Neutral Citation Number: [2018] EWHC 1113 (TCC)

Case No: HT-2017-000030

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2018

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

- -

Between :

Raymond Peacock(1)	**Claimants**
Judy Peacock (2)	
- and -	
Imagine Property Developments Ltd.	**Defendant**

- -
- -

David Sawtell (instructed by **Taylor Walton**) for the **Claimants**
Charles Raffin (instructed by **EMW LLP**) for the **Defendant**

Hearing dates: 23-26 January, 2 February, 2 May 2018

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Judgment Approved

The Honourable Mr Justice Stuart-Smith :

Introduction

1. The Claimants and the Defendant, in the person of Mr Molton, set out with the best of intentions to develop a parcel of land that was subdivided into five plots, known as Plots 1-5. For perfectly understandable reasons, the intended sequence of the development broke down, which disturbed the smooth and contractually anticipated order of things. For a number of reasons that are considered in this judgment, the relationship of the parties broke down in the second half of 2014. That breakdown led to the Defendant being instructed to stop work. It did so when the houses on Plots 3-5 had been built, the intended house on Plot 2 had been part-built, and construction of the house that the Claimants intended to keep for themselves on Plot 1 had not begun. Apart from removal of a nearby spoil-heap that is itself the subject of dispute, no progress has since been made on the development site. Irrespective of the rights and wrongs of the disputes, it has been a disaster for all concerned.

The Issues

2. The parties cooperated in formulating issues for determination by the Court and adopting a similar structural approach to the identified issues in the presentation of their closing submissions. In writing this judgment, I have adjusted the order of the issues because I consider that overwhelmingly the most important question for the

determination of the litigation is whether the Defendant did or did not exercise an option in relation to Plot 2. I shall address the issues after setting out the necessary factual background in the following order:

i) The Plot 2 Option Agreement – Exercise and Breach: see [50];

ii) Unjust Enrichment: see [77];

iii) Sewers and Drainage: see [96];

iv) The Spoil Heap: see [105];

v) Removal of Concrete Topping: see [114];

vi) The Unilateral Notice: see [116];

vii) Quantum and Collection: see [121];

viii) Conclusion: see [**Error! Reference source not found.**].

The Factual Background

3. The Claimants are husband and wife. For almost 40 years Mr Peacock carried on business as a silk screen printer from factory premises in Soulbury, near Leighton Buzzard. The pressures of competition and attempting to recruit people to work in a factory in a small village that was not well served by public transport led him to decide to sell the factory in order to provide a fund for their retirement. When he failed to find a buyer, the Claimants decided to apply for planning permission to build houses on the site. In order to make the project viable they bought two other factories that were on the site and applied for planning permission to build five houses. The combined site had Title Number BM342167. I shall refer to the combined site as "the Site". For the purposes of the projected development and the obtaining of planning permission the Site was subdivided into five plots, which became known as Plots 1-5, The Mead, Soulbury.

4. In addition to the Site, Mr Peacock was the joint owner with his brother of land immediately to the north of part of the Site, known as 9 Stewkley Road, on which was a derelict bungalow. The Site and 9 Stewkley Road are the prime subject of this action. Stewkley Road itself is to the north of 9 Stewkley Road and runs east to west. Along the east side of 9 Stewkley Road runs an access way; and to the east of that access way runs The Mead. It was the intention that access from Stewkley Road to the Site as developed would be by going south along the Mead and then turning right (towards the west) onto the Site. I deal with the necessary infrastructure works for the Site later.

5. Aylesbury Vale District Council granted planning permission for the demolition of the factory units and erection of five detached houses on 15 September 2009. The permission was subject to conditions including that the development should be begun before the expiration of three years from the date it was granted, and that the development should not be occupied until the boundary treatment indicated on the approved plans had been constructed/erected.

6. The approved plans showed the proposed layout of the development. It can be seen clearly from the 1:500 layout plan that is attached as Annexe 1 to this judgment. As can be seen on Annexe 1, the boundary treatment indicated by the approved plans included a new 1.8m high brickwork wall to the eastern side of Plot 5, a 1.2m high post and 3 rail fence along the south and west sides of the Site, an existing 1.8m high close-boarded fence to the north side of Plot 2 and a 1.8m high brickwork wall to the north of Plot 1.

7. The Claimants were in no rush to sell or develop the site, but their perspective changed during 2011 when Mrs Peacock became ill and her husband decided to concentrate on her recuperation. For the next two years, their main concern was to restore Mrs Peacock to full health; but at the same time they decided to move their development project forward. They had previously met Mr Richard Molton, who uses the Defendant as the vehicle for his property development business. He was not then a named director of the Defendant, having previously been declared bankrupt. Although I have considered the bankruptcy and any possible implications it could have on my assessment of Mr Molton and his dealings with the Claimants, I have concluded that neither the fact of his previous bankruptcy nor the fact that he did not tell the Peacocks of it influences my assessment of him or the Defendant adversely. I know nothing about the circumstances of the bankruptcy; and his reticence about it was understandable when trying to continue in legitimate business. I concluded after hearing Mrs Peacock and Mr Molton at length that both were doing their best to assist the Court with their evidence; and that both the Peacocks and Mr Molton set out with the best of intentions. Their good intentions unfortunately came to grief in the circumstances set out below.

8. In about March 2011 Mr Molton sent the Peacocks an outline "Construction Budget" covering all five plots. It included a figure of £80,000 for Infrastructure works for the whole project. The cost of building the dwellings were separately listed for each plot, with an aggregate figure of just over £450,000. Less detail was provided on a plot-by-plot basis for externals. The externals item included for electricity, gas and water, which have subsequently been treated as infrastructure works. The externals item also included an item for "Fencing" in the sum of £10,000. It was not sub-divided between the plots and the Construction Budget gave no more detail about what was included in it. The Construction Budget concluded with figures for Fees, Site Preliminaries and Overheads. The bottom line figure was just over £810,000 for the complete development.

9. By November 2011 the Peacocks and Mr Molton were considering some kind of joint venture agreement. On 7 November 2011 the Peacocks told Mr Molton that they were going to run the idea past their accountant to clarify the tax position and that they definitely did not want to trigger the capital gains on the whole site if they only ended up building one house on the site the following year. As we shall see, appreciation of the tax consequences of taking steps in one financial year or the next was a recurring theme in correspondence.

10. At some stage, probably in 2011, Mr Molton produced a "Build Budget for Plot 1…". It followed the same general layout as the Construction Budget but the costs were all specific to Plot 1, which was the plot that the Peacocks were thinking of retaining for themselves. The Build Budget for Plot 1 included £16,000 for Infrastructure. Although that was equivalent to 1/5 of the £80,000 included in the Construction

Budget, the sums that went to make up the £80,000 were not all simply 1/5 of the Construction Budget figure for the same items: so, for example, the sum for Demolition in the Construction Budget was £35,000, whereas the figure for Demolition in the Build Budget for Plot 1 was £5,000. As with the Construction Budget, there was no figure for fencing or wall-building within Infrastructure; but there was a figure of £2,000 for Fencing under the Externals section of the Build Budget for Plot 1. Sums for Electric, Gas and Water mains were also included under Externals, as they had been for the Construction Budget.

11. The formal arrangements between the Claimants and the Defendant were concluded by a series of four agreements on 28 March 2012. There was a separate agreement between the Claimants as Seller and the Defendant as Buyer in respect of each of Plots 2-5. In briefest outline, there was a Sale Agreement in relation to Plot 5 ["the Plot 5 Sale Agreement"] by which the Claimants agreed to sell Plot 5 to the Defendant and the Defendant agreed to build a house on it. There were then Option Agreements in relation to Plots 4, 3 and 2 respectively, each of which gave the Defendant the option to buy the Plot in question and, if the option was exercised, provided for the Defendant to build a house on it. The intended order in which the development was to be carried out was shown by the fact that (a) the option period for Plot 4 ended on 31 March 2013 and that option could not be exercised before the Buyer had completed the purchase of Plot 5, (b) the option period for Plot 3 ended on 30 November 2013 and that option could not be exercised before the Buyer had completed the purchase of Plots 5 and 4, and (c) the option period for Plot 2 ended on 31 July 2014 and that option could not be exercised before the Buyer had completed the purchase of Plots 5, 4 and 3. There was no agreement in relation to Plot 1.

Plot 5: the Sale Agreement

12. The Plot 5 Sale Agreement included the following terms and conditions:

> "IN THIS AGREEMENT
>
> …
>
> "conducting media" means pipes wires cables and other conducting media providing services to and from the Property and the Retained Land
>
> …
>
> "the Planning Permission" means Planning Permission number 07/03455/APP dated the 15th day of September 2009 or such other planning consent or amendment granted to an application made by the Buyer with the consent of the Seller
>
> …
>
> "the Property" means Plot 5 …
>
> …

"the Retained Land" means the land shown edged blue on the plan

…

"services" means soil water gas electricity and telephone

…

"the Title Number" means Title Number BM342167

"the works" means demolition of the buildings on the Property the Plots and the Retained Land the construction of a dwelling on the Property the construction and laying out of the access road as herein provided for the laying of conducting media and the provision of any landscaping and fencing

2. THE SELLER will sell with full title guarantee and the Buyer will buy the Property for the purchase price and interest will run on the purchase price less the deposit from the date hereof to the date of its payment

…

5. FROM the date hereof and after the Buyer has complied with the terms of condition 6 the Seller will allow the Buyer and its employees and contractors access to the Property the Plots and the Retained Land for the purpose of carrying out the works

6.1 AS from the date hereof the Buyer shall be responsible for complying with the Sellers obligations under the Section 106 Agreement and will keep the Seller fully indemnified in respect of all liability relating thereto.

…

7. THE BUYER will with all reasonable speed construct a dwelling on the Property and carry out the remainder of the works in accordance with the conditions of the Planning Permission and in accordance with Building Regulations requirements and the NHBC requirements (having first registered the dwellings with the NHBC) the dwelling to be conducted in a good and workmanlike manner using good quality materials

…

10. BEFORE THE completion of the sale and purchase the Buyer will:

(a) construct the access road coloured brown in a good and workmanlike manner to base course (without kerb stones)

> ready to be finished to the standard required by the local Planning Authority and the Highways Authority for adoption;
>
> (b) construct the access road coloured green to a stone finish (without edging) ready for base course and the final surfacing of the same as either block paving with appropriate edging or some other surface which is agreed between the Seller and the Buyer (acting reasonably); and
>
> (c) lay conducting media from the mains services to the boundary between the parts of the access road coloured brown and green
>
> …
>
> 15.1 TITLE to the Property is registered at the Land Registry under title number BM34267
>
> …
>
> 17. THE SELLER consents to an entry being made at the Buyer's costs by way of an agreed notice on the register of the Seller's title to protect this Agreement, and agrees to sign a Form AN1 prepared by the Buyer for that purpose."

13. On the plan that was incorporated into the Plot 5 Sale Agreement the area of the access road just to the left of the words "turning head to highway standards" was coloured brown with the rest of the access roadway within the Site being green.

14. The transfer was to be by a Form of Transfer TP1, of which a draft was annexed to the Plot 5 Sale Agreement. It included the following:

> 1. Title number(s) out of which the property is transferred: BM342167
>
> …
>
> 3. Property:
>
> Plot number 5 at Stewkley Road Soulbury Buckinghamshire
>
> The property is identified … on the attached plan and shown … edged red
>
> …
>
> Definitions:
>
> "access road" means the road shown coloured brown and green on the plan

"conducting media" means pipes wires cables and other conducting media providing services

"the plan" means the attached plan

"the plots" means plots 1 2 3 4 and 5 shown on the plan and for the avoidance of doubt plot 2 includes the access road

"the Property" means the property hereby transferred

"Retained Land" means the remainder of the land registered under the Title Number BM342167 as at the 1st day of January 2012

"services" means soil water gas electricity and telephone

Rights granted for the benefit of the property

The following rights are granted over the Retained Land for the benefit of the Property:

1. A right of way in common with all others entitled over the part of the access road coloured brown for the purpose of gaining access to and from the Property subject to the payment of one-fifth of the costs of repairing and maintaining the same.
2. The right to the supply of services to and from the Property through the conducting media situated in over or under the Retained Land and the right to enter thereon at reasonable times and on reasonable notice and for the purpose of inspecting repairing maintaining and renewing the same subject to doing as little damage as possible and forthwith making good all damage caused and subject to the payment of a fair and reasonable proportion of the costs of repairing maintaining and renewing those conducting media which jointly served the Retained Land and the Property.

…

Rights reserved for the benefit of other land.

The following rights are reserved over the Property for the benefit of the Retained Land:

1. The right to the supply of services to and from the Retained Land through the conducting media situated in on over or under the Property and the right to enter thereon at reasonable times and on reasonable notice for the purpose of inspecting repairing maintaining and renewing the same subject to doing as little damage as possible and forthwith making good all damage caused and subject to the payment of fair and reasonable proportion of the costs of repairing maintaining and renewing those conducting media which jointly serve the Property and the Retained Land.

…

> The Transferee for itself and its successors in title hereby covenants with the Transferor and his successors in title
>
> 1. To keep and maintain in good repair and condition the conducting media serving the Retained land situated in on or under the Property subject to the contribution hereinbefore referred to
>
> 2. To keep in good repair and condition the fences on the boundaries of the Property (Transferee to insert "T" marks when ownership of boundaries is known)"

The Options for Plots 4, 3 and 2

15. The Options were in materially the same terms with variations that reflected the order in which they were to be exercised. The Options included the following (by reference to the Plot 2 option with variations indicated in italics):

> **1. DEFINITIONS**
>
> In this Agreement, unless the context otherwise requires, the following terms and expressions have the following meanings:
>
> …
>
> | | |
> |---|---|
> | **Conditions** | the Conditions set out in Schedule 2 |
> | **Contract Rate** | 7.5% per annum |
> | **Exit Fee** | £7500 |
> | **…** | |
> | **Option Period** | the period ending on *31st July 2014*[1] |
> | **Plan** | The attached plan |
> | **Plots *3, 4 and 5*** | The plots of land numbered *3 4 and 5*[2] on the plan |
> | **…** | |
> | **Property** | The property described in Schedule 1 |
> | **…** | |
> | **Title No** | BM342167 |
> | **…** | |

[1] 31 March 2013 in Plot 4 option; 30 November 2013 in Plot 3 option- reflecting the intended sequence of development.

[2] 5 in Plot 4 option; 4 & 5 in Plot 3 option - reflecting the intended sequence of development.

Works Means the works described in Schedule 3

3. OPTION

3.1 In consideration of the Option Fee paid by the Buyer to the Seller (receipt of which the Seller acknowledges), the Seller grants to the Buyer the Option to buy the Property at the Purchase Price.

3.2 The Option may not be exercised before the Buyer has completed the purchase of *Plots 3 4 and 5*[3]

3.3 The Option lapses if it has not been exercised by the Buyer in accordance with the terms of this Agreement before the end of the Option Period.

4. EXERCISE OF THE OPTION

4.1 The Option is exercised by the Buyer giving written notice to the Seller to that effect at any time during the Option Period (subject to clause 3.2 above).

4.2 On the exercise of the Option, the Buyer is to pay a deposit of *10 per cent*[4] of the Purchase Price to the Seller

…

6. REGISTRATION OF THE OPTION

6.1 The Seller consents to an entry being made by way of an agreed notice on the register of the Seller's title to protect this Agreement and agrees to sign a Form AN1 prepared by the Buyer for that purpose.

6.2 If the Option lapses, the Buyer will procure that any registration of the Option or of this Agreement in the register of the Seller's title to the Property or against the Seller's name will be removed immediately, and immediately thereafter the Buyer will provide written evidence to the Seller of its having done so.

6.3 On the exercise of the Option the Conditions shall apply to the sale and purchase

6.4 From the exercise of the Option the Buyer is entitled to access to the Property and the remainder of the land then

[3] 5 in Plot 4 option; 4&5 in Plot 3 option, reflecting the intended sequence of development.
[4] 5% in Plot 4 option.

remaining in the title number to carry out the Works on the terms set out in schedule 3

SCHEDULE 1

Description of the Property

Plot 2[5] at land to the rear of Stewkley Road Soulbury Leighton Buzzard Bedfordshire being part of the land comprised in the title number and more particularly described in the Transfer

SCHEDULE 2

The Conditions

…

4. COMPLETION

4.1 Completion of this sale and purchase shall take place on whichever is the earlier of

4.1.1 the date which is eight months from the date of the exercise of this option and

4.1.2 the date specified by the Buyer as the date for completion by not less than two weeks prior notice in writing from the Buyer to the Seller

4.2 Completion is to take place on the Completion Date at the offices of the Seller's Solicitors or at such other place in England and Wales as the Seller or the Seller's Solicitors reasonably direct

4.2 (sic) The Buyer will on the Completion Date pay to the Seller:

4.2.1 the balance of the Purchase Price

4.2.2 interest on the balance of the Purchase Price less the deposit at the Contract Rate from the date of exercise of the Option to the date of completion

4.2.3 the Exit Fee

…

SCHEDULE 3

The Works

[5] Plot number adjusted as appropriate to different Plot options.

> 1. The Works are the construction of a dwelling on the Property and the laying of conducting media to and from it and the provision of landscaping and fencing
>
> 2. The Buyer will with all reasonable speed construct the dwelling and carrying (sic) out the remainder of the Works in accordance with the conditions of the planning permission. …
>
> 4. The Buyer will keep the conducting media under the access road defined in the Transfer in good repair and condition and the said access road maintained to a standard sufficient to allow access to the Property with or without vehicles and building materials and will before completion of the sale of the Property complete the surfacing and edging of the said access road as to the part coloured yellow on the Plan to the standard required for adoption by the local planning and highway authorities and as to the part coloured green on the Plan to a block paved finish or such other finish as is agreed between the Buyer and the Seller.

16. The form of transfer that was annexed to the Options was in substantially the same form as the form used for the Sale of Plot 5 though some of the terms appeared in different places.

Progress after March 2012

17. In June 2012 the Claimants discovered that a unilateral notice had been registered over the whole of the title. When they asked Mr Molton what was going on he told them that his solicitor had placed the notice so that "if anything was lodged at [the] Land Registry by anyone then [the] Land Registry will have to notify [the Defendant's solicitor] so it is his safeguard of my interests."

18. In November 2012 a prospective purchaser of Plot 2 emerged. This was the first occasion when the planned order of the agreements and the anticipated sequence of the development of the plots came under pressure. Draft contracts were sent out by the Defendant's solicitors on 27 December 2012. There was no doubt at that stage that the Option for Plot 2 had not been exercised, and on 14 January 2013 the Defendant's solicitors wrote to the solicitors acting for the prospective purchasers explaining that the Claimants owned the Plot, the Defendant was building it out under licence, and that on completion the purchasers would receive a transfer of the property direct from the Claimants by way of a subsale. It is not clear where the Defendant's solicitors got the information on which this letter was based. What is clear is that Mr Molton told the Claimants on 2 January 2013 that he was due to exchange contracts with the prospective purchasers for Plot 2 on 14 January with a legal completion on 30 June, and that a prospective purchaser for Plot 3 "seems to have disappeared". He raised the prospect that he may seek to start work on Plot 3 regardless in February 2013. This timetable would have put the originally intended sequence of development out of kilter by advancing Plot 2 so that it was built out before Plots 3 and 4 rather than after them. Mr Molton finished his email on 2 January 2013 by saying he hoped that the plans he was outlining were "ok".

19. Negotiations with the prospective purchaser of Plot 2 continued. On 1 February 2013 Mr Molton wrote to Mrs Peacock telling her that exchange on Plot 2 should happen that day and that he had found a purchaser for Plot 3 with exchange (of contracts with the purchaser) set for 6 April 2013. Mrs Peacock replied on 3 February 2013. She noted that the footings for Plot 2 were done even though exchange (by which she meant the exercising of the option) had not taken place. She said that she would instruct her solicitor to backdate the "exchange" to 1 January 2013 when it arrived. She said that the Peacocks had no problem with Mr Molton starting Plot 3 before the exchange date of 5 April but, in the first hint of irritation between the parties, said "please tell your guy to stop messing about with the dates." The effect of backdating the exercise of the Option would be to fix the date from which interest would run on the outstanding amounts to be paid by the Defendant.

20. The following Monday, 4 February 2013, Mr Molton wrote to Mrs Peacock and explained that he was having problems with the prospective purchasers of Plot 2, who now wanted to renegotiate. He said that he had now agreed a sale on Plot 3 and was now stuck as to what to do. He suggested that if the Plot 2 purchasers exchanged he could do the same with the Peacocks and then exchange on Plot 3 on 6 April 2013; but if the Plot 2 purchasers pulled out he may stop work on Plot 2 "and then talk to you as the best way to deal with the exchanges bearing in mind the tax year." This was evidently a reference to trying to stagger the incidence of Capital Gains Tax by exercising the Options in different years. He concluded by saying "Either way, I am more than happy to agree between us that an exchange did happen on 1 January and interest runs from then … regardless of how I resolve this." He asked the Claimants to bear with him while he resolved things.

21. Mrs Peacock replied that "my only problem was that you didn't tell me, just left me wondering what was going on and was naturally a bit concerned to find that you had started plot 2 without even mentioning it to me. I am sure we can agree something, but please keep me informed in future." Mr Molton replied apologetically and said that he would keep them informed in the future. He asked for a meeting to discuss the best way to proceed with the next exchange (by which he meant the exercising of the next option and subsequent implementation of its terms).

22. An email from the Claimants' solicitors to the Defendant's on 15 February 2013 noted that they had received no papers in relation to Plots 2 or 3. They mentioned that work had begun on plot 2 without "exchange" having taken place and continued: "We understand that our clients have agreed between themselves that interest on that plot will be backdated to the 1st January 2013 for that reason but we will need you to take instructions on that point and revert to us with confirmation."

23. On 14 March 2013 Mr Molton emailed the Claimants saying he had been told that Plot 3 would exchange in the next day or two. Plot 2 was not mentioned and at some point the prospective sale fell through. He wrote again on 19 March 2013 saying that exchange on Plot 3 was imminent and that he had started on its foundations that day. He asked whether, if his exchange with the purchasers of Plot 3 were to be delayed, it would be alright to enter into a backdated exchange with the Peacocks. Though not stated, this would mean that their position would be protected by the payment of interest. He also said he had hard interest in Plot 4. Mrs Peacock replied that the Claimants had heard nothing from solicitors, that there was no problem with his starting the foundations and welcoming the good news on Plot 4.

24. On 22 March 2013 Mr Molton wrote again saying that the exchange with the purchaser for Plot 3 was now set for the following week. He told Mrs Peacock that his purchaser was passing over £10,000 rather than 10%; and he asked if he could pass that on to the Peacocks for their solicitor to hold as it would help his cashflow. He said that he had started on the Plot 3 house and expected completion by the end of July; and that he planned to start Plot 4 as soon as the scaffold was struck on Plot 3 in May. Mrs Peacock's response on 25 March pointed out that the option "for the next plot" ran out on 31 March 2013: although not stated, that must have been a reference to Plot 4. She did not agree to a reduced deposit and called for the full 10%, which in context was a reference to Plot 3.

25. In reply to that email, Mr Molton tried once more to get the Peacocks to agree to a reduced deposit. He said that he had thought the agreement with the Peacocks was for a 5% deposit (which would have been right for Plot 4 but was wrong for Plot 3) and that he had been hoping to pass on the 10% he got (from the Plot 3 purchaser). He continued "Lets hope they exchange this week, but as I am backdating our agreement hopefully that will not cause any problems with solicitors. … Cash is not a problem other than trying to schedule the start of Plot 4, and how much of it I can build prior to Plot 3 being completed."

26. In the circumstances outlined above the Defendant had made substantial progress on Plot 3 without having exercised the Plot 3 Option. This was rectified in April 2013. On 3 April 2013 the Claimants' solicitors wrote stating that it had been agreed that the exercise of the option would be backdated to 1 January 2013 and that interest would be paid from that date. They said that they presumed the Defendant would now be exercising the option if it wanted to exchange contracts with its onward purchaser. On 22 April 2013 the Defendant's solicitors wrote to the Claimants':

> "We are writing to exercise our client's option to purchase Plot 3 … in accordance with the Option Agreement …
>
> The exercise is conditional on the acceptance of the following variations and confirmations on your part:
>
> 1. That the deposit is amended to £10,000.
>
> 2. That the deposit is held as stakeholder.
>
> 3. For the purposes of interest etc the date of exercise of the option is taken as 1 January."

The letter enclosed a cheque for £10,000. The following day the Claimants' solicitors wrote accepting the amended terms but stating that no such variations would be accepted on exercise of the option for any of the other plots.

27. It is evident that there were financial discussions between the parties in April and May 2013 which included the possibility of the Claimants making a loan to the Defendant to assist with funding further building works. On 30 April 2013 Mr Molton emailed Mrs Peacock, referring to a planning application for the Peacock's house on Plot 1 and saying "regarding the option for Plot 4 and additional funding, …, if the loan is in the region of £50,000 we could increase the interest to 10% which is twice what you

are earning at the moment. Is this acceptable to you?" Mrs Peacock replied on 3 May 2013: "… we are happy for you to take up the option on plot 4 as soon as you like, as we mentioned we will waive the deposit and will instruct our solicitor that we have done so." After referring to advice from their accountant not to cash in shares (which, in context appears to have been with a view to making a loan), she continued: "Perhaps we could arrange to give you a loan when you pay us for the land re plot 3 at the end of July."

28. Between 8 and 10 May 2013 there was a passage of correspondence during which the parties continued to discuss the prospect of a loan of £25,000 from the Peacocks which, together with the waiver of the deposit on plot 4, it was hoped would be enough to get Mr Molton started on building that plot. For his part, Mr Molton explained how building the development in the order that was now envisaged created additional cash-flow demands on him. On 10 May 2013 Mrs Peacock referred to the waiver of the deposit on plot 4, together with acceptance of a reduced deposit on plot 3 (£10,000 instead of £16,250) and "the £16,000 we gave you initially as plot 5's [sic] contribution to the road etc. which we would hope all helps." Mr Molton responded the same day that "the reduction on Plot 5 sale of £16,000 was to cover one fifth of the cost of demolition, site clearance and road and services. This is in your build contract for Plot 1 so we reduced the payment that your Solicitor holds to cover that cost I had paid. As you will appreciate I have paid the same sum (£16,000) for Plots 2, 3 and 4 even though I have yet to sell them." It is not clear what was meant by the reference to a build contract for Plot 1, unless Mr Molton meant that infrastructure costs relating to Plot 1 would have fallen to be paid as and when a contract was concluded. What is of interest, however, is that Mr Molton was referring to the "contribution" of £16,000 as being one fifth of the overall infrastructure costs. Mrs Peacock replied that she still thought the best thing was for Mr Molton to sell plot 3 before he started to build plot 4. She accepted this would be a bit more awkward for him but said she had every confidence he would be able to sort it out.

29. In the event, the sale of Plot 3 from the Claimants to the Defendant completed on 12 July 2013. The completion statement included payment by the Defendant to the Claimants of interest on the full £162,500 from 1 January 2013 to the date of completion: this was consistent with the backdating of the exercise of the option to that date. On 14 July 2013 Mr Peacock wrote to her solicitor that they were going away and had asked one of their sons to keep an eye on when Mr Molton started building Plot 4. In the same email she said that they did not trust Mr Molton's solicitor as the purchasers of Plot 3 had been let in early.

30. The Option Period for Plot 4 had expired on 31 March 2013 without the option being exercised. On 29 July 2013 the Defendants' solicitors wrote to the Claimants' in the following terms:

> "We write on behalf of [the Defendant] who wish to exercise their option to purchase Plot 4 … from your client … pursuant to the Option Agreement dated 28 March 2012.
>
> Given that the plots have been taken out of order, the Option has technically expired and your client has also agreed to proceed without a deposit in this instance.

> Bearing in mind the above, can you please confirm that you accept the Option as exercised notwithstanding the date and that we can proceed without deposit."

31. The Claimants' solicitors replied on 27 August 2013:

> "We do have our Clients' instructions that the exercise of the option on plot 4 is to be backdated to July 5th 2013, and further that they will agree to proceed with no deposit."

After this exchange, the parties went forward on the basis that the letter of 29 July 2013 had been and had been understood to be effective notice under the Option.

32. On 30 December 2013 the Peacocks wrote to Mr Molton saying they had noticed that he had started building on plot 2 before Christmas. They pointed out that he had not yet exercised the option to purchase and asked what was happening on Plot 4. Mr Molton replied with an apology and said that his bricklayers were short of work and asked if they could build the garage, to which he agreed as it would let him move materials out of the garage of Plot 4. He assured them that he was not going to build Plot 2 (meaning the house rather than the garage) until he got a sale for Plot 4 and that he was going to run a new advertisement for that plot the following week.

33. On 14 January 2014 Mr Peacock emailed Mr Molton to say that she had noticed he was still building on plot 2. She said "this is not a problem as [we] will get the solicitor to backdate the interest to December 2013, just would be nice to be asked." Mr Molton replied the same day that he was only building the garage, not the house; and that he thought he had sold Plot 4.

34. In early 2014, the Defendant was involved in pursuing a planning application on behalf of the Claimants for permission to build a larger house on Plot 1 than the four-bedroom house for which permission had already been granted. The Defendant exchanged contracts with its purchaser of Plot 4 on 7 March 2014 with completion on 28 March 2014. Mr Molton informed Mrs Peacock and said he intended to start on Plot 2 in April if that was ok with her. She replied on 10 March 2014 that, as they were so close to the next financial year, she would like the option date on Plot 2 to be after 5 April 2014. Mr Molton replied that 5 April was not a problem and he presumed he could start before then if he wished (by implication, before the option was exercised). Mrs Peacock replied the same day that there were "no probs" with Mr Molton's proposal for Plot 2 and that the Peacocks assumed that, subject to planning permission, Mr Molton would be starting on their Plot (Plot 1) in April too, as they were keen to have their house built as soon as possible.

35. This exchange of correspondence was a further example of the parties juggling and cooperating about dates to their mutual advantage, with a later exercise of the Plot 2 option pushing any Capital Gains Tax liability back to another year but the Peacocks being content to let Mr Molton start building before exercise of the option. Mrs Peacock accepted in her oral evidence that by this exchange of evidence she was giving him permission to build before exercising the Option on Plot 2. She said it was fine by them because "we were working with him, we were very keen to get this site finished and done and, quite honestly, we just wanted to just to get on with it so, you know, it was beneficial to both of us." I accept that evidence as an accurate reflection

of the state of the Claimants' minds at that time and the state of cooperation between the parties.

36. The trial bundles include an unsigned letter from the Defendant's solicitors to the Claimants' dated 14 March 2014. The text refers to an agreement to exercise the Plot 2 option on 5 April 2014 and that there would not be payment of a deposit. The text concluded "please confirm that you are able to accept this letter as notice pursuant to the Contract dated 28 March 2012 of the exercise of the option to purchase." The Claimants have consistently said that this letter was not received by their solicitors or by them, and there is no evidence that it was. The case has proceeded on the basis that the Defendant cannot prove that it was received by the Claimants or their solicitors.

37. The tone of the correspondence at this time is familiar and cordial and shows no signs of the strains that were soon to emerge. In particular, there is clear evidence of the Defendant cooperating with a view to building the Claimants' house on Plot 1 and an implicit assumption on the part of the Claimants that the Defendant would build the house for them, which speaks of a level of trust that in turn goes some way to explain why it had not been thought necessary to conclude a contract for the building out of Plot 1. On 14 March 2014 Mr Molton sent Mrs Peacock "the draft specification and also the agreed budget" and a stage payment schedule and other documents in advance of a discussion that had evidently been arranged. The build budget was for a six-bedroom house and included £16,000 for infrastructure costs, with the same breakdown of that sum as in the earlier Build Budget for Plot 1.

38. The evidence of Mr Molton, which I accept, is that the Defendant first submitted an application on behalf of the Claimants to amend the planning permission in respect of Plot 1 in about mid-2013. That application was withdrawn later in the year; but the Claimants instructed the Defendant to submit a further application and the Defendant did so in March 2014.

39. By April 2014 there was a frustrating delay on the part of the local council in dealing with the planning application to amend the size of the house that was to be built on Plot 1. Shortly before 7 May 2014, permission was refused despite earlier indications having been favourable. Also, in the first hint of the problems that developed later in the year, on 1 April 2014 Mrs Peacock emailed Mr Molton in relation to plot 2 that "as discussed at the onset of this project we will not sign it off until all site and roadworks are completed and we would also expect that the main part of our house would be completed at that stage." At the beginning of May 2014 a much more serious problem emerged about the position in which the Defendant had built the garage for Plot 2, with the Claimants being convinced that it encroached onto Plot 1 and Mr Molton being adamant that it did not. In an email on 7 May 2014 Mr Molton set out his stall on the position of the garage and picked up the suggestion that there might be a restriction on his ability to sell Plot 2. He suggested a meeting. In reply, on 12 May 2014 Mrs Peacock said that the garage should line up with the brick garage behind it (which, it is common ground, it does not), that she had checked the Option and that there were conditions in it, and introduced a new source of difficulty, namely a mound of earth located on 9 Stewkley Road. She recorded that Mr Molton had said he would remove it when the weather improved and asked him to move it by the end of May.

40. Mr Molton replied to this email on 19 May 2014. He questioned whether there were any conditions in the Option that had the effect for which Mrs Peacock was contending; he explained why he thought the garage on Plot 2 was in the right place; and he said he was getting quotes to remove the spoil heap, but that it would not be possible to remove it by the end of the month. He again suggested a meeting to discuss matters. Mrs Peacock's reply took matters little further, though she took up the suggestion of a meeting the following week. She suggested that Mr Molton was getting poor advice from his solicitors about the terms of the Option and emphasised the importance to the Claimants of knowing that the infrastructure works would be completed before they "signed off" Plot 2. On 21 May 2014 Mr Molton told Mrs Peacock in an email that his solicitor had confirmed that he had given notice on Plot 2. That was incorrect as notice had not been given.

41. A meeting took place on 5 June 2014 after which Mr Molton wrote to the Peacocks to record what had happened and Mr Peacock replied with his responses. The main topics included in the exchange of correspondence were:

    i) Mr Molton said that they had agreed a start date of 6 April (wrongly stated to be August in his email). He apologised for not having raised "the deposit question" and said "I think we agreed that Plot 2 option can be started with no deposit although I am unsure whether you want this from 6 April, the tax year, or December." Mr Peacock replied that the start date was to be backdated to December but did not refer to a deposit;

    ii) Mr Molton said that in order to achieve completion on Plot 2 he needed to finish the road and that the internal road would be finished. He pointed out the difficulty that if he completed Plot 2 and the road, the Peacocks would have to dig it up when they built Plot 1 to get gas and electric connections made. He said that he could start building Plot 1 now but for the fact that the Peacocks wanted to make some changes, meaning the changes that were the subject of the outstanding application to amend the planning permission or similar. Mr Molton's observations reflected the fact that the parties were not in a position to build Plot 1. There were two reasons for this: first, the outstanding planning application; and, second, there was as yet no contract to build the Peacock's house. Mr Peacock replied in relation to the completion of Plot 2, "hopefully you will have started plot 1 by then";

    iii) Mr Molton explained why he thought the garage of Plot 2 had been built in the right place. Mr Peacock replied that the position of the garage was going to cause them all "a massive problem";

    iv) Mr Molton said he would get the removal of the spoil heap started "very quickly". Mr Peacock did not respond.

42. Solicitors became involved in the correspondence in June 2014. On 16 June the Claimants' solicitors wrote to the Defendant's pointing out that, although the building on Plot 2 was nearing completion, they had not received a notice exercising the option. They asserted that the Defendant's building of the garage altered the boundaries of Plot 2 and built over part of Plot 1 and said that the Claimants "will not be signing a transfer to your client of [plot 2] unless this matter can be resolved." After a response from the Defendant the solicitors wrote again stating that the

Defendant "has built on land that is not offered for sale to him and … he cannot therefore purport to sell to a purchase[r] of plot 2." They asked that the construction of the garage on plot 2 be rectified so that it did not encroach on land owned and being retained by the Claimants. After further exchanges they wrote on 3 July 2014 "If [the Defendant] does wish to take up his option on plot 2 may we suggest that the option is formally exercised before any further building works take place and further that your client remedies the misplacement of the garage forthwith so that he is not building on land which is not offered to him for sale." This letter elided the building of the house, which was continuing but not encroaching on plot 1, with the position of the garage, which had been completed sometime before. Mr Molton not unreasonably interpreted this as the Solicitors telling him to stop building. He did so and told Mr Peacock the same day that he had done so. In the same email he proposed that the garage be demolished on the basis that (a) if the Claimants were right, the Defendant would carry the costs but (b) if the Defendant were proved to be right, the Claimants would indemnify him for the costs incurred in doing so. Within a few days he instructed sub-contractors to demolish the garage on 21 July 2014.

43. On 14 July 2014 the Defendant's solicitors sent the letter that is relied on by the Defendant as an effective exercise of the Plot 2 option. It said:

> "Please accept this letter as Notice pursuant to the Contract dated 28 March 2012 that our client wishes to exercise the option.
>
> The parties have agreed to waive the obligation to pay a 10% deposit pursuant to Clause 4.2 of the Option Agreement.
>
> Please confirm by return that the exercise of the option is accepted."

44. On 15 July 2014 Mr Molton told Mrs Peacock that he had arranged for the garage to be demolished the following week. Mrs Peacock replied on 16 July 2014 that the Claimants were not asking him to demolish the garage and that they were prepared to discuss a compromise. Mr Molton replied the same day pointing out that the Peacocks had "agreed the progress" (i.e. building before the option was exercised) albeit after the garage was started. He explained that "your Solicitor has said I cannot now give legal notice until the boundary issue is resolved and the only way I can do that is by demolishing the garage so wherever the boundary is eventually established to be, the garage is not in the way." He suggested a meeting on site the following day to try to resolve and mark out the boundary.

45. On 18 July 2014 the Claimants' solicitors wrote to the Defendant's in the course of which they wrote:

> "We are instructed that the exercise of the option will not be accepted while there remains a question as to whether your client has built outside the boundaries of the plot as offered by the terms of the option agreement. There is however an agreement between the parties that the option period as defined in the agreement will be extended to the 31st August to allow time for this issue to be resolved.

> …
>
> To be clear the exercise of the option is not accepted at this time because of the boundary issue but the option period is extended until the end of August and our clients will not accept any liability for any costs incurred by yours whatsoever in connection with these delays and boundary issues."

46. It is convenient to note at this stage that the effect of these two paragraphs, either singly or cumulatively, was that the letter of 14 July 2014 was not being accepted as an effective exercise of the option because of the existence of the boundary issue, and only for that reason. I will return to the proper construction and effect of the letter of 14 July 2014 later; but the Claimants' solicitors understood it to be an exercising of the option which was "not accepted" because of the boundary issue and which would have been accepted as effective if the boundary issue had not arisen.

47. Correspondence continued without achieving a resolution. During that correspondence the shifting of the spoil heap was mentioned; and on 23 July 2014 Mr Molton said that moving it would start that week. In the same email Mr Molton said that he thought it better if he restarted work on Plot 2 so that unnecessary costs could be avoided and, he hoped, the solicitors could resolve the land area and boundary issues before 31 August so that the option could be "filed by then". In a further email the next day he said he had arranged for labour to return to site the following day and that he believed they had agreed that the option for plot 2 had been taken up. This email provoked an angry reaction from Mrs Peacock. She pointed out the steps she had taken to assist Mr Molton during the transaction, stated that the Peacocks did not agree to him restarting building and instructed him not to restart building until the option had been exercised. She stated that they were not asking him to demolish the garage and said they would be prepared to negotiate compensation. This appears to have been a reference to the earlier proposal by Mr Molton to demolish the garage and rebuild it where the Peacocks said it should be, with the cost being carried by the Defendant if it was subsequently proved that the Claimants were right and by the Claimants if it was subsequently proved that the Defendant had been right.

48. By the second half of August the falling out of the parties was complete. Mrs Peacock expressed herself as being disgusted at Mr Molton's correspondence after all the help they had given him in the past; and Mr Molton's correspondence continued to explain the reasons why he believed the garage was in the right place. Despite clear statements in the past that they did not require Mr Molton to demolish the garage, the Claimants' solicitors required its demolition and reconstruction in "the right place" on 27 August 2014. In the same letter they stipulated that "before the option to purchase [plot 2] is formally exercised my clients will require written confirmation to their satisfaction that your client acknowledges that the garage has been built in the wrong place with clear confirmation of where the correct boundary line is and that the same is agreed by your client." The Solicitors returned to the old question of conditions of the option by adding that "all conditions of the option agreement with regard the construction of the access, landscaping, compliance with planning condition and section 106 agreement must be complied with to the satisfaction of my clients before they will proceed with the sale of plot 2 and they also require that your client clear plot 1 and number 9 Stewkley Road as he has been promising to do."

49. Mr Molton replied with a long letter that was forwarded by the Defendant's solicitors to the Claimants'. On 29 August 2014 the Claimants' solicitors offered to accept exercise of the option without a deposit on terms that (a) the Defendant demolished the garage and rebuilt it in the place for which the Claimants contended; and (b) no building works should take place without the Claimants' prior approval of the position of the garage. Mr Molton was prepared to make most but not all of the concessions asked of him and, although the parties came close, they could not settle their differences. Negotiations broke down on 2 September 2014. The Defendant did not remove the spoil heap and carried out no further works. As a result, the site remains much as it was in late 2014, including the part-built house on Plot 2 and the garage where it was built. Even now, the correct position of the garage has not been resolved and is not an issue for determination in these proceedings.

Issue 1: The Plot 2 Option Agreement – Exercise and Breach

Construction of Clause 4

50. Clause 4 of the Plot 2 Option Agreement must be construed in the context of the Agreement as a whole, using the principles of construction that have been set out in a series of cases of high authority. I was specifically referred to *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Co* [2017] UKSC 24 as modern statements of the relevant principles. I bear them in mind. It is not necessary to lengthen this judgment with citation from either those or other formulations of the applicable principles.

51. The Defendant does not assert that the Plot 2 Option agreement was varied to the effect that a deposit was not payable. I set out Clause 4 again for convenience:

> 4. EXERCISE OF THE OPTION
>
> 4.1 The Option is exercised by the Buyer giving written notice to the Seller to that effect at any time during the Option Period (subject to clause 3.2 above).
>
> 4.2 On the exercise of the Option, the Buyer is to pay a deposit of 10 per cent of the Purchase Price to the Seller …

52. The Claimants submit that payment of the deposit required by Clause 4.2 was a condition precedent to the valid exercise of the Plot 2 Option. As illustrative examples in support of their submission they refer to *Hare v Nicoll* [1966] Ch 130 and, by way of contrast, *Millichamp v Jones* [1982] 1 WLR 1422. In *Hare v Nicoll* the option to repurchase shares stated that "… if the vendor shall before May 1, 1963, give notice in writing to the purchaser of his desire to repurchase [the shares] at the price of £[X] and on payment of the said sum of £[X] before June 1 1963 to the purchaser the vendor may at any time thereafter by deed revoke the trusts hereby declared… ." It was held that the two conditions (i.e. notice in writing and payment of £[X] by the respective specified dates) had to be strictly complied with for the option to be effectively exercised. By contrast, in *Millichamp v Jones*, two clauses of the option agreement provided that "3. The said option shall be exercisable by the intending purchasers giving to the intending vendor notice in writing …." and "5.

Upon the exercise of the said option the intending purchasers shall pay to the intending vendor's solicitors as stakeholders by way of deposit £[x]."

53. I accept the submission, supported by *Barnsley's Land Options (6th Edn)* at 4-28, that "in all cases … it is necessary to consider carefully the form of words used and there are no general principles which will determine whether the deposit is actually payable as a condition precedent to the exercise of the option; each agreement must be construed individually." In other words, normal principles for the construction and interpretation of commercial contracts in writing are to be applied. Adopting that approach, the conclusions that payment of the deposit was in *Hare v Nicholl* and was not in *Millichamp v Jones* a condition precedent to the effective exercise of the option may be seen to be almost self-evidently correct.

54. Turning to Clause 4, both the terms and the structure of the clause lead to the conclusion that payment of the deposit was not a condition precedent to the exercise of the option. The terms are clear: the option is exercised by the Buyer giving written notice to the seller; and the deposit becomes payable "on the exercise of the option" (i.e. when the option is exercised) and not as part of the identified procedure for exercising it. The structure reinforces the clarity of the terms: Clause 4.1 says how the option is exercised; clause 4.2 creates a separate obligation that arises when the option is exercised. There is nothing in either the terms or structure that is analogous with the approach in *Hare v Nicholl* where, as set out above, two obligations linked by "and" (to show their concurrent necessity) were both subject to the initial qualifying "if", which, as a matter of structure and syntax, showed them to be the conditions that together necessarily preceded the purchaser's right to revoke the trusts.

55. I therefore conclude that non-payment of the deposit as required by Clause 4.2 of the Plot 2 Option Agreement was not a condition precedent to the effective exercise of the option. It is, however, accepted that (subject to questions of waiver or estoppel) it was a condition of the contract and that time was of the essence: see *Samarenko v Dawn Hill House Ltd* [2013] Ch 36, [2011] EWCA Civ 1445 at [17]ff.

The letter of 14 July 2014

56. No question of waiver or estoppel arises unless the purported exercise of the option on 14 July 2014 was otherwise effective. In my judgment, it was – for the following reasons. The question is how a reasonable recipient would have understood the letter of 14 July 2014, taking into account the relevant contextual scene: see the principles set out in *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749, 767G-768H per Lord Steyn, 775A-G per Lord Hoffmann. Following the lead of the House of Lords in *Mannai,* one cannot ignore the fact that the intended recipient of the letter of 14 July 2013 would have knowledge of the terms of the Option Agreement and the previous correspondence passing between the parties that I shall identify below.

57. The Option Agreement did not specify any particular formal requirements for exercising the option: the Defendant was merely required to give written notice "to that effect". The context included that the parties knew that the Plot 2 Option had not been exercised and that the parties had been discussing (a) the need to exercise it and (b) when and how it should be exercised in April, at the meeting on 5 June 2014 and in subsequent correspondence: see [34], [41], [42] above. The reasonable recipient knew from the terms of the Agreement that time for exercising the option ran out on

31 July 2014 and that the Claimants solicitors had recently reaffirmed the need to exercise it. In this contractual and surrounding context the terms of the letter were sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to the meaning and purpose of the letter. It identified the Defendant and Plot 2; it referred to the Contract of 28 March 2012; and it identified itself as Notice (capitalised) pursuant to that contract. That alone would have been sufficient in context to leave no reasonable doubt that it was intended to have the effect of notice to exercise the option. Two other features reinforced the clarity of the position. First, the reference to the deposit being waived (to which I shall return below) was only reasonably referable to the deposit that would normally be payable on exercising the option. Second, the first paragraph, in addition to referring to itself as "Notice pursuant to the Contract dated 28 March 2012" continued "… that our client wishes to exercise the option." In my judgment this could not be seen as an indication of an abstract wish to exercise the option at some date in the future; taken in context, the first sentence identified itself as a present exercising by Notice of the option pursuant to the contract.

58. These features are sufficient to compel the conclusion that the letter of 14 July 2014 was a sufficiently clear and unambiguous exercising of the option in accordance with the terms of Clause 4.1 of the contract. Although not necessary to my decision on this point, I bear in mind that the wording of the letter of 14 July 2014 was very similar to the letter that exercised the option to purchase Plot 4 on 29 July 2013: see [30] above. That letter was also sent to the Claimants' solicitors and used the linguistic device of saying that the Defendant "wish[es] to exercise their option", rather than saying in specific terms that they did so. *Mannai* at 767G makes clear that the subjective understanding of the recipient of the notice is not the question. But in considering the objective construction of the purported notice in July 2014, the history of dealings between the parties may form part of the relevant contextual scene; and I see no reason why one should exclude from the relevant contextual scene the fact that the same linguistic device had been treated on both sides as an effective exercise of the identically-worded Plot 4 option. At its lowest, I take comfort from the fact that the Claimants by their solicitors (who in this respect are not shown to be unreasonable) had clearly understood the Defendant's form of language as having the intended and actual meaning and effect of exercising the option in 2013.

59. For these reasons, I hold that (subject to the question of the deposit) the letter of 14 July 2014 was an effective exercise of the Plot 2 Option. Once again, though it is not necessary to my conclusion, I draw comfort from the fact that the Claimants' solicitors, on instructions, responded in terms that showed they understood the 14 July 2014 to have the effect of exercising the option, although it was not accepted because of the boundary issue. In closing submissions the Claimants rightly accepted that the reasons given in the solicitor's letter of 18 July 2014 did not justify rejecting an exercise of the option that was otherwise effective.

60. I therefore turn to the questions of waiver or estoppel.

Waiver and/or Estoppel

61. The principles setting out the requirements for waiver are not in dispute. *Keating on Construction Contracts* provides convenient summaries, to which each party referred.

62. *Keating*'s summary of the relevant test for waiver is:

> "A party to a contract may act so as to show that it does not intend to enforce a contractual right or require performance of a contractual obligation. It is necessary that such conduct demonstrates a clear and unequivocal representation that its contractual rights would not be enforced. Mere silence in inactivity will rarely suffice. Knowledge or lack of knowledge of the contractual right in question is important. By so acting, it may by waiver lose the right or cease to be entitled to the performance either temporarily or permanently. …"

It is also common ground that the conduct relied upon must such as to evince an intention to affect the legal relations of the parties: see *Rickards v Oppenheim* [1950] 1 KB 616, 623, 626.

63. *Keating*'s summary of the requirements for promissory estoppel is:

> 'Where a party has made a unequivocal promise or representation to another party that it will not enforce its strict legal rights and the promise or representation is intended to be relied on and is in fact relied on, the first party may be estopped from successfully asserting its strict legal rights if it would be unconscionable or unjust to allow it to do so….The promise need not be supported by consideration, but it must be shown that the promise or assurance had a sufficiently material influence on the other party's conduct to make in inequitable for the promisor to depart from it.'

A recent reiteration of these principles is to be found in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 533 at [61] per Kitchen LJ, which supports the Keating summary. No further citation of authority is necessary.

64. The Defendant says that the Claimants waived the obligation to pay the deposit on exercising the Plot 2 option at the meeting held on 5 June 2014. Confusion has been generated by a letter dated 2 December 2014, which asserted an oral representation by the Claimants made on or 14 March 2014, upon which the Defendant no longer relies. I bear in mind that the Defendant's position has shifted during the dispute when assessing its case as now presented.

65. Mr Molton's evidence in chief was that the parties agreed at the meeting on 5 June 2014 that no deposit would be payable on the exercise of the Plot 2 option and that they "discussed the fact that the exercise of the Plot 2 option would be back-dated to December 2013, which effectively meant that the Claimants would be paid interest on the option sum from that date onwards." In cross-examination it was put to him that "there was no certain and sure representation from the claimants that you could exercise the option without a deposit, was there?" To which he replied: "My understanding is that there was a nil deposit, which is what we did on 3, 4 and I thought was on 2." The cross-examination then moved on. I note and bear in mind that Mr Molton was wrong in referring to a nil deposit on Plot 3.

66. Mrs Peacock did not mention the 5 June meeting in her witness statement. She said in evidence that it was probably omitted because she had forgotten about it, that it was quite a heated meeting, and that Mr Molton's subsequent summary of the meeting (to which I refer below) was not the same as theirs.

67. Mr Molton's evidence is materially supported by the contemporaneous documentation:

    i) His email the next day said that he thought they had agreed that the Plot 2 option could be started with no deposit, while stating that he was unsure if it was to be (backdated to) 6 April or the previous December;

    ii) The Claimants' reply was evidently intended to and did take points of disagreement: see [41] above. It clarified that the agreement was to be backdated to December but did not say anything to challenge, question or clarify Mr Molton's belief that they had agreed no deposit;

    iii) The letter of 14 July 2014 itself asserted the existence of the agreement. Of equal, if not greater, importance, the Claimants' response by their solicitors' email on 18 July 2014 said nothing to contradict the asserted existence of the agreement;

    iv) The Claimants did not at any stage raise the absence of a deposit or chase for the deposit to be paid; nor did they assert that the failure to pay a deposit was a repudiatory (or other) breach of the option agreement which entitled them to disregard the 14 July letter or to elect to accept the repudiation as bringing the Option agreement to an end. Instead, they relied upon other (unjustifiable) grounds for not accepting the exercise of the option.

68. The later documentary evidence is more equivocal but lends some support to Mr Molton's evidence. In late August 2014 the question of a deposit was raised again; and, when it was, the Claimants wrote on 29 August 2014 that the proposed extension of the period for exercising the option would not require the payment of a deposit. While I accept that this was in the context of proposing terms for an extension of the Option Period, it is consistent with the Peacocks having accepted that no deposit was going to be paid. What is completely lacking in the 2014 documentation is any challenge to the assertion that it had been agreed that no deposit would be paid.

69. On the factual issue of what happened at the meeting on 5 June 2014 I prefer the evidence of Mr Molton even though the Defendant's case has changed and his evidence was not correct in all respects. I think it inherently likely that Mr Molton would have wanted an agreement that no deposit should be paid, because the disruption of the orderly anticipated sequence of development had imposed cash flow pressures on him that he was keen to alleviate. I have no doubt that the question of paying a deposit was discussed, because he referred to it in his email the next day. I accept that his email said that he "thought" it had been agreed that there would be no deposit, rather than asserting the existence of the agreement without any qualification; but I do not find that surprising after what is agreed to have been a heated meeting. I am confident that if his understanding had been wrong, the Peacocks would have challenged it. As the factual summary set out above shows, the question of deposits had been a difficult subject in relation to Plots 3 and 4, on each of which different

outcomes had eventually been reached. The Peacocks had been accommodating in relation to those plots, but not without significant discussion. I do not accept that Mrs Peacock would have let it pass if she had disagreed with Mr Molton's suggestion on 6 June that they had agreed on 5 June to no deposit on Plot 2. Instead, the Claimants' response agreed the backdating of the start date to December 2013, with the implication of additional interest accruing for the period when the deposit had not been paid. I am confident that, if there were any dispute or disagreement about the need to pay a deposit, the Claimants would have said so loud and clear in immediate response to the letter of 14 July 2014. They did not do so either immediately or at any stage before the final breakdown of relations between the parties.

70. For these reasons I find as a fact that the parties agreed at the meeting on 5 June 2014 that the Plot 2 option could be exercised without payment of the deposit, on the basis that the start date would be backdated to December 2013; and that the purported exercise of the option by the letter of 14 July 2014 was correct in asserting that "the parties have agreed to waive the obligation to pay a 10% deposit pursuant to Clause 4.2 of the Option Agreement."

71. On these findings of fact, I conclude that the test for legal waiver, summarised above, was satisfied. It is not necessary to make specific findings about who said precisely what in the course of the meeting. What matters is that the agreement that was reached involved a clear and unequivocal representation that the Claimants' contractual rights would not be enforced and that it was intended to affect the parties' legal relations.

72. Turning to the legal test for promissory estoppel, I find that the agreement reached on 5 June 2014 constituted an unequivocal representation to Mr Molton on behalf of the Defendant that the Claimants would not enforce their strict legal right to a deposit on the exercising of the Plot 2 Option. I have no doubt that the representation was intended to be relied on and was in fact relied on, as evidenced by the terms of the letter of 14 July 2014. In those circumstances I consider and find that it would be unconscionable or unjust to allow the Claimants now to rely upon their strict legal right to a deposit. I am satisfied that the assurance materially influenced the Defendant's conduct in causing it to rely upon the assurance in the letter of 14 July 2014 and that it would be inequitable for the Claimants to depart from it. Accordingly I find that the legal requirements for promissory estoppel are also satisfied.

Repudiatory breach by the Claimants?

73. The Court of Appeal has recently reviewed the principles applicable to repudiatory and renunciatory breach in *The Spar Capella* [2016] EWCA Civ 982 at [67]-[68] and [72]-[78]. The principles are not in dispute and the present case raises no new issue of principle. I therefore adopt the principles as there summarised without setting them out in full. I bear in mind at all times that:

    i) Conduct is repudiatory if it deprives the innocent party of substantially the whole of the benefit he is intended to receive as consideration for performance of his future obligations under the contract: see *Spar Capella* at [67], [73];

    ii) Conduct is renunciatory if it evinces an intention to commit a repudiatory breach, that is to say if it would lead a reasonable person to the conclusion that

the party does not intend to perform his future obligations where the failure to perform such obligations when they fell due would be repudiatory: see *Spar Capella* at [67];

iii) Repudiation is not lightly to be inferred. It is necessary for the Court to find a clear and unequivocal refusal to perform: see *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyds Rep 89, 93 per Moore-Bick J.

74. Despite what I have held to be an effective exercise of the Plot 2 Option, the Claimants refused to accept it (on unjustified and unjustifiable grounds) and instructed the Defendant to stop work. Both before and after 14 July 2014 they made clear that they would not sign a Transfer of Plot 2 to the Defendant unless and until the boundary dispute was resolved. After 14 July 2014, the Claimants' solicitors wrote on 18 July refusing to accept the (valid) exercise of the option until the boundary dispute was resolved. On 24 July 2014 Mrs Peacock wrote to Mr Molton telling him not to restart work until he had taken up the option on Plot 2. That remained her position, which is fatally undermined by my conclusion that the 14 July letter was an effective exercise of the option. In August, when the Defendant sent carpenters to the site to make it safe, it was told to stop them working and to remove them from site. On 1 September 2014 the Claimants' solicitor wrote that, unless the Defendant exercised the option on the terms then being offered by the Claimants, the option would be treated as lapsed, with the clear implication that no further work should be done. On 2 September 2014 the Defendant wrote asserting that the option for Plot 2 had been frustrated and cancelled by the Claimants. On 2 December 2014 the Defendant's solicitors wrote formally asserting repudiatory breach of the Option agreement which the Defendant had accepted by not attempting to perform further work on the property.

75. I find that the predictable effect of the Claimants' stance as set out in the correspondence to which I have just referred was to exclude the Defendant from site and to prevent it from building out the house on Plot 2 to completion and enabling it to be sold. For the reasons I have given above, the Claimants' stance was unjustifiable and unjustified. I conclude and find that it was initially renunciatory conduct which amounted to a repudiatory breach of the Option agreement by depriving the Defendant of substantially the whole of the benefit that it was intended to obtain in return for its performance of the obligations under the contract between the parties. Specifically, by refusing to transfer Plot 2 to the Defendant and refusing to let it build out the property on Plot 2, it deprived the Defendant of the opportunity to sell on the land with a completed house and thereby recoup both the costs it had already incurred in part-building the house and garage and the further costs it would have incurred in bringing them to completion. Expressed in this way it is apparent that the Defendant's costs incurred in part-completion of the building on Plot 2 forms part of the calculation of its recoverable damages.

76. I deal with quantum later.

Issue 2: Unjust enrichment

77. Because of the conclusion I have reached under Issue 1, including my approach to the question of recoverable damages, the Defendant's costs of part-completion of the building on Plot 2 will be accounted for without recourse to principles of unjust

enrichment. However, in case I were to be wrong on Issue 1, I deal with this issue – albeit relatively shortly.

78. The Defendant claims on the basis of quantum meruit and/or unjust enrichment for:

i) Works it carried out to Plot 2;

ii) Infrastructure works to Plot 2;

iii) Infrastructure works to Plot 1.

In doing so it ventures into legally complicated territory. However, some principles are clear and well established. They establish that legal rights in unjust enrichment should be determined by rules of law which are ascertainable and consistently applied: see *HMRC v The Investment Trust Companies* [2017] UKSC 29 at [39] per Lord Reed JSC.

79. I address the claims in relation to Plot 2 first.

80. When faced with a claim for unjust enrichment, the Court must ask itself four questions, which in the present case can be expressed as follows:

i) Have the Claimants been enriched?

ii) Was the enrichment at the Defendant's expense?

iii) Was the enrichment unjust?

iv) Are there any defences (such as change of position) available to the Claimants?

In relation to works affecting Plot 2, the question at issue is the third.

81. I accept as a convenient starting point the statement in Chapter 17 of *Goff & Jones, The Law of Unjust Enrichment (19th Edn)* that:

> "A defendant will be held to have benefitted from the services rendered if he, as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them and yet did not take a reasonable opportunity open to him to reject the proffered services, moreover, in such a case, he cannot deny that he has been unjustly enriched."

82. Free acceptance is a recognised ground for establishing a remedy for unjust enrichment, though the limits of the ground are not yet clearly and finally determined: see, for example, *Benedetti v Saw iris* [2014] AC938 at [25]-[26] per Lord Clarke JSC, with whom Lords Kerr and Wilson JJSC agreed. The limitations on what may be regarded as "free acceptance" are well illustrated by:

i) *JS Bloor Ltd v Pavillion Developments* [2008] 2 EGLR 85, where the Claimant's construction of an access road, which undoubtedly improved the Defendant's land, was held not to be freely accepted because (a) there was no

evidence that the Defendant knew that the Claimant was building the road in question, and (b) once the Claimant had built the road, the Defendant had no real alternative but to accept it even though it was of a higher specification than it would have been if the Defendant had built it itself;

ii) *Chief Constable of Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, where the Defendant club was held not to have freely accepted the increased level of policing that the Claimant provided (which was greater than the level that the club both wanted and needed) because it had, in practice, been unable to reject the incremental level of policing without at the same time rejecting the level that it wanted (and for which it had paid).

83. The case that comes closest to the facts of the present dispute is *Cobbe v Yeoman's Row Management Ltd and anr* [2008] UKHL 55. There the Claimant, acting on the strength of an oral agreement that the Defendant would sell a number of flats to him for £12 million, which he would then develop and sell on, spent significant time and money in obtaining planning permission for the proposed development. When planning permission had been obtained, the Defendant reneged on the oral agreement to sell. The Claimant brought proceedings alleging a beneficial interest in the property. That claim was rejected; but the House of Lords held that the Claimant was entitled to be paid a sum assessed on a quantum meruit basis on the grounds of unjust enrichment. At [42] Lord Scott (with whom the other members of the House agreed) said:

> "*Quantum meruit*
>
> It seems to me plain that Mr Cobbe is entitled to a quantum meruit payment for his services in obtaining the planning permission. He did not intend to provide his services gratuitously, nor did Mrs Lisle-Mainwaring understand the contrary. She knew he was providing his services in the expectation of becoming the purchaser of the property under an enforceable contract. So no fee was agreed. In the event the expected contract did not materialise but a quantum meruit for his services is a common law remedy to which Mr Cobbe is entitled. The quantum meruit should include his outgoings in applying for and obtaining the planning permission, which should be taken to be reasonably incurred unless Mrs Lisle-Mainwaring can show otherwise, and a fee for his services assessed at the rate appropriate for an experienced developer. To the extent, of course, that Mr Cobbe's outgoings included the fees of planning consultants whom he employed, there must not be double counting. The amount of the quantum meruit for Mr Cobbe's services would, in my opinion, represent the extent of the unjust enrichment for which the defendant company should be held accountable to Mr Cobbe.

84. The feature that bears striking similarity to the facts of the present case is that it was not originally intended that Mr Cobbe should be remunerated by the Defendants: he hoped to develop the land and recoup the expenditure he incurred in obtaining planning permission out of the proceeds of sale of the developed land to third parties.

Applying the principles in *Cobbe* to the facts of the present case, it is *not* a prerequisite to a claim by the Defendant against the Claimants that the parties should have originally contemplated that the Claimants would pay the Defendant anything.

85. The critical question is whether it can be said that the Claimants freely accepted the carrying out of the Plot 2 works and did not take a reasonable opportunity open to them to reject the proffered services. I have set out the general factual background earlier in this judgment. I accept that the Defendant did not intend to do the works in question gratuitously; and also that, if all had gone well, the Defendant would have recouped its outlay on selling the completed property to a third party. I also accept that, as in *Cobbe*, the Defendant can be said to have taken a risk in starting work on Plot 2 before exercising the option. *Cobbe* however, shows that proceeding without the benefit of an entitlement to be paid is not determinative. In one respect it may be said that the risk being taken by the Defendant in the present case was (or would have appeared) less than the risk being taken in *Cobbe*: the Defendant in the present case had the benefit of the concluded Option Agreement which gave it a contractual entitlement to open the route to ultimate payment, whereas in *Cobbe* the Claimant had nothing more than an unenforceable oral agreement about how the parties would proceed.

86. The existence of the Option Agreement affected the parties' positions in two material respects. First, they operated on the assumption that the Option would be exercised. Second, they were content to agree to notional dates for the exercising of the option so as to compensate the Claimants by additional interest. Until the parties fell out, both of these features reflected the cooperative approach to which I have already referred. Although I accept that Mr Molton presented the Claimants with faits accomplis by starting work on two occasions without notifying them, both parties recognised that there were reasons why the orderly progress of the development suggested by the terms of the Option Agreements was not happening.

87. In January 2013, the Defendant commenced work on the foundations and slab of the Plot 2 house and garage without notifying the Claimants in advance. He did, however, tell the Claimants that he had a prospective purchaser on 2 January 2013 with a legal completion on 30 June 2013. I accept the Claimants' submission that at least one of the reasons why works were started was that Mr Molton had found a prospective purchaser who wanted to operate on a tight timescale. When Mrs Peacock raised the starting of the Plot 2 work with Mr Molton, she did not object or require him to stop work: her response was that they would agree something but that he should keep her better informed in future. Mr Molton clarified that he may stop work if the prospective purchasers pulled out (as happened) and the parties agreed that exchange would be treated as having taken place on 1 January as work had started without the option being exercised. The correspondence addressed the question of the tax year into which the exchange might fall, which I take to be a mark of the cooperative approach that was being adopted on both sides.

88. The general factual background relating to the restart of works in December 2013 is set out at [32] above. Once again, the Defendant had started work on Plot 2 without prior notice to the Claimants. Once again, adopting the cooperative approach which still characterised the parties' dealings, Mrs Peacock's reaction was simply that "it would be nice to be asked." She did not ask him to stop work, and this phase of work to put up the garage was completed by early February 2014. There has never been

any objection to the building of the garage as such: the objections have all been to its disputed position.

89. Before restarting work on Plot 2 in April 2014, Mr Molton sought and obtained the Claimants permission to do so before exercising the option: see [34] ff above. As before, far from objecting to the carrying out of the works, the Claimants accepted that they were being done. Mrs Peacock's acceptance in evidence that the building works were beneficial to both the Defendant and the Claimants was, in my judgment, realistic and correct: both the Claimants and the Defendants stood to benefit from the completion of the development. All that had happened was that the pre-ordained order had been disrupted and the parties were adapting to that reality. On any of the occasions that the Defendant started work before exercising the Plot 2 option, the Claimants could have objected and required it to stop work. The fact that they never did so reflects what I find to be the reality of the situation throughout: they freely accepted the deviations from the originally planned sequence of events because they perceived it to be to their advantage to progress the development. This was not in any real sense a case of their being deprived of free choice, except to the very limited extent of Mr Molton failing to give them advance notice that he was going to start work in January and December 2013. They were content to accept the work with the agreements about the notional date for exercising the Option providing them some additional financial recompense. That situation prevailed until the Defendant was instructed to stop work in July 2014: see [42] above. On and from 14 July 2014 the Defendant was entitled to access to Plot 2 having validly exercised the option.

90. In these circumstances I conclude and find that, for the purposes of a claim in unjust enrichment, the Claimants (a) did not object to or protest against the carrying out of the works before the option was exercised though they had reasonable opportunity to do so, and (b) freely acquiesced in the carrying out of the works before the option was exercised, and (c) freely accepted the benefit that the works conferred upon Plot 2. The Claimants, had they thought about it, would immediately have recognised that the Defendant was not providing its services gratuitously, though they would (rightly) have said that both they and the Defendant expected that the Defendant would recoup its outlay from third parties. As *Cobbe* shows, this does not take the present case outside the scope of a claim for unjust enrichment. It is not a correct characterisation of the state of the parties' minds to say that the Defendant was *accepting* the risk that the land might not be transferred to it such that a claim in unjust enrichment is not established. The risk existed while the Plot 2 option was not exercised; but both parties were proceeding on the basis that it should and would be. Although their working assumption fell through, that does not automatically mean that a claim in unjust enrichment is barred. In my judgment the Claimants' free acceptance of the carrying out of the works and the benefit that conferred on their land is sufficient to render it unjust for them to retain the benefit without making suitable payment to the Defendant.

91. For these reasons, I would hold that the Defendant's alternative claim in unjust enrichment relating to the Plot 2 works should succeed. I return to quantum later.

92. Turning to the Plot 1 infrastructure works, different considerations apply. It is common ground that the Claimants were deemed to have paid £16,000 in respect of infrastructure works by way of a reduction in the purchase price paid by the Defendant on completion of the sale of Plot 5. The Claimants say that this was a sum

which was their fixed liability in respect of infrastructure works. The Defendant says it was a contribution and subject to adjustment once the costs were known.

93. The evidence on this issue is lightly sketched: the Claimants say that it was not discussed. As set out in more detail at [8] ff above, the costs breakdown for the whole development, described as a "Construction Budget" included £80,000 for infrastructure works. The "Build Budget for Plot 1" included £16,000 for infrastructure works. Although this was, as a matter of mathematics, 1/5 of the £80,000 for the project as a whole, it was not achieved simply by dividing either the £80,000 or its constituent elements by 5. There was nothing in either of the Budget documents to suggest that their constituent figures would be subject to remeasurement; but they were produced at an early stage and were not incorporated into any contractual document that has been seen or mentioned.

94. In the exchange of emails on 10 May 2013, Mrs Peacock referred to the £16,000 they had paid "as Plot 5's contribution to the road etc", which suggests a fixed contribution; and Mr Molton's reply was equally consistent with it being a fixed contribution: see [28] above. The next documentary reference to it is on or about 14 March 2014, when Mr Molton set out additional costs for building a six-bedroom house on Plot 1: the same figure appears with the same breakdown as before. Finally, on 2 September 2014, when Mr Molton sent a schedule of costs incurred on Plot 2, he included £16,000 for infrastructure and added "(same as agreed for Plot 1)".

95. In the light of these contemporaneous documents, I am not satisfied that the parties agreed that the budgeted sum of £80,000 infrastructure costs for the development as a whole was subject to remeasurement and allocation between the Plots. To the contrary, the documentation supports the finding that the £16,000 paid by the Claimants in respect of infrastructure costs was a fixed figure that represented Plot 1's agreed contribution. There is therefore no scope for a claim for further payment for infrastructure costs allocated to or benefiting Plot 1.

Issue 3: Sewers and Drainage

96. The Claimants allege that the arrangements that the Defendant has made (or not made) for the drainage of foul water on and from the Site are in breach of Clause 7 of the Plot 5 Agreement, which is set out at [12] above. It is not in dispute that "the works" which the Defendant was obliged to carry out pursuant to Clause 7 included the laying of pipes and other conducting media to and from Plot 5 and the Retained Land (which comprised Plot 1). The pleaded complaint is that the Defendant has connected the sewers for Plots 2, 3, 4 and 5 to a temporary connection that runs to the old factory sewer which runs under the Retained Land where the foundations of a house for which the Claimants have approved planning permission are to be constructed. It is also alleged that the Retained Land cannot be built on because the Defendant has connected a land drain across the retained land to the old foul factory sewer.

97. At the start of the development, there was an existing combined foul and storm drain which ran roughly from south to north across Plot 1 and 9 Stewkley Road to Stewkley Road. There was no single purpose system for either foul or for storm drainage. Anglia Water, which is the relevant authority, does not permit combined foul and storm drainage systems on new developments.

98. The present state of the drainage on site is illustrated by drawing D5. It shows a manhole on Plot 1 ["the Plot 1 Manhole"] marked with an X, the position of which is in dispute. I accept the evidence of Mr Molton that it is roughly in the position shown on D5, which is towards the south-western corner of the plot in a position that, on current information, is likely to be in the driveway to Plot 1. On current information, whatever configuration of house the Claimants chose to put on Plot 1, the Plot 1 Manhole will not be under the foundations or structure of the house. There is then a temporary drain, which was laid by the Defendant, running eastwards across Plot 1 to a temporary connexion with the combined foul and storm drain, which then runs to the north as described above. The temporary drain from the Plot 1 Manhole to the combined foul and storm drain is in a position that is likely to run under the house that may be built on Plot 1. It is therefore likely to require rerouting if and when a final decision is made about where to place the house on Plot 1, so that it does not run under the house or its foundations.

99. Dealing first with foul drainage, the Defendant has connected the foul drainage from Plots 5, 4, 3 and 2 to the Plot 1 Manhole. The foul drainage from these houses then passes east along the temporary drain across Plot 1 to the connexion with the combined foul and storm drain. This arrangement has been approved by Anglia Water and, on the evidence before the Court, is in serviceable working order.

100. The Defendant has not laid and could not lay or provide for any foul drainage for Plot 1 because (a) the position and configuration of the house had not been decided by the time that the parties fell into dispute, and (b) the Claimants have never instructed the Defendant to do so.

101. Turning to storm water, I accept the evidence of Mr Molton that the Defendant discovered, while it was doing the foundation works for Plot 5, that the Site was prone to excessive runoff of surface water from adjoining fields. It was necessary to make provision for this surface water to prevent unacceptable inundation of the site as a whole. The Defendant therefore constructed a land drain (as shown on drawing D5) along the south and west sides of the Site. At the northern point of the land drain along the west side of the Site, the Defendant laid a drain running eastwards along the northern border of Plot 2 and then turning to the south to the Plot 1 Manhole as a temporary measure. The invoices for the land drain works show that they were done in late 2012 to early 2013. The effect of taking the water from the land drain to the Plot 1 Manhole is that it then drains along the temporary drain to the connection with the foul and storm drain. The system is therefore being used for both foul and storm water, which is unacceptable to Anglian Water.

102. There are therefore two problems going forward. First, it will be necessary to make separate provision for the drainage of foul and storm water respectively; and, second, it will be necessary to reroute the drainage so that it does not run under the house that may be built on Plot 1. It appears to be common ground that the ultimate solution will involve rerouting pipes so that the foul water and the storm water separately pass through Plot 1 by routes that do not take them under the house. A possible layout is shown on the Defendant's annotated drawing D6, which the Claimant's Quantity Surveying expert agreed was a feasible solution.

103. The Claimants' claim in respect of the foul drainage fails. The arrangements for foul drainage installed by the Defendant satisfied its contractual obligation to provide

conducting media for Plot 5 and the Retained Land. There is and was no contractual basis for complaining about the routing of the temporary pipe from the Plot 1 Manhole to the existing foul and storm drain. As and when the decision is taken as to where the house on Plot 1 is to be sited, and on the assumption that the position will impinge over the present route of the drain between the Plot 1 Manhole and the existing foul and storm drain, the pipe can be rerouted to a satisfactory route. In evidence Mrs Peacock appeared to accept that this would be a cost incurred in building the house on Plot 1 and would be for the Claimants to execute and fund.

104. The Claimants' claim in respect of the storm drainage succeeds, though not for the precisely the reasons alleged. To my mind, the land drain and the disposal of water from it were infrastructure works which the Defendant was obliged to carry out to render the site habitable and operable. The cost of infrastructure works was also to be borne by the Defendant save to the extent that it recovered them from the owners of the Plots. I have already held that Plot 1's contribution was fixed at £16,000, and that there is no basis for further adjustment of that contribution. The Defendant's solution, which was temporary and unacceptable, was to connect the land drain to the combined foul and storm drain. The necessary works, such as shown on D6, for disposing of the surface water from the land drain are and remain the responsibility of the Defendant as part of its infrastructure works. Mr Molton accepted the principle of responsibility for the cost of carrying out the works, although he accepted only a proportion on the basis that it was attributable to Plot 2. I disagree with his proportional qualification because of the Defendant's responsibility for completing the necessary infrastructure works for the Site.

Issue 4: The Spoil Heap

105. In early 2013 the Defendant deposited spoil from the foundations for Plot 2 onto 9 Stewkley Road. As set out in the general factual background above, the Claimants made requests during 2014 for the Defendant to remove the spoil and, despite assurances, the Defendant did not do so. Mr Molton rightly accepted that it was the Defendant's responsibility to cart away its spoil. On the evidence there was ample time for it to be removed after the Defendant was first requested to do so and before the final breakdown in relations. Although Mr Molton says that he removed some of the heap before he was told to stop work, a substantial heap was left, as is shown on the photographs. The heap was not securely fenced and in time became a source of complaint from neighbours. Eventually the Claimants had the spoil removed in January 2017. It was then 531.72 cubic metres in volume, contained asbestos, and cost the Claimants £24,421 to remove.

106. Two issues arise. The Defendant says that the heap contained no asbestos when it was required to stop work. Second, it has advanced an alternative quotation for removing the spoil, in the sum of £13,200. The alternative quotation is dated 6 August 2015. Both of these issues are drawn on to support the submission that the Claimants have failed to mitigate the loss they suffered as a result of the heap not having been removed by the Defendant.

107. I accept Mr Molton's evidence that the spoil he deposited on the heap came from Plot 2, that he did not deposit asbestos on the spoil heap and that there was no asbestos there when his work on site was stopped. It follows that any asbestos must have been placed on the heap by others after the Defendant stopped work. There is no evidence

to enable a finding to be made about how much asbestos was on the heap when removal took place or what difference, if any, it made to the price.

108. The documentary evidence indicates that the Claimants received a quotation for the removal of the heap which they accepted, and that they were charged the quoted price after removal. The email quotation received by the Defendant is hedged in two respects, namely (a) that it is offered on the assumption that the heap is the same as last time it was seen (on an unspecified date) and (b) the price would increase "if at any time [the contractor is] stopped from tipping due to spoil being contaminated." It therefore appears not to take any account of the presence of asbestos, which would inevitably increase the price of removal and disposal. The only other evidence about rates for disposal is that Quantity Surveying experts have adopted a rate of just under £32 per cubic metre in their build ups for the cost of removing excavated material to a tip within 5 kms of the Site, which would translate into a price of just under £17,000 for the claimed quantity. However, this rate may not be directly comparable, for the same reasons as apply to the Defendant's 2015 quotation.

109. If relations between the parties had not soured and the Defendant had not been wrongly excluded from site, I am confident in finding that Mr Molton would have got round to removing the heap in the Autumn of 2014. He was ineffective in getting rid of it while things were going wrong in the summer; but, assuming that the development had progressed cooperatively, the heap would have been an irritant which he would have wanted to remove, at the latest when his cash flow improved by selling Plot 2.

110. I am not satisfied that the August 2015 quote would have been or was realistic, not least because of the rates adopted by the Quantity Surveying experts, which suggest a significantly higher cost. It is not clear why the Claimants waited until January 2017 to remove the spoil heap. It is possible that the price to them as private individuals would be higher than the price offered by a contractor to a professional developer such as the Defendant. It is also possible that the price they were quoted reflected changes in the heap during that period of nearly 2 ½ years between 2014 and 2017. There is certainly no evidence to sustain a finding either that the cost that was quoted to them was unreasonable in the circumstances then prevailing or that they acted unreasonably in accepting it. However, on the available evidence, I conclude that it would have cost the Defendant about £20,000 to remove the heap as it stood in the second half of 2014.

111. The sum that is recoverable by the Claimants therefore depends upon analysis of causation. I have accepted that Mr Molton had sufficient time to remove the heap between when he was given notice of termination of his licence to store the soil on 9 Stewkley Road and when he was instructed to stop work. His failure to remove the heap before being instructed to stop work is therefore at least a factual contributor to the need for it to be removed thereafter by the Claimants. However, in my judgment, the effective cause and reason why it was the Claimants who ended up removing the heap rather than the Defendant is the Claimants' wrongful repudiation of the Plot 2 Option Agreement and their wrongful requiring that the Defendant stop work. Had that not happened, the cost of removing the heap would have been (on my finding set out above) £20,000. The additional £4,421 incurred by the Claimants in 2017 is attributable to the Claimants' exclusion of the Defendant from site and a likely

combination of changes to the scope of the heap in the period before the Claimants had it removed and the possible influence on price of their being private individuals.

112. For these reasons, the recoverable amount for the removal of the heap is £20,000.

113. The fact that the Claimants did not remove the heap until 2017 is also relevant to a claim for general damages that the Claimants make in relation to the presence of the heap between 2014 and 2017. I am confident that if the heap had caused the Claimants any real difficulty or disadvantage during that period, they would have had it removed earlier. I therefore reject the claim for general damages, noting in passing that I would not have regarded the suggested sum of £10,000 as either appropriate or "nominal" if I had been satisfied that an award should be made. Had I thought it appropriate and justified to make an award, I would have awarded the sum of £500.

Issue 5: Removal of Concrete Topping

114. The Plot 5 Sale Agreement included "demolition of the buildings" on Plot 1 in the definition of "the works". By the time that the development started, there were no buildings to demolish, but there was a thin concrete topping which was useful to provide a hard surface for the passage of vehicles. It was therefore left in situ by the Defendant while it was working on the development and remained there once the Defendant left site. The Claimants claim the cost of taking up and removing the topping, alleging that it comes within the scope of "demolition of buildings" required by the Plot 5 Sale Agreement.

115. On a strict construction of the Agreement, the concrete topping was not part of a building and could be said to have been outside the scope of "demolition of buildings". However, Mr Molton accepted in evidence that the removal of the topping was included in the budget. I accept that evidence. It fits most conveniently as part of the infrastructure costs under the headings "demolition" and "site clearance". It follows that it was included in the Plot 1 infrastructure for which the Claimants paid £16,000. I therefore conclude that the removal of the topping was part of the Defendant's obligation either (as I find) as part of the infrastructure costs for which the Defendant was paid or (which I consider more doubtful) on a liberal interpretation of "demolition of buildings" that includes the hard standings that had served the buildings before redevelopment.

Issue 6: The Unilateral Notice

116. Clause 6 of the Option Agreements provided for an entry to be made by way of an agreed notice on the register of the Claimants' title to protect the Option Agreement: see [15] above. The Defendant was to procure its removal if the Option Agreement lapsed. The factual chronology is not in dispute. In June 2012 the Defendant or its solicitor registered a Unilateral Notice against the whole of the Site, including Plot 1. The Claimants raised the matter with the Defendant in June 2012 but nothing was done to remove or amend the Notice. Nothing further happened until May 2016 when the Claimants' by their solicitors asked the Defendant to apply to the Land Registry to cancel the Notice. In July 2016 the Claimants themselves applied for cancellation of the Notice. The Defendant initially objected but in September 2016 requested that the Land Registry to amend the notice to cover Plot 2 only. The Land Registry has not acceded to that request. On 18 April 2017 the Claimants' solicitors wrote to those

representing the Defendant and asked the Defendant to take the steps necessary to have the notice removed.

117. By the Particulars of Claim the Claimants allege that "in breach of Clause 6.2 of the Plot 2 Option Agreement the Defendant has failed or refused to remove or amend the Unilateral Notice … falsely contending that the option in respect of Plot 2 has been validly exercised." It is alleged that the Claimants are unable to develop, sell or otherwise deal with Plot 2 and/or the retained land until the Unilateral notice is removed.

118. It is clear that there is no justification for maintaining a Notice (unilateral or otherwise) over Plots 1, 3, 4 or 5. As a result of my conclusion that the Plot 2 Option Agreement came to an end when the Defendant accepted the Claimants' repudiatory breaches of contract, the Defendant has no continuing interest in Plot 2 that is capable of being protected by a notice on the register.

119. Clause 6 of the Option Agreements provided for an agreed Notice but made no mention at all unilateral notices. As such, it is not obvious that the registration of the unilateral notice was a breach of Clause 6: rather it is something that was not covered by the contract at all. However, I regard this issue, and issues relating to the possible application of section 77 of the Land Registration Act 2002 as hypothetical as the Claimants have advanced no evidence to demonstrate that any actual loss has been caused to them by the presence of the unilateral notice. The Claimants have submitted that they were unable to utilise the capital value inherent in Plot 1 and/or Plot 2 from May 2016 to date. However, there is no evidential basis upon which to make a finding that the presence of the unilateral notice has of itself either caused or contributed to any loss of use of the land or that there has been any other use which the Claimants would have made of the capital tied up in the property but did not make because of the existence of the unilateral notice. On the evidence before this court, what has stymied any further use has been the continuing dispute about the boundary between Plots 1 and 2 and the existence of the other matters in issue in these proceedings. Any notional or actual diminution in the value of the Claimants' interest in Plots 1 or 2 is temporary and reversible when the Unilateral Notice is finally withdrawn, as it must be.

120. The Claimants' claim in respect of the Unilateral Notice therefore fails for lack of proof of any actual loss or compensable damage. I therefore make no further findings or decision under this head of claim.

Quantum and collection

121. The parties instructed Quantity Surveying experts: Mr Thomas for the Claimants and Mr Cheetham for the Defendant. Mr Cheetham was instructed very late but made strenuous and successful efforts to adopt a pragmatic and co-operative approach to the case and to his colleague, Mr Thomas. In their reports and evidence the experts provided assessments as at August 2014, which provided clarity and consistency. As a result, the areas of difference between the experts were limited by the time of trial; and they continued to co-operate and submitted further summaries setting out their respective positions after completing their oral evidence at trial. I am grateful to each of them for the constructive approach that they adopted, the assistance they gave to the Court, and the expertise they displayed in giving it.

General Approach

122. In the light of my conclusions under Issue 1, the Defendant stands to be compensated for the loss of the profit that it would have made on the sale of Plot 2 with the completed house and garage on it. The approach to calculating that profit can most easily be expressed as being A-(B+C), where A is the net proceeds of sale of Plot 2, B is the costs actually incurred by the Defendant on Plot 2, and C is the costs required to complete Plot 2 to enable it to be sold. However, the appropriate measure of damages is A-C, because B has already been incurred by the Defendant and therefore should not be deducted from the net proceeds of sale when calculating damages as that would involve double counting those costs. It is for this reason that I regard the unjust enrichment claim considered under Issue 2 as an alternative claim and not an additional claim. If I were wrong in my conclusions on Issue 1 but correct on Issue 2, the profit that the Defendant might have made becomes irrelevant: all that is being compensated is the costs incurred on a quantum meruit/unjust enrichment basis.

Miscellaneous points

123. Concrete topping: there is very little between the experts. Mr Thomas contends for £1,221.50. Mr Cheetham contends for £1,038.69. Allowing for the possibility of remeasurement and contractors rates, there is no absolutely right answer. I therefore roughly split the difference and award £1,150.

124. S. 106 Payment: the Defendant was required by Clause 6.1 of the Plot 5 Sales Agreement to comply with the Claimants' obligations under the s. 106 Agreement that they had entered into with Aylesbury Vale District Council as part of the process (and price) of obtaining planning permission for the Site. It paid the required sum of £24,283 to the Council on or about 14 December 2012. It was a free-standing obligation under the Plot 5 Sales Agreement which was not allocated to any or all of the five development plots and which had to be (and was) discharged before the Defendant could commence work. It was undoubtedly a cost that the Defendant had to bear as part of the deal which was to enable it to develop the Site, but there is no sound basis for allocating all or any part of it to Plot 2. If any part of it were to be allocated, it would be an incurred cost. Its exclusion therefore does not affect the Defendant's claim for damages.

125. BLP Fees: Mr Thomas included in his costs to complete (at Appendix J9) a series of fees payable to BLP intended to lead to BLP providing guarantees for Plots 2 to 5. After adjustment and division by 4, the sum of £2,397.57 per plot is accepted as a figure by Mr Cheetham. However, it is agreed that the BLP fees were a cost that would have been incurred in novating the policy to the Claimants if they had built out Plot 2. It is therefore not a cost to complete for the Defendant, which was always a party to the policy.

126. Contingency: the Claimant contends that a contingency should be added to the costs to complete because "it is always difficult for a new contractor to take over, especially where the paper chain is deficient. There are also uncertainties about the drainage/sewage situation. An allowance for contingencies is appropriate." I reject this submission. Responsibility for there being a new contractor rests with the Claimants and a contingency on this basis would not have applied had the Defendant built out and sold on. Equally, when the Defendant was instructed to stop work there

was no sufficient uncertainty about the drainage or sewage situation to require an additional contingency to be built in.

127. Legals: the Defendant claims £914 as part of its quantum meruit claim. The item is backed by an invoice from Coffin Mew dated 19 September 2014. The invoice identifies £900 for "Acting on your behalf in the abortive purchase and sub-sale of Plot 2 The Wickets" and £14 for Land Registry Search Fees. No further detail is provided. It is therefore not established that the fees themselves or equivalent fees would not have been incurred in relation to the purchase and a successful sub-sale. The Defendant has therefore failed to demonstrate a compensable loss.

128. Windows: the parties have agreed the sum of £7,166.43, to which should be added 15% for Preliminaries and 10% for overheads and profit, as an incurred cost. This produces a figure of £(7,166.43 x 1.15) x 1.1 = £9,065.53.

129. For some unexplained reason, one window unit has been left outside and others may have deteriorated. This does not affect or reduce the unjust enrichment claim since the benefit was provided to the Claimants and any deterioration has been caused by their preventing the completion of the work and failure to protect the materials after the exclusion of the Defendant from site.

130. VAT: the Defendant is registered for VAT. It is therefore agreed that any calculation of loss of profit should exclude VAT as any part of the Defendant's costs to complete.

131. Sale Price: the joint valuation report evidences and I find that the Defendant would have sold the completed property at the end of August 2014 for £540,000 incurring legal costs in the region of £10,125.

132. Option price: the Defendant would have paid the Claimants the purchase price of £162,500 and the exit fee of £7,500. In addition, by prior agreement the Defendant would have paid the Claimants interest on the purchase price at 7.5% from 1 December to the end of August 2014: £9,150.

133. Costs to completion: Subject to the points below, which relate to numbered items on the amended Scott Schedule filed on 6 February 2018, it is agreed that the Defendant's costs to complete would have been £88,050.

    i) Item 1: survey and repairs to drainage. Disallowed – see [126] above;

    ii) Items 2-4: Repairs. Agreed as a cost to complete in the sum of £200.

    iii) Item 5: Novation of BLP guarantee. Not a Defendant's cost to complete Plot 2: see [125] above;

    iv) Item 9: Re-apply for planning on Plot 1. Disallowed. Not a Plot 2 cost.

    v) Item 11: Removal of Spoil heap. See [105] above. Although the sum of £20,000 could be characterised in a number of ways, it is agreed that it should be treated as part of the Defendant's costs to complete.

vi) Item 12: Break up existing slab. See [114, 123] above. It is agreed that the sum of £1,150 which I have found to be the appropriate sum should be treated as part of the Defendant's costs to complete.

vii) Item 13: Removal of site hut. Allowed as part of the Defendant's costs to complete in the sum of £216.32.

viii) Items 14 and 15: removal of redundant materials: Allowed as part of the Defendant's costs to complete in the sum of £250.

ix) Item 16: removal of site fencing. Disallowed. Not shown to be a cost that Defendant would have incurred.

x) Item 17: Main foul connection to manhole on 9 Stewkley Road: it is agreed that the appropriate figure is nil as the connection has been made.

xi) Item 18: Storm drainage. This refers to the land drain, see [104]. £5,000 is allowed. It is agreed that it should be treated as part of the Defendant's costs to complete.

xii) Item 20: Landscaping. Agreed as part of the Defendant's costs to complete: £28.

xiii) Items 21 and 22: Final wearing course to road/Additional work to pavement and road. Agreed as a cost to complete in the sum of £10,500.

xiv) Item 23: Block paving and other external works to complete. Exclude 5% contingency. Allow £11,039.43 as part of the Defendant's costs to complete.

xv) Item 25: Money held for finishing the roads etc. It is agreed that the sum of £2,000 would have been paid to the Defendant if it had completed Plot 2. The Defendant's costs to complete should therefore be reduced by that sum. As the Defendant will not in fact complete the roads, the retained sum should be paid to the Claimants.

Costs to completion: collection

134. I calculate and find that the costs to complete would have been:

Item	£
Agreed sum	88,050.00
Repairs	200.00
Spoil heap	20,000.00
Break up slab	1,150.00
Removal of hut	216.32
Removal of materials	250.00
Storm drainage	5,000.00
Landscaping	28.00
Road and Pavement	10,500.00
Block paving	11,039.43
Sub-total	136,433.75
Less retained sum	2,000.00

TOTAL 134,433.75

Calculation of Damages Claim

135. The net proceeds of sale can be expressed as being:

i) The net sale proceeds: £529,875 – see [131] above; less

ii) The Option Price and exit fee plus interest that would have been paid to the Claimants if the Defendant had built out Plot 2: £179,150 – see [132] above; and less

iii) The Defendant's costs to completion - £134,433.75– see [134] above.

136. I therefore calculate the Defendant's loss immediately caused by the Claimants' renunciatory and repudiatory breach of contract to be £216,291.25 and award damages in that sum.

Unjust enrichment/Quantum Meruit

137. In the alternative, the Defendant's claim for payment on a quantum meruit basis on the grounds of the Claimants' unjust enrichment includes:

i) The costs incurred by the Defendant in relation to plot 2 in the sum of £120,000. This figure was virtually agreed by Mr Thomas (at [3.2.1] of his report) and Mr Cheetham (at [4.15] of his report);

ii) £9,065.53 for the windows: see [128] above;

iii) BLP warranty fees, which I award in the sum of £1,855, being ¼ of the overall sum paid: see Mr Thomas' report at Appendix F;

iv) Plot 2 Infrastructure works: £20,000: see Mr Thomas' evidence, to which it is agreed that a further £2,000 should be added in respect of the cost of the boundary wall between Plot 5 and the neighbouring bungalow, which I find to be a general infrastructure cost and not an infrastructure costs that is attributable solely to Plot 5.

138. Accordingly, the alternative claim in quantum meruit, would have succeeded in the sum of £152,920.53.

Loss of Business Opportunity

139. The Defendant additionally claims that it would have generated a return of 100% per annum on the use of the funds which it should have acquired by 31 August 2014, which it claims as damages for loss of business opportunity. By its Counterclaim it claims as damages in the alternative "a sum representing the cost of borrowing (to a commercial entity such as the Defendant) the money of which the Defendant was deprived, at compounded rate of interest, over the period between (a) the point when the sums should have been received, and (b) are ultimately paid." In closing

submissions the Defendant submitted that this last claim was not merely alternative but could be additional and cumulative to the claim for loss of business opportunity.

140. In support of this claim Mr Molton gave evidence about specific transactions which he says he would have invested in and which, he says, would have generated specified levels of profit. Before turning to that evidence, it is convenient to set the legal framework that applies to such claims.

141. Subject to issues of remoteness and foreseeability, it is open to a person who has suffered a compensable financial loss as a result of a breach of contract (as the Defendant has in this case) to prove that the compensable financial loss caused him to suffer additional financial losses. At the highest level of proof, he may prove that he would have taken specified steps (such as taking a specified investment opportunity) that would have generated identified profits which were lost to him because of the infliction of the original compensable loss. Routinely, the contract breaker will attempt to defend the claim by alleging that the loss is too remote or not foreseeable, or that the loss is caused by a failure to mitigate by borrowing the necessary money, or a combination of these. But if the claim succeeds, it will be because the Court is satisfied that a particular loss was suffered at a particular time (or over a particular period) because of the original compensable loss.

142. At the next level of proof, it may be alleged that the infliction of the original compensable financial loss has caused the victim (here the Defendant) to suffer the loss of a chance of further financial gain. Such claims are routinely decided on the basis of principles enunciated (for claims in tort) in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 and subsequent authorities.

143. There is, however, a third level of proof which may sustain a claim for damages; and it is plain from the formulation of the Defendant's claim and submissions that they keep a close eye on this third level. Since *Sempra Metals v IRC* [2007] UKHL 34, it has been authoritatively established that a commercial entity may recover damages for being kept out of money to which it was entitled. I have reviewed *Sempra Metals* for the purposes of this judgment and gratefully acknowledge and adopt the analysis of Males J in *Equitas Ltd v Walsham Brothers & Company Ltd* [2013] EWHC 3264 (Comm) at [107]-[126]. For present purposes it is only necessary to set out the summary of principles provided by Males J at [123], with which I respectfully agree:

> "In the light of the judgments in *Sempra Metals* I would summarise the position as follows.
>
> i) First, it is clear that damages are in principle recoverable, subject to ordinary principles of remoteness and mitigation, for breach of an obligation to remit money, where the failure to remit has caused a loss.
>
> ii) Second, unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that a claimant kept out of its money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, even if adduced, may well be somewhat hypothetical and thus

of little assistance. For example, a business man may well be unable to say precisely what he would have done differently if a particular payment had been made to him when it ought to have been, especially if (as apparently in this case) he was unaware that the money was being withheld. Extensive disclosure, which would no doubt be demanded by the defendant, is unlikely to assist. But that does not mean that no loss has been suffered. …

iii) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially. The position may, however, be different if there is a good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing. …

iv) In other cases I consider that it is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived. As noted above, it may often be impossible or at any rate extremely difficult to produce such evidence, especially if that would mean attempting to disentangle a claimant's overall business operations in an artificial attempt to attribute specific activity such as borrowing to the non-remittance of specific funds. Instead, at any rate in commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did. A conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. This avoids the need for protracted investigation of the particular claimant's financial affairs. As with other conventional measures (for example, the assessment of damages by reference to a market price in sale of goods cases) this approach has the advantage of certainty and predictability which is always important in the commercial context, as well as being broadly fair in the great majority of cases and avoiding expensive and often ultimately unproductive litigation.

> v) If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself. While simple interest has the virtue of simplicity as Lord Hope observed, it also has the certainty of error and injustice. As their Lordships noted, it is impossible to borrow commercially on simple interest terms. I respectfully agree with Lord Nicholls that the law must recognise and give effect to this reality if it is to achieve a fair and just outcome when assessing financial loss. To conclude that, at least in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate is therefore both principled and predictable, as well as being in accordance with what was actually awarded in *Sempra Metals*."

144. With these principles in mind, I turn to the evidence that is put forward in support of this claim. As a preliminary point, it is agreed that the evidence sustains a finding that the Defendant's cost of commercial borrowing during the relevant period was at a rate of 10% and I make that finding. I return to the question of simple or compound interest below.

145. Mr Molton gave evidence of specific transactions which he says the Defendant would have undertaken but for its enforced inability to realise its profit on Plot 2:

i) In mid-2015 he set up a development of a block of apartments at Ternion Court in Milton Keynes. He was then hoping that the Claimants would settle soon and put him in funds for the work he had done on Plot 2. He had proposed a joint venture with another developer which required the Defendant to raise £150,000. His evidence is that his return over a 12-month period would have been £500,000 but he lost the opportunity because of his inability to raise the money;

ii) A proposed development at Tremorgan progressed as far as solicitors being instructed and exchange of contracts being close. But the proposal fell through because he could not raise the £250,000 needed to fund the first phase of a two-phase development. His evidence is that the investment of £250,000 on the first phase would have returned £750,000, though the period over which that return would be earned is not specified. Phase 2 would, he said, be more profitable but was also less certain because it was subject to the obtaining of planning approval;

iii) A development at Wing required an investment of £125,000 with a return of £400,000 but the opportunity was lost because the Defendant could not raise the £125,000;

iv) Two further opportunities were mentioned, both of which were placed with solicitors. One has fallen through. When making his statement, the other was still in the offing, but the Defendant was being pressed to produce an investment of £60,000. The precise application of those funds is not clear on the evidence.

146. Mr Molton gave evidence of actual activity by the Defendant in the period since 2014:

i) In February 2017 it took on a development in Milton Keynes having raised £135,000 to invest in the project. The project is due to be completed in 2018 with a profit to the Defendant of £300,000;

ii) Since 2017 the Defendant has raised loans from commercial lenders of various terms totalling £160,000, £55,000 of which has been repaid. In addition, it has raised £180,000 from Mr Molton's family and friends.

147. Although Mr Molton said that further documents were available, there was no detailed documentation (in the form of costings or budgets) before the Court in relation to any of the five opportunities referred to by Mr Molton. Furthermore, there is no historical financial information that enables the Court to put Mr Molton's evidence about potential profitability into context. The Court has information about the development that is the subject of this action, but that does not support the levels of return projected by Mr Molton for the opportunities that he says the Defendant has lost. The history of the present development in general and Plot 2 in particular evidences that it was the Defendant's business model to re-invest proceeds of one development to fund another and shows the difficulties that cash-flow restraints could impose. It is sufficient to remember that, far from the orderly sequence of development that was envisaged at the time of contracting, the actual development at Soulbury developed out of sequence and with two false starts on Plot 2. While it appears that Plot 5 took about 6 months and Plot 3 (taken out of sequence) took about 4 months from commencement of foundations to completion, Plot 4 took about 11 months and a period of 19 months had elapsed between the first work being done and the end of August 2014. In addition, my findings in relation to the costs to complete and costs to completion demonstrate profit levels that are much more modest than any of the projected profits on Mr Molton's lost opportunities. In the absence of considerably more detailed information, I am not satisfied that all or any specific ones of the projects would have come to fruition, though I accept that it is probable that Mr Molton would have pursued other development opportunities once he had finished at Soulbury. In that regard, I take into account that the Defendant would probably have built the Claimants' house on Plot 1 if relations had not deteriorate – but it is not possible to make detailed or firm findings about what effect, if any, that would have had upon its capacity to undertake other developments.

148. For these reasons the Defendant has not proved to my satisfaction that it has lost specific opportunities as alleged by Mr Molton or that the profit levels he has projected in his evidence are reliable. I am, however, confident that if Soulbury had been brought to a satisfactory conclusion, Mr Molton would have wished to invest the proceeds in further developments: he is, after all, a developer and cash flow is the life blood of his profession. I have also formed the view during the course of the trial that he is reasonably risk averse, so that his future investments would have had good prospects of proving to be sound and would probably have been reasonably profitable over the period from September 2014 to date. That is, however, as far as I am able to go on the evidence that has been put before the Court.

149. On this evidence and these findings, I regard this head of claim as being a claim for a loss of a chance of profits, where some profits were probable but the precise level cannot be determined. It would be possible to take one or more of Mr Molton's

projections and assess damages by reference to a percentage chance of their being achieved; but, to my mind, that would be to give a spurious endorsement to the projections and a spurious mathematical precision to what would, in truth, be an unscientific and broad-brush assessment. I therefore return to the principles derived from *Sempra Metals* and *Equitas* to which I have referred above.

150. There is no positive reason to proceed on a basis other than that the Defendant has suffered loss by being kept out of its money. Although I have not been fully persuaded by the evidence of lost opportunity, it supports my finding that the Defendant's ability to engage in further developments has been significantly restricted by being kept out of the money that I have now awarded as damages for breach of contract. I consider that to award further damages based upon the cost of borrowing to a commercial entity of the general characteristics of the Defendant (namely a small and under-capitalised developer of residential property) is neither too remote nor unforeseeable. In reaching this conclusion I bear in mind that the Claimants knew the nature of the Defendant's business and structured their agreements with it in such a way as to enable the Defendant to re-invest the proceeds from one plot into the development of the next. Adopting *Hadley v Baxendale* language, the commercial cost of borrowing money was (at the time of contracting) a loss that would arise naturally if the Defendant was kept out of its money. And I am satisfied that the commercial reality for the Defendant of borrowing money would at all material times have involved compounding interest at regular intervals. There is no direct evidence of the frequency of compounding for the Defendant, but that is not a necessary prerequisite to a finding that three monthly intervals would be appropriate: see the observations of Males J at [126] of *Equitas*, with which I respectfully agree.

151. I therefore award as a further head of damages, interest at 10% on the sum of £216,291.25 from 1 September 2014 to the date of judgment, compounded at three monthly intervals. The parties have agreed the calculation in the sum of £95,246.15.

152. Given the structure of the award of damages for lost opportunity that I have just outlined, the award of damages itself provides the compensation to the Defendant for being kept out of its money since September 2014. I therefore do not award statutory or other interest in addition to the sums identified as damages.

Conclusion

153. I conclude that the Claimants' claim fails. On the basis of my finding that the Claimants acted in repudiatory breach of contract there will be judgment for the Defendant for damages in the sum of £216,291.25 (calculated as set out at [136] above) plus £95,246.15 (calculated as set out at [151] above). In the alternative, I would have held that the Defendant was entitled to damages on account of the unjust enrichment of the Claimants in the sum of £152,920.53. Since that is an alternative and, in the result, hypothetical claim, I do not address any questions of interest on that sum.