Neutral Citation Number: [2013] EWHC 4104 (Ch)

Case No: HC12C00027

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 19 December 2013

Before :

His Honour Judge Behrens sitting as a Judge of the High Court

- -

Between :

HOWES PERCIVAL LLP	**Claimant**
- and -	
(1) NICOLAS BARRY PAGE	
(2) SARAH CAROLINE PAGE	**Defendants**

- -
- -

Simon Edwards and Ben Tankel (instructed by **Howes Percival LLP**) for the **Claimant**
Lesley Anderson QC and Dr Mark Friston (instructed by **SAS Daniels LLP**) for the **Defendant**

Hearing dates: 5 – 8, 11 – 12 and 18 November 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Judge Behrens :

1 Abbreviations

1. In this judgment I shall adopt the following abbreviations. As was made clear at the trial no discourtesy is intended by referring to the members of the Page family by their Christian names.

After The Event	ATE
Cancellation of Contracts Made in a Consumer's Home etc or Place of Work Regulations 2008	The 2008 Regulations
Conditional Fee Agreement	CFA
Harvey Ingram Owston Solicitors	HI
HBJ Gateley Wareing	GW
Howes Percival LLP	HP
Managing Director	MD
Miss Rachel Bradley	Miss Bradley
Mr Barry Page	Barry
Mr Christopher Clements	Mr Clements
Mr Geraint Davies	Mr Davies
Mr Jit Singh	Mr Singh
Mr Nicolas Page	Nick
Mr Rod Pickering	Mr Pickering
Mrs Marlene Page	Marlene
Mrs Sarah Page	Sarah
Ms Phillippa O'Neill	Ms O'Neill
S A S Daniels LLP	SASD
The Companies Act 1996	The 1996 Act
Vogle-Gapes Ltd	VG

2 Introduction

2. HP is a firm of solicitors. In these proceedings it is claiming over £500,000 in respect of services provided to Nick and Sarah between August 2009 and October 2011.

3. Nick is married to Sarah. At all material times they were the joint owners of one third of the issued shares in the family company VG. The other two shareholders were Nick's parents Barry and Marlene who each held one third of the shares. Nick and Sarah were accordingly minority shareholders. Nick was the MD.

4. VG began trading in 2002 under the style Town & Country. Between 2002 and 2005 the business grew. In 2005 Nick became MD. Following a protracted family dispute over the direction of VG's business; Sarah and Nick decided to sell their shares in the Company. They instructed GW to act for them.

5. Non binding Heads of Terms were agreed on 9 April 2009. Under those terms Barry and Marlene were to purchase the shares for £1.48 million. Payment of the £1.48 million was payable as to £750,000 on completion, the balance being payable by instalments over the following 5 years.

6. As already noted the Heads of Terms were not legally binding and there were delays so that Nick became concerned that his parents had no intention of entering into a share sale agreement. In the result in August 2009 Nick and Sarah consulted HP in relation to the

dispute. It is common ground that between August 2009 and October 2011 two of the partners of HP and a number of other members of its staff carried out a substantial amount of work in relation to the dispute. Included within that work was the prosecution of a petition under s 994 of the 1996 Act.

7. It is common ground that the litigation was carried out pursuant to a CFA between HP and Nick and Sarah. The CFA provided for an uplift/success fee of 67%. There is a major dispute between the parties as to the effect of and the enforceability of the CFA. Nick and Sarah contend that it is unenforceable by virtue of the 2008 Regulations. They complain that it fails properly to define "success" so as to trigger a payment of fees. They also contend that it should be rectified so that success is defined by reference to an offer of in excess of £1.48 million for their shares. They contend that they were not provided with adequate advice or explanation over the terms of the CFA. They complain that they were not given adequate information over the level of fees that were being incurred and that the fees incurred were in fact excessive.

8. It is also common ground that Nick and Sarah had the benefit of an ATE insurance policy to protect them against an adverse costs order in favour of Nick's parents. The policy was a deferred premium pursuit policy. The effect of such a policy is that the premium is not payable immediately. The amount of the premium is calculated as a percentage (in this case 90.19%) of the costs of the opposing party. Under the law prior to the Jackson reforms a successful party could claim the ATE premium as part of its costs. Thus Barry and Marlene were at risk of paying not only their own costs, Nick and Sarah's costs with the 67% success fee but also the ATE insurance premium of 92% of their own costs.

9. In February 2010 after the CFA and the ATE insurance were in place proceedings under section 994 of the 1996 Act were instituted. It is not in dispute that the proceedings were acrimonious and fiercely contested. Both liability and quantum were in dispute.

10. In addition to the section 994 proceedings Nick had a separate employment dispute against VG. HP was not acting in the employment dispute.

11. It will be necessary to consider the costs estimates and the updates provided later in this judgment. By 1st March 2011 HP estimated that that its total costs (including the success fee) and the ATE premium amounted to £820,000.

12. On 1st March 2011 a mediation took place. At that mediation Barry and Marlene offered to purchase the shares for £1.85 million inclusive of costs. The money was not payable immediately and only very limited security was offered. Over the next few days the offer was improved to £1.99 million and there were discussions though no final agreement on the security to be offered.

13. It will be necessary to set out in some detail the events between mid March and July 2011. For present purposes it is sufficient to state that no progress was made with the share sale agreement, that HP became concerned that an agreement was being negotiated behind its back with the assistance of a third party and that Nick and Sarah were not going to honour the CFA. The trial of the section 994 proceedings was listed for December 2011.

14. In early July 2011 HP wrote to Nick and Sarah alleging breach of the CFA and suggesting that they might wish to take legal advice. As a result Nick and Sarah consulted SASD. In a without prejudice meeting on 27th July 2011 SASD suggested that the CFA was unenforceable as a result of a number of breaches including breach of the 2008 Regulations.

15. In August 2011 HP wrote demanding that Nick and Sarah provide an unequivocal written confirmation that they would comply fully with the terms of the CFA. Eventually in

early September 2011 SASD provided the confirmation. At the same time they instructed HP to apply for a stay of the section 994 proceedings to allow for further attempts to be made to settle the dispute.

16. On 7th October 2011 SASD wrote to HP making a number of complaints about the service provided. Amongst other points SASD allege a breach of the 2008 Regulations and conclude that they have advised Nick and Sarah that HP is not entitled to recover costs from them. Not surprisingly this provoked a reply from HP who on 10th October 2011 required Nick and Sarah to confirm by 5 p.m 12th October 2011 that:

> … in the event that the conditions in the CFA …entitling us to be paid are fulfilled your clients will pay our fees.

17. No such confirmation was received. Thus on 12th October 2011 HP wrote to SASD accepting what they allege to be an anticipatory repudiation of the CFA. SASD responded on 17th October 2011 to the effect that HP was itself in repudiatory breach of contract. By a further letter dated 19th October 2011 they accepted that breach. On any view therefore the CFA had terminated by 19th October 2011.

18. It is Nick and Sarah's case that at a meeting brokered by a third party, Mr Pickering, on 2nd November 2011 an agreement was reached whereby the section 994 proceedings would be withdrawn and each side would pay its own costs. A Tomlin order to that effect was sealed on 23rd November 2011.

19. On 22nd November 2011 HP sent Nick and Sarah 3 invoices totalling £546,212.59. On 5th January 2012 HP commenced these proceedings. The claim is put on alternative bases, either on the basis that HP is entitled to a quantum meruit or damages because of Nick and Sarah's anticipatory repudiation of the CFA, or on the basis that Nick and Sarah reached a secret settlement with Nick's parents entitling HP to be paid their fees pursuant to the terms of the CFA.

20. Nick and Sarah seek to defend the claim on a number of grounds and have raised a Counterclaim. They contend that the CFA was unenforceable by virtue of the 2008 Regulations. Alternatively, if the CFA is enforceable, they deny that they repudiated the CFA in the letter of 7th October 2011 and contend that HP repudiated thereafter. In those circumstances HP is not entitled to damages or a quantum meruit. They deny that they reached a secret settlement with Barry and Marlene. In their Counterclaim Nick and Sarah allege that HP failed to give proper advice in relation to the CFA and the ATE policy and failed to draft the CFA in accordance with the oral agreement and/or common understanding between them. It also failed to provide sufficiently accurate or frequent cost estimates or any on going cost benefit analysis. Wide ranging relief is sought including rectification of the CFA, damages for negligence/breach of the professional duty of care and an indemnity against any premium payable under the CFA.

21. HP accepts that if the 2008 Regulations are applicable the claim must fail. In all other respects issue is joined with the Defence and Counterclaim.

3 Evidence

22. There are substantial conflicts of evidence between HP's version of events and that of Nick and Sarah. In the result the oral evidence lasted the best part of 6 days.

23. The principal witness called on behalf of HP was Mr Davies the litigation partner at HP in overall charge of the unfair prejudice litigation. Evidence was also given by Mr Singh a corporate partner at HP who was involved in August 2009 and after December 2010, Ms

O'Neill, the associate solicitor who had day to day management of the s 994 proceedings, Ms Bradley then a Trainee Solicitor who had limited involvement but made a number of file notes and Chris Clements, a partner in Grant Thornton who was involved in the valuation of the shares but who was called primarily in relation to one conversation said to be relevant to the question of whether there was a secret deal between Nick and his father.

24. Nick was the principal witness called on behalf of the Defendants. In addition I heard relatively brief evidence from Sarah, Mr Pickering, who was a close friend of both Nick and Sarah and Nick's parents and involved in trying to broker a settlement from early 2011 especially after March 2011 and Peter Moore the solicitor from SASD with conduct of these proceedings on behalf of the Defendants.

25. I was invited to read a witness statement from Christopher Parkin, who at the relevant time was a trainee solicitor assisting Mr Moore.

26. In addition to the oral evidence there were some 15 bundles of documents extending to over 5,000 pages. The witness statements, which in many respects did not comply with the Chancery Guide, were extremely lengthy. Ms O'Neill and Mr Davies's witness statements were each over 75 pages long; Nick's witness statement was 45 pages long.

4 The issues

27. Counsel have helpfully agreed that there are 15 issues to be resolved:

1. Was the CFA unenforceable pursuant to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008?
2. Did the Defendants come to a settlement between 1 March 2011 and 12 October 2011 so as to satisfy the CFA's definition of 'success'?
3. Were the Defendants in repudiatory breach of the CFA on/before 12 October 2011?
4. Did the Claimant repudiate the CFA on 12 October 2011?
5. Is the Claimant entitled to quantum meruit and/or damages and how should that be assessed?
6. If the Claimant is entitled to bill the Defendants, should the bill be assessed?

   ISSUES IN THE COUNTERCLAIM

7. Did the definition of 'win' and/or 'settlement' in the CFA reflect the Defendants' instructions or the agreement between the Claimant and the Defendant as to that definition?
8. If the answer to 7 is No, was the Claimant negligent in drafting the CFA and/or advising the Defendants to sign the CFA, and/or did the parties enter into the CFA under a mistake as to the definition of 'win' and/or 'settlement'?
9. If the answer to (8) is Yes, should the CFA be rectified to define 'win' as a judgment or settlement of more than £1.48 million exclusive of interest and costs?
10. Did the Claimant adequately advise the Defendants about the CFA prior to the Defendants entering into it?
11. Did the Claimant provide proper and accurate historic and future costs information during the currency of the CFA?

12. In the event that the answer to either (10) or (11) is No, would the Defendants have entered into and/or continued to instruct the Claimant under the CFA in any event?

13. Did the Claimant adequately advise the Defendants about the effect and costs of the ATE insurance?

14. In the event that the answer to (13) is No, would the Defendants have availed themselves of the ATE policy in any event?

15. How should damages, if any, be assessed?

28. During the course of the hearing the parties agreed that any assessment of costs should be carried out by way of a detailed assessment by a costs judge. All of the other issues remain for determination.

5 The facts

5.1 Background

HP

29. HP is a regional firm of solicitors practising from a number of locations including Leicester. Mr Davies was a litigation partner at the Leicester office. He only deals with commercial litigation. He has experience of funding commercial litigation on a CFA. In evidence he estimated that in 2009 he had dealt with more than 10 but less than 50 such cases. He also had experience in unfair prejudice litigation.

30. Mr Davies had got to know Nick as a result of a previous piece of litigation between VG and one of its agents – Mr Vick. HP had acted for VG and achieved a successful outcome.

31. Ms O'Neill qualified as a solicitor in 2000. She had trained with a commercial firm of solicitors in London. Apart from periods of maternity leave when she had her 3 children she had worked in commercial and chancery work and thus was an experienced litigator. She had not previously been involved in an unfair prejudice petition and had no experience of CFAs.

32. Mr Singh is a corporate lawyer. He does not deal with commercial litigation. He did, however give commercial advice to Nick on a number of occasions and was present at a number of important meetings. He became involved on behalf of HP in 2012 when the dispute over the fees emerged.

Nick and Sarah

33. As already noted Nick and Sarah were married. They readily accepted that they were a close couple. Sarah was content to leave matters to Nick. Thus she did not attend many of the meetings attended by Nick and was not included in all of the correspondence. Furthermore even when she was present she was content to leave matters to Nick. Thus when Ms O'Neill came to their house for a long meeting on 17th December 2009 Sarah described her participation thus:

> A. Well, I hadn't met Phillippa before. I had spoken to her on the telephone and when she arrived, we were just doing what women do; chat about things, about the children, connection with ----
>
> Q. Yes, but that is nothing to do with the case.

> A. No, that was nothing to do with the case, but I really wasn't talking to her for very long about the case. I did want to know how long she anticipated it would go on for and she said we should be finished by this time next year. But then I sort of left them to talk because she wanted to know the background.

34. Nick had a very difficult relationship with his parents. He described his father variously as a corporate psychopath or sociopath. It is his case that they were not on speaking terms. There are numerous examples in the documents which demonstrate that Nick did not trust his father.

35. Both Nick and Sarah were employed by VG. As already noted Nick was Managing Director until the Heads of Terms were agreed in April 2009; Sarah was an employee being paid some £30,000 - £35,000 per annum. As will appear later Nick has remained a director and Sarah has remained on the books as an employee. VG has continued to pay Sarah although she has not done any work for VG since April 2009.

5.2 Discussions in August 2009

The meeting on 11/12 August 2009

36. The first meeting between Nick and Mr Davies took place on either 11th or 12th August 2009. Mr Davies's file note indicates that Nick gave him a brief history of VG. He referred to the Heads of Terms and asked a number of questions relating to his position as MD if he pulled out of the deal and whether his father could get rid of him as MD. The file note contains a reference to a minority shareholder action. There is also a reference to funding. Nick said he had assets but was not cash rich and there is a reference to the possibility of funding the action with a CFA. The note reads:

> Fund the action on the minority shareholders dispute – CFA?

37. In paragraph 53 of his witness statement Mr Davies said that Nick had made it clear from the outset that he wanted to fund the action by way of a CFA.

38. In cross-examination Mr Davies was vague as to what was said at the meeting. It was his recollection that the conversation took place "in the early meetings" but he did not wish to pin down the exact meeting when it was discussed.

39. In Nick's witness statement he agreed Mr Davies did say that HP could consider entering into a CFA. Mr Davies told him it would need board approval. He explained a CFA as "no win no fee".

The meeting on 18th August 2009

40. On 18th August 2009 a meeting was held at HP's offices. It was attended by Mr Davies, Mr Singh, Nick and Sarah. The meeting lasted some 2½ hours. File Notes were made by Mr Davies, Nick and Sarah.

41. It is not necessary to lengthen this judgment by setting out all of the matters referred to in the Notes. Neither Nick nor Sarah had any reference to a CFA in their notes. Mr Davies had 2 references in the Agenda prepared for the meeting:

> Counsel – may not do CFA
> HP – CFA?

42. Mr Davies said that as the item was on the agenda he would have expected it to have been discussed. Both Nick and Sarah said that it was not discussed though in cross

examination Nick accepted that it might have been mentioned. He said that there was no explanation as to how it worked at that meeting. Mr Davies was unable to say at which meeting he explained how the CFA worked.

43. Amongst the other matters discussed Nick pointed out that he had reduced the asking price for his shares from £1.68 million to £1.48 million in an effort to secure a quick sale. It is common ground that Mr Singh advised him that as he had agreed £1.48 million it would be difficult to go back to £1.68 million.

44. At the end of Mr Davies' note there is a reference to the negotiations breaking down and that Nick would return to work as MD of VG. There is no dispute that there was a discussion along these lines but there is a difference in emphasis between the parties. Nick suggests that he was proceeding with the Heads of Terms and that Mr Singh and Mr Davies were seeking to persuade him to go back to work to bring matters to a head. Mr Singh and Mr Davies suggested that negotiations had broken down and that it was Nick who was keen to go back to work.

45. I do not find it necessary to resolve that dispute.

5.3 September 2009

46. Nick did not return to work in August 2009. There were further negotiations between GW, who were acting for Nick and Sarah and HI who were acting for Nick's parents. A deadline of 17th September 2009 for completion of the share sale passed without any progress being made.

47. On 22nd September 2009 Nick returned to work as MD of VG. The next day his father purported to suspend him from his role as MD.

48. On 25th September 2009 GW wrote to Barry complaining about the suspension and alleging that it amounted to an improper attempt to exclude him from the business and was thus a clear unfair prejudice of his rights as a minority shareholder. A deadline of 1st October 2009 was set for the suspension to be withdrawn.

49. On the same day GW wrote to HI terminating the negotiations relating to the purchase of the shares.

50. On 30th September 2009 Mr Greenwell, a partner at GW, wrote to Nick giving him legal advice as to his options and costs. The options included further negotiation, litigation or mediation. Mr Greenwell pointed out that negotiation had proved futile, that Barry was wholly unlikely in dispute resolution to act within objective norms and that Nick would have to use greater aggression. He stated that costs of a contested unfair prejudice action could easily be £100,000. His firm would be prepared to consider dealing with the matter on a CFA basis.

51. On the same day there was a meeting between Mr Davies, Nick and Sarah. Mr Davies' notes refer to a potential minority shareholders action, and to allegations that can be made. They do not mention a CFA. Nick's notes contain a reference to a CFA surrounded by a circle and followed by a question mark. It is plain therefore that any discussion about the CFA at this meeting was brief. There was no detailed discussion.

5.4 October 2009

52. Shortly after the meeting on 30th September 2009 Nick and Sarah decided to instruct HP in relation to the unfair prejudice proceedings. Nick decided to instruct GW in relation to the employment issues arising out of his wrongful suspension.

53. On 5th October 2009 Mr Davies received a preliminary advice from Counsel on the merits of the unfair prejudice petition. In it Counsel expressed the preliminary view that:

> There is a good prima facie case that the affairs of [VG] are or have been conducted in a manner that is unfairly prejudicial to the interests of [Nick] and that a court would order the buy out of his shares at a non discounted value.

54. It is to be noted that Counsel does not address the issue of the value of Nick's shares.

55. On the same day Mr Davies forwarded the advice to Nick and stated that the next step was to get the advice to the insurers to get the insurance and the CFA in place.

56. On 23rd October 2009 Mr Davies sent an email enclosing the proposal for the ATE insurance. The proposal referred to a success fee of 67% and gave an estimate of past and future costs. Without going into detail the estimate of costs to date was £7,700 and the estimate of the costs of a trial was £100,000 to £105,000. There was an estimate that HI's costs would also be £100,000. Thus it can be seen that GW's estimate and that of HP were broadly similar.

57. Nick and Sarah duly signed the proposal and returned it to Mr Davies. In the covering email Nick drew attention to a mistake in the proposal which did not mention Barry and Marlene as proposed Respondents to the unfair prejudice petition.

58. On 29th October 2009 Nick telephoned Mr Davies whilst he was in the car. There is a conflict of evidence as to what advice was given about the CFA in that conversation. According to Mr Davies he made a Note of the conversation immediately after it was made. The note contains the following:

> He said in relation to insurance he would have to bear the shortfall out of his damages and I confirmed that this was the case. Explained again how CFA and insurance worked.
>
> If lost – didn't pay.
>
> If won – paid plus uplift. Might not get all back from other side and shortfall he would have to pay (we have discussed previously but he wanted to make sure he understood).

59. In cross-examination Mr Davies confirmed that he believed that the note recorded what was discussed in the phone call. He was pressed as to when the CFA and the insurance had been discussed previously but was unable to be specific. He referred to the proposal form that Nick and Sarah had signed.

60. Nick has no recollection of any detailed discussion of the details of the proposed CFA or how the ATE insurance worked. He did accept that Mr Davies had explained that it was "No win, No fee". He says he received no real explanation until November 2009.

61. On 30th October 2009 Mr Davies sent an email (forwarding a copy to Nick) to the proposed Insurers (First Assist) which contained:

> At the time of assessing the case I had put the prospects of success at 60% which translates into a success fee of 67% which is what I have discussed with the client.

5.5 November 2009

62. On 9th November 2009 First Assist made a formal ATE offer to HP.

The Phillips v O'Neill letter

63. On 12th November 2009 Mr Davies sent a detailed letter (referred to as an O'Neill v Phillips letter) to HI setting out the allegations of unfair prejudice and that Nick proposed to

present a s 994 petition claiming that his shares be bought at a fair value to be determined by an independent valuer. The letter contained an offer by Nick and Sarah that their shares be bought at a price to be determined by an independent valuer. As an alternative Nick and Sarah offered to settle the claims for £1.48 million plus costs both of the claim and the abortive negotiations. The offer was to be open for 21 days. The letter informed HI that the proposed litigation was to be funded by a CFA and that Nick and Sarah had a formal offer of ATE insurance.

The meeting on 19th November 2009

64. On 19th November 2009 there was a meeting between Nick and Mr Davies. Mr Davies' notes contain no reference to the CFA or the ATE Insurance. However Nick's notes demonstrate that there was plainly a discussion on both of these topics. First he has noted that the risk assessment of 60% translated to a success fee of 67%.

65. Second he has a heading – "Definition of Success". To the right of this is "£1.48 million". Underneath are 4 subheadings: (1) Successful at court : Fees uplift, (2) Settled : [Fees uplift], (3) Offer made Sensible : ? and (4) No win/Lose : No fee.

66. On the next page he has prepared a table to explain the position to Sarah which I set out below:

	Not Funded	CFA funded	Insurance
	Assume £100k costs?		
CFA	£100,00	£100,000	£100,000
Uplift		£67,000	£91,000
Total	£100,000	£167,000	
N Recoverable 33%	£33,000	£55,119	£30,000
Win	£33,000	£85,000	
Lose	£200,000	Nil	

67. It is clear from these notes and from answers given in cross-examination that Nick understood the basic operation of the CFA and the ATE policy. He understood that the figures assumed that each side's costs were £100,000. If he was not funded the litigation would cost him £200,000 if he lost and £33,000 if he won. He understood that the insurance premium was 91% of the other side's costs. He understood that there was a 67% uplift by way of success fee. He understood that if he lost nothing would be payable but that if he won he would pay £85,000 (that is to say the irrecoverable costs associated with his costs, the CFA and his insurance premium.

68. There is a conflict as to the effect of the reference to £1.48 million in the Note. It is not a point that is mentioned in Nick's witness statement. However in cross-examination he said:

> A … The four points that Geraint ran through there were, 1. Successful at court, fees and uplift: 2. Settlement, fees and uplift: 3. Offer made sensible, flexible talk. No win/lose no fee. At some point there I must have asked him what would be successful at court. My understanding of what he said to me was that it would be a minimum of £1.48.

69. Mr Davies did not accept this. He was asked a number of questions about it in cross examination. His position was that there were a number of discussions about success culminating in a discussion on 7th January 2010. He had no recollection of any discussion and did not believe that that there was any discussion on 19th November 2009 that linked the success fee to £1.48 million.

70. On or about 24th November 2009 Ms O'Neill became involved under the supervision of Mr Davies.

5.6 December 2009

Phone call 9 December 2009

71. On 9th December 2009 Mr Davies phoned Nick in order to introduce Ms O'Neill and to discuss matters. According to Ms O'Neill's file note the call lasted 40 minutes. The note contains a number of references to the CFA and the ATE policy:

> GHD - spoke to insurers, agreed with them … fact other side not coming back will mean can come back & accept insurance proposal
> CFA explained + Insurance policy
> NP - If not successful under CFA not pay anything. If successful – pay HP fees unrecoverable
> Ins policy sep – if unsuccessful liable 91% of other sides fees
> Could be ordered to pay other sides costs.

72. Miss Anderson QC pointed out that the note did not contain any reference to the definition of success. Mr Davies accepted that he had no recollection which went beyond the note. When he gave evidence Nick had no recollection of the phone call at all.

The first draft of the CFA

73. On 10th December 2009 there was an email exchange between Nick and Ms O'Neill setting up a meeting between Nick and Ms O'Neill at HP's offices at 10 a.m 17th December 2009. The purpose of the meeting was to review and sign the CFA and for Nick to give Ms O'Neill "a potted history of the dispute". In his email Nick asked Ms O'Neill to send a draft of the CFA and the insurance proposal before the meeting.

74. As fate would have it Ms O'Neill was working from home on 17th December 2009 so the meeting was rearranged to take place at Nick and Sarah's home.

75. The CFA was not in fact drafted until 15th December 2009. It is not, in my view necessary to identify the person who drafted it or why it was not drafted until that date. It was not drafted by Ms O'Neill.

76. At 16.55 and 17.18 on 16th December 2009 Ms O'Neill emailed to Nick (1) the First Assist pursuit policy together with a Key Facts document and a Guide for Policy Holders, (2) the HP Letter of Engagement together with HP's standard terms of business,(3) a letter enclosing the CFA and containing information required to be supplied by the Law Society and (4) the draft CFA.

77. A number of points need to be made about these documents:

1. The letter of engagement addressed to Nick and Sarah sets out the hourly rates charged by Mr Davies, Ms O'Neill and the trainee solicitor. In paragraph 4.5 it provides:

   > It is very difficult at this early stage to give you a meaningful estimate of the overall costs …

2. The Key Facts document together with Guide to Policy holders does explain in clear terms the basic terms of the policy. Thus it explains that the premium is deferred, that it is calculated by reference to the opponent's costs and disbursements multiplied by the premium rate. It explains that the courts can determine whether and the extent to which the opponent is required to pay the premium.

3. The covering letter addressed to Nick and Sarah makes a number of points about the effect of the CFA including:
   1) Success means that you get a Court order in your favour which exceeds £20,000 …
   2) If you succeed or agree to a settlement you will pay not just our basic fees … but also a success fee which is 67% of our basic fee
   3) The agreement also sets out what happens if we part company for whatever reason such as a falling out over the conduct of the case. You will see that in those situations you must pay in addition to disbursements our basic fee and then a success fee if you go on to win or settle later.
4. The draft CFA is dated 17th December 2009 and contains two clear errors. The definition of Defendant is "the Estate and Beneficiaries of Mrs …Jones". The claim is defined as "litigation … against the Defendant …in relation to your mother's will". It is a fair inference that the CFA was taken from a precedent and that those responsible for drafting it had not checked it properly.

The telephone call of 16th December 2009

78. In paragraph 49 of his witness statement Nick said:

> I immediately noticed that the definition of "success" in the covering letter was "£20,000" and thought this must be a mistake as we had had many conversations about the amount and agreed that it would be £1.48 million. I recall speaking to Geraint on the telephone shortly after receiving these documents. I recall that I queried the definition of success as "£20,000" and why it was not £1.48 million. Geraint was apologetic and admitted that he "thought it was strange when I looked at it".

79. In cross examination he gave a slightly different version:

> A. Literally, as I got the email, I picked up the phone and phoned him straightaway. I saw the 20,000 ----
> …
> Q. You saw that, and did you see anything else? Because there are other mistakes as well, are there not?
> A. Well, that's what I was just trying to correct, that I didn't even notice those mistakes.
> Q. "At that stage I did not notice the other mistakes." So, "I just phoned him up about the 20,000"?
> A. I called him up and saw the definition of success at 20,000 and I said, "Geraint, I'm sure that must be a mistake, it should be 1.48 million."
> Q. "I said, 'That must be a mistake, it should be 1.48.'" Yes.
> A. And he said words to the effect - well, I think it's probably best to read from my witness statement, but it was along the lines of, "Yes, I thought that was strange when I looked at it."

80. When he gave evidence Mr Davies had no recollection of such a telephone call. He went on to say that he did not believe that Nick ever told him that it should be £1.48 million and not £20,000.

81. An examination of Nick's phone records does not support his case. However this is not conclusive as no records are available of his mobile phone.

82. In her witness statement Sarah said she was in the study next to Nick when he made the call and overheard him talking to Mr Davies. In cross examination she confirmed that the conversation definitely took place. She could remember that Nick said that the definition of success was wrong but had no further recollection.

The meeting on 17th December 2009

83. It is common ground that Ms O'Neill met Nick and Sarah in the morning of 17th December 2009. As already noted Sarah did not take much part in the meeting. Ms O'Neill made a detailed file note of the meeting but only a very small part relates to the CFA. It reads:

> Success – definition Insurance – does it cover the accountancy – No
> Reduction on unrecoverable - PHO to revert spk GKD

84. In her witness statement Ms O'Neill said that Nick raised a few queries on the CFA including the matters in her note and the errors in the CFA. Ms O'Neill had not drafted the CFA or been involved in the early discussions about funding, or had any detailed discussions with First Assist. Accordingly she felt that she could not deal with these points and told Nick that she would need to consult Mr Davies and then get back to him.

85. Nick's version of events is contained in paragraph 51 of his witness statement:

> Phillippa asked if I was happy with the CFA and invited me to sign it. I repeated to Phillippa the conversation I had had with Geraint the previous evening concerning the definition of "success". I said that we would sign the CFA once it had been corrected. Phillippa said that she would get it amended. There was no further conversation about the contents of the CFA

86. In cross-examination Ms O'Neill did not recollect Nick saying he would sign the CFA once it was amended.

87. In cross examination Nick said he repeated the conversation that he had had with Mr Davies the night before and that Ms O'Neill said she would have to revert/have a word with Mr Davies. He also agreed that the only omission from Ms O'Neill's note was the failure to mention the conversation with Mr Davies the night before. He did not mention the "offer" to sign the CFA once it was amended. However it was not put to him directly that it had not taken place.

The letter of 18th December 2009

88. On 18th December 2009 Ms O'Neill sent a long letter to HI dealing with a number of points. Much of the letter contains complaints about the lack of information being provided by Barry and Marlene. The letter concluded by stating that:

> We confirm that we have entered into a Conditional Fee Agreement with our clients and they will shortly also have the benefit of [ATE] cover.

89. When asked about this letter Ms O'Neill pointed out that the letter had in fact been drafted on 14th December 2009 prior to the meeting on 17th December 2009. She described the last sentence as "an error".

5.7 January 2010

The phone call on 7th January 2010

90. On 5 January 2010 Ms O'Neill sent Nick an e-mail which indicated that she would be sending the amended CFA later that week.

91. It is common ground that there was a telephone call on 7th January 2010 between Mr Davies, Ms O'Neill and Nick. The call lasted some 47 minutes. There is a file note of the call taken by Ms O'Neill.

92. According to the file note there was considerable discussion about the CFA. The relevant part includes:

> Mistakenly referred to recovery over £20k
> GKD – I think normal wording better
> What we do is say fees payable
> If you are liable to pay fees, we can have a conversation
> If other side – need to make it watertight
> In this case if unsuccessful – no prejudice
> All about valuation best not to prejudge
> …
> NP – "success fee" – defn
> GKD – Your case is all/nothing – either you lose or you get the value of the shares. If trial if you succeed – Ct will determine you have been unfairly prejudiced

93. In their witness statements both Mr Davies and Ms O'Neill say (in effect) that the note is an accurate record of the conversation. In particular Nick was told that this was an "all or nothing" case, that if he won he would get the value of his shares, but that it was best not to prejudge the value.

94. In cross examination Mr Davies emphasised why he was not prepared to agree a threshold in the CFA.

> … we were saying that if you win it will be by showing that you've been unfairly prejudiced. If you lose then you won't have been unfairly prejudiced. If you win then you will be -- an order will be made that your shares will be purchased at a value to be determined by an expert valuer and therefore that's what you'll get is the value of your shares." And what I was saying is best not to prejudge that. What I'm saying is we can't -- we can't prejudge what that value's going to be. We can't put a value, effectively, on your claim now. That's why we weren't prepared to agree to a threshold in the CFA.

95. Nick had a much more limited recollection of the conversation. He pointed out that he did not have the corrected CFA in front of him at the time. In paragraph 54 of his witness statement he said

> I consider that I have a good memory but can't recall any detailed conversation about the corrected CFA having taken place, which at this stage, Sarah and I had not yet received. I do recall Geraint saying something along the lines of the "normal wording is better" and that, if Sarah and I are liable for Howes Percival's fees, "we can have a conversation" about this liability and a "sensible chat" about the recovery of such costs.

96. In cross-examination Nick disagreed with how the conversation panned out. He made the point that he had not seen the amended documents and that Sarah and he trusted HP to act in their best interests. It was a friendly conversation along the lines of "Don't worry about it Nick, normal wording is better" …

The CFA

97. At 14.50 on 7th January 2010 Ms O'Neill's secretary sent an email to Nick enclosing the amended CFA and an amended covering letter. In the email she invited Nick to send back a signed copy of the CFA by return.

The covering letter

98. The covering letter is dated 7th January 2010 and is similar but not identical to the letter emailed on 16th December 2009. It has sections on the effect of the CFA, the Assessment of Costs and Insurance and Funding.

99. The major change relates to the definition of success. The paragraph relating to the threshold of £20,000 has been removed. The new wording reads.

> I refer you specifically to the definition of a "Successful Action" at Clause 4.2 of the CFA. If you succeed or agree to a settlement, you will pay not just our basic fees … but also a success fee which is 67% of our basic fee.

100. The letter invited Nick and Sarah to call either Mr Davies or Ms O'Neill if there were any queries.

The CFA

101. There are three changes between the CFA and the draft which was sent on 16th December 2010. The date has been changed to 7th January. The Defendant has been defined as VG, Barry and Marlene. The claim has been amended simply to refer to the litigation commenced or to be commenced against the Defendant.

102. On 8th January 2010 there was an 18 minute conversation between Nick and Ms O'Neill. Most of the conversation related to Counsel's fees. However Nick confirmed that he would return the CFA and engagement letter. At 11.30 the same day Ms O'Neill emailed Nick. This too related to Counsel's fees. In addition she stated that once she had the signed CFA back she could send the relevant paperwork to First Assist accepting the quotation.

103. At 17.20 on 8th January 2010 Nick sent an email confirming that both documents had been signed and returned by first class post that day.

104. When asked about the documents in cross-examination Nick said that he did not read them. It was pointed out to him that someone had altered the address and postcode on the CFA. He said that it was not his handwriting. It was pointed out that there was no mention of the £1.48 million. He replied that as far as he was concerned "we had an understanding."

105. On 14th January 2010 Ms O'Neill wrote to HI giving formal notification that the s 994 petition was to be funded under a CFA.

The ATE Policy

106. On 13th January 2010 Ms O'Neill forwarded the insurance quotation to Nick for signature. Nick and Sarah signed it and returned it the same day and the ATE policy was in place by 18th January 2010. On that day she informed Nick that it was in place and that the relevant paperwork would be forwarded the following day.

107. On 3rd February 2010 Ms O'Neill formally notified HI of the ATE insurance.

5.8 The proceedings in 2010

108. I have set out the rival versions of the events leading to the CFA and the ATE insurance in detail because of the issues relating to the enforceability and as to the advice given in relation to them. Fortunately it is not necessary for me to deal with the proceedings in such detail.

109. The unfair prejudice petition was presented on 12th February 2010. Between February 2010 and April 2010 offers and counter offers were made on each side. Some of these were pursuant to Part 36. It is no part of either side's case that Nick and Sarah ought to have accepted any of the offers made by Nick's parents. By August 2010 witness statements had been exchanged. In September expert reports were exchanged. An attempt by Barry and

Marlene to strike out the claim failed. An attempt by Nick and Sarah to obtain specific disclosure was largely successful.

110. Towards the end of 2010 the hearing of the trial was fixed for 5 days at the end of December 2011.

111. One of the issues in the proceedings was known as the Great China Issue. Great China was a corporation that Nick believed his father had an interest in and which was siphoning off profits from VG because it was charging a big mark up over what the true cost of goods coming from China should be. In November 2010 someone at Great China forged Nick's signature in order to obtain copies of his bank statements. Nick believed that his father was behind it. In the result he made a formal complaint of forgery to the Hong Kong police. Although this allegation was of peripheral relevance to the unfair prejudice allegations it was felt that it was an added pressure that might persuade his parents to settle the proceedings.

112. In addition to the unfair prejudice proceedings Nick was involved in proceedings before the employment tribunal in relation to his suspension in September 2009. These were listed for hearing in March 2011. He also claimed to be owed money on his director's loan account.

113. In January 2011 Barry and Marlene caused to be served on Nick a notice of a meeting of VG to be held on 11th March 2011 to consider a resolution to remove him as a director of VG. If acted on this would potentially have serious tax consequences in that it affected Nick's ability to claim entrepreneurial relief.

5.9 The Mediation

The lunch with Mr Singh on 22nd December 2010

114. Mr Singh had a number of discussions with Mr Davies about the case. One such discussion took place in November 2010. Amongst the points discussed was the acrimonious nature of the dispute, the amount of the costs that had been incurred, and a concern that Nick felt so strongly and personally about the issues that it might make settlement difficult to achieve. Mr Davies accordingly felt it might be sensible for Mr Singh to meet Nick over lunch. Nick agreed with the suggestion and a meeting was arranged for 22 December 2010.

115. On 15th December 2010 Ms O'Neill sent Nick and Sarah an email with a fees update. As at that time HP's unbilled fees amounted to £206,984. She also sent Mr Singh a detailed summary of the case to prepare him for the lunch.

116. The lunch lasted about 2 hours. At the lunch Mr Singh said that he felt it would be sensible to try and settle the matter if acceptable terms could be achieved. He asked if there was a third party whom his father might listen to in order to try and convince him to reach a sensible compromise. One of the persons mentioned was Mr Pickering.

117. There was a discussion on costs. According to Mr Singh he told Nick that HP's costs were £210,000 before VAT and uplift and that if the matter went to trial they were likely to exceed £500,000 including the uplift. He did not discuss the ATE premium at that meeting. In cross-examination he agreed that it might have been better if he had.

The meeting on 21st January 2011

118. On 20th January 2011 Nick phoned Ms O'Neill to inform her that he had spoken with Mr Pickering and that he had arranged a meeting with Mr Singh the following day to discuss the points he should put to Mr Pickering in order to persuade his father to settle.

119. In order to prepare for the meeting Mr Singh prepared a list of some 7 points to put to Mr Pickering. It is not necessary for me to set them out in detail. The meeting was attended by Mr Singh, Mr Davies and Nick. In addition to Mr Singh's list notes of the meeting were prepared by Mr Davies and Nick.

120. It is common ground that in addition to a detailed discussion on the points to be put to Mr Pickering there was a discussion about costs. There is, however a difference in recollection as to what was said.

121. Mr Davies's note on costs (which was prepared in advance of the meeting) puts HP's base costs at £225,000. Together with the 67% uplift and VAT the sum increases to £450,900. In addition there were Counsel's fees (£12,000 plus VAT) and Grant Thornton's fees (approximately £20,000). Both Mr Davies and Mr Singh said that the note recorded what Mr Davies told Nick.

122. Nick's note contains an entry for all costs in the sum of £500,000. Nick's recollection is contained in paragraph 69 of his witness statement:

> Several times during this meeting I asked Jit what the final costs figure was likely to be for Howes Percival (including any uplift) and the Insurance Company if a settlement could be achieved with my Parents. My abiding impression is that Jit was reluctant to commit himself. I pointed out to Jit that, if I was to have a meaningful settlement discussion with Rod, I needed to know what our side's costs would be as I would need to add this amount to the settlement figure I had in mind. Eventually, Jit said the total figure would be "at least £500k".

123. It was Mr Singh's evidence that he was not reluctant to commit himself. It was, however, Mr Davies who dealt with the question of costs.

124. If one adds the figures contained in Mr Davies's note the total is not far short of the figure of £500,000 noted by Nick. However the figures do not include the ATE insurance premium. Thus the difference between the parties is really whether the figures given by Mr Davies purported to include the ATE premium.

125. Nick met with Mr Pickering that evening and proposed a settlement figure of £2.3 million made up as to £1.48 million for the shares, £300,000 for the employment claim and £500,000 in respect of costs. There was no positive response to this proposal.

The Mediation

126. The mediation took place on 1st March 2011. On the day before there was a meeting between Mr Davies, Ms O'Neill, Nick and Sarah. Notes of the meeting were taken by Ms Bradley . Those indicate that there was a discussion about costs, the uplift and the insurance premium. At one stage Ms Bradley left the room to fetch the ATE policy. Ms O'Neill read out the definition of success in the policy and made the point that it did not mention £1.48 million.

127. On 25 February 2011 HP sent the mediator a summary of their costs totalling £246,960. On 28 February 2011 HI sent HP a summary of its costs which amounted to £319,254. On the same day HP reciprocated the information. By that time the costs totalled £254,223. The email also drew attention to other costs such as Counsel's fees expert fees and fees in relation to Nick's employment claim.

128. The mediation duly took place on 1st March 2011. It lasted into the early hours of the following morning. It is not in dispute that costs were discussed with both Nick and Sarah and that those costs included the ATE premium, the uplift and VAT.

129. It is unnecessary to set out a detailed account of the mediation. There were a number of offers and counter offers. Both Nick and Sarah found it a harrowing experience. At one stage Sarah broke down. At another Nick and Sarah's Counsel (Dan Stilitz QC) raised the possibility of Nick withdrawing the complaint to the Hong Kong police. No settlement was achieved.

5.10 Post Mediation Events – March

2nd March 2011

130. Although no settlement was achieved at the mediation negotiations continued. Ms O'Neill spoke with Nick on the phone. According to a contemporaneous email sent by Ms O'Neill Nick complained that the costs of the litigation were disproportionate. He could not understand how they had risen from £500,000 to the £825,000 which was the figure quoted at the mediation. Ms O'Neill explained that the difference was the ATE premium which could not be calculated until HI's costs were known. It was clear to Ms O'Neill that Nick was angling for concessions on both HP's costs and the premium.

131. At about 2 p.m a further offer of £1.99 million was made for Nick and Sarah's shares. £60,000 was payable in 28 days, £1 million was payable in four tranches of £250,000 with the balance payable over 5 years.

132. There were a number of further offers and counter offers during the day. It is not now necessary to refer to them in detail because it is not now suggested that Nick and Sarah were advised formally that it was an offer that should have been accepted. In any event there was never an agreement as to the full terms. There was always an outstanding point on security which was a stumbling block.

133. When he gave evidence Mr Singh said that he described it as:

> Not a knockout offer but it is a reasonable offer and I recommend it be accepted but I wasn't talking about the full terms I was talking about the £1.99 million.

134. Nick's evidence was that he was not happy with the offer. Once the costs had been deducted it represented an offer of only £1.1 million for his shares which was far lower than the £1.48 million in the Heads of Terms. Both he and Sarah were undecided as to whether to accept it.

3rd March 2011

135. On 3rd March 2010 Mr Davies sent an email to Nick setting out how the £1.99 million would be split. The letter made it clear that HP would accept £400,000 plus VAT for their fees and the insurers would accept £256,000. It is not necessary to set out the Schedule of payments. However Mr Davies proposed that Nick would receive the first £60,000 but would not receive any further moneys until the third payment of £250,000.

4th March 2011

136. Although no final agreement had been reached negotiations continued. It is however clear that there was a sticking point over the security clause.

137. Both Nick and Sarah contend that some time during the afternoon or early evening whilst they were in their car they received a phone call from Mr Davies. They describe Mr

Davies as being incredibly aggressive and the call as a "rant". In effect he was demanding that they accept the payment proposals.

138. Mr Davies has no recollection of or any file note relating to the call. However he strongly refutes the suggestion that he would have "ranted" or been aggressive to a client.

139. It is, to my mind, significant that when he arrived in Norfolk at about 6.30 p.m Nick sent Mr Davies an email in which he expressed concern about Sarah's health. He thought she was having a nervous breakdown. He described the payment schedule as "fine" but needed to factor in over the first 3 payments £35,000 to GW and an additional £70k for Nick and Sarah. He described himself as a man of integrity and had a priority to meet his obligations. He made the point that he had had a difficult 2 years and a very long emotional week.

140. He also sent a further email at 7.30 that evening to his entire legal team thanking them for their support that week.

5th March 2011

141. Unfortunately Nick's concerns about Sarah's health were well founded. On the evening of 5th March 2011 Nick found her attempting to end her life by taking an overdose of sleeping tablets. Fortunately the attempt was not successful.

7th March 2011

142. Ms Orton replied to Nick's email on behalf of Mr Singh. In effect HP was prepared to allow GW to be paid on a pro rata basis. It was not prepared to allow the further £70,000 to be paid to Nick and Sarah.

143. Meanwhile there were further negotiations about the employment claim (which was due for hearing on 15th March 2011). It is plain from emails that were exchanged on that day that both Mr Davies and Counsel (Mr Stilitz QC) felt that the employment claim should not be settled until the share dispute had been settled. In an email timed at 8.24 p.m (and copied to Nick) Mr Finlay of GW shared that view.

144. In Nick's witness statement he says he was concerned about Sarah's health and did not want to put her through the stress of the employment tribunal. Furthermore he was advised that the costs of the employment tribunal would not be recoverable. In the result he decided to compromise the employment claim.

9th March 2011

145. At 8 a.m there was a conference call between Nick, Mr Davies and Mr Finlay. Nick said he had spoken to Mr Pickering the night before and his parents had asked for a cooling off period. There were health issues on both sides. Both Mr Davies and Mr Finlay advised against a cooling off. Nick said that he did not think that either he or Sarah could make a decision at the moment. He added that he did not think that Sarah was in a state to sign a deal that day.

146. In an email sent at 17.43 Nick stated that

> I felt we needed some space for a few days and I feel we are being put under considerable pressure in signing a deal which we still have to come to terms with. Rod is a trusted family friend and it was Rod who I contacted a few months ago at Jit's suggestion. Rod is honest and will not take sides.

147. He went on to say he would like to get the employment claim out of the way first thing tomorrow.

148. Mr Finlay replied at 18.52. He confirmed he would compromise the employment claim if he received instructions to do so. He pointed out that the only assurance from Barry was that Barry was keen to do the main deal. He went on to point out the pros and cons of compromising the employment claim before the main deal. He pointed out that Barry had not agreed to the security issue.

149. Mr Davies replied at 19.50. In a long email he advised against settling the employment claim before the main deal. The email includes:

> The question is whether you want to reach a global deal on the terms currently being expressed. You have indicated in your email and on the phone to-day that you feel under pressure to sign a deal that you have not yet come to terms with. You made this comment at the mediation and so I deliberately organised for you to meet Jit and I the following day so that we could calmly discuss the position and make a decision as to whether to settle broadly on the terms proposed or continue to litigate. …… Having given it a lot of thought you decided to settle and we spent the rest of the week negotiating amendments to the deal so that by Friday you were happy with the deal being proposed and we only needed to negotiate one clause that the other side were not happy with.

150. The email went on to suggest that Barry had stopped negotiating the main deal that week and that a worse deal would be obtained if Nick settled just the employment claim.

10th March 2011

151. Mr Stilitz sent an email to all relevant persons (including Nick) asserting that he had been told by Barry's Counsel that Barry and Nick had reached an agreement that (a) the remaining issues would be resolved through Mr Pickering (b) that there would be a 7 day moratorium on further negotiation and (c) the employment claim would be settled separately. He made a number of observations suggesting that he did not agree with this course.

152. Notwithstanding this advice Nick settled the employment claim on the basis that he received a total of £75,000 in respect of that clam and the claim under the loan account. It was a further term that he would not be removed as a director until the conclusion of the main deal. [He is in fact still a director of VG].

153. On the same day there was a general discussion between Nick, Sarah and Mr Pickering about the effect of the litigation on the family and their health.

11th March 2011

154. Nick sent an email to the Hong Kong police withdrawing the complaint. The email refers to the fact that

> A long standing family dispute that is now in the process of being settled.

155. He asked that all further communications be sent to him alone.

14th March 2011

156. Nick emailed Mr Stilitz. In the first paragraph he referred to his meeting with Mr Pickering and the health issues affecting both his parents and Sarah. He concluded:

> We felt we had been put under considerable unnecessary pressure to conclude this matter and needed time to reassess what was going on.

16th and 23rd March 2011

157. According to Nick meetings were held with Mr Pickering and his parents on these days. No settlement was achieved. Although Mr Pickering could not remember the exact dates he confirmed that there were several meetings that he attended.

5.11 April

3rd April 2011

158. The Hong Kong police emailed Nick that there would be no prosecution as a result of insufficient evidence. Nick forwarded the email to Mr Davies.

4th April 2011

159. There was a meeting at Mr Pickering's factory attended by Nick, Mr Pickering and Mr Davies. At that meeting Mr Pickering proposed a solution involving the discontinuance of the s994 proceedings, the payment of all HP's costs and the ATE premium, Nick leaving his shares in VG and being provided with financial information. Nick asked for a running total of costs. These totals were supplied by Ms O'Neill over the next few days.

13th April 2011

160. There was a long phone call between Nick and Mr Davies. According to Mr Davies it lasted 1 hour 36 minutes. Mr Davies prepared a detailed note immediately afterwards. The note contains detailed discussions of settlement options. Included amongst them:

> I said that if he and Sarah simply discontinued the litigation they would become liable to pay the other side's costs …Also I said that …this would probably constitute a settlement … He said would this be the case when they had not settled and had just stopped the proceedings. I ask why he would do this when it would result in a substantial costs liability to the other side … He said what if the other side bore their own costs. I said this was likely to be regarded as a settlement but I would have to check the position. … He said he recalled that at the outset we had discussed that a success might be achieving over a particular figure but we had decided to drop this when we reached agreement.

161. It was suggested to Mr Davies that the final sentence of the note was an embellishment and that he had made it up. Mr Davies denied it. He said that he had some recollection that it was what Nick said.

162. When Nick gave evidence he accepted that the conversation had lasted about an hour and a half. However, he denied that the conversation was as alleged in the note. His evidence was that Mr Davies simply said that he would get back to him (Nick) the following morning with what the costs would be in the scenario of hands-down, walk away both sides paying their own costs.

14th April 2011

163. Nick says he had an inconclusive meeting with Mr Pickering and his father. As Mr Davies had not got back to him Nick was unable to advise Mr Pickering on his options. At 9.57 pm Nick sent Mr Davies an email which included:

> … as our lawyers I was expecting clear advice from [HP] on the 3 options. In particular option 3 which is walking away from the litigation.

> Accordingly can we please have your response by the weekend in addition to the detailed breakdown of costs involved should we terminate the CFA.

15th April 2011

164. Mr Davies replied to the email at 9.23 p.m. After expressing disappointment at what he described as unjustified and unfair criticism he set out a detailed summary both of the meeting on 4th April 2011 and the conversation he had the previous day. The email included:

> As you know, we had advised you that this was a reasonable offer …subject to clarifying the security clause. However, after initially agreeing the amount on offer you then chose not to proceed with this proposal and indicated you felt you wanted a higher sum. I said that in these circumstances if you came to some sort of an alternative settlement, which involved retaining your shares, this was likely to still be a settlement that meant that the insurance premium, costs and uplift were payable and I thought that the insurers were likely to see it in this way. You reiterated the point that you were not seeking to avoid paying the costs or insurance premium.

5.12 May

3rd May 2011

165. Nick sent a long email in reply to Mr Davies' email. He took issue with the assertion that he had ever agreed to the offer. He said he was unable to understand how the figure for costs had been arrived at and said that he had asked for a detailed breakdown. He said that the dramatic increase in costs came as a shock. He asked for Mr Davies' views as regards the CFA and as to the premium payable to First Assist.

11th May 2011

166. Mr Davies replied to Nick's email at length. After setting out Mr Stilitz's view that Nick's best option was to complete the settlement subject to the security being agreed he dealt with the meeting with Mr Pickering and costs and then turned to the options available to Nick. He pointed out a number of disadvantages of the discontinuance option.

> In relation to the success fee [HP] has, as you know, agreed to be a stakeholder in these proceedings, sharing the risk of proceedings with you. You have always made it clear that you could not have brought the proceedings without the [CFA] In return we have only ever asked that we be paid what we are entitled to receive under the CFA. In view of the comments you make in your email, we would reiterate that you may wish to take independent legal advice on the terms of the CFA and in particular the success fee if you have any concerns.

18th May 2011

167. Nick replied to Mr Davies' email. He pointed out that there was a difference in recollection as to the circumstances surrounding the mediation. He made the point that the withdrawal from the litigation on a drop hands basis was a viable option. The scenario of buying the business looked "increasingly attractive".

168. He pointed out that Sarah and he were keeping all options open and reiterated that:

> … we are not seeking to avoid our obligations but rather to know exactly where we stand so that we can make a properly informed decision in order to go forward with our lives.

20th May 2011

169. HP received an email from the Hong Kong police that stated that it was Nick who asked for the complaint to be withdrawn.

170. Nick had a meeting with Chris Clements and Harshad Bharakada of Grant Thornton. As a matter of courtesy Grant Thornton notified HP of the meeting. Mr Davies asked Grant Thornton to ask Nick about the employment settlement.

171. Following the meeting on 23rd May there was a catch up call between HP and Grant Thornton. In that call Mr Davies was told that Nick had settled the employment claim for 2 reasons – (1) concerns over Sarah's health and (2) because the Hong Kong police had dropped the forgery allegation.

172. The second of these reasons, if said, cannot be true in that Nick had withdrawn the complaint. HP rely on this "lie" in support of the allegation that Nick has made a secret settlement with his father.

173. Mr Clements gave evidence in the trial. In that evidence he accepted that it was possible that he had misheard what Nick had said. He pointed out that the primary thrust of the meeting was the potential for a purchase and Grant Thornton's fees.

174. After he had given evidence Mr Clements helpfully sent to the Court the contemporaneous notes made after the meeting. That note supports the version of events given to Mr Davies on 23rd May 2011. However it also includes as note 7:

> [Nick] was considering 3 key options: (a) carry on the dispute, (b) pursue the mediation type settlement and (c) buyout of his parents shares.

175. Thus Note 7 does not support the allegation that there was a secret settlement by 20th May 2011.

5.13 June

3rd June 2011

176. As a result of his concerns Mr Davies wrote a long letter to Nick and Sarah. In that letter he set out in detail his concerns especially in relation to the fact that Nick had concealed that he had himself withdrawn the complaint to the Hong Kong police.

177. He asserted that as a result of Nick misleading HP, HP would be entitled under cl 9.1 to terminate the CFA. He also asserted that HP had reason to believe that Nick had entered into a settlement.

178. The purpose of the letter was to give Nick and Sarah the opportunity to respond and he asked for a response within 7 days.

9th June 2011

179. Nick emailed Grant Thornton pointing out that their understanding of what he had told them on 20th May 2011 was not correct.

180. Mr Clemets replied on the same day enclosing a copy of the note of the meeting that he had sent to HP.

14th June 2011

181. Nick sent a detailed reply to Mr Davies' email of 3rd June 2011. It is not necessary to set out the details. He denied that the employment claim was settled as a result of the withdrawal of the complaint to the Hong Kong police.

182. He denied that he had misled HP or that HP was entitled to terminate under cl 9.1. He asserted that he was still considering his options one of which was to proceed to trial. He expressed himself deeply saddened by the unfounded allegations.

5.14 July

8th July 2011

183. Mr Davies wrote a long letter to Nick. The immediate cause was that Nick had cancelled a meeting on 11th July 2011. Mr Davies challenged some of the factual statements in the email of 14th June 2011. He asserted that Nick had no intention of progressing the litigation to trial and was in breach of the CFA. He repeated the assertion that Nick had reached some form of settlement with his parents.

184. He stated that unless Nick proceeded with the meeting on 19th July 2011 and was able to convince HP not to terminate the CFA HP would terminate the CFA on 19 July 2011. He stated that Nick and Sarah might wish to take independent legal advice.

13th July 2011

185. SASD wrote to HP stating that they were instructed in relation to the CFA. It described the deadline in the letter of 8th July 2011 as inappropriate.

186. The deadline was withdrawn.

22nd July 2011

187. Nick sent an email to Mr Stilitz in reply to a request for information pointing out that he was in dispute with HP over the CFA. In the email he stated that there had been no discussions or negotiations to settle the matter and that all options were being kept open.

27th July 2011

188. A without prejudice meeting was held between the parties. Privilege has not been waived save in one respect. It is common ground that SASD alleged that the CFA was unenforceable as a result of the 2008 Regulations.

5.15 August

1st August 2011

189. Mr Singh, who had taken over the matter on behalf of HP wrote to SASD. In the letter he asked for three sets of matters to be dealt with. First he wanted full and frank disclosure of a number of matters relevant to the possible "secret settlement". Second he wanted confirmation that Nick and Sarah would implement the steps necessary to take the matter to trial. Third he required

> An unequivocal written confirmation from [Nick] and [Sarah] that they will comply fully with all the terms of the CFA.

15th August 2011

190. Mr Smith of SASD replied to the letter of 1st August 2011. However he did not deal with all of the points raised and did not give the assurance requested. He sought a number of documents from HP.

17th August 2011

191. Mr Singh wrote to Mr Smith complaining that Nick and Sarah had not given the assurances requested on the 1st August 2011. He drew attention to paragraphs 7.1(ii) of the CFA under which Nick and Sarah were required to co-operate fully with HP in pursuing the claim.

5.16 September

5th September 2011

192. Mr Singh wrote again to Mr Smith. He pointed out that there was no response to the letter of 17th August 2011. He summarised the history and then gave a final deadline of 9th September 2011 for the provision of documents. He referred to the ongoing litigation. He pointed out that steps needed to be taken to progress the matter to trial in December. He repeated the insistence that Nick and Sarah confirm they will comply with the CFA.

7th September 2011.

193. Mr Moore of SASD replied to the open letter of 19th August 2011. In paragraph 1 he said:

> Our clients are your clients. They have and will comply with the terms of the CFA.

194. In paragraph 2 they instructed HP to apply for a stay of the proceedings to allow for further attempts to be made to resolve the dispute. This would involve vacating the trial window. The letter then goes on to deal with points about disclosure.

9th September 2011

195. Mr Singh replied to the request for a stay by advising that such a course would not be in Nick and Sarah's best interests and strongly advised them against that step.

20th September 2011

196. Mutual Disclosure took place together with a summary by Nick of the various meetings he had with his father and Mr Pickering.

26th September 2011

197. Mr Smith wrote to Mr Singh repeating and explaining Nick and Sarah's request that an application be made for a stay.

27th September 2011

198. Mr Singh wrote to Mr Smith. In the letter he confirmed that HP would continue to act for Nick and Sarah in the unfair prejudice proceedings. He drew attention to advice given by Mr Stilitz that the matter be progressed without delay and suggested that Mr Stilitz be instructed to recommence settlement negotiations without delay.

5.17 October

5th October 2011

199. Mr Stilitz emailed Mr Davies. In the email he advised against applying for an adjournment and made other suggestions as to how a negotiated settlement might be achieved.

6th October 2011

200. Mr Smith sent a further letter in which he instructed HP to apply for an adjournment. Mr Singh replied the same day repeating his advice and setting out the anticipated fees for applying for an adjournment.

7th October 2011

201. Mr Moore of SASD wrote what in relation to the repudiation issue is the crucial letter in the case. It is a long 3 page letter and I shall not set it out in full.

202. On page 1 SASD alleged that there was a breach of the 2008 Regulations and that the agreement is unenforceable. On page 2 and 3 SASD made 11 allegations of breach of duty. They included allegations that HP failed to explain the terms of the CFA and the ATE insurance. It alleged that the definition of settlement and win were too wide and ought to have been drafted to take into account the offer that had been made in the Heads of Terms. There was no advice on the effect of the ATE on the ability to negotiate. The costs estimate and the costs information provided was inadequate.

203. The letter concluded in this way:

> For all the above reasons we have advised our clients that you are not entitled to recover costs from our clients in this matter.
>
> We are also concerned about our clients' potential liability for the insurance premium. Had you carried out your obligations under the Code of Conduct, our clients would not have embarked upon the litigation, they would not have entered the Agreement and they would not have purchased the ATE policy. Moreover, given the risks that this matter posed to our client even if the case was settled, we do not believe that a proper "demands and needs" statement was provided.

10th October 2011

204. In response to this letter Mr Singh emailed SASD. He referred to the penultimate paragraph of the letter (set out above) and continued:

> In those circumstances we require your clients to unequivocally and unconditionally confirm in writing by 5 p.m on 12th October 2011 that in the event that the conditions in the [CFA] between us and [Nick] and [Sarah] dated 7 January 2010 entitling us to be paid are fulfilled

> then, subject to an assessment of quantum under section 70 of the Solicitors Act 1974, your clients will pay our fees. Please provide this confirmation by the time and date stated
>
> **11th October 2011**

205. Mr Moore wrote stating that he would deal with the deadline during the meeting the following day.

12th October 2011

206. A without prejudice meeting was held. It is common ground that no assurance in the terms of the email of 10th October was given by Nick and Sarah.

207. Shortly after the expiry of the deadline Mr Singh wrote to SASD. The letter included:

> In those circumstances we can only conclude that your clients do not intend to pay our costs should the conditions for payment under our CFA be fulfilled. Your clients have therefore evinced a clear intention not to be bound by a fundamental obligation of the CFA, namely to pay for our services when payment is due.
>
> We accept that as an anticipatory breach of the CFA and accordingly the CFA has come to an end with immediate effect.

19th October 2011

208. Following a letter of 17th October in which Mr Moore alleged that the letter of 12th October was itself a repudiatory breach of the CFA Mr Moore wrote a further letter under which Nick and Sarah elected to accept HP's repudiatory breach and asserted that they were discharged from further performance of the contract.

20th October 2011

209. Nick and Sarah filed notices that they were acting in person

27th October 2011

210. HI made an application to come off the record on behalf of Barry and Marlene. In the witness statement in support of the application one of the grounds relied on was that no fees had been paid since July 2011. However Barry had made a complaint against HI and had alleged the fees were too high. HI was formally removed from the record as acting for Barry and Marlene on 11th November 2011.

5.18 November

211. It is Nick and Sarah's case that on 2nd November 2011 he reached a drop hands agreement at a meeting between himself Mr Pickering and his father.

212. On 18th November 2011 a Tomlin Order was filed staying the s994 proceedings with no order as to costs. The Schedule (which is signed by all four parties) provides for discontinuance of both claim and defence.

6 Assessment of witnesses

213. In the light of the conflicts of evidence it is necessary to make an assessment of the principal witnesses:

Mr Davies

214. In paragraph 12 of their closing submissions Miss Anderson QC and Dr Friston submit that Mr Davies was an unsatisfactory and not straightforward witness. They list 9 criticisms of his evidence.

215. I accept that Mr Davies was negligent in relation to the drafting of the CFA which was sent to Nick and Sarah on 16th December 2009. Both the covering letter and the CFA contained obvious errors which should have been spotted before they were approved.

216. I also accept that when he gave evidence he was unable to recall the details of the advice given with any precision. Thus he could not remember in which of the meetings he gave advice about the CFA and ATE insurance. I also accept that the notes made by Mr Davies do not contain full details of the advice given in relation to the CFA and the ATE policy.

217. I do not, however, accept the remainder of the criticisms levelled at Mr Davies. In my view he was prepared to make concessions. When he could not remember the details he said so. Thus when he could not remember a phone call (such as the alleged phone call of 16th December 2009) he did not say it did not happen. He simply said he could not remember it. His notes contain references to explaining the CFA.

218. I do not accept that he embellished the file note of 13th April 2011 as suggested in paragraph 12.4. The note was made immediately after the long phone conversation. It took over 50 minutes to compile. At that date there was no suggestion that the CFA did not reflect what had been agreed between the parties. Mr Davies would have no reason to embellish the note as suggested.

219. I formed the view that Mr Davies was an honest witness doing his best to assist the court. However in a case such as this where he cannot remember many of the details considerable weight has to be paid to the contemporaneous documentation.

Ms O'Neill

220. In paragraph 13 Miss Anderson QC and Dr Friston describe Ms O'Neill as careful, meticulous and straightforward. I agree, though she did make a careless mistake in not spotting the error at the end of the letter of 18th December 2009 to HI.

221. I do not, however, agree that her evidence adds very little. The importance of her evidence is that she made detailed contemporaneous file notes of meetings she attended and of conversations between Mr Davies and Nick. Her evidence is also important to the question of when costs estimates were given or sent to Nick and Sarah.

222. It is correct that she did not in oral evidence seek to go beyond her file notes. However in my view she and Mr Davies were entitled to rely on those file notes as an accurate record of what occurred or was said.

Mr Singh

223. In paragraphs 14 and 15 Miss Anderson QC and Dr Friston level a number of criticisms of Mr Singh upon which I do not need to comment. It does not surprise me that Mr Singh was unable to explain the Billing Guide. I am not in a position to comment on the criticism of the practice of allocation of payments. It is not relevant to anything I have to decide.

224. The only relevant controversial area of Mr Singh's evidence related to the costs estimates given at the meetings in December and 21st January 2011. Mr Singh's evidence on this topic was consistent with the note that Mr Davies had prepared before the meeting. Very little, if anything, turns on these meetings.

225. I took the view that Mr Singh was an honest witness doing his best to assist the court.

Nick

226. I regret to say I did not find Nick to be a satisfactory witness. Contrary to the submission of Miss Anderson QC and Dr Friston I did not regard him as having "impressive recall". There were a number of features of his evidence that caused me concern. A number of examples will suffice:

1. The suggestion that no proper explanation was given of the CFA and ATE insurance is inconsistent with Nick's own file note (made to explain the position to Sarah) which shows that the operation of the costs aspects of both the CFA and the ATE insurance was explained.
2. Nick's evidence in relation to the phone call of 7th January 2010 either shows a poor recollection of relevant events or is inconsistent with the full file note taken by Ms O'Neill.
3. It was part of Nick's evidence that he did not realise that the premium for the ATE insurance was deferred. As he was aware in November 2009 that the premium was 91% of his parents' costs I cannot accept that he thought that this sum was payable when the insurance was entered into.
4. I find it very hard to accept that Nick signed the CFA on 7/8th January 2010 without reading it or the covering letter. Nick is an experienced and intelligent businessman. His letters and e-mails show an attention to detail. It is Nick's case that he spotted the mistake in the original covering letter (relating to the £20,000 threshold) and drew it to Mr Davies' attention. He says that the threshold should have been £1.48 million. A relatively short glance would have shown that that was not what the covering letter of 7th January 2010 provided. There were corrections to the CFA. It is to be recalled that he spoke to Ms O'Neill for 18 minutes on 8th January 2010 before he returned the CFA and engagement letter.
5. If, as both Nick and Sarah suggested, Mr Davies ranted to them in the phone call of 4th March 2011, it is to my mind remarkable that Nick should have sent the 2 emails he sent in the evening without in any way referring to the call. Certainly Mr Davies did not give me the impression of being aggressive or insistent over the payment schedule. It is noteworthy that HP was prepared to agree two amendments in relation to the schedule in later correspondence. Furthermore when Mr Davies's suspicions were aroused in June or July he wrote long letters to them inviting an explanation.
6. Nick's evidence of the long phone call of 13th April 2011 is inconsistent with the detailed file note made by Mr Davies immediately after it was made. It is also inconsistent with the e-mail sent by Mr Davies on 15th April 2011 which summarised his understanding of the phone call.
7. Nick's evidence in relation to the withdrawal of the complaint to the Hong Kong police and the conversation with Grant Thornton is, to put it no higher, suspicious. It is by no means clear why he should ask the Hong Kong police to send all further communications

to be sent to him alone if he did not want to conceal the fact that he had withdrawn the complaint. Equally whilst, as Mr Clements acknowledged, it is possible that both he and Mr Bharakhada were mistaken as to what they were told on 20th May 2011 both the contemporaneous file note (paragraph 5) and what Mr Bharakhada told Mr Davies on 23rd May 2011 support the original version. It is, as Mr Edwards pointed out, difficult to see how Grant Thornton made the alleged mistake.

8. There must, in my view, have been more communications between Nick and his parents between March 2011 and November 2011 than those set out by Nick in his evidence or in the Schedule he provided on 20th September 2011. It is plain from an e-mail sent by HI to Barry on 23rd May 2011 that Barry had discovered that Nick was considering taking independent advice on the CFA (It will be recalled that Mr Davies suggested this in his email of 11th May 2011.) Nick was able to offer no explanation as to how Barry obtained this information. In reality it must have come directly or indirectly from Nick. One of the options that Nick was considering was the purchase of his parents' shares. Although all of his advisors advised against this option Nick progressed the option to the extent of having discussions about finance with Barclays. It would, to my mind be remarkable if the matter had not at least been raised with his father. Finally there remains the fact that within one month of the termination of the CFA Nick and his father agreed a settlement of the action. Even if, as will be discussed below, there was no final settlement of the proceedings before the termination of the CFA in October 2011 it seems to me highly likely that there were some discussions.

227. In all the circumstances I have come to the conclusion that I must treat Nick's evidence with considerable caution especially where it is uncorroborated by contemporaneous documentation.

7 The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008?

The Law

228. The 2008 Regulations have their origins in the European Community. The predecessor of the 2008 Regulations came into being to give domestic effect to Council Directive 85/577/EEC. The original regulation related only to unsolicited visits. The 2008 Regulations extended the regulations to solicited visits.

229. The policy underpinning that extension was explained by Baroness Vadera, Under-Secretary of State of the sponsoring department:

> 'The purpose of the proposed new regulations is to extend to solicited visits the cooling-off period and cancellation rights that currently apply to contracts made during unsolicited visits by traders; and to require that a notice of the right to cancel the contract be prominently and clearly displayed in the same document where the contract is completed wholly or partly in writing.'

230. Regulation 5 of the Regulations provides:

> "These regulations apply to a contract … between a consumer and a trader which is for the supply of goods or services to the consumer by a trader and which is made –
>
> (a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual;

(b) …;

(c) after an offer made by the consumer during such a visit or excursion".

231. The Regulations require any such contract to have a cancellation period and the consumer to be given written notice of his right to cancel at the time the contract is made or (in the case of a contract made after an offer made by the consumer during a visit by the trader to his home) when the offer is made.

232. Failure to comply with the Regulations is an offence pursuant to Regulation 17 of the Regulations and pursuant to Regulation 7(6) a contract to which the Regulations applies

> "shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this Regulation"

233. A Consumer is defined in Regulation 2 as

> "a natural person who in making a contract to which these Regulations apply is acting for purposes which can be regarded as outside his trade or profession"

The issues

234. It is common ground between the parties that the CFA did not include a cancellation period. Thus if the 2008 Regulations apply the CFA is unenforceable. It is equally common ground that if the CFA is unenforceable HP cannot obtain any payment indirectly either on the ground of quantum meruit or otherwise.

235. The principal issue to be determined under the Regulations is whether the CFA was made during a visit by HP to Nick and Sarah's home or place of work or after an offer made by Nick and Sarah during such a visit.

236. There is a subsidiary issue whether Nick and Sarah or either of them are "consumers" within the meaning of the Regulation. That issue will only arise if the principal issue is determined in their favour.

Relevant Findings of Fact

237. I have set out in considerable detail the evidence leading up to the creation of the CFA. I shall not lengthen this evidence by setting it out again. A number of points can be made:

1. None of the early discussions took place at Nick and Sarah's home. The meetings in August, September and November all took place at HP's offices. In addition there were phone calls between Nick and Mr Davies or Ms O'Neill. Amongst the phone calls was the important call on 7th January 2010. In addition there were a number of emails passing between Nick and HP. These included the emails on 16th December 2009 when the CFA and the covering letter were sent and the emails on 7th January 2010 when the amended CFA and amended covering letter were sent.
2. It was little more than happenstance that the meeting on 17th December 2009 took place at Nick and Sarah's home. It was originally arranged to take place at HP's office. It was only re-arranged as a matter of convenience for Ms O'Neill who was working from home that day.
3. The principal purpose of the meeting on 17th December 2009 was to enable Ms O'Neill to obtain details of Nick's underlying unfair prejudice claim. Only a very small part of the meeting was devoted to the CFA. Ms O'Neill had not drafted the CFA and was not responsible for it.

4. It is plain that there was no concluded contract on 17th December 2009. Whilst this suggestion was not abandoned by Dr Friston it is, to my mind unarguable. Thus Nick and Sarah can only succeed if the contract is made after an offer made at the home visit.

238. Dr Friston relied on paragraph 51 of Nick's witness statement where he says:

> 'I said that we would sign the conditional fee agreement once it had been corrected."

239. He submitted that this is an offer with the inevitable consequence that the 2008 Regulations are engaged.

240. I do not accept that submission for a number of reasons:

1. When the evidence is viewed as a whole I am not satisfied that Nick made the "offer" that appears in paragraph 51 of his witness statement.
    1) Ms O'Neill has no recollection of the statement being made. Nick did not mention it when being asked about the conversation.
    2) There was some debate in the oral submissions as to whether the statement in paragraph 15 was challenged. Dr Friston suggested that there should have been a direct challenge to the sentence. Mr Edwards suggested that it was sufficient for Nick to have confirmed that the only thing left out of Ms O'Neill's note was the reference to the phone call on 16th December 2009. I do not accept that I am bound to hold that Nick made the challenged statement. I have to view the evidence as a whole and decide whether Nick has established on balance of probabilities that the statement was made. As already noted Nick was not an impressive witness and I view his evidence with caution.
    3) Ms O'Neill was an impressive witness who kept detailed file notes, I would have expected her to have noted the offer if it had been made. Ms O'Neill was honest enough to say that she had little recollection beyond what was contained in her file note. That does not mean that I should not pay considerable attention to the contents of her contemporaneous file note.
    4) It is possible that there was a conversation on the evening of 16th December 2009 between Nick and Mr Davies at which Nick drew to Mr Davies's attention the reference to £20,000. I do not, however accept that Nick ever said that the figure should be £1.48 million. The answer that Nick says was given ("Yes, I thought that was strange when I looked at it") is a very odd answer. If the £1.48 million had been mentioned I would have expected Mr Davies either to agree with it or refute it. It is, however clear, that even on Nick's version of events Mr Davies did not agree that there was a threshold of £1.48 million for success.
    5) To my mind the most likely scenario is that at the meeting on 17th December Nick queried the mistake in the covering letter (referring to the £20,000) and possibly the obvious errors in the CFA itself. He may or may not have mentioned the controversial phone call. Ms O'Neill said she would have to revert to Mr Davies.
2. I attach no weight to the fact that Ms O'Neill wrote to HI on 18th December 2009 a letter which included the statement that HP had entered into a CFA with Nick and Sarah. It was part of a long letter which had been drafted on 14th December 2009 in the expectation that the CFA was to be signed on 17th December. It is plain that no CFA was in force on 18th December. Ms O'Neill accepted that the letter contained an error. It is to my mind of no assistance in determining whether Nick made an "offer" on 17th December 2009.

3. Even if Nick had used the words alleged in paragraph 51 of his witness statement I am not satisfied that they constitute an offer. They do not make clear what amendments Nick is seeking. Is he suggesting that whatever amendments are made he would sign the CFA? Is he suggesting that the amendment would have included a threshold of £1.48 million in the definition of success? If he is it is remarkable that he signed the CFA on 7 the January 2010 when the covering letter made no mention of the £1.48 million.
4. It was common ground between Mr Edwards and Dr Friston that there must be some causal link between the offer made by Nick and the contract that was ultimately made. Dr Friston submitted that the test was whether it could be said that the offer and the contract were part of the same transaction. He submitted that the offer did not need to be an offer in the legal sense of the word. He submitted that in this case both the offer and contract did relate to the same transaction and he referred me to answers given by Mr Davies and Ms O'Neill in cross-examination. In a loose sense of the word I agree that the "offer" and contract both related to a CFA between the same parties in relation to an unfair prejudice petition. However if, as is Nick's case, the offer related to a CFA with a threshold of £1.48 million then I find it impossible to say that the CFA related to the same transaction. Such a finding would ignore the conversation on 7th January 2010. I shall deal with that phone call in more detail in the section on Rectification. To my mind any causal link between the alleged offer and the subsequent contract was broken.
5. I am in any event by no means satisfied that the test proposed by Dr Friston is correct in law. To my mind the offer has to be a legal offer in accordance with the law of contract. I also think that the contract has to be made substantially on the terms of the offer. It has to be borne in mind that 2008 Regulations impose a criminal sanction and there is in my view no reason to construe them any wider.

241. It follows that I have come to the conclusion that the 2008 Regulations were not engaged and the defence on this issue fails. In those circumstances I do not have to consider the difficult question whether either Nick or Sarah was a consumer within the meaning of the 2008 Regulations.

242. I have to confess I am not sorry to reach this conclusion. It seems to me that the facts of this case are about as far from what is contemplated by the 2008 Regulations as it is possible to imagine. Nick is an experienced businessman. Both he and Sarah permitted HP to act for them under the CFA for over 18 months during which time a large amount of work was carried out. In my view the existence of a cooling off period would have made no difference to the position. Nick and Sarah would not have availed themselves of it. I do not accept the suggestion in Miss Anderson QC closing submissions that they were particularly vulnerable.

8 Rectification

243. There is little dispute as to the relevant law. In paragraph 37 of their opening submissions Mr Edwards and Mr Tankel referred me to Chitty on Contracts 31st Ed and Chartbrook v. Persimmon Homes Limited (2009) UK HL 38 at 48, where Lord Hoffman approved a succinct summary of Peter Gibson LJ as follows:

> "The party seeking rectification must show: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention".

244. They submit that there was never an agreement that the definition of success should be doing better than £1.48 million. £1.48 million was a sum that had been agreed in the Heads of Terms, but Barry and Marlene had never concluded the agreement. It defies logic and common sense to pick that sum as the barrier over which any result would have to jump in order for HP to be paid.

245. I agree with that submission. It is inherently unlikely that Mr Davies would have agreed a threshold of £1.48 million. At the time of the CFA there was no valuation evidence. Counsel had advised only that there were reasonable prospects of obtaining a purchase order. He had not considered value at all. In those circumstances it would be remarkable if Mr Davies had agreed that HP would not be paid unless Nick and Sarah achieved £1.48 million for their shares. It also has to be borne in mind that the discussions were on the basis that Nick and Sarah would be seeking their costs to be paid by Barry and Marlene.

246. The matter is, to my mind put beyond doubt in the phone call on 7th January 2010. Ms O'Neill's note makes it clear that there was an express discussion about success fee and Mr Davies made it clear that this was an "all or nothing case" in the sense that Nick and Sarah would have succeeded if the Court determined there was unfair prejudice. He also made it clear that it was best not to prejudge valuation.

247. Rectification can also be obtained for unilateral mistake. The conditions are summarised in paragraph 5-122 of Chitty and in cases such as Bates v Wyndhams [1981] 1 WLR 505 where Buckley LJ laid down 4 conditions to be satisfied:

1. Party A must be mistaken in his belief that a contract contained a particular term
2. Party B must be aware of the omission and that it was due to a mistake on the part of A
3. Party B has omitted to draw the mistake to the attention of Party A
4. The mistake must be calculated to benefit Party B

248. In those circumstances the court may regard it as inequitable to allow B to resist rectification on the ground that the mistake was not mutual.

249. To my mind the telephone call of 7th January 2010 is a complete answer to a claim based on unilateral mistake. I am fortified in this conclusion by the discussion in the course of the phone call on 13th April 2011. For the avoidance of doubt I accept Mr Davies's note of that call as accurate.

250. In my view the claim for rectification fails.

9 Secret Settlement

251. There is no doubt that Mr Davies and Mr Singh suspected that Nick and Sarah had reached a secret settlement with Nick's parents. They set out those suspicions very fully in the letters of 3rd June 2011 and 8th July 2011. It was at the forefront of the request for disclosure in Mr Singh's letter of 1st August 2011.

252. I also agree that there are a number of suspicious features about Nick and Sarah's case. They include the evidence about the Hong Kong police, Barry's knowledge of the taking of independent advice about the CFA, the negotiation for further finance in order to buy out Barry and Marlene's shares and the speed with which the claim was settled after the termination of the CFA.

253. These features have led me to the view I have expressed about Nick's evidence. I also agree that I am satisfied on the balance of probabilities that there must have been further discussions between Nick and Barry than those disclosed by Nick in evidence.

254. However none of this evidence satisfies me that there was an enforceable concluded agreement between Nick and Sarah and Nick's parents for the settlement of the unfair prejudice petition before the agreement in November 2011.

255. There is no direct evidence of such a settlement. There is no document even hinting at it. I have referred to a number of documents where Nick is recorded as saying he is keeping all his options open. A good example is the note made by Grant Thornton following the meeting on 20th May 2011. It is also to be noted that Barry's instructions to his Counsel were inconsistent with an agreement actually having been concluded.

256. Nick and Sarah deny they have concluded an agreement. They are supported by Mr Pickering.

257. Thus I am being asked to infer on the basis of suspicions that a secret settlement had been concluded. I am not prepared to draw that inference.

258. It follows that I reject HP's claim that a secret settlement was reached by Nick and Sarah before the termination of the CFA.

10 Repudiation

The law

259. Fortunately there is no difference between Counsel as to the relevant law. In their closing submissions Mr Edwards and Mr Tankel drew my attention to the decision of the Court of Appeal in Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168.

260. That case concerned a contract for the sale of land. After the contractual completion date had passed the vendor served a notice to complete but miscalculated the date. Making the same error the vendor served a rescission notice a few days before it was entitled to do so. The recorder held that the vendor had repudiated by serving the completion notice too early. The Court of Appeal allowed the appeal.

261. In the course of his judgment Etherton LJ (as he then was) referred in detail to the judgments in The Nanfri [1978] QB 949 and [1979] AC 757 and the decision of the House of Lords in Woodar v Wimpey [1980] 1 WLR 277

262. Etherton LJ cited a passage from Lord Denning's judgment in The Nanfri:

> "I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension. Nor can he excuse himself on those grounds from the consequences of a repudiation. In those three cases the conduct of the party concerned was entirely innocent. It did not evince any intention to break his contractual obligations. I would go by the principle as I have always understood it that if the party's [conduct] - objectively considered in its impact on the other party - is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards.

263. He also cited passages from Lord Wilberforce's speech where he set out a number of different formulations of the test to be applied. When he considered Woodar he referred to a number of the speeches in the House of Lords. He made the point that Lord Wilberforce had emphasised that in considering whether there was a repudiation it was necessary to look at all the circumstances of the case and in particular the conduct of the purchasers as a whole.

264. Etherton LJ also quoted from the judgment of Lord Keith:

> "So in the present case the question comes to be whether, having regard to all the circumstances, the conduct of the appellants in relation to their invocation of special condition E (a) (iii) of the contract was such that a reasonable person in the position of the respondents would properly infer an intention "in any event," to use the expression employed by Warrington and Atkin L.JJ. in the *Spettabile* case, 121 L.T. 628, to refuse to perform the contract when the time came for performance."

The issue

265. It will be recalled that the penultimate paragraph of the letter of 7th October 2011 was in the following terms:

> For all the above reasons we have advised our clients that you are not entitled to recover costs from our clients in this matter.

266. In response Mr Singh gave Nick and Sarah until 12th October

> to unequivocally and unconditionally confirm in … that in the event that the conditions in the [CFA] … entitling us to be paid are fulfilled then, subject to an assessment of quantum under section 70 of the Solicitors Act 1974, your clients will pay our fees.

267. There was no reply to this ultimatum. The issue is accordingly whether viewing the matter objectively and taking into account all the relevant background circumstances a reasonable person in the position of HP would properly infer an intention by Nick and Sarah not to perform their part of the CFA by paying the sums due under it. Nick and Sarah's subjective intention is irrelevant. It is equally irrelevant that Nick and Sarah were acting on advice and what I have held to be an erroneous reliance on the 2008 Regulations.

268. In their closing submissions Mr Edwards and Mr Tankel submit that a threat not to pay a solicitor was a clear breach of a fundamental term of a retainer. Where as here there was the potential of a 5 day trial listed some two months ahead it put the solicitors in an impossible position. If this was merely a tactic to force the solicitors to lower its fees it is still a breach of a fundamental term in that it is saying that they will only perform the contract on their terms.

269. They rely on a number of matters in support of the submission that a reasonable person standing in HP's shoes would have concluded that Nick and Sarah intended not to pay HP's fees. They are set out in paragraph 134 of the closing submissions. In summary they submitted:

1. Since around 4 March 2011 Nick and Sarah were openly and actively seeking a way out of the litigation which meant that they would not incur fees to HP.
2. Nick and Sarah had instructed separate legal representatives in relation to their obligations under the CFA. There was every indication that the threat not to pay was serious;
3. At the without prejudice meeting on 27 July 2011 SASD (in the presence of Nick) alleged that the CFA was unenforceable under the Regulations.
4. Nick and Sarah were using the Regulations argument as a negotiating tactic to try to force down the Claimant's fees, such fees having been legitimately incurred at the Defendants' instruction and with the Defendants' approval over an 18 month period;
5. The letter of 7th September 2011 which ultimately gave the assurance sought by HP contained a caveat:

> 'we are advising our mutual clients in relation to the CFA and, in due course, we will set out our client's position in relation to it in detail. At that point, we shall deal with The Cancellation of Contracts made in a Consumers Home or Place of Work Regulations 2008'.

6. HP gave an ultimatum on 10 October 2011, stating clearly that it would treat the absence of a further assurance as a repudiatory breach of contract. SASD said that it would take instructions and revert to the Claimant at a meeting on 12 October 2011. Nick and SASD attended that meeting. They did not give the proposed assurance;

270. Miss Anderson QC and Dr Friston deal with the submissions in paragraphs 98 to 105 of their submissions. In summary they submit:

1. Nick and Sarah were at all times acting in good faith and were simply setting out the basis upon which they had been advised by SASD that the CFA was unenforceable as a matter of law. They asserted that that if the Agreement was unenforceable they may take the point at some time in the future.
2. Nick and Sarah had given repeated assurances that they were not seeking to escape their obligations.
3. The letter was written in response to a request by HP for SASD to set out in open correspondence the allegation that had been made at the without prejudice meeting on 27th July 2011.
4. In addition to the claim under the 2008 Regulations the letter also referred to the negligent advice.
5. The letter was not unequivocal. The expression we have advised our client falls short of saying the clients have accepted the advice.
6. There was a failure to remind SASD of the ultimatum at the meeting which took place on 12th October 2011 before the deadline expired.
7. The assurance could not have been given in any event. If the proceedings against Bary and Marlene had been successful they could have challenged the CFA with the result that Nick and Sarah would have been left with HP's costs and no recourse to Barry and Marlene.

Conclusion

271. I prefer the submissions on behalf of HP. An obligation by a client to pay a solicitor's fee is plainly a fundamental obligation. Thus a statement that the solicitor is not entitled to recover costs is plainly (if wrong) a breach of such a term. I agree that it put HP in an impossible situation in relation to the ongoing litigation. The fact that Nick and Sarah were acting on advice and or in good faith does not assist them. It may well be that in the past they had said that they were not seeking to escape their obligations. This letter asserted the opposite. It asserted (wrongly as I have held) that the CFA was unenforceable and that no fees were payable. This was a high risk strategy. If (as I have held) the assertion was wrong it amounted to a breach of its terms.

272. Equally I am unimpressed with the argument that the letter was equivocal because it referred to the advice of SASD and not to the question of whether Nick and Sarah were acting on it. This is especially so as HP gave Nick and Sarah the opportunity to confirm that it was enforceable. They did not reply to the letter. It was always open to Nick and Sarah to give a qualified assurance if for example they wished to preserve their right to Counterclaim. In fact they did not reply at all.

273. In my view the conduct of Nick and Sarah did evince an unequivocal intention not to be bound by the CFA. Accordingly they repudiated it and HP was entitled to accept the repudiation on 12th October 2011.

11 Negligence/breach of duty of care

274. The allegations of negligence are contained in paragraph 31 of the Counterclaim. There are 11 separate allegations. Three of these relate to costs (allegations 1, 2 and 8); five relate to the CFA (allegations 3 to 7); three relate to the ATE (allegations 9 to 11).

The CFA

275. Four of the allegations relate to the drafting of the CFA. In general terms it is alleged that the CFA was not drafted in accordance with Nick and Sarah's instructions, that the CFA as drafted was inappropriate in its definition of settlement and a failure to define "win" in clear unambiguous terms.

276. It is in my view possible to deal with these allegations quite shortly. I have rejected the suggestion that it was ever agreed that this should be a threshold CFA with a threshold of £1.48 million. I have accepted that the definition of success was specifically discussed in the phone call of 7th January 2010. I shall not repeat my findings on that phone call. In my view the definition of success/winning in clause 4.2 of the CFA and of settlement in clause 1.9 is in accordance with the discussion in that phone call.

277. The fifth allegation alleged that HP failed to advise Nick and Sarah adequately about the nature of the CFA and their options in relation to the success fee.

278. It is, of course, true that Mr Davies could not remember the precise dates on which advice on the CFA was given. It is equally true that the CFA and the covering letter were not drafted until 7th January 2010.

279. It is, however, clear that Nick understood the basic operation of a CFA by 19th November 2009. He understood that the success fee was to be 67% based on a risk assessment of 60%. He also understood, (based on the note he prepared to show Sarah) the effect on costs both of the CFA and the ATE insurance premium. He also understood that he would be liable for the unrecoverable costs that is to say costs not payable by his parents.

280. As Miss Anderson QC pointed out there is no reference to a settlement in that note. There was a further discussion on 7th January 2010 in which the definition of success fee was discussed in terms of getting an order for the value of the shares.

281. There is a further explanation of the CFA in the covering letter sent on 7th January 2010. That letter expressly refers Nick and Sarah to the definition of settlement and expressly advises that if they agree to a settlement they will be liable for basic fees and the success fee at 67%. Thus express appropriate advice on settlement was given.

282. It is true that Sarah did not attend all of the meetings and did not receive all of the advice that was given to Nick. Although Nick and Sarah were joint shareholders this was primarily Nick's case. It was Nick who was excluded from the management. Sarah was perfectly content to leave most of the management of the case to Nick. Nick and Sarah were a close couple. In those circumstances I do not regard it as negligent for Mr Davies to have meetings with Nick alone and not to repeat to Sarah all the advice he had given to Nick. To have done so would have substantially increased HP's costs. The letter of 7th January 2010 was sent to both Nick and Sarah.

283. I reject the claims for negligence based on the CFA.

The ATE

284. Nick and Sarah allege first that the definition in of "success" in the ATE policy was inappropriate and that no premium should have been payable unless they achieved at least £1.48 million. Second HP failed to give them an adequate "demands and needs" statement and failed to give adequate advice about the effect of insurance. Third HP failed to advise about the ATE policy or about its potential effect if they wished to settle the claim.

285. The first allegation fails in the light of my findings of fact in relation to what was agreed on 7th January 2010. The definition of success in the policy is not in fact identical to that in the CFA. It includes 3 situations (1) where the claim for relief is decided in favour of Nick and Sarah, (2) where an offer is made that Counsel or a solicitor advises should be accepted and (3) any other offer is accepted.

286. It is plain from Nick's file note of 19th November 2010 that he was aware of the basic operation of the ATE policy. He was aware that the premium was 91% of his parents' costs. He was also aware that he would have to pay irrecoverable costs and that no premium was payable if he lost.

287. Both Nick and Sarah were also sent (on a number of occasions) the Key Facts Document which contains a whole section on the payment of premium. It makes the point that the premium is deferred and only payable if they succeeded. It refers expressly to the definition of success in the policy.

288. In evidence Nick suggested that he was unaware that the premium was deferred and that he was expecting to be charged the premium. I do not accept that evidence. I am quite satisfied that Nick understood that it was an integral part of the ATE policy that the premium was deferred.

289. Whilst there is no express statement in the Key Facts document that the premium is payable in the event of a settlement a moment's thought would indicate that it would be payable. Otherwise the premium could be avoided by a settlement at the doors of the Court. The Key facts document did however in clear terms cross refer to the definition of success in the policy.

290. In my view the advice given to Nick and Sarah did not fall below what could be expected from a reasonably competent solicitor.

Demands and Needs

291. Solicitors are subject to the Solicitors Financial Services (Conduct of Business) Rules 2001 and, as such, have to comply with Appendix 1. This deals with 3 matters:

(1) Disclosure of certain information;

This includes a duty to inform the client whether he has given advice on the basis of a "fair analysis" of a sufficiently large number of insurance contracts on the market to enable him to make a recommendation regarding a product which is adequate to meet client needs (Article 1)

(2) They must consider whether the ATE insurance is suitable.

Before recommending an ATE policy the solicitor must take reasonable steps to ensure the recommendation is suitable to the client's needs and demands (Article 2).

(3) They must prepare a "demands and needs" statement.

The demands and needs statement must be given to the client before the contract of insurance is finalised and must be on paper of some other durable form (Article 3).

292. The covering letter of 7th January 2010 contained in its final section information which purported to comply with HP's obligation. It asserted:

1. that Mr Davies did not believe that Nick or Sarah had any existing policy which would cover proceedings against Nick's parents.
2. that Mr Davies had spoken to First Assist and obtained a quotation from them for ATE insurance cover
3. the premium payable is in principle recoverable from the other side as part of any costs awarded though the exact amount may be reduced by the Court
4. It does not appear to Mr Davies that they have any other way of funding the litigation beyond insurance and a conditional fee agreement. He did not consider any other method of funding to be appropriate either for HP's fees or for adverse costs.

293. Miss Anderson QC levelled a number of criticisms at Mr Davies. First he had failed to conduct a survey of the ATE market and had simply chosen First Assist as the provider. Mr Davies accepted that he had not. As against that no evidence has been adduced that any other policy would have been more suitable or cheaper.

294. It was suggested that Nick and Sarah might have been able to fund the litigation by selling assets. At the first meeting Nick had said that he was asset rich but did not have ready cash. However Nick and Sarah have not provided any evidence of the value of such assets or how else they could have funded the litigation. More important they never challenged Mr Davies' belief that any other method of funding was appropriate.

295. It is said that Mr Davies ought to have advised Nick and Sarah to continue attempting to negotiate terms with Nick's parents. To my mind this is wholly unrealistic. The Heads of Terms were agreed in April 2009. GW was instructed in relation to it. GW had been unable to persuade Nick's parents to complete. By the end of September 2009 Nick had been suspended, GW had written terminating the Heads of Terms, and both GW and HP wrote advising in relation to unfair prejudice proceedings. It is to my mind completely unrealistic to suggest that Mr Davies should have advised Nick to continue to negotiate.

296. To my mind the covering letter is a "demands and needs" statement within the regulation. Whilst there may have been a technical breach of Article 1 in that Mr Davies did not carry out a survey of the market, I am satisfied this made no difference. In any event the allegation that Mr Davies did not survey the market is not specifically pleaded.

297. In my view Mr Davies did take reasonable steps to ensure that the ATE policy was suitable for Nick and Sarah's needs.

Costs

298. Nick and Sarah allege that HP failed to give advice about the future costs and failed to advise that there was a risk that the cost of litigation would outweigh the benefits. Second they allege that HP failed to provide reasonably accurate and frequent estimates of past costs and costs to be incurred. As a result HP failed to give Nick and Sarah any form of on going cost-benefit analysis.

299. Before considering these points in detail it is worth making a number of points:

1. This was litigation conducted under a CFA with an ATE. Thus Nick and Sarah would not be liable for costs or the premium if they lost. They would only be liable if they "succeeded". If they succeeded after litigation there was a reasonable prospect that they would recover most of their costs from Nick's parents. If they compromised the costs would no doubt be a factor in the compromise. Thus the notion of a cost benefit analysis has to be seen in the light of this.
2. If the compromise following the mediation had been completed Nick and Sarah would have received between £1.1 and £1.2 million for their shares payable over 6 years after the payment of their costs. It is difficult to see that it can be said the cost thereby outweighed the benefits.

300. During the course of the trial Dr Friston and Mr Tankel helpfully produced a Schedule recording the dates and the details of those occasions when advice about funding was given or said to have been given. I shall not lengthen this judgment by summarising it. I have included as an Appendix to this judgment my comments on the disputed items. In general I have accepted HP's evidence as to when Nick and Sarah were informed.

301. The original cost estimate was that the costs would be of the order of £100,000 each side. That estimate was similar to the estimate given by GW in the letter of 30th September 2009. Furthermore Ms O'Neill described it as reasonable. No evidence has been adduced that a reasonably competent solicitor with the information provided by Nick ought to have given a higher estimate as at October/November 2009. The letter of engagement sent on 16th December 2009 made it clear that it was very difficult at that stage to give a meaningful assessment of the costs. I accordingly reject the claim that the original costs estimate was negligently given.

302. In the light of my findings on the Schedule I am satisfied that Nick and Sarah were kept up to date with the costs that were being incurred on a regular and relatively frequent basis.

303. I reject the allegations of negligence relating to costs.

12 Entry into and/or Continuance with the CFA

304. In the light of my findings on the negligence issue this issue (Issue 12) does not arise. It is in fact dealt with very shortly in Miss Anderson QC and Dr Friston closing submissions. They invite me to accept the evidence of Nick and Sarah.

305. To my mind the CFA did meet Nick and Sarah's needs. They hoped to recover the ATE premium (or most of it) and the uplift from Barry and Marlene. They did not have the cash to fund the litigation. I am wholly unimpressed with the suggestion that they would have sought to re-open negotiations with Barry and Marlene. The only realistic course was the CFA and the ATE policy.

306. I regret therefore that I do not accept Nick and Sarah's evidence on this point.

13 Quantum meruit

307. Where, as here, the contract has come to an end as a result of the acceptance of Nick and Sarah's repudiatory breach of contract Mr Edwards and Mr Tankel submit that HP is entitled to elect between a claim for quantum meruit and damages for breach of contract.

308. They rely on three main cases where a claim for quantum meruit has succeeded – Planche v Colburn (1831) 8 Bing 14; Chandler v Boswell [1936] 3 ARE 179 and Myers v

Macmillan (unreported March 3 1998). They also referred me to Goff & Jones on the Law of Unjust Enrichment 8th Ed at paragraphs 5-21 to 5-26.

309. Miss Anderson QC does not accept that quantum meruit is open to HP. Its remedy is limited to a claim for damages. She points out that the reasoning in two of the cases cited has been criticised [See footnote 62 and the text in paragraph 5-33] She drew my attention to the decision of Cooke J in Taylor v Motability Finance [2004] EWHC 2619 (Comm). In paragraphs 24 and 25 Cooke J said:

> 24. The decisions of the House of Lords in Johnson v Agnew [1980] AC 3677, Photo Products v Securicor Transport [1980] AC 827 and Lep Air Services Limited v Rolloswin Investments Limited [1973] AC 331 establish the position where there is a repudiation of the contract which is accepted or which is effective to bring the contract to an end. In those circumstances the contract is not rescinded ab initio, but future obligations are discharged from the moment the contract comes to end. All accrued rights remain in being and, so far as executory elements are concerned, the primary obligation to perform is replaced by a secondary obligation to pay damages.
>
> 25. The position is wholly different from that where money is paid for a consideration which wholly fails. In such a case there is a total failure of consideration and the money is recoverable. Although this means that the payer may escape from the consequences of a bad bargain, there is no room for extending this to a situation where both parties have performed substantially and there is a full and adequate remedy for breach of contract which will compensate the Claimant for any loss suffered. The point is clearly set out in Goff & Jones – The Law of Restitution at paragraphs 20 – 007 and between paragraphs 20 – 019 and 20 – 023. The authors there say that there is no English authority to suggest that an innocent party, who has rendered services or supplied goods, may elect to sue in restitution if he has performed or substantially performed his part of the contract. If therefore he can claim under the contract whether in debt or in damages, that is the true measure of his entitlement, because it is that which he bargained for. If it were otherwise, not only would the Claimant be able to recover more than his contractual entitlement in respect of bonus, but he could also seek to establish that he was underpaid in terms of salary, despite his agreement thereto.

310. To my mind there is considerable force in Miss Anderson QC's submissions. The cases cited by Mr Edwards are distinguishable because none of them involved a conditional right to payment. Suppose for example it had become clear that Nick and Sarah were going to lose. In that event HP would be entitled to no fee. Can it really be right that if Nick and Sarah had repudiated the contract in that situation that HP would be entitled to a quantum meruit?

311. In my view where there is only a conditional right to payment the cases cited by Mr Edwards do not compel me to hold that there is a right to a quantum meruit. In those circumstances I prefer the more principled approach of Cooke J in the paragraphs cited above. A similar situation arises in the case of an estate agent where the conditions necessary for the payment of commission are not met. He cannot claim payment under a quantum meruit.

312. I accordingly reject the claim for a quantum meruit.

14 Damages

313. As no settlement had been reached at the date of the acceptance of Nick and Sarah's repudiatory breach there was no entitlement to the payment of either HP's base costs or its success fee at that time.

314. However the effect of the breach was to deprive HP of the chance to earn its fee if Nick and Sarah were successful within the meaning of cl 4.2 of the CFA. Success covers 2

situations. The first is if Nick and Sarah obtain an order against Barry and Marlene. Such an order would include an order that they purchase Nick and Sarah's shares. The second situation is the agreement of a settlement with Barry and Marlene.

315. A settlement is defined as including

> "a legally enforceable settlement of the claim or … agree to cease any legal proceedings against the Defendant in return for consideration whether by consent order or otherwise during the Agreement."

316. The law relating to the assessment of damages in a loss of a chance case is set out in Chitty on Contracts at paragraph 26-070:

> Where the Claimant claims that in the absence of a breach of contract by the Defendant the third party would have acted in a particular way so as to benefit the Claimant he need not prove that hypothetical action on the balance of probabilities. Provided the Claimant can prove that in the absence of breach there was a real or substantial chance of the third party's action, the court must assess the chance of that action resulting (usually as a percentage) and then discount the Claimant's damages by reference to that percentage.

317. In this case therefore provided I am satisfied that there was a real chance that Nick and Sarah would have been successful within the meaning of clause 4.2 of the CFA I must assess the chance of such success and apply an appropriate discount to the fees that would have been earned thereby.

318. If the case had gone to trial the only material before me on which to assess success is the assessment made by Mr Davies of 60%. I was not shown any advice from Counsel suggesting that that prospect had increased. However I think it highly unlikely that the case would ever have come to trial. I think it virtually certain that some form of settlement would have been achieved prior to trial. I say that for the following reasons:

1. The parties were close to settlement in the negotiations following the mediation. Barry had indicated that he was keen to settle.
2. Between May 2011 and October 2011 Nick was actively looking for ways to settle the case including the investigation of raising finance.
3. In September and October 2011 Nick and Sarah repeatedly instructed HP to apply for the hearing date to be adjourned to explore settlement.
4. Nick had expressed repeated concerns about Sarah's health. That was a prime reason why he settled the employment claim. According to Mr Pickering there were concerns about the health of Barry and Marlene.
5. A settlement was in fact achieved in early November 2011.

319. Footnote 355 in paragraph 26-070 suggests that no discount is appropriate if it is certain what the third party would have done. It is to my mind arguable that is the position here. In the end I cannot be quite certain that there would have been a settlement and in those circumstances I propose to allow a very small discount of 5%.

320. In the circumstances I assess the damages for the breach as the sum of the assessed costs and the success fee as at the date of the breach discounted by 5%. By agreement between the parties the assessment will be carried out by a costs judge.

15 Conclusion

321. In the result the Claim succeeds and the Counterclaim fails. As I noted during the course of argument there are a number of by no mean straightforward points of law in this judgment and, I would provisionally be prepared to grant permission to either side to appeal.

322. I cannot leave this case without expressing my gratitude to Counsel for the detailed and helpful skeleton arguments and submissions that have been made in this case.

323. I hope that I have dealt with all of the points raised in the 15 agreed issues. If not Counsel will no doubt draw any omissions to my attention before this judgment is formally handed down.