Neutral Citation Number: [2023] EWHC 2216 (Ch)

Case No: PT-2021-000147

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 5 September 2023

Before :

Richard Farnhill
(sitting as a Deputy Judge of the Chancery Division)

- -

Between :

Brian Burgess

Claimant

- and -

Robert Kempson

Defendant

- -
- -

Mr Damian Falkowski (instructed by **DMH Stallard LLP**) for the **Claimant**
Mr Clifford Darton KC (instructed by **Wannops LLP**) for the **Defendant**

Hearing dates: 20-26 July 2023

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JUDGMENT

Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division) :

Introduction

1. This case is about a 10–15-minute meeting that is said to have taken place between the Claimant and the Defendant almost exactly 10 years ago. No notes were made by either party at the time; the first written record of the discussion was made around four months later. The claim, which totals a little under £7.5 million, turns on what they both said.

2. The core point is a simple one: the Defendant owned land with development potential and the Claimant gave advice with a view to increasing the value of that land. What, if anything, was the Claimant legally entitled to be paid for that work?

3. The parties now disagree on what was said, at the initial meeting and subsequently, what was meant and the legal implications of both. Claims are asserted for both breach of contract and unjust enrichment. The relationship between those claims was a source of further disagreement. The brevity of the discussion and the apparent simplicity of the question to be answered have spawned a lengthy and acrimonious dispute.

The witnesses

4. As with any case where an oral exchange is central, the witness evidence is especially critical. In such cases a judge is always mindful of the jurisprudence flowing from *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm). It is worth noting at the outset Leggatt J's guidance from that decision:

> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory,

> as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
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> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

5. Leggatt J concluded at [22] that "*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.*"

6. That is not the end of the analysis, of course. As Michael Green J noted in *Wrangle v Brunt* [2021] EWHC 368 (Ch) at [23]:

> I do not think Leggatt J was prescribing how oral evidence should be dealt with and assessed for every type of case. Rather, he was saying that where there are undisputed contemporaneous documents, they are going to provide a better guide to the truth than oral testimony, which is inherently unreliable, particularly where witnesses claim to be able to recall events or conversations many years back and where their recollection of events is necessarily overlain with the events that have happened since and the willingness to support one side or the other.

7. He emphasised that where the documentary record is limited, as it is here, or unreliable, witness recollection should be tested primarily against objectively ascertainable facts.

8. The principal witnesses were the Claimant and the Defendant. The Claimant was, I felt, an honest witness, but one who had become increasingly persuaded by his own arguments. He has gone over the events in question so often that the line between his recollection and his case has become, at best, a hazy one.

9. In certain aspects his evidence was very strong. He had a clear understanding of the situation faced by the Defendant at the time and of the shortcomings of what was being offered to him. He plainly had (and indeed still has) a much keener commercial grasp of land transactions than does the Defendant.

10. Where he was much less strong was on the central question of what was discussed at his meeting with the Defendant on 3 August 2013. He has subsequently formed a clear view that he has an entitlement to be paid, a view that the documents suggest has evolved over time, and, I accept subconsciously, has worked backwards from there. I therefore found his description of the circumstances surrounding the meeting on 3 August more helpful than his description of what was discussed, as to which I formed the view he had limited independent recollection.

11. The Defendant's cross-examination was more direct in nature. That is no criticism of Mr Falkowski, but possibly as a consequence the Defendant became defensive and at times struggled to follow the question being asked. Inevitably that led to a loss of clarity in his answers.

12. That was compounded by the fact that the Defendant plainly did not appreciate the nuance of the deal or the Claimant's proposed strategy at the time. Nor, I should add, was there any reason why the Defendant should have appreciated that nuance. He is an experienced and successful businessman but this was not his area. He had a clear goal of improving the price at which he could sell his land but he engaged others to assist him in realising that goal. That was a perfectly sensible thing to do. What it inevitably meant, however, is that he did not have a command of a number of key aspects of the transaction in the way that the Claimant, with his professional experience, did.

13. Even making allowance for these factors, at times the Defendant was evasive in his answers. Particularly as regards the 3 August 2013 meeting I felt he was not entirely frank in his evidence. The combination of this lack of frankness and

his not having focussed on the detail at the time was that on key issues I was cautious about relying on his evidence.

14. Ms Kempson was the Claimant's wife and is the Defendant's sister. At the time of the events in question she was a partner in the Claimant's business but was not actively involved in the advice given. She and the Claimant divorced in 2016, at which point the business partnership was dissolved.

15. Ms Kempson gave honest evidence, but her remoteness from the events that are central to this dispute meant that she had little to say about them, other than to confirm the Defendant's evidence that their respective branches of the family were not especially close.

16. I deal with the detail of the experts' evidence below. Both are experienced and competent valuers, I felt both gave their evidence honestly and that both understood and discharged their obligations to the court.

17. I feel compelled to emphasise this in the case of Mr Fowler, the Defendant's expert, in particular because he was subject to what I considered to be a plainly meritless attack on his professional integrity. The proffered bases of that attack seemed to be: that he had not disclosed historical emails between Savills and the Defendant, which was an obligation of the Defendant not Mr Fowler; that he did not disclose that he disagreed with the views of someone else in Savills, who formed a more limited view at a different time on the basis of different information and with whom he was in any event entitled to disagree; and that he did not disclose that his colleague at Savills had advised in the past that the Defendant's land had ransom value (because with another parcel of land it could sever two parts of the wider development area), which was a point that was based on the location of the Defendant's land and was obvious from a cursory review of the site plan even to someone who was not a surveyor.

18. For reasons I go on to address I do not accept Mr Fowler's valuation. To be entirely clear, that has nothing to do with the attack on his integrity, which I reject entirely. He was a professional and competent witness who sought to and did assist the court. There was no ground, or anything even approaching a ground, for suggesting otherwise.

Factual background

19. The Defendant owned land at Owls Castle Barn, near Horsham, West Sussex (the **Land**) comprising his home and around 31.4 acres of agricultural land. From 2009, or thereabouts, the Land was promoted for development by Huntley Farms LLP (**Huntley Farms**) and Liberty Property Trust UK Limited (**Liberty**) in the Horsham local plan. Specifically, Liberty proposed a scheme that included a development of 4,500 homes, of which the Land would form a part.

20. The owners of land thought likely to be included in the Scheme, including Mr Kempson, entered into a series of land collaboration agreements (the **LCAs**) in May, June and October 2010. These provided, in outline, that:

i) The parties would collaborate to promote the inclusion of their various holdings in the Local Development Framework.

ii) Applications for planning permission would be led by Huntley Farms and the individual landowners would not submit or support other planning applications in respect of their own plots of land.

iii) The parties would not sell their plots for less than £250,000 per acre.

iv) The parties would grant one another certain rights of pre-emption.

21. The LCAs were entered into at an early stage in the planning process. It was not until August 2013 that the Horsham District Council Planning Framework Preferred Strategy, including the Land for proposed residential development, was published for consultation. In December 2014 a Government Planning Inspector issued an interim letter to Horsham District Council to state that he favoured concentrating development around Horsham, which Horsham District Council welcomed as helping to address "*months of uncertainty*". Only in May 2017 was the Land zoned for development and a resolution to grant planning permission passed. Outline planning permission was not granted until March 2018. In part for reasons that I will address in due course, final planning permission has still not been granted in respect of the Land.

22. In February 2011 Liberty was recommended as the "Development Partner" for the purposes of the LCAs. In August 2011 Liberty offered the Defendant a call option for the Land at £250,000 per acre with provision for indexation at 2.5% per annum. Negotiations over the option lasted for some years, on and off, but the Defendant ultimately never accepted that offer.

23. The Claimant was aware that the Defendant was in discussions with Liberty and on 22 January 2013 wrote to him suggesting that he could introduce the Defendant to a larger residential developer. The Claimant emphasised that, "*My involvement will not incur* [sic] *you in any expense.*" The Claimant confirmed on cross-examination that he was to have been paid a fee by the developer he proposed to introduce, Gleeson Homes, of 2% of the sale value should a transaction go ahead.

24. The Claimant stressed, also during cross-examination, that his reference to the Defendant not incurring expense was limited to effecting the introduction but as it transpired he did further work on top of that. He also accepted, however, that he never indicated to the Defendant at this stage that he expected to be paid for that further work. In my view it would have been fair for the Defendant to assume that the Claimant would need to do some work on understanding the Land and the agreements that affected it in order to make any introduction. In light of the unqualified assurance that the Defendant would incur no expense, it was also fair for him to assume that whatever the Claimant was doing formed part of the introduction for which the Defendant was not to be charged.

25. Those discussions led to the Claimant emailing the Defendant on 24 April 2013 offering to set up a meeting with Gleeson. The Claimant and the Defendant discussed that approach at a meeting at the Claimant's home office on 28 April.

26. There were various exchanges with Gleeson in the following months. However, the LCAs were only provided by the Defendant to the Claimant on 3 July 2013, the Claimant sending them to Mr Pitt of Gleeson the next day. On 9 July 2013 Mr Pitt wrote to the Claimant noting that he could not see how different parties could take different approaches under the LCAs. Thereafter, the Gleeson opportunity did not proceed.

27. On 3 August 2013 the Claimant and the Defendant were due to meet another landowner potentially affected by the Scheme, Mr Walton. On cross examination the Claimant explained that he had wanted to agree some arrangement for his remuneration with the Defendant ahead of the discussion with Mr Walton. His effort to do so in a brief meeting before Mr Walton arrived is at the heart of this dispute.

28. The Claimant says that he and the Defendant reached an oral agreement, which is pleaded in the following terms:

> [the Defendant] would pay to the Claimant:
>
> a. A sum calculated on the basis of 15% of any increase in value of Land above £250,000 per acre; or
>
> b. 15% of any payments made to the Defendant above £250,000 per acre
>
> increased by 2.5% p.a. interest from the "Planning Date" as defined in two draft option agreements offered to the Defendant (but not entered into);
>
> and if the Claimant received any profit share from any other parties to the Land Collaboration Agreements, he (the Claimant) would split any such profit share 50/50 with the Defendant upon receipt,
>
> but if there was no increase in the value of the Land or if the Defendant received no more than £250,000 per acre for the Land then the Defendant would not be liable to pay anything for the work done and services rendered by the Claimant.

29. Other than its terms and the date, the only detail about this alleged agreement in the Claimant's witness statement was that it was entered into during a discussion in the Defendant's kitchen. In the course of his cross-examination the Claimant accepted that the meeting was quite brief – possibly as short as 10 minutes. He also explained that he had proposed a deal to the Defendant whereby he would receive 25% of any increase above £250,000 per acre; the Defendant had rejected that level of fee but they had agreed 15%.

30. The Claimant's evidence was that when discussing what his work was intended to achieve he would have used the language of improved "terms" and improved "value" interchangeably. Put another way, he drew no distinction between the concept of improving on the terms offered by Liberty and increasing the value of the land (regardless of whether any offer was made reflecting that increase in value). The Claimant sought to give examples of what he meant, referring to

an employee improving their salary as being an improvement of both their terms and the value of those terms.

31. In response to a question from me the Claimant confirmed that he would have expected to be paid even if he had done no further work after 3 August 2013 and the increase in value or terms was wholly attributable to factors other than his input. It is fair to say that his answer developed certainty as he was giving it, such that it was clear that he had not previously given the point much thought.

32. It was the Defendant's evidence that he was keen to achieve more than the £250,000 per acre reserve price provided for in the Land Collaboration Agreement. Specifically, he was aware that land further from Gatwick Airport had sold for £350,000 per acre some six or seven years earlier. It was also his evidence that he knew nothing at the time about the housing development business, that he believed the Claimant was experienced in such work and that he thought he would benefit from that experience.

33. The Defence originally denied that any agreement was made, whether on the date and terms alleged or, indeed, at all. It acknowledged that the Claimant may well have suggested that in return for his work he should be paid 15% of any increase in the £250,000 per acre price in the Liberty draft option but stated that these proposals were rejected by the Defendant. Initially the Defence asserted that these suggestions were made at family or social gatherings but that was deleted by amendment. Also by amendment the Defendant accepted that there was an agreement reflecting the third limb alleged by the Claimant – an introduction to other landowners coupled with a 50/50 split of the profit derived – but asserted that this was entered into at the 28 April 2013 meeting. It was also accepted, once again by amendment, that a meeting took place one Saturday in August (which the Defendant confirmed in his witness statement was 3 August) at which the Defendant introduced the Claimant to Mr Walton, another landowner who was a party to the Land Collaboration Agreement. This was said to be pursuant to the 28 April 2013 agreement.

34. Finally, the Defendant accepted that he told the Claimant something to the effect of, "*I am happy for you to keep trying* [to achieve a higher price for the land] *and if you succeed I'll happily pay you for it.*" Throughout his statement the Defendant recognised that the Claimant expected to be "*paid for his work*" and that the Defendant understood that he was to have "*an opportunity to earn some money*".

35. There is limited reference to what was discussed in the documentary record. The first time it comes up is in an email from the Claimant to the Defendant on 7 December 2013, where he states:

> I am doing you a favour as family and rolling the dice in the hope of improving your terms in return for what we agreed, namely I receive 15% of any improved terms over and above what you have been offered which is £250,000 per acre indexed at 2% and no premium for the options. In addition, I will split 50/50 with you any profit share if I manage to improve terms of your other LCA Parties should that eventually arise.

> …I might earn nothing at all but hope to prevent you being disadvantaged at the very least.

36. The Defendant responded to that email the same evening but did not engage with what was said about there being an agreement.

37. In June 2014 the Claimant wrote again on the question of fees, stating: "*This Firm would appreciate some fees, if available from Liberty apart from the 15% share of value achieved on your behalf over and above the £250k per acre currently offered by Liberty.*" The Defendant responded three minutes later simply to say he had been busy. Again, he did not engage on the question of fees.

38. On 6 November 2014 White & Case, solicitors for Liberty, wrote to Stevens Bolton, the Defendant's solicitors, noting that Stevens Bolton had confirmed that the Defendant was willing to finalise an option with Liberty. Under the attached heads of terms the option price was to total £250,000 per acre. The Claimant explained in his witness statement that he raised, with the Defendant, the issue of his fees, noting that he had spent many hours on this matter and would not be rewarded if the Defendant entered an option at £250,000 per acre. He further asserted that the Defendant said he would "*look after*" the Claimant if the Liberty option was signed. It never was.

39. There followed on 6 January 2015 a letter from the Claimant to the Defendant seeking to "*confirm*" the profit share arrangement. This provided:

> The terms we agreed were that in consideration for my general property advice on a no win no fee basis, I will be paid a 'profit share' sum calculated as to 15% of any increase in value of your land or payments made to you over and above £250,00 per acre for the two draft options on Owlcastle Barn land as contained in title WSX203258. The current offer is from Liberty Property Trust, although our agreement relates to any Purchaser or joint venture partner, howsoever any disposition of your land may occur at the best price, at arms [sic] length.
>
> In return, I will split 50/50 with you any profit share that I may agree and eventually receive, from the other Parties to the Land Collaboration Agreements … payable to you upon receipt.
>
> …If, as discussed recently, you enter into an option with Liberty Property Trust without any improvement of terms, then you will pay me a sum to be agreed based [sic] the time I have spent advising you.

40. The Claimant places very considerable reliance on this letter, which he says is an accurate and comprehensive record of what was agreed on 3 August 2013 subject to the further discussion on fees held in early November 2014.

41. The Claimant followed up by email on 26 January 2015, to which the Defendant responded the same evening stating:

> Ref the fee agreement that you sent to me. I need to make a few amendments to it as written. Some detail is missing.

42. It seems that discussion had happened by 19 February, when the Claimant wrote to the Defendant asking "*If I add the 'Liberty indexation' to the letter we discussed will that be sufficient?*" A further version of the letter amended to address indexation but otherwise in identical form was sent by the Claimant to the Defendant on 26 February 2015. According to the compliments slip accompanying that version the amendment was to address indexation following the discussion between the Claimant and the Defendant, and the Claimant's evidence was that no other matters remained outstanding.

43. The Defendant does not seem to have responded to the 19 February email or the 26 February letter, but in his cross-examination stated that there were numerous other matters that needed to be addressed. I found his answers on this point to be wholly implausible and do not believe that they were given honestly. The Defendant did not give any examples of what remained to be resolved. Moreover, his reference at the time was to "*detail*" being "*missing*". The addition of indexation would fit that description; a denial that any agreement was reached, which is the essence of the Defendant's case, would not. In my view, indexation was the "missing detail", and the only missing detail, raised by the Defendant in his discussion with the Claimant.

44. The Claimant repeatedly chased the Defendant for a countersignature on the 26 February letter, emailing on 27 February and 2 March 2015 and 6 October 2017. In each case the Defendant did nothing in response to the request. His evidence was that this was something of a try-on by the Claimant and so he ignored it. I do not accept that in the least. The Defendant thought that by not signing he secured some sort of advantage, presumably because he felt he would have more room to argue later. Had he actually thought something was incorrect he would have said so, as he did on the issue of indexation.

45. The Claimant wrote to the Defendant on 29 March 2015 accusing the Defendant of having lied to him about meetings with other parties to the LCA. In it he stated:

> Upon your invitation, I have strived to get you and others a better deal in return for a share of any increase in terms. This firm has not acted for anyone else on such a generous basis and it's only because you are 'family'. At the outset, we discussed at your home this Firms [sic] basis of remuneration and as mentioned later in my email to you of 7th December 2013 and letter dated 26th February 2015 hand delivered to your office by Serena.
>
> …It is as plain as a pike staff, [sic] that following my efforts on your behalf over the past two years, that you are now trying to "cut this Firm out" of its share of improved terms…
>
> …You will not be able to hide the eventual terms, Rob, if you do sign up with Liberty so I would recommend that you behave truthfully and honourably.

46. On 30 March 2015 the Defendant replied to the Claimant with the intention of terminating his involvement:

> All of the suggestions that you have made have been along the lines of stirring up the LCA members which so far has led to me receiving the threatening letter that you mentioned. All of your doing, and the lawyers who I have been using for the past ten years calmed it down. I do not want to follow your suggestions thank you, they just spark unnecessary trouble. It has just cost me unnecessary legal fees and upset my neighbours. They have made their choice. If you want to interfere with their business I suggest you call them.

47. The Claimant still sought to contact the Land Registry on the Defendant's behalf, but on 2 April 2015 they wrote to the Claimant stating:

> I refer to our telephone conversation today and can confirm that Mr Kempson has advised me that you no longer act on his behalf in connection with this application. In the circumstances, we will no longer be able to correspond with you about the application, or discuss matters with you over the telephone.

48. On the same day the Claimant again wrote to the Defendant. Again, the topic of fees was raised:

> Just so you know, I met with Lizzie, Brad and her Solicitor today on marital matters. As expected, this Firm's work in progress was discussed and future earnings. I mentioned that you are a Client and that this Firm had been engaged on your behalf for two years and carried an interest in any enhancement in the terms over and above those that Liberty initially offered to you.

49. While the Claimant asserts in these proceedings that he did not understand the 30 March email to be terminating his services, from the schedule he prepared in support of his quantum meruit claim to show the work he says he carried out for the Defendant (the **Schedule**) it seems he accepted his input was no longer sought. Of the 231.2 hours of work for which he claims, only 2.35 hours come after 30 March 2015.

50. The Claimant continued to carry out Land Registry checks and was aware, from a search with the Land Registry carried out on 29 July 2015, that the Defendant had abandoned the approach advocated by the Claimant of registering a restriction based on the LCAs. He was equally aware, of course, that he had not been involved in that decision and had only found out from his Land Registry search.

51. On 1 March 2018 outline planning permission was granted for a proposed scheme comprising 2,750 houses and a business park, retail, community centre, leisure facilities, education facilities, public open space, landscaping and related infrastructure. The Land is part of Phase 2B of the scheme, which has to date not been reached.

52. On 24 September 2019 the Defendant transferred 29.9 acres of the agricultural land to Latimer Developments Limited, which both parties agree is unrelated to the Defendant or any of his businesses, for a consideration of £4,457,440, which equates to £145,956.69 per acre. Since that is significantly below the £250,000 trigger alleged by the Claimant, the Defendant asserts that no sums are due in any event, even if a commission agreement had been entered into. The Defendant is entitled to a further payment of overage based on 50% of the market value of the 29.9 acres less certain expenses. He has also retained Owl Castle Barn itself and around 1.5 acres of gardens.

53. In September 2021 Natural England imposed a requirement of water neutrality on developments in the Horsham area, essentially meaning that new developments must not increase net extraction from local water sources. The requirement does not affect schemes with full planning permission but since the Land had only outline planning permission the water neutrality issues must be resolved before any development can proceed.

The claim for breach of contract

Bilateral or unilateral?

54. This is the logical starting point for the analysis. It was the Claimant's case on opening that the parties' relationship took the form of a unilateral contract. This was, Mr Falkowski contended, relevant when one came to consider the Defendant's right to withdraw. It is fair to say that the point was pursued less vigorously in closing, but it remains necessary to address it.

55. Chitty on Contracts at 4-102 describes the offer of a unilateral contract in the following terms: "*An offer of a unilateral contract is made when one party promises to pay the other a sum of money (or to do some act, or to forbear from doing something) if the other will do (or forbear from doing) something without making any promise to that effect; for example, where A promises to pay B £100 if B will walk from London to York or find and return A's lost dog or give up smoking for a year*."

56. Chitty then identifies the following features of such an offer:

> First, the offer can be accepted by fully performing the required act or forbearance. Secondly, there is no need to give advance notice of such acceptance to the offeror. Thirdly, the offer can be accepted *only* by performance and not by a counter-promise, since such a counter-promise would not be what the promisor had bargained for. And fourthly the offer can, like all offers, be withdrawn before it is accepted.

57. Applying those principles here it seems to me exceedingly unlikely that any offer was for a unilateral contract.

58. The Claimant's position was that he made the original offer – that he would provide property advice to the Defendant in return for the defendant promising to pay 25% of any uplift above £250,000 per acre. Simply as a matter of law that could not be an offer of a unilateral contract because the Claimant was

seeking (and only seeking) a promise of payment from the Defendant, and as Chitty notes the offeree in a unilateral contract accepts by performance, not by a promise of performance. That original offer could only have been for a bilateral contract, in which each side promised to render performance in the future.

59. The Claimant then says that the Defendant rejected 25% but agreed to 15%. If the proposal of 15% had come from the Claimant, for example if the Defendant had simply rejected the initial offer and the Claimant had bid against himself in response, the analysis would be identical to that set out above: the Claimant would be seeking not performance but a promise of performance. Does anything change if the 15% was a counterproposal from the Defendant? In theory it might if that counterproposal had addressed not just price but also the nature of how the offer could be accepted – to perform the services rather than to promise to do so. There is no evidence that any such change in basis was ever discussed, however, and outside the realms of an undergraduate contract law supervision or a court such an exchange would have been a highly unusual one.

60. In the circumstances, it seems to me that the initial proposal must have been for a bilateral contract and nothing was discussed to change that aspect of any agreement. Any ensuing contract was bilateral, not unilateral.

Was there an agreement?

61. The parties both accept that any agreement reached on 3 August 2013 was purely oral, with the subsequent correspondence being evidence of the agreement, rather than the agreement itself. The approach that the court adopts to an alleged oral contract is quite different to that adopted for written agreements. As the Court of Appeal noted in *Zymurgorium v Hammonds of Knutsford* [2023] EWCA Civ 52 at [58]*:*

> Whether the contract was made at the meeting in November 2015 is a question of fact: see the account given by Lord Hoffmann in *Carmichael* at 2048D to 2050D of what he referred to as "*the troublesome distinction between questions of fact and questions of law*". As he there explained, although the construction of a written instrument is, for historical reasons, treated as a question of law, this only applies where the parties intend all the terms of their contract to be contained in a document or documents. It does not apply where the intention of the parties "*has to be gathered from documents but also from oral exchanges and conduct. In the latter case the terms of the contract are a question of fact.*" To that I would add that whether a contract was entered into at all on the basis of oral exchanges is equally clearly a question of fact.

62. Further guidance comes from *Maggs v Marsh* [2006] EWCA Civ 1058 at [26]:

> Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the

> agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose recollection is right.

63. It seems to me that the evidence here points very strongly to an agreement having been reached at the 3 August 2013 meeting under which the Claimant was to be remunerated by the Defendant.

64. The starting point is the historical context to the meeting. All parties accept that the Claimant had wanted to be paid for his time working to assist the Defendant and that the Defendant knew of that. Originally the idea was that payment was to come from a different developer to Liberty, specifically Gleeson, but less than a month earlier the Claimant and Gleeson had seen the LCAs and realised that this would not be realistic. By August 2013 the person who might most realistically pay for the Claimant's work was the Defendant.

65. The evidence of both parties regarding the meeting is somewhat unsatisfactory. As I have noted, both the Claimant and the Defendant have persuaded themselves of the virtues of their respective causes, and their recollections have been affected accordingly.

66. The follow-up exchanges in correspondence offer more guidance. It is apparent from the Claimant's email of 7 December that he thought some agreement had been reached. The Defendant said that he simply ignored the email because he viewed it as a "*bizarre effort to present a* fait accompli *out of nowhere to see if it would stick*". That evidence is difficult to accept. While I have reservations about the accuracy of the Schedule showing the work he claims to have done, which I address below, it is apparent simply from the volume of correspondence that he was by this time undertaking significant work, which the Defendant acknowledges was to be paid for somehow. My sense of the Defendant was that if he had thought that the money was coming from somewhere else, he would very likely have told the Claimant.

67. Moreover, the 7 December email was far from a one-off. As I have noted, the Claimant followed up on the question of fees on a number of occasions. Again, it seems to me unlikely that if the Defendant had thought the Claimant had misunderstood he would simply have remained silent.

68. In his witness statement the Defendant addressed the 6 January 2015 letter dealing and accepted that he knew there was an "*informal arrangement between family members*". I address the informality or otherwise of the arrangement below, but it is difficult to read that as anything other than an acknowledgment that some agreement had been reached.

69. Also significant is the Defendant's reaction to the 6 January letter at the time. On 26 January 2015 he told the Claimant that the terms needed to be amended because "*Some detail is missing.*" Again, I address the relevance of that exchange further below because it goes to what was agreed, but what is relevant here is that in January 2015 the Defendant plainly thought there was some agreement. It cannot sensibly be suggested that the existence of the agreement

is simply a "*detail*", and the statement that something is "*missing*" means points needed to be added, not taken away. The Defendant's email is consistent with, and only with, there being an agreement with the Claimant.

70. In my view an agreement unquestionably was reached under which the Defendant was to remunerate the Claimant for his work. The December 2013 email and the collapse of the Gleeson arrangement in July 2013 suggest that the agreement most likely was reached between those times. In this respect I accept the evidence of the Claimant and reject that of the Defendant that it was reached on 3 August.

The terms of the agreement

71. Obviously, the fact that an agreement was reached is only the starting point; the terms agreed are critical.

72. The context of the meeting is, it seems to me, highly significant. The Claimant accepted that the discussion with the Defendant was a short one, possibly as little as 10 minutes. Moreover, there is no suggestion that he had alerted the Defendant to the fact that such a proposal might be coming. In that brief period he therefore had to articulate his position and persuade the Defendant to accept it.

73. In the Claimant's view there was nothing surprising about that because the matter could be discussed and agreement reached very quickly. The logic of that view, of course, very much depends on the scope of the agreement: the simpler the agreement, the more quickly it could have been reached. An agreement based on an offer of improved terms could be relatively simple: when an offer of over £250,000 per acre is received, the Claimant is entitled to be paid. While it might be desirable for the parties to agree terms as to whether an offer is credible, whether the Claimant could require a low offer to be rejected or when payment was to be made, such terms do not need to be agreed expressly for the agreement to function.

74. By contrast, there is more to address where the agreement is premised on land value. The value of land, like that of many assets, is volatile. It therefore depends heavily on the valuation date, meaning the parties would have to agree what the trigger for valuing the Land was in this case. The Claimant accepted that there was not enough time to discuss whether the trigger for payment was outline planning permission, final planning permission or some other step. In the Claimant's view, the Defendant would not have been sufficiently familiar with the concept of what might constitute satisfactory planning permission to have that discussion, and there was not enough time before Mr Walton was due to arrive for the Claimant to explain it. That tends to suggest the agreement between the parties was a simpler arrangement on which there was time to reach consensus.

75. There is also the question of what the parties would be comfortable agreeing. A commission based on sale price was an arrangement with which the Claimant was very familiar, that having been the deal he had with Gleeson. The rate to be paid by Gleeson of 2% was significantly lower than the rate contended for

here of 15%, but the Gleeson deal applied to the whole sale price rather than just the excess over £250,000 per acre. Below around £288,500 per acre the Gleeson offer would be better; above that point 15% of the price over £250,000 per acre produced a better return for the Claimant. However, while there was different risk profile based on the sale amount a commission arrangement premised on sale was an arrangement with which the Claimant was comfortable.

76. The Defendant said in his witness statement that he also had experience of commission arrangements but found them to be "*more trouble than they were worth*". That evidence seemed to me to oversimplify the position. The factors that he lists as problems – the profit on which the percentage commission was to be calculated, the costs to be deducted, the timing of payment and duration of the agreement – would not necessarily arise. If the agreement were based on 15% of the amount received above £250,000 per acre allowing for indexation of the base price at a fixed rate, none of the concerns that had previously resulted in "*trouble*" for the Defendant would have been present. Moreover, it was clear, both from his witness statement and, in particular, his cross-examination that the Defendant had little if any recollection of his short exchange with the Claimant. In such circumstances, the suggestion that he was put off the Claimant's proposal by his earlier experience seemed to be principally reconstruction of what he would have thought had the problematic factors he identified arisen, rather than recollection of what he actually thought on 3 August. If the deal were a simple one based on price, none of those problematic factors would be present and I do not believe that the Defendant's earlier experience would have put him off. That is reflected by the Defendant's evidence regarding the profit share relating to sums received from other landowners. While the parties disagree over when that agreement was reached, both agree that they entered into it on the terms alleged by the Claimant. Any reservations the Defendant had about commissions and profit shares had therefore not held him back as regards that limb of the agreement alleged here.

77. The context of the agreement is also relevant. The Defendant was not actively involved in the process of pursuing the grant of planning permission. Under the LCAs that role fell to Huntley Farms. At this stage the Claimant had not carried out the requisite searches or consulted lawyers to formulate his strategy of attacking the LCA. Consequently, as the Claimant accepts, his obligation was to provide more general advice. However, it is also the Claimant's case that the value trigger referred to, and could only refer to, the grant of outline planning permission. On the Claimant's case his work would have no necessary connection with the payment trigger: Huntley Farms could put in all the effort, and the Claimant would still be paid. It is possible to structure an agreement in that way, of course, but it seems to me less likely that the Defendant would have been interested in it, certainly in the course of a short meeting where the concept had never been mooted before.

78. By contrast, the offer on the table was the draft option agreement from Liberty. Improving on that offer is what had first led to the Claimant's involvement from January, and by July it had become clear that Liberty was, for the foreseeable future, the most likely bidder. Seeking general advice in dealing with Liberty

with the object of improving the terms of that offer or securing a better offer elsewhere in return for a share of the upside made obvious sense for both parties.

79. The whole context of the 3 August meeting therefore suggests a simple deal based on receipt of an improved offer: there was little time to discuss anything; the Defendant was an experienced businessman but had little if any experience in land matters; value in the abstract was closely linked to planning with which the Defendant was not familiar and was less likely to agree anything; and the Defendant had reservations about more complex commission arrangements that make a value based agreement less attractive.

80. That view is reinforced by the 7 December email, which refers to (and only to) "*any improved terms over and above what you have been offered*". There is no reference to value at all. The Claimant's evidence was that he thought that "terms" and "value" could be used interchangeably. I do not accept that.

81. First, the concepts are not interchangeable. Taking the Claimant's example of an employee who negotiates a pay rise, I agree that improved terms increases the value the employee derives from the relationship. That is because terms are one way of assessing value. The reverse is not true; value can change without affecting terms. The employee might obtain additional qualifications in their own time, which makes them more productive and so more valuable to their employer. But unless that is reflected in a change to their employment contract, the terms on which that employee is engaged are unchanged.

82. As an experienced surveyor one would expect the Claimant to know that. Both experts relied on the RICS Valuation Global Standards 2022 (the **RICS Red Book**), which defines market value as "*The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arms-length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.*" They both agreed that similar transactions gave the best indication of market value: where one property in a development had sold recently and a second, very similar property was being valued, the first sale was very strong evidence of the market value of the second property. Terms demonstrate value, therefore. The reverse is not true – the fact that the first property sold at a given price does not mean that any offer has been made on the second property. A nominal increase in value does not necessarily produce an improved offer.

83. Secondly, they are not used interchangeably by the Claimant in the 7 December email; the term value is not used at all.

84. Thirdly, if the Claimant thought his reference to "terms" would apply equally to an increase in "value", his subsequent conduct is incomprehensible. When, in November 2014, he was concerned that the Defendant might accept the Liberty option after all he was worried that he would not be paid because the terms were unchanged. But if his agreement with the Defendant was premised equally on value he would have been entitled to be paid in any event. His immediate reaction would not have been to seek a quantum meruit but, rather, to seek a valuation.

85. The Claimant's 26 June 2014 email is in a similar vein. He referred to "*value achieved on your behalf*". The concept of value achieved is something more than just a notional or theoretical increase in value; value is volatile and fluid, and can only be sensibly said to have been achieved when it is in some way crystalised. That does not necessarily mean payment, but nothing can be said to be achieved in the absence at least of an offer.

86. The November 2014 exchange following the Liberty offer to the Defendant points to the same conclusion. As I have noted, if the Claimant had thought that an increase in nominal value was a basis on which he could claim, the Liberty offer would be irrelevant. The Claimant could still bring a claim based on value. Indeed, that is exactly what the Claimant has done in these proceedings: the Defendant sold for a price that he asserts is less than £250,000 per acre, but the Claimant still claims based on the value of the Land. It is true that the Land did not have planning permission in November 2014, but that trigger has only been settled on in these proceedings – it does not feature in the contemporaneous exchanges. At the very least one would expect the Claimant to be seeking or suggesting a valuation; in fact, that suggestion first comes from the Defendant on 3 February 2015; the Claimant responded the same day saying, "*It depends on what purpose you have in mind for the valuation.*" Prior to that point valuation does not seem to have been something he had considered; certainly, it was not part of his thinking in November 2014.

87. That leads to the 6 January 2015 letter, which appears from the language to be the foundation of the Claimant's pleaded case. A number of points about it are striking.

88. First, the Claimant was plainly adding additional protections, in the form of any sale having to be not simply "*at arms* [sic] *length*" but also "*at the best price*". There is no suggestion that was agreed on 3 August 2013, and had it been suggested I would have rejected it. As I have noted, what could be agreed in a short meeting was limited. The "*best price*" concept is far from straightforward, since it requires some objective criteria by reference to which the price achieved could be assessed. There was insufficient time to discuss and agree that concept. Nor is this a case of the Claimant making explicit that which was already implicit. Such a term would not be implied because it is neither necessary nor sufficiently obvious that it went without saying (see *Barton v Morris* [2023] UKSC 37 at [22]-[24] for an authoritative discussion of the test for implication in the context of an oral agreement). The Claimant receives some protection from the transaction being at arm's length, which is a requirement that I agree is both necessary for business efficacy and obvious. That is all that is needed to make the contract function, however; if the Claimant had wanted more he needed to bargain for it. He did not do so on 3 August 2013, but sought to improve his position on 6 January 2015. The letter goes beyond the agreement actually reached.

89. Second, the letter claims to reflect the 7 December 2013 email. However, the parties both agreed that the letter contained different triggers based on increased value and payment received. The email only refers to a single trigger, based on improved terms. For the reasons I give above, I believe that the reference to terms would not necessarily require payment to have been agreed, let alone

received, but it would require more than an abstract or theoretical increase in value. The letter therefore stretches the 7 December email in ways that benefit both the Claimant and the Defendant. But it does not reflect what was agreed between them.

90. Third, the agreement set out in the letter is said to relate to "*any Purchaser or joint venture partner*" and applies regardless of the method of "*disposition*" which is to be "*at arms* [sic] *length*". All of that language is consistent with improved terms being offered to the Defendant; none of it is consistent with some abstract concept of increase in value.

91. Fourth, there is no reference to value being assessed at the date of planning permission, whether final or outline, nor is there any valuation mechanism based on a grant of planning permission. Obviously by this stage the Claimant had had ample time to explain concepts of outline, final and satisfactory planning permission to the Defendant. None of them feature in the 6 January 2015 letter, however. Even were one to accept that the letter accurately reflected what had been agreed almost 18 months before, and for the reasons I have given I do not, it still would not show that the Claimant's preferred valuation date was ever even discussed between the parties, let alone agreed.

92. There then follows the exchange between the Claimant and the Defendant that resulted in the addition of the Liberty indexation language. As I have noted, I entirely reject the Defendant's suggestion that he had other concerns; I believe that indexation was the only issue he raised. Accordingly, I accept that he did not object to the addition of the language on value or that relating to best price. Nor did he agree to them, however, since he never countersigned the letter or in any way indicated his acceptance of it. The matter was in limbo.

93. I also come back to the exchange in early February when the Defendant raised the question of valuation. Had the parties actually thought that value was an independent trigger, one would have expected the roles to be reversed – for the Claimant to be pursuing this and the Defendant to be resisting it.

94. By the end of March 2015 the relationship was on the point of collapse. It is notable that the Claimant's 29 March 2015 email reverted to referring to improved terms: "*I have strived to get you and others a better deal in return for a share of any increase in the terms.*" His concern was that he would be "cut out" of his "*share of improved terms*". He followed that up with his 2 April 2015 email, again focussed on his claim to a share of improved terms: "*this Firm … carried an interest in any enhancement in the terms over and above those that Liberty initially offered to you.*"

95. It is apparent that at the time the Claimant thought that a proposal was in the offing from Liberty, and that may in part explain the focus on terms. Nowhere in those emails, however, does the Claimant even reference the value-based claim that he now advances.

96. In my view, a right based on an increase in value of the Land was never discussed by the parties at the 3 August 2013 meeting. It was impractical for the Claimant to explain it and secure agreement to the necessary detail in the

time available, and in any event the Defendant had previously found such agreements, when subject to too many variables, to be more trouble than they were worth. What they settled on, which I shall refer to as **the Agreement**, was a very simple arrangement whereby the Claimant would work for the Defendant with a view to improving the terms on offer, with the Claimant to receive 15% of an increase in price offered above £250,000 per acre. That was the deal set out in his 7 December 2013 email. His best protection was the Defendant's self-interest: the better the price achieved, the greater the upside for both parties.

97. Subsequent experience demonstrated the weakness of the Agreement. The Claimant sought to buttress his position in November 2014 by asking for additional protections. When he came to document the arrangement in January 2015 he further sought to address those issues, doubtless believing (as I accept he still does) that he must have addressed them at the time. He was, and is, mistaken: he had secured the deal he could in the time available and it was based on, and only on, improved terms being offered to the Defendant.

98. The next question is whether there was any requirement under the Agreement that the Claimant's work bring about the improved terms, the question of whether the Claimant needed to be an or the effective cause of the improvement in terms or the increase in the value of the Land.

99. The Claimant relied heavily on the decision in *EMFC Loan Syndications Lip v The Resort Group Plc* [2021] EWCA Civ 844 to support his case that no such term could be implied into the Agreement. There are important differences between this case and *EMFC*. Critically, the question of effective cause was not addressed by the contract in issue in *EMFC* (see [69]). That, it seems to me, is an important distinction. Unlike in *EMFC* the Defendant does not seek to satisfy the test for implication; he asserts that, properly understood, the point was expressly addressed in the Agreement. Moreover, *EMFC* was a case relating to construing a written agreement. As I have noted, the exercise in the case of an oral agreement is different but I agree that at least some of the factual points identified by Carr LJ at [69]-[78] and her approach to them seem to are just as relevant here.

100. The first is how the question of cause was addressed in the Agreement. In the 7 December 2013 email the Claimant stated: "*I am doing you a favour as family and rolling the dice in the hope of improving your terms in return for what we agreed, namely I receive 15% of any improved terms…*" The "*in return for*" language most naturally links payment to the improvement of terms, the favour being "*rolling the dice*", that is taking the risk of getting nothing. That reading is reflected in the Claimant's 29 March 2015 email, in which he stated "*I have strived to get you and others a better deal in return for a share of any increase in the terms.*" He then makes clear that offering this no win no fee arrangement in the first place is the "family favour": "*This firm has not acted for anyone else on such a generous basis and it's only because you are 'family'*". Both emails link the right to payment with the Claimant improving or striving to improve the terms on offer.

101. The various iterations of the 26 January 2015 letter have a different focus: "*in consideration for my general property advice, I will be paid a 'profit share'*".

However, as I have noted that letter added a number of protections for the Claimant that the balance of the evidence demonstrates were unlikely to have been discussed and agreed on 3 August 2013. In my view it is a less reliable indicator of what was actually agreed.

102. The second is the purpose for which the Claimant was engaged. In this case there was a specific aim: to improve the Liberty terms. That is obvious from the two emails quoted above. It is also consistent with the backdrop to this agreement: the Claimant had been seeking to get a better deal from Gleeson and, when that fell through, was engaged on the same task but vis-à-vis a different party. There is nothing to suggest that the scope of what the Claimant was tasked with doing changed fundamentally to a general advisory role with the hope of improved terms or value materialising. On the contrary, the Claimant's strategy was to put pressure on the LCA and on Liberty with a view to freeing the Defendant to negotiate with other parties or to securing a better offer from Liberty. As late as March 2015, the Claimant was explaining, "*I believe that I have a solution to make a revised deal possible with Liberty.*" The focus was a specific strategy, targeted on Liberty and the parties to the LCAs, with the object of securing better terms.

103. In this respect the Agreement is different to that in issue in *EMFC*, where EMFC's services were to assist and support, not deliver a result (see [71]). The increase in value of the Land was not simply an aim underlying the Claimant's engagement; it was its raison d'être.

104. The question of whether the Claimant's work need to be the effective cause or simply an effective cause is one to which the answer is "*not entirely clear*" (*EMFC* at [61] (by reference to *Foxtons v Pelkey Bicknell* [2008] EWCA Civ 419 at [18])). In this case, on either measure the Claimant cannot succeed. As I have noted, the Claimant's work had been focussed at disrupting the LCAs and putting pressure on Liberty. In fact, the LCA remained intact and eventually expired according to its terms; Liberty never made an improved offer. The Defendant proceeded with Latimer, an introduction effected by Mr Hilder, not the Claimant.

105. The Claimant suggested that he was the reason that the Defendant did not sign the options with Liberty, and that had the Defendant done so he would have been unable to contract with anyone else, such that he was, in that sense, the cause. Bowstead & Reynolds, at 7-029, addresses effective cause and refers to the Court of Appeal's decision in *Millar v Radford* (1903) 19 T.L.R. 575. There, the Court of Appeal held that a causa sine qua non was not sufficient to amount to an effective cause.

106. There was a further suggestion by the Claimant that the Defendant continued to adopt the same strategy advised upon by the Claimant. I reject that. The strategy of registering the LCAs at the Land Registry was discontinued, negotiations broke down with Liberty, the Defendant and his neighbour, Mr Gatt, did not work together to disrupt the development as the Claimant had suggested and the Defendant ultimately sold to Latimer independently of Mr Gatt and through the agency of Mr Hilder. It was an approach that bore no

resemblance to that suggested by the Claimant. He was neither an nor the effective cause of the ultimate sale.

Was the Agreement intended to be legally binding

107. In light of what I have found regarding the terms of the Agreement, the Claimant cannot succeed even if it is binding. It remains important to address the question, however, because it is relevant to the claim for a quantum meruit.

108. The Defendant put his case on two grounds – that the Agreement was not intended to be binding and that it was two vague to be a contract. The first ground had two related sub-parts – that the Agreement was between family members and was, in any event, intended by the Claimant to be binding in honour only.

109. Taking, first, the family relationship, at the time that the Agreement was entered into Ms Kempson was both married to and in partnership with the Claimant and it is not disputed that the contract was a partnership asset. Indeed, at one point it was a central element of the Defendant's case that only the partnership could bring this claim, although by trial that argument had fallen away, the Defendant having come to realise that the dissolution of the partnership on the Claimant's divorce had resulted in the claim belonging solely to the Claimant. At the relevant time, however, this was an agreement between siblings and brothers-in-law.

110. As Chitty notes at 4-239, intention has been found in an agreement between siblings following a meeting convened for commercial purposes (in *Johal v Johal* [2021] EWHC 1315 (Ch) at [42]). The Agreement was unquestionably of a commercial nature both in terms of its content and in that all parties treated it as a partnership asset. Moreover, while the precise details of the Schedule of work prepared by the Claimant was disputed, he plainly did perform significant amounts of work in an effort to further the Defendant's financial interests and, by virtue of the profit share, his own. Again, that suggests more than an informal favour for a family member.

111. The evidence of the Defendant and Ms Kempson was that the siblings were not especially close given the Defendant's frequent travel on business and periods of residence in Spain. That, again, goes to rebut the suggestion that the Claimant would undertake significant work without wanting to have a legal right to be paid. As I have noted above, in both the 7 December 2013 and 29 March 2015 emails he stressed that he had offered the terms he did because of the family relationship. However, I have found that to relate to working on a no-win no-fee basis; the Claimant would not normally have offered such terms to his clients at all. It did not relate to whether the terms, when offered, were intended to be legally binding.

112. Finally, the Defendant accepted that he did contract with the Claimant in respect of the profit share from advice provided to other landowners. That is inconsistent with any argument that the family relationship as such precluded the Agreement from being a binding contract. The Defendant would have

needed therefore to identify something specific that elevated the importance of the family relationship in the case of the Agreement. He did not do so.

113. Accordingly, it seems to me that the Agreement was a commercial arrangement that all parties understood and intended should be binding. The Claimant offered what he considered to be softer than normal commercial terms because of his relationship to the Defendant; he still expected those terms to be legally enforceable, however.

114. In support of the contention that the agreement was unenforceable as being binding in honour only Mr Darton KC referred to *Cobbe v Yeoman's Row* [2008] UKHL 55. I accept that in his witness evidence and in the course of his cross-examination the Claimant referred to his expectation that the Defendant would "honour" their arrangement. As was the case in *Cobbe* at [74], however: "*'Honour' is used, as a verb, to describe compliance with both contractual and non-contractual promises, and so its use rather elides the difference between them.*"

115. Moreover, the references to "honour" in the record are thin. In his email of 29 March 2015 the Defendant urged the Claimant to act "*truthfully and honourably*" in disclosing any terms he had agreed with Liberty. However, the context was that the Claimant wanted transparency; he was not commenting on whether or not the Agreement was binding. When dealing with remuneration, earlier in his email, he made no reference to the Defendant being obliged to act honourably or in honour. The 7 December 2013 email, which was much closer in time to the formation of the Agreement, made no reference to honour at all. On the contrary, it is stated in plain terms that the Defendant was to pay the Claimant.

116. It is somewhat notable that the Claimant made no effort to document the agreement for so long. The 6 January 2015 letter states this to be a professional obligation under the RICS rules, yet the Claimant had done very little to discharge that obligation for 18 months. The 7 December 2013 email plainly was not sent with a view to satisfying this obligation; the context makes clear that it was prompted by the Claimant's unhappiness at the Defendant sharing his advice with other landowners.

117. It was put to the Claimant that the January 2015 letter was in fact prompted by his divorce and a desire to put his affairs in order. The Claimant broadly accepted that and it seems to me that is the most likely explanation. That does not change the nature of the Agreement, however. The failure to document it shows the Claimant to have been overly relaxed in his record keeping practices; it is only very limited evidence that he was equally relaxed about his legal right to enforce the Agreement.

118. The Defendant's evidence makes various references to the Agreement being informal and not legally binding. Nowhere does he point to that ever being discussed at the time, however. On the contrary, in his witness statement he explained that at the 3 August 2013 meeting he used words to the effect that "*I am happy for you to keep trying* [to increase the sale price of the Land] *and if*

you succeed I'll happily pay you for it." He does not suggest that he ever explained that the right to payment was not to be legally binding.

119. His response to the 6 January 2015 letter is also noteworthy. In his statement the Defendant claims he did not respond because he viewed the arrangement as an informal one, "*not some land contract full of contingencies such as the one Liberty was offering.*" As I have noted, that is untrue. He did respond and asked that the indexation provision from the Liberty option also be inserted into the wording provided by the Claimant. In my view he did so because he understood the Agreement was intended to be legally enforceable and wanted it to track the language used in the option so that he was not disadvantaged.

120. The second ground is that the agreement is too vague to create a binding contract. This turns on the terms of the Agreement. I have found that the trigger for payment was the Defendant's receipt of better terms than those offered by Liberty and that the Claimant be at least an effective cause of that happening. While there may be a factual issue over causation, there is no insurmountable issue with vagueness in such an arrangement. The outstanding issues such as time of payment can readily be resolved.

121. If I am wrong on that, and trigger for payment under the agreement was based on the value of the Land, the question arises of how and when that is to be determined.

122. Mr Falkowski relied on *Brown v Gould* [1972] Ch 53 for the proposition that the machinery for valuation was something that the court could determine. Up to a point I accept that. Both experts agreed that valuation must be by reference to the RICS Red Book and that they would be extremely uncomfortable adopting any other approach. It therefore seems there is no real debate about how the Land is to be valued.

123. Much more difficult is when the Land is to be valued. That is a critical part of the determination under the RICS Red Book, and one for which no guidance is given. *Brown* does not suggest that the time of valuation is part of the mechanics a court can resolve because the parties' agreement in that case specified the time for the valuation to take place, and so the issue did not arise.

124. The expert evidence in this case highlights the scale of the problem. Mr Sudworth valued the Land at £18 million on 1 March 2018 and in October 2019 but said it was not possible to value (but would be worth significantly less) by June 2023. Mr Fowler valued it at £5 million in March 2018 and October 2019 but only £1.2 million in 2023.

125. As I have noted, the Claimant's evidence was that there was insufficient time at the meeting on 3 August 2013 to pin down the trigger for payment, in part because the Defendant would not sufficiently have understood concepts such as satisfactory planning permission. That necessarily means that a valuation date by reference to planning permission could not have been agreed at the 3 August meeting.

126. The Claimant's submission was that the valuation had to be carried out on the date that outline planning permission was granted, since that was when the increase in value became bankable. Mr Falkowski contended that the experts agreed that the grant of outline planning permission crystalised value. There were a number of difficulties with that submission.

127. First, that was not my understanding of their evidence. Both experts agreed that outline planning permission was a critical step, but both also agreed that there was a significant change to the value of the Land between October 2019 and June 2023. Mr Sudworth did not place a figure on that change, simply noting that the value in June 2023 would be "*significantly less*". Mr Fowler estimated a fall in value of 75%. Neither is compatible with the suggestion that value has in some way crystalised.

128. Secondly, when pushed, Mr Falkowski accepted that it would be better to use the date on which any such permission could no longer be challenged by way of judicial review. As it transpired, as both experts recognised, the value was subsequently affected by the Natural England requirement for water neutrality, which would not have been the case had final planning permission been granted in respect of it. That is consistent with Mr Fowler's view that a grant of final planning permission further derisked the site. Both the expiry of the right to seek judicial review of an outline permission and a grant of final permission are therefore stages in the planning process that affect value. It is hard to see why the former is relevant but the latter is not.

129. Thirdly, it is apparent from the background to the Agreement that outline planning permission was not the only possible valuation date. Indeed, it was not used in other agreements or draft agreements. The LCAs and the Liberty options, which were the backdrop to the parties' discussions in August 2013, both used a definition of planning permission that excluded from its scope a permission subject to adverse conditions (the definition of which differed between those agreements). The Liberty option also gave Liberty considerable discretion in determining what was satisfactory.

130. This range of possible dates is significant on two levels. First, without settling on a date it is impossible as a practical matter to carry out the valuation. The range of valuations in this case demonstrate that very clearly. Secondly, since no date was agreed between the parties on 3 August 2013 the Claimant must show that a term is implied into the Agreement. Not only is there no pleaded case on this, the fact that there are multiple possible dates that could have been used is fatal to an implication argument. Such a situation was considered in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 482, where the Court of Appeal emphasised: "*it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred…*". Here, there are multiple possible alternative dates, and none of them can be said without doubt to be the preferred option. The Claimant would want an early trigger, in the form of outline permission (alternatively, which is in itself telling, outline permission

not subject to judicial review); the Defendant would presumably have wanted to reduce the risk, suggesting final planning permission.

131. I have found that the agreement was premised on an offer of improved terms, in which case the valuation date is straightforward: the date of the offer. It is also of limited significance because what matters is the price to be paid, which would be specified in the offer. By contrast, had the agreement been based on the value of the Land the valuation date is critical. No such date was agreed between the Claimant and the defendant on 3 August 2013, or indeed at any time subsequently. No guidance is offered by the RICS Red Book. The different stages leading to a grant of final planning permission can all affect value; none is obviously better than or preferable to any other, rendering implication of a term, which in any event was not pleaded, impossible. In such circumstances, had the agreement been premised on value it would, in my view, have been void for uncertainty.

Conclusion on the Agreement

132. On the morning of 3 August 2013 the Claimant and the Defendant entered into a binding oral contract. The Claimant was to exercise his professional skill to improve the terms on offer to the Defendant in return for 15% of any improvement in terms that he was a cause of securing above the £250,000 per acre then contemplated in the draft Liberty options. If no improvement was achieved, or if it was achieved independently of the Claimant's work, he was to receive nothing.

133. The subsequent Latimer offer had nothing to do with the Claimant. His strategy of attacking the LCAs was irrelevant because it lapsed simply by effluxion of time. His attempt to put pressure on Liberty had not yielded any improved offer. There is also a question of how the Latimer offer is to be valued, which I address below, but the causation point is in and of itself fatal to the contract limb of the claim regardless of how that question is answered.

The claim in unjust enrichment

134. In the alternative to his claim in contract the Claimant seeks to recover a quantum meruit on the basis of unjust enrichment. That claim appears to be premised on a failure of basis, although it was far from clear if that was the case or, if it was, when the failure of basis was said to arise.

135. The elements of a claim in unjust enrichment were recently considered by the Supreme Court in *Barton.* There, Lady Rose referred at [77] to the judgment of Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149 in setting out the four factors that the court must consider in any claim for unjust enrichment: whether the defendant was enriched; whether it was at the claimant's expense; whether that enrichment was unjust; and whether there are any defences.

136. Lady Rose then turned to the specific issue of failure of basis as an unjust factor. Again, she referred to *Dargamo* and specifically Carr LJ's judgment at [79] in which she stated:

> The core concept of 'failure of basis' is that a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see Goff & Jones [7th Ed 2007] at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing consent, it differs in that it is concerned with qualification of consent, as opposed to impaired or vitiated consent (see Burrows *The Law of Restitution* (3rd Ed, 2011)).

Enrichment

137. As Goff & Jones (10th Ed 2022) explains at 4-32, the burden is initially on the Claimant to plead what services were provided and the basis on which they should be valued. The burden then shifts to the Defendant to show why the benefit was worth less to him than the market value. At 4-33 Goff & Jones refers to the judgment of Lord Clarke in *Benedetti v Sawiris* [2013] UKSC 50 at [23]:

> A defendant can always simply assert that he valued a benefit at less than the market value. However, a court will be very unlikely to accept such an assertion unless there has been some objective manifestation of the defendant's subjective views. In principle, this can occur before or after a transaction, although conduct after the transaction is likely to carry little weight.

138. The first step is to ascertain what work was done by the Claimant for the Defendant. The Claimant has pleaded his quantum meruit claim by reference to the Schedule. That document was prepared partly from his contemporaneous records and partly from his recollection. The Defendant contests its reliability.

139. On this issue I have considerable sympathy with the Defendant's position. The events in question occurred some eight years before proceedings were commenced but the Claimant's schedule purports to be accurate to three-minute units. That is simply not credible.

140. Moreover, it significantly exceeds the Claimant's estimates at the time. In the 7 December 2013 email the Claimant said that he had carried out, by that stage, £15-20,000 of work for the Defendant. The Schedule suggests that the sum is over £26,000. I recognise, of course, that the numbers given in December 2013 were intended as quite a vague estimate; that much is obvious from what the Claimant says in his email and from the broad range. Equally, however, a part of what the Claimant has done for the current proceedings is an estimate, and one conducted significantly further from the events in question.

141. Finally, when it was put to the Claimant in the course of cross-examination that he was seeking to recover for items that were not properly recoverable he said that he was not seeking to claim for all items in the Schedule. Yet the Schedule

is headed "*These are chargeable items*" and the total in the Schedule of 231.2 hours is the total claimed in the Reamended Particulars of Claim.

142. In my view this document was very much the Claimant's most ambitious case, more suited to the purposes of negotiation than as evidence upon which very much weight could be placed in court proceedings. Nor do I accept that it was legitimate to ask the Defendant whether he could positively say that any work detailed in the Schedule was not done; in many cases the Defendant would not know precisely what work was done, and in even more would not know how long it took the Claimant to carry out.

143. Ideally, the estimate would be tied to contemporaneous or otherwise objectively verifiable evidence. That is not necessarily limited to diary entries, emails or attendance notes. By way of example, the Claimant carried out numerous Land Registry searches; these will typically take similar amounts of time and a reasonable estimate can be made of what that time was. That covers a significant number of the entries and in respect of them I consider that the Schedule establishes at least a prima facie case.

144. Where recovery was sought for other items, such as commenting on the land options on 4 November 2013 (for which eight hours is claimed totalling £1,520 but which resulted in a two page note) an explanation should have been given in the pleaded case or a witness statement explaining the basis for the estimate. Otherwise, the time is no better than the unaided recollection of a witness that cannot sensibly be assessed. I do not believe they offer any reliable guide to the amount of work actually done, and would not allow recovery in respect of them.

145. The number of hours shown to have been worked then needs to be multiplied by the market rate for that work. The Claimant's then hourly rate of £190 was addressed by both experts. Mr Fowler has spent his whole career at Savills and accepted that he was not familiar with the sorts of rates charged by an experienced, self-employed surveyor such as the Claimant. He estimated that Savills would have charged in the region of £170-220 over the relevant period and then applied a discount. Mr Sudworth adopted a similar approach by starting with his firm's rate for a surveyor of equivalent experience to the Claimant, which was £200 per hour. On that basis he considered that the Claimant's rate of £190 was a reasonable one. He was not challenged on that aspect of his evidence.

146. From that evidence it is apparent that a rate of £170-220 was the market rate over the relevant period for an experienced surveyor with the skills one would associate with Savills or Vail Williams. It is also apparent, from the contemporaneous evidence, that the Defendant sought the advice of Savills – that was the quality of advice that he demanded. Finally, he worked with the Claimant for a period of 18 months, and initially seemed to feel that he was receiving the level and quality of service he wanted. In the circumstances I accept that the market rate for the Claimant would have been at or above £190, such that the rate claimed is a reasonable one.

147. As Goff & Jones notes, the burden then moves to the defendant to show why they were not enriched. In this case the Defendant denies that he benefitted

from the services and advice provided by the Claimant. This appears to be tied to the assertion in respect of the contract claim that the Claimant's actions did not bring about the Latimer offer. However, the claim in contract and the claim in unjust enrichment are, on the Defendant's case, different and mutually exclusive: for reasons I go on to address, the Defendant asserts that the quantum meruit claim is only even possible if there is no valid contract. The suggestion that a non-existent contract could be used to cap recovery in a claim on a wholly different basis is an unattractive one simply as a matter of logic: either there was an agreement (in which case the claim in quantum meruit is not, and on the Defendant's case cannot be, pursued) or there is not (in which case it can have no legal effect). As the Court of Appeal noted in *Rover International Ltd v Canon Film Ltd* [1989] 1 WLR *per* Kerr LJ at 927H:

> I do not think that the contention in favour of a 'ceiling' is in accordance with principle. It would involve the application of provisions of a void contract to the assessment of a quantum meruit which only arises due to the non-existence of the supposed contract.

148. It also seems to me to fall foul of Lord Clarke's observations in *Benedetti*, quoted above. Aside from pointing to the Agreement, which is irrelevant to the quantum meruit claim, it is unclear why the Defendant says he has benefitted by less than the market value of the Claimant's services.

149. Accordingly, had the question of enrichment been relevant, in my view the Defendant was enriched by the receipt of the Claimant's services. The claimed rate of £190 per hour represents a market rate. However, the evidence as to the services provided is unreliable. To the extent that evidence is supported by contemporaneous documents or is otherwise objectively verifiable those hours would have been recoverable, but not otherwise.

Unjustness

150. The unjust factor pleaded by the Claimant was that the services were provided "*at* [the Defendant's] *request and/or in anticipation of being paid, between January 2013 and January 2017*". That raises a number of unanswered questions, not least what request is said to have been made, the basis for the alleged anticipation and the timing of both, that are fundamental to the unjust enrichment claim. In particular, in this case the relationship between the parties changed over time, such that what is said in the Reamended Particulars cannot apply equally to all the periods it is said to cover. The best that can be done is to work chronologically.

151. Despite what is said in the Reamended Particulars, the Claimant sought to recover sums back only to March 2013. At that point he was working for Gleeson. As I have noted, his evidence was that his work went beyond that which was strictly needed to make the Gleeson introduction, but was also that he had not communicated that fact to the Defendant. As such, it seems that at this stage of the parties' relationship there was no request from the Defendant

for the additional work and no anticipation (or at least no anticipation with any sensible basis) that the Defendant would pay for the additional work.

152. That conclusion is supported by the fact that the unjust enrichment claim is pleaded as an alternative to the contract claim. On any analysis the Agreement only incepted in August 2013. If the quantum meruit is premised on the Agreement in some way having failed, it logically cannot arise before the Agreement was thought to have come into effect.

153. That takes the analysis forward to August 2013, when I have found that the Agreement was entered into between the parties and was a contract, rather than being binding in honour only. It seems to me that the decision in *Barton* is therefore highly significant. In that case the majority of the Supreme Court found at [96] that:

> When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty being unjust.

154. On this point, the dissenting Justices were in agreement with the majority. Lord Leggat emphasised at [191]:

> In relation to the subject matter of the contract, the law of contract determines, and governs the consequences of, not only the existence but also the absence of an obligation on one contracting party to confer a benefit on the other. To redistribute the allocation of benefits and losses provided for by the law of contract by applying another set of legal principles would undercut this regime.

155. Finally, Lord Burrows noted at [237]:

> The parties' own allocation of risk can override the law of unjust enrichment that would be imposed if there were no such exclusion. If the unilateral contract was an 'if, but only if' contract in the strong sense, restitution for unjust enrichment would have been excluded.

156. Even on the Claimant's case, the Agreement was an "if but only if" contract. As the Claimant recognised in the 7 December 2013 email: "*I might earn nothing at all.*" The Agreement was the factual and legal basis upon which the Claimant carried out the work. By its terms, it precludes a claim in unjust enrichment.

157. The Claimant appeared to suggest that the position potentially changed in November 2014, when the Claimant became concerned that the Defendant might sign the Liberty options after all and contacted him to ask for payment. The precise nature of that suggestion was unclear, however:

i) The exchange is not referenced at all in the Reamended Particulars of Claim or the Reply.

ii) In his witness statement the Claimant said that he raised the prospect of being paid with the Defendant and was assured by the Defendant that he would "*look after*" the Claimant if the Defendant signed the Liberty options. That is consistent with what the Claimant then said in the 6 January 2015 and subsequent letters, which included such a provision apparently as a term of the Agreement. However, if this was a variation it is unclear what consideration is said to support it. Even on the wider view of consideration contemplated by cases such as *Williams v Roffey Bros* [1991] 1 QB 1 there must be at least practical benefit, but none is alleged. If the Agreement had been a unilateral contract, changing it to a bilateral contract under which the Claimant was obliged to provide services would, in my view, constitute consideration, but for the reasons I have given it seems to me that the Agreement was a bilateral contract all along.

iii) Mr Falkowski suggested in submissions that this was not a variation but, rather, a new agreement. If that is the case it should have been pleaded as such pursuant to PD16 paragraphs 7.4 and 7.5 and was not. In any event, that would not in itself answer the consideration question, and is at odds with the way that the January 2015 email is drafted.

iv) Even if the exchange amounted to a binding variation or a new binding agreement the evidence suggests that it was tied to execution of the Liberty option, which never happened.

v) The Claimant suggested in cross-examination that the November 2014 exchange was the basis of his claim for a quantum meruit. Again, that is difficult to follow. If there was no variation to the Agreement the difficulty based on *Barton* remains – the Agreement governs and it says the Claimant gets nothing. In any event, if the unjust factor only arose in November 2014 it cannot possibly support a claim for work done before that date because the basis on which those services were provided has not failed.

158. In my view the November 2014 exchange could not be a basis for a quantum meruit claim. It is unclear what enforceable legal basis it could have, and even if it had some legal basis it was tied to the execution of the Liberty option, which never happened.

159. If I am wrong on the existence of the Agreement then, as Mr Darton KC largely accepted, *Barton* does not apply and the case for failure of basis becomes much stronger. To my mind, if the Agreement had not been entered into or had not been enforceable the claim for failure of basis would be unanswerable, because the Claimant plainly believed he did have some arrangement in place under which he would be entitled to be paid and the Defendant, for the reasons I give above, had encouraged him in that belief.

160. In such a case, the failure of basis could only have been after the 3 August meeting with Mr Walton had concluded. In the period up to July the Claimant had been working on arranging a deal with Gleeson; he had made clear that the Defendant would not be expected to pay for that work. Thereafter the Gleeson

arrangement fell away, but the Claimant does not suggest that he told the Defendant he expected payment, less still that the Defendant agreed to pay anything. The Claimant's preparation for the 3 August meeting itself preceded anything said by the Defendant and so the Claimant would have carried out that work regardless. Similarly, I very much doubt that if the Defendant had flatly told the Claimant he had no interest in his proposal in the short meeting before Mr Walton arrived that the Claimant would have refused to see Mr Walton, to whom he intended to pitch his services.

Conclusion on quantum meruit

161. The Agreement is fatal to the quantum meruit limb of the claim. As the Claimant recognised, this was a no-win, no-fee deal. If he did not achieve the trigger for payment in the 3 August 2013 agreement he could not fall back on unjust enrichment.

162. If I am wrong about the existence of the Agreement then there is a claim in unjust enrichment for failure of basis. That claim could not have arisen until after the meeting with Mr Walton on 3 August 2013, however. The parties agree that the Defendant's email of 30 March 2015 terminated the Claimant's right to any further recoveries.

163. In either event the November 2014 exchange was irrelevant. There was no obvious consideration to support a variation to the Agreement or to support some new contract, and without a variation the Agreement governs and precludes an unjust enrichment claim for the reasons explained. If there was no Agreement or if it was unenforceable there was a failure of basis from 3 August and the November 2014 exchange adds nothing to it.

Quantum

Valuation of the claim under the Agreement

164. My finding on the Agreement has a significant impact on the valuation case. That case was premised on, and really only on, determining the value of the Land at three different dates: the grant of outline planning permission in March 2018; the sale to Latimer in October 2019; and the date when the experts performed their respective valuations in June 2023.

165. The first difficulty for the Claimant is that this assumes he is right in his reading of the Agreement and he has a claim based on the value of the Land. I have found that he is not, and his claim is based exclusively on the value of the deal with Latimer. As such, a valuation of the Land is not especially helpful. That is no criticism of either expert, both of whom approached the exercise in accordance with their instructions.

166. The Latimer deal is not straightforward to compare to the trigger threshold of £250,000 per acre. The Liberty option was premised on a cash payment per

acre based on development value. The Latimer offer does neither of those things:

i) There is an upfront cash payment of £149,078 per acre for 29.9 acres. Obviously, that in itself presents no issue in assessing value.

ii) The Defendant is entitled to an overage of, broadly, 50% of the uplift after deduction of costs. Mr Fowler valued the land with such an overage in place as being between £40,000 and £73,000 per acre. With respect, in ascertaining the value of the terms secured by the Defendant the issue is not what the land bought by Latimer would be worth to a purchaser, given that it is encumbered with an overage. It is what the overage is worth to the Defendant. During his cross-examination Mr Sudworth said the overage ought to be worth the difference between what was paid and his figure of £18 million. I discounted that answer, which was given without real consideration and failed to deal with such issues as the fact that the valuation date is yet to occur and the complexity of resolving the water neutrality issue.

iii) The Defendant retained Owl Castle Barn and 1.5 acres as gardens. That seems to me significant. In each expert's calculations, all 31.4 acres are treated in the same way. Mr Sudworth explained that any developer would not pay a premium for the Defendant's house because it would be demolished as part of the redevelopment of the site. That makes perfect sense if one is valuing the Land, but if one is considering the value of the Latimer offer compared to the £250,000 per acre in the draft Liberty option, the fact that the Defendant retains a residential asset rather than development land seems to me potentially relevant. Mr Fowler excluded the 1.5 acres in question and valued only the development land sold to Latimer, but that leaves unanswered the question of what the total deal is worth to the Defendant because it ignores what he has been able to retain.

167. Put another way, under the Liberty deal if the option was exercised the Defendant would have received £250,000 per acre, a total of £7,850,000. Under the Latimer deal he received £4,457,440, retained a house as a residential, not a development asset (the value of which has not been considered) and had a contractual right to overage (which has also not been valued).

168. It is simply not possible to say what those non-cash terms are worth. The expert evidence, and I stress again through no fault of either expert, does nothing to assist. I note that paragraph 27 of the Defence describes the terms as better than the Liberty offer, but I have no means of assessing why or by how much.

169. Nor do I consider it to be an alternative to use the value of the Land at the date of sale to show what the sale should have achieved. The argument would be that the sale to Latimer was poorly structured and favoured the buyer, such that the actual sale value should be replaced with the value that ought to have been achieved.

170. Both experts agreed that the sale was poorly structured and favoured Latimer, and I accept that it was. However, while I have already found that the sale had to be at arm's length, I have found that it did not need to be "*at best price*". Although the sale to Latimer may have been flawed, the parties agree that it was an arm's length transaction, so the requirements of the Agreement were satisfied. To go further than that would be to introduce a best price requirement at the valuation stage having rejected it at the contract construction stage. Plainly, that is impermissible.

171. It therefore seems to me that the Claimant's case on valuation fails for want of evidence. It was part of his case that the alleged two limbs of the Agreement were based on the value of different assets – the land and the terms. He has valued one, I have found that he agreed to be paid on the basis of the value of the other. Ships have passed in the night.

172. If I am wrong on that and the value of the Land is in some way relevant, as I have noted, both experts agreed that the basis for valuation was the RICS Red Book. In ascertaining the value of the Land they also agreed that it was necessary to use both a comparables approach – looking at the amount similar property had sold for – and a residual value approach – calculating what the final development would sell for and deducting the costs of development and the developer's profit to determine the land value. They also agreed that if the comparables were sufficiently close that was the better approach to use.

173. There they very much parted company. Mr Fowler thought the comparables available were not sufficiently close; Mr Sudworth thought they were. Mr Fowler's residual valuation calculation came in at £5 million for both March 2018 and October 2019. Mr Sudworth's equivalent calculation had a sensitivity analysis and so produced a range of £11,993,172 up to £20,199,058, with his preferred figure being £16,096,115. However, he considered it stronger to use a comparables approach, which suggested a figure of £18 million. Again, those figures applied to both March 2018 and October 2019. Mr Sudworth did not feel able to value the Land in June 2023 due to a lack of updated costings, limited visibility of comparable transactions and the uncertainty resulting from water neutrality. He recognised, however, that the value would be "*significantly less*" than in 2018 or 2019.

174. To the extent that the Land's value were a relevant consideration I would have preferred Mr Sudworth's calculations based on residual value. I say that for the following reasons:

    i) Mr Fowler's calculation of £5 million for the Land with outline planning permission is significantly below the option price proposed by Liberty years before the Land was even zoned for development. Both experts agreed that a grant of outline planning permission ought to improve the value of land, and Liberty was obviously an experienced developer keen to make a profit, so would not willingly have overpaid. In the circumstances it at least required explanation as to why the price with outline permission should be almost 40% lower than that proposed by Liberty without permission.

ii) The Latimer deal involved an upfront payment of £149,078 per acre for 29.9 acres. That payment alone is only around £11,000 per acre less than Mr Fowler's valuation at the same date, yet both experts agreed that the sale was poorly executed and favoured the purchaser, no value has been ascribed to the overage and the Defendant retains Owls Castle Barn, whose value is unknown but as a residential property near Horsham with 1.5 acres of grounds may well exceed £240,000, which would be the price represented by Mr Fowler's valuation of around £160,000 per acre. Again, that seems to me unrealistically low, particularly in light of paragraph 27 of the Defence, which describes the Latimer offer as involving better terms than those proposed by Liberty.

iii) Mr Fowler carried out a sensitivity analysis but did not include it in his report. I therefore have no way of assessing how any findings I make might alter his assumptions.

iv) I was not persuaded by Mr Sudworth's analysis of comparables. In particular, it seemed to me that he attached too little weight to the fact that two of the sites – Hurstwood and Ifield – were purchased by Homes England, a quasi-Government body whose role is to promote house-building. While Mr Sudworth accepted that the identity of the buyer was relevant to the usefulness of a comparator, his answers on how purchase by Homes England affected that question seemed to me defensive to the point of being somewhat ducking the issue. Similarly, he ultimately accepted that the strategic nature of the Ifield site would improve its value – which struck me as an obvious point – but only after repeated back and forth. He also, ultimately, accepted that phasing and landlocking would affect site value but also only after repeated questions. He had not, in my view, attached sufficient weight to those factors and they undermine the value of his comparables.

v) By contrast, his answers on the different factors that went to make up his residual value calculation were strong and he had an obvious grasp of the detail. He was prepared to make sensible concessions on issues of delay and sales rates. He recognised that his report had been prepared without the assistance of a project manager or quantity surveyor, which was in accordance with his instructions, and that he was therefore working with historical costs data and had limited transparency of current costs.

175. Had land value been the appropriate test I would therefore have ordered a payment based on Mr Sudworth's residual value calculation adjusted to allow:

i) Four years to the commencement of building.

ii) Sales rate of six units per month.

iii) Costs increase of 5%.

The issues identified by the parties

176. The parties agreed the issues for resolution at this trial. For the reasons set out above the answers to those issues are as follows:

i) *Did the parties enter into an oral agreement in the terms alleged at paragraph 7 of the Particulars of Claim or at all?* The parties entered into an oral agreement on 3 August 2013 under which the Claimant was entitled to 15% of any amount offered (whether by Liberty or someone else) for the Land in excess of £250,000 per acre. The triggers for payment under that agreement were either receipt by the Defendant of a sum in excess of £250,000 per acre or receipt of an offer to pay that the Defendant unreasonably either declined or lost through delay. The Claimant had to be at least an effective cause of the improved terms.

ii) *Did the parties enter into an oral agreement for the Claimant to be paid 15% of any increase in the value of the land over £250,000 per acre and, if so, the terms of that agreement including any implied terms?* See the answer to issue (i).

iii) *Did the parties intend any agreement that they made to be legally binding?* Yes.

iv) *If there was an Agreement, as contended for by the Claimant, was it an express or implied term of this contract that payment to the Claimant was conditional upon the Defendant having received an increase in the price over £250,000 per acre?* If payment was based on receipt, it was an express term of the agreement that the price was received. If payment was based on an offer to pay and the Defendant accepted that offer it was an implied term that the Defendant had received payment. If the Defendant, in breach of his implied obligations, unreasonably refused to consider or accept an offer, the Claimant would have a damages claim for a sum equivalent to the amount that would have been paid in the absence of that breach.

v) *Whether, if proved, the existence of such a term precludes the Claimant from recovering the quantum meruit value of his services following the decision in Barton v Morris [2023] UKSC 3?* The terms of the agreement taken together, including in particular the express term that the Claimant was not to be paid if no improved terms were achieved, preclude a claim for *quantum meruit* on the basis of *Barton v Morris*.

vi) *Whether, as contended by the Defendant at paragraph 28 of the Amended Defence, the Claimant has to prove that:*

a) *he was the "effective cause" of the Land being worth more than £250,000 per acre.* The relevant question is not what the Land was worth in the abstract; it is the value of any terms offered to the Defendant, in this case the Latimer offer. At a minimum the Defendant had to prove he was an effective cause of that offer. In fact, he did not do anything to bring it about. At most he prevented the Defendant from taking the Liberty offer, but that is a causa sine qua non, which is insufficient. If the relevant

measure had been the value of the Land the reasoning is similar: the language of the emails shows that there had to be a causal link between the Claimant's work and the increase in value. The difference in that case is that the Claimant cannot even show that he was the causa sine qua non.

b) *the Defendant derived benefit from the activities, it being denied by the Defendant that he derived any benefit at all.* Once the Claimant has established that services were provided and a market rate the burden is on the Defendant to show there was no benefit, rather than on the Claimant to show that there was benefit. The Defendant has not discharged that burden.

c) *he pursued the said activities solely for the Defendant's benefit?* Questions of motive and collateral benefit to others (including the Claimant) are irrelevant to the question of enrichment; the issue is whether the services enriched the Defendant at the expense of the Claimant.

vii) *Whether the Claimant was the effective cause of the Land being worth more than £250,000 per acre?* See the answer to issue (vi)(a).

viii) *Whether, if there was no agreement in the terms alleged by the Claimant, the Claimant is nevertheless entitled to a quantum meruit and, if so, the amount that should be paid by the Defendant and when?* Had there been no agreement at all or had the Agreement been unenforceable the Claimant would have been entitled to a quantum meruit between after the meeting with Mr Walton on 3 August 2013 and the Defendant's email on 30 March 2015, from which point it should have been clear to him that he would not be paid for further work. My finding is that there was an agreement, broadly on the terms alleged by the Claimant but the Claimant was or came to be mistaken about the operation of those terms. That mistake does not change the fact that he was providing services pursuant to the Agreement and so there is no basis for the quantum meruit.

ix) *The number of hours work performed by the Claimant and the appropriate hourly rate.* The hours would need to be calculated for the period after the meeting on 3 August 2013 up to 30 March 2015 by reference to contemporaneous records. The entries based on the Claimant's unaided recollection are not sufficiently reliable or explained to prove the time spent on the balance of probabilities. The appropriate hourly rate was £190.

x) *The market value of the Land as at the date of the grant of outline planning permission, the sale to Latimer and experts' reports?* This would need to be calculated by reference to Mr Sudworth's residual value calculation subject to the adjustments I set out above.

xi) *The market hourly rate between 2013 and 2015 for a chartered surveyor possessed of the Claimant's knowledge and experience?* £190