

Neutral citation number: [2021] EWHC 2232 (Ch)

IN THE COUNTY COURT AT LIVERPOOL

Claim No. G30LV257

Business and Property Work

Before His Honour Judge Cadwallader

BETWEEN:

(1) ESCALATE LAW LTD

(2) BERMANS (2012) LTD

Claimants

and

(1) MICHAEL KENNEDY

(2) VANESSA DAWN KENNEDY

Defendants

JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on Wednesday 4 August 2021

Introduction

1. This was the trial of a claim for £75,148.02 or for damages to be assessed, and interest, arising out of contractual arrangements between the Claimants and the Defendants over a professional negligence claim to be advanced by the Defendants against a firm of

solicitors, Peter W Marsh & Co (“the Solicitors”). The First Claimant (“Escalate”) is a company that carries on business providing funding solutions for litigation. It used to be called Capitalise Business Solutions Ltd. The Second Claimant (“Bermans”) is a company carrying on business as solicitors. The Defendants, who are husband and wife, are private individuals. They engaged with Escalate and Bermans to pursue a claim against the Solicitors.

Background

2. The Defendants had bought a plot of land at Tofts Hill, Strathern, Leicestershire (“the Land”) on 19 June 2013. They bought it from the Leicester Diocesan Board of Finance (“the Diocese”) for £44,454.00. They bought it subject to an overage agreement which had been required by the Diocese. They had instructed the Solicitors in March 2013 or thereabouts to act for them in relation to the purchase of the Land, including the overage agreement.
3. They sought and on 28 April 2017 obtained planning permission for the construction of one dwelling house on the Land. The planning permission was to expire on its third anniversary unless by then a material start had been made on the works which it permitted.
4. Concerns arose about the effect of the overage agreement. In summary, those concerns were, so far as relevant, that it was at least arguable that it had two serious flaws, as to which the Solicitors had failed to advise: firstly, that it did not allow any deductions in the calculation of the overage payment for planning, legal and building costs, and that it should have done; and secondly, that it provided for repeat payments for, in effect, the same increase in value, and that this would substantially reduce the value of the Land for development, if not it did not sterilise it completely (this last concern was

variously referred to before me as the “Repeated Payments Ambiguity” or the “Groundhog Day scenario”).

5. Following a number of meetings, and the preparation and signature of a referral form, the claim which the Defendants wanted to make was accepted by Escalate, and on 6 February 2018 the Defendants executed Escalate’s engagement pack. Thereafter, Nicholas Harvey, a solicitor, and a director and shareholder in both Escalate and Bermans, got involved on behalf of the Defendants. Following various investigations, a letter of claim was served on the Solicitors dated 9 July 2018. Counsel was instructed to advise and did so on 6 December 2018, and on 29 January 2019 a mediation took place which, however, did not settle the claim. On 28 April 2020, the three-year anniversary of the grant of planning permission occurred. On 4 May 2020 the Claimants served a termination notice on the Defendants, on the ground of various alleged breaches of their agreement with the Claimants on the part of the Defendants, and then claimed payment of their fees and disbursements in the sum already mentioned.

The proceedings

6. This claim was issued on 28 August 2020 and was met by a defence and counterclaim to which there was a reply and defence. The matter was listed before me for trial for 3 days commencing on 1 June 2021. I heard evidence from Mr Harvey and briefly (although I do not mention them again) from Christopher Clay and Charles Meynell for the Claimants, and from Mr Kennedy for the Defendants. Although the Claimants had also filed and served a witness statement from Tom Watkinson, they did not call him and did not seek to rely upon it. Similarly, the Defendants had filed a witness statement from the Second Defendant, but did not call her or seek to rely upon it.
7. In the event, evidence took longer than anticipated and, due to the commitments of counsel, submissions had to be postponed until 17 June 2021, which took a further full

day. In view of the relative complexity of the matters raised, I reserved judgment, as I had indicated that I was likely to do.

The issues

8. The following issues arise for determination: whether the Claimants were entitled to terminate their contractual arrangements with the Defendants on the basis that the Defendants were in breach of contract, by failing to provide clear instructions whether the planning permission had been preserved; whether the Defendants failed to provide clear instructions as to whether they were able to pay the sum due under the overage agreement; whether they deliberately misled the Claimants as to whether they would have built 5 houses on the Land but for the Solicitors' negligence, or had the means to do so; and whether they sought to have the Claimants work in an inappropriate or unreasonable way in instructing them to finalise an agreement with the Diocese to amend the overage agreement and quantify the overage without informing the Diocese that the Defendants could not or would not make the payment. If the Claimants were entitled to terminate their contractual arrangements with the Defendants on that basis, the Claimants claim to be entitled to invoice for their accrued hourly rate charges and disbursements, as in fact they did.
9. The Defendants accept that they entered into a CFA with Bermans, but argue that the agreement was varied by an email from the Claimants of 9 March 2018, the terms of which they accepted, as the result of which the CFA became a damages based agreement within the meaning of section 58AA(3)(a) Courts and Legal Services Act 1990 because it provided for payment of a percentage of the Defendants recovery to Bermans; but since it did not specify the reasons for setting Bermans' payment at that

level, contrary to regulation 3 (c) of the Damages Based Agreements Regulations 2013, it was therefore unenforceable. The Claimants did not accept that the CFA had been varied at all, or that if it had been it gave rise to a damages based agreement, or that if it did it was unenforceable, or could not be saved by severance of the relevant provision. The Defendants also raised an argument that, to the extent that the Claimants might claim that there was a liability to Escalate, whatever the position in relation to Bermans, such a liability could not arise under their agreement because it was an agreement to provide litigation funding, and therefore a credit agreement which was vitiated by the Financial Services and Markets Act 2000 and, for lack of proper execution, by section 65 Consumer Credit Act 1974, and was void for champerty. The Claimants responded that it was not a credit agreement, and that even if it was, Escalate was exempt under article 60G(3) of Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. However, on the basis that the Claimants accepted that if the Defendants were liable, they were liable to Escalate only to the extent that they were liable to Bermans, I was informed by counsel on behalf of the Defendants in opening that they did not need to pursue these credit agreement arguments, and accordingly I do not consider them in this judgment.

10. Quite apart from these technical arguments, the Defendants denied any breach of contract and, accordingly, that the Claimants were entitled to terminate. On the contrary, by serving a notice of termination when not entitled to do so, the Claimants were guilty of a repudiatory breach of contract, which the Defendants accepted; and the Claimants had substantially failed to perform the contract in particular by giving negligent advice to the Defendants that if the overage agreement were amended to remove the repeated payments ambiguity they could still pursue the claim against the Solicitors on the basis of a loss of opportunity to develop the Land because of the

closure of the planning window; and for allowing the contractual and primary tortious limitation periods for the claim against the Solicitors to lapse despite having been offered a standstill agreement; and for failing to advise them at the mediation to accept the Solicitors' offer of £80,000. On that basis, they owed no liability to pay the Claimants at all. Moreover, they counterclaimed for damages on the basis that Bermans allowed the limitation period to lapse, and failed to advise them to accept that offer. The Claimants denied negligence.

The contractual arrangements

11. It is convenient to deal with the contractual arrangements first. In February 2018 Escalate sent the Defendants a number of contractual documents: an Engagement Letter dated 6 February 2018, a Conditional Fee Agreement ("the CFA"), the Escalate Terms of Business ("ToB"), and the Acceptance of Terms document ("Acceptance").
12. These had been preceded by the preparation of a referral form signed by the Defendants. It referred to the dispute as a potential professional negligence claim against the Solicitors in the following terms, so far as relevant:

"It turns out the Overage agreement has at least 2 serious flaws which are extremely damaging to Mike and Vanessa. These have been looked at by Fergal O'Cleirigh at Bermans.

1. The overage calculation is flawed in that it does not allow for any deductions from the sale price, such as planning and legal but most important any build costs. Fergal thought this wrong.
2. The overage potential binds any new purchaser to pay the same overage payment that Mike has had to pay over again. Fergal felt this was a typo type mistake and capable of voluntary rectification but if not it is wrong

the loss suffered is that the Land is significantly less [valuable, *presumably*] and there is the loss of possible development value."

After referring to Mr Kennedy's purchase of an additional adjacent field subject to a similar overage agreement, the referral form went on to say,

"Both Landholdings have planning opportunities, Mike has so far chosen to seek an application for a single dwelling before discovering the problems with

the overage agreement. Mike will need to achieve a net settlement which enables him to resolve the overage agreement issues and to then move on with his plans for the Land”.

13. Among the suite of contractual documents, the Engagement Letter was sent by PKF Littlejohn LLP, a firm of accountants, and signed off by one Chris Clay. It described Escalate as offering a commercial dispute resolution solution designed for SME businesses which operated through a subcontracted specialist panel of professionals including among others commercial litigation lawyers and third-party funders (these were described as the Escalate Team). Funding for any litigation, should it be required, was included. The primary focus was to help the client secure an early resolution of their claim on commercial terms. In the case of the Defendants, the claim is described as a dispute over about £200,000 owed by the Solicitors. The letter went on to say that by signing and returning the attached confirmation sheet the Defendants agreed that should settlement prove unattainable under Path A, and should the merits of the claim warrant it (in the Escalate Team’s discretion), they authorised the lawyer to pursue their claim under the CFA, which was underpinned by the Escalate ToB which, along with the Engagement Letter, were to govern the terms of the collective engagement of the whole Escalate team, as their services might be required. The letter stated that while their overarching agreement was with Escalate, Escalate would subcontract the corporate recovery and legal aspects to the Escalate Team, who would invoice the Defendants directly for their respective services.
14. The Engagement Letter stated that Escalate considered that there were two alternative routes to seek to resolve the dispute: Path A, a pragmatic and commercial solution aimed at achieving 50% or greater of the quantum sought with a maximum three-month

period; and Path B, extending the process to a full claim in litigation, using the necessary resources to pursue the claim to a successful outcome.

15. The letter explained that they would work under a contingent fee arrangement and that, provided the Defendants complied at all times with the Escalate terms, they would not be at risk of paying costs. Even so, they would be responsible for their fees and the fees of those instructed on the Defendants' behalf. It set out the hourly rates. It then said that, in accordance with the CFA, if they achieved a recovery for the Defendants of any part of their claim through a negotiated settlement, an order of the court or by any other method, they would be entitled to the following: under Path A, a fixed cost of £12,500 plus VAT; and under Path B, a success fee that would reflect what they consider to be the inherent risk in the claim and securing an actual recovery of damages. The assessment was unrelated to the level of the damages being claimed because it was based on an uplift of the time costs of the litigation; and the letter confirmed that the success fee, together with the insurance covering third-party funding to cover the disbursement costs associated with progressing the claim to trial should be no greater than 30% of the recovered amount, irrespective of the value of the hourly rates incurred. This was to ensure that the Defendants were the greatest beneficiary of any litigation. In addition, the lawyer would be entitled to recover any costs award made by the court order or agreed with the opponent as part of a negotiated settlement.
16. The letter came with the Escalate Team Sheet which described PKF Littlejohn LLP as the accountant/corporate recovery professional, and Bermans as the lawyer. Within Bermans, Nick Harvey and his team were to carry out most of the work.
17. The CFA also came with the Engagement Letter. It stated that it covered the claim: that was defined as the Defendants' demand for damages (that is, money that the Defendants should win whether by a court decision or settlement) and/or other form of redress

whether or not court proceedings were issued. Plainly, this was a reference to the claim to which the Engagement Letter in turn referred. It provided, among other things, that

- “5.1 You must give us clear instructions which allow us to do our work properly
- 5.2 You must not ask us to work in an improper or unreasonable way
- 5.3 You must not deliberately mislead us
- 5.4 You must cooperate with us when asked.”

By clause 6.1 it also provided,

“if you Win the case or if you Recover Damages through a negotiated settlement before the Court Hearing you pay the Success Fee in addition to any Charges, Disbursements and interest from any Recovery that we are able to Recover from your Opponent on your behalf. In addition to this, you are also required to pay us VAT at the standard prevailing rate, currently 20% and any Disbursements incurred whilst we are representing you.”

The Success Fee was defined as the percentage uplift by which the charges in respect of the claim were to be increased in the event of Success calculated by reference to the accrued Charges. The uplift was not to exceed 30% of the damages recovered together with the ATE premium and any associated funding cost.

18. By clause 7.1, the Success Fee was to be a 100% uplift on the charges or such lesser percentage as was determined in accordance with clause 7.2 of the agreement. Clause 7.2 of the CFA provided that

“when accepting instructions in relation to a claim or, if later, on receipt of a reply to a letter before action or, if later, within one month of receipt of a defence following service of court proceedings we shall prepare and retain a written statement containing a risk assessment; the firm’s assessment of the amount of the success fee in relation to the claim having regard to the risk assessment; and the reasons, by reference to the risk assessment, for setting the success fee at that level.”

19. Clause 8.1 stated simply that “if you lose you do not have to pay us anything”.

However, clause 9 of the CFA provided as follows:

“9.1 You can end the Agreement at any time. Without prejudice to clause 6.1 above if you end this Agreement before your case has been Won, settled or Lost, you are liable to pay our Charges at the following hourly rates...”

9.2 We can end the Agreement if you do not keep to your responsibilities set out in paragraph 5 above. You are then liable to pay us our Charges incurred up to the date the Agreement ends on a full indemnity basis, calculated at the hourly rates set out in paragraph 9.1 one above together with Disbursements and VAT at the prevailing rate.”

20. So far as relevant, clause 12.8 provided that if any inconsistency existed between the CFA and the ToB then the ToB should prevail.

21. The ToB further provided, at clause 12.2 that

“We may decide to stop acting for you on reasonable notice if ... We believe you are acting unreasonably or not providing us with proper and timely instructions”

and at clause 12.3 that

“if you or we decide that we will no longer act for you, you will pay all charges and disbursements incurred up to the point that we stop acting...”

22. On or about 5 March 2018 the Defendants signed the Acceptance, and Mr Clay did so too. In signing the Acceptance, the Defendants unconditionally accepted the engagement (that is, the Engagement Letter), the CFA, and the ToB. The Acceptance was countersigned on behalf of PKF Littlejohn LLP acting, as is clear from the context and the other documents, on behalf of both Escalate and Bermans. Thus, contractual relations were entered into between the Defendants on the one hand, and Escalate and Bermans on the other. To the extent that it was suggested on behalf of the Defendants that the Acceptance was signed only on behalf of the First Claimant, I reject that submission: it is plain from the heading and signature of the Engagement Letter that PKF was acting on behalf of both. It is equally plain that the CFA was entered into between Bermans and the Defendants.

23. It was suggested on behalf of the Defendants that by signing the Acceptance the Defendants had not entered into the CFA, but only into an agreement with Escalate to

enter into the CFA, and only to do so if certain preconditions were satisfied which were contained, it was said, in the bullet points on the second page of the Engagement Letter. It follows from what I have already said that I do not accept the first part of that proposition in any case. As to the second, the submission was that the CFA should only come into effect (which is not quite the same as already being binding) if settlement should prove unattainable under Path A, and that the Escalate Team should consider that the merits of prospects and success of the claim warranted its pursuit through a full claim in litigation. But that is not supported by the passage of the Engagement Letter relied upon, which makes it clear that that the CFA was intended to take effect immediately the Acceptance (there referred to as ‘the confirmation sheet’) was signed; but that Bermans authority to act was conditional upon settlement’s proving unattainable and the Team’s assessment of merits. It was a matter of the Defendants giving authority to pursue a claim. If they had not yet, they might at any time, as in fact they did, as a result of the email exchange in March 2018, to which I refer next. There is therefore nothing in the conditionality point.

24. Accordingly, if and insofar as relevant, I do not accept the proposition that the CFA was entered into by Bermans by conduct, rather than by writing.

Damages based agreement

25. On 10 March 2018 Mr Harvey emailed Mr Kennedy to say that although, ordinarily, qualifying claims would first pass through Path A under the Escalate process, because it was a claim in professional negligence it had no realistic prospect of settling under that Path because of the involvement of insurers, so that it made no sense to waste time under Path A, so that

“we should crack on straightaway under path B and ramp up the pressure ASAP. That being the case, though, I should flag up that the Path B contingent pricing model of 30% of damages recovered now will apply”;

and the following day Mr Kennedy responded,

“Understood, path B! The critical factor for Vanessa and me is we sufficient funds from the process to enable development in line with our planning permission.”

26. The Defendants’ case is that the CFA was varied by this, so as to turn it into an unenforceable damages based agreement. But in my judgment it was not varied. The contract was originally made and accepted by the Defendants’ execution of the Acceptance, in my judgment. The original agreement provided for both Path A and Path B. The suggestion in Mr Harvey’s email of 9 March 2018 that one should move immediately to Path B was a suggestion about how to operate the original contract, not a proposed amendment of that contract. The reference to the contingent pricing model was expressed as a reference to the contingent pricing model under the original contract, not as a variation to or amendment of the contract. It is true, of course, that the contract did not provide for a flat price of 30% of damages, but for a variable price subject to a cap amounting to 30% of damages: in other words, the email is referring to the maximum payable, not to the lesser sums which might be payable (unless he was just using abbreviation). That was appropriate in an email intended to flag up and warn of consequences of adopting a particular course of action under the agreement. Acceptance of the terms of that email did not indicate that there was any subjective understanding on the part of the Defendants that the agreement had been varied: ‘Understood, path B!’ was the Defendants’ authority for Bermans to pursue the claim under the CFA by which they were already bound, not agreement to a variation.

Severance

27. That is sufficient to dispose of the suggestion that the contractual arrangements amounted to a damages based agreement which could not be enforced. But in case I am

wrong, I should consider the alternative argument raised by the Claimants, that the case of *Zuberi v Lexlaw* [2021] EWCA Civ 16 means that an agreement is only a damages based agreement anyway if and insofar as it requires payment of the fee out of the proceeds of the action: *ibid.*, paras 33-34:

“... If a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA”.

On that footing, the Claimants simply say that their claim is not based on the success fee obligations, but on the Defendants’ obligation to pay their charges on early termination, so that the question does not arise. The Defendants, for their part, argue that this misses the point: the agreement is champertous, and therefore void in its entirety, unless validated by satisfying the Damages Based Agreements Regulations 2013 and the Courts and Legal Services Act 1990 s58(AA)(1). In my judgment, that is correct. But the court has power to sever the offending parts of the contract (the supposed contingent fee of 30% of damages recovered) if the offending provision can be removed without modifying or adding to the other terms, the remaining terms continue to be supported by adequate consideration, and removal does not change the nature of the contract: *Zuberi v Lexlaw* [2021] EWCA Civ 16 at [7] citing *Tillman v Egon Zehnder Limited* [2019] UKSC 32. If the court holds that the provision for the success fee fails, but there remains adequate consideration for the agreement, the claimant is still entitled to its base charges. I accept that.

28. In my judgment, the supposedly offending provision could be removed without needing to modify or add to the other terms because the obligation to pay the base charges remains; that obligation continues to be supported by adequate consideration, the carrying out of the work; and removing the obligation does not change the nature of the

contract, which governs payment for carrying out legal work. Nor do I consider that public policy would be offended by approaching the matter in that way. Accordingly, should it have been necessary, I would have severed the offending provision and allowed recovery of the base charges and disbursements in any event.

Breaches

Clear instructions

29. I turn, therefore, to consider the question whether the Defendants were in breach of the CFA. The CFA requires the Defendants to “give us clear instructions which allow us to do our work properly”. Once the question had been raised in the mediation on behalf of the Solicitors whether the supposed defects in the overage agreement could not be cured, the Claimants negotiated a variation to cure at least the Repeated Payments Ambiguity and to fix the overage sum at £70,000, payable on development or sale.

Material start

30. In his email dated 15 April 2020 to Mr Harvey, Mr Kennedy said, among other things,

“[we] have discharged the pre-commencement conditions prior to concluding a significant investment on site to achieve a material start. The works have been assessed as meeting the building regulation requirements of Milton Borough Council by the building control officer. Having reviewed the works on site, there is no need to serve notice on Milton Borough Council, and it is definitely not in our interests to trigger any obligations with the Diocese formally agreed or otherwise by revealing our actions to cement the planning consent... With planning consent cemented we don’t see why we should rush into ‘officially’ documenting the overage payment and making the payment until we have first understood the impact of Covid 19 on the self-build market. The continued availability of mortgage debt, the GDP potential of the development and the market for our family home are in serious doubt. Whilst we are not experts, we are sure that the impact will not be positive. To pay the Diocese now would, in our view be naïve. Our view is simple, the Diocese is not paid until we are ready to begin the development and are in a position to completed. Cementing the planning consent is a technicality...”

This email confirmed Mr Kennedy's instructions to Mr Harvey that the Defendants had by then already made a material start (so as to have commenced development before the expiration date of the planning permission on 28 April 2017, to which he referred later in that email; and so as to preserve it). It followed that the planning permission had not expired, on his instructions; and on the basis of the amended agreement with the Diocese, the consequence was that the overage was payable right way according to the terms which had been agreed (albeit it was arguable they were not yet in binding form).

31. In cross-examination, Mr Kennedy sought to avoid accepting that this email was saying that a material start had been made, however. I do not accept this. What this email was saying was that although a material start had been made, he did not want to have to pay the Diocese the overage for which it followed he was liable on the basis that had been agreed. In cross-examination he attempted to avoid accepting that he was giving instructions about this by pointing out that he was not a planning expert, which he was not. But that is not the point: his understanding, as expressed in that email without qualification, and for the purpose of giving Mr Harvey instructions about what or what not to communicate about what had happened on site, was that it had cemented the planning permission: that is, definitively kept it in existence. It cannot reasonably be understood in another way. Moreover, although he was seeking to deny that in cross-examination, that was precisely what he had said in his witness statement at paragraph 84; and moreover, that the local planning authority's officers had agreed that the work constituted a material start for the purposes of preserving the planning permission. Accordingly, it was not just a matter of his inexpert view, but of what the local authority had definitively told him.

32. His suggestion in cross-examination that this passage in his witness statement was simply an error is not credible. If one looks at the emails between him and the local authority it is plain that by his email dated 17 December 2019 he was seeking advice on what amounted to a material start, and he got it. It matters not whether that was from building control rather than planning officers. And it is apparent from his email to Mr Kennedy dated 14 April 2020 that Mr Harvey had been told by his colleague, Richard Moose, what Mr Kennedy had told Mr Moose: that is, that he had put drainage ditches in or scraped a foundation line on the site in order to enable it to be classed as a material start.
33. At this stage, therefore, Mr Kennedy's instructions were indeed clear. But on 17 April 2020 he emailed Mr Harvey to say the following:

“the works we have undertaken are not on the actual plot that has planning. They also not detailed within the planning permission granted (they are mentioned in the conditions but that's not the permission), so it is not clear to me how they trigger the payment. Worse still, and as you pointed out yourself, it's not even clear if they have the effect of preserving the permission which may in fact lapse in a week or so time, possibly resulting in Vanessa and me suffering further losses and expanding the damages claim. Surely it would not be wise to make any overage payment based on these works or even raise the question of it with Diocese. Also, there has been no attempt to commence the development so as to trigger a payment.”

So, having originally stated that a material start had been made, but having resisted telling the Diocese, so as to avoid having to make payment, Mr Kennedy was now saying that a material start had not in fact been made after all, so that the question of triggering a payment would simply not arise. That is despite everything he had previously told Mr Harvey and Mr Moose, and everything he had been told by the local authority. Critically, he was the only person in this exchange of emails who knew what he had actually done, and he had just contradicted what he had previously said about that. It is hard to resist the conclusion that he did so because he was prepared to say

anything he thought he might get away with in order to avoid having to make the payment at that time, whilst at the same time keeping the planning permission open.

34. These were not clear instructions because they were self-contradictory. Furthermore, the nature and circumstances of the contradiction must give rise to the concern that it would be difficult thereafter to place any reliance on any instructions which he might give on that topic. Accordingly, I find that the Defendants were in breach of the obligation to give clear instructions so as to allow the Claimants to do the work.

Ability to pay

35. The Claimants also claim that the Defendants were in breach of their obligation to give clear instructions by flip-flopping over the question whether they were in a position to pay the overage payment at all. Negotiations with the Diocese had settled on a figure of £70,000 as a lump-sum one-off payment payable either upon the sale of the plot, undeveloped; or on the implementation of the planning permission, that is, when the Defendants broke ground: that appears from email from Louise Hodgkinson to Michael Kennedy dated 22 November 2019 when she asked Mr Kennedy to confirm the outline of an agreed deal based on that. Mr Kennedy emailed back on the 25 November 2019 to say that he and his wife were content to proceed. That is to be understood as giving instructions that they were content to proceed to an agreement on that basis. At the time, Mr Kennedy was acutely aware that the planning permission would expire some 5 months thereafter, if he did not make a material start; so he must have been aware even at this stage that an agreement to that effect would involve his making a payment of £70,000 on or shortly thereafter, if the planning permission was to be preserved. He cannot complain of that.

36. In cross-examination he accepted that his intention was indeed at that point to make a material start. It is therefore submitted on behalf of the Claimants that this amounted to

an implied representation, or implied instructions, to the Claimants that he would actually be able to pay £70,000 as anticipated. I do not accept this. It would, however, be reasonable for the Claimants to have assumed that, consistently with ordinary commercial probity, the Defendants were not proposing to undertake an agreement without intending to fulfil it (as I infer they did); and reasonable for the Claimants not to have sought explicit confirmation of that. But I do not see that the Defendants were under any obligation to the Claimants to address the question at all, although obviously it would have been sensible for them to do so at least if they anticipated a problem. Absent any such obligation I do not see how failing to address the question amounted to any representation or instruction at all.

37. What can be said, however, is that negotiations were not being conducted on the footing that Mr Kennedy would need time to pay the overage after the planning permission had been implemented. It appears that he had not told the Claimants that he would. Certainly there is no evidence that he had told them that but that they had failed to act on that information before the email of 22 November 2019. He did not tell them that in his response, either. If, as was the tenor of the Defendants' evidence, they were never going to have been in a position to make a payment of that kind on breaking ground, then at the very latest they should have said so in their response on 25 November 2019, but they did not do so. That, in my judgment is a failure to give clear instructions.

38. By 21 January 2020, however, Mr Kennedy was indeed telling Mr Moose in his email of that date that he would not be in a position to pay over the amount on signing the documentation with the Diocese, and would rather avoid that until they actually started the build. He said there was a big difference in implementing the planning to the planners' satisfaction so that the consent did not expire, and actually commencing the development. He said that no lender would move until the Diocese was agreed, planning

was implemented, and he had an offer for the Defendants' existing property. It was submitted to me that saying he would rather avoid having to make early payment was not the same as saying that he could not pay. I agree. There is an ambiguity. But it certainly looked as if he might say that he could not pay. It was not clear in my judgment whether the reference to the lender was to borrowing required to fund the building project, or to raising money in order to make the overage payment, although my reading of the email would suggest both. At any rate, his instructions at this point were not clear because they were equivocal, at best. (I do not agree that they can be described as unclear on the ground that they contradicted the previous supposed representation: first, there was no such representation; second, circumstances might have changed.)

39. In response to this email, work seems to have been done to approach the Diocese to see what flexibility there might be over the payment date. The Diocese was unwilling to move on this. When on 18 February 2020 Mr Moose told Mr Kennedy the position, his immediate response was,

“It’s not an option. Simplistically, it’s impossible to save the planning in that case. Game over. I’ll just have to go ahead and make a material start to save the planning, and then they can pursue me, at which point I can accept the £45k offer [for the Land, from a third party] if I’m not able to get the project off in time and they are unwilling to compromise. I might even go lower. Then they can all go away.... Let’s keep Charles focused on closing out on the £70k.”

Clearly at this point he is implying that he has not made a material start after all; and saying that he cannot pay the overage when it is to fall due but wants to enter into formal obligations to do so. There is no suggestion that his circumstances have changed, however, and no such suggestion was made before me.

40. On 19 February 2020 Mr Kennedy offered Mr Moose further clarification. In his email, he said,

“for complete clarity we are in receipt of a self-build mortgage offer that requires planning to be locked, and our home to be sold prior to any draw down.

That offer and the consideration from our home provides sufficient funding for the development and overage payment.”

Plainly, he is saying that without that, funding will be insufficient, and he will not have it in time.

41. By 20 March 2020 Mr Harvey is emailing Mr Kennedy to say that the way forward is to document the deal with the Diocese, notify them that the development work had commenced so that planning position had been preserved, recognise that this would crystallise the Defendants liability to the Diocese for the £70,000 overage agreement; and to say that he assumes that funds have been mobilised given the agreement had been agreed in principle back in November, and to ask him if not please to ensure that funds were mobilised as soon as possible. In his email the same day, Mr Kennedy agreed. In oral evidence, Mr Kennedy said that his agreement to mobilising funding was actually conditional upon the demonstration of a need to make such payment for the purposes of the claim. I do not accept that. His answer was unequivocal and unqualified. If he had conditions in mind, he did not tell his solicitors.

42. On 16 April 2020, in a text which for some reason was not in the bundle but the terms of which are agreed, Mr Kennedy told Mr Harvey that

“the £70k isn’t available, deal with it and get on with the claim. Also, no one knows we have made a material start, and it is not a public document so I don’t see the issue, and we will not be serving any notice on the council”.

In his email dated 18 April 2020 to Mr Harvey, Mr Kennedy is still resisting the idea of making an overage payment. He writes that he and his wife have secured an offer of financing to begin the development that includes the payment to the Diocese, but requires them first to cement the planning consent, and sell their home. It is suggested to me that this was another flip-flop; but in my judgment it is not necessarily inconsistent with the previous email on the footing that the money was not available until after the various preconditions had been satisfied. But if it is not a flip-flop, it was

more equivocal than it looks. I would accept that this is a failure to provide clear instructions.

43. Mr Harvey's email the following day records a conversation on 18 April 2020. Mr Kennedy is said to have stated that the Claimants had not told him that a failure to preserve the planning permission would be detrimental to his claim against the Solicitors, or that a failure to discharge the overage fee, once crystallised, would be equally damaging to the claim, but that if he was wrong on this he would eat humble pie and immediately transfer £70,000 to the Claimants' client account as he had the funds available to do so, because he had two friends that had offered to lend him the money. So on the very same day he had been saying in writing that he did not have the money, or would not have it in time, he was able to say orally that he did or could. Again, there was no suggestion of a change of circumstances. In cross-examination, Mr Kennedy simply denied having said any of it: instead he gave a frankly implausible account of him and Mr Harvey having spent the telephone call screaming at each other. I accept Mr Harvey's email as accurate on this point, because he would have an interest in its being accurate, because it was contemporaneous, and because Mr Kennedy did not write back and disagree with it on that point (though he did on others).

44. Accordingly, I accept that Mr Kennedy's instructions were less than clear, if they were not positively misleading. My impression is that, just as I observed in his evidence in court, he was trying to tell the Claimants whatever seemed best for him at the time.

45. His instructions on this point mattered to the claim. If he could not or would not pay the overage, he would have great difficulty in saying he had any prospect of developing multiple houses.

Not deliberately to mislead

46. I turned then to the second obligation upon which the Claimants rely. The Defendants were obliged under the CFA not deliberately to mislead the Claimants. The Claimants' case is that Mr Kennedy did deliberately mislead them as to whether he and his wife would have built at least 5 houses on the Land if they could have.

47. In his email dated 17 March 2018 to Mr Harvey, Mr Kennedy refers to having spoken to Mr Harvey the previous day. Part of the email read as follows:

“I also looked back to the planning process and have included an email from the head of regulatory services at Milton Borough Council confirming that the Land purchased from the Diocese was not dead to development. As part of the Milton plan the Land had been considered for 31 dwellings and had been rejected, however in an email from James Beverley planning assistant at Milton Borough Council he says that ‘a small development may likely have less of an impact on issues such as Landscape business comes. When I spoke to him on the phone in Jan 16, he said that up to 8 dwellings might be possible subject to planning. In the end Vanessa and I submitted a single dwelling to the preplanning advice process. Armed with this information, might that challenge your view that we should not be pursuing a greater loss despite the lack of formal plans?’”

Mr Kennedy refused to accept that this was an example of his asking Mr Harvey to widen the claim for loss based on multiple dwellings, when plainly it was.

48. The letter of claim in July 2018 was sent out on the basis that the Defendants had lost the opportunity to build 5 houses on the Land. That was on the Defendants' instructions. The draft Particulars of Claim prepared on the Defendants' behalf proceeded on the same footing. The manuscript notes in Mr Kennedy's own hand on the draft Particulars of Claim, stated “what we said was ‘we wanted to maximise the potential of the Land’ is i.e. development!”. (I should note that Mr Kennedy sought to deny in cross-examination that he had said that the Land was bought for development. When he eventually accepted, as he had to, that he had bought it for development, he sought to minimise the concession by saying that it was only for a long time in the future. That was not the point.)

49. Mr Harvey had emailed Mr Kennedy on 14 November 2018 to say that Mr Harvey was awaiting a response from counsel to the latest exchange of questions and answers, but

that in the meantime the good news was that the Solicitors' solicitors (BLM) were inviting the Defendants to an early mediation, and that the indications were that they would like to settle, but he anticipated that they would look to negotiate hard on the numbers. Mr Harvey said,

"I suspect that they will, aside from formal challenges et cetera argue forcefully that the planning evidence does not favour a 5 dwelling loss of opportunity when considered alongside the contemporaneous evidence in 2016. I.e. you could not have had a loss of opportunity at that time if it was either: (i) never the intention in that period to undertake development on that scale; and/or (ii) you were not financially able to do so. We need to think carefully how we respond to these challenges. As between us, your recent answers to [Counsel] suggest that the overage issue only really 'came to a head' in 2017 and of course prior to that you had only sought planning permission for one unit. This begs the question as to whether more than one unit was under contemplation prior to that point. I suspect [Counsel] may raise concerns over this. Of course, BLM don't know this."

Mr Kennedy's response was to say that he understood, but thought it was irrelevant. He expressed frustration. He said that if he had known then what he knew now he would be sat on planning for 8 houses. The planning application submitted in 2016 was a test of what was possible, and

"boy did we destroy every argument presented to suggest the field was undevelopable. We were catapulted from outrageous success into failure by Marsh's incompetence. And, importantly I believe even now we could achieve 5 dwellings on the site... What more evidence would [counsel] like, an actual certificate from MBC to build?! At this point I despair....It's a red herring and we should be pursuing the full claim quantified by Fisher German and not a penny less. This is no time to let 'rational' professionals undermine our right to Justice! I want someone who wants to win against wrong, not follow some process that leaves Vanessa and I stranded. Fight on, determined as you have always been. It is your light that had sustained us during this period of despair. Nothing less would be to let Marsh get away with it. And if [counsel] doesn't get it, I'm happy to make my way to him at his convenience to reinforce the devastating impact Marsh has had on our lives."

This makes it plain that Mr Kennedy understood very clearly the points that Mr Harvey was making. Notwithstanding that, in his oral evidence he said he did not understand at all, and had just said that he did for the sake of appearances. I do not accept that.

50. On 15 November 2018 Mr Harvey recorded, in a telephone attendance note of a call with Mr Kennedy, that he had reminded him that it was important that they focus on his state of mind before 2016 and at 2016 to show that the intent was always to ‘max out’ the site and that he was able to deliver on that. Mr Kennedy is recorded as having said that he had an email from 2014 showing that he intended to build 14+ units, and that he would send Mr Harvey a copy. He never did, but he did send emails from February 2016 showing that he was concerned to find out whether the Land was ‘dead’ to development: he wanted, he said, to maximise the permissible return from the Land. Mr Harvey fed this into counsel’s instructions.
51. The position statement in preparation for the mediation shows that Mr Kennedy was (at the least) allowing his case to be put forward on his behalf on the basis that he had lost the opportunity to build multiple houses. His attempt to deny this were unconvincing. He suggested in cross examination that when, in his email dated 20 January 2019 to Mr Harvey he said that he was reviewing the draft mediation statement ‘now’ with his wife, that had not actually been true. This was just an attempt to get out of accepting responsibility for the basis upon which the negotiation was conducted, but it did not increase any sense that he might not have misled his solicitors while instructing them.
52. When, during the mediation itself, he was asked to show on a piece of paper where the houses he would have built would have been, his evidence in cross-examination was that he drew ‘boxes’ to show them: that is, more than one.
53. However, the Defendants were never in a position to carry out such development, not least because they did not have the money or the means of obtaining the money. The text of 16 April 2020 which I have already referred is indication enough; and if that was not true, then it was misleading about the Defendants’ means.

Improper or unreasonable

54. The CFA obliges the Defendants not to ask the Claimants to work in an improper or unreasonable way. The Claimants' case is that the Defendants were in breach of that by Mr Kennedy's text of 16 April 2020 to which reference is made above, and in particular because it amounted to request to formalise the agreement with the Diocese in the knowledge that the Defendants would not be able to perform it. This was said to be requiring the solicitors to work in an improper or unreasonable way because it would involve the Claimants in misleading the Diocese as to the Defendants' intentions, or at least the Claimants being complicit in the Defendants' bad faith in entering into the agreement. It is plain from his email of 18 February 2020 that what he was proposing to do was enter into the agreement, having made a material start, and wait to be sued; and then to sell the Land for what he could get if they were not prepared to compromise.
55. I agree that what Mr Kennedy proposed to do lacked commercial probity, and that instructing the Claimants to proceed in that knowledge involved instructing them to be complicit in that lack of probity and bad faith. Those instructions were therefore to work in a way which was both improper and unreasonable, and amounted to a breach of the CFA.

Cooperation

56. The Claimants also rely on the obligation in the CFA to cooperate with the Claimants when asked. The Claimants' case is that in refusing failing to pay the £70,000 overage agreement which had been negotiated when it was agreed to be due, alternatively failing to preserve the planning permission, the Defendants were failing to cooperate with the Claimants, who had asked them to do so with a view to preserving the claim and/or securing the benefit of planning permission. This amounted to a failure to cooperate because the business model of the Claimants, into which the Defendants had joined, made the Claimants stakeholders in the Defendants' success in those two matters. I do

not accept that. The obligation to cooperate cannot have required the defendants to act so as to undertake a liability they could not afford, even if the effect might be that a claim otherwise capable of leading to success, and thus to a payment to the Claimants under the CFA, would therefore fail, so that no payment would be payable. Nonetheless, the other breaches on the part of the Defendants remain.

Termination

57. On the face of things, it follows that under clause 9.2 of the CFA, the Claimants, or at least Bermans, were entitled to end the CFA, and on that footing, the Defendants were liable to pay the charges incurred up to that date on a full indemnity basis, calculated at the hourly rates set out in paragraph 9.1 of the CFA together with disbursements and VAT at the prevailing rate. The First Claimant served notice of termination of the agreement on the basis of breach by letter dated 4 May 2020. From the terms of that letter, it is apparent that the notice of termination was given on behalf of both Claimants, in particular since it referred to clause 9.2 of the CFA and to clause 12.2 of the ToB, which was equally satisfied.

Ambit of the contract

58. However, the Defendants' case is that the work undertaken by the Claimant' after 27 June 2019, in respect of the negotiation of a variation to the overage agreement with the Diocese, was not carried out in pursuance of the claim at all; and by extension that the contractual terms upon which the Claimants rely as entitling them to terminate the contract with the Defendants did not apply to such work or to instructions given in relation to such work.

59. The argument started with an attempt to define the ambit of the claim by reference to the telegraphic language of the contractual documentation. That is unrealistic. In any case, the scope of a claim may often change over time, while remaining identifiably the same claim. It would not necessarily fall out of any applicable CFA just because of that. As already noted, by the date of the mediation, at the latest, the Defendants' case was that but for the negligence of the Solicitors they would have been able to develop multiple properties. After the mediation, Mr Kennedy was also pushing the pursuit of a claim based on the loss of or closure of the planning window: that appears from his email dated 18 February 2019 to Mr Harvey. A claim based on the loss of multiple dwelling opportunities was not outside the ambit of the claim to which the contractual documents between the Claimants of the Defendants referred. It was the same claim.
60. The Defendants say that work under the claim was suspended when the focus turned to attempting to resolve the issues on the overage agreement with the Diocese, or at least to secure a determination of them. But in my judgment, it is plain, and it should have been plain to everyone involved at the time, the resolution of those apparent issues was central to the pursuit of the claim and always had been. Whether they really were issues was fundamental to the question of whether any loss had been caused by the alleged negligence on the part of the Solicitors; and whether and how easily they could be resolved would be likely to be important to the question of mitigation of any such loss. Of course, pursuing those issues would mean addressing the Diocese more than the Solicitors, until the position was clear enough. In that rather limited sense, it might be said that work on pursuing the claim against the Solicitors had been suspended; but for contractual purposes, it is plain that the claim continued to be pursued under the CFA by carrying out that work, and that it could not be pursued otherwise: and also because negotiations with the Solicitors' insurers would depend upon the outcome. The fact that

a beneficial resolution of those issues with the Diocese might make it difficult or impossible to pursue the claim thereafter, because the loss had evaporated, is in my judgment neither here nor there when considering whether the CFA applied to such work. But it might mean that the CFA was worth little or nothing to the Claimants.

61. Mr Harvey's email of 19 February 2019 to Mr Kennedy represented an attempt to deal with his concern that he had that if attempts to resolve the issue with the Diocese meant that the claim evaporated and the Defendants were able to pursue planning permission for multiple dwellings, the Defendants would have derived a benefit for the work done by the Claimants for which the Claimants might not be entitled to payment under the CFA. Mr Harvey wanted to make sure that the Claimants were paid in that event, and proposed in outline that the 30% success fee should attach to the value of the profit element in any such deal. In my view, any such agreement would have had to have been a separate agreement from the CFA, because it was of an entirely different nature. No formal agreement was ever made, but Mr Harvey's email dated 20 February 2019 to Mr Kennedy agrees with the proposal which the latter had made in his email of the same date which represented a counteroffer and incorporation of the terms of the email of Mr Harvey dated 26 February 2020. In my judgment, there was an agreement for remuneration in the events to which it applied, but it was a side agreement, separate from the CFA and did not prevent the work to deal with the Diocese over the difficulties in the overage agreement from being work carried on under the CFA, albeit a payment under that side agreement might be triggered in certain circumstances.

62. I therefore reject the suggestion that the work was outside the ambit of the agreement, and conclude that the Claimants were entitled to terminate for the breaches already identified above, and to payment of their fees, disbursements and interest. That is subject to the question of set off.

Set off and counterclaim

63. The Defendants' set off and counterclaim is on the basis that the Claimants breached their contractual and tortious duties to the Defendants by failing to advise the Defendants to accept the offer of £80,000 made at the mediation, but instead advising them make offers to accept £140,000 or more; failing to seek to agree a formal variation of the overage agreement to resolve the difficulties, and in particular the repeated payments ambiguity; and failing to advise the Defendants that the amount of the overage payment could not be determined until after a disposal of the relevant part of the Land, or at least that it was arguable that it could not be, or that agreeing a liquidated sum at £70,000 in advance would mean that instead the overage payment was due immediately on the commencement of development, and in fact advising them to liquidate the overage payment of £70,000 despite knowing the Defendants were having difficulties obtaining finance, and, worse, pressing them to pay the £70,000 notwithstanding that they were under no obligation at that point to do so because no formal agreement had been made, and nor had any demand; and advising the Defendants that even if the Repeated Payments Ambiguity were resolved, they could still pursue their claim against the Solicitors on the basis of a loss of opportunity to develop the Land owing to the closure of the planning window, when the Claimants knew that the Defendants had not been aware of the Repeated Payments Ambiguity during the relevant period; failing to accept the offer of a standstill agreement from the Solicitors made on 14 February 2019 despite the impending expiry of relevant limitation periods, and letting the limitation period expire without bringing a claim.
64. On that footing, it is said that the services provided by the Claimants were worthless to the Defendants, and they were entitled to and did terminate the contract with the Claimants.

Standstill

65. The Claimants rightly accept that they should have entered into the standstill agreement, but it seems (and it seems to be accepted on behalf the Defendants) that no quantifiable loss has been suffered, if any. There was a suggestion in submissions that an award of £1000 should be made for the costs of dealing with the limitation issue as against the Solicitors, but this was neither pleaded nor evidenced.

Variation to the overage agreement

66. The Defendants counterclaim damages for the Claimants' failure to agree a formal variation to the overage agreement. This cannot stand with my findings about the Defendants' approach to entering into such a variation without payment; and no loss is alleged to have eventuated in any event. This element of the counterclaim fails.

Failing to advise and pressing for payment

67. Failing to advise as to the effect of the variation of the overage agreement and pressing for payment of the £70,000. This cannot stand with my findings about the Defendants' approach to entering into such a variation without payment; and no loss is alleged to have eventuated in any event.

Mediation advice

68. At the mediation, which Mr Kennedy attended with Mr Harvey, Mr Harvey took notes. To the extent that there is any suggestion that these notes were inaccurate as a record of what occurred, I reject it. Mr Kennedy's uncorroborated evidence is not reliable: he gave his evidence generally in an unimpressive way: he made few concessions, even where they were obviously appropriate; was not infrequently evasive; and his responses seemed calculated with an eye to what he thought would advance his case at that point,

rather than to the unvarnished truth. In this, his evidence contrasted with that of Mr Harvey, which represented in my judgment an attempt to assist the court with his best recollection (albeit quite often with lengthy attempts to set it in context), and was overwhelmingly consistent with the contemporaneous documents.

69. According to Mr Harvey's notes, the Solicitors' insurers initially offered simply to fund proceedings for the rectification of the overage agreement, and to take an assignment to argue the case. On behalf of the Defendants that was rejected, and Mr Harvey asked for an offer plus costs based on a rationale which he had noted overleaf. It included notes of his response to the offer: which included the following points: rectification of the overage agreement would only deal with part of the problem, the Groundhog Day scenario; the deduction of costs and the valuation approach also remained to be dealt with; the offer did not address the planning situation in 2016 and the loss over the lack of planning; it would involve the Defendants losing control of the process; they would be left in limbo for an unspecified period; the advice they had had was that it was a strong claim; costs would be wasted, and time too. Instead, on the basis of a concessionary assumption that 3 units would have been developed (not 5) but adding back development costs, he had in mind a figure of £190,000. An offer of £66,000, inclusive of costs was received, and he made a counteroffer about £190,000 on the basis of 3 units. Three quarters of an hour later, the Solicitors' insurers made an offer of £80,000, and he made a counteroffer of £173,915. The mediation then ended because someone was unwell.

70. Contrary to the impression Mr Kennedy tried to give, the Defendants were advised repeatedly about the difficulties with their claim before the mediation. Counsel's opinion drew attention to the difficulties over causation and loss in clear terms, as Mr Harvey pointed out to Mr Kennedy in his emails of 14 and 20 November 2018, and as

I accept was recorded in his telephone attendance note of 15 November 2018. It is clear from that note, and from his response to the email dated November 14, 2018, that Mr Kennedy understood the position, and that he said so. Mr Kennedy accepted in evidence that Mr Harvey had warned him about the difference between assessing the merits of the case for trial, and trying to negotiate a settlement. The letter of claim itself said clearly that the Defendants had not been aware of the supposed defect in the overage agreement before October 2017, which ought to have made it impossible to claim that the Solicitors' negligence, rather than his own choice, meant that he had not obtained planning permission for multiple dwellings. It was there to be seen by those negotiating on behalf of the Solicitors, too. Nonetheless, for reasons which I cannot know, they were prepared to negotiate on a substantive basis.

71. In the light of this documentation, and Mr Harvey's evidence, I cannot accept the idea that Mr Kennedy did not understand exactly where he stood. Perhaps anticipating this, Mr Kennedy said that he did not understand that the Claimants' costs would be deducted from the settlement on a costs inclusive basis. I do not accept that either. It is hard to understand what alternative meaning he would say he ascribed to the words 'cost inclusive basis' used at the mediation. In any case his own spreadsheet showing his attempt to work out what it would mean in a number of scenarios plainly shows he had a good understanding of the concept. Finally, it was wholly unclear how this alleged failure to understand had any bearing on his approach to the mediation.

72. But it is submitted that Mr Kennedy is not saying that he received incorrect advice on the merits after all. His complaint is that, instead of telling him to accept the £80,000 offer, Mr Harvey said at the unexpected conclusion of the mediation he thought that there was 'more to come'. Mr Harvey did not deny this. It was exactly what Mr Kennedy wanted, of course. And in fact, Mr Harvey might have been right (particularly

since the Solicitors appeared to be negotiating already substantially above the true value of the claim, considered in the context of its prospects of success at trial); but on no footing can he said to be negligent about it, even though in the event no greater offer has in the event been received.

73. The Claimants submit that Mr Kennedy would never have accepted the offer anyway, even if he had been advised to do so. Mr Kennedy's evidence was that he wanted to accept the offer, but that Mr Harvey refused, saying something along the lines of "what about my costs?" Mr Kennedy tried to persuade him, saying that they could talk about his costs if they did the deal, the Mr Harvey was having none of it. I reject Mr Kennedy's account. It does not sit well with his email of 30 January 2019 referring to the Solicitors' advice as over-confident, and suggesting that he give them notice that the Defendants' next step would be to serve court papers. A complaint, even of the mildest kind, that Mr Harvey had refused to allow him to accept an offer he wanted to accept, is conspicuous by its absence. On the contrary, by his further email of same date, Mr Kennedy is saying that he would not want to be anchored to offer about £140,000: that email makes it clear that he wanted more, rather than less; and that he was saying £140,000 was very marginal for the Defendants based on the spreadsheet which I have already referred, which was attached. The spreadsheet showed his understanding that his net receipt on that basis would be £65,408. What that shows is that he was considering what he needed, not the value of the claim. I agree: on the balance of probabilities, Mr Kennedy would not have accepted the offer of £80,000 even had he been advised to do so. It was a negotiating risk and one which I accept that at the time Mr Kennedy was prepared, even eager, to take. There really was no evidence to the contrary.

Worthless

74. I therefore reject the claim on behalf of the Defendants that the Claimants work for them was worthless. On the contrary, it secured an offer of settlement which the Defendants now say was acceptable (and I have rejected their attempt to blame the Claimants for the Defendants not accepting it), and an agreement in principle for a useful variation of the overage agreement (and I have rejected their attempts to blame the Claimants for its not being formalised), and did so in a way which was effectively risk-free for the Defendants (and I have rejected their attempts to blame the Claimants for finding themselves obliged to pay the Claimants' fees).

Conclusion

75. Accordingly, the Claimants are successful in their claim against the Defendants as to their entitlement to be paid their profit costs and disbursements, together with interest. The counterclaim is to be dismissed. By consent order dated 4 May 2021 the court has provided that the non-statutory assessment of the profit costs and disbursements payable by the Defendants to the Claimants is to stand adjourned pending the determination of the Defendants' case that no sum is due, alternatively any sum due is reduced and/or extinguished by reason of the counterclaim; and any non-statutory assessment of the Claimants costs that is required shall be conducted by a costs judge.

Next steps

76. I will receive written submissions as to the terms of the order to be made, and as to costs, for which I will give directions separately. Any request for a hearing by either party will, of course, be considered; but if the parties are in agreement, then attendance when this judgment is handed down in open court may be dispensed with.