explain HY's rights in that regard. They discussed obtaining statements from witnesses who could support the rebuttal of the contention regarding Mr Langsam's late father's domicile. A lot of work was carried out, in particular by Mr Loeffler, in responding to disclosure requests from HY on the domicile issue and seeking evidence about Mr Langsam's father's resumption of links to Austria after World War II.

59. In the light of his retirement, Mr Wingate-Saul would obviously not be available to conduct the trial and in August 2005 Mr Langsam (through Mr Ferrari) accepted Mr Southeran's recommendation that Mr Bartley Jones QC be instructed. The papers were sent to Mr Bartley Jones in early October (including of course all the witness statements) and formal instructions to advise in conference were sent on 16 November 2005.

60. By that stage, the trial date had been fixed for 30 January 2006, and the two sides had agreed to hold a mediation. Although initially dates in December 2005 were being considered for a mediation, in late November HY's solicitors wrote to say that HY would only agree to hold the mediation in January after the lending experts' reports had been exchanged and their joint statement agreed.

Calling Mr Morton as a witness

61. Back in the spring of 2005, Beachcroft had started to address the issue of witness availability with a view to listing the matter for trial. One of the witnesses from whom a statement had been served was Mr Morton. However, by this stage there had been a significant falling out between Mr Langsam and Mr Morton. As explained by Mr Langsam, this began in late 2003 after Mr Morton told him that he wanted to retire from the business, something Mr Langsam did not agree with as that would have left Mr Langsam running the business by himself. Mr Langsam said that by the end of 2003, they were hardly on speaking terms and communications between them were routed through Mr Ferrari. Both Mr Langsam and Mr Morton instructed lawyers to represent them in their dispute and in about April 1994 they reached agreement whereby Mr Morton would retire: he received payment of £17 million with a further £5 million held in escrow pending certain conditions.

62. However, in May 2005, Mr Morton's solicitors, who were also the solicitors acting for HY in the HY proceedings, wrote to Beachcroft, who had acted for Mr Langsam in relation to the separation agreement, contending that a condition of the agreement had not been fulfilled so that Mr Morton was still a partner and entitled to his share of

the Partnership profits. Mr Langsam described his reaction to this in his statement for the present proceedings:

> "By this letter Mike was seeking to take a technical opportunity to get further profits from me and from the business, even though he knew that we had done our deal together and that he hadn't contributed anything to the business from the end of 2003 onwards. It seemed to me that Mike was looking to get hold of a sum which might be millions by way of profit over that period of time. Mike had always been an opportunist and I suppose he felt that this was a good opportunity in circumstances where we didn't have the relationship that we had once had. It is fair to say that I was angry about this. I was unhappy with Mike because I felt this was an unfair attempt to try and exploit the position which had developed because there had been some delay in finalising all the necessary agreed documents, even though the substance of what was agreed was known and understood. I took that personally. This was a serious matter."

63. As well as being angry with Mr Morton, Mr Langsam was angry with Beachcroft as he considered that their failure to ensure that there was a clear and conclusive agreement had got him into this position. He faced a potentially large claim from Mr Morton when he had understood that everything had been settled for the sum of £22 million. Mr Langsam's displeasure was directed in the first instance at the partner at Beachcroft who had dealt with that matter, but he then blamed also Mr Southeran, supposedly for not supervising her properly (although Mr Southeran explained in the present case that he would not have been in the position to supervise another partner). In any event, Mr Southeran now became involved in sorting the matter out, and on 6 June 2005 it was agreed that Mr Morton would receive a further £150,000 in return for dropping all claims against the Partnership.

64. Mr Southeran naturally realised that there was, therefore, sensitivity over calling Mr Morton as a witness in the HY trial. On 13 April 2005, Mr Southeran told Mr Ferrari that while he had written to the other witnesses outside the business asking about availability, he had not written to Mr Morton and asked whether he should send him a standard letter or whether Mr Ferrari would prefer to deal with him directly. Mr Ferrari told Mr Southeran not to contact Mr Morton at that stage, even at the risk that he may not be available. Mr Southeran returned to the issue in a letter to Mr Ferrari of 7 November 2005. As one of a number of points he raised, Mr Southeran wrote:

> "One witness we have not been in contact with is Mike Morton. You will recall that we effectively decided to leave this issue on one side. I think the time has come where we need to decide on our approach to calling Mike. Obviously if the mediation results in an acceptable offer it will not be necessary for a trial to take place, however I do not think it is a sensible idea to leave addressing this issue until after the mediation.
>
> Quite apart from the issues which Mike Morton's statement actually deals with it is also necessary to bear in mind he will

> be questioned about his attitude towards allowing Alex to withdraw monies from the partnership.
>
> Again, I think we need to discuss precisely how this issue is handled and I am strongly of the view a decision should be taken in the near future."

65. It appears that there was no immediate response on that point, and Mr Southeran referred to the matter again in his email of 7 December 2005:

> "Finally I would be grateful if you would confirm your instructions re Mike Morton. As matters stand he is a witness and we need him to attend trial. On your instructions we have not approached him but if we are to take all necessary steps to ensure he attends we need him to agree to do so or serve a witness summons on him requiring him to attend. This is a hostile step and it would be better if the issue of the trial and the need for him to attend could be discussed informally with him in the hope of persuading him to agree to attend. This is an issue which now needs to be dealt with and I would be grateful for your comments as soon as possible."

66. This provoked a very critical response from Mr Langsam who, on the issue of Mr Morton, wrote in his email as follows:

> "From the outset Mike Morton made very clear that he did not want to appear as a witness. This was discussed on numerous occasions and you repeatedly stated that this would not be necessary.
>
> You were particularly aware of my dispute with Mike. You have now stated by e-mail that you may need him to appear by subpoena without discussion with me. This has un-nerved me.
>
> The claim is not an insubstantial one and for us to move forward particularly as we are so near the arbitration and the hearing of the case it is most important that we are kept more involved (receive paperwork) and that you remain in charge and control of the case."

67. Mr Langsam expressed concern that Mr Southeran was not "up to speed" on the case and sought an urgent meeting with him. That duly took place on 9 December and was held, like most of their meetings, at Mr Langsam's offices in Halecroft. But in advance of the meeting, Mr Southeran sought to set out his understanding of the position in an email to Mr Ferrari from which I should quote the relevant section in full:

> "In relation to Mike Morton. It is for Alex to decide whether Morton or indeed any witness is called but I have assumed we would be calling him having put in a statement on his behalf. I am aware that he did not want to give evidence and ultimately a

> decision might be taken not to call him (whether he is willing to attend or otherwise) but I am afraid I simply cannot accept that I have advised it would not be necessary for him to attend. We are not required as a matter of procedure to call him but that is a different matter.
>
> Brief consideration of my file indicates that I raised the issue of how Mike Morton was to be approached in connection with attending trial back in April this year when I wrote to you re the question of notifying witnesses of the proposed trial dates (the letter is dated 13 April). I also mentioned him in my letter of 7th November in context clearly indicating a decision needed to be made as to the best means of approaching him. I believe we have also discussed this issue on other occasions but I have not been able to further review the file in the time available since receipt of Alex's e-mail / letter.
>
> As regards his attendance and the need for a subpoena, I have no intention of taking any step to compel his attendance without specific authority to do so. I mentioned the need to proceed in this way as a possibility I wished to discuss with you rather than a step which is simply being taken in any event. Ideally I think the correct approach to Mike Morton is for you or Alex to [s]peak to him and it [sic] at all possible persuade him to attend voluntarily. As I recall the sale agreement reached with him includes a provision re him assisting in connection with this claim?
>
> The point which arises now in relation to Mike Morton is not so much the matters which he gives evidence about in his statement but the point raised by the opposition concerning his willingness or otherwise to consent to Alex removing money from the partnership. We have discussed this and I know the view is that the money could be raised even if he objected, but him not attending could give the Court the impression that we have not called him because he is likely to say something unhelpful about what his attitude would have been. I mentioned this point in my letter of 7th November, in connection with him being approached.
>
> I have asked the barrister to express a view about this but my view is we should take steps to ensure he can be called if it is deemed appropriate to do so and this should include if necessary service of a subpoena."

68. I should state that I see no basis for Mr Langsam's assertion that Mr Southeran had advised that the attendance of Mr Morton was unnecessary, and Mr Ferrari accepted in cross-examination that he did not think that Mr Southeran had said that. Mr Langsam could not recall whether Mr Ferrari showed him this email, but in my view that does not matter, although I think it is highly likely that Mr Ferrari would have shown it to him, especially as it is by way of response to Mr Langsam's own email.

69. The question of calling Mr Morton was fully discussed at what was a lengthy meeting on 9 December. It is clear that it was not an easy meeting for Mr Southeran because of the critical stance of Mr Langsam (as indicated by his email the day before). Mr Langsam said that he went into this meeting "in a bad frame of mind" regarding Mr Southeran and that he was angry with him for not having apologised for Beachcroft's handling of his earlier dispute with Mr Morton and the separation agreement. Mr Langsam accepted in his evidence that he behaved in a "strong, emotional, loud way" at this meeting when discussing Mr Morton. Mr Southeran's attendance note records that Mr Langsam said that "under no circumstances whatever was he going to call Morton because of the damage he could do and this had been his position for some time, we had agreed it, etc.". The note proceeds to set out what purports to be a summary of a lengthy ensuing discussion. Because of its importance to one of the allegations in this case, I shall quote that section in full:

> "I accepted that if they were determined not to call him it was a matter for Alex but the fact that the point he was not necessarily taking on board is that as matters had developed an issue had arisen concerning whether or not Morton had agreed to releasing funds from the partnership and although Morton did not deal with this in his statement because it was not an issue at that point not calling him would now leave this point hanging in the air and if the opposition could make any capital out of it they would obviously do so.
>
> I made the specific point that the judge might take the view that the reason that Morton was not being called was because he was saying something unhelpful about this point and potentially other points he may help on.
>
> Obviously there had to be a careful consideration of the pro's and con's of calling any witness not only Morton but only if it was satisfied that the potential downside of calling him outweighed any possible benefit of doing so would it be reasonable not to call him in my view. Both of them were absolutely adamant that the downside of calling him was absolutely massive whereas what he could contribute was relatively modest.
>
> We discussed the ins and outs of this for a while. As a result of this discussion and despite my protests I was told that in no uncertain terms and no circumstances would they even consider calling Morton."

70. Mr Ferrari in his evidence said that he never said that the downside of calling Mr Morton would be "absolutely massive" and he doubted that Mr Langsam used those words although, understandably, he could not recall the specific words used. He agreed that Mr Southeran was arguing with them about this, but said that he did not realise that not calling Mr Morton could have a very significant financial impact. He said his own view was that Mr Morton would not be a problem as a witness, although he accepted that he did not say that at the meeting. He also said that by the end of the meeting Mr Langsam was less opposed to calling Mr Morton, although still not in

favour of doing so. Mr Langsam, when questioned about this meeting, explained that he was opposed to calling Mr Morton only because he felt he had been humiliated by his conduct over the separation agreement and having had to pay him the extra £150,000, and he did not want now to be "beholden to him" for giving evidence in support of his case. He said that the attendance note is an inaccurate record and that he never said that he was concerned that if Mr Morton were called he could damage his case. He said that by the end of the meeting he "was compliant" and accepted that, although he was not happy about it, Mr Morton should be called as a witness.

71. Faced with these three versions of what Mr Southeran was instructed to do, I should make clear that I do not accept Mr Langsam's recollection of this meeting as correct. I have no doubt that if he had told Mr Southeran at that point that Mr Morton could be called, Mr Southeran would at the very least have written at once to Mr Morton to inform him of the trial date. Moreover, if this matter had been decided at that stage, the subsequent discussions regarding calling Mr Morton could not have taken the form which they did. I also think that Mr Langsam would have asked Mr Ferrari at that point to go to see Mr Morton to clarify his view, as happened only later. In addition, it is notable that on 10 January 2006 Mr Southeran wrote to Mr Ferrari again raising the Morton issue and stating:

> "I am aware both Alex and you take the view that the potential downside of calling him is so serious as to outweigh any possible benefit of doing so but I remain of the view we should at least establish his availability."

Not only is that email consistent with Mr Southeran's earlier attendance note but Mr Ferrari did not respond suggesting that Mr Southeran's understanding of the position was incorrect. (Indeed, Mr Ferrari could not remember how he reacted to that express advice save that he thought he would have discussed it with Mr Langsam.)

72. Whether Mr Langsam remained as resolutely opposed to calling Mr Morton by the end of the meeting of 9 December as he had been at the beginning; or whether, as Mr Ferrari believed, he felt less hostile to the suggestion and wanted to reflect further, seems to me a question of interpreting Mr Langsam's underlying sentiments which it is not important to determine. Nor is it important whether the words "absolutely massive" were used. What is important, and I so find, is that Mr Southeran was told that Mr Morton in his evidence could significantly damage Mr Langsam's case; and that Mr Southeran was not given any indication, let alone instructions, at this meeting that Mr Langsam had now changed his mind such that Mr Morton should be called.

The lending experts

73. The reports of the parties' experts on bank lending were served on 30 November and 2 December 2005. Mr Langsam's expert was Mr Paul Ruocco and HY's expert was Mr Robin Bryant. The two experts met some two weeks later and produced a joint statement on 10 January 2006. It is convenient to refer to their respective position as set out in that statement. As regards back-to-back lending (i.e. against an equivalent sum deposited overseas), Mr Ruocco considered that £36 million would have been lent to the Partnership on a back-to-back basis in 1996 or 1997. Mr Bryant in his report said that it was reasonable to assume that a prudent bank would have lent £30 million to the Partnership from 1996 on a back-to-back basis, but he added: "The

bank might have imposed covenants relating to further borrowings and a negative pledge which could have inhibited the future growth of [the Partnership] and its profitability." In the joint statement, he went somewhat further and his opinion was summarised as follows:

> "Although he believes that a £30 million back to back loan would have been the likely maximum amount lent to [the Partnership] …, in the light of Mr Langsam's and Mr Morton's other hotel interests Mr Bryant considers it likely that a further £6 million would have been raised although it is not clear how this would have been done."

74. Prior to this joint statement, Mr Loeffler, who was principally liaising from Beachcroft with Mr Ruocco, made considerable effort to request that the experts should seek to agree a percentage for the degree of likelihood of monies being advanced. However, the experts were not willing to do so.

75. The experts also considered the prospect for a bank loan secured against the hotel assets. They agreed that considering the assets of the Partnership in isolation, £12 million was a reasonable sum that a bank would have lent in 1996. However, if all the assets in the Britannia Hotels group were available as security, then Mr Ruocco considered that a further £24 million would have advanced (producing £36 million in total). By contrast, Mr Bryant considered that a further £16 million would been lent the year to April 1996, increasing to £20 million in the following year (producing £28 million rising to £32 million in total). Since these sums would have to cover withdrawal of their equity by both Mr Langsam and Mr Morton, in Mr Ruocco's opinion Mr Langsam would have been able to withdraw £18 million whereas Mr Bryant considered that £14 million and £16 million would have been the maximum available for Mr Langsam's benefit in 1996 and 1997. The difference between them was due to Mr Bryant applying a lower LTVR than Mr Ruocco, on the basis that banks were more cautious in lending against hotel assets than other commercial property. In their calculations, the experts assumed that the actual value of the hotel assets was equal to the value shown in the accounts, but they agreed that before lending a bank would have required a current professional valuation.

Part 36 Offer

76. The day the lending experts signed their joint statement, 10 January 2006, HY made a Part 36 offer of £500,000 plus costs. At this time, Mr Langsam was on holiday in Tenerife. Mr Southeran spoke to him about the offer over the telephone and recommended that it should not be formally rejected but that they should write to say that it was far too low to be acceptable, and he sent Mr Langsam by fax a draft letter in those terms. Mr Langsam said in his evidence that Mr Southeran told him that he should consider accepting the offer and that it could be viewed as a good offer. I reject that evidence. Given the figures that were in play at that point, I think it is inconceivable that Mr Southeran would have advised in those terms given the content of the experts' reports; and his covering fax to Mr Langsam referred to the fact that "we consider the offer to be derisory." Moreover, as he was shortly to meet the QC instructed for the trial at a consultation which Mr Langsam would attend, I accept his evidence that he would not in any event have recommended acceptance of the offer before obtaining counsel's advice.

77. In any event, Mr Langsam did not agree with Mr Southeran's recommendation that the offer should be left open but instructed him to reject it. In fact, that was not done, and when Mr Langsam subsequently discovered this he was annoyed. Mr Southeran explained this as an oversight which he did not seek to excuse. Although the actual response made to the offer is irrelevant to the issues in this case, what occurred is notable in two respects. First, it illustrates that Mr Langsam was very much a man of his own mind, who would not necessarily follow his lawyers' advice even on litigation strategy. (In the consultation on 18 January 2006, Mr Bartley Jones also advised that the offer should be kept open.) Secondly, I consider that Mr Langsam's discovery on 18 or 20 January that, contrary to his instructions, the offer had not been rejected contributed to his loss of confidence in Mr Southeran.

78. Mr Langsam summoned Mr Southeran to attend two long meetings with him at his home on his return from holiday. The first, on Sunday 15 January lasted some four hours and the second, also at his home, on 17 January lasted over five hours. Mr Ferrari was present on both occasions. The meetings were spent going over the documents and witness statements, which Mr Langsam had been studying while on holiday. Mr Southeran said that he gained the impression that Mr Langsam was anxious about his case. In my view, that is an entirely natural feeling for an individual about to face a major court trial. Mr Southeran also said that the first meeting, in particular, was spent reviewing documents relating to the domicile issue at Mr Langsam's insistence although Mr Southeran did not think this was very constructive. Mr Langsam denied that the Sunday meeting was largely focused on matters relating to his domicile and indeed was emphatic that he was "not in the least bit" concerned about the domicile issue. I prefer Mr Southeran's evidence on this, particularly as it reflects what he wrote in his manuscript notes taken during the meeting. Furthermore, it is based on his attendance note dictated that evening and I reject Mr Langsam's challenge to the accuracy of that note.

The consultation with Mr Bartley Jones

79. Mr Southeran had been keen to arrange a consultation with Mr Bartley Jones to be attended by the client. However, a consultation arranged for 16 December had to be cancelled, and the next date that could be arranged after the holiday break was 18 January. This was an all-day consultation, at which Mr Southeran was accompanied by Mr Loeffler and Mr Langsam was accompanied by Mr Ferrari. All four gave evidence about the consultation. Mr Southeran dictated a brief attendance note afterwards and Mr Loeffler took verbatim notes in abbreviated form of the discussion as it proceeded. Mr Loeffler's manuscript notes of this consultation, as of the subsequent mediation, were typed up for the purpose of this trial but even he had difficulty interpreting his notes on a few points.

80. I think it is unfortunate that the client only met his leading counsel for the first time on a case of this complexity just a couple of days before the mediation and less than two weeks before trial, but it is not suggested that this was causative of any loss as compared to what would have happened had the consultation taken place a month or two earlier. Moreover, the lending experts' statement had arrived only on 10 January and that was of obvious importance to any advice regarding the case.

81. It is clear that Mr Bartley Jones explained the concept of a claim for the loss of a chance and how discounting worked, and he pointed out that this claim involved a

number of variables. Although overall he considered that on the primary claim Mr Langsam had a good case, his message was that because of discounts damages could be significantly less than the top-line figures for loss calculated by the experts. As Mr Ferrari accepted, Mr Bartley Jones made clear that because there were so many variables involved in the assessment of loss, it was not easy to predict what Mr Langsam would recover if he won on liability.

82. During the course of the consultation, the mediation statement from HY arrived. The approach which it took to quantum was that the maximum lending available to the Partnership on the basis of the lending experts' joint statement was £12 million secured on the Partnership's hotel assets. On that basis, it calculated Mr Langsam's loss on the basis of a £6 million off-shore investment: that produced a loss of £304,676 before interest, to which HY applied a discount of 10% on account of the risks regarding the Revenue (on domicile) and Mr Morton not having consented. Messrs Langsam and Ferrari testified that when this Statement arrived the atmosphere in the consultation changed and the lawyers showed considerable concern. Mr Langsam said that the lawyers' confidence started to go downhill when they had read the statement, and referred to an "air of doom and gloom." Mr Southeran and Mr Loeffler disagreed, and said that there was simply puzzlement at how HY could consider that the experts' joint statement supported only such a low figure.

83. I do not think it is necessary to resolve this conflict about what degree of concern may have been expressed, because of what transpired in the mediation two days later. I would only say that the limited approach in the HY mediation statement to the amount that could be borrowed is indeed difficult to reconcile with the experts' joint statement so I would have expected the lawyers to be puzzled rather than pessimistic, and there is no reflection of a pessimistic attitude in either Mr Southeran's or Mr Loeffler's contemporaneous notes. But I note that another major point relied on in HY's mediation statement concerned domicile: HY made it clear that they would be contending that Mr Langsam failed to make full and frank disclosure to the Revenue when securing confirmation that he was a non-domiciliary, and that his application would probably have been refused if such disclosure had been made.

84. It is common ground that there were three particular issues that Mr Bartley Jones specifically covered in the consultation.

85. First, he pointed out at the outset that although overall Mr Langsam was in a strong position, if the Court were to find that even if he had been advised correctly about his status he would not have implemented an ERA in 1996, he could lose completely. This was an unlikely outcome, but if the Court were to reach that view this was "the only issue where we can be stuffed."

86. Secondly, as regards Mr Morton, Mr Bartley Jones raised the issue of what he would say on the question of his consent to an earlier ERA. Mr Southeran explained that there had been a falling out between Mr Langsam and Mr Morton and said that Mr Morton "will say anything that suits [him] to cause grief." Mr Langsam said in cross-examination that he responded to Mr Southeran's remark by saying words to the effect that Mr Morton would be okay, but that this in effect 'fell on deaf ears.' I reject that evidence. No such observation is recorded by Mr Loeffler, whose notes record many remarks made by Mr Langsam during the consultation and, indeed, on this point record him as saying that Mr Morton "does not like court" and "won't take kindly to

being called"; Mr Langsam did not mention this in his account of the consultation in his witness statement; Mr Ferrari did not suggest that this was said; and if it had been said, I regard it as inconceivable that the lawyers would have paid no regard to it. Instead, there was discussion as to whether Mr Morton should therefore be called as a witness. Mr Bartley Jones made the point that the Court would be very surprised if he did not give evidence and might draw an adverse inference about his cooperation in the scheme, which could have serious implications. He pointed out that if Mr Morton were called, since he was a witness for Mr Langsam it would not be possible for Mr Bartley Jones to cross-examine him. He said that it was important to establish whether Mr Morton would be called as a witness and this was a decision for Mr Langsam.

87. As a result, it was agreed that Mr Ferrari would go to see Mr Morton to ascertain whether he was willing to come to give evidence and what he would say about the question of his consent to an earlier ERA. When asked why it was arranged that he alone, rather than Mr Southeran, would go to see Mr Morton, Mr Ferrari agreed that the reason was that how to approach Mr Morton was a very sensitive issue, and added that Mr Morton didn't particularly like lawyers.

88. Thirdly, it was agreed that up-to-date valuations of the hotels would be useful. Indeed, Messrs Langsam and Ferrari had already set this exercise in hand a few days before the consultation. There was some conflict in the evidence as to how much emphasis was placed on these valuations and Mr Loeffler's notes are not clear on this point, but I do not think that is significant. The consensus was that such valuations should be obtained and this may have resulted from the observations of the lending experts. In any event, Mr Bartley Jones said that he wanted to maximise the amount of lending available on a non-back-to-back basis. He told Mr Langsam that he could not guarantee that the Court would not take the view that the ERA scheme was not tax-compliant, even though the Revenue had not challenged the 2000 ERA.

The Mediation

89. The mediation on 20 January was attended by both sides' Leading Counsel who led the negotiations that lasted all day. As mentioned above, Mr Loeffler again took a full manuscript note.

90. In the course of the day, Mr Bartley Jones had a discussion with Mr Bernard Livesey QC, who was representing HY, which clarified the way HY were putting their case. It emerged that HY would contend that an ERA based on pure back-to-back lending was seen as carrying a much greater risk of challenge from the Revenue than if it was based on borrowing by the Partnership secured on its own assets; and that under the 2000 ERA the back-to-back lending was replaced with secured loans after one year. Accordingly, even if greater back-to-back lending had been available to Mr Langsam, he would probably have adopted the safer course of withdrawing only the amount that could be replaced by such a secured loan, especially bearing in mind that there was in 1996 an SCO investigation into the business. Secondly, they relied on a discount as the ERA depended on Mr Morton's consent and hence the loss of a chance of a third party's conduct.

91. Mr Ferrari had been to see Mr Morton the previous day. He therefore reported in one of the private sessions during the mediation to Mr Bartley Jones and Mr Southeran on

that conversation. As recorded in Mr Loeffler's notes, which were not disputed, Mr Ferrari said that on the question whether he would have agreed to an ERA in 1996 Mr Morton would have been "suitably vague". He said that this meant that Mr Morton would probably say if pressed: "Why would I object?"; and that he would be "not unhelpful but neither helpful" [sic]. Mr Ferrari added his own view that they would not lose on the response to this question, but Mr Southeran remarked that these answers implied that Mr Morton is just as likely to say "yes" as "no"; and that this could cause significant difficulty. Mr Bartley Jones said that this could mean a 50% discount on account of Mr Morton; and that a lot would depend on what Mr Morton said in the witness box.

92. Mr Southeran's evidence, which was not challenged on this point, was that Mr Langsam was very reluctant to make the first offer in the mediation, but eventually agreed to offer £1.5 million plus costs. HY responded with a counter-offer of £900,000 including costs, which Mr Langsam rejected as too low.

93. Mr Langsam said in his evidence that it was in the mediation that he felt he was in "a losing situation", which is why he put forward the £1.5 million offer. He expressed his feelings in his evidence as follows:

> "… the walls started to cave in. We went through these big discounts that we'd never never before considered, envisaged, and, again, it was at the mediation, it was addressed to us in a manner of, well, whatever I might have tried to say, because I'm less geared up to these things, whatever Robert [Ferrari] would have had to say, it had nothing to do with our views. There was a barrister, a very formal type of chap, a very nice man, putting this forward and we had -- we started to have no hiding place."

94. Also on 20 January 2006, Mr Loeffler spoke to the lending expert, Mr Ruocco, who expressed his view that if the ERA was considered on the basis of pure back-to-back lending it was "almost certain" that Mr Langsam would have got the full sum alleged in his claim (i.e. £18.7 million). However, Mr Ruocco had been unable to persuade Mr Bryant to accept that, such that a statement to that effect could be included in their joint statement.

23 January meeting

95. The abortive mediation took place on a Friday. The following Monday, 23 January, a meeting took place at Beachcroft's offices with Mr Warburton attended by Mr Southeran, Mr Loeffler and Mr Ferrari; Mr Bartley Jones joined by telephone for part of the discussion. As well as an attendance note by Mr Southeran and Mr Loeffler's verbatim manuscript note, Mr Warburton made an attendance of note of this meeting.

96. Mr Ferrari said that Mr Morton would come to give evidence, that he would be "suitably vague", and this was repeated to Mr Bartley Jones when he joined on the telephone. But he also informed the others that Mr Morton initially did not want to go along with the 2000 ERA, and that he was concerned about potential inheritance tax disadvantages. Mr Warburton recorded in his note that Mr Ferrari raised the potential difficulty over Mr Morton as follows:

> "Robert said that we may have difficulty with Mr Moreton [sic] in the witness box saying that he would have agreed to Alex Langsam withdrawing £18.7 million in 1994/95. He was apparently concerned about his Inheritance Tax position and the fact that, having withdrawn money from the Partnership, he would lose Business Property Relief on that amount of his personal wealth."

97. Further, in his evidence Mr Warburton said that Mr Ferrari indicated that he thought that the inheritance tax implications may have been the way in which HY would try to get Mr Morton to concede that he may not have agreed to take part in an earlier ERA. Mr Warburton therefore considered alternative means whereby Mr Langsam could have withdrawn £18.7 million from the Partnership without Mr Morton's corresponding participation in an ERA, and suggested as a viable option that only Mr Langsam withdrew this sum, with a compensating adjustment in the profit share with Mr Morton having a first share of the profits equivalent to the interest paid by the Partnership on the £18.7 million borrowings. He considered that there might also have to be a further adjustment in the share as an inducement to Mr Morton to agree. This alternative accordingly required Mr Morton's consent, but not his participation. (Mr Warburton outlined another option but that was less robust from a tax perspective.) However, Mr Warburton was clear that Mr Langsam would have been able to raise the money by back-to-back lending and he regarded the matter of property valuations for secured lending as a side issue.

98. In addition, Mr Warburton was also asked on the advice of Mr Bartley Jones to prepare revised calculations of loss taking account of two factors. First, they should reflect the actual times when tax relief would be received each year (in his earlier calculations the tax saving on interest was simply credited as a final lump sum). Secondly, and much more significantly, he was asked to compound the interest on-shore as well as off-shore. This was to take account of the point raised by HY's expert Mr Lowden that the additional borrowings by the Partnership would have had an adverse impact on the cash-flow of the business for which credit has to be given: see para 56 above. Mr Warburton was sure that he was right to accumulate the interest earned off-shore – and thus disagreed with Mr Lowden's approach - but he was uncertain as to what approach was appropriate to reflect Mr Lowden's point about cash-flow. Mr Bartley Jones considered that the point had merit and Mr Warburton agreed. Mr Warburton considered that everything would depend on what those running the business would, hypothetically, not have done if this element of the profits had not been there; however, there was no clear way of answering this hypothetical question. As Mr Warburton put it in his evidence:

> "… we were looking at a hypothesis and I found it difficult, and I think frankly everybody found it difficult, to button up in that hypothetical situation exactly what the correct approach should be."

There were a number of ways it could be approached, and Mr Bartley Jones considered that compounding the interest paid on-shore was a realistic method to adopt.

99. Towards the end of the meeting, Mr Ferrari also mentioned that Mr Langsam had substantial monies deposited off-shore since 1997, which had increased above the figures referred to in HY's Defence, and which would have been available as security for lending. Mr Southeran was particularly struck by this, and appears to have forgotten at that point that this was acknowledged in the pleadings. In any event, he thought this could be valuable evidence and asked Mr Ferrari to establish how much Mr Langsam had on off-shore deposit for each year of the claim.

Revised calculation of loss

100. On that basis, Mr Warburton and his assistant prepared revised calculations that were produced on 25 January. Between 23 and 26 January, Mr Bartley Jones was directly in touch with Mr Warburton with queries over the basis of some of the calculations and it is clear that counsel, rather than the solicitor, was directly guiding the approach at this point. The revised calculations prepared by Mr Warburton and his assistant were produced on 25 January, using LIBOR rates. Mr Warburton was not asked to produce calculations using the client's interest rates that he had been unable to verify. The resulting figures were as follows:

April 1996-Nov 2000	£2,881,415
Oct 1996 – Nov 2000	£2,559,556
Oct 1997 – Nov 2000	£1,838,921

101. These figures were slightly revised a few days later to take account of an adjustment in the tax relief following advice from Mr Langsam's accountants. The Claimant's final schedule on which the case would have proceeded gave the following figures:

April 1996-Nov 2000	£2,862,065
Oct 1996 – Nov 2000	£2,545,491
Oct 1997 – Nov 2000	£1,825,455

The off-shore monies and hotel valuations

102. The day after the meeting of 23 January, Beachcroft received from Mr Ferrari's office schedules setting out the monies held personally by Mr Langsam in various off-shore accounts as at 5 April in each of the years 1997 to 2000. This showed that Mr Langsam held almost £18.6 million in various Isle of Man and Channel Island accounts as at 5 April 1997, and increasing amounts in each of the subsequent years.

103. On 25 January, the two valuations for the International Hotel were received. These came from Christie & Co and Jones Lang LaSalle, who retrospectively valued the hotel as at 31 March 1996 at £53 million and £52 million, respectively. Mr Ferrari acknowledged that the mortgage on the hotel at the time was about £10.25 million. This hotel was owned by the Partnership; no valuations were produced for the other hotels in the Britannia group.

104. These documents were sent by Mr Loeffler to the lending expert, Mr Ruocco, attached to an email in the evening of 26 January. They were disclosed to HY's solicitors on 27 January and sent as attachments to an email to Mr Bartley Jones at 11.25 am that day. It was put to Mr Southeran that Mr Bartley Jones was not supplied with these documents before then so that he could take account of them in advising

the client. Mr Southeran accepted that he could not point to any document showing that they were provided over the previous days but he said that as soon as he learnt about Mr Langsam having substantial monies abroad (i.e. on 23 January), this information had been conveyed in the telephone call to Mr Bartley Jones and that indeed it was Mr Bartley Jones who asked that evidence of those deposits should be obtained. Furthermore, following the discussion at the consultation on 18 January, Mr Bartley Jones knew that the hotel valuations were coming. Mr Southeran said that they (i.e. he and Mr Loeffler) must have told Mr Bartley Jones the figures when the details were received. I accept that evidence. It may well be that in the rush of events on 24-26 January, Mr Bartley Jones was not actually sent the documents: indeed, if they were sent to him, it seems strange that they would be sent again on 27 January. But in the few days running up to a major trial, when (as Mr Loeffler confirmed) the solicitors were in frequent contact with leading counsel by telephone, and both solicitors and counsel knew that some potentially important information was about to be received, I regard it as inconceivable that the solicitors would not have told counsel when it arrived and what it said, or that he would not have asked about it if he had not been told.

26 January meeting and telephone call

105. On 26 January, Mr Southeran attended an all-day meeting with Messrs Langsam and Ferrari, at their request, at the Britannia Group offices. An important conference call with Mr Bartley Jones took place during the meeting. The day before, he had filed his skeleton argument on behalf of the claimant. It appears that Beachcroft (and hence the client) did not see this in draft before it was filed and so did not have an opportunity to comment on it. In his skeleton, Mr Bartley Jones stated that it was appropriate to compound the interest for the borrowing on-shore as well as the interest earned off-shore. He also said that if HY were now seeking to advance a case that a simple back-to-back arrangement would not have been sufficient to implement an ERA, which was unclear, then "it may be necessary to examine, in evidence, the availability of funding, and security, to the Claimant outside the ambit of the main Hotel Partnership." That would appear to presage potential reliance on the monies held by Mr Langsam on deposit off-shore.

106. Mr Southeran dictated an attendance note of the meeting of 26 January after it took place, as was his usual practice. He also made rough manuscript notes of the advice given by Mr Bartley Jones over the telephone.

107. Mr Southeran noted that the clients [he generally used the plural, no doubt because Mr Ferrari was usually involved alongside Mr Langsam] had expected HY to come back with a better offer following the mediation and were slightly surprised that they had not done so. He recorded that Mr Langsam told him that Mr Ferrari's wife was very ill and that he was therefore reluctant to involve him in a stressful action at that time, and that he was therefore keen to see if the case could be settled. Mr Southeran responded that if the action was now to be settled, Mr Langsam would have to initiate further negotiations.

108. Mr Langsam and Mr Ferrari accordingly wanted to discuss matters with Mr Bartley Jones and he was therefore telephoned for advice. The conversation with Mr Bartley Jones was a long one, and he went into matters in some detail. As his advice is in my view of critical importance for this case, I set out the relevant part of Mr Southeran's

attendance note in full (incorporating a typographical correction and a clarification that he gave in his evidence).

> "Edward was I have to say rather heavy about all this and I have taken a note of what he had to say insofar as I could get it down. Basically he was taking the view that the hard/realistic value of the clam, bearing in mind Warburton's figures and based on us being able to invest £18.75 million we were realistically depending on which start date was used down at £1.8 to £2.2 or £[2.3] million.
>
> He went through at some length the various discounts which had to be made on this with the result that the amount of claim came down potentially substantially.
>
> This was not because of any particular problem with the claim, to put it simply judges took a somewhat conservative approach and the judge was very likely to discount for various reasons to take account of the fact that what we were suggesting might well have happened or might well not have happened.
>
> All of this had been discussed at considerable length at the conference last week and at the mediation but we went back over it all at some length anyway.
>
> Also Edward Bartley Jones made the point that he saw the Morton factor as quite significant. The difficulty was that Morton could cause us a lot of trouble without intending to simply by being "suitably vague". The reference to this point was taken from Robert Ferrari's point that when he had spoken to him he had said he would be "suitable vague" about whether he would have agreed to Alex taking money out etc.
>
> [Edward noted that it] was quite clear in Robert's view that he was saying this to try to be helpful, but being vague was probably not going to assist and at the moment we were not quite clear what Morton was going to say and it was doubtful whether it was really possible to do anything about this although if possible we would try to do something about what he was saying between now and the hearing.
>
> Obviously the opposition would subject Morton to a lengthy cross-examination and seek to put points to him in various different ways which might well leave him in the position where he had to accept that depending on precisely what the state of play was at the time, how things were going to be done etc he may or may not have co-operated. The sum total of this was to make the point that without any particularly adverse finding from Morton or him trying to be difficult the court could conclude that there was the need for a substantial discount to take account of what might have happened.

> Obviously if Mr Morton decided to be difficult he could cause us some very significant difficulties. We went over various other matters concerning the matter of quantum etc. Pointing out that realistically the value of this claim was not too far from the offer made at the mediation and if attempts were to be made to settle it then we should approach them or put various points to them etc and see what they had to say.
>
> I gave Alex and Robert the opportunity to make any points they wanted to make in the telephone call with counsel and various additional points raised were concerning precisely what he would say to the opposition, how he would say it etc. We had the usual argument about what they (AL and RF) required Edward to say as part of the approach they felt it would help.
>
> Edward gave them a lengthy lecture on the difference between saying they wanted £1million and meaning it and being genuinely prepared to go to trial if they did not get it as opposed to specifying a figure in the hope that we would get say £100,000 more.
>
> A different approach was required depending on precisely what we were seeking to do."

109. Mr Southeran's contemporaneous note of Mr Bartley Jones' advice, which Mr Ferrari accepted as broadly correct, explains his approach a little further, although parts of the note are incomplete. As regards the principal loss, he apparently considered that the realistic alternatives for the Start Date were October 1996 or, on HY's case, October 1997; so that on Mr Warburton's revised figures, the principal loss was between c. £2.5 million and £1.8 million. For the sake of argument he took £2 million as the assumed loss with interest of £500,000 - £600,000: on that basis, £2.5 million would be the best outcome. However, he pointed out that these figures are highly sensitive to basic assumptions and the Morton factor. For example, they assume that £18 million would have been invested at the first opportunity, but the Court might find that less than this would have been withdrawn: if it concluded that only £12 million would have been withdrawn the loss reduces by a third; or the Court might find that the amount would have been increased in stages. Morton was a wild card and could lead to a 50% reduction. Altogether, there were substantial permutations and the judge had a discretion given that he would be assessing a hypothetical situation. On domicile, he thought Mr Langsam was in a strong position, which he put at 75-80%; but he pointed out that this left a risk, albeit a low risk, to the benefits that Mr Langsam now received from his non-UK domicile as the Revenue could review his non-domiciliary status.

110. In response to Mr Southeran's question of what figure he would suggest putting forward, Mr Bartley Jones said that much depended on the client's attitude to litigation and how keen he was to settle. He said that if one looked at how much might be available, his feeling was that HY would settle for £750,000 plus costs or maybe £1 million plus costs.

111. Mr Langsam stated in his evidence that it was principally Mr Bartley Jones that gave the advice and that Mr Southeran did not interrupt much. Mr Ferrari gave evidence to the same effect, but said that Mr Southeran appeared to be agreeing with Mr Bartley Jones. Mr Southeran accepted that he did not disagree with Mr Bartley Jones' advice but he left it to counsel to advise the clients. Mr Bartley Jones did not refer in his summary to either the hotel valuation or the monies Mr Langsam had on deposit off-shore in the relevant period. But Mr Southeran said that the advice and discussion in this conversation was not based on HY's argument (as put in the mediation) that only £6 million would have been taken out under an ERA.

112. Following this telephone advice, Mr Langsam and Mr Ferrari left the room to discuss the matter amongst themselves. They returned after a short while with instructions that Mr Langsam was keen to achieve a settlement of £1.4 million inclusive of costs but would accept £1.1 million inclusive of costs. Mr Southeran told them that Mr Langsam's estimated costs were now £300,000. Accordingly, Mr Bartley Jones was called again and given these instructions. In fact, for reasons that are unclear, Mr Bartley Jones telephoned the other side and put an offer of £1.375 million not £1.4 million. When Mr Southeran learnt of this he protested, but as matters turned out I do not think it made any difference. Mr Bartley Jones said that the offer had not been rejected out of hand and he was waiting for a response.

113. Mr Langsam said that the reason he gave these instructions was that Mr Bartley Jones was going on about "how bad the situation was" and Mr Southeran was agreeing with counsel and saying much the same, so that he felt that "the writing was on the wall." He also said that while he found Mr Bartley Jones to be a really nice man, he felt that he somehow didn't want to go to court. Mr Southeran, however, said that he did not feel pessimistic about the case at all, but simply recognised that there were many permutations involved when it came to working out quantum and he therefore left it to counsel to give guidance as to how these might be resolved.

114. Later that day, Mr Ferrari telephoned Mr Southeran from his car. He spoke in the absence of Mr Langsam. After asking about what had happened regarding the offer, he said that Mr Langsam wanted to settle the case and was not looking forward to going to court. Mr Southeran's attendance note of the conversation (which was not a verbatim note but made subsequently) continues as follows:

> "[Mr Langsam] had gradually taken on board the difficulties there were with proving cases like this and the fact that he was very open to a cross-examination on a number of points. In short, it was [Mr Ferrari's] personal view (which would have to be confirmed by AL in due course) that his bottom line was not £1.1 million and if they were to offer say £1 million inclusive of costs he might well accept that. I said that I had taken this on board and in the circumstances we could do little other then see what happened in the course of tomorrow morning."

115. Mr Ferrari did not refer to this call in his witness statement, but he accepted that it took place and thought he had made the call on his own initiative and not at Mr Langsam's request. He did not challenge the substance of Mr Southeran's note save to say that he did not particularly say that Mr Langsam felt vulnerable to cross-examination, although he accepted that he said that Mr Langsam did not want to be

cross-examined. He said that he felt Mr Langsam was now depressed about the case, and that he probably told Mr Southeran that Mr Langsam did not like the sound of everything that Mr Bartley Jones was saying and felt that there was a real danger if he went to court, such that a bird in the hand was better than two in the bush. When asked by the Court what prompted him to ring up Mr Southeran to have this private conversation, Mr Ferrari replied:

> "I can't remember. I think it was probably just the way it had all gone, and it was probably best we just settle this thing if we could do."

27 January meeting and settlement

116. On Friday, 27 January, with the trial due to start early the following week (the Monday had been set aside for the judge's pre-reading), Mr Langsam called Mr Southeran to the Britannia offices for a meeting in the early afternoon. Exceptionally, on this occasion Mr Ferrari was not present although he called in to ask if HY had responded to the offer made the previous day (they had not). After initial discussion about the questions that Mr Langsam might be asked in cross-examination, and as they had not heard any further news of HY's response, Mr Southeran agreed with Mr Langsam that they should call Mr Bartley Jones. Mr Southeran dictated a lengthy (3½ pages) attendance note that evening recording his account of what transpired.

117. In the absence of Mr Ferrari, Mr Langsam asked Ms Ashton, who was then Britannia's in-house lawyer, to attend for part of the meeting. There was dispute as to how much of the meeting she attended. Mr Southeran, in reliance on his attendance note, thought that she joined them only after they had the lengthy conversation with Mr Bartley Jones. Both Mr Langsam and Ms Ashton said that this was not correct and that she was present during the telephone calls with counsel and, indeed, for most of the meeting. I accept their evidence on this point. Ms Ashton under cross-examination gave a clear and compelling account of the meeting, including the telephone discussion with counsel, which as appears below was not particularly complimentary to Mr Langsam; she left the Britannia Group in May 2008 and so is no longer working for Mr Langsam; and I do not think she was imagining her evidence. She said that she was mostly just listening and did not intervene in the discussions, whereas for Mr Southeran this was a very long day and I consider that he mis-remembered the sequence of the meeting when he dictated his note afterwards.

118. Mr Southeran's note says that when they called Mr Bartley Jones, Mr Langsam was keen to discover what the opposition were up to and whether they were likely to make an improved offer. I accept that as correct, and indeed it was the logical thing for Mr Langsam to say.

119. Mr Southeran also recorded:

> "Alex made the point to Edward that he was keen to settle this because he was very concerned about Robert Ferrari's position, the difficulties with his wife etc."

Ms Ashton did not recall this being said and doubted that it would be correct. As she put it:

> "Alex was very, very concerned about this case and he was very, very concerned about the money, and I don't think he was particularly concerned about anything else."

120. I consider that this is an accurate reflection of Mr Langsam's position but that does not in itself preclude his saying to his counsel that his wish to settle was partly driven by Mr Ferrari's personal circumstances. On balance, I think that probably was said, but I also consider that it was not actually a significant factor in motivating Mr Langsam's wish to settle; and indeed Mr Southeran for his part did not consider that it was a major factor. I find that by the end of the discussion on 26 January, Mr Langsam was very keen to settle the case but was determined, as someone with experience of many successful commercial negotiations, to get a better deal than the £900,000 offered in the mediation, which he regarded as derisory.

121. Mr Southeran's note says, succinctly, that Mr Bartley Jones then "rehashed a lot of what he had talked about yesterday." For Ms Ashton, however, this was new as she had not been present at a detailed discussion about the case before. She recalled that Mr Bartley Jones went on about the various weaknesses in the case and did not point out any strengths; and that he said that £900,000 was a good offer. Her evidence continued:

> "what happened next is that Alex absolutely lost his rag and started to shout at the barrister, shouting "No, no, no", and he started to be exceedingly rude, in fact he was virtually sneering at the barrister, and I'm sure Peter will remember this, because it was an extraordinary situation. And he was in terms saying that the barrister really didn't know how to negotiate or do his job, that's what he was saying, and the barrister then said, right, he would go back."

Ms Ashton said that Mr Bartley Jones then called again about half an hour later saying simply that they would go to £1 million or they would go to trial. In fact, Mr Southeran did not recall Mr Langsam losing his temper. That is perhaps surprising, but I do not think that Ms Ashton imagined, or still less invented, this and I accept that it happened.

122. At some point, Mr Langsam told Mr Bartley Jones to go back and try to get a further £100,000 out of HY, making various points that he wanted him to take into account in pushing for this. It is immaterial whether that was before or after the £1 million offer was made, as Ms Ashton and Mr Southeran, respectively, recalled. There is no doubt that £1 million was the final offer available for settlement that day.

123. Mr Southeran's note states:

> "Edward went back over the issues, noting this represented a reasonable settlement etc etc. I took a note of Edward's comments about this but essentially his stance was this was a really sensible offer. We were now talking about general horse trading rather that [sic] the technicalities of the case but bearing in mind what Edward saw as the hard value of this claim he could see how discounts could be factored in which would

> bring it down to close to the amount being offered. There was an obvious risk that if things went wrong we would end up with less than this and possibly less than the Part 36 Offer etc etc.
>
> This was really a bringing together of the things we had discussed at some length over the last week or so and it became clear that Alex was keen to do the deal and authorised Edward to go back and accept £1 million inclusive of costs.
>
> This was duly done and Edward then wanted to talk about the precise form of the order and I stayed with the clients whilst he did that."

124. I do not think it matters at precisely what stage of the discussion Mr Bartley Jones advised in these terms. What is important is that this is the advice he gave. However, I do not accept that Mr Bartley Jones was in effect seeking to persuade Mr Langsam to settle and that there was anything to suggest that he as an advocate did not wish to fight the case: his approach, as Mr Langsam described it in another context, was that settlement can be viewed as a business decision and was therefore a matter for the client, in terms of risks. Further, I accept that, as Mr Langsam and Ms Ashton stated, Mr Southeran appeared to agree with this advice; he certainly did nothing to suggest that he disagreed with it. But I do not consider that after hearing the views of his QC, Mr Langsam then turned to Mr Southeran and expressly asked him for his own view.

125. There are two further points to mention. First, I do not think that the words "inclusive of costs" were actually used by Mr Langsam. Ms Ashton said that all the discussion was about offers of a single lump-sum, and the attendance note is not a verbatim note. However, it was clear and understood that there would be no further payment by HY on account of costs. Mr Southeran had also made clear that Mr Langsam's costs were now some £300,000, so that Mr Bartley Jones could mention that in his discussions with the other side.

126. Secondly, Mr Langsam said that he asked early in the discussion if they had got the valuations in evidence, and that Mr Southeran replied that they had not succeeded in doing so. Ms Ashton recalls the valuations being brought up and that while before Christmas, when it was first proposed to get valuations, Mr Southeran had expressed some doubts whether they would be admitted, now that valuations had been obtained he simply said that they had not been formally introduced into evidence. I prefer Ms Ashton's account, not least because it corresponds to the facts. As already mentioned, the two valuations (along with the schedules of Mr Langsam's offshore deposits) were disclosed to HY's solicitors that same day and, on Mr Bartley Jones' instructions, they were placed in a supplemental bundle with all the recently introduced evidence, that he wanted paginated. Further, Mr Southeran said in his evidence that by this stage he thought that they would succeed in getting them admitted because of the late service of new evidence by HY.

127. Ms Ashton's only direct involvement came as regards the form of the final order. She assisted Mr Langsam in requiring that it should provide for payment of the settlement sum directly to him and not to Beachcroft. They did this since they were concerned about what Mr Southeran had said regarding costs, a matter to which I shall return in addressing the counterclaim.

128. A Tomlin Order in those terms was duly presented to Patten J in the Manchester District Registry for approval on Monday, 30 January.

THE LAW

129. The general principle governing a professional negligence action against a solicitor is well-established and was not in dispute. A solicitor, like any other professional, will not be liable for an error of judgment on a matter on which the opinions of reasonably well-informed and competent members of the profession might differ. He or she will only be liable for advice, acts or omissions which no reasonably well-informed and competent solicitor would have given, done or omitted to do. See *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, per Lord Diplock at 218D-E, 220D-E. In that case, which curtailed the scope of what was then the barrister's immunity in negligence, Lord Salmon said this (at 231D-E):

> "Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent."

The reference to barristers obviously applies equally to solicitors.

130. However, the present case raises two particular aspects of the solicitor's duty of care which require further consideration: (a) as regards advice on settlement of litigation; and (b) where he or she relies on the advice of counsel.

131. Advice on settlement was the subject of the professional negligence claim in *Moy v Pettman Smith* [2005] UKHL 7, [2005] 1 WLR 581, where the advice at issue was that of a barrister to reject an offer of settlement. In his speech, with which the other members of the House of Lords agreed, Lord Carswell cited (at [59]) with approval a passage from the judgment of Anderson J in the Ontario High Court in *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 117 DLR (3d) 383, 397-398:

> "What is relevant and material to the public interest is that an industrious and competent practitioner should not be unduly inhibited in making a decision to settle a case by the apprehension that some judge, viewing the matter subsequently, with all the acuity of vision given by hindsight, and from the calm security of the Bench, may tell him that he should have done otherwise. To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes

> negligence, which gives rise to liability, and what at worst constitutes an error of judgment, which does not, is harder to answer. In my view it would be only in the case of some egregious error that negligence would be found."

132. The issue of a solicitor's reliance on counsel has been considered in a number of cases. It is clear that it does not provide a blanket defence for the solicitor irrespective of what error counsel may commit. A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel but must apply his mind to the advice received: *Ridehalgh v Horsefield* [1994] Ch 205, 237. In that case, the Court of Appeal endorsed the guidance given in *Locke v Camberwell Health Authority* [1991] 2 Med LR 249, where Taylor LJ summarised the relevant principles as follows (at 254):

> "(1) in general a solicitor is entitled to rely upon the advice of counsel properly instructed.
>
> (2) For a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar.
>
> (3) However he must not do so blindly but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it."

133. In the present case, Beachcroft accepts that it held itself out as having special expertise and experience in professional negligence litigation. On that basis, it was submitted that a higher burden rested on Beachcroft as regards advice from counsel.

134. The question of what effect the specialist experience of a solicitor has on his entitlement to rely on counsel was considered by Lloyd J (as he then was) in *Matrix Securities v. Theodore Goddard* [1998] PNLR 290. There, the plaintiffs ("MSL") claimed against a leading City of London firm of solicitors alleging negligence by its specialist tax department in the drafting of a letter to the Revenue regarding a proposed tax avoidance scheme. The solicitors sought advice on the final form of the letter from a senior tax QC (who was also sued), with whom the draft had been discussed in conference. Referring to the argument that Taylor LJ's principles were to be distinguished where the solicitor had specialist expertise, Lloyd J stated (at 323):

> "The only difference that that makes is that the solicitor must bring that experience to bear on the matter. It remains the position, in my judgment, that after leading counsel has given considered advice to the client, such as was given at the July 13 conference, it is only a solicitor's duty to differ from it at that time and to give separate advice or to record reservations separately to the client if there was an important point on which the solicitor regarded counsel's advice as being seriously wrong."

135. Mr Wardell relied on the judgment of the Federal Court of Australia in *Yates Property Corporation v. John Boland* [1999] Lloyd's Rep PN 459, where the Court stated (at 477-478):

> "… it may be accepted that a solicitor who does not have specialist experience in a particular field is entitled to rely heavily on counsel. It is proper for a solicitor who conducts general practice to rely on the Bar to obtain specialist advice. It may be that for many solicitors who have no particular experience in an area of law counsel is the source of specialist advice. In such a case the solicitor will only be guilty of negligence if counsel's advice is obviously wrong – that is so wrong that the error should be obvious to a reasonably competent solicitor. But a solicitor with experience in an area of law cannot rely on counsel to the same degree. Of course a solicitor expert in a field will also seek the advice of counsel. Sometimes he will do so to obtain a second opinion. Sometimes the solicitor will be asked by his client to obtain counsel's advice. Sometimes the solicitor may be too busy to deal with a problem himself and for that reason will obtain the services of counsel. But for whatever reason counsel's advice is sought, when the specialist solicitor receives that advice he is well placed to consider it and form his own view about its correctness. In our view there is no justification for the conclusion that he is absolved from that task merely because he has taken the advice of experienced counsel. "

136. However, as Mr Wardell in the end accepted, there is no inconsistency between that approach and the statement of Lloyd J in *Matrix*. As the Federal Court said earlier in its judgment (at 475):

> "When a client retains a firm that is or professes to be specially experienced in a discrete branch of the law that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have."

137. Accordingly, the independent judgment which the solicitor should apply when considering whether the advice of counsel is "obviously or glaringly wrong" is a judgment informed by his or her specialist expertise. But subject to that test, I hold that where the advice is given by appropriate counsel specialised in the field who has been properly instructed, even an experienced and specialised solicitor is entitled to be guided by counsel's advice.

138. The present claim is for the loss of the prospect of recovering higher damages from HY for the loss of the prospect of the financial benefit from an earlier ERA. The issue of loss of a chance therefore arises in this case in two respects: first, in terms of the HY proceedings themselves; and, secondly, as regards the present proceedings.

139. As to the HY proceedings, the issues there concerned not only what Mr Langsam would have done if HY had advised him to seek non-domicile status but what third

parties would have done, in particular financial lending institutions and Mr Morton. According to the well-established principles in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, while the question of what Mr Langsam as the claimant would have done would be determined on the balance of probabilities, the questions of what the third parties would have done would be determined on the basis of loss of a percentage chance, provided that Mr Langsam could show a substantial, as opposed to a purely speculative, chance. That was obviously important for the lawyers advising Mr Langsam as to his likely range of recovery and, therefore, regarding settlement.

140. As to the present action, the issue of loss of chance arises if Beachcroft is shown to have been in breach of its duty of care, such that it is necessary to consider causation and quantum. However, these various issues are bound up with each other since the question of whether the advice on settlement was negligently wrong cannot be divorced from the question of what damages Mr Langsam is likely to have recovered if the HY action had gone to trial, and hence the underlying causation and quantum issues in the HY proceedings. Since those issues also involve the loss of a chance, it is necessary to avoid any double discounting when considering damages. At the same time, it is important to bear in mind that I am not trying the HY proceedings and it is not for me to determine the findings that the judge would have made in a hypothetical HY trial.

141. The proper approach in such a case was considered by the Court of Appeal in *Dixon v Clement Jones* [2004] EWCA Civ 1005, [2005] PNLR 93. There, Mrs Dixon's solicitors negligently allowed her claim against her former accountants to be struck out. She had sued the accountants for negligent advice on the prospects for a business project. The trial judge assessed the value of the lost claim at only 30 per cent because although he found the accountants to have been negligent, he considered that Mrs Dixon would probably have pressed ahead with the scheme even if she had been given the correct advice. The Court of Appeal rejected the defendant solicitors' argument that on this basis the judge should have dismissed the claim against them altogether. In his judgment, with which Carnwath LJ and Lord Slynn agreed, Rix LJ stated at [42]:

> "None of the loss of struck-out litigation cases which I have considered in this judgment, including cases which are subsequent to and cite *Allied Maples*, suggest that any causation issue in the underlying litigation is dealt with as a matter of a finding on the balance of probabilities, rather than as merely another issue within the generality of issues in the underlying litigation which have to be assessed for their prospects only; nor should the position, in my judgment, be otherwise. The causation issue is, in truth, just one among a number of issues which, in the underlying litigation, would have had to have been litigated or settled. Provided the underlying claim is of some real value, then the separate causation issue which arises in the instant claim out of the loss of underlying litigation answers itself. In other words, unless the underlying claim is at one or other end of the *Kitchen* spectrum [i.e. that it was either bound to succeed or bound to

> fail], it is not possible to say on the findings of fact in this case that every judge would have regarded the issue in the same way. Ultimately, the value of the underlying litigation did not lie in Mrs Dixon's own hands, but in the hands of the court (or, in the case of settlement, in the hands of bilateral negotiation)."

142. Accordingly, insofar as Mr Langsam would have had to prove matters in the HY trial on the balance of probabilities, in the present case I have to approach them on the basis of his chance of doing so, applying an appropriate discount. See *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920, which was considered in *Dixon*. That indeed would be implicit in the process that Mr Langsam's lawyers in the HY proceedings would bring to bear in advising him on settlement.

143. Finally under this head, in *Harrison v Bloom Camillin* [2000] Lloyds Rep PN 89, Neuberger J (as he then was) in the course of a valuable discussion of the principles applying to claims against solicitors for the loss of a chance to pursue an action against a third party, observed (at 99) that in some cases the court may think it right to view the prospect on a fairly 'broad brush' basis, whereas in others it may be correct to look at the prospects in far greater detail. In the present case, the HY proceedings settled only days before trial, when all the witness statements, experts reports and documentary evidence had been prepared. Therefore, I consider that it is necessary to look at the various elements involved in the HY proceedings in some detail, and much argument and evidence before me was addressed to each of them. Nonetheless, since what is at issue, at least on the alleged advisory negligence, is the advice as to an overall settlement, it is then necessary to step back and look at the matter in the round to determine whether the figures Mr Langsam was given fell outside any reasonable bracket; and insofar as they came from Mr Bartley Jones, whether they were so far outside that Mr Southeran should have regarded the advice as "obviously wrong". For both parts of that exercise, it is necessary to bear in mind that the advice has to be judged according to the information available to the lawyers at the time. The court in this trial has the benefit not just of hindsight but of some additional matters: for example, the court has seen Mr Langsam give evidence under cross-examination and heard a further suggestion by Mr Warburton of how the interest on borrowings should have been assessed that he had not previously put forward.

DISCUSSION

Advisory Negligence

144. I accept that Mr Langsam and Mr Ferrari genuinely did not appreciate until the consultation with Mr Bartley Jones on 18 January 2006 that significant discounts could apply to his claim since it fell to be analysed as a loss of a chance. I think that some of the initial advice from Mr Southeran failed to make this very clear and that a fuller explanation, early on, would have been prudent and helpful. But I do not regard that as constituting negligence on the part of Mr Southeran and, in any event, it cannot be causative of any loss. Mr Wardell QC, appearing for Mr Langsam, very properly did not press this point. However, I think its significance is more in the effect which it had on Mr Langsam. He viewed the figures calculated by his accountancy expert, Mr Warburton, as the measure of loss that he would recover, and therefore once his lawyers applied potentially significant discounts to those figures he felt his case was going downhill and that they were not properly supporting him.

145. The critical advice on settlement, in my judgment, was given on 26 January 2006. Although Mr Langsam was disheartened by what happened in the mediation, it was then that detailed advice on quantum was given that led directly to the settlement. It is therefore relevant to assess that advice with regard to the various issues in the HY claim.

146. On the issue of the Start Date, Mr Bartley Jones clearly took the view that the Court would reject an April 2006 start date, on the basis that Mr Langsam would not have implemented an ERA in advance of Revenue confirmation of his domicile status. Since this issue would be decided on the balance of probabilities, this was an entirely reasonable view, especially as it corresponded to what happened in 1999-2000. Although in the present action Mr Langsam's pleaded case refers to £3,409,076 as the true value of his primary claim (i.e. based on an April 1996 start date), in the trial his case was advanced on the basis of October 1996 as the earliest realistic start date.

147. On the compounding issue, Mr Warburton accepted that it was seen as a difficult issue to which no one on Mr Langsam's side was sure of the correct approach, although he clearly rejected Mr Lowden's "short-cut" of taking only simple interest both off-shore and on-shore. Mr Bartley Jones directly considered the matter and concluded that the appropriate method of addressing the point was to compound also on-shore. Mr Warburton did not express particular disagreement with that approach at the time, and he certainly did not suggest an alternative. For the purpose of the present trial, Mr Warburton has reflected further on the appropriate way that credit should be given for the effect of the loan. His preferred approach now is to apply simple interest to the on-shore borrowing but to calculate a credit on the basis of the annual cost to the business of servicing the loan (i.e. the interest that was notionally earned through not having to spend that money) that falls to be deducted from the sums set out in the claimant's schedule of loss: see para 40 above. Applying an interest rate of 6%, Mr Warburton initially suggested that this would result in a credit of £189,034, although in cross-examination I think he accepted that a more appropriate multiple on this method would produce a credit of £283,550; and Mr Moriarty submitted that it would be still higher.

148. While I recognise that this method has some attraction, it was not put forward by Mr Warburton at the time. If Mr Warburton, with his expertise in the area, did not think of it, then I do not think Mr Southeran can be criticised for not thinking of it. Accordingly, I do not see that in considering whether the advice given on quantum was negligent this new approach is relevant, save only that it reinforces the view that Mr Warburton and Mr Bartley Jones were correct in considering that the figures in the claimant's schedule over-stated the claim since they failed to reflect any credit for the cost of borrowing that had been avoided. I do not see how the approach which Mr Bartley Jones adopted at the time as to the preferable way of dealing with this issue can possibly be condemned as negligent.

149. Mr Bartley Jones also apparently took the view that the court would prefer to use the LIBOR rates for borrowing that Mr Warburton had independently verified, rather than what were referred to as the client's rates, being an average of the rates charged by the banks used by Mr Langsam for secured lending under the 2000 ERA. Since those were not the rates charged with reference to a back-to-back transaction, insofar as the 1996 ERA was being put forward on the basis of back-to-back borrowing, Mr Warburton recognised in cross-examination that this approach was probably correct.

Insofar as back-to-back lending might have been replaced by secured lending, there was more scope for argument. But this was a matter of judgment on which I would not expect a solicitor to disagree with experienced leading counsel.

150. Accordingly, there can in my judgment be no criticism of the lawyers taking as the starting point the figures in the revised schedule of loss of 25 January: para 100 above (and see para 101 for the slightly adjusted figures, which were produced just after the 26 January advice). It follows, that there was no negligence in Mr Bartley Jones explaining that the maximum base-line loss before interest was between (in broad terms) £2.5 million and £1.8 million, depending on the Start Date. This would be a matter for argument and cross-examination of the two accountancy experts, and Mr Bartley Jones used as a working assumption a loss of £2 million, or with interest at 6% to the end of January 2006, a total of £2.5 million. This was not, in my view, an unreasonable approach, where the parameters and the range were explained to, and would have been understood by, the client.

151. In reaching this view, I do not ignore the fact that an accurate interest calculation would produce a range of £3.3 million (using an October 1996 start date) to £2.4 million (using an October 1997 start date). A working assumption of £2.5 million was therefore on the conservative side, and another lawyer might well have adopted, for example, £3 million. But this is very much a matter of approach as to which reasonable and competent lawyers may differ; and I do not consider that adoption of an assumption at the more conservative, or alternatively the more generous, point in the range could be regarded as wrong.

152. The more significant issue, in my view, is the advice given concerning the discounts which would be applied to the 'top-line' figure.

153. As regards the Morton issue, Mr Bartley Jones repeated his advice that there could be a discount of 50% if the judge found there was a serious risk that Mr Morton would not have cooperated. Mr Langsam, supported by Mr Ferrari, suggested that the advice he received was that this was the likely discount. I do not accept that. It seems to me clear on the evidence that the advice was that the discount could be up to 50%. But even on this basis, that view was strongly challenged before me as manifestly wrong.

154. However, it is clear, first, that any form of ERA would have required Mr Morton's consent. Although Mr Warburton came up with a viable alternative that did not require Mr Morton's active participation in withdrawing his own capital, Mr Warburton accepted that if Mr Morton had objected, that alternative also would not have been feasible. Secondly, Mr Langsam described his former business partner as, in effect, a 'no nonsense' straight-talking Yorkshireman. Yet the answer which Mr Morton gave when Mr Ferrari went to see him on 19 January specifically to ascertain what he would say when asked if he would have cooperated is very curious. Mr Morton told Mr Ferrari that on this point he would be "suitably vague", whereas one would have expected him to say something along the lines of: "Well, I did it in 2000 so of course I would have done the same thing a few years earlier if I had been asked." Accordingly, I can well see why both Mr Bartley Jones and Mr Southeran were independently concerned by Mr Ferrari's report. The fact that Mr Langsam may have felt comfortable with what Mr Morton said is not the point. The lawyers advising him had to assess how it would appear to the Court. Mr Southeran in particular had to consider the answer as reported by Mr Ferrari against a background

where his client had been extremely reluctant to involve Mr Morton in the trial since they had fallen out and, as discussed above, had warned him that Mr Morton could do the case significant damage. And just a few days before the advice given on 26 January, Mr Southeran had attended a meeting with Mr Ferrari where he suggested more specifically how the other side might have got Mr Morton to say that he would have been reluctant to take part in an ERA.

155. Of course, as against all that was the fact that Mr Morton did agree to the ERA in 2000. Mr Langsam's claim had naturally placed strong emphasis on that from the outset. However, in my judgment, that is why it was not inappropriate for Mr Bartley Jones to place the maximum discount for Mr Morton at 50%; if it were not for that important factor, the discount would doubtless have been higher. Accordingly, I do not regard the advice that Mr Morton was a 'wild card' and could lead to a discount of up to 50% as wrong. It follows that it was certainly not "obviously wrong" such that Mr Southeran as the solicitor should have disagreed with it.

156. There are two further aspects that I must mention. First, reliance was placed on the fact that in their mediation statement, HY allowed a discount of only 10% for the Morton and domicile issues together. However, not only was that applied to a very much lower base figure, but it manifestly did not mean that HY would not at trial press for a much larger discount. On the contrary, they clearly would have done precisely that, and they were well aware of the falling out between Mr Morton and Mr Langsam: apart from anything else, their solicitors had also acted for Mr Morton in that dispute. Mr Langsam's advisors had to consider what might happen at trial on the evidence that would then be before the court, aside from any more conciliatory approach that HY had been prepared to adopt in a mediation. I do not regard the percentage discount in the HY mediation statement as significant.

157. Secondly, as mentioned above, Mr Morton provided a witness statement for the present trial. In that statement he states that if he had been asked to agree to an ERA earlier, as far back as 1996, so that Mr Langsam could have benefited he can see no reason why he would have objected; and so he would have agreed. However, I have to assess the advice given by the lawyers to Mr Langsam as against the material available to them at the time. They of course did not have this statement; and the clear and direct approach of Mr Morton in this statement is in marked contrast to the "suitably vague" response reported by Mr Ferrari, which Mr Ferrari interpreted to the lawyers as meaning that Mr Morton would be neither helpful nor unhelpful. Indeed, the discussion which Mr Ferrari had with Mr Morton on the question of what he would say in court seems to have been very limited since when Mr White went to see Mr Morton in November 2008 for the purpose of preparing his present statement, Mr Morton had no recollection at all of that conversation with Mr Ferrari – although it can hardly have been a common occurrence for Mr Morton to be asked about the evidence that he would give in court. Therefore, for the purpose of determining advisory negligence, I do not regard Mr Morton's evidence in this case as of much assistance or relevance.

158. The lending issue is in my view the most troubling aspect of the case. As at 26-27 January, Mr Langsam's legal advisors had the lending experts' joint statement and further information in the form of the valuation of the International Hotel and details of Mr Langsam's offshore accounts. However, this was a loss of a chance claim, and any ERA involved a lending decision by a third party bank, so some discount for that

factor was almost inevitable. Secondly, Mr Langsam's primary claim was being put forward on the basis that he would have executed an ERA in 1996 in the same way as he eventually did in 2000. That involved an initial period of back-to-back borrowing which was then replaced by independently secured borrowing. Although Mr Warburton and Mr Ruocco were both confident that £36 million could have been borrowed in 1996 on a back-to-back basis, HY's expert, Mr Bryant considered that £30 million would have been "the likely maximum amount" that could be raised on that basis. If that view were accepted, Mr Langsam's half-share would reduce to £15 million.

159. Moreover, if the court took the view that the hypothetical ERA in 1996 would have been on the same basis as the 2000 ERA, any back-to-back borrowing would have been replaced after the first year by secured lending and it would therefore be necessary to determine how much secured lending would have been available. On the basis of the assets of the Partnership alone, in the absence of an up-to-date valuation the experts agreed that £12 million would have been available; this would rise if security over assets outside the Partnership was provided, and while that led to higher figures, Mr Bryant still disagreed with Mr Ruocco that the full £36 million could have been raised and, if viewed in terms of commercial borrowing by the Partnership, thought that only £20 million might have been justified. (The further possibility considered by the experts of borrowing by BHL for onward lending without interest to the Partnership is far removed from the 2000 ERA and would appear to entail very different tax consequences since, as Mr Warburton emphasised, for the scheme to work it was essential that the borrowing was by the Partnership in order to fund the business).

160. Accordingly, when Mr Bartley Jones advised that it was possible that the court would find that Mr Langsam would have withdrawn only £12 million, or that he would have implemented an ERA in stages starting at, e.g., £6 million with that amount being topped up, that would appear to be a broad-brush reflection of the borrowing factors discussed in the experts' reports. I do not understand the advice as telling the client that this is a likely outcome – indeed as these are alternative outcomes they self-evidently could not all be likely. Instead, Mr Bartley Jones was emphasising that there are many possible permutations and that in his view the court would be unlikely to find that Mr Langsam would have been able to withdraw the full £18.7 million, at least initially, under an ERA. No doubt that advice could have been more precisely calibrated, with the aid of schedules of calculations of the kind prepared for the present trial, and some QCs might have adopted that approach. I think that is partly a matter of style in giving advice on settlement in a situation where an accurate assessment of the likely outcome was difficult and such calculations could give a misleading suggestion of precise prediction.

161. Moreover, although Mr Bartley Jones did not refer on 26 (or 27) January to the International Hotel valuation, that does not in my view change the picture. Mid-way between the two valuations was £52.5 million. If one applies a 65% LTVR calculation (mid-way between the Ruocco and Bryant ratios) and deducts the £10.25 million for which the hotel was already secured, that leaves £24 million. Accordingly, Mr Langsam's half-share works out at £12 million. I note that this was one of the figures Mr Bartley Jones expressly suggested the court might find was the amount that Mr Langsam would have withdrawn, although it is impossible to say

whether his process of reasoning was based on the valuations. To reach further levels of secured borrowing by reference to the current value of assets (which the experts agreed would have been needed) therefore would have required valuations of the other hotels of the Britannia group, as Mr Ferrari accepted.

162. As for the off-shore monies, the fact that Mr Langsam had deposited substantial sums in off-shore accounts had been expressly referred to in the pleadings, and indeed was first raised in HY's Defence which appended a schedule showing that over £15 million was held by Mr Langsam in that way. Mr Warburton had also been aware of this fact. Neither he, nor apparently Mr Lowden, regarded these substantial deposits as significant for the lending issue (and the fact that the actual sum held by Mr Langsam overseas was even higher does not affect the principle). The reason for that was not explored in evidence or argument, but it seems to me that using Mr Langsam's personal monies held in various different overseas accounts as security for a loan to the Partnership would have involved the risk that the Revenue would have regarded the lending as a recovery of partnership loan capital, and thus challenge the arrangement as an artificial tax avoidance scheme, in the way that Mr White cautioned against in 2000. I note that although the existence of the off-shore monies was raised at the meeting on 23 January, Mr Warburton did not even think this fact was worth recording in his note of the meeting. Aside from the fact that the detailed pleaded allegations of negligence against Beachcroft do not include a failure to have regard to the off-shore monies (and Mr Moriarty for Beachcroft therefore took strong objection to this point being advanced at all), without evidence that these deposits could have supported lending under a viable ERA, I do not see how Mr Bartley Jones can be criticised if he did not take them into account; or even if he could, how such an omission would have had any causative effect.

163. It might have been prudent for Mr Southeran to ask Mr Bartley Jones during the 26 January telephone conference whether the valuations or the substantial funds held offshore did not strengthen Mr Langsam position on the lending issue. But I consider that the fact that he did not do so, does not make the solicitor's conduct negligent when counsel was essentially pointing out to the client the fact that the damages figures rested on various assumptions and could decrease significantly if those assumptions were rejected by the judge at trial. Mr Southeran gave Mr Langsam and Mr Ferrari the opportunity to make any points they wished in the discussion with Mr Bartley Jones, and these were not clients who were shy or hesitant in expressing their concerns or queries.

164. Moreover, there were three other important factors. First, HY were clearly running the argument that Mr Langsam would not have implemented an ERA in 1996 or during the currency of the Revenue's SCO investigation, which did not conclude until early 2000. Much effort was devoted by Mr Moriarty in his cross-examination of Mr Ferrari and Mr Langsam to show that Mr Langsam was concerned to delay commencement of the HY proceedings until that investigation was over. I have set out above my finding that this was the case and that Mr Langsam adopted a very cautious approach where the Revenue was concerned. However dismissive Mr Langsam and Mr Ferrari may have been of this point in their evidence before me, I think it was rightly considered by the lawyers in the HY proceedings as a potential risk. Although I think that a judge would have been likely to have found, on the balance of probability, that Mr Langsam would have gone ahead with an ERA, the

point made by Mr Bartley Jones in advising Mr Langsam was that if he did lose on that point, then virtually the entire claim went.

165. Secondly, there was the domicile issue. I do not think that there was a significant risk that the court would find that the Revenue had been wrong to confirm Mr Langsam as a non-domiciliary, and Mr Bartley Jones always took the view that Mr Langsam was very strong on this issue. In his advice on 26 January, he appears to have put the discount on account of this at 20-25%. Nonetheless, it is notable that it had become clear that HY would be contending at trial not simply that the Revenue had been mistaken in 1999 (as suggested in the Amended Defence) but that Mr Langsam had failed to make full disclosure to them in his application. HY was calling evidence from some of the former neighbours of Mr Langsam's parents to try to support their argument, and Mr Langsam in turn had served further evidence in support of his position. Although the chance of HY succeeding on this issue was small, the consequences if they should have succeeded were very serious. The Revenue may well then have reviewed its acceptance of Mr Langsam's non-domicile status, at least prospectively. He could then lose all the benefits he enjoyed as a non-domiciliary going forward, which far exceeded the amount being argued about with HY. Mr Bartley Jones pointed this out to Mr Langsam, and I consider that he was clearly right to do so.

166. Thirdly, there are the imponderables that arise regarding almost every major trial. Chief among these was how Mr Langsam would be as a witness. It is necessary to recall that the secondary claim, which turned on whether and in what circumstances Mr Langsam had sought advice from Mr Grundy prior to March 1996, was still being pursued. Mr Langsam would clearly be cross-examined intensively on that strongly disputed issue, as well as on the factual issues concerning his late father and whether he would have implemented an ERA while an SCO investigation was pending. Mr Southeran had real concern that Mr Langsam would not be a good witness under the pressure of cross-examination. That is obviously a sensitive matter for a solicitor to raise with his client, but Mr Southeran did so at the meeting on 15 January. Unsurprisingly, Mr Langsam did not agree. However, having seen Mr Langsam give evidence over several days, and allowing for the fact that he was in better physical health back in 2006, I consider that Mr Southeran's concern was justifiable. That is something that, in my judgment, a lawyer can properly factor in when advising his client on settlement.

167. It follows from the above that, taking all the many considerations together, I conclude that the approach adopted by Mr Bartley Jones on 26 January, that was in effect repeated in summary on 27 January, was not wrong. There were many hypothetical aspects to the case (i.e. what would have happened if Mr Langsam had been correctly advised by HY), and consideration of the likely damages and risks involved a range of possible outcomes. Mr Bartley Jones may have placed more emphasis on the downside than the upside, but that is a matter of style and a cautious approach to litigation with its imponderables. The fact that other counsel might be more bullish or positive does not begin to make this approach erroneous, let alone negligent. Nor is there, in my view, any requirement to present the client with schedules or financial tables, of the kind that were placed before the court in the present trial. What is necessary is that the client is given a sufficient explanation to enable him to make an informed choice as to whether he should accept the sum being offered: *Moy*, per Lord

Hope at [14]. In that regard, the nature and manner of the explanation can, and should, reflect the sophistication of the client. Mr Langsam is a highly intelligent man with experience of commercial transactions and Mr Ferrari is a chartered account. It is abundantly clear from the history of all the various meetings and correspondence that neither was remotely reticent or inhibited in raising points or questioning what their lawyers were telling them.

168. A settlement of £1 million, with Mr Langsam's costs estimated at £300,000, would have meant to the lawyers advising him the equivalent to damages of about, or a little above, £700,000. If Mr Bartley Jones had said that £700,000 was the amount that Mr Langsam would be likely to recover at trial, I think that would have been wrong. But I am satisfied that he did not advise in those precise terms, but on the contrary emphasised that the case involved a number of permutations such that there was a range of outcomes affecting how far the damages would come down from his notional top-line of £2.5 million; and that accordingly while Mr Langsam could recover substantially more than £700,000 there was a risk that he would recover less. It in that context that I interpret his advice on 27 January, when the £1 million offer was made, that he thought this was close to the realistic value of the claim.

169. I have no doubt that there would be other QCs advising in these circumstances who would have put this value at a higher figure. But I do not think it can possibly be said that no competent and experienced counsel would have taken the same view as Mr Bartley Jones. The assessment of value in the context of settlement is an exercise of judgment that here involved weighing all the matters discussed above. As the Sir Murray Stuart-Smith (with whom Schiemann and Kay LJJ agreed) said in *VG v Kingsmill* [2001] EWCA Civ 934, [2001] Lloyd's Rep PN 716, at [63]:

> "… in a very complex case, it may be that in advising settlement too much weight is given to some factors and not enough to others. Here again a difficult judgment has to be made; and unless the advice was blatantly wrong, ie such that no competent and experienced practitioner would give it, it cannot be impugned and the prospects of successfully doing so would seem very slight."

170. Thus far, I have concentrated on the advice from Mr Bartley Jones. That is because it is clear that as from the consultation on 18 January 2006, he took the lead. Mr Southeran essentially followed and emphasised leading counsel's advice. I do not accept that he advised "jointly" or was under a duty independently to form his own view on all aspects. These were the days before the trial, with the QC now about to run the case in court and well on top of the figures and the evidence. I consider that it was reasonable, in particular in a case with so many variables, that Mr Southeran considered that it is for leading counsel with much greater trial experience to guide the client as to how the judge might respond to these various aspects and what the risks were. Mr Southeran's duty was to consider the advice which counsel was giving, and express a different view if that advice was clearly wrong. In doing so, he would of course take into account the view he had formed of certain aspects, e.g. whether Mr Langsam would make a good witness.

171. In a case such as this there is a range of views as to quantum to which counsel could reasonably come. For the reasons set out above, I do not find that Mr Bartley Jones'

advice was negligent, although his view was a cautious one towards the bottom of that range. But if I should be wrong about this so that it could be said that Mr Bartley Jones' advice was erroneous (and I emphasise again that neither has he been sued nor did I hear any evidence from him), I have no doubt that he was not "clearly" or "obviously" wrong such that even an experienced litigation solicitor was under a duty to dissociate himself from Mr Bartley Jones' view and advise the client accordingly.

172. I accept Mr Langsam's evidence that, in effect, by the end of the mediation, or at least the consultation on 26 January, he felt that the advice his legal team wanted to give him was negative and that this made him very pessimistic. But in my judgment that is because he had entertained excessive expectations previously as to the amount he would recover, and as the litigation approached trial he realised that more complexities and potential obstacles were involved. He was therefore surprised and frustrated that HY were not prepared to make a higher offer.

173. Moreover, I find that as the trial date approached Mr Langsam was very keen to settle the case. That was the view of Mr Southeran and it is supported by the personal telephone call that he received from Mr Ferrari. Mr Langsam naturally wanted the highest possible settlement, but he came to appreciate the various risks that a trial would entail. As to domicile, he knew that he would be cross-examined on the submissions made on his behalf to the Revenue about his late father, and face evidence from some of his father's neighbours. Although he now purports to be dismissive of that evidence, I do not consider that this was his attitude at the time, as evident, for example, from his concern to review the evidence on the domicile issue with Mr Southeran on 15 January when he returned from holiday. I readily accept that his desire to settle in the days after the mediation was strongly influenced by the advice that he received from Mr Bartley Jones. But he would be well aware from that advice that he had a prospect of recovering considerably more than £700,000 (plus costs) if he was prepared to take the risks involved in going to trial.

174. Finally under this head, even if it were the case that Mr Southeran should have said that he actually did not agree with the QC and thought that Mr Langsam's claim was worth, say, £1.5 or £2 million. I am not satisfied on the balance of probabilities that it would have made any difference. Well before this stage in the proceedings, I find that Mr Langsam had lost all confidence in Mr Southeran. Mr Loeffler testified that at a meeting on 20 April 2004, during a heated discussion regarding the terms of the fee agreement, Mr Langsam pointed to a plug socket in the wall and said to Mr Southeran that it had more sense than he did. Mr Langsam did not recall saying this, but I have no doubt that he did so. It was the first time Mr Loeffler met Mr Langsam and it is not the kind of remark one would imagine. Obviously, that was said in the heat of the moment and it would be wrong to place much weight on such a remark. But much more significantly, Mr Langsam himself told the court that at the time the 2nd CFA was proposed by Mr Southeran, he would ideally have wanted to change solicitors and he had a lot of discussion with Mr Ferrari about whether to move away from Beachcroft. He explained that he decided not to do so partly because he was so far advanced in the case and also because he had a favourable deal on the fees since it had taken the case on as a loss leader. But this demonstrates forcefully that already in late 2004 Mr Langsam had started to lose faith in Mr Southeran. I do not consider there was anything that occurred subsequently that led him to change his mind and feel more confidence. On the contrary, he blamed Mr Southeran for what he regarded

as a serious mishandling of the settlement with Mr Morton that emerged in May-June 2005. Accordingly, I find that in January 2006, it was to Mr Bartley Jones that Mr Langsam was looking for advice on his claim and that he would have set little store by the opinion of Mr Southeran had the latter said (as it is alleged Mr Southeran should have said) that he took a different view. That may often be the position of clients when represented by an experienced leading counsel. But I consider that there are particular reasons why it was the case here.

Evidentiary Negligence

175. It is alleged that Mr Southeran was at fault in failing to address well in advance of trial the question of Mr Morton's evidence as regards his participation in an ERA. I reject that criticism. It was only on receipt of Mr Lowden's second report in September 2004 that there was any indication that a point might be raised in this regard, and by that stage the falling out between Mr Langsam and Mr Morton had occurred. The initial statement taken from Mr Morton in July 2003 (which addressed only the secondary claim) was seen subsequently by Mr Wingate-Saul and he did not suggest that it was inadequate. Once the matter came in sharper focus, Mr Southeran pressed Mr Langsam and Mr Ferrari on the importance of calling Mr Morton to deal with the ERA, but Mr Langsam refused to agree. Mr Southeran expressly raised this issue in the instructions to Mr Bartley Jones to advise, which led to the postponed consultation on 18 January 2006.

176. Of more significance, in my view, are the events of the days following the 18 January consultation, and in particular once Mr Ferrari reported at the mediation on his meeting with Mr Morton the day before and the response that he would be "suitably vague". Since for the client(s) this meant that Mr Morton would be alright, but for the lawyers this response left them concerned at what he might actually say, the obvious course would have been for Beachcroft then to take a supplementary statement from Mr Morton covering the matter more fully – as he has in his statement for the present trial. Such a statement would not only have served as his evidence-in-chief, but service of the statement on HY would strengthen Mr Langsam's position in any further negotiations. That was not done.

177. At one time I felt that there was force in the allegation that Mr Southeran was negligent in failing thereupon to advise that he should take such a statement. In ordinary circumstances, that is the advice I would expect a solicitor to give, and to press it strongly. However, these were not ordinary circumstances. It is necessary to consider the context as it appeared at the time, shorn of the distorting benefit of hindsight. Mr Langsam had even a few weeks before expressed strong opposition to calling Mr Morton at all. When Mr Bartley Jones impressed on him the critical importance of Mr Morton's evidence on the ERA issue, Mr Langsam arranged for Mr Ferrari to go to see him alone; and Mr Ferrari explained that on the basis that Mr Morton did not like lawyers and that way it would be easier to get a positive result. Mr Ferrari knew exactly what he had to find out from Mr Morton, but on his own evidence they had only a very brief discussion producing a very limited response, so much so that less than two years later Mr Morton could not recall it. When the lawyers pointed out that this response was less than clear and therefore not reassuring, Mr Langsam and Mr Ferrari were well able to suggest going back to Mr Morton on the basis that the lawyers needed some clarification, but neither did so. Mr Langsam by this stage well understood the importance of witness statements: indeed he had

asked Mr Southeran to take a statement from Mr Morton in the first place (and similarly from some others) as a potentially useful witness on the secondary claim, and he had rejected Mr Southeran's draft of Mr Morton's original statement as inadequate and himself arranged for a revised version.

178. When this point was raised by the Court with Mr Southeran, he explained the position as follows:

> "The context of all this is in my view important. It was obvious that we wanted to know with a good degree of precision what Mr Morton was going to say. I can't accept there is any doubt from anybody about that. And the purpose of Mr Ferrari going to see him was to clarify that point, and I -- I think also the expectation was that we would then be -- he could explain to him we needed to see him to put a statement together, prepare the ground for it. But the important thing is we needed to be clear what he was going to say. The result was this reference to being suitably vague. Edward Bartley Jones dealt with this toing and froing about him. That just doesn't take matters any further forward, we need to be clear. I cannot cross-examine him about this, we need to be clear ... .
>
> I can't recall it being said to him "Go and take a statement", but the discussion about this and the consequences of him not being there, and how it worked at court and the fact of cross-examination and all the other -- it was very clear to all of us in the debate that if we wanted to get him there we needed a statement from him, and that would involve me -- someone, but probably me -- going to see him.
>
> The clients were not receptive to that, they didn't not want to go back to him after the discussion, and the fact that Robert Ferrari had seen him. They didn't want to go back to him again, despite the advice that it might have quite a significant effect on the costs."

179. I accept that evidence fairly reflects the position. Further, Mr Langsam was clear that Mr Morton would not have been receptive to a further visit on the issue after he had seen Mr Ferrari.

180. Accordingly, I do not consider that there was any negligence on the part of Mr Southeran in failing expressly to advise that a further statement from Mr Morton was required.

181. A further allegation of evidentiary negligence was made regarding the valuations of the International Hotel. It was alleged that Beachcroft should have arranged to obtain these earlier, in time to be adduced as evidence at the HY trial.

182. However, the issue of current valuations surfaced only on the lending experts' joint statement that was received on 10 January 2006. This point was not made in their reports that were exchanged on 2 December 2005. It is unclear in those

circumstances whether or not an application to adduce this evidence at the trial would have succeeded. But I do not think that the interval between 10 January and 18 January when the clients were told in the consultation that valuations would be helpful was significant in that regard. Furthermore, even if, contrary to my primary view, these valuations should reasonably have been obtained earlier, I do not think for the reasons set out above that they would have had a significant effect on the likely resolution of the claim and thus the level of settlement. I note that no allegation is made regarding valuations of the other hotels in the Britannia Group.[2]

Other allegations

183. The Re-Amended Particulars of Claim contain a large number of other allegations against Beachcroft, although relatively little or no emphasis was placed on these at trial. They can be addressed briefly.

184. It is alleged that Beachcroft failed to instruct leading counsel in sufficient time, and that the leading counsel (i.e. Mr Bartley Jones) did not meet Mr Langsam and Mr Ferrari until 18 January 2006. Mr Wingate-Saul retired in July 2005 and the papers were first sent to Mr Bartley Jones on 5 October 2005 (with instructions to follow). It might have been preferable for Mr Bartley Jones to have been brought in a month or so earlier, but I cannot regard this as remotely constituting a breach of the solicitors' duty. I have referred above to the fact that the client(s) met their counsel so late as unfortunate. However, neither of these matters caused any damage. By the time of the mediation and in the final run-up to trial, Mr Bartley Jones was on top of the issues in the case, and I do not see that it would have made any difference to the Morton issue if the consultation with Mr Bartley Jones had taken place earlier.

185. It is alleged that Beachcroft permitted Mr Bartley Jones to make a concession regarding the compounding of the on-shore interest when Mr Wingate-Saul had taken a different view. It is correct that Mr Bartley Jones took a different view from his predecessor on the case, but at the same time Mr Wingate-Saul had not been clear how the point raised by HY's expert, Mr Lowden, should be addressed. I have set out the position of Mr Warburton above, as it was at the time, and he clearly recognised the issue and was unsure then how to deal with it; nor did he express particular disagreement with Mr Bartley Jones' approach. Accordingly, this was not a "concession" but counsel's view as to how the damages should best be estimated. There is nothing in this point.

186. It is alleged that Beachcroft failed to liaise with HY's solicitors to obtain from HY a formal concession on the lending issue or acknowledgment that what was said in the joint statement of the lending experts would be binding at trial. However, as explained above, the lending issue in the view of HY's lending expert was far from clearly resolved; and as to what that expert did say in the joint statement, since it would obviously be very difficult for HY to go behind that at trial it would be unusual and unnecessary to seek any formal agreement that the joint statement was binding.

187. It is alleged that Beachcroft failed during the mediation and the subsequent negotiations to put forward Mr Langsam's case effectively, by reference in particular

[2] The pleaded allegation of delay in getting hotel valuations relates specifically to the International Hotel: Re-Amended Particulars of Claim, para 17.1, Particulars (1G).

to the lending experts' joint statement. However, in the first place those negotiations were conducted entirely by Mr Bartley Jones; there were no negotiations at that stage between Beachcroft and HY's solicitors. Secondly, there is no basis for the assertion that Mr Bartley Jones did not rely on the evidence of the lending experts. He referred to it in what is, unsurprisingly, a summary fashion in his position statement for the mediation (at para 11.3), and he relied on it strongly in his skeleton argument served on 25 January 2006.[3] That skeleton would obviously have been before HY's advisers when they were negotiating on 26-27 January. This allegation, which was not pursued at trial, is misconceived.

188. Finally, I should record that the allegation that Beachcroft failed to instruct leading counsel whom they believed to be suitable was based on a misreading of one of Mr Southeran's attendance notes and was expressly, and very properly, abandoned by Mr Wardell at the start of the trial.

189. Accordingly, despite the valiant efforts of Mr Wardell on behalf of Mr Langsam, the claim is dismissed.

II THE COUNTERCLAIM

Introduction

190. Mr Langsam duly received payment of £1 million pursuant to the Tomlin Order. He discharged the fees of Mr Bartley Jones but declined to pay the fees of Beachcroft in the total amount of £213,686.98. Beachcroft counterclaims for its fees pursuant to the 2nd CFA, alternatively in quantum meruit.

191. Because of the change between the former partnership of Beachcroft Wansboroughs to the limited liability partnership of Beachcroft in May 2006, two partners in Beachcroft Wansboroughs were out of caution added as additional counter-claimants in case it might be contended that Beachcroft was not the party entitled to claim. However, no such contention has been advanced on the part of Mr Langsam.

192. Mr Langsam's argument, in essence, is that the 2nd CFA is unenforceable for a number of reasons, and that the various alternative grounds advanced on the part of Beachcroft whereby it should nonetheless be allowed to recover these fees should therefore not be accepted. He also contends that under the terms of the 2nd CFA the fees are not due at all. Although that is advanced very much as a secondary ground of defence, logically it falls for consideration first.

The 1st CFA

193. As referred to above, from the outset Mr Langsam and Mr Ferrari were concerned to address and limit the fees that Beachcroft would charge, and they pressed hard for a reduction in the rates first quoted. In October 2001, while still at Garretts, Mr Southeran agreed on fixed fees for the primary claim to be payable in six stages, up to and including attendance at trial, in the total amount of £44,500 (plus VAT) and disbursements; with a "success fee" that he proposed should be £10,000 (plus VAT). Following his move to Beachcroft in 2002, he proposed reduced fees for each stage,

[3] On the basis of the expert evidence, "… the Court can be certain that at least £30 million, and in all probability £36 million, would have been available for back to back lending in 1996" (para 27.1).

but that the success fee of £10,000 should remain, and further that there should be 100% uplift on the fees in the event of success. Mr Ferrari responded that he was not comfortable with the idea of a success fee, and proposed an all-in fee through to the end of trial of "£30,000 for a thorough job." Although there was no clear agreement in the correspondence, the parties subsequently operated on the basis that agreement had been reached on a revised total of £34,250 for the six stages as set out in an e-mail of 18 September 2002; the issue of a success fee was not then resolved.

194. In November 2003, Mr Southeran returned to the question of the funding arrangements. He said that Beachcroft did not offer to conduct substantial commercial litigation on a "no win no fee" basis but that it was prepared to look at a reduced hourly rate with an 'uplift' in the event of success. There was intermittent discussion of this over the subsequent months and on 17 February 2004 Mr Southeran wrote to Mr Ferrari emphasising that the matter needed to be resolved. His letter stated:

> "As a means of resolving this going forward, can I suggest to you that it would be appropriate for us to enter into a Conditional Fee Agreement which uses the figures set out in my e-mail of 18 September [2002][4] with an uplift on those figures in the event of success. What this means in practice is that Alex will pay only the amounts agreed (see below) except in the event we are successful as defined in the agreement. I am suggesting there will be 100% uplift on the figures which will be claimed from the Defendant. As you will see from Schedule 2 to the agreement the basic charges are specifically linked to the set amounts discussed. Accordingly for stage 3, disclosure, the amount recoverable from Alex is limited to £2,500. Under this head the amount actually billable will be £5,000 plus VAT provided sufficient time has been spent on stage 3 at the rate of £150 an hour to justify the first £2,500 and then an uplift of 100% to £5,000.
>
> I anticipate it will be necessary for us to discuss this, and I am very happy to do so but the sooner this Agreement is put in place the better."

195. He enclosed a draft CFA and a written explanation based on the Law Society's precedent. The draft defined a "win" in terms of recovering damages "of at least £250,000." This was discussed with the clients at a meeting on 26 February 2004 when they made clear that they were not prepared to accept such a low figure. Mr Southeran reluctantly agreed that instead a figure of £2 million should be used. On that basis, he sent a finalised CFA to Mr Ferrari on 7 April 2004 with a written explanation. The CFA stated:

> "**Paying us**
>
> If you win your claim, you pay our basics charges, our disbursements and a success fee. The amount of these is not

[4] The letter says "2003" but that is clearly an error.

> based on or limited by the damages. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, success fee and insurance premium (if applicable). Please also see conditions 4 and 6.
>
> If you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. Please also see conditions 3(j) and 5. If you lose, you do not pay our success fee but we will require you to pay our basic charges and disbursements.
>
> In a situation not covered above, if your opponent is ordered or agrees to pay your costs, you pay our basic charges and disbursements."

196. The method of computing "basic charges" was set out in terms of hourly rates of £150 per hour for a partner or other solicitor[5] and £110 per hour for trainees (or equivalent), but the CFA further provided:

> "Our basic charges are subject to the following maximum amount agreed:
>
> 1. Initial investigation of your claim: £6,000.00
> 2. Letter of Claim, considering responses, issuing proceedings: £2,500.00
> 3. Dealing with disclosure: £2,500.00
> 4. Preparation of witness statements: £10,000.00
> 5. Instruction of expert witnesses: £1,750.00
> 6. Trial preparation and attendance: £10,000.00
>
> The amounts agreed above are <u>not</u> inclusive of dealing with the interim applications or work carried out dealing with issues arising which were not apparent to us at the time of entering into this agreement. Should such issues arise or interim applications be considered, we will write to you and agree an appropriate figure in respect of our basic charges with you."

197. The CFA proceeded to provide for a "success fee" of 100% of the basic charges. The application of the success fee was set out in conditions 3(j), (l) and (m) and 4-5 of the Law Society Conditions set out in the schedule:

> "**3. Explanations of words used**
>
> (j) "*Lose*
> …
> The court has dismissed your claim or you have stopped it on our advice.
>
> (l) *Success fee*

[5] Mr Southeran had previously explained that this was a very significantly discounted rate for him as a partner.

The percentage of basic charges that we add to your bill if you win your claim for damages and that we will seek to recover from your opponents.

(m) *Win*

Your claim for damages is finally decided in your favour awarding you a sum in respect of damages of at least £2,000,000, whether by a court decision or an agreement to pay you damages. 'Finally' means that your opponents:

- are not allowed to appeal against the court decision; or
- have not appealed in time; or
- have lost any appeal.

4. What happens if you win?

If you win:

- You are then liable to pay all our basic charges, our disbursements and success fee - please see condition 3(m).
- Normally, you will be entitled to recover part or all of our basic charges, our disbursements and success fee from your opponent.
- If you and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and our disbursements, then you pay the difference.
- …
- If the court carries out an assessment and disallows any of the success fee percentage because it is unreasonable in view of what we knew or should have known when it was agreed, then that amount ceases to be payable unless the court is satisfied that it should continue to be payable.
- …

You remain ultimately responsible for paying our success fee….

5. What happens if you lose?

If you lose, you do not have to pay the [sic] or success fee. You do have to pay:

- us for our basic charges and disbursements;
- your opponent's legal charges and disbursements."

198. At a meeting on 20 April 2004, Mr Ferrari said that Mr Langsam would sign the CFA if Mr Southeran prepared a side letter to the effect that Mr Langsam would not have to pay the difference between the uplift recovered from the defendant on a successful outcome and the 100% success fee provided for in the CFA. Mr Southeran then prepared and sent a side letter in those terms on 29 April 2004, and Mr Langsam signed the CFA. The CFA as sent on 7 April 2004, which Mr Langsam signed later that month, still stated as the "Agreement date" 26 February 2004, i.e. the date of the previous draft.

The 2nd CFA

199. In the months following the entry into the 1st CFA, HY applied to amend their defence to introduce the domicile issue, Mr Wingate-Saul was instructed in place of Mr Elleray, and the first report of Mr Warburton and the first and supplementary reports of Mr Lowden were served. On 11 October 2004, Mr Southeran wrote to Mr Ferrari a detailed letter about various aspects of the case, to which I have referred in connection with the claim (para 44 above). Under the heading of "Costs", Mr Southeran referred to the current (1st) CFA. I need to set out almost in full this part of his letter:

> "In the event, the action has broadened from our original assessment of what might be necessary. In particular it appears it will be necessary to deal to [sic] with a contested Application which could not realistically be contemplated at an early stage. Similarly additional claims in the form of the CGT point raised by Mike Warburton have now become part of the action and will have to be dealt with including appropriate disclosure, additional evidence etc.
>
> In the circumstances what I am going to suggest is that we revise our agreement in the interest of putting this firm in a position to recover a reasonable amount of costs from the opposition in the event we are successful.
>
> In the interest of avoiding any doubt, what I have in mind is creating a situation where in the event Alex succeeds in recovering from the opposition and obtains a costs Order we as a firm are entitled [to] seek to recover the time costs actually incurred to date between now and any trial. In the event Alex recovers in excess of the £2m already indicated in the existing agreement, we are able to recover an additional sum in the form of a success fee. None of this will put Alex at a significant cost risk as the costs are, in either of the circumstances mentioned above, likely to be recoverable from the opposition, or not recoverable at all.
>
> To this end I am going to suggest to you that we enter into a new CFA which reflects the fact that additional risks arise from the Defendant's Application to amend the Defence and the fact that due to the increased value of the claim arising from the CGT claim substantial additional work and hence risk will arise prior to this matter being ready for trial.

> I therefore suggest that a new CFA should provide for an hourly rate of £200 for myself (discounted from my usual rate of £275) and £150 for assistant solicitors (such as Harald Loeffler discounted from his usual hourly rate of £185) and £100 for trainees (discounted from the usual hourly rate of £125). You will only have to pay our fees based on the above mentioned hourly rates in the event that your claim is successful i.e. that you recover something from the Defendant. Should your claim fail you will only pay our disbursements (such as Court fees and Counsel's fees which you are currently due to pay anyway). You will also remember that should you be successful a huge percentage of your costs (usually around 70%) can be recovered from the Defendant.
>
> In addition should you recover at least £2,000,000 you will also pay what is technically described as a success fee of 100% of our costs calculated in accordance with the hourly rate mentioned above. This success fee can be recovered from the Defendant and we will not seek to recover any more from you than is recoverable from the Defendant.
>
> I suggest we discuss the above mentioned CFA at our next meeting in more detail."

200. On 21 October 2004, Mr Southeran went to see the client(s) at Halecroft. At the end of a long meeting addressing various evidential and disclosure issues, there was brief discussion of the question of fees and the proposal in his letter that I have quoted. Mr Langsam said he was happy with this and Mr Southeran said he would send a modified form of CFA for signature. Mr Ferrari said in his evidence that Mr Southeran made it clear that the proposed new CFA would not place Mr Langsam at any additional disadvantage.

201. On 2 November, Mr Southeran sent the proposed revised CFA to Mr Ferrari. In his covering letter, he stated:

> "It is important that we have an opportunity of discussing this document so that I can advise you as to its contents immediately before the document is signed. I would like to arrange to do this (on the telephone will suffice) at the earliest opportunity."

202. On 8 November, Mr Ferrari spoke to Mr Southeran and asked what were the differences between the new CFA and the 1st CFA. As recorded in a manuscript note that Mr Ferrari made on Mr Southeran's letter, he was told that there are amendments to condition 5 ("What happens if you lose?") in that under the revised CFA, Mr Langsam would not have to pay any of the basic charges if the case was lost.

203. The 2nd CFA specifies the "Agreement date" as 21 October 2004. The preamble states:

> "This agreement is entered into on the basis that it is to provide the funding arrangements from 21 October 2004. It is hereby recorded that due to the increasing risk and complexity of this matter, generally, due to the large number of individual issues which now arise and due to issues raised by the Defendant's application to amend its Defence (listed for hearing on 8 November 2004) and the additional fundament[al] issues which will be raised should the amendments be allowed (which is likely) and your intention potentially to pursue further additional claims which will require amendment of the Particulars of Claim, you and we have agreed to review the funding arrangements and to enter into this agreement on the basis set out below."

204. The section headed "Paying us" is almost the same as in the 1st CFA save that it reflects the fact that if Mr Langsam loses he would not have to pay the basic charges. For completeness, I should set it out, with added emphasis of the passage relied on in argument:

> "**Paying us**
>
> If you win your claim, you agree to pay our basics charges, our disbursements and a success fee. The amount of these is not based on or limited by the damages. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, success fee and insurance premium (if applicable). Please also see conditions 4 and 6.
>
> If you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. Please also see conditions 3(j) and 5. If you lose, you do not pay our success fee but we will require you to pay our disbursements.
>
> *In a situation not covered above, if your opponent is ordered or agrees to pay your costs, you pay our basic charges and disbursements.*"

205. The section on "Basic charges" sets out the increased hourly rates in accordance with Mr Southeran's previous letter, but it also omits the fee caps: cp para 196 above.

206. In Schedule 2, the definitions of "Lose", "Success fee" and "Win" in condition 3, and the terms of condition 4 ("What happens if you win?") are the same as in the 1st CFA, but condition 5 is revised to read:

> "**What happens if you lose?**
>
> If you lose, you do not have to pay any of our basic charges or success fee. You do have to pay:
>
> - us for our disbursements;

- your opponent's legal charges and disbursements."

207. Accordingly, the 2nd CFA, as proposed and then concluded, introduced three substantive changes: (i) it increased the hourly rates; (ii) it removed the fee caps on the basic charges; and (iii) it provided the Mr Langsam would not have to pay Beachcroft' basic charges if he lost. There was also no side letter as had been provided in relation to the 1st CFA.

208. On 16 December 2004, Mr Southeran went to a meeting with Mr Langsam and Mr Ferrari at their offices. Much of this was devoted to consideration of the draft Amended Reply and discussion of additional claims that Mr Langsam wanted to pursue against HY. However, Mr Southeran was also concerned to get the 2nd CFA signed and the bundle of documents that he took with him included copies of that document for signature and also a one page "Written Explanation" of the agreement. That was identical in all respects to the written explanation provided for the 1st CFA save that in paragraph 2(b) the reference to "basic charges" was removed from the statement of what Mr Langsam would have to pay if he lost. Mr Southeran said that he handed over copies of this document and would have summarised it orally in the meeting, but Mr Ferrari and Mr Langsam said that there was no substantive discussion of the CFA on this occasion. Mr Southeran's attendance note records:

> "We have discussed all aspects of the proceeding [sic] conditional fee agreement previously and we also discussed this one in length on the telephone and at previous meetings.[6]
>
> Alex previously agreed that the form of documents sent to him were acceptable and that he would sign it and he duly signed the copies in Robert's file which had the conditional fee agreement as being agreed when we discussed it and agreed to sign its current form on 21st October 2004."

209. Mr Langsam signed the 2nd CFA on 16 December 2004. The document, as set out above, stated that the date of the agreement was 21 October 2004, and there is nothing in it to indicate that it was in fact signed almost two months later.

210. Both Mr Ferrari and Mr Langsam were emphatic that in these discussions concerning the 2nd CFA, Mr Southeran never explained or pointed out to them that it removed the fee caps. Mr Ferrari said that when he read Mr Southeran's letter of 11 October about a revised CFA, he assumed that this would be explained in more detail afterwards; and that when the matter was indeed discussed, Mr Southeran explained that it would enable Beachcroft to recover the increased hourly rates from the other side but stressed that Mr Langsam would be no worse off under the new agreement. Mr Ferrari did not suggest that Mr Southeran ever said that the fee caps remained in place, but he was clear that when explaining the changes introduced by the 2nd CFA Mr Southeran did not point out that the caps were being removed. He said that Mr Southeran positively stated that Mr Langsam would not have to pay any more money, and that this was the point that he was particularly concerned about at the time.

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[6] In fact, it was common ground that there was only one previous meeting where the 2nd CFA was discussed (and then only briefly), i.e. the meeting of 21 October 2004.

211. Mr Southeran in his evidence did not suggest that he explained to Mr Langsam and Mr Ferrari that the fee caps were being removed. At the time he regarded the changes being made as entirely to Mr Langsam's benefit since, by contrast with the 1st CFA, he would not be liable to pay Beachcroft' basic charges if he lost. Indeed, Mr Southeran acknowledged in his witness statement that he did not explain that Mr Langsam might have to pay more as result of the higher hourly rate and the removal of the cap on basic charges:

> "…because that was not the intention of the 2nd CFA. … The intention was that Mr Langsam should not have to pay those charges if he lost the action; and, if he did not lose, he would only be liable to the extent that Hacker Young was ordered or agreed to pay them. Moreover, in circumstances where Mr Langsam was not going to be out of pocket as a result of the changes made to Beachcroft's basic charges, it is difficult to see what was to be served by my raising with him methods for funding costs which he was not going to have to bear."

212. Although it was suggested in cross-examination that Mr Ferrari (and thus through him, Mr Langsam) would have appreciated that the fee caps were being removed, I find that they did not realise that this was the case. I accept Mr Ferrari's evidence that although he looked through the 2nd CFA, he did not read it carefully and relied on Mr Southeran for an explanation of its implications, and that Mr Langsam would have taken in even less of the long document than he did himself. I also accept that Mr Southeran told his client(s) that entering into the new CFA would not involve Mr Langsam paying any more money, or words to that effect. My conclusion is based not only on the oral evidence but also on an email of 9 December 2004 to Mr Southeran from an employee in the finance department at Britannia Group working for Mr Ferrari, in which she wrote with reference to an invoice received from Beachcroft:

> "We are being chased by your accounts department for payment of the above bill.
>
> Can you please confirm that once we have paid this we have paid Stages 1 to 5 and part of Stage 6 leaving a remaining £4250 plus VAT still to be billed.
>
> Once you have confirmed this I can arrange payment of the bill immediately."

213. That is manifestly a reference to the staged fee caps, and is wholly inconsistent with those caps being removed. It seems that there was no response from Mr Southeran to this email, but it would have given him a clear indication at the time of his client's understanding of the funding arrangements.

214. Furthermore, it is clear from the totality of the evidence in this case that, right from the outset, Mr Langsam and Mr Ferrari on his behalf were very concerned about his exposure to costs. They bargained hard on fees, and in effect missed no opportunity to push them down (e.g. when Mr Southeran moved from Garretts to Beachcroft). If they had been aware of the removal of the fee caps by the 2nd CFA, I have no doubt

that they would have made a point of establishing what might be the implications for Mr Langsam.

Construction of the 2nd CFA

215. The settlement agreed with HY was for an "all-in" payment of £1 million, and HY were told in the final negotiations on 26-27 January 2006 that Mr Langsam's costs were now about £300,000. It is common ground that the settlement was inclusive of costs. The Tomlin Order recited in the usual way that the parties had agreed a compromise in the terms of the schedule to the order and provided that all further proceedings be stayed except for the purpose of carrying the order and terms of the schedule into effect. It then stated:

> "No Order as to the costs of and incidental to this Action"

216. The schedule provided that HY should pay to Mr Langsam personally the sum of £1 million by 24 February 2006.

217. In those circumstances, it was submitted that HY had not been "ordered or agreed to pay" Mr Langsam's costs, so as to trigger a liability on his part to Beachcroft under the 2nd CFA.

218. I reject that argument, which I consider rests on an over-literal construction of the relevant paragraph of the agreement. The third paragraph under the heading "Paying us" expressly addresses a situation that is not covered by either the first ("if you win") or second ("if you lose") paragraph. It therefore covers the case of a judgment or settlement whereby Mr Langsam recovers less than £2 million. The provision might be ambiguous and create difficulty if on a judgment HY was ordered to pay only a part of Mr Langsam's costs (e.g. if the damages were less than the Part 36 Offer) but that was not the case here. HY agreed to make a payment in full settlement that clearly implied an acceptance on their part that they would be liable for Mr Langsam's costs, and that was doubtless why they wished to know the level of his costs when determining their offer. On any sensible construction of this paragraph in the 2nd CFA, I do not think Mr Langsam's liability for Beachcroft's fees varies according to whether the agreement with HY was expressed as an obligation on them to pay "£x (inclusive of costs)"; or "£x with no order for costs" or "£y and costs to be taxed if not agreed". To hold that Mr Langsam is liable for Beachcroft's fees in the first and third alternative but not in the second would defy common sense and, objectively viewed, cannot have been the parties' intention when concluding the 2nd CFA. Accordingly, I consider that the provision about costs in the Tomlin Order does not affect the position: HY were not here ordered to pay Mr Langsam's costs because they had agreed to pay a sum that was inclusive of costs. The condition for Beachcroft to recover its costs was therefore satisfied.

219. Beachcroft advanced a contrary argument on construction of the 2nd CFA. It was submitted that, considered against its factual background, the provision that the basic charges were payable if HY was ordered or agreed to pay Mr Langsam's costs meant that (as it was expressed in Mr Moriarty's and Mr Dale's written closing submission) he was liable for those basic charges "only if Hacker Young were specifically ordered or agreed to pay costs *in a certain amount which would be recoverable from them by Mr Langsam*" [my emphasis]. I reject that argument. In my view, the agreement

clearly means that if Mr Langsam's costs were recoverable under a court order but on taxation the amount recoverable was less than the basic charges calculated in accordance with the agreement, Mr Langsam would have to pay the difference. The third bullet point under condition 4 of the Law Society Conditions in the schedule to the agreement says so expressly (para 197 above). Moreover, Mr Southeran's letter of 11 October acknowledged that on taxation Mr Langsam would be likely to recover only about 70% of his costs and not the full amount, and there is no suggestion that the basic charges, which are expressly defined in the agreement, would then be reduced accordingly. In cross-examination, Mr Southeran accepted that if there were a shortfall in recovery of costs from HY (which he said he thought was unlikely), Mr Langsam would have to pay this.

220. Indeed, if Beachcroft was correct in this submission, I would find that Mr Langsam was not liable for their basic charges under the agreement since HY never "agreed to pay costs *in a certain amount*." They were told in the negotiations that Beachcroft' costs were about £300,000 and they then made an all-inclusive offer of £1 million. But in my view that clearly does not mean that they specifically agreed to pay the full amount of Mr Langsam's solicitor-and-own-client costs. HY may have considered that the likely level of costs due from them after taxation would have been £220,000, or £250,000, or £275,000, or the full £300,000 and then calculated their overall offer accordingly. This is pure speculation. There is no evidence to suggest that they agreed to pay costs of £300,000 and that only 70% of their offer was on account of their liability in damages.

221. I also reject Beachcroft's alternative submission that if this was not the true meaning of the 2nd CFA, there was here an estoppel by convention that prevents Mr Langsam disputing that it has this meaning. On the evidence, there was no common assumption that his liability for basic charges, although no longer capped, was limited in this way. For example, I note that even at the time of the final settlement discussions on 26 January, Mr Southeran's attendance note shows that he recognised that if they were to seek an agreement with HY on their liability specifically to pay Mr Langsam's costs, that might leave a shortfall which Beachcroft would then have to ask Mr Langsam to pay.

The statutory framework

222. Section 58 of the Courts and Legal Services Act 1990 (as amended) ("the Act") provides, insofar as material:

> "(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of it being a conditional fee agreement; but (…) any other conditional fee agreement shall be unenforceable.
>
> (2) […]
>
> (3) The following conditions are applicable to every conditional fee agreement-
>
> (a) it must be in writing;

> (b) […]
>
> (c) It must comply with such requirements (if any) as may be prescribed by the [Lord Chancellor]"

223. Pursuant to sub-section 3(c), requirements are set out in the Conditional Fee Agreements Regulations 2000 ("the CFA Regulations"). Regulation 4 lays down a number of explanatory requirements in respect of a proposed CFA which must be given to the client. Of particular relevance in this case are sub-regulations (3) and (5):

> "(3) Before a conditional fee agreement is made the legal representative must explain its effect to the client.
>
> (4) […]
>
> (5) …the explanation required by paragraph (3) must be given both orally and in writing."

224. In *Hollins v Russell* [2003] EWCA Civ 718, [200-2] 1 WLR 2487, where some of the problems arising under CFAs received extensive consideration in the Court of Appeal, it was held that that test of enforceability under section 58(1) was one of material compliance. As stated in the judgment of the Court (at [107]):

> "Costs judges should … ask themselves the following question:
>
> > 'Has the particular departure from a regulation pursuant to s 58(3)(c) of the 1990 Act or a requirement in s 58, either or its own or in conjunction with any other such departure in this case, had a materially adverse effect upon the protection afforded to the client or upon the proper administration of justice?'
>
> If the answer is "yes" the conditions have not been satisfied. If the answer is "no" then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied."

225. The problems there considered by the Court concerned primarily objections by paying parties who, when recovery of costs was sought against them after they had lost contested proceedings, argued that the CFAs entered into by the winning parties with their solicitors were unenforceable. In that context, the Court added, at [109]:

> "… sufficiency or materiality will depend upon the circumstances of each case. This is not to encourage paying parties to trawl through the facts of each case in order to try to discover a material breach. Quite the reverse. At the stage when the agreement has been made, acted upon, and success for the client has been achieved, it is most unlikely that any minor shortcoming which the paying party might discover in the agreement or the procedures leading up to its making will

> amount to a material breach of the requirements or mean that the applicable conditions have not been sufficiently met."

226. The test and guidance given in *Hollins v Russell* received further and very full consideration by the Court of Appeal in *Garret v Halton Borough Council* [2006] EWCA Civ 1017, [2007] 1 WLR 554. After citing from a judgment of Lord Nicholls in a Consumer Credit Act case, the Court stated with regard to section 58(1) and (3):

> "30. … Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that the satisfaction of the statutory conditions was an essential prerequisite to the enforcement of CFAs. It is to be noted that in September 2000, the Lord Chancellor issued a consultation paper entitled "Conditional fees: Sharing the Risks of Litigation". The Law Society and the Senior Costs Judge responded that the Law Society's new Client Care Code adequately covered the need to provide additional information about CFAs. But in the view of the Government, such was the need to ensure client protection that this response was not accepted.
>
> 31. The only mitigation of this strict approach is that, as was made clear in *Hollins v Russell*, the breach must be material in the sense described at para 107 of the judgment. Thus, literal but trivial and immaterial departures from the statutory requirements did not amount to a failure to satisfy the statutory conditions. It is unnecessary to decide whether the test stated at para 107 was no more than an application of the principle that the law is not concerned with very small things.
>
> 32. The principal question that arises on these appeals is whether there is substantial compliance with (or no material departure from) a requirement if a breach does not in fact cause the client to suffer detriment. If it had been intended that a CFA

> should only be [un]enforceable[7] where the client suffered actual damage, it would have been easy enough so to provide. But the focus of the scheme was on whether the CFA satisfied the applicable conditions, not on the actual consequences of a breach of one of the requirements of the scheme. In our view, it is fallacious to say that a breach is trivial or not material because it does not in fact cause loss to the client in the particular case. The scheme has the wider purpose of providing for client protection (as well as the proper administration of justice)."

The Court therefore expressly rejected the argument that a breach should not be considered to be material unless the client has had actually suffered loss as a result: see at [38]-[39].

227. Here, in the circumstances, the important explanation that had to be given to the client who was already party to an existing CFA was as to the changes that the new CFA introduced. The fact that there were no longer any caps on Beachcroft' basic charges was not explained, either orally or in writing. I have no doubt that this was a potentially material change. It is necessary to consider the position as at the time when the 2nd CFA was entered into. Although the 1st CFA expressly did not cover further issues that might arise (e.g. the domicile question), it did impose a tight ceiling on Beachcroft's fees up to the end of trial of what remained a major part of the case. Although Mr Southeran said in the witness box that he did not expect that Mr Langsam would fail to recover Beachcroft' basic charges as set out in the 2nd CFA from HY, that was not the view he expressed in his letter at the time, and it is a commonplace that a successful party does not usually recover his full costs on taxation. Not only is there the question of the number of hours billed, but also the hourly rate. Mr Southeran's charge at £200 an hour may have been less than his normal rate but, as Mr Wardell pointed out, it was more than the guideline rate for a grade A partner in central Manchester at the time (£184). While I accept that Mr Southeran believed he would be successful in arguing on a taxation for his full rate based on the complexity of the case, that was by no means guaranteed.

228. Accordingly, even if HY would be ordered to pay Mr Langsam's costs, there was a potential shortfall for which Mr Langsam would be liable. Moreover, there was the obvious possibility of a settlement. Should there be an offer of settlement in the form of £x for damages plus £y for costs, £y might be less than Beachcroft's basic charges, irrespective of Mr Southeran's view that those charges were reasonable. Nonetheless, the offer might be attractive and lead to a settlement. Similarly, if HY had simply offered a lump sum with no prior discussion about costs, if the figure was sufficiently high it clearly might be accepted. Since in either of those circumstances Mr Langsam was liable (on the true construction of the agreement) to pay Beachcroft's fees in full, then the amount he had to pay would be higher than if fee caps had been maintained. When asked about this, Mr Southeran replied that he thought it unlikely that any settlement would have been on the latter basis, but accepted the point in principle.

229. Accordingly, I consider that there was a failure properly to explain the effect of the 2nd CFA in a material respect. In so finding, I should make clear that I do not attribute

[7] The judgment says "enforceable" but that must be a typographical error.

this to any bad faith on the part of Mr Southeran. But the consequence is that the agreement is unenforceable pursuant to section 58(3)(c) of the Act. In the light of that, it is unnecessary to consider separately the alternative argument that the agreement was voidable for misrepresentation. The misrepresentation relied on is the statement that Mr Langsam would be no worse off under the new agreement. The misrepresentation claim therefore goes no further than the argument of statutory unenforceability.

230. It is also not strictly necessary to consider Mr Langsam's further challenge to the agreement on the basis that it was backdated, but I shall do so for completeness. The question of a back-dated CFA was considered by Stanley Burnton J (as he then was) in *Holmes v Alfred McAlpine Homes (Yorkshire) Ltd* [2006] EWHC 110 (QB). I respectfully follow that judgment in expressing the view that the CFA should not have been back-dated; the proper course would have been for the 2nd CFA to state that it was executed on 16 December 2004 but applied retrospectively to work done since 21 October 2004. As the court stated in *Holmes* (At [23]):

> "Back-dating is liable to mislead third parties, and is liable to lead to the suspicion that it was done in order to mislead third parties, including a court before which the agreement is to be placed."

231. It was not entirely clear to me whether it was alleged that the agreement was rendered unenforceable because the consequences of the retrospectivity of the 2nd CFA were not fully explained to Mr Langsam or because the agreement was not properly in writing, in the sense that the written date did not correspond to the actual date, and thus contravened section 58(a) of the Act. But if the former, I consider that Mr Langsam, through Mr Ferrari, appreciated that the agreement applied to fees as from 21 October; Mr Ferrari never suggested the contrary. And if the latter, I consider that the back-dating here was not material. It did not have a material adverse effect on the protection to the client, since the actual date shown on the agreement made no difference to Mr Langsam; what made a difference was the date from which the agreement took effect, but there is no inherent objection to a correctly dated agreement being retrospective. Nor did it have a material effect on the administration of justice since I consider that it was not done in order deliberately to mislead HY or their solicitors. Mr Southeran explained that he had never entered into a CFA before this case, and I find that he considered that the principle of the 2nd CFA had been accepted by Mr Langsam at the meeting on 21 October. If recovery of costs due under the 2nd CFA would ultimately have been sought from HY, Beachcroft would have had to produce a Notice of Funding (Form N251): CPR 44.15 and CPD section 19.2. Since this was a change to the previous funding arrangement, that Notice should have been filed and served within 7 days. Beachcroft never did file a Form N251 as regards the 2nd CFA and, therefore, if it had come to a stage of seeking Mr Langsam's costs from HY, it would have had to explain the position. There is no reason to suppose that Beachcroft would have done so anything but accurately. Accordingly, although the back-dating was wrong, I would not hold the agreement unenforceable on that ground.

Election and Estoppel

232. Faced with the prospect of the 2nd CFA violating the statutory conditions, Mr Moriarty advanced a number of grounds on which he contended Beachcroft could nonetheless enforce it.

(i) Election

233. It was argued that Mr Langsam is prevented from contesting his liability to fees on the basis of the equitable doctrine of election. This doctrine was explained succinctly by Hoffmann J (as he then was) in *Banner Industrial and Commercial Properties Ltd v Clark Paterson* [1990] 2 EGLR 139 at 140F-G:

> "There is an equitable doctrine of election encapsulated in Lord Eldon's dictum that "no person can accept and reject the same instrument" *Ker v Wauchope* (1819) 1 Blight 1 at p 21. Its main application has been to a will, deed or other instrument which confers a benefit upon a party and at the same time purports to dispose of his property to someone else. The principle requires that if he accepts the benefit, he must also accept the burden of giving effect to the purported distribution of property or compensating the person intended to benefit thereby"

234. In that case, a landlord's application to set aside an arbitrator's rent review award was resisted on the basis that he had adopted the award by demanding rent at the rate determined by the arbitrator. The application rested on the ground that the arbitrator had failed to give the landlord the opportunity to see the tenant's comments on the landlord's primary submissions, and that those comments contained allegations of fact that should have been communicated to the landlord before being accepted by the arbitrator. Before the application was issued, the landlord had sent out a demand for rent at the rate determined by the arbitrator. The tenant submitted that the issue of the rent demand was a final election to affirm the award. However, the rent demand was issued shortly before the landlord's surveyor obtained from the arbitrator a copy of the tenant's comments, on the basis of which the landlord then consulted solicitors and, having received advice, made its application.

235. Hoffmann J emphasised (at 143A-B) that "a party will not be held to have made an election if he did not know that he had a right to elect." And he cited the statement of Viscount Maugham in *Lissenden v CAV Bosch Ltd* [1040] AC 412:

> "… no person is taken to have made an election until he has had an opportunity of ascertaining his rights and is aware of their nature and extent."

236. There, the landlord did not know that it had a good ground to challenge the award until it received a copy of the tenant's counter-submissions from the arbitrator. The judge held that in those circumstances the rent demand did not amount to an election by the landlord. He stated:

> "… an unequivocal act which outwardly signifies an election is not enough. Knowledge of the choice is an additional requirement. Nor does this seem to me an unfair result. As Slade LJ said in *Peyman v Lanjani* at p 301:

> 'If A has acted to his detriment in reliance on an *apparent* election by B, he will in most cases be able to plead and rely on an estoppel by conduct … If, on the other hand, A has *not* acted to his detriment in reliance on any such apparent election, justice would not seem to preclude B from sheltering behind his ignorance of his legal rights.' "

237. In the present case, Mr Langsam was told that his fees were some £300,000 and he knew that the negotiations were being conducted with HY on that basis, so that when he received an offer of £1 million, payment of those fees would leave him with about £700,000. Both he and Mr Ferrari gave evidence that they felt clearly that this was contrary to the agreement with Beachcroft and that he could not be liable for such a high figure of fees because of the fee caps that they believed were still in place. But even assuming for present purposes that Mr Langsam did not express any protest about this before the settlement proceeded, I consider that he cannot be regarded as having had in those final days of January 2006 an opportunity to ascertain his rights with regard to the 2nd CFA, let alone to appreciate "their nature and extent." I should add that the same principle applies, as Hoffmann J made clear, and thus the same conclusion follows if (which I understood not to be the case), Beachcroft is relying on the common law doctrine of election.

238. I do not think Beachcroft is assisted in this regard by *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320, on which Mr Moriarty sought to rely. There, Sir Nicholas Browne-Wilkinson VC applied the doctrine of election in unusual circumstances where the publishers of one set of national newspapers involved in two sets of proceedings against the publisher of another national newspaper sought to adopt a stance in one of those proceedings that was wholly inconsistent with the stance they had adopted in the other. There was no question there of the publisher not being able to make a fully informed choice, and the nature of that case is very far removed from the present.

(ii) Estoppel

239. Beachcroft' case on estoppel rested on what happened in the final days up to the settlement, and it is therefore necessary to return to the facts. Towards the end of the mediation on 20 December 2005, Mr Langsam said that he overheard Mr Bartley Jones and Mr Southeran discussing what his costs would be so that they could be factored into settlement negotiations, and that Mr Southeran said that the fees and disbursements were about £270,000. Mr Langsam said, and Mr Ferrari testified to the same effect, that he raised this with Mr Ferrari at the time and neither could understand how that could be right, given that they believed that fee caps still applied. Whether or not Mr Langsam first heard the £270,000 figure in that manner does not matter; I find that when HY's offer in the mediation of £900,000 inclusive of costs was reported to him, Mr Southeran pointed out the current level of his total costs, so that he could take that into account when considering the offer.

240. Moreover, it is common ground that after the mediation, Mr Ferrari called Mr Southeran from his car to ask about the fees for clarification of the figure of £270,000. Mr Southeran explained the breakdown between Beachcroft' own fees and the disbursements for counsel's fees and the fees of the two experts. Mr Ferrari said that he knew that this was going to be a seriously disputed issue but considered that it

would not be appropriate to get into an argument with their solicitor the week before the trial. He therefore responded simply with words to the effect, "I understand". Mr Langsam was with him in the car. He said that they then realised that they had a problem with Beachcroft over costs and that the fixed fee caps were not being applied.

241. At the meeting on 26 January 2006, when discussing further proposals that might be made for settlement, Mr Southeran explained that the total costs (including the fees Mr Langsam had already paid) had now risen to some £300,000 because of further work that had been done over the previous few days. He said that the previous costs figure of £270,000 had been given to HY at the mediation. Mr Southeran said that he was keen to ensure that the client(s) fully understood the costs implications of any settlement. In that meeting, Mr Langsam and Mr Ferrari withdrew for some 10-15 minutes to have a private discussion, something that Mr Southeran recorded as being unusual. On their return, Mr Langsam authorised him to negotiate at £1.4-£1.1 million inclusive of costs, and they made it clear that they wanted an all-in settlement. Mr Ferrari said that in their private discussion he and Mr Langsam felt that Mr Southeran had not stood by what they understood was their agreement on fee caps, and that they put forward those figures for an all-in settlement on the basis that they could subsequently have a separate argument with Mr Southeran about fees. It seems that Mr Southeran also got that impression since he recorded in his attendance note:

> "I … formed the view that they thought an all in deal might benefit them in arguing this with us about the level of costs from the damages rather than leaving us to deal with the opposition and then talk to them about any shortfall etc."

242. Mr Langsam and Mr Ferrari felt that they could not raise their concerns about fees prominently given that they were on the verge of trial and that they could not get into an argument with Mr Southeran about fees at that point. Nonetheless, Mr Langsam said that he mentioned the issue and said that he did not accept the position as to Beachcroft' entitlement to such fees unless the settlement was above £2 million. Mr Ferrari confirmed this, but said it was mentioned relatively briefly: Mr Langsam in effect indicated that he did not think that Mr Southeran had the fees position right and referred to there being a cap on the fees. That evidence was strongly disputed by Mr Southeran who said that no adverse comment was made that indicated any challenge to his firm's entitlement to this level of fees.

243. In the course of the conversation on the 27 January 2006 between Mr Southeran, Mr Bartley Jones and Mr Langsam, Mr Bartley Jones also made it clear that if Mr Langsam accepted £1 million, that would mean his recovering around £700,000 for himself. This is clear from Mr Southeran's attendance note and Mr Langsam, in his evidence, agreed that that this type of a discussion took place. I consider it is reasonable to infer that Mr Bartley Jones referred to the increased level of his client's costs in his final negotiation that day with leading counsel acting for HY.

244. In the drafting of the settlement agreement as reflected in the Tomlin Order, Mr Langsam, with the assistance of Ms Ashton, was concerned to provide that the total amount was paid to him directly. Mr Southeran said that he found this was "odd" and "wondered what was going on", although he accepted that Mr Langsam was entirely within his rights to have the money paid that way.

245. On the basis that (contrary to Mr Langsam's and Mr Ferrari's evidence) no challenge was made by Mr Langsam to the costs figures put forward by Mr Southeran, and which Mr Langsam knew were being passed on to HY in the negotiations, it is alleged that Mr Langsam is estopped from denying Beachcroft' entitlement to recover those costs. Since that submission rests on Mr Langsam saying nothing, this would amount to an estoppel by silence.

246. It is well-recognised that there can be an estoppel by silence (or acquiescence) in circumstances where the party against whom the estoppel is raised had a legal duty to speak. Moreover, such an estoppel can arise in wider circumstances and is not confined to the case of a legal duty. For example, in *The 'Henrik Sif'* [1982] 2 Lloyd's Rep 456, Webster J held that the time charterer of a vessel was estopped from contending that it was not the party liable to the cargo owners on a bill of lading where it had allowed the cargo owners to seek extensions of time for the claim commenced against it without pointing out that it was in fact not liable under the bill, with the consequence that the limitation for claiming against the shipowners under the bill had expired. In reliance on the dicta of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, Webster J stated:

> "the duty necessary to found an estoppel by silence or acquiescence arises where "a reasonable man would expect" the person against whom the estoppel is raised "acting honestly and responsibly" to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations."

That this is the general principle underlying estoppel by acquiescence was in effect[8] confirmed by the House of Lords, by reference to Lord Wilberforce's earlier dicta, in *Republic of India v India Steamship Co (No 2)* [1998] AC 878 at 913H-914C (per Lord Steyn, with whom the other members of the Judicial Committee agreed).

247. However, as with other forms of estoppel, reliance and detriment are necessary elements to found an estoppel by silence. Lack of any possible reliance was one of the grounds on which an estoppel by acquiescence was rejected in the *Republic of India* case. By contrast, the claimants' solicitors in *The 'Henrik Sif'*, in reliance on the charterer's failure to point out that it was the wrong party to sue, did not commence proceedings against the correct party until it was too late.

248. In the present case, I can see some force in the submission that Mr Langsam should reasonably have pointed out that he did not see how he was liable for costs in anything like the amount being mentioned in view of the fee caps. There is a direct conflict of evidence as to whether in fact Mr Langsam did so at the meeting on 26 January 2006. In my view, it is not necessary to reach a concluded view on that dispute, since even if Mr Langsam said nothing, I do not see that Beachcroft then relied on that position to its detriment such that it would now be inequitable for Mr Langsam to raise this objection. The party that did rely on his liability for fees to its detriment was HY, in taking this into account in calculating their offer and then making payment. But HY is of course not the party seeking to raise an estoppel. The position might have been different if the negotiations had failed and Beachcroft had

[8] The point was not there disputed

then continued to do substantial further work through a trial. But that is not the case. Hence I conclude that the ingredients for an estoppel are not made out.

249. In case that conclusion should be wrong such that an estoppel here could arise, I express my view on what occurred on 26 January. Mr Langsam's version of events was supported by a note which he said he dictated to his secretary following the meeting. It is headed: "FILE NOTE ABOUT PETER SOUTHERANS FEES" and deals only with that subject. The material paragraphs state:

> "The discussion on fees started when we were deciding the negotiating process on trying to settle the claim. It was decided that our Barrister should contact their Barrister and try and get a settlement of £1.4 million with each side paying its own costs. Peter then referred to the mediation process last weekend and the cost figure given to the other side of about £250k. He said that the other side would expect Beachcrofts to reduce their fee element of £160k by 25% to circa £120k.
>
> I challenged Peter on this and told him that this was not our understanding of the fee agreements we had entered into. We understood that we were not responsible for any more fees unless the Settlement exceeded £2 million.
>
> …
>
> When challenged today he made no comment. As such when he made no comment I said is that right."

250. The note thus purports to summarise two aspects of the discussion: (i) that HY would not expect Beachcroft to recover its full fees but only about 75% of the total; (ii) that Mr Langsam challenged Mr Southeran on his liability for fees, to which Mr Southeran made no comment. In my view, the first of these two points probably was made in the discussion. It was a point that one might expect HY to make; it is broadly consistent with what Mr Southeran had previously said himself (in his letter of 11 October 2004 he estimated 70% recovery); and I think that Mr Langsam is very unlikely to have imagined such a statement. There would be no particular reason for Mr Southeran to have recorded this comment in his attendance note since it is the routine advice that a solicitor gives his client on the effect of taxation of costs, and Mr Southeran was only repeating what he had told Mr Langsam previously in writing. However, as to (ii), I regrettably consider that this was not said and find that this was a self-serving note created by Mr Langsam afterwards. I reach that conclusion for three reasons. First, if Mr Langsam had said this, Mr Southeran would surely have protested, but this note records that he made no reaction: I regard that as wholly implausible. Secondly, I consider that this would have been so important to Mr Southeran that he would have both referred to it in his attendance note of the meeting and, more particularly, written to the client after the meeting in order to correct the position, as he had done previously when he felt his position was being misrepresented (e.g. as regards his advice on the need for Mr Morton to attend as a witness). Thirdly, I regard it as very curious that this is the only attendance note dictated by Mr Langsam of any of the numerous meetings with Mr Southeran in the entire history of the case.

Quantum meruit

251. If neither of the doctrines of election or estoppel applies, I was urged in the alternative to hold that Mr Langsam was liable for Beachcroft's fees, or at least some part of its fees, on the basis that a part of the payment received from HY was clearly to cover Mr Langsam's costs and it would be unconscionable for him to keep this.

252. This submission was advanced on the basis of a quantum meruit claim, in reliance in particular on *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752. The House of Lords' judgment in *Yeoman's Row* is a clear illustration of the application of a quantum meruit to allow a restitutionary remedy for services carried out in reliance upon an agreement that was unenforceable. However, the agreement in question in that case was not an agreement to pay for those services. The case concerned arrangements between the appellant company which owned a block of flats and the respondent property developer. The two parties made an oral agreement that the respondent would at his own expense apply for planning permission to demolish the block and erect in its place a terrace of houses, and that upon the obtaining of planning permission the appellant would sell the property to him for a specified up-front payment and then 50% of the excess of the proceeds of sale of the houses over an agreed sum. Thus the amount which the respondent would derive under the agreement would depend on, first, planning permission being granted, and secondly, the costs of the development and the prices at which the houses were sold. The respondent carried out the necessary work successfully to obtain the requisite planning permission, but the appellant then went back on the agreed terms and sought to demand substantially more money for sale of the property. The respondent's difficulty was that the agreement was a contract for the sale of land that was not in writing, and thus was unenforceable pursuant to the Law of Property (Miscellaneous Provisions) Act 1989. His primary claim was to a right in the property based on proprietary estoppel or a constructive trust, but although that ultimately failed in the House of Lords it was held that he was plainly entitled to recover in quantum meruit for the reasonable cost of his services in obtaining the planning permission, by which the value of the property had been substantially increased.

253. In the present case, the claim to a quantum meruit is for payment for the services provided under a contract which is unenforceable. That is accordingly a sharp contrast with the situation in *Yeoman's Row*. Moreover, the unenforceability of the CFA arises under a statute intended, as the Court of Appeal emphasised in *Garret v Halton Borough Council*, to protect the public (as clients engaging solicitors to provide legal services) at the potential expense of solicitors. In my judgment, it would significantly undermine the operation of section 58 of the Act if a solicitor who is unable to claim his fees for the legal services provided because of material non-compliance with the statutory requirements could nonetheless recover payment for those services from the client on the basis of a quantum meruit claim. I recognise that the conduct of Mr Langsam in the present case is deeply unattractive, since he has received a payment from HY that includes a significant (although indeterminate) amount in recognition of a liability on his part to pay his solicitors that he now refutes. But I do not regard that as a basis on which the court can permit Beachcroft, in effect, to circumvent the prohibition on recovery under the Act. The Act is framed in clear terms and, as the Court of Appeal stated, it adopts a tough approach which

does not take the question of prejudice to the client, or lack of it, into account. Judicial disapproval of the conduct of a particular litigant and sympathy for his solicitor cannot, in my view, establish an exception that enables a restitutionary recovery.

CONCLUSION

254. For the reasons set out in Parts I and II of this judgment, both the claim and the counterclaim are dismissed.