



Neutral Citation Number: [2024] EWHC 2222 (Ch)

Case No: BL-2022-000781

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 7 August 2024

Before:

MASTER BRIGHTWELL

Between:

(1) PRADEEP MORJARIA
(2) SANGITA MORJARIA
(3) SUMMERHILL TRUST COMPANY (ISLE OF MAN) LIMITED
(ACTING AS TRUSTEE OF THE WENTWORTH CAPITAL TRUST)
(a company incorporated under the laws of the Isle of Man)
(4) VIPER LIMITED
(a company incorporated under the laws of Jersey)

Claimants

- and -

(1) CAMRAN MIRZA
(2) TYDWELL LIMITED
(3) TOJI JOHN
(4) SAIRA MIRZA
(5) AMEER MIRZA
(6) BOOMZONE LIMITED
(7) REDWIRE DC LIMITED
(8) OTAKI HOLDINGS LIMITED
(a company incorporated under the laws of Jersey)

Defendants

APPROVED JUDGMENT

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A P P E A R A N C E S

Daniel Burgess and Sean Butler (instructed by **Forsters LLP**) for the **Claimants**

Alexander Cook KC, Stephen Ryan and Jack Fletcher (instructed by **CANDEY LLP**) for the
First, Second, Fourth and Seventh Defendants

MASTER BRIGHTWELL:

1. This is my judgment on an application by the claimants dated 7 March 2024 to strike out part of the re-amended defence and counterclaim. At the outset, I express my thanks to both sides for the high quality of the submissions that I have received.

Background

2. The application follows two case management conferences. At the first of those hearings in July 2023, orders were made against the first, second, fourth and seventh defendants (“the defendants”) under CPR Part 18 and then at a subsequent hearing in November 2023 further Part 18 orders were made against them. The strike-out application is focused upon the responses that were provided.
3. The claim arises out of a joint venture for the development of property at 22–24 Uxbridge Road in Ealing, West London. The joint venture was entered into by virtue of a joint venture agreement dated 14 December 2007 (“JVA”) between the first and second claimants and the first defendant and the eighth defendant, Otaki Holdings Limited, a company incorporated in Jersey. Otaki had two relevant subsidiaries, Viper Limited (“Viper”) and Krugar Limited (“Krugar”). In accordance with the JVA, planning permission was obtained to build both a hotel and a data centre at the Uxbridge Road property. The property has never been sold, although the development took place, and Otaki is now in the course of liquidation in Jersey.
4. As well as the claims between the claimants and the Mirzas and related parties, there is also a Part 20 claim in these proceedings made by the first defendant against the directors of Otaki alleging that a sale of Viper to a Morjaria entity was made in breach of the good faith provisions in the JVA. An order was also made under Part 18 against

the defendants in relation to the claim against the directors but the directors have not made any further application, and they have not appeared on the present application.

5. The claimants claim that the Mirzas' companies, Tydwell Limited ("Tydwell") and Redwire DC Limited ("Redwire"), being the second and seventh defendants, entered into contracts with Viper and Krugar for the provision of services in relation to the joint venture. The claimants claim that those companies were not entitled, under the terms of the JVA or otherwise, to make any profit from those contracts but only to recover the costs and expenses which they incurred. The claimants say that the benefit to the Mirzas was to come from the fact there was a 55/45 profit share in the JVA itself.
6. The defendants in response refer to the negotiations for the joint venture in which at an earlier stage there were negotiations for a 70/30 split. The defendants indicate that the final position was reached on the basis that the Mirzas' companies would be able to make a profit from services provided to the joint venture.
7. The claimants allege transparently that the defendants misrepresented that sums were due from Viper and Krugar, and acted in breach of the JVA and in breach of fiduciary duty but also that the defendants acted in concert with one another to perpetrate a fraud on the Morjaria parties. The claimants claim that the third-party invoices raised and issued to Tydwell and Redwire were not simply passed on but were inflated without justification. They also claim that cladding costs charged by Teampol, a third-party contractor, were inflated by some 267%. The claimants contend that the sums charged by the defendants have been retrospectively calculated simply as the difference between the total sum paid out to third parties and the amount charged by Tydwell and Redwire to the joint venture entities. As Mr Burgess put it, the claimants' case is that Mr Mirza and Mr John were adding on whatever they thought they could get away

with before invoices were rendered. It is therefore the claimants' position that the fees and services defence is an ex post facto attempt to rationalise a fraud. They also do not accept that all of the third-party invoices are genuine.

8. The amount billed to the joint venture companies in excess of the charges incurred by Tydwell and Redwire as third-party costs is pleaded by the defendants following amendment to be a sum around £2.47 million (paragraph 64.3 of the re-amended defence and counterclaim). The claimants do not accept that this is the limit of what they allege to be an overcharge.
9. As Mr Cook KC pointed out, there are provisions in some of the underlying contracts which, on their face, give Tydwell at least the right to charge and he points out that, under clause 5.2 of the JVA, it was the first defendant who was to manage the daily operation of the joint venture and to make decisions through Tydwell in the best interests of the joint venture. The claimants contend that this imposed fiduciary duties on Mr Mirza and that he and/or his companies were not entitled to make any profits. As I have indicated, the defendants dispute this, referring to the way in which the JVA came to be agreed.
10. On the question whether the companies were entitled to make any charge, Mr Cook referred to terms in three contracts which the defendants contend give them a right to make a charge. They allege that under a procurement contract between Tydwell and Viper dated 22 October 2010 for the completion of the development of the data centre and hotel, and under a development contract dated March 2015 between Tydwell and Viper for the fit out of the data centre, Tydwell was entitled to payment of a fee for the costs of properly performing its obligations. Then, under a property management contract between Tydwell and Viper dated 3 August 2012, by which Tydwell was appointed by Viper to manage the property, it is said that Tydwell was entitled to be

paid a management fee. Finally, under a design and build contract dated 6 March 2020 between Tydwell and Otaki for the replacement of cladding, it is said that Tydwell was entitled to apply for any additional costs and expenses required to complete the project. The claimants in response say that those terms are either unenforceable or that they are limited in their terms or in their effect to the reimbursement of expenses and do not permit the making of a profit.

11. There is also an allegation by the defendants that through what are defined as the Preliminary Works Contract and the Redwire Contract, which are said to have arisen through conduct, there is a right on the part of Tydwell and/or Redwire to levy a charge for services provided to the joint venture. The defendants rely on the fact that the directors of Otaki who were, at the relevant time, provided by the offshore services company IQEQ, approved the relevant payments. The claimants, in response, say that that would be relevant only if the directors knew what the payments were for and had made an informed decision to permit them.
12. I have mentioned the design and build contract dating from March 2020. I should say that the claimants also claim that the fees charged by Tydwell to Otaki pursuant to that contract, which was entered into in order to carry out works to the cladding of the property in light of the Grenfell tragedy, were similarly improper. The claimants contend that the defendants' claim is obscure in how it seeks to apportion the fee between the amount attributable to an alleged exposure of risk to a claim by Otaki and any other services for which fees have been charged, or purportedly charged.
13. The basis on which the defendants plead their defence based on the alleged entitlement to claim for fees and services is set out in the re-amended defence and counterclaim in a section relating to invoices from paragraph 55 onwards. The key pleading for present purposes is that set out in paragraph 64 and the main focus at each of the

hearings in this claim so far has been on paragraph 64.4, which refers back to paragraph 60 of the re-amended particulars of claim. Paragraph 64.4 provides:

“As to Subparagraph [60](b), it is admitted that it is admitted that it is now possible to calculate the total amount of fees, in fact, charged by Tydwell by deducting the third party costs incurred or funded by it from the amounts received by it. However at the time that such fees were charged, they were determined by Mr Mirza in conjunction with Mr John on the basis of what was fair and reasonable having regard to the services provided by Tydwell.”

14. Mr John is the third defendant who is pleaded by the defendants to have been an employee of Tydwell and/or Redwire at the material times. He is not participating in these proceedings and there is no expectation that evidence from him will be available at trial.

The Part 18 orders and responses

15. The Part 18 orders which have been made at the previous hearings have related, at least in part, to the way in which the defendants seek to pursue paragraph 64.4. This has concerned the works and services provided or allegedly provided by Tydwell and Redwire throughout the period of the joint venture and including the cladding works. The way in which the defendants put their case in relation to cladding is set out at paragraph 68 of the re-amended defence and counterclaim.
16. Before the first hearing, the claimants made a Part 18 request about paragraph 64.4. That was dealt with at the first case management conference which came before me on 13 July 2023. The order sought by the claimants was resisted by the defendants and there was a lengthy discussion at the hearing between the court and David Scorey KC who was, at that stage, leading counsel instructed on behalf of the defendants. In particular, the discussion surrounded the way in which the defendants sought to pursue their claim, in particular whether there had been a calculation of the relevant charges

made at the relevant time on an invoice by invoice basis, or whether a charge had been made on some other basis.

17. As the claimants set out in detail in their skeleton argument for the November 2023 hearing, Mr Scorey put forward a number of theses in that lengthy discussion which appeared to suggest that the defendants were, or at least might not be, contending that Mr Mirza and Mr John set a fee on submitting each invoice to the joint venture entities. This would or at least might have entailed a departure from the pleading at paragraph 64.4. It did not appear to me that Mr Scorey was, on instructions, indicating a final position on this point. The issue was resolved at that hearing by an order made following a proposal by the defendants on the basis of an indication I had given and so I was not required to give a formal ruling.

18. On returning after lunch, Mr Scorey said the following:

“I took instructions, Judge, and what should be possible, which I hope reflects what you had in mind, was a narrative summary of the services provided by Tydwell and/or Redwire from time to time [that point encompassing the fourteen-year period and the different phases without explaining that] and the basis on which fees were calculated by them.”

19. There was then further discussion with both Mr Scorey and Anthony Peto KC, who appeared for the claimants, before Mr Scorey said the following:

“It does not matter then what was done and where. What matters is our approach to the calculation. So I do not want to be bound to say what was done when because that may not be relevant to some periods but may be to others. When it is, I will give the summary of that. Where it is not, I will explain why not.”

20. What appeared to be important was that the services for which charges were made were identified and that the claimants were told how those charges were calculated, or, as paragraph 64.4 of the re-amended defence and counterclaim says, ‘determined’. It is clearly pleaded that there was a positive act of determination by the first and third

defendants. The claimants, I considered, were entitled to know what method was used or to be told positively that the defendants could no longer explain how the charge was determined. As I have just indicated, Mr Scorey said correctly that what matters is the approach to the calculation. The discussion then went on to what would happen if memory was a problem and Mr Mirza could not recall how a charge was set.

21. As expressly discussed at both of the previous hearings, one possible response from the defendants would be that they simply could not remember or simply could not now state how the charges were determined. It is clear on any view that Tydwell and Redwire were not simply passing on third-party invoices without more. Something was added on and there was some basis for doing it.

22. The order that was made at the July 2023 CMC was found at paragraph 3. This provided that:

“By 4.00 p.m. on 6 October 2023, the CMS defendants [as they were then defined] shall:

- (1) Explain with sufficient particularity so as to enable the claimants to understand the case they have to meet:
 - (i) How Mr John and/or Mr Mirza and, if so, who determined what was a fair and reasonable level of charge for the services provided by the second defendant and the seventh defendant to the joint venture entities, and state whether the determination was on the same basis on each occasion, or whether different bases were used on different occasions and, if so, stating what those bases were;
 - (ii) The services provided to the JV entities for which Tydwell and Redwire caused the charges to be made, including without prejudice to the generality of the foregoing:
 - (a) the individual or individuals who provided the services;
 - (b) under which of the JV or Tydwell contracts, preliminary works agreement, or Redwire contract for services were provided;

- (c) the dates, or approximate dates, on or between which the services were provided; and
- (d) the connection between the basis or bases of charging and the amounts shown in the invoices issued by Tydwell and/or Redwire to the fourth claimant, eighth defendant, and/or Krugar Limited, together the JV entities.”

The order then went on to require other information and documents to be provided.

23. The gravamen of the point is that the claimants are entitled, as I found in making the Part 18 order, to know what the defendants’ case is as to the fee charged by Tydwell and Redwire and how it was determined. It is obviously not for the court to tell the defendants how to formulate their case but it must be capable of being comprehended. The limits of the case must also be understood on the footing as made clear at both earlier hearings that it is not acceptable for the case to emerge only at the stage of exchange of witness statements.
24. In response to that Part 18 order, what has been called the first RFI response was provided on 27 October 2023. This was three weeks after the deadline ordered of 6 October 2023, no doubt at least partly explicable by the fact that the defendants changed solicitors and counsel in the weeks before this.
25. It is, I consider, important to note that the defendants had clearly retained their invoice by invoice case which Mr Scorey had indicated might at least possibly be eschewed. So far as relevant, the answer to the request that there be an explanation with particularity as to the way in which the charges were calculated or determined was this:

“2 The determination as to what was a fair and reasonable level of charge for the services provided by Tydwell and Redwire was made

2.1 on an *ad hoc* basis at the time that each particular invoice was raised by either Tydwell or Redwire;

2.2 by Mr John and Mr Mirza;

2.3 taking into account the value of services and/or goods supplied by third parties on the basis of and commensurate with the services provided by Tydwell or Redwire in respect of the matters set out in each invoice; and

2.4 using their experience in and knowledge of (in Mr Mirza's case) property development and basis, and (in Mr John's case) accountancy and business.

3 On each occasion, the determination was made on the basis referred to in paragraph 2 above.”

26. This, perhaps unsurprisingly, led to a further application by the claimants for a further Part 18 order. That application was determined at the November 2023 hearing. Again, after discussion with counsel, it was accepted that a further order needed to be made and, indeed, a further order was made. The order which was contained in paragraphs 20 and 21 of the November 2023 order provided as follows:

“20. By 4.00 p.m. on 12 January 2024, the main defendants shall, in relation to each individual invoice provided in connection with services provided to the fourth claimant, eighth defendant, and/or Krugar Limited, provide the following particulars in each case providing particulars sufficient to enable the claimants to understand the case they have to meet:

20.1 A statement of what sum within that invoice is referable to services provided to the JV entities for which the second defendant and the seventh defendant caused charges to be made, and what the nature of the services provided to the JV entities contained within that invoice is;

20.2 A statement of the basis or bases on which the charge within that invoice was calculated;

20.3 The names of the individual or individuals who provided the services; and

20.4 A statement of which one or more of the JV Tydwell contracts, preliminary works agreement, or Redwire contract for services were provided pursuant to.

21. To the extent the main defendants are unable to answer or cannot recollect any of the matters in paragraph 20 above, they shall say so expressly.”

27. I did not make an unless order even though the claimants asked me to do so. This would likely have led to an argument whether or not it had been breached by an inadequate response, but I expressly recognised the possibility that the claimants might wish to pursue a strike-out application following the defendants' compliance or, if so argued, non-compliance with the order. The claimants had issued a strike-out or summary judgment application in advance of the November 2023 hearing which was expressly adjourned at the hearing with directions set out as to how it might be restored. In the event, however, the claimants issued a new application on 7 March 2024.
28. The second RFI response was served on 24 January 2024. It is the adequacy of that response with which the court is now concerned. The invoices from Tydwell are, in that second response, grouped into five phases. The smaller number of invoices from Redwire are grouped together separately. For each phase, the total sum of the third-party invoices is added together and a sum is given for the total value of services provided. There is a column for the nature of service provided with significant lists of tasks set out in each column, for each phase. That is, to some extent, broken down into further smaller periods by reference to the works that were being undertaken in shorter periods within each phase. A list of individuals providing services is given at the head of each phase but not for each service that is itemised.
29. It is immediately apparent that the second RFI response does not provide a statement in relation to each invoice as to what the fee for services relating to that particular invoice was, nor does it explain, either individually or by some more general statement in relation to each phase, or in relation to groups of invoices, how the first and third defendants determined the fee to be charged by Tydwell or Redwire for the services provided. What it does is to indicate what total sums are said to comprise the fees for

each phase as identified in the response. There is a line item in the summary at the beginning of each phase, ‘total value of services provided’. Mr Burgess makes the point in respect of that that there is no statement of what fees were charged but merely what is the total value of services provided, which he says is not the same thing.

30. The claimants also complain that the second RFI response does not explain the relationship between each invoice and the list of services provided in the phase. It seems to me that this is an extension of the criticism that there is no explanation of how the fee was determined, especially in circumstances where in the first RFI response the defendants had indicated that there was a determination by Mr Mirza and/or Mr John individually, an ad hoc determination on the basis of the services that had been provided.
31. The second RFI response also does not give a confirmation that the information given is all that the defendants now can give, nor does it state that they were unable to answer or could not recollect any of the matters covered by paragraph 20 of the November 2023 order as required by paragraph 21 of that order.
32. That matter was pursued in correspondence after the second RFI response was given but only in response to the strike-out application was the point confirmed in a document verified by a statement of truth. On 8 April 2024, Mr Mirza served a further, fifth, witness statement, at paragraphs 6 and 7 of which he said the following:

“6. As was pointed out in CANDEY’s letter dated 15 March 2024, the suggestion there had been any deliberate effort not to comply with the court’s order is entirely misplaced. The claimants had never sought confirmation as to whether the RFI response represented our best endeavours to provide the information required.

7. In this regard, and without prejudice to my position that it is unnecessary to do so, I confirm that the RFI response comprises the best possible particulars that I and the other

main defendants are currently able to give according to the best of our recollection and ability.”

33. The claimants also point out that an application for an extension of time for provision of the second RFI response was issued in January 2024 and has not, in fact, yet been determined. That application was supported by the fifth witness statement of Mr Leo Nabarro, the defendants’ solicitor, dated 12 January 2024. He set out the work that had been done to date and indicated that there were two stages to what the defendants were doing. The first was going through the third-party invoices to enable them to be allocated to each of the invoices charged to the joint venture entities, and Mr Nabarro said at paragraph 13 that it had only been by undertaking this task in this manner that the defendants had been able to determine the value of charges caused to be made by Tydwell and Redwire for each phase of work during the period as required by paragraph 20.1 of the November 2023 order. He said that that stage was completed on 3 January 2024. The second stage was then reviewing the third-party invoices so as to match them with the work referable to each joint venture invoice.
34. The claimants complain that this witness statement did not indicate that the information provided in the second response would not be on an invoice by invoice basis as the first response might have suggested that it would be. Mr Burgess expressed considerable scepticism about the scale of the task carried out in preparing the second response, suggesting that it could have involved no more than a few hours’ work. I will return to the extension of time application in due course.

The role of expert evidence on the issue

35. At the first CMC in July 2023, I gave the parties permission to rely at trial on expert evidence, including that of a construction expert on the issue of the market rates for the project management services supplied by Tydwell pursuant to each of the JV/Tydwell

contract and the Preliminary Works Agreement, and by Redwire pursuant to the Redwire Contract. I considered that if the defendants articulated a case that their entities were entitled to charge identifiable fees for identifiable services then expert evidence would be reasonably required on the question of whether the fees themselves were reasonable and proper.

36. The defendants have applied to rely in response to the strike-out application on the evidence of a quantity surveyor, Mr Danny Large, and they rely on his report dated 4 June 2024. That application is not opposed by the claimants. The instruction to Mr Large is set out at paragraph 4.1 of his report, where he refers back to his letter of instruction and he says:

“I have been asked to provide my opinion on the following question: is it possible for a construction expert to opine on whether the services outlined in the RFI response were provided for fees at no more than market rates?”

37. In order to give some context to what he is saying, he goes on at paragraph 4.2:

“In my opinion, the presentation of the value of services on a phase by phase basis provides a construction expert with a reasonable basis upon which to opine upon whether the overall fees charged were at no more than market rates. I form this opinion for the following reasons...”

38. In what I consider to be the germane parts of the following subparagraphs, Mr Large says the following:

- “(i) Each of the Phases in the RFI Response broadly delineate between the different projects that were carried out in the Development. This is important because the fee for the personnel engaged by the client for its development and project management team is unlikely to be the same for all manner of projects...;
- (ii) The narrative contained in the RFI response, as a whole, provides details of the scope and nature of the project, its size, duration and value and the period of involvement and range of duties of the Main Defendants. In my opinion, this information, by Phase, provides the construction expert the

necessary details to be able to form an opinion on whether the fees charged compare to market rates for similar services...;

- (iii) The RFI Response contains information about the nature of the work performed at the Development during a Phase (such as whether it is a new build construction or fitting out works). This enables a construction expert to understand the scope of the services provided by the client's development and project management team (i.e. the scope of services provided by Tydwell and Redwire) which, in turn, enables the expert to opine on the amount charged by reference to market rates...; and
- (iv) Indeed, a construction expert ought to be able to opine on the reasonable of a fee charged for a Phase by examining the completed project as a whole. This does not require details of the charges on an invoice-by-invoice basis."

39. Of course, the question whether the defendants have properly responded to the Part 18 request is a matter for the court and not a matter for the expert, but the claimants raise the question whether it will be possible for an expert at trial to grapple with the case in the manner put forward by the defendants, which is why I consider it important to make reference to what Mr Large says.

40. As the Chancery Guide indicates at paragraph 9.51, permission is required for expert evidence when it is relied on in support of an interim application. The courts have indicated that the rules on admitting expert evidence can, if necessary, be relaxed where interim applications are concerned.

41. The defendants referred to the decision of HHJ Matthews in *Axnoller Events Ltd v Brake & Anor (Possession and Eviction Proceedings)* [2022] EWHC 1162 (Ch), particularly at [72]. He indicated that the form of expert evidence can be flexible, particularly at interim hearings, but there can be and there is no objection to the format of Mr Large's report. As I indicated at the hearing and without objection from the claimants, I grant permission to the defendants to rely on the report for the purposes of responding to the strike-out application.

42. The claimants suggest that the way in which Mr Large discusses the phase by phase assessment of reasonableness of fees is not how the defendants have pleaded their case such that it does not match the defendants' pleaded case. I discuss below the relevance of Mr Large's approach to the grounds on which strike out is sought.

Grounds for strike out

43. Turning now to the way which the application is put, the claimants rely, in applying to strike out part of the re-amended defence and counterclaim, on CPR r 3.4(2). They rely on all three limbs. The rule provides:

- “(2) The court may strike out a statement of case if it appears to the court –
- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
 - (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
 - (c) that there has been a failure to comply with a rule, practice direction or court order.”

44. I was also referred to paragraph 1.4 of the Practice Direction 3A, which provides:

- “1.4 A defence may fall within rule 3.4(2)(a) where:
- (1) it consists of a bare denial or otherwise sets out no coherent statement of facts, or
 - (2) the facts it sets out, while coherent, would not amount in law to a defence to the claim even if true.”

45. Mr Burgess also referred to the notes in the *White Book* at 3.4.2. He made particular reference to the final paragraph in that section which reads:

“A statement of case which discloses no reasonable grounds may also be an abuse of the court's process and in respect of it, the opposing party may be entitled to summary judgment under Part 24. Thus, there is no exact dividing line between ground A and ground B, or between either of them and Part 24.”

46. The claimants have divided their arguments into three grounds on which they seek the strike out of the defendants' fees and services defence. Mr Burgess submitted that:
- (a) The invoice by invoice case is unsustainable and appears to have been abandoned without the defendants acknowledging it;
 - (b) The way in which the defendants have conducted themselves and the terms of the second RFI response are such that there would be an obstruction of the just disposal of the proceedings if the fees and services defence were to be permitted to continue; and
 - (c) There has been non-compliance by the defendants with court orders.
47. The claimants also submit that summary judgment can be granted under CPR r 24.3, even though it is not sought in the application notice. This is on the footing that the defendants have no real prospect of succeeding on the fees and services defence, and that there is no compelling reason why that issue should be determined at trial. For the reason articulated in the notes in the *White Book*, this clearly overlaps with at least the first of the strike-out grounds.
48. On the first limb for strike out, Mr Burgess submitted that the defendants do not give the minimum particulars necessary to substantiate the defence. They rely on Mr Large's report in that he says it would be impracticable for an expert to opine on what should be charged on an invoice by invoice basis.
49. Mr Burgess also submitted that it is not open to the defendants to argue for a phase by phase particularisation of the charges said to have been levied, for the following reasons. First, that it is not pleaded that way at all. Secondly, the defendants have explicitly pleaded that there was a determination by the first and third defendants on

each occasion that an invoice was rendered. Thirdly, even on the basis of the information provided in the second RFI response, the defendants' defence is subject to the same defects that already existed in relation to the invoice by invoice case. There is no statement as to how the individual charges were determined. It is pointed out that the letter of instruction to Mr Large suggests how this might be done by reference to the RIBA seven stages of a construction project, but that is not how it is pleaded that the charges were made.

50. As I have indicated, Mr Burgess also submitted that the relevant allegation should be struck out because the invoice by invoice case maintained in the first RFI response has now been abandoned or has been at least effectively abandoned. He submitted that the defendants should not be entitled to shift their case as it emerges that each iteration of it becomes untenable, that being his characterisation. The claimants rely on the first defendant's 8 April 2024 witness statement to say that the defendants have now indicated that no further particulars will ever be forthcoming and it would in any event, as I have indicated previously, not be appropriate for the particulars of how the fees were determined to be deferred to witness evidence. The claimants are entitled to know the full case they have to meet before witness statements of fact are produced.
51. On the second limb, as I have indicated, Mr Burgess submitted that the fees and services defence should be struck out under rule 3.4(2)(b) as obstructing the just disposal of the proceedings. In his oral submissions, this was to an extent run together with discussions of the defendants' conduct in relation to the fees and services defence more generally and with the suggestion that there had been breaches of court orders.
52. One point made in the claimants' skeleton argument is that the anticipated scope of the expert evidence for which permission was granted at the first CMC cannot now be fulfilled. The point was put this way, by way of example of the impact of the

defendants' case on the just disposal of these proceedings, the first CMC order provided that the parties were permitted to adduce evidence from (among others) a forensic expert to determine the amount of each invoice that was charged as fees. That is not entirely accurate. Permission was given for an expert forensic accountant to give evidence in relation to the sums "allegedly retained by Tydwell and Redwire as 'fees'", but not specifically as the claimants contend to determine the amount of each invoice that was charged as fees. In any event, the claimants say that the experts will not be able to opine on the fee for each invoice for each specified service because that is not how the claim has been particularised.

53. Finally, following on from the last point, the claimants submitted on the third strike-out limb that the fees and services defence should be struck out because of non-compliance with previous orders. First, it is said that the first RFI response did not comply with the July 2023 order. The defendants did not say at the November 2023 hearing that it had not been possible for them to comply with it. They had, instead, effectively made no real efforts or attempts to comply with the July 2023 order by the time of the November 2023 hearing. Mr Cook was instructed at the November 2023 hearing to repeat the submission that had been made at the July hearing, that it was not proportionate to require the defendants to conduct the exercise of further particularising their claim. This can now be seen, it is submitted, to have been an attempt to buy time as those particulars were never going to be able to be provided.

54. Then, it is submitted that the defendants did not provide the second RFI response in time. As I have already indicated, the claimants complain that Mr Nabarro's fifth witness statement does not bear a proper relationship to what had, in fact, been done and when that statement was served, and to what would be provided. The application

for an extension of time for the second RFI request is still outstanding. The claimants say that I should not permit it.

55. Finally, in relation to breach of orders, Mr Burgess submitted that the second RFI response does not say that the defendants can provide no further details. That confirmation only came later, possibly only to an extent in correspondence and then in the first defendant's April 2024 witness statement.

Strike out: unsustainability, and summary judgment

56. I turn now to discussion of the various grounds on which strike out of the fees and services defence is sought. The first is that of unsustainability, or that there are no reasonable grounds for the defendants to defend the claim in relation to fees and services disclosed in their statements of case. Whilst there is an overlap between unsustainability and the other grounds on which the court may strike a claim out, I consider that this ground falls properly to be analysed on its own merits. The question whether a claim or a defence is unsustainable on its face is logically separate from any questions of conduct.
57. Mr Burgess drew my attention to the decision of Teare J in the case of *Towler v Wills* [2010] EWHC 1209 (Comm) and, in particular, what he said at [18]:

“18. The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. ...”

58. The claimants also rely on the decision of Chief Master Marsh in *Nekoti v Univilla Ltd t/a Consol* [2016] EWHC 556 (Ch). This was summarised by Joanna Smith J in the later decision of *Ashraf v Attarian* [2023] EWHC 2800 (Ch) at [73] where she said:

“73. In *Nekoti*, Chief Master Marsh was persuaded to strike out the claimant’s re-amended particulars of claim on the basis that the claim was, in the Chief Master’s words (at [72]) ‘endlessly mutable’. At [74] he accepted that a party may be ‘genuinely mistaken about a version of events, particular facts or how best to put forward its case’, but he noted that the claimant’s case had been ‘developed to meet the difficulties which have been pointed out by the Defendant with elements of the claim which were no longer convenient being jettisoned’. The Chief Master was particularly concerned at the close proximity of statements of truth on a re-amended claim and a witness statement which he said ‘cannot stand together’. He noted that the court’s powers to deal with a claim for abuse of the court’s process arise not just from CPR 3.4(2)(b) but also the overriding objective...”

59. I would also note what the Chief Master said in *Nekoti* itself. At [14], he set out the following propositions, which had been made in submissions:

“14.

(i) The court should not strike out a claim unless the court is certain that the claim is bound to fail;

(ii) a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only properly be determined by hearing oral evidence; and

(iii) whether or not a statement of case should be struck out should be judged on the face of the statement of case itself and not on the evidence.”

60. The Chief Master then went on to say this:

“15. I accept the first and third of [these] propositions but it seems to me [the] second proposition is overstated. I agree that on an application to strike out a statement of case under CPR 3.4(2)(a), the focus is on the statement of case and unless an essential fact can be demonstrated to be obviously wrong, the court must assume, for the purposes of the application, that the factors pleaded are true. It is usually irrelevant whether they are disputed. The court is looking at the way the claim is put, considering whether it sets out a coherent case, and whether that case discloses a legally recognisable claim. However, it does not follow that because there is a dispute of fact, a claim which is inadequately pleaded or is

incoherent is exempt from striking out. All the more so when the facts pleaded in the statement of case do not match the facts which a party subsequently states it wishes to rely upon.”

61. I consider that the issue in the present application arises because of the difficulty that the claimants have had in pinning the defendants down as to their case on the fees and services issue. The defendants pleaded a case based on a positive determination having been made to charge, and on an invoice by invoice basis, and then suggested that the particulars of the charges would and should be given in witness evidence. They have now indicated that they cannot particularise the charges in that way, now or later.
62. The position is not quite the same as that in *Nekoti*. I bear in mind that some of the statements relied on by the claimants are statements that were made by counsel on instructions at the first case management conference. That is not the same as a party’s pleaded case changing, or a party making contradictory statements in different documents each supported by a statement of truth. The central basis of the defendants’ case, that the charging decisions were made on an invoice by invoice basis, has not changed. What has become clear over quite a protected period is that the defendants are not in a position to particularise the charges with that level of granular detail.
63. Mr Burgess submitted that in light of that indication now finally given, the fees and services defence cannot realistically be made out. This overlaps, of course, with the suggestion that summary judgment should be granted to the claimants on that issue, the submission being that it is fanciful to suggest that the defendants can make out their case to have made charges on an invoice by invoice basis.
64. On the basis of the defendants’ pleaded case, an issue for trial will be whether the statement in paragraph 2 of the first RFI response, consistent with paragraph 64.4 of the re-amended defence and counterclaim, that an ad hoc determination was made by

Mr Mirza and Mr John every time an invoice was rendered is correct, that being a determination which takes into account and is commensurate with the services that were provided to the joint venture. The indication that no further particulars can be given suggests that no disclosure will be given as to the determination made in relation to any individual invoices. As discussed at the hearing, however, the first defendant and, if appropriate, others will be entitled to rely on witness evidence and to be cross-examined on this issue if it is permitted to go to trial. If so, it seems to me that that evidence would properly be able to explain, in general terms, how paragraph 2 of the first RFI response sits with the second RFI response even though no particulars relating to individual invoices can be provided.

65. The defendants have been required to give the best particulars they are able to provide and have provided a detailed list of services by phase. I appreciate that is a far cry from particulars being given as to precisely what was charged in relation to each invoice. It is relevant, I consider, that the defendants were ordered to provide particulars of the charges and of the basis of determination of those charges, or to confirm that no such particulars could be given. They were not ordered to provide a narrative account. The question is whether there is a defence which is recognisable in law and thus capable of succeeding. For strike out purposes, this requires consideration of the pleading itself.
66. As I have indicated already, it is clear that this application has arisen because of difficulty in extracting clarity from the defendants on their case on the fees and services issue. I consider that a plea by a party that they levied charges for services rendered but have no record of the individual charges and can now only calculate the total is not bound to fail merely because of the inability to give those particulars. The problem is that the defendants were reluctant to admit that they could not give those

particulars, possibly because they did not want to make that admission for as long as possible, or possibly because they thought they would be able to work out the charges on an invoice by invoice basis, and, on attempting to do so, discovered that they could not do so. Those matters will no doubt be said to affect the credibility of the defendants' claims in this regard and provide material for cross-examination but I do not consider that they show that the claims raised by way of defence are inherently unsustainable.

67. Connected to that point is the key issue in this context of whether the Mirzas' companies were entitled to charge the joint venture for services provided. As I have indicated, that is a hotly disputed issue, and it is not suggested that the defendants' contentions in this regard are unarguable. This is logically a prior question to that of whether the first and third defendants did, in fact, make charges for services (or cause them to be made), although the connection between the two issues is obvious. The defendants' subjective understanding of the entitlement to make a charge for services rendered is also relevant to the allegations of dishonesty.
68. It must be possible for someone to intend to make a charge for services even though they cannot, possibly years after the event, particularise how they did so. The lack of particulars may, on analysis of the circumstances, mean that the party is unable to establish an entitlement to some or all of the sums said to have been charged but that party may be able to satisfy the trial judge that he or she believed that there was an entitlement to charge and an intention to do so. In particular, it would not necessarily follow from a party failing to succeed in whole or in part on the issue that they had acted fraudulently.
69. It is relevant to consider the connection between the allegation that charges were or were not made for services and the allegation that the defendants have committed a

fraud on the claimants. Mr Cook in his submissions went in some detail through the passages in the re-amended defence and counterclaim which the claimants seek to strike out. I consider that two examples will suffice. In relation to paragraphs 64 and 80, the claimants seek the striking out of the plea by the defendants that the allegations of falsity in relation to the charges for fees and services are denied. They leave in, however, the denial of the allegations of fraud. I do not understand, and it was not explained to me by the claimants, how the allegations of falsity and fraud could sensibly be disentangled in that way.

70. Secondly, the pleas of contractual entitlement to recover the cost of fees and services are sought to be removed save where they refer to the joint venture and Tydwell contracts. Mr Cook pointed out that the question of the entitlement to charge under the contracts is relevant to other issues which will go to trial in any event. No attempt was made to persuade me that he was wrong on that point. I consider that it is relevant that Mr Burgess did not carry out the same exercise of going through the passages in the re-amended defence and counterclaim which his clients sought to strike out, indicating instead that this could be done after judgment, if judgment was in the claimants' favour. I consider that the court must be sure when deciding whether to strike out some sentences and paragraphs from a statement of case that each deletion is justified. Mr Cook raised a real point of principle which I do not consider can be left hanging in the air.
71. On the same point, I also do not consider that the claimants made a real attempt to satisfy me that the striking out of some passages in the re-amended defence and counterclaim would not affect the fairness or integrity of the trial which would be left if other passages were left behind. For those reasons, I am not satisfied that it is appropriate to strike out part of the re-amended defence and counterclaim on the basis

that there are no reasonable grounds for the defendants to pursue it. As I have indicated, that is on the basis of a consideration of the pleading in light of the two RFI responses.

72. The claimants also separately suggested that summary judgment should be granted in the claimants' favour. I accept that in an appropriate case the court may treat an application for strike out as if it were an application under Part 24 for summary judgment: see *Moroney v Anglo-European College of Chiropractic* [2009] EWCA Civ 1560. I consider, however, that the court must be cautious about doing so in a fact-heavy claim involving allegations of fraud and where no application for summary judgment has, in fact, been made.
73. The test for summary judgment is well established. It was set out, as is most frequently cited, by Lewison J in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. I do not consider that it needs to be set out in full but it is notable that I was not taken to it at the hearing.
74. It is particularly relevant that the court must not, on a summary judgment application, conduct a mini trial and must have regard not only to the evidence before it but also to the evidence that will likely be available at trial. I bear in mind that the fees and services issue concerns not only whether proper charges were or were not made by the defendants' companies, but also the understanding of both sides about the basis of and the terms of the joint venture. An assessment of the credibility of the evidence given on both sides will be important.
75. Mr Cook relied on the (apparently undisputed) allegation that Mr Morjaria created a false document in order to bolster his case. The claimants did not respond to this point on this application and I consider this kind of point demonstrates that there may well

be a real issue as to the parties' credibility which may go beyond the effect of that one individual document.

76. I also consider it to be relevant that the first and second claimants sought to pursue a private prosecution of the first and second defendants and their son in relation to the cladding aspects of this claim. The summons was set aside by District Judge (Magistrates' Courts) Sternberg as an abuse of the court's process. The Divisional Court upheld his decision (see [2023] EWHC 2936 (Admin)), handed down a week after the second CMC in November 2023. The court upheld the decision of the District Judge that the claimants were using the criminal prosecution as a threat to force the defendants to settle the present claim, which was an improper purpose, saying that his decision could not be sensibly impugned.
77. Mr Cook also relies on documents disclosed in those proceedings in which the first claimant appears to have said to his solicitors about Mr Mirza: "Every year he gets inside is worth £2 or £3 million to me." Of course, this sort of consideration does not itself mean that the defence is adequately pleaded but it exemplifies the fact that in a fraud claim, cross-examination of the parties at trial may be of crucial importance.
78. Whilst the decision was in a somewhat different context, Mr Cook referred me to the decision in *Alpha Rocks Solicitors v Alade* [2015] 1 WLR 4534. The first instance judge had struck out parts of a claim because of the improper conduct of the claimant as he had found it. The Court of Appeal overturned that decision, despite the criticisms which could be made of the claimant, Vos LJ saying this at [25]:

"25. In my judgment, it is perfectly apparent from a reading of the judgment itself that the judge forgot his own repeated warnings to himself about not conducting a mini-trial and about the draconian nature of what he was contemplating doing. He did conduct an inappropriate mini fraud trial without hearing any witnesses. He decided that a solicitor was lying and that other witnesses were

untruthful without their being cross-examined. In my judgment, that was a most unsatisfactory state of affairs. Of course, it can very occasionally be appropriate to conclude that there has been fraud without oral evidence being heard, but in this case the judge relied on forensic deduction in a case where oral evidence at least *might* have put a different complexion on the allegations made.”

79. The present application did not proceed in that way and I was not asked to make any positive finding that there had been fraud but I consider that if I were to strike out part of the re-amended defence and counterclaim, the effect may well be to leave an undenied plea that the defendants have committed a fraud. That point was raised at the hearing. It may or may not be right but I was not persuaded that it is not right and I bear in mind the risks of inappropriate findings or inappropriate determinations being made by default.
80. I have indicated already that, at trial, the defendants will be entitled to rely on witness evidence explaining, even if not further particularising, the charges made by reference to the information that is given in the second RFI response. I do not accept the proposition that the first defendant has admitted that he is unable to adduce any evidence at all on his case that charges were determined and levied for the services provided. The fact that evidence is not available now must be taken into account for summary judgment purposes. As no application was made for summary judgment, the defendants have had no opportunity to file evidence on the points which I have been discussing.
81. In those circumstances, whilst I am fully aware of the difficulties that the defendants may face given the problems that they have had to date in articulating what their case is, I do not accept that there is only a fanciful prospect of the defendants succeeding, at least to some extent, on the fees and services defence and so I would not grant summary judgment either.

Strike out: obstruction of just disposal of proceedings

82. Moving on to consideration of the second ground on which strike out is sought, Mr Burgess referred to the commentary in the *White Book* on abuse of process, in particular at 3.4.3. He pointed out that the categories of abuse of process are many and are not closed. Mr Cook responded that I had not been referred to any case where it had been held that there was an obstruction of the just disposal of proceedings without there being an abuse of process.

83. The obstruction of just disposal argument rests, in the way in which it was presented by the claimants, on the inability of an expert to do their job because of the way in which the claim is pleaded. In other words, because the claim is pleaded on an invoice by invoice basis and is particularised in more general terms in the second RFI response on a phase by phase basis, an expert will not be able properly to opine on the reasonableness of the fees if the court finds that charges were levied.

84. Mr Large indicates that it is his view that it is possible for an expert to opine on the reasonableness of the amounts charged by reference to phases and, indeed, he positively suggests that it would be impracticable for an expert to do so on an invoice by invoice basis. In his report, he sets out in section 3 the RIBA plan of work, published by the Royal Institute of British Architects, which he says sets out a recognised framework for the design and management of a construction project in the UK. He sets out the seven stages to the RIBA plan of work. He then says at paragraphs 3.9 and 3.10:

“3.09 From the phases referred to in the RFI response [being the second RFI response], it is apparent that a number of projects were carried out between approximately 2007 and 2021. For each of those projects, which have been the subject of different contracts between the Tydwell,

Redwire, and the JV entities, the stages of the RIBA plan of work apply.

- 3.10 It is therefore my opinion that the services provided by Tydwell and Redwire cannot be viewed as the delivery of a single ongoing project but a series of projects involving different works at different times.”

85. Then, in his conclusion, he says:

“4.6 I note that the claimants’ request for further information concerned information about services on an invoice by invoice basis. In my opinion, it is not necessary for a construction expert to have information on the services provided by Tydwell and Redwire on an invoice by invoice basis in order to form a view about whether those services were provided for fees and no more than market rates.

4.7 Not only do I consider that the provision of information on an invoice by invoice basis is not necessary for a construction expert to opine about whether those services were provided for fees at no more than market rates, having such information on an invoice by invoice basis would not, in and of itself, enable a construction expert to opine on that question. I form this opinion for the following reasons...”

He then sets out three detailed reasons as to why he has come to that view.

86. In light of this, I do not consider that the way in which the second RFI response is given itself obstructs the just disposal of the proceedings. The real issue is whether the defendants made determinations as to charges as they plead, at all. If the defendants can establish that they did and what those charges were, I do not consider that the evidence suggests that there will be a difficulty in the provision of expert evidence such that the just disposal of the proceedings will be obstructed. The trial judge will be able to take account of the vagueness of the particulars in various ways, including in the findings as to what was actually charged. The expert evidence is, of course, there primarily to address the reasonableness of charges, not whether they were made. Mr Large makes clear that they do not have to be provided on an invoice by invoice basis for that to be done.

87. As to the separate suggestion that the defendants cannot rely on a phase by phase slicing in order to assess the reasonableness of the fees because that is not how the defence is pleaded, I consider this to be a restatement of the unsustainability arguments which I have already addressed. Accordingly, I do not consider that the defendants' plea on the fees and services issue in light of the second RFI response will obstruct the just disposal of the proceedings and I would not strike it out on that ground.

Strike out: failure to comply with court orders

88. I turn now to the third basis on which strike out is sought, that there has been a failure to comply with court orders. Here, Mr Burgess refers to the case of *Walsham Chalet Park Ltd (t/a the Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607. This was a case in which the first instance judge had to decide whether to strike out the claim because of prior breaches, not whether to grant relief from sanctions. Nonetheless, the considerations which the court applies where there is a relief from sanctions application were considered, and at [44] Richards LJ said this:

“44. The judge treated the principles in *Mitchell* as ‘relevant and important’ even though the question in this case was whether to impose the sanction of a strike-out for non-compliance with a court order, not whether to grant relief under CPR rule 3.9 from an existing sanction. In my judgment, that was the correct approach. The factors referred to in rule 3.9, including in particular the need to enforce compliance with court orders, are reflected in the overriding objective in rule 1.1 to which the court must seek to give effect in exercising its power in relation to an application under rule 3.4 to strike out for non-compliance with a court order. The *Mitchell* principles, as now restated in *Denton*, have a direct bearing on such an issue. It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see *Mitchell*, paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as

fundamental as a strike-out. Mr Buckpitt drew our attention to the recent decision of the Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64, at paragraph 16, where Lord Neuberger quoted with evident approval the observation of the first instance judge that ‘the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified’.”

89. I was again referred by Mr Cook to the decision in *Alpha Rocks Solicitors v Alade*. At [24], Vos LJ said this:

“24. The cases I have mentioned were right to emphasise in the context of striking out what is effectively factor (a), namely the need for litigation to be conducted efficiently and at proportionate cost. The need for compliance with rules and orders is equally important. But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied upon has been clearly established...”

90. I set out above the three ways in which the claimants contend that there have been breaches of court orders. I have also indicated that the defendants have clearly tergiversated over what their case is as to the way in which they are able to give particulars of the fees and services defence, and, in particular, that a charge was determined by Mr Mirza and Mr John on an invoice by invoice basis.

91. The first breach relied on by the claimants is that of the July 2023 orders. For reasons that were discussed at the November 2023 hearing, it was clear that the defendants had not properly sought to comply with it and the first CMC order required the sort of exercise which was not conducted until after the November 2023 hearing.

92. Secondly, the claimants rely on the failure to provide the second RFI response by the deadline of 12 January 2024. As I have indicated, an application to extend time was made. The complaint is really that Mr Nabarro did not perhaps fully explain that an invoice by invoice narrative was not going to be provided. Mr Burgess was highly

critical of Mr Nabarro's fifth witness statement but expressly stopped short of submitting that it was dishonest.

93. I can see that it might have been more clearly expressed given what was anticipated and it is fair to record that it referred to the matching up of individual third-party invoices with invoices then rendered to the joint venture but did not indicate that what was to be provided would not provide that level of particularisation. It is perhaps fair to comment that paragraph 13 was a more accurate indicator of what was to come.
94. Whilst criticism can perhaps be made of the defendants for not having given a clearer picture of what the defendants were producing, I do not consider that the way in which that application was made itself constitutes the breach of an order or that there was a breach of the November order. It was anticipated at the November hearing that if the particulars could not be provided in time then an application might be made for a short extension and that the evidence on such an application would have to explain what had already been done, and why more time was needed. That application was made despite the criticisms which might be made of the explanation that was given in it.
95. The third matter relied on by the claimants is the failure of the defendants to comply with paragraph 21 of the November 2023 order. This was the provision which said that to the extent the defendants were unable to answer or could not recollect any of the matters which they were required to address in paragraph 20 then they should say so expressly. It is quite clear that the second RFI response did not comply with that requirement. It was only after the second strike-out application had been issued that Mr Mirza's fifth witness statement was served. I might also make the comment that paragraph 7 of that witness statement does not quite directly deal with paragraph 21 in terms. What it says in terms is that the second RFI response contains the best particulars that the defendants are currently able to give. It is clear from the discussion

that I had with Mr Cook at the hearing that the first defendant is not seeking to reserve the right to give further particulars later and clearly, for reasons discussed at all three of the hearings, it would be inappropriate to do so.

96. There have been breaches of two orders, shown in the first and the third of the matters identified by the claimants. Undoubtedly also, the claimants and, to a lesser extent perhaps, the court have been messed around in the attempts to ascertain precisely what the defendants' case is. As *Walsham* suggests, the issue for the court is whether it is proportionate in light of those breaches for the court to strike out part of the re-amended defence and counterclaim. If I apply the *Denton* test by analogy and assume in favour of the claimants that the breaches were significant and that there was no good reason for them, I would need to turn to the third *Denton* criteria and consider and assess all the circumstances of the case. In doing so, the court would be considering whether it would be proportionate to make a strike-out order.
97. In carrying out that assessment, some of the same considerations that applied when considering the unsustainability arguments apply again. The effect of a partial strike out on the fairness of the rest of the trial process needs to be considered. As I have already indicated, a partial strike out would leave the defendants unable to defend some of the key allegations against them. This is also relevant here. However, I also consider that serious though the breaches of the court orders undoubtedly were, in the context of this litigation, an order striking out the fees and services defence would not be a proportionate response. The breach of the July 2023 order was visited by a costs order made in November 2023, and the failure to comply with paragraph 21 of the November 2023 order, at least not until the application was issued, whilst it is not a trivial breach does not, in my judgment, justify the strike out of part of a defence to a

fraud claim valued in millions of pounds. The defendants had given to the best of their ability the particulars required, albeit late and coupled with an extension application.

98. As I therefore do not consider that this ground justifies a strike out order either, the application to strike out part of the re-amended defence and counterclaim will be dismissed and, for the avoidance of doubt, I consider it appropriate to extend time for the provision of the second RFI response to the date on which it was provided, and I will make an order accordingly.

Conditional order?

99. In light of that decision, the claimants ask me to make a conditional order, i.e. that as a condition for being permitted to pursue the fees and services defence, the defendants should be required to make a payment into court. Mr Burgess seeks a payment in of £2.47 million-odd, being the amount put in issue by the defendants, although he accepted that an alternative basis for an order might exist, such as an amount to represent the costs of this issue being contested from here until trial. This part of the application was not made in the application notice and was raised for the first time in the skeleton argument for the hearing.
100. Furthermore, the claimants rely on CPR r 24.6 which allows conditions to be imposed when an application for summary judgment is dismissed. The application, on its face, was not an application for summary judgment.
101. I would not permit the claimants to argue for a conditional order now for the reason that the defendants have not had a proper opportunity to respond to such an application, but I would also not grant it for other reasons. As the *White Book* indicates, the Practice Direction formerly attached to Part 24 required it to be improbable that a claim or defence would succeed before a conditional order could be

imposed. As I have commented already on the need for allegations of fraud to be resolved at trial, and because of the credibility of both sides being squarely in issue and having been squarely raised, I do not consider that I am able to go so far as to say that the defendants' case on the fees and services issue is improbable or particularly weak.

102. Mr Cook also relied on the decision of Akenhead J in *Lazari v London & Newcastle (Camden) Ltd* [2013] EWHC 97 (TCC). The judge made clear repeatedly, particularly at [24] and [25], that the prime focus of a conditional order is to protect the future orderly conduct of the proceedings and not merely to punish bad conduct in the past, although, of course, such conduct would be relevant to consideration of whether an order ought to be made.

103. In the present case, albeit with some reluctance and hesitation, the defendants have particularised their position to the maximum extent that it will be particularised and I do not consider that requiring a payment into court would be a proportionate response to what has happened in the past in order to regulate the future conduct of the proceedings.

Conclusion

104. I will therefore make orders granting permission for reliance on expert evidence, dismissing the strike-out application, and granting an extension of time for the second RFI response.