2019 EWHC 1038 (Comm)

IN THE HIGH COURT OF JUSTICE **D40MA083**

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

Before His Honour Judge Pearce, sitting as a Judge of the High Court at Manchester Civil Justice Centre on 13th, 14th, 15th, 18th and 20th March 2019, judgment handed down on 26 April 2019.

(1) JAVED AKBAR WARAICH
(2) FARAH WARAICH

Claimants

and

ANSARI SOLICITORS (A FIRM)

Defendant

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.

JUDGMENT

Appearances: Claimant: Mr Tariq Mahmood

Defendant: Mr Stephen Bailey

Note: references to the trial bundle are in bold, in the format **volume/page**.

Introduction

1. By a claim issued on 25 October 2017, the Claimants, who are a married couple, seek damages for the alleged negligence of the Defendant, a firm of solicitors, in failing to advise them to issue a claim against another firm of solicitors, Khan's, within the

limitation period. The claim against Khan's was itself based on the allegation that they negligently handled an application for leave to remain on behalf of the First Claimant, as a result of which his work permit expired. This is alleged to have caused delay in he and his family obtaining indefinite leave to remain in the United Kingdom and in turn to have caused them to lose the chance of getting British Nationality by the time of the trial.

2. The First and Second Claimant claim losses totalling just in excess of £820,000 which can be broken down into 6 categories:

    a. Legal costs and Home Office fees for applications that would not have been necessary but for the failure to make an appropriate application for leave to remain;

    b. Loss of earnings suffered by the First Claimant as a result of the expiry of his work permit and leave to remain;

    c. The loss of capacity "*to obtain mortgages/loans etc"*;

    d. Losses associated with the Second Claimant's bankruptcy which would have been avoided if an appropriate application for leave to remain had been made (claimed as general damages);

    e. Losses associated with failing to obtain British Citizenship earlier, including "*loss of rights and amenities"* and *"loss of benefits"*;

    f. *"Stress, and/or distress and/or inconvenience."*

3. Breach of duty is admitted in the claim against the Defendant on the basis of the breach of an admitted retainer and common law duty of care in respect of the First Claimant and the breach of a common law duty of care in respect of the Second Defendant. However, the Defendant denies that the Claimants have suffered any loss as result of the admitted breach of duty, asserting that they have not lost the real or substantial chance of a successful claim since the original claim against Khan's was doomed to failure. Alternatively it asserts that the valuation of the claim by the Claimants is exaggerated.

4. Given the admitted duty of care owed to both Claimants, it was not necessary during the trial to address the alternative argument that the Second Claimant retained the Defendant. There is no express retainer and on the available evidence, I could find no material from which such a retainer could be implied. Therefore, in so far as it necessary to resolve the issue, I find that the Defendant's duty to the Second Claimant is limited to that in tort.

Relevant events

5. I am obliged to counsel for the Claimant, Mr Mahmood, for the preparation of a chronology from which I borrow here:

13.3.02	First Claimant and his dependent family enter UK as visitors

13.8.02	First Claimant is granted a 4 year work permit to work as a Balti Chef at the Mughli Takeaway[1] in Withington, Manchester; he and his dependent family are granted 4 years leave to remain
3.4.06	First Claimant is made bankrupt
7.06	First Claimant retains Khan's Solicitors to act in an application relation to his immigration status. The exact date is unclear.
12.8.06	First Claimant signs SET(O) form regarding application for leave to remain. The application is treated as made on 14.8.06 and is received by the Home Office on 15.8.06. The application is framed around the Claimants' family's rights under Article 8 of the ECHR.
13.8.06	First Claimant's work permit (and his and his dependents' leave to remain) expires
13.9.06	Application for leave to remain is refused.
7.11.06	First Claimant applies for an extension of his work permit.
16.11.06	First Claimant applies for a fresh work permit.
27.11.06	First Claimant's application for a work permit is refused.
1.07	First Claimant instructs Abbey Solicitors to act on his behalf
2.07	First Claimant instructs Amjad Malik Solicitors to act on his behalf
7.2.07	First Claimant signs a receipt stating "*I have collected my full file of papers from the offices of Khan's Solicitors…*"
16.2.07	Abbey Solicitors send a letter to Khan's about a potential professional negligence claim
28.2.07	Abbey Solicitors make an application for a work permit for the First Claimant
1.3.07	Amjad Malik Solicitors make an application for a work permit for the First Claimant
4.07	First Claimant instructs Defendant to act on his behalf
30.5.07	Defendant submits a work permit application for the First Claimant
7.07	Work permit issued to First Claimant for 18 months
9.11.07	Defendant submits an application for further leave to remain as a work permit holder for the First Claimant
27.11.07	First Claimant's application for further leave to remain is refused.
30.4.08	First Claimant is convicted as the owner of an off licence selling alcohol to a person under the age of 18
9.1.09	First Claimant and his dependent are granted further leave to remain for 18 months to 9.7.10

[1] At some point, the Mughli Takeaway moved location within Withington and was renamed the New Mughli. The clearest evidence of this is a letter dated 15.11.03 though in due course this change of location and name became an issue in the first Claimant's immigration applications as set out below.

29.6.09	Second Claimant is made bankrupt on the petition of Davenham Trust plc
6.7.11	First Claimant and his family are granted 3 years leave to remain.
13.7.12	Defendant records in a letter that it has been told that Khan's file is water damaged.
7.11.12	First Claimant is convicted of offences of Housing Act and Fire Safety offences and fined.
13.8.12	Limitation period in claim against Khan's expires
22.4.15	First Claimant is convicted of fire safety offices. Sentenced to a suspended period of imprisonment.
7.2.18	First Claimant and his dependents are granted indefinite leave to remain

The trial

6. Each of the Claimants provided seven witness statements. They each gave oral evidence. As identified at paragraph 17 below, the Defendant took a preliminary issue about the language in which their statements had been prepared. This led to a delay of one day in starting the trial which had the knock on effect of causing the trial to finish one day late.

7. On behalf of the Defendant, Mr Ansari prepared two witness statements and gave evidence.

The Law

8. This claim is for the loss of a chance of success in an action against Khan's, an action which itself involved the loss of a chance of a successful immigration application. The correct approach to a claim of this kind was considered by the Court of Appeal in Kitchen v Royal Air Force Association [1958] 1 WLR 563, in which Lord Evershed MR (with whom the other members of the Court agreed) said:

"*If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged Plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the Plaintiff could reasonably ever have formulated then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence…The present case, however, falls into neither one nor the other of the categories which I have mentioned. there may be cases where it would quite impossible to try 'the action within the action'… In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case as the present is to determine what the Plaintiff has lost by negligence. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine the value as best it can.*"

9. In assessing a Claimant's potential loss, a distinction must be drawn between determining what the Claimant would have done if properly advised (to be decided on the balance of

probabilities) and what is dependent on the acts of others (to be determined as a loss of a chance). As Lord Briggs said in Perry v Raleys [2019] UKSC 5:

> *"20. For present purposes the courts have developed a clear and common-sense dividing line between those matters which the client must prove, and those which may better be assessed upon the basis of the evaluation of a lost chance. To the extent (if at all) that the question whether the client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities. To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation.*
>
> *21. This sensible, fair and practicable dividing line was laid down by the Court of Appeal in Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602 ...*
>
> *22. The Allied Maples case was about the loss, due to negligence, of the opportunity to achieve a more favourable outcome in a negotiated transaction, rather than about the loss of an opportunity to institute a legal claim. But there is no sensible basis in principle for distinguishing between the two, and none was suggested in argument. In both cases the taking of some positive step by the client, once in receipt of competent advice, is an essential (although not necessarily sufficient) element in the chain of causation. In both cases the client will be best placed to assist the court with the question whether he would have taken the requisite initiating steps. He will not by the defendant's breach of duty be unfairly inhibited in proving at a trial against his advisor that he would have done so, save perhaps where there is an unusual combination of passage of time and scarcity of other probative material, beyond his own unaided recollection.*
>
> *23. Two important consequences flow from the application of this balance of probabilities test to the question what the client would have done, in receipt of competent advice. The first is that it gives rise to an all or nothing outcome, in the usual way. If he proves upon the narrowest balance that he would have brought the relevant claim within time, the client suffers no discount in the value of the claim by reason of the substantial possibility that he might not have done so: see Stuart-Smith LJ in the Allied Maples case [1995] 1 WLR 1602 , 1610G-H. By the same token, if he fails, however narrowly, to prove that he would have taken the requisite initiating action, the client gets nothing on account of the less than 50% chance that he might have done so.*
>
> *24. The second consequence flows directly from the first. Since success or failure in proving on the balance of probabilities that he would have taken the necessary initiating step is of such fundamental importance to the client's claim against his advisor, there is no reason in principle or in justice why either party to the negligence proceedings should be deprived of the full benefit of an adversarial trial of that issue. If it can be fairly tried (which this principle assumes) then it must be properly tried. And if (as in this case) the answer to the question whether the client would, properly advised, have taken the requisite initiating step may be illuminated by reference to facts which, if disputed, would have fallen to be investigated in the underlying claim, this cannot of itself be a*

good reason not to subject them to the forensic rigour of a trial. As will appear, this has an important bearing on the extent of the general rule that, for the purpose of evaluating the loss of a chance, the court does not undertake a trial within a trial."

10. In determining the loss of a chance, the Court has to consider whether that chance was real or substantial. Simon Brown LJ as he then was put it thus in Mount v Baker Austin [1998] PNLR 493:

> "*In order to recover for the loss of that kind the court must be satisfied that the plaintiff had at least a "real" or "substantial" chance that he would have succeeded in the primary action, not merely a speculative one: see Allied Maples Group v Simmons & Simmons [1995] 1 W.L.R. 1602 per Stuart-Smith L.J. at 1614. If his prospects of success fall short of that, the court will ascribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all."*

The issues

11. The Claimants contend that the Defendant was negligent in failing to advise that a claim against Khan's be issued before expiry of the limitation period. But for that negligence, the Claimants would have had a valuable claim against Khan's for damages for negligent advice in their immigration application. The First Claimant should not have been advised to make an application for indefinite leave to remain, but rather should have sought an extension of his work permit and an associated extension of leave to remain. Had such an application been made, it would probably have been granted and the Claimants would have retained their right to be in the country. This would have avoided them being in the country for a period as overstayers and their consequent financial losses.

12. The Defendant admits its breach of duty in failing properly to advise the Claimants on the issue of limitation in their prospective claim against Khan's. However, it either denies the claim or puts the Claimants to proof on every aspect of the claim that they have thereby suffered the loss of a real or substantial chance of a claim against Khan's.

13. In determining whether the Claimants have suffered any loss as a result of that breach of duty, two issues arise:

    a. On the balance of probabilities, but for the Defendant's admitted breach of duty in failing to advise the Claimants that any claim against Khan's should have been issued on or before 13 August 2012, would the Claimants have issued proceedings against Khan's within the limitation period? (Issue 1)

    b. On the balance of probabilities, would a claim against Khan's, if brought in time, have had a real or substantial prospect of resulting in an award of damages or settlement? (Issue 2)

14. If those two questions are answered in the affirmative, the following issues need to be determined:

    a. On the balance of probabilities, when would such a claim against Khan's have been resolved, whether by trial or settlement? (Issue 3)

    b. What is the value of the lost claim against Khan's, having regard to the chance of such a claim being pursued to trial or settlement and the probable value of any such claim or settlement? (Issue 4)

15. The determination of issues 2, 3 and 4 will be greatly influenced by the determination of the following sub-issues:

    a. On the balance of probabilities, what was the nature of each of the Claimants' retainer of Khan's? (Issue 5)

    b. On the balance of probabilities, what advice did Khan's give to the Claimants? (Issue 6)

    c. What was the chance of either or both of the Claimants proving that Khan's were in breach of any duty owed to them by reason of the advice that they gave? (Issue 7)

    d. Had Khan's not been in breach of any duty owed to the Claimants:

        i. On the balance of probabilities what instructions would either or both of the Claimants have given in respect of the immigration application? (Issue 8)

        ii. What is the chance that either or both of the Claimants would have been granted further leave to remain earlier than 9 January 2009 and when would such leave have been granted (Issue 9)

        iii. What loss flows from the loss of the chance of obtaining further leave to remain earlier than 9 January 2009? (Issue 10)

        iv. What is the chance that either or both of the Claimants would have been granted indefinite leave to remain earlier than 7 February 2018 and when would such leave have been granted? (Issue 11)

        v. What loss flows from the loss of the chance of obtaining indefinite leave to remain earlier than 7 February 2018? (issue 12)

        vi. What is the chance that either or both of the Claimants would have been granted British Nationality earlier than they now will do and when will/would such nationality have been granted? (Issue 13)

        vii. What loss flows from the loss of the chance of obtaining British Nationality earlier than they now will do? (Issue 14)

16. In considering these issues, six important factual questions arise as dealt with below:

    a. When did the First Claimant first instruct Khan's?

b. On what terms were Khan's instructed?

c. What has become of Khan's file?

d. Has the First Claimant suffered any loss of earnings and, if so, how much?

e. What was the cause of the Second Claimant's bankruptcy?

f. Did Khan's insurers offer £200,000 to the Claimants?

The evidence – Introduction

17. At the beginning of the trial, the Defendant raised an issue as to the statements of truth on the Claimants' statements of case and witness statements. Each statement of case had been signed by both Claimants and each Claimant had signed their witness statements. The First Claimant's first witness statement dated 12 March 2018 asserted, *"My spoken English language is not as good as my written English and this is why I can sign documents in English, but I struggle with the spoken English. I have time to read the documents in English and therefore do not require an interpreter for reading."* In her first witness statement of the same date, the Second Claimant said, "*I confirm that I cannot speak fluent English and need an interpreter for spoken English. I have time to read documents in English and do not require the assistance of an interpreter for written English. This is the reason why I can sign documents in English."*

18. However, shortly before the trial, the Claimants served 14 statements from an interpreter, Mr Syed Haider Ali Shah, stating that he had translated into Urdu[2] each of the 7 statements that each Claimant had signed, stating in each case that the Claimant *"confirmed that the contents are true and correct and she was made aware of the consequences of making false statements in court."*

19. The statements from Mr Shah raised questions as to the compliance by the Claimants with Rules and Practice Directions:

    a. Were either or both Claimants unable to read the documents (both statements of case and witness statements) that had been verified by a statement of truth, such that Paragraph 3A.1 of PD22 to the CPR applied?

    b. Were the witness statements expressed in the witness' own words in accordance with Paragraph 18.1 of PD32?

20. In so far as the putative non-compliance related to the statements of case, this did not of itself render it ineffective, though gave rise to the possibility of it being struck out (see CPR22.2(1)); in so far as it related to witness statements, it gave rise to the possibility that the Claimants had not served witness statements in compliance with the rules and that CPR32.10 debarred them from relying on the evidence without relief from sanction.

21. To deal with this issue, the Claimants sought an adjournment overnight on the first day of trial with a view to making an application for relief from sanction and made such an application, relying on two witness statements from their solicitor, Mr Khalid

[2] The Claimants are native Punjabi speakers but speak Urdu as well.

Mahmood[3], both dated 13 March 2019. The application sought relief from sanction for failing to comply with PD22. In his third statement, Mr Mahmood explains at paragraph 6 that he had translated the statements of case into Punjabi for the Claimants and explained the contents of the documents. He followed the same process with the witness statements and list of documents.

22. As to the need for the statements from Mr Shah, Mr Mahmood stated that, "*during the trial preparation, it transpired that the Claimants may not fully appreciate and comprehend the contents of the documents … in order to make sure that that Claimants fully appreciate all of the documents listed above, I requested Mr Syed Haider Ali Shah to translate their witness statements to both Claimants."* Mr Mahmood identified that Mr Shah is both a qualified interpreter and a practising solicitor (therefore able to sign a certificate in accordance with PD22).

23. For reasons given at the time, I indicated that I was not satisfied that relief from sanction was required, since the extent of the Claimants' understanding of English was unclear and therefore I could not conclude whether the statements could properly be said to be in their own words so far as practicable and/or whether they could read the statements. I gave relief from sanction in so far as it is might have been required and I declined to strike out any statement of case. However I expressed concern that there may be an underlying issue as to reliance on the statements that would be more apparent after the Claimants had given evidence.

24. In oral evidence, both Claimants were asked about parts of their statements and said that they could understand much of their statements but that there were some words that they could not understand. For example, the First Claimant said that he did not know what "*appreciate*" means[4]. The Second Claimant identified "*instructed*", "*appropriate*" and "*proceedings*" as words that she did not understand.

25. This trial deals with events that happened a considerable time ago. I was conscious that, in so far as matters were recorded in contemporaneous documents, there was a risk that witnesses would misremember matters. As Leggatt J (as he then was) said in Gestmin v Credit Suisse [2013] EWHC 3560 at paragraphs 16 to 20 cited by him and expanded upon in paragraphs 66 to 70 of his judgment in Blue v Ashley [2017] EWHC 1928, *"the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*

26. In the event, the First Claimant's oral evidence gave rise to serious concerns as to his reliability, most particularly on the issue of his loss of earnings. It was his case that he came to the United Kingdom and worked initially for the Mughli Takeaway and latterly for the New Mughli Takeaway as a Balti Chef. That was a business owned by Mr Mohammed Chaudhury[5]. Mr Waraich asserted that, following the failure to renew his

[3] Mr Mahmood had prepared a statement for an earlier stage in the proceedings, so these were his second and third statements.
[4] Though in fairness to the First Claimant, an error in interpretation may have been responsible for this.
[5] Also called, at times, Mr Mohammad Afzal.

work permit in 2006, he had suffered a period of unemployment for which he claimed loss of earnings.

27. The Claimants relied on a schedule which originally claimed loss of earnings over a four year period. That schedule was amended to reduce the claim to a period of 2½ years and in the earlier part of his cross examination, Mr Waraich stood by this period. But when pushed on the dates, Mr Waraich asserted that the period of loss of earnings had begun in around February 2007, shortly after instructing Amjad Malik's Solicitors[6]. He accepted that he had resumed working when he got a work visa in January 2009. Accordingly he accepted that the true period of loss of earnings cannot have been more than 23 months. When asked to explain why he had originally signed a schedule stating a period of loss of earnings of 4 years and then signed the amended schedule with the lesser period of 2½ years, he repeatedly asserted that he had signed the document because his solicitor, Mr Ansari, had told him to. In so far as there was any inaccuracy, he attributed that to the fault of Mr Ansari in telling him to sign the document.

28. However there are numerous documents either signed by Mr Waraich or written in support of applications on his behalf when it is asserted that either he was working in this lesser period of 23 months or that there was no interruption at all in his work:

    a. In a work permit application dated 6 March 2007 at **2/395**, which is signed by Mr Waraich, reference is made to him working "*at present*" as a Balti chef at the New Mughli Takeaway at 450 Wilmslow Road, Withington.

    b. In an application for a work permit signed by Mr Muhammed Afzal on 29 May 2007 (and signed by Muhammed Tahir Ansari on behalf of the First Defendant) at **2/414,** it is stated that Mr Waraich had worked "*to date*" at the New Mughli Takeaway

    c. In an application for leave to remain dated 2 November 2007 and signed by Mr Waraich at **2/437** it is stated that he is working in the United Kingdom. For the purpose of that application, the Defendant is named as the company representing the First Claimant, and the document is signed by Mr James Badejoko, a trainee solicitor with the Defendant.

    d. In a letter from the Defendant to the Home Office dated 5 September 2008 at **2/449**, written in support of an application for leave to remain for the First Claimant and his family, it is stated "*our client is working at New Mughli Takeaway as a Balti Chef.*"

    e. On 17 November 2008, in a letter at **2/453** on notepaper from the New Mughli Takeaway, a Director has signed as confirming that *"Mr Waraich is currently employed with our establishment as a Balti Chef and we confirm that he is still needed for this employment and that his employment with us is continuing."*

[6] Mr Waraich's case is that he had not initially realised that it was illegal for him to continue working once his leave to remain and work permit had expired.

f. In a letter from the Defendant at **2/460** dated 23 September 2009, it is stated that Mr Waraich is "*still required for his job with Mughli Takeaway and his employment is continuing.*"

g. On 28 January 2010, in a letter again on notepaper from the New Mughli Takeaway at **2/468**, a Director has signed to state that "*since* (Mr Waraich) *was issued with a work permit which was August 2002, he has been working with us a as a work permit holder without any gaps.*"

h. In a letter from the Defendant dated 2 February 2010 in support of a request for reconsideration of an application for leave to remain at **2/469**, it is stated that Mr Waraich "*has been and still is continuing to work for the same employer since his arrival in the UK without any gaps whatsoever.*"

i. In a letter at **2/493** from the Defendant dated 1 December 2010 in support of the Claimants' application for indefinite leave to remain, it is stated, "*He has worked for the same employer since his arrival in the UK which is August 2002 as a work permit holder without any gaps.*"

29. Further, a letter dated 15 November 2011 at **5/1250** and purportedly written pursuant to the Pre-Action Protocol for Professional Negligence cases, sets out Mr Waraich's complaint about the conduct of Khan's and asserts a variety of losses. But no reference is made either to any period of interruption in work as a chef or any consequential loss of earnings. It should be noted that Mr Ansari states at paragraph 27 of his statement of 22 January 2019 that he drafted this letter. I shall return to this issue below.

30. Mr Waraich was asked about the Further Leave to Remain form referred to at paragraph 28.c above that he had signed at **2/442** and in particular the assertion at **2/438** that he continued to work. He said that he had signed this document in blank and had trusted his solicitor, Mr Ansari, to complete the document. He blamed Mr Ansari for telling an untruth to the Home Office about whether he was working.

31. Mr Waraich similarly stated that he signed in blank:

    a. The original SET(O) application made by Khan's;

    b. The Indefinite Leave to Remain form submitted by Mr Ansari on his behalf in 2010 (**2/475**).

32. Mr Waraich was asked on the second day of the trial about his application for leave to remain in 2014. He said that the form, which appears at **3/631ff** and is signed by him at **3/655**, had been prepared when he was using Thornhills Solicitors. He said that, when he signed the form, his daughter was with him. He had read through the form himself and afterwards his daughter read and translated it for him. But when asked about the same document on the fourth day, he said that this too was a document that he had signed in blank.

33. Given the obvious importance of these documents to the case, it is surprising that the assertion that Mr Waraich had signed documents in blank does not appear anywhere in his witness statements.

34. When asked about the document at **2/414**, which is apparently signed by Mr Mohammed Afzal[7] in his role as owner of the New Mughli Takeaway, Mr Waraich did not dispute the genuineness of the signature, even though on his case it was wrong to state that, at the date of the signature, 29 May 2007, he was working at the New Mughli Takeaway. But in respect of the document at **2/453**, he asserted that the signature was not that of Mr Chaudhury, describing it as "*counterfeit.*" He said that document was wrong to say that he was "*currently*" employed at the New Mughli Takeaway.

35. Of the letter from the New Mughli takeaway dated 28 January 2010 at **2/468**, he again said that this was not Mr Chaudhury's signature and that "*I was not working there at the time.*" He further stated that a payslip at **2/458** was untrue in stating that he was working in August 2009 and in recording earnings of £7,000 to date (which seems to reflect basic pay of £1,400 for the 5 months of the tax year starting April 2009). But later in his evidence he stated that he had in fact started working again at the New Mughli Takeaway when he got a work permit in January 2009. The payslip would of course be consistent with that case.

36. It is certainly correct that the signatures on the various documents apparently signed on behalf of the New Mughli Takeaway do not all look the same. But, as the Defendant points out, the only obvious motive to assert that Mr Waraich was working at the Takeaway when he was not was to prove continuity of employment for an Indefinite Leave to Remain application. This raises two points:

    a. It is difficult to see how anyone other than Mr Waraich stood to benefit from asserting that he was working at the Takeaway when he was not. Such a declaration would have exposed the employer to the risk of penalty for employing someone without a work permit and/or leave to remain. The obvious suspicion is that Mr Waraich was party to the assertion that he was working there.

    b. It is not obvious why someone would go to the trouble to lie about whether Mr Waraich was working at the New Mughli Takeaway. If it was going to be asserted that he was working there, he might as well actually have done so.

37. Making due allowance for the fact that Mr Waraich was speaking through an interpreter and was dealing with matters some time back, it was nevertheless apparent that his evidence on the issue of his loss of earnings was hopelessly contradictory. It appeared again and again that Mr Waraich was saying the first thing that came into his mind to deal with any document that was put to him. He frequently later changed his account when other documents were put.

38. When it was put to Mr Waraich by counsel for the Defendant that his loss of earnings claim was entirely made up, he replied that Mr Ansari had made the claim for loss of earnings and that "*If you say it is false, then he made it up…The claim was drafted or made by him and I am just taking it forward.*" That answer gave the impression that Mr Waraich was not actually saying he had a period of unemployment but was merely

[7] That is Mr Chaudhury – see footnote 5 above.

repeating Mr Ansari's claim that he had not. In an answer to a further question though he maintained that he had had a period of unemployment.

39. All in all, I have grave concerns about the reliability and the honesty of the First Claimant's evidence on this issue. I gained the impression that he repeatedly answered questions in the way that he thought best suited his case. His general approach to giving an account of himself, including his apparent willingness to sign blank documents and his assertion that he signs what he is advised to without regard for its accuracy cause very great concern.

40. Further, his evidence gives rise to concern about whether the disclosure process has ever been properly carried out.

    a. There have been three disclosure lists provided by the Claimants: the first, following an order dated 20 April 2018, leading to the disclosure of just 49 pages of documents; the second leading to the disclosure 927 pages; and the third, following an order dated 8 November 2018, leading to the disclosure of more than 2,000 pages. There is no adequate explanation as to why disclosure that was given later was not provided pursuant to the earlier orders.

    b. The disclosure that has been provided by the Claimants does not include many obviously relevant documents, in particular relating to their income, their earnings from their businesses and their bankruptcies. It is Mr Waraich's case (see paragraph 7 and 8 of his statement of 24 September 2018; paragraph 50 of his statement of 19 October 2018) that relevant documents went missing when they were in the possession of the Defendant. The Defendant denies this.

    c. At paragraph 11 of his statement of 22 February 2019, the First Claimant stated an email address that he and his wife use. However, in evidence, his attention was drawn to a letter at **5/1517** which had been sent to a different address. He said in cross examination that this was an address used for the whole family and that he had searched that address for relevant emails. In re-examination, he said that the email address in the letter at **5/1517** was his daughter's private email address and was not used by the family. The inconsistency between these two statements was unexplained.

    d. At paragraph 7 of his statement of 24 September 2018, the First Claimant speaks of having had wage slips from his employment with Mughli during the period 2002 to 2006 which he handed over to the Defendant. He says that these were never returned to him and that Ansari's handed over what he described in cross examination as "only one" file of documents, which was "small" and was copied on one side only, to Abbeys when he instructed them. Yet the Defendant's version of Ansari's file, as listed in its disclosure, ran to 575 pages, which could not be said to equate to a small file of single sided copying.

    e. In any event, the Claimants gave disclosure of a number of payslips. It is unclear why some were available and some were not.

    f. Further, a careful examination of written instructions to counsel to advise shows that Mr Waraich had provided relevant wage slips to Abbey Solicitors (whose

involvement came after that of the Defendant) at some point between instructions to counsel dated 29 January 2014 (which state that loss of earnings information is required from the First Claimant) and instructions to counsel dated 2 February 2016 (which refer to wage slips being attached). He was unable to explain how he might have had wage slips in his possession during this period if, as he asserted, Ansari's had lost a substantial file of original documents.

g. The First Claimant was unable to show what enquiries had been made of HMRC and/or his banks to obtain missing wage and tax documentation and what was the outcome of such enquiries, notwithstanding the fact that Abbey Solicitors had contemplated seeking such information in respect of the claim against Ansari's in a letter dated 4 November 2015 at **5/1517.** The mystery as to the nature of such enquiries is all the greater when one notes that Abbey's instructions to counsel of 2 February 2016 at **5/1546** refer to "*HMRC subject access report*" yet no such documentation has been disclosed in these proceedings.

h. Further, the Defendant in these proceedings has repeatedly raised an issue about the absence of documentation from the HMRC yet the Claimants are unable to show any steps taken to obtain such documents. In a note on the issue of disclosure prepared on behalf of the Claimants for a pre-trial hearing it is simply stated (at paragraph 7 on **8/2158** in response to a query by the Defendants about the disclosure of HMRC records) that no direction had been made in respect of such disclosure.

i. The First Claimant asserted in the witness box that his daughter had telephoned HMRC and been told that records were only kept for four years. There was no first hand evidence to this effect and Mr Waraich's vague account of the conversation gave me no confidence that it was accurate. Further, if such a call had been made, it is surprising that it is not referred to in the document at **8/2158**.

41. When pushed on the source of the documents that had been provided to various solicitors at various time, Mr Waraich made the point that he was dealing with matters that had taken place some time ago. He accepted that he could not say which documents he had supplied to which solicitors and when. The absence of many documents relevant to the issues in the case clearly creates a difficulty for the Court in determining both what did happen and what would have happened in the hypothetical situation that needs to be considered to determine the Claimants' loss of a chance claim.

42. The Claimants seek to argue that this position has been brought about by the fault of the Defendant in having lost documents. It is clear that the First Claimant has provided various documents to various solicitors at various times. However, in the light his unsatisfactory evidence on this as well as other issues (as identified above and further explored at paragraphs 71 to 75 below) and Ansari's denial that it has lost relevant documents, there is no safe basis for concluding that it, rather than the Claimants themselves or other solicitors, are responsible for the absence of relevant documents. Indeed, the overwhelming inference is that the Claimants themselves are at least in part responsible because of their failure to pursue disclosure with their banks and/or HMRC.

In these circumstances, there is no basis to draw from the absence of the documents inferences which are adverse to the Defendant or favourable to the Claimants – the Claimants simply fail to prove that the Defendant, rather than others or the Claimants themselves, are responsible for their absence.

43. Overall, I found Mr Waraich to be a deeply unsatisfactory witness. His contradictions were many and blatant. His assertion that he had frequently signed documents in blank was difficult to accept, but if true demonstrated a willingness to put his name to statements regardless of their accuracy. In so far as his evidence is contradicted by other witnesses and/or does not coincide with common sense, I am very reluctant to accept what he says.

44. This assessment of Mr Waraich is not only relevant to factual findings in this case. It potentially bears on his loss of a chance case, in so far as any Immigration or Nationality application would have depended on his word being accepted. Mr Waraich is so poor a witness that any examination of what he was saying in such an application would, if scrutinised, have led to doubts about his truthfulness.

45. As a further criticism of Mr Waraich's credibility, it might be suggested that his understanding of English is better than he was admitting, such that the use of an interpreter was unnecessary. This is not an unusual allegation in cases where witnesses have lived in the country for some time but wish to have the use of an interpreter in giving oral evidence. The Equal Treatment Bench Book counsels caution in concluding that, just because a person has lived in this country for some years, they do not need an interpreter. I consider that both of the Claimants were assisted in giving evidence by the presence of the interpreter and I do not at all hold their request for his presence against them.

46. It was clear from the evidence of Mrs Waraich that, whilst she dealt with day to day matters, she had relatively limited involvement in the finance of the business. Her husband had mainly dealt with the banks in particular. When pressed on issues, she repeatedly said that she could not remember matters and indeed she said that her memory was not good. She could not deal with the detail of the applications nor of her financial affairs. She provided very little assistance to resolving the main issues in the case.

47. Mr Ansari gave evidence for the Defendant. When he was first involved on behalf of Mr Waraich, he was considering the threat to the Claimants' family of removal from the country because they were overstayers.

48. He understood from Mr Waraich that Khan's had wrongly applied for leave to remain based on Mr Waraich working in the country for four years, in ignorance of the change in rules. He considered that an application should have been made for an extension of the work permit.

49. Latterly, when he acted in the potential professional negligence claim against Khan's, Mr Ansari said that he considered that the claim had very good prospects of success. Indeed, he agreed to take it on the basis of a conditional fee agreement. However, he never advised in writing on liability or quantum.

50. In respect of the allegation that documents had gone missing whilst in control of his firm, he denied having had the full file from Khan's stating that if he had done so he would not have needed to ask the solicitors acting for Khan's to provide the file. He was however unable to explain precisely which documents had been available to his firm. In so far as his firm had referred to documents within their possession, these would have been handed on to other solicitors as requested by Mr Waraich.

51. Mr Ansari accepted that the First Claimant was not an expert in Immigration Law and that he had been instructed to provide on immigration matters, not simply to carry out Mr Waraich's instructions.

52. I have referred at paragraph 28 above to various communications from the Defendant in which either it is asserted that the First Claimant worked continuously as a chef or which fail to refer to any period of interruption in his employment.

53. In a meeting on 25 October 2011, noted at **5/1240** (and involving Mr Waraich and Ms Rehman on behalf of the Defendant), there is no reference to a loss of earnings claim even though there is detailed reference to other losses. The letter of claim at **5/1260,** dated 15 November 2011, shortly following that meeting, makes no reference to any loss of earnings claim on behalf of the First Claimant .

54. Yet Mr Ansari's firm later advanced the claim on behalf of Mr Waraich for a period of loss of earnings. The claim is first referred to in a letter dated 11 July 2012 at **5/1282** and the schedule annexed to that letter at **5/1287** – that claim is in the same terms as the original version of the Schedule in this claim. The response of solicitors for Khan's is noted on 21.7.12, when a person called Steven phoned Ansari's and drew attention to the fact that there were no documents to support the valuation of the claim.

55. Mr Ansari accepted in evidence that he had told the First Claimant that he had a very good case and that the figure in the schedule was £1.4 million.

56. I have two distinct concerns about this aspect of the evidence.

    a. Given Mr Ansari's knowledge of the immigration claim, he should have realised that a claim for loss of earnings was inconsistent with instructions that he had previously been given by Mr Waraich.

    b. The suggestion that this claim had a potential value of £1.4 million appears to have been made without any material to prove the losses, nor analysis of how the evidence would support so large a figure.

57. The Claimants invite the court to draw the inference from this that in fact the Defendant must have had much more information before it when the claim was being formulated in 2012, otherwise the claim could not have been advanced as it was.

58. I find it surprising that so large a claim might be advanced by a solicitor in the position of Mr Ansari without Mr Waraich being clearly warned of the need for documentary evidence in support and of the highly speculative nature of the claim as formulated. It is particularly concerning that the case involves a contradiction between Mr Waraich's working history as advanced by Ansari's on his behalf in the immigration claim and the loss of earnings claim advanced by them in his claim against Khan's.

59. However, the file note of 12 July 2012 is striking – had the documentary evidence in support of the claim been in existence at that time, it would surely have been disclosed to Khan's. The lack of detailed response tends to indicate that Mr Ansari is correct to say that there was little documentary evidence in support of the figures being advanced. Further that attendance note indicates that it was Ms Rehman, an employee of the Defendant, rather than Mr Ansari himself who was formulating the loss of earnings claim on behalf of the First Claimant. That might suggest that the inconsistent case has arisen through oversight.

60. Mr Ansari was cross examined on the assertion that he had told Mr Waraich that an offer of £200,000 in settlement of the claim had been made on behalf of Khan's. He denied this. He also denied the assertion that he had asked the First Claimant to sign the SET(O) form at **2/275** in blank.

61. Overall, I found Mr Ansari to be a reasonably convincing witness, notwithstanding my concern about the matters referred to in paragraph 58 above.

The important factual questions

A. When did the First Claimant first instruct Khan's?

62. Mr Waraich asserted in his witness statement of 21 January 2019 at paragraph 9 that he had instructed Khan's in July 2006. In cross examination he stated that it was during the first week of July 2006.

63. He was questioned on a letter from solicitors acting for Khan's dated 4 June 2013 whilst the claim brought against them was current at **5/1323** which refers to a retainer letter dated 28 July 2006. He maintained that the instruction was about 6 weeks before his leave to remain was due to expire (which would have equated to early July) but accepted that in paragraph 3 of the Particulars of Claim he had stated the instruction to have been about one month before expiry of the leave to remain.

64. I consider Mr Waraich's evidence that the instruction was in early July to be unconvincing. This level of precision as to the date was not given in the Particulars of Claim or the witness statements. Given that Khan's file is not now available, the letter referred to in paragraph 63 above is the only contemporaneous evidence of the date of first instruction. It is perfectly plausible that the first meeting was in the days preceding that letter but doing the best I can I conclude that the first instruction of Khan's was in late rather than early July 2006.

B. On what terms were Khan's instructed?

65. The First Claimant's evidence is that he approached Khan's on the basis of a recommendation. He asked them for advice on his immigration status and was told that, because he had four years' continuous lawful residence in the United Kingdom, he was entitled to apply for indefinite leave to remain. He said in cross examination that he was not aware that Khan's had made an application on Human Rights rather than work permit grounds.

66. The Defendant's case is that, had Mr Waraich approached Khan's and asked them to make a claim on work permit grounds, they would have done so. Rather it is contended, repeating what Khan's had argued in their solicitors' letter of 4 June 2013 at **5/1323**, that

the instruction was to bring a claim for indefinite leave to remain and that they were not in breach of Khan's duty in bringing this application.

67. As I indicated during evidence and counsel's submissions, I have considerable difficulty in accepting the Defendant's case on this issue.

    a. It has consistently been stated that on behalf of the Claimants that Mr Waraich consulted Khan's for advice and assistance in applying for an extension of his leave to remain as his 4 year work permit was expiring and that they advised that he was entitled to seek Indefinite Leave to Remain given his 4 year period of continuous employment in August 2016 (see for example Ansari's letter of 30 May 2007 at **2/426** and the witness statement at **2/411** which would appear to be the statement referred to in that letter).

    b. I do not see any material to indicate that, in 2006, the First Claimant would have known what kind of application to make relating to his immigration status. All that is clear is that he wished to remain in the United Kingdom. He almost certainly required advice on what application to make.

    c. Any reasonably competent Immigration Solicitor would have known in 2006 that a Human Rights based application was highly unlikely to succeed. The First Claimant and his family were in the United Kingdom. There was no imminent threat of their being removed. Further, they had a perfectly good domestic remedy through the First Claimant applying to extend his work permit with an associated application for leave to remain.

    d. On the other hand, any reasonably competent solicitor would have appreciated that, for someone in the position of the First Claimant, namely in employment, an application for a further work permit would be likely to be successful and would probably lead to an extension of leave to remain for him and his family.

68. Against this, the Defendant raises two points:

    a. The very fact of the weakness of the application made by Khan's raises the question as to why it would have been made. The suggested answer is that it must have been on the Claimant's instructions.

    b. The First Claimant's credibility is such that his version of events on this issue should not be preferred.

69. As to the first of these points, it is common ground that this application was made shortly after the law on application for indefinite leave to remain changed[8] so that five rather than four years' continuous residence as a work permit holder was required to make the application. It is plausible that a person making this application may have overlooked this change when advising the First Claimant. Indeed, one explanation for the oddity of the application and the fact that Mr Waraich may have misunderstood what was being sought is that the person drafting the application on his behalf had intended to make an application for Indefinite Leave to Remain based on 4 years' relevant continuous residence but realised on completing the form that the requirement had changed to 5

[8] The relevant change was effected by HC1016 with effect from 3 April 2016.

years, hence that route was not available and another basis for applying had to be relied on.

70. As to the second, the mere fact that I find the First Claimant to be a highly unreliable witness does not mean that he was wrong on all matters. On this issue, I consider his explanation to be plausible and the alternative rather unlikely. I have no hesitation in concluding that that his instructions encompassed Khan's advising him on the appropriate application to make.

C. What has become of Khan's file?

71. The original immigration file from Khan's has apparently become water damaged (see the letter at **5/1300**) so that relevant original documents are not available. The loss of Khan's file is problematic because it deprives the court of material that would assist in understanding the nature of the retainer of Khan's, why the original application for Indefinite Leave to Remain was made and why subsequent work permits were refused. Mr Waraich states that Ansari's had possession of a copy of the file and that its loss is caused by their carelessness. Mr Ansari denies having lost the file.

72. Mr Waraich's initial position in cross examination was that he had collected a copy of the file from Khan's in 2007. He said that, to the best of his recollection, he had passed it on to Mr Ansari. But when pushed, he said he could not say that it was he who had passed the file on to Ansari's, rather than someone else. When his attention was drawn to paragraph 41 of his witness statement of 21.1.19, he reverted to saying that it probably was he who had collected the file and passed it to Ansari's. However, Mr Waraich's attention was drawn to the fact that this passage deemed to relate to passing on a file in 2011. He then said that that he had collected the file twice, first in 2007 and then 2011.

73. Mr Waraich was asked about the note that he had signed at **6/1767**, dated 7 February 2007, by which he confirmed collecting the "*full file of papers*." He first stated that, having collected the file, he took it to Ansari's. But it was then pointed out that this note pre-dated the involvement of Ansari's. Indeed, the close coincidence of time of a letter of claim by Abbey's dated 16.2.07 at **5/1223** suggests that the file may have been collected for their purposes. It is certainly inconsistent with the suggestion that the file went to Ansari's in February 2007.

74. Further, in respect of the instruction of Ansari's in 2011, Mr Waraich's attention was drawn to a letter dated 13 July 2012 at **5/1300** where Ansari's stated to solicitors acting for Khan's that "*Your client has not provided any file to our client.*" In a letter dated 31 July 2012, Ansari's stated to the same solicitors that "*Our client confirms that he did not collect his full file of papers and as stated before he only collected copies of application forms.*" It is difficult to understand why Ansari's would have been stating this if Mr Waraich was in fact saying at the time that they already had had his file.

75. The Claimants' case on this issue is hopelessly vague. There is no material from which I could safely conclude that Ansari's are to blame for missing documentation.

D. Has the First Claimant suffered any loss of earnings, and if so, how much?

76. I have set out at paragraphs 26 to 38 the evidence relating to the First Claimant's employment with the New Mughli Takeaway and whether there was a gap in that employment in 2007 to 2009.

77. Given that analysis, I am not satisfied that the First Claimant could show that he has suffered any loss of earnings. Indeed, I conclude that the assertion that he has done so is made dishonestly.

E. What was the cause of the Second Claimant's bankruptcy?

78. The First Claimant accepted that his bankruptcy pre-dated the involvement of Khan's in his immigration application and that it could not therefore be attributed to their alleged negligence. Further, he accepted that the bankruptcy would have continued to cause difficulty in getting a loan until he was discharged in 2009. The various businesses that he and his wife operated were family businesses.

79. The Second Claimant said in her evidence that the financial problems had begun "*in 2006 after a short while of our becoming over-stayed and then we had to close the businesses because we could not – when they refused the overdraft facility and loan, then we were unable to stock up the business."*

80. It is the Claimants' case that, but for their immigration status, they would have been able to borrow money. It is said (or at least suggested) that this would have staved off the Second Claimant's bankruptcy. The evidence does not however come close to showing this. The First and Second Claimants were understandably closely connected in their operation of the businesses. For example, the Second Claimant said of their relationship with the accountant, "*This was a family business and my husband would give me advice and do all the dealings."* The First Claimant's bankruptcy pre-dated and was of course unrelated to the issue of their immigration status. It is clear that it started to have an effect on the Second Claimant – see for example the letter at **1/132** by which a supplier who had originally done business with the First Claimant and was now looking to recoup their indebtedness from the Second Claimant stated, *"I have been dealing with your husband but due to developments I must now deal with you only. I had a discreet conversation with CLB Coopers yesterday who are handling you husband's bankruptcy and was surprised to note that Mr Waraich has told the official receiver that he is only an occasional worker in the business and has no authority to have any dealings."*

81. It is certainly possible to see that the effects of being an overstayer might include difficulties in obtaining credit. But in order to show that Mrs Waraich's bankruptcy was a consequence of the Claimants becoming overstayers rather than being due to underlying weaknesses in the business and/or problems flowing from Mr Waraich's bankruptcy, the court would have needed far more than the mere assertion of the Claimants that this was so. They wholly fail to provide evidence beyond that mere assertion.

82. There is no evidence that either Claimant was prevented by their immigration status from raising money to pay debtors. There is no basis for concluding that but for the immigration issue, either the Second Claimant would have avoided bankruptcy or that other losses would have been avoided.

Did Khan's Insurers offer £200,000 to the Claimants for the losses

83. Mr Waraich asserts that such an offer was made at paragraph 44 of his witness statement of 21 January 2019. Mr Ansari denies any such offer was made.

84. Had an offer been made, it would have been highly relevant to the valuation of the loss of a chance in this case, since it would have indicated that Khan's solicitors believed the case against them had real value.

85. In my judgment, it is highly unlikely that such an offer was made.

    a. There is no record of such an offer having been made in any of the documents before the court.

    b. The offer is not mentioned in any of the instructions to counsel that post date Ansari's involvement in the case, yet such an offer would have been highly relevant to an assessment both of the prospects of success of the claim and its value.

    c. The offer is not mentioned in the Particulars of Claim in this case.

    d. The offer is not mentioned in Mr Waraich's earlier statements in this case, in particular that of 19 October 2018 which deals with the substance of his case against Ansari's – again the offer would be highly relevant to the contention that the Defendant's negligence has caused him to lose something of value.

    e. None of the material before this court makes it likely that Khan's insurers would have offered this sum. Given my assessment of the Claimants' prospects of success in an action against Khan's, it is possible that some offer would have been made in settlement of the claim. However, given the absence of plausible material in support of the majority of the losses claimed, it is in my view highly unlikely that an offer of £200,000 or anything approaching that would have been made.

The Issues

86. Issue 1 - Would the Claimants have issued proceedings against Khan's within the limitation period?

    a. This is an issue to be decided on the balance of probabilities since it relates to what the Claimants would have done in the counter factual scenario.

    b. The Claimants have shown considerable willingness to pursue litigation. The very fact of pursuing this claim to trial shows a willingness on their part to do so, even if it has involved them in cost, and a willingness on the part of lawyers to pursue the claim.

    c. I have no hesitation in concluding that they would have commenced the claim.

    d. It is probable that the claim would have been defended given my assessment of the prospects of success set out below. Further, given the Claimants' pursuit of a large but speculative claim in this case, it is probable that a claim against Khan's would have been pursued as far as trial if that had been necessary. Again, the determination with which the Claimants have pursued this claim is strong support for the conclusion that they would have acted similarly in a claim against Khan's.

87. Issue 2, namely would a claim against Khan's have had a real and substantial prospect of resulting in an award of damages or settlement, like issue 3, when would a claim against Khan's have been resolved, and issue 4, what is the value of the lost claim against Khan's, is resolved by looking at the answers to issues 5 to 14 and I shall therefore deal with those issues first.

88. Issue 5 - What was the nature of each of the Claimants' retainer of Khan's?

    a. The Defendant puts in issue the nature of the First Claimant's retainer of Khan's. It contends, following the letter at **5/1323**, that Khan's instructions were simply to make a leave to remain application and that was what they did. However, for reasons identified at paragraphs 65 to 70 above, I conclude that the First Claimant was seeking advice on immigration matters more generally.

    b. In Minkin v Landsberg [2015] EWCA 1152, Jackson LJ summarised the scope of a solicitor's retainer implicitly to include "*that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*" it follows that Khan's duty included a duty to advise on the appropriateness of the application.

    c. In Harrison v Bloom Camillin [2001] PNLR 7, Neuberger J (as he then was) held that an issue of law which would have arisen in a claim that has been lost as a result of a lawyer's negligence should be resolved in the same way as an issue of fact or opinion that might arise in such a case, but that the court should be more willing to determine whether the point would have failed or succeeded.

    d. In my judgment, the First Claimant would have succeeded in showing that he retained Khan's to advise on immigration matters generally and I do not discount the claim for a chance that this argument would have failed.

    e. The Defendant does not accept either that the Second Claimant retained Khan's or that they would owe a duty of care in tort to her. As regards the first of these, that would appear to be factually accurate. As regards the second, what the Second Claimant has lost is the chance of proving that she was owed a duty of care. This is far more uncertain than the previous point. The Court would need to know what instructions had been given to Khan's and what they knew of the Second Claimant's situation, including her dependency on the First Claimant's immigration status. It is however of note that the Defendant in this case has admitted that it owed a duty to the Second Claimant, notwithstanding that she was not involved in instructing the firm. Doing the best I can, I would put the Second Claimant's chance of successfully arguing that she was owed contractual and/or tortious[9] duties by the Khan's at 75%.

89. Issue 6 - What advice did Khan's give to the Claimants?

    a. I have explored this issue at paragraphs 65 to 70 above. As indicated, I accept the Claimants' case that Khan's advised that an inappropriate application be made.

[9] Far more likely tortious than contractual.

90. Issue 7 - Were Khan's in breach of any duty owed to either or both of the Claimants by reason of the advice that they gave?

    a. Again it follows from the analysis above that the advice given was negligent. This was a misconceived application.

91. Issue 8 - Had Khan's not been in breach of any duty owed to the Claimants, what instructions would either or both of the Claimants have given in respect of the immigration case?

    a. This is a matter to be decided on the balance of probabilities, given that it relates to steps that the Claimants themselves would have taken. I have no hesitation in concluding that the Claimants would have given instructions to make whatever applications were necessary to secure their remaining in the United Kingdom. that is what they have done at every opportunity. That would almost certainly have been an application for a further work permit for the First Claimant and applications for further leave to remain for both Claimants.

92. Issue 9 - Had Khan's not been in breach of any duty owed to the Claimants, what is the chance that the Claimants would have been granted further leave to remain earlier than 9 January 2009 and when would such leave have been granted?

    a. But for Khan's breach of duty as identified above, I have no doubt that the Claimants would have been advised to ask New Mughli to apply for a work permit and themselves to apply for leave to remain.

    b. However the determination of such applications would have been complex, given what actually happened in the First Claimant's applications for work permits after the refusal of his application in August 2006.

        i. The first application was made by Khan's on 7 November 2006 and was on form WP1X for an extension of an existing work permit (**2/348**). It would appear that that application was refused on the basis that the employer the New Mughli differed from that on which the first work permit was issued (namely The Mughli) – this can be discerned from Khan's letter of 16.11.06 at **2/356.**

        ii. A further application for a work permit on WP1 (based on the new name of the employer) was made on 16 November 2006 (see **2/361**). It would appear that this was refused because the new job was not advertised in accordance with the then requirements for a work permit application – see **2/374**. Notwithstanding protestations on behalf of Mr Waraich, that decision was not reviewed.

        iii. On 1 March 2007, a work permit extension application was made relating to Mr Waraich by Amjad Malik's Solicitors (**2/384**), albeit that Mr Waraich says that he was not working at this time – I have dealt with that matter above. No evidence of refusal of that application appears in the documents. One might infer, particularly from the letter at **2/407**, that the application was refused on the same ground as the work permit application made by Khan's.

iv. On 6 March 2007, a work permit application was made by Amjad Malik's (see **2/404**). Presumably that was refused, though again there is no letter of refusal in the documents before the court.

v. On 29 May 2007, an application for a work permit was made by the Defendant - see **2/414**. It appears from the letter at **2/446** that a work permit was granted in July 2007 and this may well have been as a result of this application.

c. In addition to the work permit applications, the First Claimant made applications for leave to remain.

i. In November 2007, an application was made by the Defendants on his behalf – **2/437.** This was refused as set out at **2/446.** The grounds are not clearly stated, but appear to include not only that there was a period when the Claimants had been in the United Kingdom without valid leave to remain but also that fact that Mr Waraich had continued to work for the New Mughli Takeaway notwithstanding his lack of work permit.

ii. On 5 September 2008, the Defendant wrote a further letter, seemingly in support of the application of November 2007 (see **2/449**). It would seem that that application was granted in January 2009 (see **2/454, 2/455** and **2/465).**

iii. On 23 September 2009, the First Claimant made an application for indefinite leave to remain **(4/460**). That was refused due to the lack of 5 years' continuous presence as a work permit holder (see **2/467**).

iv. Notwithstanding a request for reconsideration, that decision was maintained in a decision letter dated 21 July 2010 (**2/473**).

v. A further application for indefinite leave to remain was made on 1 December 2010 (**2/493**). That application was refused on 6 July 2011 on grounds that the First Claimant had a conviction on 30 April 2008, namely that for sale of alcohol to a person under the age of 18, that was not spent. However a grant of limited leave to remain was made, expiring in July 2014.

vi. An application for limited leave to remain was made by Thornhills Solicitors on behalf of the Claimants on 2 July 2014 (**3/771**). That was granted on 3 October 2014 for a three year period (**3/779**).

vii. In 2017 an application for indefinite leave to remain was made by the Claimants. That was granted in around February 2018 (see **4/1194**).

d. This complex immigration history shows the difficulties that the Claimants would have had in obtaining even if they had sought limited leave to remain earlier than 2009. There were two distinct problems standing in the way of the Claimants getting leave to remain at an earlier date:

i. The time spent in the country following expiry of leave to remain;

ii. The fact that the First Claimant was working in this period.

e. In order to avoid the first of these problems, the First Claimant would have needed to make an application for a work permit before leave to remain expired on 13 August 2006. But given my finding that he first instructed Khan's in late July 2006, there was very limited time to achieve this end.

f. The Claimants have never clearly pleaded a route by which the First Claimant may have achieved further leave to remain at an earlier time. In closing submissions, Mr Mahmood on their behalf contended that an application could have been made for an extension to the First Claimant's work permit coupled with a further leave to remain application. Mr Mahmood contended that there was time for this to be achieved without the Claimants becoming overstayers. He contended that the Home Office had been notified of the change of employer in 2003 by the letter at **2/315** so the application should have been granted.

g. On the other hand, Mr Bailey for the Defendant contended that this time scale was completely unrealistic:

    i. It should be recorded first that the Defendant at various points in this case has complained about the lack of clarification of the Claimants' case as to how they could have obtained leave to remain at an earlier date. In the event, as indicated above, the Claimants attempted for the first time in closing submissions to plug this gap in their case. The Defendant objected to this manner of advancing the case against them and said that the very fact that a positive case had not been advanced sooner underlined the weakness of the argument.

    ii. An application for an extension of a work permit would have required Mr Chaudhury, as the First Claimant's employer, to cooperate in the application. There is no evidence that he would have done so. In any event, time would have been spent in seeking his cooperation such that any such application may not have been made before the existing leave to remain expired.

    iii. An application for a work permit extension would have been refused, just as the application on 7 November 2006 was refused, on the basis that original permission had been granted to work at the Mughli Takeaway but Mr Waraich was not working at the New Mughli Takeaway.

    iv. It would have been to no avail that there was a letter dated 2003 at **2/315** referring to the change of name. The Home Office were not persuaded that the work permit extension was appropriate when the application of 7 November 2006 was made and there is no reason to think that things would have been any different with an earlier application.

    v. If the First Claimant's employer had made a work permit application (either instead of a work permit extension application or following a failed application for extension), that would have required

advertisement of the job under the relevant immigration rule absent which the application would have been refused just as the 16 November 2006 application was refused.

vi. The suggestion that the work permit issue could have been resolved before expiry of the First Claimant's leave to remain is fanciful. The process of advertising the job would have taken 28 days and this could not have been achieved before expiry of the existing leave to remain. Thus he would have been an overstayer in any event.

vii. Had the First Claimant been an overstayer, it is highly likely that he would have continued to work. Thus, he would have been faced with exactly the same problems as is identified at (d) above.

viii. The Defendant concludes that the Claimants' prospects of obtaining earlier leave to remain are so speculative as to be incapable of assessment as a loss of a chance.

h. There is considerable force in the Defendant's analysis of the Claimants' case in this regard. The case as advanced by the Claimants simply fails to show any clear route to the earlier grant of leave to remain. It is always possible that an earlier application may have led to a better outcome. But the court has no material on which to begin to assess the chance of this. For example, it was postulated at various points in the trial that there was a 28 day period of grace following the expiry of a work permit, during which the permit holder would not be treated as an overstayer. But there is no evidence of such a rule being in force at the time of this application, therefore no basis for concluding that an application within that 28 day period would have been dealt with differently.

i. In my judgment, the chance that, but for the breach of duty, the Claimants would have been granted further leave to remain earlier than 9 January 2009 is a classic example of the kind of speculative chance that Stuart-Smith LJ in <u>Allied Maples Group v Simmons & Simmons</u> [1995] 1 WLR 1602 and Simon Brown LJ in <u>Mount v Baker Austin</u> [1998] PNLR 493.

93. Issue 10 - What loss flows from the loss of the chance of obtaining further leave to remain earlier than 9 January 2009?

a. Of the Claimants' losses summarised at paragraph 2 above, all but that referred to at sub-paragraph 2.e appear to be said to flow from the failure to obtain leave to remain earlier.

b. Of the legal costs claimed, the costs relating to the application made by Khan's can be distinguished from the others.

c. As to the costs of the Khan's application, including Home Office fees of £1,250, it appears to me that these were incurred as a result of Khan's putative breach of duty in that, but for that breach, the application for indefinite leave to remain would not have been made. To that extent, the First Claimant has suffered loss as a result of the breach of duty. Since Khan's went on to make work permit applications on the Claimants' behalf that would not have been avoided, in the

counter factual scenario I suppose, the claim must be limited to only that part of Khan's fees relating to the original application. As the Defendant points out there is no bill breaking down the sum claimed. Doing the best I can, I would apportion one half of the total solicitors' costs to the inappropriate application. With the addition of the Home Office fees, the claim comes to £2,750.

d. As to the other legal costs, for reasons referred to in paragraph 92 above, I can see no basis for concluding that, but for any breach of duty by Khan's, they would have been avoided. The Claimants fail to show any real and substantial prospect of pursuing a route to obtaining leave to remain that would not have incurred such costs, since the evidence indicates that this would have been a difficult immigration application in any event.

e. As identified above, the Claimants fail to show that the Second Claimant's bankruptcy flows from the breach of duty alleged against Khan's. In any event, it is difficult to see how the claim could be quantified as general damages. In principle it is possible to see how an avoidable bankruptcy might be causative of loss, but that would be by way of special damages. The Claimants' case does not particularise a case that could lead to such an award.

f. The claim for damages for *"Stress, and/or distress and/or inconvenience"* is a general damages claim. It presupposes that this is a contract pursuant to the breach of which such damages are recoverable. The Court of Appeal in Channon v Lindley Johnstone [2002] EWCA Civ 353, applying Johnson v Gore Wood [2001] 2 WLR 72, held that a solicitors' retainer is not normally a contract for the provision of a "*pleasurable amenity*" for the breach of which general damages are recoverable. Only if the Claimant demonstrated "*some particular feature of the Defendant's retainer which amounted to a contract to protect the Claimant from mental distress or disappointment or actually to procure for him a particular beneficial result."* No such particular features are shown here and this head of loss cannot be substantiated.

94. Issue 11 - Had Khan's not been in breach of any duty owed to the Claimants, what is the chance that the Claimants would have been granted indefinite leave to remain earlier than 7 February 2018 and when would such leave have been granted?

a. The Claimants could have sought indefinite leave to remain after 5 years' presence during which the First Claimant had continuously worked under a work permit. The difficulties in achieving that are identified above.

b. The factors that prevent the Claimants from showing a real and substantial chance of obtaining an earlier grant of further leave to remain apply with equal force to the application for indefinite leave to remain.

c. It is equally impossible to put a time on this end being achieved.

95. Issue 12 - What loss flows from the loss of the chance of obtaining indefinite leave to remain earlier than 7 February 2018?

a. I have dealt at paragraph 93 above with losses said to flow from the delay in the application for further leave to remain. All of the criticisms and findings made

above apply with equal force to the claim for damages flowing from the failure to obtain indefinite leave to remain earlier. Apart from the original costs of Khan's, none of these are proven losses (even on the basis of a loss of a chance) in this action.

96. Issue 13 - What is the chance that the Claimants would have been granted British Nationality earlier than they now will do and when will/would such nationality have been granted?

    a. The Claimants' application for British Nationality was even more problematic than the application for leave to remain. The only plausible route by which it is suggested that it may have been achieved was through an application following a period of one year indefinite leave to remain. But the First Claimant's convictions and his and his wife's bankruptcies would have been substantial factors against such an application succeeding.

    b. An application for British Nationality must show that they are of good character, The Guidance Notes indicate that a person who has a conviction that is not "spent" under the Rehabilitation of Offences Act 1974 is unlikely to be considered to be of good character. The relevant rehabilitation period for the offences committed by the First Claimant and noted above is in each case 5 years. Thus, since 2008, there has never been a point at which the First Claimant has been of good character within this definition. The Claimants have never addressed this bar to their claim for losses associated with British Nationality.

    c. It is also arguable that losses flowing from the failure to gain the status of British Citizenship fell outside of the scope of Khan's retainer (see the decision of the Supreme Court in Hughes-Holland v BPE Solicitors [2017] UKSC 21). Given that this is a hopeless case on the facts, it is not necessary to consider this point further.

97. Issue 14 - What loss flows from the loss of the chance of obtaining British Nationality earlier than they now will do?

    a. The Claimants claim a head of general damages relating to the failure to obtain British Nationality. It is entirely unclear what this is meant to encompass and written and oral submissions at trial have not elucidated this matter.

    b. The Claimants separately contend that the cost of British Nationality will now be costlier than it otherwise would have been. In principle, such a loss might be capable of recovery were the Claimants to be able to show that they have lost the chance of gaining that status. Sadly for them they cannot.

98. Issue 2 – Would a claim against Khan's have had a real and substantial prospect of resulting in an award of damages or settlement?

    a. It follows from my conclusion above that:

        i. A claim for wasted expenditure on the application made by Khan's had very good prospects of success.

ii. No other aspect of the claim against those solicitors had a sufficient chance of success to be quantifiable as a loss of a chance.

99. Issue 3 - When would a claim against Khan's have been resolved?

a. The claim against Khan's would have been issued by August 2012. A notional trial date of August 2015 is realistic.

100. Issue 4 - What is the value of the lost claim against Khan's?

a. The Claimants would doubtless have pursued the proposed claim against Khan's with the same determination as they have pursued this claim against Ansari's. They are convinced that their lives during the last 12 years have been blighted by the failure of Khan's to advise on bringing the right application.

b. The claim against Khan's would have had a settlement value. However, if it had been pursued as one small part of a large claim for damages (as it has been in this case) there would have been little prospect of settlement without a degree of insight on the part of the Claimants as to the weakness of their case and the lack of evidence in support. They would have had to forego nearly all of their claim. Even if the claim had settled without going to trial (which I consider unlikely, given the manner in which this case has been conducted), it is highly unlikely that the damages that they would have recovered (£2,750, as set out above) together with interest would have exceeded their irrecoverable costs. If, as I consider to be more likely, the Claimants would have pursued an unrealistic claim to trial (just as they have here), the overwhelming likelihood is that their damages award would have been swallowed by their own irrecoverable costs or conceivably an adverse costs order.

c. Given the sums at stake, I am driven to the conclusion that the Claimants cannot be said to have lost anything of value in this claim. What they have lost is the chance to pursue a claim of very modest value, the cost of doing which would have far exceeded that value.

Conclusion

101. For the reasons set out above, the Claimants have failed to show that they have lost anything of value in their claim against Khan's. Only one small aspect of the claim can be said to have had a real and substantial prospect of success. The value of that claim is so small and the costs involved in the likely manner of pursuing it as to mean that they cannot be said to have lost anything of value.

102. It follows that:

a. There should be judgment for the First Claimant for nominal damages on the contractual claim.

b. The claim in tort of both Claimants fails on the ground that no loss is shown to flow from the breach of duty.

103. I understand from counsel that it has not been possible to agree the terms of a final order consequential upon the version of this judgment sent out in draft. Accordingly the matter

should be relisted for a hearing before me to deal with matters consequential to this judgment.

104. For the avoidance of doubt, time for applying to the Court of Appeal for permission to appeal this judgment and the order of 26 April 2019 runs from 26 April 2019 when this judgment was handed down and the order was made, unless the Court of Appeal orders otherwise.