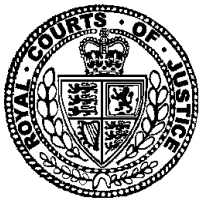

Neutral Citation Number: [2024] EWHC 3002 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2021-BRS-000011**
BUSINESS AND PROPERTY COURT IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliffe Street
Bristol BS1 6GR
Date:

Before:
HHJ BERKLEY
sitting as a Judge of the High Court

- -

Between :

(1) MARTIN MELIA
(2) CAROLE MELIA

Claimants

-and-

TAMLYN AND SON LIMITED

Defendant

Mr Oliver Assersohn for the Claimants
Mr Laurence Page for the Defendant

Hearing dates: 22nd, 23rd, 24th, 25th, 26th, 27th, 28th November 2023

- -

JUDGMENT

This judgment was handed down remotely at 10am on 25 November 2024 by circulation to the parties' representatives by e-mail and by release to the National Archives.

HHJ Berkley (sitting as a Judge of the High Court):

Introduction and Summary

1. This is a claim arising out of an unusual set of facts, albeit that the origins were routine. The

Claimants are career teachers who were approaching retirement in 2014/2015. They owned a property at 2 Scotts Lane, Catcott, Bridgwater in Somerset. That property comprised a period house, a more modern garage building which had been converted to partly accommodate an office, and an outbuilding ("the Outbuilding"). The Outbuilding forms the main subject of this dispute. As of 2015 the Outbuilding was a long and relatively narrow oblong box-shaped single story building with a sloping flat roof originally constructed in the 1960s, understood by the Claimants to have been used as a commercial kennels, but for some years had fallen into disuse.

2. The Claimants' intention was to convert the Outbuilding into residential accommodation in which they intended to live. For this they need planning permission. They intended to divide the plot into two, moving into the newly converted Outbuilding and constructing a new garage (for which planning permission had been obtained in 1994) and selling off the dwelling house and new garage. This would pay off the mortgage secured over the original house which was funding the project and leave them with a lump sum and a mortgage-free retirement home.

3. The Defendant is a company of chartered surveyors which offer a range of services described in the Defence as including "planning services", which themselves include services "*(i) to assist modest residential planning permission applications; (ii) to prepare schedules of work for small residential projects with clients do not wish to obtain specialist architectural design input; and (iii) project management during the construction phase of works*". Mr James Venton was employed by the Defendant variously as Drawing, Planning and Design Manager; Assistant Principal, rising to Acting Principal at the relevant times.

4. It is common ground that the Claimants consulted with Mr Venton in or around June 2015 to advise on and assist with the development of the Outbuilding and construction of the new garage. Mr Venton wrote to the Claimants on 29 June 2015 advising that there was virtually no potential to obtain planning permission for a new dwelling, but it might be possible to obtain permission to reuse the Outbuilding, provided that the works would be limited to conversion only. He said "*The parameters of a change of use/conversion application are that the building has to be capable of conversion without too much in the way of major structural works. In short, we have to basically use the existing building to form the outline of the proposal.*"

5. On 7 July 2015 Mr Venton provided to the Claimants a fee quote for the Defendant to provide services for two stages of work in respect of the Outbuilding: (i) preparation of an application for planning permission; and (ii) preparation application for building regulation approval, including preparation of the construction specification. It is common ground that the Claimants accepted that offer at some point after 13 July 2015 and before 22 September 2015.

6. The precise terms of the arrangement between the Claimants and the Defendant are in dispute, not least because the Defendant pleads that either by themselves, or in conjunction with Mr Venton, the Claimants always intended to embark upon an unlawful, dishonest and sham planning application which from the outset was intended to mislead both the local parish council as well as Sedgemoor District Council (to whom, where the context admits, I shall refer collectively as "the Council" in this judgment) into granting permission to redevelop the Outbuilding without demolishing it, whereas the Claimants' true long-standing intention was to demolish and rebuild all or part of the Outbuilding to give them more space and a better configuration, in the hope that the planning authorities would not notice. The Defendant says, in the alternative, that the Claimants' intentions developed into a similarly dishonest and unlawful project at some point after April 2016.

7. Mr Venton duly produced drawings and drafted a planning application (together with various planning statements, including one which confirmed that the Outbuilding was structurally sound) for a 'true' conversion of the Outbuilding (i.e. one that retained the structure thereof) for which planning consent for change of use was granted on 21 April 2016. Condition three of that consent read as follows:

> "*3. The permission hereby granted permits the conversion of the building to a dwelling. The existing building shall not be demolished and/or replaced with a new structure. Reason: the proposal is only acceptable as it involves the conversion of an existing building. Conversely, the construction of a new building in this place would be contrary to paragraph 55 of the National Planning Policy Framework*."

8. It is the Claimants' case that at an on-site meeting held on 3 May 2016 (and thereafter) Mr Venton positively advised them that various alterations to the footprint, layout, roofline and structure of the Outbuilding would be acceptable to the local planning authority, and that, in reality, once planning permission had been granted and, supervision passed to Building Control, the local planning authority would not object if the Outbuilding was demolished and rebuilt, as long as it looked the same or very similar to the pre-existing building. They say that Mr Venton advised them that such works would be akin to a large repair once he had identified a significant crack in the Outbuilding, and that he advised that the method of achieving this outcome was to build around the existing structure before demolishing it from within. The Claimants state that Mr Venton advised them that he had done a similar thing very many times before without difficulty.

9. In summary, the Claimants' case is that they were wholly dependent upon Mr Venton's advice, that they trusted him entirely, and they simply agreed to proceed in accordance with his advice despite what was said in Condition 3. In August 2016, Mr Venton drew up plans for submission for Building Regulation approval in accordance with his advice, which had included a recommendation that they use an independent approved inspector because the new plans did not "entirely accord" with the planning consent plans. Those plans were approved, and Mr Venton was then appointed by the Claimants (under, it is common ground) a separate contract) as project manager for the intended building work to both the Outbuilding and the new garage. In March 2017 Mr Venton drew up a Schedule of Works and accompanying plans to form the basis of a contractual tender for the work by builders and any consequential contract to be entered into by the Claimants and the builder. Those works involved the demolition of the existing building and construction of new walls on the footprint similar to, but larger than, the existing building.

10. In May 2017 the Claimants accepted a tender from B&G builders Ltd for £262,200 to undertake the works. By 23 August 2017 new foundations had been dug and laid for the new Outbuilding, and the existing Outbuilding had been demolished to ground level. Following a complaint made to Sedgemoor District Council, (apparently about a hedge) a planning officer visited the site in October 2017 and, discovering the extent of the works, instructed the builders to stop working. The Claimants say that Mr Venton then embarked upon a process trying to rescue the position by making false claims about the scope and nature of the work carried out, as well as the state of the original Outbuilding. This included making an application for retrospective planning permission for the demolition and reconstruction of the Outbuilding, all prepared by Mr Venton based on false statements relating to the size and build of the new Outbuilding. The Claimants engaged Ashfords LLP as solicitors for the process they say on Mr Venton's advice to whom these false statements were repeated, as well as to the local parish council at a meeting.

11. The application for retrospective planning permission was refused. This refusal was confirmed upon appeal to the planning Inspectorate.

12. The Outbuilding remains in the same part-built condition to this day. Sedgemoor District Council have not taken any enforcement action to date.

13. The Claimants claim that the Defendant, via Mr Venton, was negligent and/or breach of contract in advising the Claimants as he did. The pleaded particulars are as follows:

    (i) The terms of Condition 3 were clear. The condition did not permit, and indeed purported to and did prohibit any works of demolition or Reconstruction to the Outbuilding alternatively demolition and all reconstruction to the extent and of the nature carried out.

    (ii) It was not the case (and should not have been reasonably considered by the Defendant or Mr Venton to be the case) that the local planning authority would not have been concerned with an alteration of the structure, footprint or envelope of the pre-existing Outbuilding structure that was more than *de minimis.* The alteration proposed by Mr Venton was far greater than a *de minimis* alteration and was not considered by Mr Venton to be *de minimis*.

    (iii) Mr Venton had by his email of 21 April 2016 given the local planning authority assurances as to the state of repair of the existing structure and as to the Claimants' intentions for remediating any anticipated structural difficulties that might be discovered in the course of construction. The council had considered those assurances and relied upon them in granting planning permission. In the circumstances it was wrong to consider (and to advise the Claimants) that the Council would turn a blind eye to demolition and enlargement if they became aware of it.

14. The Particulars of Claim go on to set out various matters about which Mr Venton should have advised in relation to the unauthorised works and the likelihood of the Council allowing the redesigned Outbuilding to be completed. The Claimants also claim that the Defendant acted negligently and/or in breach of contract in advising them to make the false claims they ultimately did make as part of their application for retrospective planning permission in 2018.

15. The Claimants claim damages arising out of the alleged negligence and/or breach of contract under various heads, including payments made to B&G builders; wasted ancillary payments related to the development; wasted legal costs; mortgage interest payments, and the difference between the value of 2 Scotts Lane in its current legal and physical condition, and that which it was prior to the commencement of the unlawful works. They also claim the loss of the chance of obtaining retrospective planning permission which would have been more likely to be granted if they had been advised to make full statements to the planning authorities in respect thereof. That is measured by the putative increase in value of the plot had the retrospective planning permission been granted.

16. As already alluded to, the Defendant relies on illegality and/or moral turpitude to plead that the claim "*should not be permitted*". In summary the Defendant avers that the Claimants claim seeks to impose liability on the Defendant following a dishonest and illegal scheme pursued by the Claimants (alternatively, the first claimant, and Mr Venton) to (i) make a sham application for planning permission for the conversion of the Outbuilding in circumstances in which the Claimants/Mr Venton had no intention of acting in accordance with the permission granted; and/or (ii) knowingly or recklessly carrying out construction works otherwise in accordance with the planning consent, and (iii) conspiring to carry out works that would be zero-rated VAT contrary to the planning permission.

17. More particularly, the Defendant alleges that the Claimants are guilty of encouraging or assisting fraudulent misrepresentation contrary to section 45 of the Serious Crime Act 2007 by encouraging or assisting the commission of an offence by Mr Venton to submit a false and misleading planning application. The defence also alleges that the actions of the Claimants amounted to the making of dishonest and false representations which were intended to make a financial and/or amenity gain contrary to section 2(1) Fraud Act 2006. Further or alternatively the Defendant alleges that the claim of illegality and/or moral turpitude is supported by the Claimants engaging a contractor to follow a schedule of works which deceitfully breach the planning consent obtained by the Claimants contrary to section 171A(1)(b) of the Town and Country Planning Act 1990.

18. The Defence sets out 14 particulars of the First Claimant's dishonesty, ranging from making or conspiring to make a sham application for planning permission to convert the Outbuilding when his intention was to carry out works otherwise than in accordance with plan submitted with the application, to instructing Mr Venton to prepare a schedule of works for the construction of the new Outbuilding knowing them to be contrary to the terms of the planning permission, to falsely and dishonestly making statements to representatives of Sedgemoor District Council in relation to both the old and the new Outbuildings.

19. In all circumstances, the Defendant says that to allow this claim would be damaging to the integrity of the legal system because it is fundamentally based on unlawful and fraudulent intent and activity.

20. In relation to the allegations of breach of contract and negligence, the Defendant denies any duty of care was owed to the Claimants at common law and denies the claim in contract by virtue of the alleged illegality and/or moral turpitude. As regards the advice that it is alleged ought to have been given, the Defendant says there was no duty, contractual or otherwise, on the Defendant to warn or advise the Claimants as alleged and/or the Claimants were well aware of the facts and matters forming part of the alleged omitted advice, for example the Claimants knew that a failure to act in accordance with the planning permission would be unlawful.

21. Each head of damages is denied by the Defendant. It is said that the Claimants received the value of the construction work which was carried out and paid for: the fact that it cannot be completed does not entitle Claimants to recover those costs. Payments made to the Defendant are irrecoverable because there was not a total failure of consideration it is said. The following heads of damage are pleaded as being outside the scope of the Defendant's duty: the cost of consultants associated with the retrospective planning application; the mortgage interest, and the differential value between the plot with a valid planning consent and its current value. The costs of demolishing and/or rebuilding the Outbuilding and the new garage is said to be speculative and based on further unlawful activity, and so is an abuse of process. Finally, it is pleaded that any loss associated with the deceitful retrospective planning application is irrecoverable by virtue of illegality and/or moral turpitude.

22. Contributory negligence is also pleaded.

23. In their Reply, the Claimants deny any intention to submit a false planning application. They say they were always guided by Mr Venton. They accept that they would have liked to have enlarged the Outbuilding by way of adjusting the footprint, but they always sought and followed Mr Venton's advice which, *inter alia*, included advice that any application for such enlargement should be made approximately two thirds of the way into the construction. They also aver that they had no sight of the planning application prior to Mr Venton submitting it on their behalf.

24. Importantly, the Claimants aver that they had no notion of demolishing the original Outbuilding until it was suggested to them by Mr Venton at a meeting on-site between the Claimants and Mr Venton held on 3 May 2016. At that meeting, it is said that Mr Venton had considered the state of repair of the structure of the Outbuilding and had concluded that it would be simpler to rebuild the entire thing. Upon the First Claimant questioning the effect of such an act and planning control, it is said that Mr Venton advised him that the planning authority's interest lay in checking that the finished building looked like the design that they had approved, and that his proposed rebuilding of the Outbuilding was a technicality that would have no planning consequences. It is pleaded that he further stated that the rebuilding he proposed was equivalent to a large-scale repair, and repair was not a breach of planning control.

25. The Reply points out that, absent an Enforcement Notice which is not complied with, the Planning Act 1990 does not create criminal offences, and avers that the recovery of damages for negligent advice given by Mr Venton would not defeat the purpose of the Act.

Representation

26. At trial, the Claimants were represented by Mr Assersohn of Counsel (the pleadings having been settled by previous Counsel) and the Defendant by Mr Page of Counsel. I am grateful to them both for their written and oral submissions.

List of Issues

27. The parties helpfully provided a list of issues. I hope that I have addressed each of those below, without the need for setting them out here.

28. I shall make a few preliminary observations on important aspects of the case.

(a) Mr Venton

29. Mr Venton was subject to disciplinary proceedings by the Defendant in the summer of 2021 for breaching his terms of employment by *inter alia* working privately for the Defendant's clients. It is notable that those proceedings did not include any allegations of wrongdoing connected with Mr and Melia's project. However, during these disciplinary proceedings the Defence in these proceedings was signed, alleging Mr Venton's criminal collusion with the Claimants in the allegedly illegal and deceitful project. Moreover, the allegations of criminal conduct by Mr Venton had been raised by the Defendant's solicitors in December 2020 in response to the Pre-Action Protocol Letter which led to this claim. Despite this and the disciplinary proceedings, Mr Venton was not suspended whilst investigations and the disciplinary proceedings were completed. It is not clear to me whether the disciplinary proceedings were formally concluded, but Mr Venton resigned on 1 June 2021, and somewhat surprisingly in the circumstances, he was allowed or required to work out his notice period of three months, departing the Defendant firm on 31 August 2021.

30. Neither the Claimants nor the Defendant provided a witness statement from, nor did they call or witness summons, Mr Venton, who is the only person able to directly contradict Mr Melia's evidence about what was said and done by Mr Venton and by him (Mr Melia), and when; and how Mr Melia reacted to Mr Venton's advice and guidance. Of course, the Defendant may rely on contemporaneous documents, such as they are, to do so, as well as properly drawn inferences. As will be seen, Mr Page relies heavily on this process to challenge Mr Melia's evidence.

(b) Vicarious Liability

31. The Defendant has accepted that it is vicariously liable for whatever it is found (within the boundaries of the allegations raised) that Mr Venton did or did not do in his dealings with the Claimants in the events with which this case is concerned. The Defendant does not invoke the principle that may be referred to in shorthand as Mr Venton having been "*off on a frolic of his own*" thereby avoiding vicarious liability, despite their pleaded allegations of criminality and collusion against him.

(c) The 3 May 2016 Letter

32. The Defendant has disclosed a letter dated 3 May 2016 purportedly sent by Mr Venton to the Claimants following the 3 May 2016 meeting in which the Claimants are warned of the risk of proceeding in breach of planning permission and, by its tone and implication, assert that this was against the advice of Mr Venton. The Defendant relies on this letter to corroborate its position that Mr Venton had always advised the Claimants to abide by the planning consent and warned them of the perils of not doing so. The Defendant's overall stance is that it was Mr Melia who was always pressing Mr Venton to enlarge the footprint of the Outbuilding; depart from the advice given by him, and change the design including demolishing and rebuilding some or all of it.

33. The Claimants deny ever having received this letter until these proceedings. They point out that there is no copy on headed paper; it has other inconsistent features and does not reflect the oral advice given by Mr Venton at the meeting. They say that it is a forgery, probably concocted by Mr Venton when things had gone wrong and inserted into the Claimants' file before he left the Defendant's employ.

The Facts and The Law

34. The parties' pleadings and the skeleton arguments reflect an unusually broad range of potential legal implications depending on the factual findings. This draws me into dealing with the evidence and findings of fact before turning to the law.

The Evidence

35. I heard from Mr and Mrs Melia for the Claimants and Mr Morehen and Ms Frost for the Defendant.

36. I can deal with Ms Frost summarily. Ms Frost is employed by the Defendant's solicitor. She was called to deal with the involvement of Mr Venton's former wife, Ms Tottle, in potentially giving evidence, initially for the Claimants and latterly the Defendant, but who never signed a witness statement for either party. Ms Frost spoke only to the documents, namely draft statements and attendance notes of one of her colleagues who had spoken with Ms Tottle. No reason was advanced why that colleague had not given her evidence. She added little or nothing to the documents themselves which in turn are on the margins of relevance given that Ms Tottle never committed her signature to a statement relied upon by either party at trial.

(a) Mr Melia

37. Mr Melia filed a detailed witness statement, spanning 14 pages of close-typed script. In it, he relates the narrative which is reflected more formally in the Particulars of Claim.

38. He refers to their working lives as teachers, having no experience in property development. They had one bad experience with a builder some 28 years ago when the price doubled during the project of building an extension. For these reasons the Claimants felt they should employ a professional to oversee the entire project. In addition, Mr Melia said that he was suffering from chronic fatigue syndrome at the time and did not want the stress or challenges of managing the project himself. Having heard that the Defendant had managed a similar project nearby, on 8 June 2015 Mr Melia telephoned the Defendant and asked if they would send someone to visit the Outbuilding and tell them whether it had any potential.

39. Mr Venton visited the Claimants on site on 23 June 2015. Either then or before, he had described himself to Mr and Mrs Melia as an Assistant Principal, and as a Drawing, Planning and Design Manager. At the site meeting Mr Melia outlined the project to Mr Venton, whom he described as having a "*confident manner and detailed knowledge of the process, [such that we] felt certain that we were in safe hands. He appeared confident, knowledgeable, and friendly. He was happy that the Defendants were more than capable of acting on our behalf and redevelopment outlined*" by Mr Melia.

40. Mr Melia sets out at paragraph 12(a) – (h) of his witness statement details some of what they were told by Mr Venton in that initial meeting. These can be summarised as follows:

    (a) The Outbuilding was suitable for conversion, and he was confident that he could obtain permission. Mr Melia expressed a reservation about the width of the building being only about 12 feet wide and 6 feet high at its lowest point.

    (b) Mr Venton assured Mr Melia that the planners would accept alterations necessary to make the building habitable.

    (c) Mr Venton specifically said they would be quite happy if the Claimants raised the roof level by a few feet and, since the project would require the removal of the front wall, existing floor and roof, quite happily turn a blind eye to new front walls built a couple of feet further out than the original width that he felt it needed.

    (d) As a rule of thumb, it was okay to enlarge by about 10 to 15% compared to the original during conversions.

    (e) The planners were not interested in measuring the finished building if it looked roughly the same as that which they had approved.

    (f) Mr Venton had been overseeing such projects for many years and had over 100 under his belt. This was in contrast to Mr Melia's position which was that he had no idea of what was allowed or not allowed for conversions.

    (g) Mr Melia raised a concern because of the state of the rear wall, a section of which appeared to be subsiding and large cracks had appeared from ceiling to floor. Mr Venton advised that, if necessary, that part of the wall could be rebuilt.

    (h) Mr Venton confided to Mr Melia that it was "*a bit of a game*" with planning and that he (Mr Venton) knew what was allowed and not allowed, which is often not what the rule books said.

41. All in all, Mr Melia said that he was left feeling much more positive about the project and "very confident" in the ability of Mr Venton.

42. Mr Venton wrote to Mr and Mrs Melia in a letter dated 29 June 2015. Mr Melia acknowledges in his witness statement, and accepted in cross examination, that the letter was of a far more cautious and cautionary tone than that which he alleges was given during the meeting. Mr Melia met this head-on by stating that Mr Venton took an entirely different approach in face-to-face meetings than he did in his formal letters. He compared this to letters he was used to writing to parents as a teacher in which he was always more formal and cautious than he would have been in a face-to-face meeting. The thrust of Mr Melia's evidence in this regard was that Mr Venton encouraged him to disregard the formality of the letters and rely on what he was telling the Claimants face-to-face. This chimes with the approach that Mr Melia says Mr Venton took to the planning process as a whole, e.g. it being "*a bit of a game*".

43. Mr Melia's witness statement next refers to a meeting in September 2015 in which he explored with Mr Venton the possibility of adding a conservatory and a garage and the extent of the planning "*leeway*" that Mr Venton had previously referred to. He acknowledged that Mr Venton was cautious about this at the time, but said that it was "*allowable*" to apply for extensions when the build was about two-thirds complete. Mr Melia stated that he felt that Mr Venton knew "*exactly what he was doing*" and was content to follow his advice. The letter that followed that meeting was, Mr Melia stated, as expected, more cautious in its approach than the verbal advice. He latched onto the reference to the words "*we have to work **in the first instance** within the building you currently have*" (emphasis added) to chime with his understanding of Mr Venton's advice that once planning permission had been granted, things could change.

44. In his statement, Mr Melia goes on to describe how he in essence handed over the planning process to Mr Venton and denies having seen the application before it was submitted, pointing out a number of errors he would not have allowed to pass had he seen it in advance.

45. What happened next lies at the heart of the case. Planning consent was granted on 21 April 2016. Mr Venton visited the Claimants on 3 May 2016 and had a good look at a section of the wall that he had pointed out to Mr Venton as having a crack. Mr Melia's statement says that Mr Venton advised that having thought about it, he had concluded that it would be simpler to demolish and then rebuild the entire building. The statement goes on:

> *I was surprised and said that I thought we would need to incorporate at least part of the existing building in order to for it to be an extension [*by which I presume he means conversion]. *Mr Venton explained that, now that the planners had given permission for it, they were only interested in checking that at the end of the project the finished building looked like the design that they had approved. I clearly recall that he reassured me by confidently stating:*
>
> *a. His proposal to rebuild was only a technicality.*
>
> *b. We were allowed to repair the building, which was what he was proposing on a large scale.*
>
> *c. We had established the principle that there should be a residential property on the site.*
>
> *d. Had the building be made of stone nor had any particular architectural features, we would be allowed to demolish it instead, he explained, it was made of thin, single – skin breezeblock and we will be replacing it with better quality breezeblock and render. He said that the planners were happy to turn a blind eye to this kind of thing as long as the finished product look like that which they*

had approved.

e. He had done a similar thing many times before without any problem.

f. It would have the added advantage of allowing us to move the building in a few feet from the boundary and enable us to make it a little longer. He was very confident and assured about it, and already convinced me that he knew the ways of planning and so I accepted his advice. We then went on to discuss building a garage for the main house the same time as the conversion. I only had permission for this (I thought) that run it past Mr Venton.

g. *He was enthusiastic and I try to describe what I wanted (a garage and workshop) to replace the outbuilding which was to be converted, as I've used it for this purpose for 20 years. This verbal advice was contrary to that given in his letter of 29 June 2015 when he said that "… The building has to be capable of conversion without too much in the way of major structural works.*"

46. Mr Melia goes on to describe the progress of the project. In particular he mentions an email from Mr Venton in which he advises that because the alterations to the plans "*which he had advised were permissible*" were "*not strictly in accordance with the approved plans*", they should use a private building inspector for building regulations. Mr Melia refers to correspondence regarding appointing Mr Venton as project manager and the required schedule of works and tender process that would follow; how he had appointed Mr Venton who would act "*as a buffer between you and the contractor*". He describes how Mr Venton went through his proposals for the conversion prior to putting the work out to tender and how Mr Venton was solely responsible for drawing up the tender pack including the specifications. He accepts that he made some comments on those but this was essentially Mr Venton's responsibility. Mr Venton chose the builders who were to quote. It is common ground that the drawings and schedule of works clearly state that the builders should "*strategically demolish*" the existing building.

47. Mr Melia goes on to describe how the build started, and how it came to an abrupt end in October 2017, most of which evidence is uncontroversial.

48. Following the cessation of works, Mr Melia describes how Mr Venton had persuaded him to adopt the line that the building had needed to be demolished due to it being unstable and unsafe for the builders. He said that Mr Venton had assured him that he could resolve the matter provided Mr Melia put their trust in him, which he said that he did. Mr Melia goes on to describe the instruction of Ashford's solicitors to represent him in the retrospective planning permission application, but that Mr Venton essentially decided what to do and gave the relevant instructions as well as spoke at the relevant Council meetings.

49. Mr Page's cross-examination of Mr Melia's was aimed at demonstrating that it was he, Mr Melia, that was the force behind a plan to put in a planning application to which he had no intention of adhering. It was aimed at undermining Mr Melia's recollections of conversations as compared to the contemporaneous written material. For example, in his witness statement, Mr Melia had referred to wanting a single story building, but he was taken to an email dated 2 July 2015 he had written referring to dormer windows which, it was suggested, meant that he had in mind a 2-story house. Mr Melia stated in response that Mr Venton had been enthusiastic and they should explore what might be possible and that in any event a dormer implied a single story with one room in the roof. Similar questions were put to him about reference to a new roof, to which Mr Melia recalled that Mr Venton had suggested that they would need to replace the roof anyway because of asbestos; that one of the walls would need

to be removed for access and the floor would need to be upgraded to an insulated floor. All of this suggested that there was scope for exploration. It was put to Mr Melia that the letter of 26 June 2015 (the initial letter following the visit) would be more accurate than such recollections. Mr Melia was clear that he had a very clear recollection of these conversations. It was suggested that the email made it clear that it was Mr Melia stating what *he* wanted from the project, whereas Mr Melia referred to the word "*hope*" in the email, and that he was merely sharing thoughts following Mr Venton's preliminary advice and enthusiasm.

50. Mr Melia willingly accepted that he had initial concerns that the Outbuilding would be too small, but those had been appeased by Mr Venton's advice and he was obviously willing to progress matters in accordance with that advice.

51. On questioning, Mr Melia was consistent in his replies that Mr Venton had not in any way led him to believe that the planning application would be made otherwise than in accordance with a true conversion, but that changes could be made later, at the appropriate time as and when he advised.

52. Mr Melia was questioned about alterations and suggestions he had made in respect of various plans, but the consistent response was that it was a natural thing to explore possibilities, but it was always Mr Venton who gave the advice, and it was always advice that the Claimants followed. Mr Venton advised, took any appropriate ideas away and drew the plans and compiled the planning application. He denied having seen the planning application before it was submitted, pointing out that the address was wrong; the year was wrong and the existing windows were described as wood when they were metal. These were details he would not have allowed to pass by, Mr Melia said. The only documentary reference to Mr Melia having seen the planning application was an email dated 8 June 2018 from Mr Melie, some two months after permission had been granted.

53. In one email (6 March 2016), Mr Melia was reporting to Mr Venton that a Parish Council member had been supportive of the plan as a whole and suggested he should attend the meeting, and Mr Melia was seeking advice on that. He mentioned in passing that the Councillor had suggested that he should apply for a "*proper roof*" (by which he meant a hipped roof) because the existing one would render the building a bit cramped. Mr Venton had replied that they needed to retain the roof. This was seized upon by Mr Page as Mr Melia again trying to push the envelope and force a change to the Outbuilding on Mr Venton. Mr Melia was calm in his response, stating that he was merely reporting what had happened, and that, because of Mr Venton's reference to there being leeway in due course he should mention it.

54. He explained (more than once) that what Mr Venton says in writing is not what he says verbally; he never put things down in writing which he (Mr Melia) now realises may have got Mr Venton into trouble. He pointed out that there were gaps in the correspondence when Mr Melia had written, but the reply had been by way of a telephone call.

55. In one email dated 22 April 2016, upon Mr Melia informing him that he had received notification that planning consent had been obtained, Mr Venton had written to Mr Melia stating:

> *Hi Martin*
>
> *I was made aware this was coming only yesterday. The planner phoned me to tell me he was minded to approve but needed some reassurance that the building was structurally sound! I therefore quickly cobbled together (I mean professionally constructed!) a letter of comfort for him which did the trick. …*

It was suggested that this implied that Mr Venton and Mr Melia were in cahoots in trying to mislead the Council, to which Mr Melia replied that he had no idea what Mr Venton was talking about because he had no technical knowledge; he said "*I was really and truly relying on Mr Venton. My only concern was the layout of the rooms not the construction*".

56. Turning to the 3 May 2016 meeting itself, it was put to Mr Melia that this was an important day when everything had changed, which he accepted. Mr Page took Mr Melia to a series of pre-action letters in which the meeting had not been specifically mentioned. He pointed out that he had mentioned it in one, but that he felt the solicitors could not list everything. He accepted it was not referred to in the Pre-Action Protocol Letter of 17 December 2018. Mr Melia felt sure that he had explained everything to his solicitors, but the overarching effect of his evidence to me was that he had not realised the significance of the 3 May 2016 meeting as such until he had had sight of the 3 May 2016 Letter which he had seen for the first time in reply to that letter. He had always been sure that it was only after the planning consent had been obtained that Mr Venton's advice had changed and he had recalled the conversations very clearly. He said that of course he could not be certain that the pleaded words of advice were not given *verbatim* but they were their true effect.

57. Going through some of the pleaded allegations in detail, Mr Page suggested to Mr Melia that the advice that the variations would be "*acceptable*" to the Council (¶13(1) PofC) was different from the Council "*not objecting*" (¶13(2)) in that the former required consent. Mr Melia replied that he took it to mean that the Council would accept it without specifically giving permission for it. He was asked whether ¶13(3) amounted to turning a blind-eye, to which he replied that as he understood it from Mr Venton, the Council would not be concerned about it, even if they knew about it. When it was suggested that Mr Melia knew full-well that this was a suggestion to do something he knew was wrong, he replied that from Mr Venton's advice, it meant that the Council would be turning the blind eye.

58. Asked why he had not told his wife of this new development, Mr Melia explained that he was suffering from Chronic Fatigue Syndrome which led him to be extremely tired and exhausted. He said that he had never been asked why not before, otherwise he could have provided medical support for the proposition.

59. Mr Melia was asked whether he expected this glaringly different advice to be contained in a letter, to which he replied firmly that out of all the many communications he had with Mr Venton, only a handful had been by way of letter: they were nearly all made in calls or meetings. He was adamant that had he seen the 3 May 2016 Letter, he would have remembered and acted on it. He pointed out that Mr Venton had <u>never</u> mentioned his alleged advice in any other correspondence. He also asked rhetorically why, had it been his idea all along, would Mr Venton suddenly become corrupted when it came to the retrospective planning application, taking it upon himself to go to meetings and mislead the Council: that was done to cover his own tracks, he said.

60. Following on from May 2016, the dominant theme of Mr Page's cross-examination of Mr Melia was that it was perfectly obvious that what Mr Venton was alleged to have said or advised on 3 May 2016 and afterwards would be in flagrant breach of Condition 3 of the planning consent, which meant that Mr Melia was (a) driving the scheme and/or (b) voluntarily and knowingly taking a risk. Furthermore, it was Mr Venton who was consistently sounding a note of caution and expressing his concern about proceeding. This was consistently and calmly denied by Mr Melia whose responses took the theme that he was simply going along with what Mr Venton had advised would be perfectly legitimate. Of course he knew about Condition 3, he would say, but the advice he had received and believed was that the variations would be permissible, even if the Council discovered them. He

pointed out that he had raised the seeking of additional permissions from the Council several times, e.g. on 9 May 2016, he was asking by email whether Mr Venton could seek permission for a hipped roof and/or an extension. It is notable that this was sent at a date after which he would almost certainly have received the 3 May 2016 Letter had it been sent.

61. Mr Melia was taken to many plans and schedules which contained generic warnings about needing to comply with planning consents, and a summary of Mr Melia's consistent answers is that he was more worried about the internal room layout and the detail of the accommodation and was not reading the small print. Mr Melia conveyed the sense of excitement and lay-person's interest in the success of the application and the practical things to look forward to which might well lead one to leave the intricacies to his chosen professional. Mr Melia accepted that he had appreciated that under Mr Venton's variations, the old Outbuilding was to be at least partly demolished, but repeatedly said that that was on Mr Venton's advice and only on his advice: the overarching requirement was that the new building looked like the one for which planning consent had been granted. In re-examination, he said that he had not received the detailed builders' plans at the time.

62. Turning to the post-discovery phase, Mr Melia accepted that he had told lies to the Council and to his solicitors. This had come about he said by Mr Venton advising that he could resolve matters if the Claimants would trust him: Mr Melia described it as getting himself out of a hole as well as them. He said he was unhappy telling lies, but Mr. Venton was very confident and suggested that he would leave him to his own devices if he did not go along with him: he was completely in control, he said. He also said that it had been Mr. Venton that had spoken at the solicitors' offices as well as at the Council meetings.

63. Mr Melia said that it all came to a head when Mr. Venton had "*dropped [him] in it*" by suggesting, minutes before the Parish Council meeting that it would be better if he said that it had been Mr Melia's idea with the builder about the need to demolish Outbuilding. He said that that had made him angry and he had remained silent at the meeting, the only thing that he was able to do was to give him a hard stare, he said. It was shortly after that that Mr Melia said that he had decided to "come clean" and tell his solicitors who had then referred him on to a different firm.

64. Mr Melia accepted that he could have intervened at these various meetings to correct matters, but that he had been "a coward" and had failed to do so. He said "*I admit that I was totally wrong. I was and am ashamed. I only did so because* [Mr Venton] *threatened to leave me on my own if I didn't comply*".

65. It was suggested to Mr Melia that he was prepared to lie then, and he was prepared to lie in court, which he denied. He had stopped lying, he said, when he severed his ties with Mr Venton.

66. Mr Page concluded his cross-examination by asking about some of his evidence regarding payments, which I do not need to record here.

(b) Mrs Carole Melia

67. Mrs Melia was called simply to affirm her statement which confirmed that the Claimants had decided to instruct a professional to deal with the project which was important to them, and to thereby avoid problems. She went on to describe what she says have been the devastating effect on their lives and their planned retirement under the headings of retirement, finances, reputation and emotional and mental health. She did not give substantive evidence as to the process.

(c) Mr Charles Morehen

68. Mr Morehen is a surveyor and director of the Defendant company. Historically, he has been the person in charge of training junior surveyors in RICS standards at the Defendant. He became a director of the company to meet RICS compliance requirements of having one professional member as a director of a member firm, the inference being that the other directors are not members of RICS.

69. Mr Morehen knew Mr Venton well, Mr Venton having been a junior member of the team, until his appointment as the lead in the Drawing and Design Department. He confirms in his statement that staff are expected to know the details of, and abide by, planning consents. He states that the Defendant "*would not permit any member of staff to participate in a plan of works which would be in breach of those or indeed Building Control regulations*". In cross examination, Mr Morehen was taken to the RICS Rules of Conduct and confirmed that the Defendant is required to follow those. He also confirmed that the Defendant would not get involved with works in breach of planning consents, and agreed that such works can lead to demolition in extreme circumstances.

70. Rules 4 to 5 of the RICS rules forbids a member firm from advising a client to depart from the planning consent Mr Morehen said. It was suggested to him that if a client sought help and advice in departing from a planning consent, the only proper response would be to refuse to do so and give an explanation which, he agreed, would be better done in writing. Similarly, the Building Regulation process was to be carried out in accordance with the planning consent, and a member of the Defendant company should refuse if asked by client to depart from the planning consent at that stage. He was asked whether he agreed that, through Mr Venton, the Defendant had assisted the Claimants with a proposal which was in breach of planning permission. Mr Morehen agreed. He accepted, too, that the Defendant, through Mr Venton, was engaged as a project manager to execute the works for which it had produced the schedule of works departing from the panning consent, and that Mr Venton had lied about what happened afterwards. Mr Morehen also had to accept that these matters amounted to a failure to comply with RICS standards.

71. In terms of the office layout (potentially relevant to the 3 May 2016 Letter), Mr Morehen stated that it was an open plan office with both paper and electronic files accessible to all at any time, which included the time during which Mr Venton was under investigation and working out his notice.

72. The pre-action protocol in this case commenced on 1 November 2019, and Mr Morehen accepted that at least from the 31 December 2019 (when the Defendant's solicitors replied to the letter of claim), the Defendant was aware that the Building Regulations documentation prepared by Mr Venton were in breach of the planning consent to which they related. It was then pointed out to him that Mr Venton had been appointed Acting Principal of the Defendant company from 10 February 2020 to November 2020. He did not know why that promotion had been made at that time, saying that it had been the company's then Principal, Grace Martin.

73. Similarly, Mr Morehen could shed no light on why, despite positive allegations of fraud and dishonesty having been pleaded against Mr Venton in the defence to this action (dated 29 July 2021), as well as the allegations regarding Mr Venton's activity in fraudulent breach of his contract with the Defendant, Mr Venton had been allowed to work out his notice having resigned on the 1 June 2021. Mr Morehen denied that the Defendant thereby condoned Mr Venton's behaviour, but accepted there was a level of inconsistency in the Defendant's responses. When asked whether those responses meant that there was no real belief that there

had been illegality in the Claimants' activities, Mr Morehen said that he did not know what the directors were thinking at the time. He said that he did not know that Mr Venton had been working secretly for clients of the company until after Mr Venton had left, and that he had had no involvement with Mr Venton's internal discipline procedure until after settlement had been reached.

74. Mr Morehen was unable to provide any more detail in respect of Mr Venton's resignation; the internal disciplinary process; the reasons for allowing Mr Venton to continue working during his notice period, or the allegations of criminality pleaded in the defence to this action. He was asked whether there was any reason why the Defendant's Principal, Grace Martin, could not have given evidence at this trial, Mr Morehen replied that he did not know of any such reason. He did not know why Ms Martin had not been called when she had been the guiding director at all material times. Similarly, Mr Morehen could not shed any light on the decision not to call Mr Venton.

75. Mr Morehen had signed the disclosure certificate in this case in which it was stated on behalf of the Defendant that Mr Venton's laptop had been "*wiped*" before his departure in August 2021. He stated that he had not known that Mr Venton had been allowed access to that laptop even after the Claim Form and been served on 4 June 2021, and he acknowledged that depending on what was on that laptop, its contents might have been useful to the Claimants. He accepted that it had been a "*mistake*" to have allowed Mr Venton, a man accused of fraud in these proceedings as well as being the subject of an internal disciplinary investigation involving allegations of dishonesty, to have had unrestricted access to his own business laptop and the company's paper files from December 2020.

76. Mr Morehen was unable to explain an issue I deal with in more detail below, namely why the Defendant's solicitors had been provided with the text of a letter dated 5 October 2016 (which they quoted in pre-action correspondence) which did not accord with a hard copy of the same letter in the possession of the Claimants.

77. Finally, Mr Morehen was unable to explain why no action had been taken against Mr Venton in respect of the matters raised in the pre-action protocol correspondence in these proceedings.

(d) Assessment of Mr Melia

78. Mr Page in addressing the way the Court should approach the evidence referred me to *Piper v Hales* [2013] WLUK 302 (HHJ Simon Brown QC sitting as a Judge of the High Court) as providing a useful compendium of senior judicial observations on the correct approach of a trial judge when dealing with competing versions of events. HHJ Brown QC set out some extra-judicial writing of Lord Bingham in "*The Judge as Juror: The Judicial Determination of Factual Issues*" published in "*The Business of Judging*", Oxford 2000 ; some *dicta* of Lord Goff in *Grace Shipping v. Sharp & Co* [1987] 1 Lloyd's Law Rep. 207 at 215-6 and then Lady Justice Arden (as she then was) in the Court of Appeal in *Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others* [2011] EWCA Civ. 610, in paragraphs 11, 12 & 14 referring to the case at first instance, Arden LJ said:

> *11. By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.*
>
> *12. There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see*

> *whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a Defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the Defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.*
>
> *14. In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.*

79. An important weakness in Mr Page's reliance on these citations is that there was no live evidence which competed with, or could gainsay, Mr Melia's evidence, tested in cross-examination. Mr Venton was not called, and did not give evidence. That, of course, does not render what Mr Melia said unchallengeable or necessarily true. It does not render it more likely to be true in itself. But it does leave the Defendant heavily reliant on inferences to be drawn from documentary evidence and inherent likelihoods. I keep to the forefront of my mind the well-known cases such as *Gestmin SGPS SA v Credit Suisse UK Ltd* [2015] EWHC 3560 which emphasise the importance of documentation as against the recollection of a witness of conversations that happened several years ago.

80. Mr Page, adopting what he submitted was the correct approach, set out 19 facts which he said were common ground or ascertainable facts, from which the Court should start its assessment of the competing versions of events. These were: (i) the initial letter from Mr Venton to Mr Melia dated June 2015 which contained no suggestion that the planning phase was different to the building control phase; (ii) the email dated 2 July 2015 Mr Melia to Mr Venton hoping to "*get permission to build a room or two in the roof*"; (iii) the letter dated 7 July 2015 Mr Venton to Mr Melia explaining BR process; (iv) the email dated 13 July 2015 Mr Melia to Mr Venton asking how likely it was that they could build upstairs because query whether unviable otherwise (v) the letter dated 23 September 2015 Mr Venton to Mr Melia enclosing plans which show no demolition; (vi) the email dated 9 November 2015 Mr Melia to Mr Venton with sketch showing all windows in the same place and Mr Melia trying to squeeze rooms into the existing footprint; (vii) the email dated 29 November 2015 - as per (vi); (viii) planning documents (ix) the email dated 24 February 2016 from Mr Melia to Mr Venton seeking revisions "*pressing*" for changes to window layouts to create feeling of space; (x) the email dated 6 March 2015 Mr Melia to Mr Venton in which Mr Melia had been advised by a parish councillor that he should apply to have a "*proper roof*" (i.e. an enlargement) and the reply cautioning against; (xi) the email dated 8 March 2016 Mr Melia to Mr Venton parish council questioning viability given its size and shape; (xii) Mr Melia received a full copy of the planning consent; (xiii) the planning consent, conditions 2 and 3

are very clear along with the plans; (xiv) the email from Mr Melia to Mr Venton dated 5 May 2016 regarding the proposed garage, but expressing no surprise at the alleged sudden change in whole approach which occurred two days before; (xv) the email from Mr Melia to Mr Venton dated 9 May 2016 where Mr Melia was pressing for hipped roof and a conservatory; (xvi) the letter from Mr Venton to Mr Melia dated 18 May 2016 enclosing preliminary building regulation drawings clearly showing a demolition; (xvii) the email from Mr Melia to Mr Venton dated 8 June 2016 Mr Melia's response showing no concern or surprise about departure from planning condition 3 – the reason being that Mr Melia was pressing to use an independent inspector to avoid the Council's ongoing involvement; (xviii) the email from Mr Venton to Mr Melia dated 26 September 2017 indicates a pattern of Mr Melia pressing for non-compliant PVC windows; (xix) the email from Mr Melia to Mr Venton dated 11 October 2017 (after the works stopped), one would have expected "*an explosive email*" submitted Mr Page, whereas Mr Melia shows no anger or complaint to Mr Venton, which indicates that he knew of the risks. This came weeks after a complaint about a boiler issue, demonstrating that Mr Melia would complain, Mr Page said.

81. Mr Page submitted that these were uncontroverted facts which all tended to show that Mr Melia was determined to build something new instead of converting the Outbuilding; that this was always his intention which gave rise to a sham planning application, and that he was determined to pressure Mr Venton into agreeing to this, which he succeeded in doing as is reflected in the building design drawings and schedule of works. As regards what Mr Page described as the "*disputed facts*" (including the receipt of the 3 May 2016 Letter) these needed to be put in context, in respect of which the Court could not rely on Mr Melia's integrity because he had shown himself to be willing to lie in the retrospective planning application once he had been found out, and (in respect of the receipt of the 3 May 2016 Letter) the Court couldn't rely on the Claimants' disclosure (the letter being absent) because it had been shown to be incomplete. Instead, those disputed facts should be approached in the context of these 19 undisputed facts which should lead the court inevitably to the conclusion that the Claimants' version of events should be rejected.

82. The nine contested facts, Mr Page submitted, started with what had happened at the initial 22 June and 29 September 2016 meetings. The two versions were contained in the letters of 25 June and 29 September 2016 on the one hand (Defendant's version) and ¶12 and ¶14 of Mr Melia's witness statement on the other. The contemporaneous documents should simply be preferred, he said. The third contested fact was whether Mr Melia had seen the planning application before it had been submitted. Mr Page said it was almost certain because Mr Melia had been so closely involved with coming up with the plans and from the fact that he attended the parish council planning meeting alone. The fourth was what Mr Melia's true intention had been going into the first planning application. Mr Page suggested that the ascertained facts prior to April 2016 all gave a picture of Mr Melia "*pushing at the margins*", which revealed the sham nature of that application, and that he had no intention of confining himself to that which was approved. The fifth contested fact was what was said at the first parish council meeting. Mr Page pointed to the email of 8 March 2016 which referred to there having been a "*few tough questions*" at that meeting, and yet Mr Melia had given no hint to Mr Venton of not complying with any consent granted only because he knew that he was not going to do so. The sixth was the point at which Mr Melia had first seen the planning documentation (on his own case). Mr Page said that Mr Melia had said "*much later*" in his oral evidence whereas the ascertainable evidence was that Mr Venton had promised to post it to him as soon as it came through. Further, Mr Melia had made reference to it in his email of 8 June 2016 which, Mr Page said, showed that Mr Melia was not telling the truth in his evidence. The seventh contested fact was what had happened at the 3 May 2016 meeting. Mr Page submitted it was inconceivable that Mr Melia would have meekly sat at the meeting of 3 May 2016 with Mr Venton and been told, out of the blue, to do precisely what he had

previously been told he could not do (demolish the Outbuilding) and adopt that advice without demur, complaint or serious questioning. He went on to submit that it was clear from the evidence that the invariable trend between the parties was of Mr Melia continually pushing for something more and Mr Venton sounding a note of caution. If the two 2015 meetings had been accurately recorded in a letter, it was very likely that that would have happened on this occasion, too. Mr Page submitted that the letter revealed that Mr Venton had again advised that this had to be a true conversion, and yet Mr Melia had again pressed that he wanted to go further, leading to Mr Venton backing down and saying to him, "*well, if that's really what you want to do, it's a matter for you*" (Mr Page's paraphrasing).

83. The eighth disputed fact was whether the 3 May 2016 Letter was sent at all. Mr Page submitted that it was only Mr Melia's word that it had not been delivered, and that it was entirely in Mr Melia's interests in so saying. Furthermore, Mr Melia had been established as not being an honest person by virtue of his lies told to the Council and his own (planning) solicitors after October 2017, and so the answer has to be found in the surrounding ascertainable facts rather than relying on his word. The content was entirely consistent with earlier letters, he said, and this was the same pattern as the earlier meetings, and of sending hard copy letters only. This is normal behaviour to be expected of a professional person. Mr Page suggested that the story about what had happened at the meeting only emerged after the letter had been disclosed. The drawings with notes stated to have been enclosed with the 3 May 2016 Letter were precisely the warnings that Mr Melia says he should have received. It was clear, submitted Mr Page, that the contextual facts demonstrate that the letter was genuine and had been sent and received by the Claimants.

84. The ninth disputed fact was Mr Melia's belief post-May 2016. His evidence was things had all changed when it got to the building control/construction phase, and yet Mr Melia's now-stated beliefs go against all known advice and knowledge regarding the need for a strict conversion only, Mr Page said. Mr Venton had reminded Mr. Melia that the plans were not "*in strict compliance with*" the approved plans and Mr Melia had been keen to instruct an independent inspector for building regulation purposes to avoid the Council's further involvement. Mr Page submitted that Mr Melia's post-May 2016 beliefs are laid bare by the fact that he did not complain following the Council's intervention, because he knew he was doing wrong, and that this was the only reason he spent a year and good money lying to the parish council, the District Council and their planning solicitors: Mr Melia was trying to unravel his early conduct.

85. Mr Page also submitted strongly (in accordance with the *Gestin* line of authority) that for the Court to accept Mr Melia's word over the written material would be to prefer faulty and imperfect human recollection over contemporaneous written evidence.

86. Before turning to Mr Page's submissions on the documents as set out in ¶¶80-85 above (although these observations apply to some of those submissions, too), I do not accept this last submission. This distinction between what Mr Venton was prepared to do and say as compared to the formal approach to the rules goes to the heart of the Claimants' case. It is very much the thrust of Mr Melia's evidence and the Claimants' case as a whole, that Mr Venton's *modus operandi* was deliberately to '*play the system'* (my paraphrase). The dichotomy between the written material and what Mr Melia says that he was told and advised is not a difference that can be put down to a false but truthfully held memory: it is a distinct part of the Claimants' case. The contemporaneous documents go to the weight to be attached to the oral evidence of Mr Melia, but the allegation against Mr Melia is not one of an imperfect or false but honest memory, which is what the *Gestin* approach is primarily aimed at.

87. Mr Page's 19 ascertained facts are references to contemporaneous documents and, save for

the provenance and delivery of the 3 May 2016 Letter, that cannot be gainsaid. But I agree with Mr Assersohn's submission that Mr Page has put a partisan and sometimes contentious gloss on many of them which rather transforms them into self-fulfilling observations.

88. A good number of them refer to letters, plans and drawings which demonstrate that the proposed conversion and the consent showed that there was a requirement for a 'true' conversion, and no demolition. This requirement has never been denied by Mr Melia, and so these take the matter no further. I refer back to the documents I have referred to in paragraph 80 above by reference to the following Roman numerals.

(i) The letter was an introductory letter and its failure to address two phases means nothing.

(ii) This email specifically refers to the possibility of obtaining *permission* for the two rooms.

(iii) This distinguishes between the planning and Building Control phases and specifically refers to upgrading the drawings, which accords with Mr Melia's evidence.

(iv) In this email, Mr Melia is simply asking questions about what they are likely to be permitted to do, and specifically refers to advice from Mr Venton.

(v) Mr Melia denied having seen the planning application before they were submitted, so this is not an "*ascertained fact*" contributing to Mr Melia's intention as regards the first application.

(vi) This is merely seeking adjustments to the plans that were to be submitted to the District Council, and is not evidence of Mr Melia "*pushing*" Mr Venton or subterfuge on Mr Melia's part. It involved no expansion of the footprint nor demolition of the building.

(vii) This email is firstly passing on a councillor friend's suggestion about having a "*proper roof*" and rather than sounding caution, Mr Venton suggests that that can wait until a later application. Secondly, the email is Mr Melia asking Mr Venton for advice about what he ought or ought not to say having been invited to the parish council meeting by a councillor friend, which Mr Venton advises him on. I do not accept Mr Page's characterisation of this email, either.

(viii) Mr Venton makes a comment in this exchange: "*The planner phoned me to tell me he was minded to approve but needed some reassurance that the building was structurally sound! I therefore quickly cobbled together (I mean professionally constructed!) a letter of comfort for him which did the trick.*" This seems to me to support Mr Melia's case as to Mr Venton's attitude to "*the rules*".

(xiv) This is a valid observation. Although it is equally valid to say that there are no warnings from Mr Venton about the highly risky path that the Claimants have taken against his advice except for the disputed 3 May 2016 letter.

(xv) This email again specifically refers to the possibility of obtaining *permission* for the roof and extension.

(xvi) Again, it is not the Claimants' case that they did not know that the new design would not involve demolition – it is that they were advised it would be acceptable to do so. It is also worth noting that these plans themselves do not come with any health warning which one might have expected on the Defendant's case, since they marked the point of no return and they were drawn up by Mr Venton himself.

(xvii) The absence of a reference to breaching Condition 3 in this correspondence cuts both ways and does not therefore carry the inference Mr Page imputes. Furthermore, the use of an independent surveyor was not skullduggery on Mr Melia's part. The idea to use the independent contractor for Building Regulations came from Mr Venton as advice: "*I advised that in light of the alterations you were looking to make (not strictly in accordance with the approved plans) it would be better to avoid Sedgemoor Building Control if possible*" (email Mr Venton to Mr Melia 5 October 2016 (09:34)). I accept that Mr Venton refers to alterations the Claimants were looking to make, but that could equally be read as referring to his instructions after he had told them how best to proceed as per the Claimants' case.

(xviii) The response to Mr Venton's warning about the PVC windows "*Thanks very much for the heads up on the windows. In that case we will be having wooden windows as originally described!*" is equally (in fact more) indicative of Mr Melia's looking to Mr Venton for advice and taking his advice and heeding his warnings.

(xix) The lack of complaint in the email of 11 October 2017 from Mr Melia is a valid observation, although the seriousness of the situation may not have dawned on Mr Melia. However, the reference to the boiler complaint made by Mr Page does not support the proposition that Mr Melia was prone to make complaints if aggrieved: the boiler complaint came from Mrs Melia and is about the only piece of correspondence emanating from her that I was referred to. I do find that the lack of any complaint from Mr Melia to a superior of Mr Venton to be quite puzzling, however. Mr Melia explained to me that he felt that he was caught up with Mr Venton and just went along with what he said. Paraphrasing, Mr Melia felt that he was in so deep with Mr Venton that he had to keep with him and did not want to risk alienating him at this critical juncture.

89. Accordingly, the "*ascertained facts*" are not as clear-cut as Mr Page suggests, and thus the "*contested facts*" do not fall to be assessed in the context Mr Page suggests either. The documents relied on by Mr Page fall well short of discrediting Mr Melia's account of events, even without taking into account the live witness assessment that is part of the trial process, and particularly in the absence of live witness evidence to counter what Mr Melia said.

90. I found Mr Melia to be an impressive witness. His tone and manner, and his evidence in general, was measured, thoughtful and respectful to the process. He was confident but modest (sometimes bordering on meek), and came across as someone who, together with his wife, was prepared to trust and be led by those he reposed confidence in. He knew that he was no expert in matters of planning, development and construction, and sought out, and believed he had found in Mr Venton, an experienced, trustworthy and dependable source of advice and guidance.

91. I accept that he put several ideas to Mr Venton which were not in strict accordance with the planning documents submitted to Sedgemoor District Council. However, it is abundantly clear to me from both his evidence and documentary evidence that these were tentative ideas, quite naturally exploring the boundaries of where he felt the development could go (given that this was to be his and his wife's retirement home), and he was always going to accept without question what Mr Venton told him, and would take his advice. I accept Mr Assersohn's submission that the correspondence clearly indicates that Mr Melia was keen to stay within what Mr Venton considered to be the acceptable interpretation of the planning documents and consent. Such exploration is by no means an indication of someone attempting to assert undue pressure on a professional adviser. What's more, I find that it would be entirely out with Mr Melia's character to try and impose himself on someone in Mr Venton's position, with Mr Venton's experience.

92. Finally, in terms of character, I find that Mr Melia is a man who wants to play by the rules and does not want to rock the boat. This is evidenced by his placatory attitude to neighbours and others when hitches were arrived at in the planning and building process.

93. I reject entirely Mr Page's characterisation of Mr Melia as someone who, from the outset, was a man determined to flout the planning procedure and the limitations governing his plot's development potential. This, I find, did not change during the course of this unfortunate narrative.

94. It does not follow (as Mr Page submitted) from Mr Melia's conduct following the discovery of the build variation that he is a thoroughly dishonest man whose word should simply be discounted without more. He was candid in accepting that his behaviour following the discovery was wrong and shameful, and he was contrite, and convincingly so. I reject Mr Page's submission that he did not show any humility in court when confronted with these uncomfortable truths: rather the opposite. I find as a fact that he was thoroughly embarrassed by what he had done; was ashamed of himself and regretted his decisions for reasons of honest regret rather than legal convenience.

95. It follows from the foregoing that I accept Mr and Mrs Melia's evidence that they had not seen the 3 May 2016 Letter before these proceedings. This is corroborated by the anomalies that that letter presents with which I deal below.

96. From as soon as the 3 May 2016 Letter was disclosed, the Claimants' solicitors have been pressing the Defendant's solicitors for its metadata, to no avail. Indeed, Mr Melia took the unusual step of contacting the police when it was disclosed to him. As Mr Assersohn submitted, that was a bold move if it was an ill-founded allegation on Mr Melia's part that he had never seen it before. Initially the Defendant's solicitors intimated that Mr Venton would be going to explain its provenance as a witness. That, of course, has not occurred. Mr Venton's absence as a witness means that the only source of information as to the contents of the letter (as well as its provenance) is Mr Venton himself. Mr Venton is a person who the Defendant has accused of criminal offences as well as dishonestly making money behind the Defendant's back, and who the Defendant has chosen not to call as a witness. These factors alone put the Defendant's case on this letter on an unpromising footing at the outset, particularly in the face of Mr Melia's otherwise uncontroverted evidence. But the other anomalies make that case even more unsustainable in my judgment.

97. Mr Venton's (and thus the Defendant's) explanation for the inability to provide metadata for this letter is that it was, it was said by Mr Venton, produced on his personal notebook, hence it not making its way to the Defendant's server. This was unusual for Mr Venton whose usual practice (it was common ground) had been to email his correspondence to his secretary who would print it on headed notepaper and send it out, whether by scanned email or by post. Another anomaly is that it was said to have been printed on Mr Venton's parents' printer because he was living with them at the time (having recently separated from his wife). Not only is this highly unusual and begs the question "*why?*": there was no urgency, and if there had been, it could have been emailed to the office. It conveniently means that the Defendant's server has no record of the print job. Why did Mr Venton have headed notepaper at home (for it is said that he sent it on such paper) and, it having been said that he used a template for the letter, why did his personal notebook have templates on there, and which one was used? Finally, there is the convoluted and, frankly, suspicious explanation of the existence of, and disappearance of, Mr Venton's notebook itself which came initially from Mr Venton's former wife, Ms Tottle. The disappearance of the laptop has also prevented the metadata from being extracted. I ask myself why Mr Venton was using his personal laptop instead of his business laptop (which was itself wiped by Mr Venton three years after the 3 May 2016 Letter was questioned). There appears to be no good reason and, more importantly,

none advanced by any witness for the Defendant.

98. Furthermore, the email correspondence between Mr Venton and Mr Melia at the time of the alleged would-be receipt of the letter does not accord with the letter having been sent or received: there is no reference to it, and it runs contrary to the works specification that Mr Venton was to produce, which itself (nor any surrounding correspondence) contained similar warnings.

99. I find, therefore, that the 3 May 2016 Letter was not written contemporaneously and it was never sent to, or received by, the Claimants. It follows that there must have been another motive for its concoction, which can only logically have been an attempt to exculpate Mr Venton from any accusation that he had encouraged or advised the Claimants in a way contrary to that suggested in the letter. This is consistent with the Claimants' evidence about what occurred at the meeting on site on 3 May 2016, which I accept.

100. The Defendant's case is also undermined by the fact that Mr Venton agreed to act as project manager in November 2016 which involved producing a schedule of works which was completely in accordance with the varied plans; he carried out the tendering process and supervised stage payments. He did all of that without any recorded warning at all (and Mr Melia does not suggest any were given orally). It is highly unlikely, given Mr Morehen's evidence, that had Mr Venton been acting as the Defendant suggests (i.e. entirely properly and within RICS rules and under duress from Mr Melia), he would have agreed to have anything further to do with the project once the Building Regulations plans had been submitted (allegedly) against his advice.

101. Further corroboration regarding Mr Venton's equanimity in relation to the build-phase is found in Mr Venton's email dated 6 September 2017 in response to Mrs Melia's complaint about the boiler, in which he says:

> *It is obviously in my best interests that your project runs smoothly. It is often the way that there can be one or two small teething problems during the early stages of a development such as this, but I cannot foresee once we have found a solution to this matter that there should be any further concerns.*

102. I find that Mr Venton advised Mr Melia in the terms he (Mr Melia) sets out at ¶21(a)-(g) of his witness statement as set out above.

103. For the reasons set out above, I find as a fact that the Claimants would in no way have departed from the planning consent for the Outbuilding unless advised and persuaded by Mr Venton to have done so. I accept, too, that Mr Melia questioned Mr Venton's suggestion as being inconsistent with the planning consent, but was advised and persuaded by Mr Venton that the variations would be satisfactory to the Council, meaning that it was safe to continue and that there was no (beyond *de minimis*) risk of any significant enforcement action by the Council. He was reassured by the fact that Mr Venton had said he'd done this many times before.

104. As is advanced very strongly by the Defendant, I accept that the Claimants must have known that Mr Venton's proposals were to some extent at least a breach of Condition 3 of the planning consent. Contrary to Mr Page's submissions, however, I find that this did not represent a knowing and wilful breach of the planning consent, but rather that Mr Venton had advised, which the Claimants accepted, that the variations he proposed would be *sanctioned* by the planning authority as meeting the criterion that Mr Venton had set: that the finished building would look like the building that had received consent. It was not Mr Melia who was being asked to turn a blind eye, but Mr Venton advised that the Council

would certainly do so provided the criterion he referred to was met. Mr Melia took that advice and relied on Mr Venton's experience and professed expertise in this area in doing so.

105. It was the very essence of Mr Venton's advice that, provided the steps taken were taken in the order and the manner in which he advised, namely that planning consent should be obtained on the basis of a strict conversion, but once the matter passed to Building Control, the emphasis turned to compliance with Building Regulations, and the planning authority would (a) allow digression from the strict planning consent provided the building looked the same as the planning consent and (b) entertain an application for significant additions to those (e.g. roof; conservatory) once the build had reached approximately $^{2}/_{3}$ completion. It would not make sense to advise digressing from the consent if a future application to vary (which was advised) would reignite interest from the planning authority if it was not felt that the planning authority would not condone what had been done in divergence from the consent granted: that would imperil the whole scheme.

106. I find it unsatisfactory that the Defendant chose to call only Mr Morehen in respect of the substantive matters in this claim. The anomalies and inconsistencies exposed during Mr Morehen's cross examination in relation to how Mr Venton was treated once the allegations in this claim had been made, as well as the allegations in respect of which the internal disciplinary procedure was instigated, requires explanation. Whilst, of course, it is for each party to decide which witnesses to call, the absence of certain witnesses can give rise to an adverse inference. Even if an adverse inference as such is not drawn, the absence of an obviously relevant and available witness such as Grace Martin is bound to lead a court to question why such witnesses have not been called and tends to invite the resolution of any doubts in favour of the party against whom such witness might have been expected to give evidence.

107. The absence of Mr Venton is to my mind of greater relevance. I am invited to draw an adverse inference from the failure by the Defendant to call Mr Venton. The law on adverse inferences was recently reviewed by David Hodge QC sitting as a judge of the High Court in *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) at [23]–[25] with which I respectfully agree. The authorities there cited, and the conclusions he himself reached are pithily summed up in *Phipson on Evidence* 20th Ed. ¶45-35 thus:

> *"It is in a comparatively small number of cases that it would be appropriate to draw an adverse inference, but where it is sought to do so, the party inviting the court to exercise such a discretion must:*
>
> *(1) Set out clearly (a) the point on which the inference is sought and identifying the inference sought; (b) the reason why it is said that the missing witness would have material evidence to give on that issue; (c) why it is said that the party seeking to have the inference drawn has himself adduced relevant evidence on that issue; and (d) why the party seeking the inference could not himself be expected to call or witness summons the witness.*
>
> *(2) Explain why such inference is justified on the basis of other evidence that is before the court.*
>
> *It is then open to the other party to resist such an inference by giving a good reason why the witness is absent or silent. If he is able to do so, then no inference should be drawn. If there is some credible explanation given, even if not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.*

108. *Efobi v Royal Mail Group Ltd [2021] UKSC 33,* was a case concerning the burden of proof in an employment case where discrimination is alleged. Speaking with the agreement of Lord Hodge, Lord Briggs, Lady Arden and Lord Hamblen, Lord Leggatt said this (at [41]):

> *"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in* Wisniewski v Central Manchester Health Authority *[1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."*

109. Mr Assersohn described, perhaps inevitably, the Defendant's case as being Hamlet without the Prince, whereas Mr Page suggested that the Claimants could themselves have called Mr Venton, but moreover, the correct approach he submitted was to assess Mr Melia's evidence against the contemporaneous documents. This included the provenance of the 2 May 2016 Letter, he said: look at the pattern of behaviour in light of the known documents, he said, hence his approach as I have dealt with above.

110. Nearly all of the factual issues in this case are within the exclusive knowledge of two people: Mr Melia and Mr Venton. The issues upon which Mr Venton could have given material evidence are, of course, obvious in this case. The Claimants have adduced their own complete evidence on those issues and, this being an adversarial jurisdiction, there is no reason why the Claimants should have called or summonsed Mr Venton.

111. Whilst I accept, of course, that the allegations made against Mr Venton by the Defendant in this case may have made it awkward, or even risky, for the Defendant to call him, but that was a decision for the Defendant given the void that his absence has left. And that risk is the basis of the invitation for the drawing of the adverse inference. It would have been in Mr Venton's own interests to have supported the Defendant's factual case because that puts the onus on the Claimants and exonerates him to some extent, particularly in relation to the allegations of criminality. On the other hand, of course, he would have been under an obligation to tell the truth. Accordingly, unless his evidence was going to be unhelpful to the Defendant, the potential difficulties with calling Mr Venton are in fact superficial. It is always open to a party who calls a witness who turns out to be hostile to apply to the court to treat him or her as such, which opens up that witness to cross examination by the party calling him or her.

112. In summary, the Defendant has failed to call the only factual witness who is able to gainsay the evidence of Mr Melia whose evidence is, on its face, not incredible. It has failed to give any, let alone any convincing, explanation as to why it has not done so and I reject the criticisms made of the Claimants' approach in this respect. The documentary evidence relied

on by the Defendant to challenge the oral evidence of Mr Melia falls far short of that which would be required to outweigh (still less disregard) Mr Melia's evidence, which has been tested in extensive and skilful cross examination, and yet remains convincing. I do not consider that I need to draw an adverse inference from Mr Venton's absence to conclude, without any real hesitation, that I should accept Mr Melia's evidence where it is not convincingly challenged by reliable and persuasive contemporaneous documentary evidence which is not open to various interpretations. I have seen none which satisfies that test. However, I am driven to draw such an inference which bolsters my conclusions.

113. In the absence of a good explanation, the only inference that I can draw from the Defendant's failure to call Mr Venton is that it either knew or was significantly concerned to think, that he would give evidence that was either helpful to the Claimants or adverse to their own interests. This may have reflected, as Mr Assersohn put to Mr Morehen, that the Defendant's attitude to the sort of behaviour alleged by Mr Melia was indifferent or even condoning. I do not know.

(e) Findings of Fact

114. Insofar as I have not made findings, the following are findings I make for the avoidance of doubt.

115. The Claimants did not set out to mislead the planning authorities. They had every intention to make a lawful planning application with the assistance of the Defendant and had every intention of complying with the same. They engaged the Defendant to guide them through the whole planning process, which included advising them on what they were entitled to do and what they were prohibited from doing. Mr Venton on behalf of the Defendant accepted instructions on this basis, both initially and when the Building Control and works phases commenced. I will set out my legal analysis of these findings below.

116. The Claimants reposed complete trust and confidence in Mr Venton and thus the Defendant. Mr Venton advised them as claimed by Mr Melia in his witness statement. They believed Mr Venton when he told them that he knew the planning system extremely well, and that he had advised on and carried out variations to the planning process such as he advised here, many times before. He advised them that his proposals were not unlawful, but were within the acceptable bounds of variation that planning authorities allowed. The Claimants thus believed, a belief which Mr Venton knew about and encouraged, that the proposed variations were lawful. Upon being questioned by Mr Melia, Mr Venton advised that there was no appreciable risk in proceeding with the variations as advised. He did not advise them that there was a risk that the whole project could be put in catastrophic jeopardy, nor that there was a risk that the Outbuilding as built could be ordered to be demolished.

117. It was Mr Venton who instigated the variation to the planning process, and it was Mr Venton who drew up the schedule of works in accordance with his advised way forward.

118. Following the discovery of the unlawful construction works, it was Mr Venton who devised the way forward and advised and persuaded the Claimants to adopt the stance that they did. Mr Venton led the way in misleading the planning authorities and the Claimants' planning solicitors in the attempt to gain retrospective planning permission.

119. However, Mr Melia at least, must have appreciated that he was participating in a misleading and dishonest scheme to attempt to obtain retrospective planning consent. I accept that he regrets that decision now, but the Claimants have to accept some responsibility for their own actions once they cross the threshold of deliberate deceit, whether advised by the Defendant

through Mr Venton or not.

The Pleadings and the Law

(a) Illegality

120. It follows from my findings of fact that up until October 2017 at least, any allegations of illegality against the Claimants must fail. I do not therefore deal with the individual aspects of that broad expression as set out in the Defence.

(b) Contract

121. The parties are agreed that there are two potential contracts: the first entered into in July/August 2015 covering the planning and building control phases ("the First Contract"), and the second being in relation to the devising and production of a schedule of works and thereafter project managing the building works themselves ("the Second Contract").

The First Contract

122. The Particulars of Claim were not pleaded by Mr Assersohn and are admittedly sparse in relation to the terms of the alleged contract. Paragraph 7 states that the Claimants "*engaged the Defendant to act for them for reward in connection with the proposed development of the Outbuilding … and specifically to advise on and seek planning permission for the change of use of the Outbuilding to residential use.*" Paragraph 8 pleads the usual 'due skill and care' implied term. The Defence complains of the lack of particularity as regards terms and formation of the contract (though no Part 18 requests were ever served by the Defendant), and pleads unenforceability by virtue of illegality, both as to the contract as a whole and the implied term.

123. In his closing submissions, Mr Page submitted that the relevant document to ascertain the terms of any contract was the pro forma fee quote sent to the Claimants under cover of a letter dated 7 July 2015 and signed and returned by Mr Melia on 15 August 2015 (he rightly takes no point on the wrong date having been pleaded). The quote contains no reference to advice, he submitted, and thus Mr Venton was engaged more as a draftsman than anything else. As to whether an advisory role could be implied, Mr Page submitted that it was not so obvious so as to pass the business efficacy test as set out by Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 at [21] that the business efficacy test is only satisfied "*if, without the term, the contract would lack commercial or practical coherence.*" He submitted that this was a high threshold, and in his skeleton argument set out a number of reasons why it had not been met. It is also important, he submitted, to compare the cost of the services (around £3,000 in total) to the likely overall cost of the project: approximately 1%.

124. Mr Assersohn rejected the criticism of the pleading, submitting that the word "*advise*" was used in paragraph 7 of the Particulars of Claim, and that it was pleaded as an express term, so implication was irrelevant. The documentary context made it clear, he said, that advice was sought by the Claimants and anticipated to be given by the Defendant.

125. In my judgment, there clearly was a contract entered into between the parties, and that

contract expressly included the provision of advice in connection with the planning application, for a number of reasons. First, the quote which Mr Melia signed, referred both to itself as a document as providing the terms, but also the letter enclosing it. In that letter, the Defendant refers to the two phases, the planning and the building control phase and states that they will prepare as much of the information as possible themselves, though additional expertise may be required. It goes on:

> *"All quoted fees are fixed, and have been equated using our vast experience of preparing,*
> *submitting and monitoring many planning applications, on a daily basis, for many years.*
>
> *We can never give any guarantees as to the success of a planning application but our advice is based on current planning policies and our most recent experiences of similar proposals."*

And, as regards the Building Regulation phase,

> *"The process from Tamlyns point of view involves upgrading the planning drawings to include a construction specification to comply with the building regulations."*

These passages contain a profession of specialist skill on the Defendant's part as well as the anticipated provision of advice.

126. There is additional context, however, which bolsters this interpretation of that letter. Mr Venton's note of instructions for the initial visit to the Claimants from the Defendant specifically refers to the Claimants seeking advice. Although this was not a shared document, it informs the Defendant's position.

127. More importantly, however, is the letter from Mr Venton to the Claimants following that initial visit (agreed to have been dated 29 June 2015). It is worth setting this letter out in full because it gives a fuller flavour of the basis upon which the Claimants and the Defendant were about to engage.

> *"Firstly thank you for inviting me to meet with you on Tuesday 23rd June 2015 to provide you with an overview of our thoughts in relation to any planning potential pertaining to the formation of new residential accommodation at 2 to Scotts Lane, Catcott.*
>
> *Due to the location of your property being outside of any recognised development boundary, and in what is referred to under planning policy as the open countryside, there would be virtually no potential in relation to the construction of a new dwelling on the site. A different set of planning policies however looks at the possible re-use of redundant buildings for the purposes of either holiday accommodation or full time residential use in this particular circumstance.*
>
> *Your current property does incorporate a long narrow building formed over one storey at the bottom of the garden. There may be some potential in relation to the possible conversion of this. I do not believe any such application would be particularly straightforward necessarily as the building is not what I would refer to as being of 'traditional' construction. That said however it does in my opinion have some planning merits that may be enough to sway any future planning application in your favour. The parameters of a change of use/conversion application are that the building has to be capable of conversion without too much in the way of major structural works. In short we have to basically use the existing building to form the outline of the proposal. Arguments can certainly be put*

forward as part of any formal submission suggesting that the building is of sufficient structural integrity to support a conversion scheme. Any proposed conversion scheme would have to respect these criteria.

I believe that now having given this matter some more thought, a strong case could be put forward for either a planning application for the conversion of this building to form a single residence, or alternatively a planning application to convert the building into two holiday cottages. Obviously we discussed in some detail various scenarios during our meeting and I do not propose within this letter to go into any huge depth to cover all of these points.

There are two main options to consider here. The first option to convert the building into a couple of holiday lets for example would probably necessitate the need (in the future) to sell this building with the principal house. If however planning permission could be obtained for a single independent residence then there could be an option to separate this building away from the main house giving it some garden and providing a separate access track without I believe too much in the way of detriment to the value of the existing property. In this location a building with a planning permission for a change of use and conversion to form a dwelling (with the views that it could potential enjoy) would be very sought after indeed. There would obviously be some capital outlay involved in going through the planning process for either option, but I believe that if an application were to be successful then it would be very well worth the initial expenditure.

Tamlyns prepare, submit and monitor planning applications on a daily basis and we have been doing so for many years. We provide the whole service in house including the preparation of plans and elevations drawings and the submission and monitoring of planning applications to the district council. If you would like to explore this further and would like for me to provide you with a written quotation for undertaking works then please do not hesitate to contact me. I have not done this as part of this letter due to the fact that there are two different possible routes that you may wish to take, the fees for such would differ.

I trust this letter is of some use to you. I must reiterate finally that we can never give any guarantees to the successful outcome of any planning application.

I look forward to hearing from you in due course."

128. In my judgment it is clear that the advice referred to in the subsequent letter has to be interpreted in the context of this letter, from which it is clear that Mr Venton is professing expertise and experience, and is anticipating offering advice on what would be and what would not be permissible in terms of the project as a whole.

129. The Claimants replied by email on 2 July 2015:

"Many thanks for your letter relating to the proposed conversion of our redundant building. My wife and I would like to go ahead with applying for planning permission for its conversion into a single residence. We would hope that we can get permission to build a room or two in the roof – I believe that you mentioned dormer windows during our discussion?"

130. That was followed by the 7 July letter referred to above, to which the Claimants responded that they were intending to delay for "*a couple of years*" to coincide with their retirement, but that they intended to proceed to develop the site themselves, and then posed a number of

questions:

> *"1. How detailed must the plan be that you submit? We have a friend who designed the major extension to our existing house, whom we would like to involve in any detailed planning.*
>
> *2. How likely is it that we will be able to build an upstairs area, as we feel that the existing floor space would be too small/narrow to be viable without an upstairs area as well?*
>
> *3. Given the tight restrictions on floor area that you predict, how likely is it that we would be allowed to also build a garage? If this is unlikely, would it be better for us to build a garage down the garden first, before applying for any permission for conversion of the kennels? We have/had permission to build a double garage up by our existing house, as part of the major extension that we did some 15 years ago. Unfortunately, we ran out of money at the time and also concluded that its placement, in front of the house, would block out too much light to the house. As a result we didn't build the garage. Given that most of the planned work was done, is the permission for a garage still current? If so, can we apply to vary its location, so that it is built down the garden a little (so that we can hive it off when we sell the main house)?*
>
> *Many thanks for your advice, which is much appreciated."*

131. There is no written response to this email contained within the trial bundle before the Claimants' acceptance of the quotation by email on 25 August 2015. Interestingly, and contrary to the Defendant's averments regarding Mr Melia's overbearing lead role in the planning process, the email of 25 August 2015 signs off with "*I assume that you will consult us in drawing up plans for the conversion of the building*".

132. It is part of the Defendant's defence overall that Mr Venton consistently told Mr Melia (to paraphrase) that to depart from the planning consent would be risky and that he should not do it. That case explicitly includes the giving of advice by Mr Venton in connection with the planning application.

133. Applying the well-known principles from the *Rainy Sky* line of authorities (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50), I conclude that the contract included the express term that the Defendant would be giving advice in respect of the planning application, and the word "*advise*" in the 27 July 2015 letter has to be interpreted in light of the foregoing context. Subject to illegality, it was conceded that the contract would have been subject to the usual 'reasonable skill and care' implied term.

The Second Contract

134. This is more straightforward. The Particulars of Claim at ¶17 plead:

> *"On or about 14 November 2016 the Claimants agreed to and did appoint the Defendant acting through Mr Venton as project manager for the intended building work to the Outbuilding and the new garage. It was an implied term of this agreement between the Claimant and the Defendant that the Defendant would carry out its obligations with all due care and skill. Further, in advising the Claimant in matters concerning the development, the Defendant continue to owe the Claimants a duty to act with care and skill."*

135. In ¶46.1 of the Defence, the Defendant admits that Mr Venton was appointed as project manager but denies that any express or implied terms (which it is pleaded were unparticularised) were enforceable by virtue of the "*illegality of the underlying proposed works*." In ¶46.2 of the Defence, the Defendant avers that there is no concurrent duty alleged by the Claimants in respect of this aspect of the project but, for the avoidance of doubt, denies that any such duty existed.

136. Because it is accepted that Mr Venton was contractually appointed as the project manager as, the usual implied term as to 'skill and care' applies. For similar reasons in relation to the First Contract, a concurrent duty in tort arose at the same time which is in fact pleaded at ¶17 of the Particulars of Claim. It seems to me inescapable that the duties of a project manager extended to advising on the steps to be taken in the circumstances faced by the Claimants when the works were stopped by the Council.

(c) Common Law Duty

137. This was pleaded in similarly stark terms as the contractual duty at paragraph 9 of the Particulars of Claim:

> *"Further or in the alternative, by Mr Venton giving the Claimant advice as to the works which would be acceptable to the local planning authority in circumstances where he was aware that they would rely on the same by carrying out works of construction for their residence for the their retirement, as he did and as is set out hereafter, the Defendant owed the Claimant a duty of care*."

138. The Defence denies the existence of any such common law duty of care "*for at least two reasons*". The first was based on illegality; the second was that Mr Venton "*was not a qualified surveyor, architect or engineer and did not hold himself out as such. Accordingly, the Defendant did not purport to provide services of specialist skill such as to make it fair just and reasonable to impose on the Defendant a common law duty of care separate to any contractual duty owed*". In his closing submissions, Mr Page stated that the pleadings were too vague to support a stand-alone common-law duty of care and if this was a case of concurrent duties (which was not his primary position), the common law duty of care would not normally be any wider than the contractual one.

139. I accept Mr Page's submission that the test for the imposition of a duty of care is set out in *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 AC 145: where a professional undertakes to perform professional or quasi-professional services for another, reliance on them is sufficient to give rise to a duty of care in tort unless this is precluded by contractual agreement between the parties.

140. *Jackson & Powell on professional Liability* 9th Ed. ¶¶2-061 - 062 deals with concurrent duties in short order now that, following *Henderson v Merrett*, such concurrent duties are now recognised. The passage goes on:

> *… The main area of ongoing uncertainty concerns the exact location of the dividing line between a construction professional and a 'normal' building contractor. As stated by Jackson LJ in* Robinson v PE Jones (Contractors) Ltd, *the former will owe a concurrent duty of care to its client, the latter will not.*
>
> *2-062 There is no doubt that the existence of the concurrent tortious duty of care has the potential to offer advantages to a claimant compared to the position in contract. The limitation period for a claim against a professional will often be more generous in the tort of negligence than in contract. 132 It was formerly the case that there was a*

> *more generous test of remoteness of loss and damage in tort than in contract, but this is no longer so* [citing Wellesley Partners LLP v Withers LLP [2015] EWCA Civ 1146 in which the Court of Appeal concluded that, where there is concurrent liability, the contractual test of remoteness should be applied in both contract and tort].

141. I find for the reasons stated above that Mr Venton did hold himself out as having a special skill in advising in connection with planning applications and specifically what was and was not permissible. That is a sufficiently defined specialism to qualify as a profession for these purposes. He undertook to use that skill in advising the Claimants and I find that, to his knowledge, the Claimants relied on that skill.

142. Mr Venton clearly professed to have the skill and experience required to draw up a schedule of works, carry out the tender process and act as project supervisor. These are special skills worthy of a professional label, and for those reasons (along with the Claimants' known reliance thereon), I find that there was a concurrent tortious duty of care to exercise reasonable skill and care when executing the retainer reflected in the Second Contract.

Breach

(a) First Contract

143. This is divided into acts of allegedly negligent advice and negligent omissions of advice. I shall first deal with the positive advice I have found was given by Mr Venton.

144. It is true that the Claimants have not adduced any expert evidence on this aspect of the matter. However, on the facts as I have found them, and further in light of the evidence of Mr Morehen (which I acknowledge was not expert evidence), there can be no doubt that Mr Venton was in breach of both contracts and breach of duty when he advised Mr and Mrs Melia as he did, both before and after the local authority's discovery of the departure from the planning consent. Even on the Defendant's case, Mr Venton did not act in accordance with Mr Morehen's evidence that someone in Mr Venton's position should have refused to act otherwise in accordance with the planning consent and its conditions, and should have explained in detail why not, preferably in writing. This must be so *a fortiori* in relation to the post-discovery position. In those circumstances, it cannot lie in the Defendant's mouth to say that the failure by the Claimants to adduce expert evidence on breach prevents them from establishing such a breach. It is obvious to anyone that a professional advisor should not have acted in the way that I have found Mr Venton acted.

145. To the extent that authority is required for the principle of my approach, I accept Mr Assersohn's submission that this case falls within the exception to the general rule that expert evidence is required to prove professional negligence which is discussed in *Jackson & Powell* (*ibid.*) ¶6-010 under category (3) and ¶6-011: cases in which no professional assessment of the act or omission in question is necessary for the Court to identify the shortcomings thereof. This is not a case where the Defendant even avers (let alone adduces evidence) that Mr Venton's advice was, if made, not negligent or in breach of contract. The Defendant's case is entirely fact-based: the advice was not given.

146. The question of breaches in respect of omissions are slightly more nuanced. There is a line over which the Court cannot cross without applying standards in respect of which it has heard evidence. The Court must be astute to avoid applying its own thoughts about what the relevant professional should have done. This, though, is also subject to the obviousness test. An example might be the failure of an architect to advise a lay client to wear a hard hat when on a building site. Again, no hard and fast parameters can be set out in writing, but common

sense and legal experience (as to where the line lies) come into play.

147. The omissions are pleaded at ¶37(1) to (7) of the Particulars of Claim. It is necessary for me to set them out in full. It is alleged that the advice that Mr Venton should have given the Claimants was that:

(1) They should anticipate and assume that the local planning authority would verify or check that the Outbuilding once converted complied with the planning permission granted.

(2) In the event that the conversion work amount to development not permitted by the grant of planning permission always on breach of a condition within the planning permission, the building work would be subject to enforcement action which could extend to the removal of work carried out and permitted by planning permission or in breach of condition.

(3) A local planning authority retained discretion as to whether to enforce a breach of planning control and could choose not to enforce a breach of planning control if it was expedient not to do so.

(4) In the circumstances as they existed in any the conversion of the Outbuilding as anticipated by the Schedule of Works it was highly unlikely that Sedgemoor District Council would refrain from taking enforcement action in respect of the unpermitted development and or breach of condition given that the planned works:

(a) deliberately demolish the existing building on breach of Condition three of the planning permission; and

(b) constructed a rough facsimile of the existing building that was not based on the same footprint as the existing building at a significantly larger; and where

(c) Mr Venton had given assurances of the half of the claimant that any structural disrepair that impinged on the development would be remedied by repair.

(5) That insofar as they wished to demolish or alter the structure of the Outbuilding, the same should only be carried out both after the conclusion of the building works and in so far as work consisted of permitted development, alternatively with the benefit of further grant of planning permission encompassing the proposed further works.

(6) That the claimant should seek further permission from the local planning authority prior to carrying out such works of demolition or alteration.

(7) That insofar as they might seek to rely the provisions of section 171 Town and Country Planning Act 1990 to protect from such enforcement action, the local planning authority might assert that the Claimants had deliberately concealed their breach of planning control.

148. I find as follows in respect of each:

(1) I cannot find that this omission was negligent or in breach of contract without expert evidence. On the facts of this case, had there been no complaint about the hedge, the local planning authority may well never have visited the site again.

(2) This seems to me to be an intrinsic and important aspect of the retainer of someone advising on a planning application, the implications of a consent

granted and the implications of proceeding otherwise than in accordance with that consent. Lay clients may well not appreciate the potentially catastrophic risks of straying from the consent conditions. This omission was in breach of the contractual and common law duties.

(3) Given that the options available to a planning authority are within the expertise of someone in Mr Venton's position (as he professed), the omission of an assessment and communication of the potential consequences should the departure from the consent be discovered would be a breach in these circumstances, and I so find.

(4) This is the other side of the coin to (3) and I make the same finding.

(5) This is clearly within the realm of expert evidence.

(6) This is an obvious proposition, but the timing and methodology are clearly quite nuanced and so to make such a finding here would require expert evidence.

(7) Assuming that s171 as pleaded is intended to incorporate ss171A; 171B etc., it is not possible to assess whether the omission pleaded is a breach without expert evidence because the provisions are complex and possibly obscure; they could be obvious to a planning adviser but without such evidence, it is not possible to judge.

149. Turning to the list of issues under this sub-heading, I find that the statements alleged to have been made by Mr Venton at ¶¶13-14 and 37 of the Particulars of Claim were made. I find that Mr Venton should have advised as set out above.

(b) Second Contract

150. As regards the post-discovery advice, I find that Mr Venton did advise the Claimants to make representations and, more importantly, allow him to make representations on their behalf to the Council and others, which were untrue and misleading. In my judgment this is self-evidently a breach of his, and thus the Defendant's, contractual and tortious duty owed to the Claimants.

Causation

151. I have concluded that Mr and Mrs Melia are generally risk-averse, law-abiding people who are willing to seek and take advice. There is clear evidence throughout their dealings with Mr Venton that, whilst, of course, they were interested in securing consent for as large a building as possible (and thus raised the possibilities that occurred to them with Mr Venton), they always took his advice, for example the windows needing to be wooden instead of their preferred PVC.

152. The only evidence which suggests that that might not have been the case (aside from the 3 May 2016 Letter) is a letter from the Defendant's solicitors to the Claimants' solicitors in response to their Pre-Action Protocol letter. In that letter, the Defendant's solicitors quote a letter from Mr Venton to the Claimants' accountant dated 18 October 2017 (shortly after the work had been stopped) in which it is said that he had written: "***Upon the instructions of the client in this case, against my advice****, the building was made slightly larger …*" [emphasis in the original solicitor's letter]. However, the hard copy of that letter on headed notepaper is in the bundle at [503] the words "***against my advice***" do not appear. Mr Assersohn was clear that the Claimants do not accuse the Defendant's solicitors of doctoring the quote from

the original letter, instead submitting (and I agree) that the only conclusion is that the Defendant, and in all probability, Mr Venton had supplied the solicitors with a doctored letter (he was Assistant Principal at the relevant time, about to be made Acting Principal). This reflects Mr Venton's approach to proper procedure as described in the Claimants' evidence and corroborates the conclusion that Mr Venton produced the 3 May 2016 Letter.

153. The combination of my findings inexorably leads me to conclude that, had Mr Venton not advised the Claimants that the alterations were safe and lawful to make, the Claimants would not have departed from the granted planning consent. Moreover, given the Claimants' character and risk-averse nature, he must have been very firm and convincing in his advice, and I find that he was able to overcome the doubts expressed by Mr Melia. Furthermore, if he had advised as I have held that he should have done, then the Claimants would similarly not have proceeded with the variations. Although the steps Mr Morehen was very clear in his evidence that Mr Venton should have taken are not pleaded, the fact that Mr Venton did not take those steps again corroborates Mr Melia's evidence which taken as a whole suggests that Mr Venton had a reckless and irresponsible approach to the "*rules*", the law and proper procedure.

154. Paragraph 7 of the List of Issues asks the Court to decide whether, "*had Mr Venton not advised the Claimants to misrepresent matters to the Council following the discovery of the variations from the planning consent, would the Claimants have had a significantly better chance of obtaining planning permission for the retention of the Outbuilding*?" It is simply not possible to answer that question without expert evidence (or perhaps, rather unrealistically, direct evidence from the relevant Councillors), and even then, it would be rather speculative. For completeness, however, I do find that it would have been highly unlikely that the Claimants would have undertaken that course of action without being so advised by Mr Venton. It is simply not in their nature to have done that. Whether it was their lying which did for the retrospective planning consent, or whether it was the fact that the Outbuilding was demolished for reasons other than disrepair is impossible to answer on the evidence I have before me.

Quantum and Scope of Duty

155. As an introduction to this aspect of the claim, it is useful to remind oneself of the interplay between contract and tort in this area of commerce.

156. In *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 ("*MBS*"), the Supreme Court began the leading judgment at paragraph 2, thus:

> *Accountancy advice is usually given pursuant to a contract, as was the valuation advice in SAAMCO and the legal advice considered in the other leading judgment in this area,* Hughes-Holland v BPE Solicitors *[2017] UKSC 21; [2018] AC 599 ("Hughes-Holland"). In such cases, there is a parallel duty of care in tort and in contract. The extent of the responsibility assumed by the professional adviser, and the extent of their liability if they fail to act with reasonable care, is the same in tort and in contract. Medical advice may also be given pursuant to a contract, in the private medical sector. There too there is a parallel duty of care in tort and in contract, and the extent of the responsibility assumed by the professional adviser and the extent of their liability will again be the same. In what follows, for ease of exposition we will focus on the scope of the duty of care in tort. The scope of the parallel duty of care in contract depends on the same factors.*

157. The Claimants claim losses under nine heads, all of which are denied by the Defendant. They were pleaded as follows, some of which were incalculable at the date of pleading:

(1) "Payments made to B&G Builders totalling £169,703.30. These were in respect of works carried out to the Outbuilding and which the Claimants say would not have been incurred and now wasted but for the Defendant's breaches of duty.

(2) Payments made to the Defendant in respect of the project management, the Second Contract, totalling £3,600.

(3) Ancillary costs incurred in the development of the Outbuilding, comprising planning fees; building inspector fees; tree surgeon's fees and BT Openreach, totalling £2,998.

(4) Legal and finance costs totalling £1797.62.

(5) Legal and planning costs for second planning application, totalling £7,919.90.

(6) Mortgage interest and penalties arising upon early repayment (on the basis that the Defendant knew that the project was being funded by a mortgage.

(7) The costs of demolishing and/or reinstating the Outbuilding and demolishing the new garage.

(8) The difference in value between 2 Scotts Lane:

(i) in its present condition but on the basis

- *that the Outbuilding could be subject to an enforcement notice;*
- *the fact that the added value of the original planning consent has been lost, and*
- *the potential of enforcement action in relation to the new garage which is said to have been built in the wrong place and to the wrong size, and*

(ii) its value as it would have been with the benefit of the original planning consent, before any work was undertaken.

(9) *The loss of a chance of the increased value of the plot had the retrospective planning consent application been successful*."

158. The Defence of each head of loss is denied in ¶¶70-76 of the Defence (in summary) as follows:

(1) The Defendant did not underwrite the cost of the construction works. The Defendant properly certified those costs, and the Claimants have "*received the value of the same*."

(2) There was not a total failure of consideration and no claim for unjust enrichment, thus the claim is misconceived.

(3) This is not pleaded to.

(4) This is not pleaded to.

(5) This loss arose out of the Claimants' dishonest application was outside the scope of the Defendant's duty and /or they are legal costs and unrecoverable as damages.

(6) Subject to a potential issue of the mortgage having been obtained by fraudulent misrepresentation [which was not pursued at trial], this loss was outside the scope of the Defendant's duty.

(7) This was categorised as the "*costs of a new property*" and was denied as being speculative and duplicative of the losses claimed under head (1), and/or it is an abuse of process being predicated on further unlawful work to the Outbuilding.

(8) This loss was described as misconceived on the basis that the Defendant did not owe the Claimants a duty in contract or tort to enhance the value of the property as a whole, that being at the Claimants' own risk.

(9) This is denied on the basis of a denial of the duty on Mr Venton to tell the Claimants not to lie in their retrospective planning application, and in any event is denied and "in any event barred on grounds of illegality and/or moral turpitude".

159. In their skeleton arguments, Counsel approached quantum and scope of duty rather differently. Mr Assersohn for the Claimants submitted that *MBS* was of little relevance because here the risk that the duty was supposed to guard against was clear and the losses claimed represent the fruition of that risk and, further, arguments surrounding scope of duty were only available to the Defendant in respect of two heads of loss (see ¶¶72-73 of the Defence - only one of these was pursued at trial). For his part Mr Page set out the six questions formulated by the majority of the Supreme Court in *MBS* and answered them all negatively (which I will deal with below).

160. Those questions are as follows (¶6):

> *(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)*
>
> *(2) What are the risks of harm to the claimant against which the law imposes on the Defendant a duty to take care? (the scope of duty question)*
>
> *(3) Did the Defendant breach his or her duty by his or her act or omission? (the breach question)*
>
> *(4) Is the loss for which the claimant seeks damages the consequence of the Defendant's act or omission? (the factual causation question)*
>
> *(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the Defendant's duty of care as analysed at stage 2 above? (the duty nexus question)*
>
> *(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)*

161. Before turning to the application of those questions to the instant matter, there are other passages from *MBS* which are of assistance in understanding the development of the law since *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ("*SAAMCO*"), through *Hughes-Holland v BPE Solicitors* [2017] UKSC 21 to *MBS* itself.

> *18 The distinction drawn by Lord Hoffmann in* SAAMCO *between "advice" cases and "information" cases has not proved to be satisfactory. Put shortly, as explained by Lord Sumption JSC in* Hughes-Holland *at paras 39–44, the distinction is too rigid and, as such, it is liable to mislead. In reality, as Lord Sumption JSC emphasises at para 44, the whole varied range of cases constitutes a spectrum. At one extreme will be pure "advice" cases, in which on analysis the adviser has assumed responsibility for every aspect of a transaction in prospect for his client. At another extreme will be cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act. In some cases (such as those involving valuers) it is readily possible to say that the purpose of the advice given is limited and that the adviser has assumed responsibility under a duty the scope of which is delimited by that purpose, which Lord Hoffmann called an "information" case. However, Lord Sumption JSC observed (para 44), "Between these extremes, every case is likely to depend on the range of matters for which the Defendant assumed responsibility and no more exact rule can be stated".*
>
> *19 In our view, for the purposes of accurate analysis, rather than starting with the distinction between "advice" and "information" cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the Defendant: see section (ii) above. Ascribing a case to one or other of these categories seems to us to be a conclusion to be drawn as a result of examination of that prior question.*
> *…*
>
> *22 We welcome Lord Leggatt JSC's proposal (para **92**) to dispense with the descriptions "information" and "advice" to be applied as terms of art in this area. As Lord Sumption JSC points out in* Hughes-Holland*, para **39**, both "advice" and "information" cases involve the giving of advice. For the reasons we give, we think it is important to link the focus of analysis of the scope of duty question and the duty nexus question back to the purpose of the duty of care assumed in the case in hand.*

162. The Court went on to discuss and appraise the "*SAAMCO* style counterfactual analysis" and concluded as follows:

> ***27** The points which we make in this judgment are interrelated. Identifying the scope of the duty of care by reference to its purpose is a reasonably determinate test, applicable in principle from the outset of the parties' relationship. It seems to us that a focus on this criterion is a surer and simpler guide than a causation-based analysis as proposed by Lord Leggatt JSC. It is fair to say that the two modes of analysis may often lead to the same outcome, but problems arise where it is unclear whether they do or not. A choice then has to be made, and in our view it should be in favour of clear adoption of the purpose of the duty of care as the relevant test. Analysis using the counterfactual "tool" as deployed in* SAAMCO *was designed to assist with looking at the scope of duty question from a causation-based perspective. Therefore, once it is accepted that the scope of duty inquiry turns on identifying the purpose of the duty, it can readily be seen that a* SAAMCO*-type counterfactual analysis is just a cross-check, rather than the foundation of the relevant analysis. By contrast, if emphasis is given to a causation-based analysis of the scope of duty question and the related duty nexus question, then* SAAMCO*-type counterfactual analysis moves centre stage and appears to assume greater significance than it should do.*

163. Mr Assersohn in his oral submissions dealt with the six questions, but also cited *URS Corp Ltd v BDW Trading Ltd* [2023] EWCA Civ 772, a case arising out of the Grenfell Tower disaster, where Coulson LJ referring to Counsel for the Claimant's submissions said at ¶31:

> *... He maintained that, on the facts of this case, there was no need for such a convoluted delineation of the scope of the duty and the risk of harm. He said that the duty owed by URS was co-existent with the duty it owed under the contract, to the effect that the structural design would be produced using reasonable skill and care. He said that the risk which URS had to guard against was the risk that their negligent structural design would lead to structural defects and an unsound building. No other analysis was necessary or required.*
>
> *32. On this issue, at para 49, the judge gave an unequivocal answer:*
>
> > *"I consider that the answer to this question is the risks of harm to BDW, the employer, against which the law imposed upon URS, the structural designer, a duty to take care was the risk of economic loss that would be caused by a construction of a structure using a negligent design such that it was built containing structural deficiencies or defects."*
>
> *33. In my view, the judge's answer was entirely conventional and correct. This was a standard duty imposed on a design professional which was co-existent with that professional's contractual obligations. The risk of harm was that, in breach of the professional's duty, the design of the buildings would contain structural defects which would have to be subsequently remedied. For the purposes of the Preliminary Issues, it was assumed that the design was not only defective but dangerous, requiring multi-million pound remedial works and, in one block, the evacuation of the residents. In such circumstances, it is impossible to conclude that the losses were somehow outside the scope of URS's duty.*

He went on to make reference to the *MBS* six questions and observed:

> *35. I am not persuaded that* Manchester BS *[2022] AC 783 has any direct application to a case of this sort. The decision of the majority in* Manchester BS*, which at para 6 sets out the six-stage checklist, is designed to provide a useful way of analysing whether an alleged duty of care properly correlated to the harm claimed. It was, I think, primarily designed to analyse duties of care alleged to arise in novel situations which had not previously been considered by the courts, or where the type of loss claimed was unusual or stretched the usual boundaries imposed by the law. The checklist was not primarily intended to be applied by rote to the well-known and much-reported standard duties of care, such as those owed by doctors to their patients, or structural engineers to their employers, where the damage claimed is, respectively, the personal injury caused by a botched operation or the consequences of the errors in the structural design. As Mr Hargreaves submitted, this was not a claim that fell into any sort of grey area: it was, as he put it, "right bang in the middle".*
>
> *36. That said, I accept that the judgment of Lord Hodge DPSC and Lord Sales JSC in* Manchester BS *sets out a useful checklist which does, even in a conventional case like this, act as something of a "sanity check". If that checklist is applied here, it can be seen that the judge properly worked his way through the relevant questions and arrived at incontrovertible answers.*

164. It is therefore permissible, in a suitable case, for the Court to assess the scope of duty of care and the losses associated with and/or resulting from its breach by a straightforward analysis of the factual matrix on the evidence seen, heard and read without necessarily applying the *MBS* questions.

165. It falls to me now to address the scope of the duty of care in more detail than I have above when considering the existence of the contractual and common-law duties in this case.

166. Paragraph 37 of *MBS* suggests that the outset of the parties' relationship is the appropriate place, *in principle*, to assess the scope of the duty of care. I have found that in the First Contract, Mr Venton agreed to advise the Claimants on their planning application and advise on and produce appropriate plans for the Building Control inspector intended to form the basis of the proposed works. Contractually, that had to be done with reasonable skill and care as is accepted by the Defendant. I accept that his duty was to advise and draw up plans as per the Claimants' instructions as submitted by Mr Page, but that is only half of the story. Those instructions were given as a result of the advice proffered by Mr Venton. That advice was not proffered nor received, however, as an expert planning lawyer based on a detailed knowledge of planning law as suggested was required by Mr Page: Mr Venton did not hold himself out as having that level of specialist skill, nor did the Claimants expect that level of advice. Instead, both parties proceeded on the basis that Mr Venton was a professional in the planning field, very experienced in and knowledgeable of rural planning applications. Although the Defendant did not call itself a firm of planning advisers, nor did Mr Venton's job title incorporate that term, the combination of his professed skill and experience in advising on the prospects of would-be building projects; the obtaining of planning consent; the scope of options available to a client; the drawing and design aspects of such projects as well as the production of plans and works schedules together all point to a specialist skill which went well beyond those of a draftsman whose scope of duty was simply to draw plans reflecting the bald instructions of Mr and Mrs Melia, as Mr Page would have it.

167. What was the purpose of the advice to be given by Mr Venton? It was to use reasonable skill and care to obtain planning consent (though not a guaranteed result – that much was made clear). But in my judgment, it was thereafter to use that reasonable skill and care to bring the planning process to successful fruition, which included advising on and producing the detailed plans for Building Control purposes and then (in the second contract) a schedule of works. The purpose of the advice included producing a lawful building project which avoided a situation in which the Council could take enforcement action which would undermine the entire project and its expenditure.

168. It is clear to me from the oral and documentary evidence that I have seen, heard and read that the scope of the Defendant's duty of care extended to advising on whether and to what extent the Claimants could depart from the planning consent when the Building Control phase arrived because this would necessarily feed into the building itself. I find strong support in that conclusion from Mr Morehen's evidence which inherently confirms that to be the case, and the fact that Mr Venton positively took on that role when that moment arrived. The duty extended to both positively and negatively advising the Claimants (depending on whose idea any such departure from the consent was) should the prospect of such departure arise, together with a clear assessment and communication of the risks associated with such a departure. It was in Mr Venton's specialist knowledge and skill to be able to assess such risk and he alone had knowledge of the possible consequences.

169. Very much as a secondary position, and whilst *MBS* refers to the assessment as being at the outset of the parties' relationship, the pleaded case here is wide enough at Paragraph 9 to rely, if necessary, on Mr Venton taking it upon himself to widen the scope of his special relationship and thus his duty owed to the Claimants when he gave the positive advice that I

have found that he did on 3 May 2016.

170. In order to cross-check that assessment, I shall consider the six-stage checklist set out in *MBS*.

(1) Is the harm (loss, injury and damage) which is the subject matter of the claim actionable in negligence? (the actionability question)

171. Mr Page submitted that this being a case of pure economic loss, there was no special relationship and so the case fails at this hurdle. The assumption of duty was pleaded at paragraph 9 of the Particulars of Clam, and I have found above that such a special relationship in accordance with *Henderson v Merrett* did exist.

(2) What are the risks of harm to the claimant against which the law imposes on the Defendant a duty to take care? (the scope of duty question)

172. As stated, Mr Page accepted that the Defendant owed the Claimants a (contractual) duty to take reasonable care in carrying out that which it agreed to do. He submitted that the purpose of Contract 1 was two-fold: (i) at stage one, to draw up plans and the associated narrative documents which accurately reflected the works for which Claimants wished to seek planning permission; and (ii) at stage two, to draw up plans which accurately reflected the works for which the Claimants wished to seek building control certification as having complied with the Building Regulations 2010, and Mr Page correctly identified that any breach is actionable only if it causes a loss that has a nexus to the purpose of the duty.

173. I repeat the analysis here of the scope of the duty referred to in the paragraphs immediately preceding this check-list. I do not accept the limitations Mr Page puts on the purpose of the relationship in contract or tort, for the reasons I have set out in this judgment. From the outset, Mr and Mrs Melia, to the Defendant's knowledge (through Mr Venton), were relying on the Defendant to advise them on the permitted development they could achieve. That must, by any logical analysis, have included the potential consequences of following any advice given as and when that advice was given. In looking forward at the beginning of their relationship, the advice that would be offered in deciding how the planning consent might be brought to successful fruition (i.e. the detailed building control plans which would form the basis for the build), this advice would have been sought and tendered for the very purpose of keeping the build lawful and avoiding the Council taking enforcement action and putting the project to an end with disastrous consequences. This does not elevate Mr Venton to the status of an architect or "expert planning lawyer" as Mr Page submitted; it merely encapsulates the responsibilities he undertook professing the skill and experience that he did.

(3) Did the Defendant breach his or her duty by his or her act or omission? (the breach question)

174. I have dealt with this above.

(4) Is the loss for which the claimant seeks damages the consequence of the Defendant's act or omission? (the factual causation question)

175. Mr Page submitted that the Claimants' claim on factual causation faced the "*insuperable barrier*" that they already knew the matters which they now allege Mr Venton should have warned them about. He said that the terms of the planning permission couldn't be clearer. Condition 3 contained an absolute prohibition against demolishing the Outbuilding and they knew, in proceeding with the variations, that they would be in breach of that condition and would be subject to at the very least a significant risk of enforcement and chose to proceed, nevertheless. This was obvious, he said, from the exchange relating to the instruction of

Building Control: Mr Melia understood that the primary purpose of engaging an external provider rather than the Council's Building Control department was to minimise the risk that a council officer would attend the site and realise that the works being carried out were in breach of the planning permission that had been granted.

176. As Mr Assersohn submitted, it was the Claimants' case, and I have so found, that the Claimants were persuaded by Mr Venton that the course of action would be *permitted* by the Council provided the finished building looked like the planning consent drawings. The exchange regarding the building inspector actually reflects the light-hearted way that Mr Venton downplays the (as it turned out) momentous departure from the consent, moving instead to the demolition of the Outbuilding ("*not strictly in accordance with*"). This forms part of how the Claimants came to believe that what they were being advised to do would be permitted by the Council.

177. In accordance with my findings of fact that the Claimant would have proceeded with a lawful build if they had been correctly advised and warned, I proceed to answer the balance of this question on that basis.

178. As a result of the advice given and taken, the build proceeded as it did instead of in a lawful way. As a result, the whole project was stopped by the Council which it would not have been had the variations not been made. The Claimants would have ended up with a converted outbuilding which was lawful and habitable, and they could have sold the main house to pay off the mortgage used for the building costs. As things stand, the costs incurred on the building works have been completely wasted as they have derived no benefit from them at all. That applies to the ancillary and preparatory costs as well as the fees paid to the Defendant not just in respect of the project management, but also the planning and building control costs (although these are not claimed). Similarly, they have borrowed money and paid interest in respect of a project from which they cannot gain any benefit: the planning consent is "spent" in that the original Outbuilding has been demolished and can no longer be converted. They are exposed to the possibility of an enforcement order to demolish the Outbuilding which is left as a disintegrating eye-sore, and so there must be a significant risk of such an order. As a matter of fact, they would also not have incurred the costs of attempting to obtain retrospective planning consent.

179. By the simple application of the "but for" test, all of the heads of loss pleaded at ¶¶41(1) to (8) arise from the breach of duty in respect of the non-compliance with the planning consent. The loss at ¶41(9) factually arises only out of the second breach in relation to the retrospective planning consent.

(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the Defendant's duty of care as analysed at stage 2 above? (the duty nexus question)

180. The demolition and reconstruction of a building in a very rural area would never have been given planning consent according to Mr Venton's initial advice. With his experience and knowledge of the planning system, he must have known, or can certainly be taken as having known because of how he held himself out to the Claimants, that there was a significant risk of the there being a calamitous intervention by the Council if this significant deviation from the planning consent was discovered. His very involvement in the project had been to afford the Claimants protection from falling foul of the planning system and instead to bring their application to fruition. It must have been in the contemplation of the parties that, if Mr Venton advised the Claimants to carry out an unlawful build (at the same time as telling them that it was lawful), or failed to prevent them from doing so, enforcement action would likely follow. The Claimants were never appraised of the disastrous potential form that such

enforcement action could take, but Mr Venton would have known that.

181. The fact that the enforcement action had such disproportionate financial effect compared to the fees received by the Defendant was not something the Defendant sought to control by its contractual terms and conditions (and it would have been open to them to have done so), and yet the Defendant would have known (or ought to have known) that such a disproportionate result could occur if one of its employees acted as Mr Venton did. As I have already observed, the Defendant has not sought to disassociate itself from Mr Venton's acts and omissions and has accepted vicarious liability. Whilst the level of fees has some bearing on the scope of the duty of care, I have taken that into account in concluding that the scope extended to the matters set out above. Thereafter, it was up to the parties to moderate the effects of the common law by contractual terms if they wished to do so, but which they did not do. A valid contractual limitation clause would, of course, normally operate to have a similar effect on the damages recoverable for a breach of a common law duty of care (see e.g. *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146).

182. This is not a case like *SAAMCO* or *MBS* where the negligent advice was but one ingredient in the decision taken to proceed with the non-compliant build: it was the sole driver. It is not a case where some of the damage arose from factors other than the advice given.

(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, or because there is a different effective cause (including novus actus interveniens) in relation to it or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid? (the legal responsibility question)

183. Subject to what follows, and because of the scope of the Defendant's duties coupled with the losses contemplated by the parties, I do not consider that there is any element of the claim which falls within the answer to this question.

184. It is in answering this question, that the Claimants' partial responsibility for what happened post-discovery must be brought into account. I accept Mr Melia's evidence that he felt that he had no choice in the face of Mr Venton's threats to "*leave him out to dry*" (to use Mr Melia's words) if he did not play along with Mr Venton's proposed method of proceeding, namely, to lie. Mr Melia only acted after he had been left exposed by Mr Venton's last-minute idea to blame the demolition decision on Mr Melia and the builder.

185. Moral turpitude is a question of fact and degree: that is common ground. For reasons of proportionality, I do not propose to add to this already lengthy judgment. In my judgment, the Claimants' recovery in relation to the post-discovery costs is limited to 50% of those costs. It is true that they would not have spent those costs but for Mr Venton's pressure and advice, but I must reflect the fact that they were partially responsible for advancing a dishonest case to the Council.

Conclusion on Scope of Duty

186. I therefore conclude that the losses claimed fell within the scope of duty owed by the Defendant to the Claimants.

Measure and Quantum of Damage

(a) The measure of loss

187. Mr Page emphasised the need to focus on expectation losses rather than restitutionary ones,

by which he means the contractual measure of loss rather than the tortious measure. This was the conclusion of the Court of Appeal in *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146 at [80] per Floyd LJ. I accept that submission.

188. The valuation losses are pleaded as I have set them out above at paragraph 160 (as paraphrased by Mr Assersohn), but for ease of reference repeat them here.

> *(8) The difference in value between 2 Scotts Lane:*
>
> *(i) in its present condition but on the basis:*
>
> - *that the Outbuilding could be subject to an enforcement notice;*
> - *the fact that the added value of the original planning consent has been lost, and*
> - *the potential of enforcement action in relation to the new garage which is said to have been built in the wrong place and to the wrong size, and*
>
> *(ii) its value as it would have been with the benefit of the original planning consent, before any work was undertaken.*

189. As will become apparent difficulties arise here because the experts have been instructed to advise on different basis of value at three different dates and otherwise than in accordance with their clients' pleaded cases.

190. Mr Evans for the Defendant was instructed to provide a value in respect of head (8)(i) as at October 2017 and 8(ii) as at April 2016. This he did in a rather confusing way. For 8(i) he valued the would-be completed property as a whole at £755,000 (I think there must be a typo when he says "without" garage and completed bungalow because he goes on to deduct their values), which he breaks down as to £425,000 for the house and £330,000 for the bungalow, but then deducts a further £25,000 from the house value to take account of the shared drive. He assesses the build costs for the bungalow at £200,000 leaving the plot worth £130,000 as at April 2016.

191. In respect of (8)(ii) as at October 2017, Mr Evans values the plot in its current state at £450,000, subject to demolition costs of £5,000 for the garage and £10,000 for the bungalow, leaving a residual value of £435,000.

192. Mr Neason values what would have been a lawfully completed project at £920,000 as at 16 November 2020 (the date of inspection), divided as to £530,000 for the house and new garage and £390,000 for the bungalow. He values it as at the same date but in its current condition at £565,000 if the bungalow has to be demolished and £535,000 if the garage also has to be demolished.

193. The costs of demolition of the Outbuilding and the garage are pleaded at ¶41(7) of the Particulars of Claim and cannot be taken into account twice.

194. Mr Page argued that the Claimants should be put into the position which they would have been in at the point in the works that was reached before the builders were instructed to stop the works on a compliant project (i.e. one for conversion rather than demolition/rebuilding).

195. His skeleton argument described the calculation of such losses thus:

> *Any such claim would require expert evidence from a quantity surveyor, identifying (i) the percentage progress of the works reached as at 10 October 2017; (ii) the cost of*

demolishing the current property; (iii) the cost of re-erecting the original Outbuilding; and (iv) works reflecting the same percentage progress actually reached as at 10 October 2017 following the plans approved by the Council.

196. I can see perhaps a theoretical route to this approach in different circumstances, but I regard it as wholly unrealistic on the facts of this case (and I suspect it would be a disproportionately expensive measure to adopt in any event).

197. It is unrealistic because the original Outbuilding has gone, and it cannot be resurrected. It would be impossible and probably irrational for the Council to ever adopt such a project: the rationale for the grant of the consent was the use of an existing building. Once the building has gone, it has gone. To require the recreation of an inferior building in order to recreate the rationale for the planning consent is non-sensical.

198. If Mr Page's approach is intended as a theoretical calculation only (i.e. recognising the difficulty with its practical application), that would fail to take account of the loss to the Claimants of the planning consent and its attendant utility as well as the enhanced value of the property that would have accrued to them had they been left with a lawfully constructed second dwelling and garage on the plot. As Mr Page's proposed calculations recognise, there would have needed to have been more expenditure to complete the conversion but, the build project would have been entirely different.

199. Mr Page's approach also has all the hallmarks of an enforced mitigation process which it is trite law to say is not permissible. It is therefore wrong in principle.

200. Had the contracts been performed properly, the Claimants would have had a lawful second residence and garage, and they would have been in a position to sell the main residence and pay off the mortgage as planned. As things stand, they have lost their planning permission, they have expended a large sum of money on a build from which they have gained no benefit and are paying mortgage interest on that sum. The *prima facie* position from which their loss can most properly (and simply) be calculated (based on my findings as to scope of duty and causation) is the difference between the value of what they would have got had the contracts been performed properly (as set out above – subject to the costs of the project) and the value of what they have ended up with. There is one difficulty with this approach: calculating the deduction to be made from the value of the putatively properly-completed project of the sum it would have cost to undertake the project. This would have been a different build from the one that Mr Venton proposed and tendered for, and there is scant evidence of what this would have cost. I will return to this below.

201. The Claimants' approach to calculating this sum is to value what they currently have (the property with unlawful partly built additions) and compare that to the value of what they did have prior to the works commencing (i.e. main house and original Outbuilding with planning consent) and to add to that the costs incurred in getting themselves to the position they now find themselves in, plus the loss of a chance of obtaining the increase in value that a retrospective planning consent would have brought. From the above figures, Mr Assersohn calculates the difference in the valuations between (8)(i) and (ii) as being £80,000.

202. This approach has the one advantage that it measures the actual costs incurred in getting to where the Claimants are and obviates the need to calculate the putative costs of the lawful project. But it introduces other complications, such as assessing the loss of a chance to obtain the retrospective planning consent and the fact that it is akin to (but not entirely the same as) a "non-transaction" or restitutionary approach to the measure of damages.

203. It also fails to take into account what might be described as a "*marriage value*" between the

incomplete and completed project which can never now be recovered since the planning permission has been 'spent' (as described above). Mr Neason, the Claimants' expert, has provided evidence that the value of the lawfully completed project was £920,000 as at 2020. The loss of a chance claim is intended to meet the "*marriage value*" aspect of the loss but is problematic because it is conceptually difficult to devise a logical approach to this, coupled with the fact that I have found that that is not possible in any event on the evidence available.

204. I emphasise that this "*marriage value*" loss is not reflective of the Defendant underwriting the Claimants' original project in terms of value: both valuations I am contemplating are equally subject to market conditions and variations. Indeed, they would avoid any difference between changes in market values of the site as compared with changes in building costs which the Claimants' approach suffers from. What they do is to reflect the reality that there is no other way that the Claimants can be put into a position that they should have been in had the contracts been performed correctly. This is because of the unusual position that there is no way of resurrecting the conversion of the Outbuilding. This approach also avoids the arguments raised in relation to the Defendant's fees and other ancillary costs associated with the project.

205. In order to put the Claimants in to the position as close as possible to the position that they would have been in had the contracts been performed properly, the correct measure, or calculation, is to compare the value of what they now (subject to what I say below regarding the date of assessment) have with the value of what they should have had had Mr Venton not been in breach of his contractual duties.

206. In that scenario, they would have owned a site which the Claimant's expert states would have been worth (as at November 2020) £920,000 having spent all of the money that they would have needed to expend to complete the lawful project. That is not the same animal, however, as the partially completed build that they did undertake which was much more extensive. This is reflected in an email from Mr Melia dated 6 May 2017 upon receipt of the tender quotes (and which, of course, would have excluded the application for retrospective consent). This build cost is a missing figure at present. Instead, they have a site worth somewhere in the region of £535,000 and £565,000. Interest has accumulated on the mortgage funding the works which it would not otherwise have done because the main house would have been sold. This is recoverable *prima facie* from the hypothetical date of sale onwards.

207. A further complication on the valuation evidence and award is the proper date of assessment. It is trite law that the date of assessment of damage for a breach of contract is the date of breach. However, that is subject to a rather wide and vague number of exceptions. *Chitty on Contracts* 35th Ed. ¶30-107 states:

> *The general rule is that damages for breach of contract should be assessed as at the date when the cause of action arose, viz the date of the breach (which rule usually applies where substitute performance is readily available in the market):*
>
> > *"But this is not an absolute rule: if to follow it would give rise to injustice the court has power to fix such other date as may be appropriate in the circumstances."*
>
> *... If the claimant did not know of the breach of contract at the time it occurred, damages will usually be assessed as at the time when he should reasonably have discovered the breach, and was able to act on his knowledge, e.g. by attempting to mitigate. When a property owner claimed an agent had acted without authority but the agent disputed this, it was held to be reasonable to assess the purchaser's damages for breach of warranty of authority at the date of trial. The time for*

assessment may also be postponed until after the date of breach where damages have to be assessed by the cost of substitute performance or by the cost of a reasonable attempt to mitigate.

208. In the instant matter, the Claimants did attempt to mitigate but in an inappropriate manner, as discussed above. The attempt at mitigation ultimately failed when the planning inspectorate refused the Claimants' appeal against the refusal to grant retrospective planning permission given on 7 November 2018. There are no valuations as at that date.

209. Obviously, the Claimants did not know of the breach of the First Contract when it occurred, and I have already held that it would be wholly artificial to try and recreate their position as at that date by a reconstruction of the original Outbuilding and the Claimants starting again.

210. It is clear to me that as a matter of principle it would not be in the interests of justice to dismiss the Claimant's claim on valuation simply because some of the valuations are not precisely on point, particularly given that the experts agreed that their respective valuation evidence is consistent with each other's over time, and accord with agreed variation in values and building costs.

211. Although there are three quotes, all obtained on the Defendant's tender documents with the Defendant's "*Prime Cost*" sums included, those quotes are for a different job than the Claimants should have been advised to carry out.

212. Because my preferred approach is one that falls between what the parties anticipated, I consider that it is appropriate to receive further written submissions on these outstanding matters as defined below.

(b) Mortgage Interest

213. I accept that the Defendant knew that the Claimants were borrowing to fund this project, and that it was reasonably foreseeable and in the contemplation of the parties that, should the project be catastrophically halted in the way that it was, the Claimants would be left with an outstanding mortgage and no way of redeeming it until their residential position had been resolved. Mr Page suggested in his closing submissions a notional completion date for the Outbuilding as February 2018 which I consider reasonable. The garage was a simpler construction and would also probably have been completed by then. The property market as at 2018 was buoyant and I consider that it is reasonable to assume that the Claimants could have achieved a sale by August 2018. Thereafter, the mortgage interest payments are the reasonably foreseeable result of the Defendant's breaches.

Contributory Negligence

214. I have proceeded on a contractual basis in this judgment. In any event, I do not consider that the Claimants were contributorily negligent in respect of the duties arising out of the First Contract. As I have found, they reposed complete trust and confidence in Mr Venton which is what he sought and received, and they were entitled to do so.

215. My findings of 50% liability on the Second Contract as regards moral turpitude would reflect a finding of contributory negligence were that to be the basis of my decision.

Conclusions

216. I conclude that the Defendant is liable to the Claimants for the losses arising from the Defendant's breaches of duty created by the First and Second Contracts.

217. Factual causation is established in relation to each head of loss: the Claimants would have proceeded lawfully if they had not been advised otherwise by Mr Venton.

218. The Defendant's legal scope of duty extended to the losses pleaded.

219. The Claimants are entitled to be put into the position that they would have been had Mr Venton advised them otherwise than in breach of contract which, *prima facie* is the difference in value of the property as a whole now compared to what it would have been had the project been completed in a lawful manner. That completion would have occurred in February 2018, but a sale would not have been achieved immediately.

220. I invite written submissions on how that is to be best achieved.

221. My preliminary views are that the experts should be invited to express a joint opinion of the value of the property as a whole as at August 2018 together with a figure for the costs of constructing the true (i.e. lawful) conversion of the Outbuilding and the new garage between May 2016 and February 2018. The damages should be the difference in those values (plus peripherals such as appropriate interest; 50% of the retrospective planning application costs of £3,959.95 and mortgage interest from August 2018) on the one hand and the value of what the Claimants had as at August 2018 less the actual cost of construction as at that date plus the costs of the retrospective planning costs (even though incurred later). No account need be taken of the would-be completion costs because they were not incurred and will not be incurred.

Addendum

222. Since circulating this judgment in draft in March 2024, there have been very extensive delays caused initially by directions being negotiated for further submissions on the issues surrounding measure and *quantum* of loss, and then by a further factual development relating to a subsequent planning application having been granted in respect of the Outbuilding over which the parties have been in dispute (i) as to its potential effect on the factual findings in this judgment; (ii) further disclosure, and (iii) its relevance to the issue of loss.

223. The parties have agreed directions which *inter alia* invite me to hand this judgment down as a liability-only judgment and proceed to a further hearing on the measure of loss and *quantum*, together with costs. It has been agreed that further expert evidence is to be obtained to assist with these issues. I have agreed to make those directions and have handed this judgment down accordingly. A further judgment on *quantum* and costs will follow in due course.