Neutral Citation Number: [2022] EWHC 2201(TCC)

Case No: HT-2021-000498

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 August 2022

Before :

MRS JUSTICE JEFFORD DBE

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Between :

LIBERTY HOMES (KENT) LIMITED **Claimant**

- and –

(1) KANAGARATNAM RAJAKANTHAN
(2) DONATA RAJAKANTHAN
(3) KANAGARATNAM RAJAMOGAN
(4) JANE RAJAMOGAN
(5) RICHARD SUREN RAJAMOGAN
(6) NATALIE REKA DOWDING
(7) FOREST DOWDING
(8) JASON RAJAMOGAN
(9) RUTH RAJAMOGAN
(10) NICHOLAS JAMES CARE HOMES LIMITED
(11) REGAL CARE TRADING LIMITED
(12) JRN GARAGES LIMITED
(13) UNIQUEHELP LIMITED

Defendants

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Michael Levenstein (instructed by **Furley Page LLP**) for the **Claimant/ Respondent**
Daniel Churcher (instructed by **Thomson Snell & Passmore LLP**) for the **First, Tenth, Eleventh and Thirteenth Defendants/ Applicants**

Hearing date: 19 July 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by e-mail and release to The National archives. The date and time for handdown is deemed to be 10.30am on 19 August 2022.

Mrs Justice Jefford DBE:

Introduction

1. This litigation concerns, in effect, two families who have done business together and socialised together for many years but in about 2020 fell out and become embroiled in multiple disputes. David and Pauline Caulfield operate their business interests through a group of companies all or mostly with Liberty in their name and including the claimant company which is described in the Particulars of Claim as principally a building contractor of domestic buildings. I shall refer to the claimant as "Liberty Homes". The first defendant, Kanagaratnam Rajakanthan, and the third defendant, Kanagaratnam Rajamogan, are brothers. The further defendants are all related to these two defendants or are companies associated with them or their relatives.

2. This judgment concerns two applications made on behalf of the first, tenth, eleventh and thirteenth defendants only, although there is a potential impact on other defendants of the outcome of these applications. The tenth, eleventh and thirteenth defendants are all companies of which Mr Ragakanthan is a director and which operate or have operated care homes. In this judgment, when I refer to "the defendants" without any qualification, I am referring to these four defendants who make the applications. I shall refer to the tenth defendant as NJCH, the eleventh defendant as RCTL and the thirteenth defendant as Uniquehelp.

3. Because of the potential impact of the outcome of the applications on the remaining defendants, prior to the hearing of this application, the court granted extensions of time to the remaining defendants for the filing of their defences to 3 weeks after the hearing of the application to strike out the claimant's Particulars of Claim. At the conclusion of the oral hearing on 19 July 2022 I made it clear that the hearing would not be concluded until I had delivered judgment so that, until then, time did not start to run for the purpose of the filing of defences; alternatively, and if necessary, I further extended time for the filing of defences to 21 days after the handing down of judgment. That is, of course, subject to such further directions as will be made in consequence of this judgment.

The applications

4. The defendants make two applications:

   (i) The first is to strike out the claimants' Particulars of Claim, or portions thereof, and/or for summary judgment on certain claims. The draft Order provided with the application identifies those claims as (i) all claims against Mr Ragakanthan which allege that he was guarantor for one or more of the other defendants; (ii) all claims against the defendants in unjust enrichment; (iii) the claim described as "Assorted Care Home Works and Services"; and (iv) the global claim in the sum of £2,588,813 plus VAT, alternatively £2,627,019 plus VAT. The last of these, whether or not properly described as a global claim, captures the claim described as "All Claims" in the Particulars of Claim. "All Claims" itself encompasses all the separate claims made.
   (ii) The second application is for security for costs. The application is expressly for security by way of payment into court.

5. The discrete claims made are referred to in the Particulars of Claim – and in the order in which they appear in Part 3 (Factual Background) as Four Oaks, Consultancy Claim, Rent Claim, 129 Foxley Lane and 129A Foxley Lane, Loan Claim, 14 Arden Grove, and Assorted Care Home Works and Services. I deal with the nature of these claims below.

The story so far

6. The demise of the amicable working relationship between the claimant and the defendants is set out in the judgment of O'Farrell J in *Nicholas James Care Homes Ltd. v Liberty Homes (Kent) Ltd.* [2022] EWHC 1203 (TCC) and is not repeated here. This formed the background to an adjudication commenced by Liberty Homes against NJCH.

7. The claimant's case, which is set out in the Particulars of Claim by way of background information only was that, from 2017, it had carried out substantial building works for NJCH at a care home known as Beacon Hill Lodge. Liberty Homes' last two payment applications (nos. 23 and 24) had not been paid. The claimant commenced the adjudication in October 2020. The adjudicator gave his decision on 2 December 2020 ordering NJCH to pay the full amount of the applications, namely £274,698.04. Although the adjudicator made some findings as to sums paid, he did not decide the value of work done and his decision as to the sum to be paid followed from the absence of payment notices. NJCH initially failed to pay and Liberty Homes commenced enforcement proceedings in this court against NJCH (under case number HT-2021-000001). The proceedings were transferred to the Central London County Court and appear thereafter to have been compromised by NJCH paying the full amount due, together with the costs of the enforcement proceedings, on 25 February 2021.

8. In order for the adjudication to have proceeded, there must have been a contract between Liberty Homes and NJCH. The Notice to Refer which formed an Annex to the Particulars of Claim in the enforcement proceedings alleged that there was a contract made on 2 March 2017 which incorporated a JCT Standard Form of Design and Build

Contract (2011). What this makes clear is that despite the formerly amicable relationship between the claimant and the defendants, some of them at least have entered into formal contracts and certainly contracts that are capable of being set out with some degree of particularity. In his skeleton argument, Mr Levenstein for the claimant, also makes the point that NJCH has never denied the existence of that contract or impugned its validity.

9. In summary, and following the adjudication enforcement proceedings, it appears that that contract was terminated; that the claimant's position is that it was NJCH that unlawfully terminated the contract; and that there may be further claims arising out of the termination. The claimant has also indicated further claims in respect of professional services on this project. None of this, however, forms part of the present claim.

10. On 14 July 2021, Liberty Homes' solicitors sent to all of the defendants, with the exception of Uniquehelp, a letter of claim. The letters of claim were all in identical terms. The letter advanced all of the claims which are the subject matter of these proceedings, in very similar terms to those of the Particulars of Claim, together with claims in respect of Beacon Hill Lodge for professional services and loss of profit. At paragraph 24, it was asserted that the primary legal basis for Liberty Homes' claims was breach of contract; rights to payment were also asserted; and there were said to be alternative bases of claim in restitution.

11. In the context of the application to strike out, two aspects of this letter stand out.

12. Firstly, paragraph 25 said this:

"For the avoidance of doubt, none of the defendants will be able to raise any arguable defence on the basis of any lack of contractual formality. In particular, the terms of each agreement were sufficiently certain, including with respect to the scope of works and/or services to be provided".

That was a clear indication that the claimant had a positive case as to each agreement alleged to have been entered into with each defendant and a case which encompassed the terms of such contracts, in particular in relation to the scope of works and services to be provided and, it might reasonably be inferred, actually provided. Leaving aside the Beacon Hill Lodge claims, the letter, at paragraph 10, said that it annexed a final account valuation for Four Oaks; a Consultancy Services Valuation for Regal Care Trading; a Valuation for 129 Foxley Lane; a Valuation for 129A Foxley Lane; a Valuation for 14 Arden Grove; and a "Schedule of Care Home related Works, Valuation and Supporting Invoices". These valuations were said to have been made by a quantity surveyor, Mr Harrison, and the provision of these documents would seem to have been consistent with the claimant's position that there was a clear scope of works to be undertaken, and in fact undertaken, on each project, which enabled such valuations to be made.

13. Secondly, and somewhat inconsistently with the statement that none of the defendants would have any defence based on informality, at paragraph 48 the solicitors said this:

"We accept there is some ambiguity with respect to the exact liabilities of certain of the defendants. For the most part, such ambiguity has arisen due to the defendants' own

conduct, including (a) acting as each other's agents (whether authorised to do so or not); (b) assuming each other's liabilities (whether authorised to do so or not); and (c) failure to keep and provide adequate contractual documentation and payment records. For completeness, therefore, all parties presently considered to owe sums to Liberty Homes have been included in this letter."

14. Beyond this general statement about defendants assuming each others' liabilities, and with one exception, there was no case put forward that Mr Rajakanthan had guaranteed any payments by other defendants. The exception was the Loan Claim in respect of which it was said that *"Mr Rajakanthan had personally guaranteed Liberty Homes' loan (and has since erroneously claimed to have repaid it"*.

15. By letter dated 20 August 2021, Thomson Snell & Passmore responded on behalf of the first defendant, the tenth defendant and the eleventh defendant. At the beginning of the response, they took issue with whether the letter of claim complied with the Pre-action Protocol and they complained about its lack of particularisation. They said that, where appropriate, they set out their clients' requests for further information and that in some instances they were unable to respond fully because of the absence of particulars.

16. The response that followed was nonetheless lengthy. The defendants were undoubtedly able to give an account of their case in relation to each of the claims made and to advance a positive case that the claimant had been overpaid by £2,642,587.85. I was told at the hearing that there were 114 pages of enclosure which included final valuations. In his statement in respect of the applications, Mr Crofton-Martin, the claimant's solicitor, says that these enclosures included a valuation of works at Four Oaks and 14 Arden Grove. The other enclosures were concerned with Beacon Hill Lodge. In paragraph 17 of the letter of response a number of specific requests for further information were made. Some of these requests related to the breakdown of the sums claimed but they did not generally relate to the identification of the contracting parties, the formation of any contracts, or the terms of any contracts. The exception was a specific request for full particulars of the basis on which it was said that the second defendant, Mrs Rajakanthan, was party to the contract relating to the property known as Four Oaks.

17. Each of the further defendants responded to the letter of claim sent to them. The third and fourth defendants, Mr and Mrs Rajamogan, responded by letter dated 11 August 2021. In respect of the Loan Claim, they said that Mr Rajakanthan had already stated in writing to Mr Caulfield and to his solicitors that he was responsible for all the Rajamogans' debts to Mr Caulfield and had given his guarantee to pay. In respect of 14 Arden Grove, they said that they had not had funds to instruct any works and the instructions had come from Mr Rajakanthan. In respect of Foxley Lane, they also said that Mr Rajakanthan had agreed to pay for the works and agreed that a sum of £332,865.52 was owed.

18. In October 2021, NJCH referred to adjudication a dispute as to the true value of the work done under the Beacon Hill Lodge contract, claiming that it had overpaid Liberty Homes and seeking repayment. Liberty Homes raised various jurisdictional challenges which were rejected by the adjudicator. The adjudicator gave his decision on 18 February 2022. He decided that Liberty Homes should repay to NJCH a sum of £2,589,737.76. On 29 March 2022, NJCH commenced proceedings (with case number

HT-2022-000104) to enforce this decision. The claim in those proceedings has not yet been determined and was recently adjourned to a hearing in October 2022.

19. In the meantime, on 21 December 2021, the claimant issued the Claim Form in these proceedings. The Claim Form and Particulars of Claim were served on 20 April 2022.

20. Also in the course of 2020-2022, a number of new "Liberty" companies were incorporated. In August 2020 a new holding company, Liberty Holdings (Kent) Limited was incorporated; in November 2020 Liberty Investments (Kent) Limited was incorporated. Two further companies, Liberty Trade Holdings Limited and Liberty Investment Holdings Limited, were incorporated in February 2022.

21. In November 2020, Liberty Homes transferred ownership of a number of properties to other companies in the group including the new Liberty Holdings (Kent) Ltd. and Liberty Investments (Kent) Ltd. The transfers are set out at [39] in the judgment of O'Farrell J but it is convenient to repeat them here:

    (i) On 10 November 2020, 10 Page Heath Lane Bromley (also known as Liberty Court), with a stated value of £3.69 million was transferred to Liberty Holdings (Kent) Ltd.
    (ii) On 12 November 2020, Courtways, Holwood Park Avenue, Orpington, with a stated value of £1,663,790, was transferred to Liberty GB Ltd.
    (iii) On 19 November 2020, 12 Page Heath Lane, Bromley, with a stated value of £910,000, as transferred to Liberty GB Ltd.
    (iv) On 19 November 2020, 126 Main Road, Biggin Hill and land next to 134 Main Road was transferred to Liberty GB Ltd.
    (v) On 25 November 2020, Knoll Court, 18 Station Road, Orpington was transferred to Liberty Investments (Kent) Ltd.
    (vi) On 25 November 2020, Flat 2, Page Heath Court, Bromley, with a value of £413,924 was transferred to Liberty Investments (Kent) Ltd.

22. Although it was submitted to me by the claimant that these values were ones provided by or accepted by Mr Rajakanthan, he states in the affidavit referred to below, that they were taken from the office copy entries on the register.

23. All of these transfers were for no consideration. It was, and is, Liberty Homes' case that they were part of a corporate restructuring.

24. These adjudication enforcement proceedings and these transfers of property, formed the background to an application by NJCH for a freezing injunction. That application was made without notice on 21 April 2022, the day following service of the Claim Form and Particulars of Claim, and was supported by an affidavit of Mr Rajakanthan. Mr Rajakanthan's evidence was that he had become aware that Liberty Homes had transferred ownership of a number of properties to other companies within the Liberty group of companies. An interim injunction was granted by O'Farrell J which prohibited Liberty Homes from disposing of assets up to a value of £2,903,755.60. The injunction specified that that prohibition extended to a number of identified properties, some of which had already been transferred to other companies. There were the usual exceptions to the injunction including that the order did not prohibit Liberty Homes from dealing with or disposing of any assets in the ordinary and proper course of

business. That was qualified by a provision that, if the transaction exceeded £10,000 in value, NJCH's legal representatives must be given two business days notice. The purpose of that provision was to allow NJCH to raise any objection to the transaction and bring the matter before the court.

25. The return date for the freezing injunction was 9 May 2022. O'Farrell J reserved judgment. In her written judgment she continued the injunction.

26. The claimant now alleges that Mr Rajakanthan failed in his duty of full and frank disclosure, in that he was aware of the transfer of properties from Liberty Homes to other companies many months before the application for the injunction. Delay in making the application had been a matter relied on by Liberty Homes as a reason the freezing injunction should not be granted. The claimant now seeks to discharge the injunction. That application is to be heard at the same time as the adjourned enforcement proceedings in October 2022.

The application to strike out

Particulars of Claim

27. To address the first application, it is necessary to set out in some detail the structure and content of the Particulars of Claim.

28. The Particulars of Claim are divided into 5 parts: (i) Part 1 – Parties; (ii) Part 2 – Overview of Claims; (iii) Part 3 - Factual Background; (iv) Part 4 – Particulars of Each Claim; (v) Part 5 – Summary of Claims and Relief Sought. Part 4 is itself divided into Sections A to G which are given the headings (A) Four Oaks; (B) Foxley Lane; (C) Assorted Care Home Works and Services; (D) Loan Claim; (E) Consulting Claim; (F) Rent Claim; and (G) 14 Arden Grove.

Part 2

29. Part 2 starts with paragraph 11 which explains that:

> *"Most of the claims arise of out unpaid works and services carried out over several years and relating to various matters. Those matters include building projects and repair and maintenance agreements ("Final Account Claims") as well as consultancy services ("Consultancy Claim") ...."*
>
> A right to payment is asserted under the Housing Grants, Construction and Regeneration Act 1996 and the Scheme and under terms implied by section 15 of the Supply of Goods and Services Act 1982 and section 51 of the Consumer Rights Act 2015.

30. The paragraphs that follow also give a brief description of the Loan Claim and the Rent Claim.

31. As I said above, the entirety of the claims are referred to as "All Claims". At paragraph 17, Liberty Homes pleads that the primary legal basis for All Claims is breach of contract. At paragraph 20, Liberty Homes pleads, inconsistently, that its primary position is that each claim is a debt claim and that its secondary position is that the claims are a combination of debt and damages claims. At paragraph 23, Liberty

pleads, further or in the alternative, that *"the goods, services and/or monies provided give rise to a claim in restitution to the extent that any of the defendants were enriched at the expense of Liberty …. Such rights and remedies exist in respect of All Claims"*.

32. As set out above, two alternative figures are pleaded as the total sum due and it is averred that the computation of those figures relies on comprehensive quantity surveying valuations supported by extensive contemporaneous and expert evidence. Given that this is a section of the Particulars of Claim headed Overview of Claims, one might have expected to see the computation of these figures set out with greater particularity in the later parts of this statement of case but, as I explain below, that is not the case.

Parts 3 and 4

33. Part 3, headed Factual Background, is the part of the pleading in which the Liberty sets out its case as to the contractual relationship or other relationship that gives rise to its claims. It is not set out in exactly the same order as the claims in Part 4. In Part 4, three claims (in respect of Four Oaks, Foxley Lane and Assorted Care Home Works and Services) are grouped together and described as Final Account claims. It is, to my mind, helpful to consider them in this grouping and to address the other claims in the order of Part 4.

Four Oaks

34. Paragraph 33 sets out Liberty Homes' case as to the contract in respect of the property known as Four Oaks at 12 Park Avenue, Farnborough Park, Orpington, Kent as follows:

> *"Kanagaratnam and Donata Rajakanthan reside at Four Oaks. They personally contracted with Liberty for the demolition of the original property at 12 Park Avenue and for the design, construction and project management of a 12,500 square foot luxury dwelling in or around March 2011. The initial contract price was estimated at £2,037,590.36 and contained various provisional sums . Throughout the course of the project, Donata Rajakanthan frequently instructed variations to Liberty's original scope of works. Kanagaratnam and Donata Rajakanthan moved back into their property in late 2015 and building control certified the works in early 2016. By the time of completion, numerous variations had been instructed, significantly increasing the final contract sum. ….. As per Liberty's final account, substantial sums remain outstanding <u>and which are detailed below</u>….."* [emphasis added]
>
> The paragraph further sets out Liberty Homes' case that invoices were paid by the tenth defendant, NJCH, and that a "line of credit" was extended by due dates for payment being deferred.

35. The promised detail below appears in paragraph 56 in Part 4 of the Particulars of Claim which states that "a comprehensive Final Account" has been prepared for Four Oaks which values the works at nearly £4.5 million of which £1,408,542 is said to be outstanding. The valuation is said to rely on "*inter alia, the original works schedule, schedule of provisional sums (versus actual costs), schedule of variations and contemporaneous records (including invoices, photographs and architectural drawings)"*.

36. At paragraph 57, the said sum of £1,408,542 is claimed as loss and damage and/or in unjust enrichment. That claim is made as against the first, second and tenth defendants. Later, in Part 5 of the Particulars of Claim under the heading "Summary of Claims and Relief Sought", the sum of £1,408,542 or such other sum as the court shall find due appears to be claimed as a debt claim. In the alternative, the claimant repeats the claim for damages or for "restitution and/or unjust enrichment". The claimant adds additional bases of claim described as quantum meruit or quantum valebat and lastly claims a declaration as to the true valuation of Liberty's final account "whether assessed under the terms of the Contract or the Scheme for Construction Contracts 1998".

The basis of the application to strike out

37. The CPR at Part 3.4 provides a number of bases on which the Court may strike out a statement of case. These include that it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim (sub-paragraph (a) and that there has been a failure to comply with a rule, practice direction or court order (sub-paragraph (c)). The defendants' application relies on both these sub-paragraphs.

38. In respect of the Final Account Claims (Four Oaks, Foxley Lane and Assorted Care Home Works and Services), the pre-action correspondence between the claimant, the defendants and the remaining defendants included the provision of final accounts which the defendants were able to some extent to respond to. The Rajamogans, in particular, accepted that some sum was due in respect of Foxley Lane but not from them. Although there may be many criticisms to be made of the Particulars of Claim, it would be difficult to conclude, at least so far as the parties said to be in contract with Liberty Homes are concerned, that the Particulars of Claim disclosed no reasonable grounds for bringing the claims or that the court ought to exercise its discretion to strike out the claim as a whole. By the same token, the court would not give summary judgment for the defendants on these claims.

39. That was accepted by Mr Churcher, on behalf of the defendants, from the outset of the hearing, and accordingly his oral submissions focussed on the non-compliance of the Particulars of Claim with the rules and Practice Direction. In other words, he accepted that the court could strike out the some or all of the Particulars of Claim without striking out the claim itself and giving the claimant the opportunity to set out its claim in a compliant manner. The statement of Mr Kirby-Turner, the defendants' solicitor, in support of the application, also contemplated that the order the court might make was one that required the claimant to re-plead its case. Mr Churcher emphasised, however, that even in respect of the final account claims, his concession did not extend to the claims in restitution.

Four Oaks

Submissions in respect of Four Oaks

40. Part 16.4(1) provides that the Particulars of Claim must include *"a concise statement of the facts on which the claimant relies"* (sub-paragraph (a)) and *"such other matters as may be set out in a practice direction."*

41. The Practice Direction to Part 16 at paragraph 7 sets out matters which must be included in the Particulars of Claim where the claim is based on an agreement:

"7.3 Where a claim is based upon a written agreement:

(1) a copy of the contract or documents constituting the agreement should be attached to or served with the particulars of claim ....., and

....

7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual claim used and state by whom, to whom, when and where they were spoken.

7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done."

42. The rules and Practice Direction together provide that the Particulars of Claim must set out a concise statement of the claimant's case and, where it is based on an agreement, must provide the particulars or details specified in the Practice Direction. It is implicit that the Particulars of Claim must set out the claimant's case as to whether the agreement is oral or in writing or made by conduct or some combination.

43. The defendants' submission is that the Particulars of Claim in respect of Four Oaks does not comply with the rules in that it fails to set out a concise statement of the facts on which the claimant relies and fails to comply with paragraph 7 of the Practice Direction, starting with a failure even to state whether the contract is oral or in writing.

44. In response, Mr Levenstein, for the claimant first focussed on the alleged non-compliance with the Practice Direction. His submissions were predicated on the pleaded contract being an oral contract. He submitted that the parties who made the contract were identified, the date of making the contract was identified, the subject matter of the contract was identified and the key terms and contractual works were set out. He submitted that the words used were set out because it would be seen from the Particulars of Claim that the gist of them was a request from the first and second defendants to Liberty Homes to demolish one property and design, construct and project manage the provision of a luxury dwelling with a specified square footage. There may have been a technical breach of the Practice Direction in the omission of the location where this contract was made but, he submitted, the addition of that detail would add nothing of assistance to the court and its absence would not be a sufficient reason to strike out the pleading.

45. So far as the concise statement of the claimant's case was concerned, Mr Levenstein submitted that the Particulars of Claim did give a concise statement of the nature of the case and that it would be disproportionate and/or unhelpful to have annexed the final account relied upon or to have set out in schedule form or some other form all the elements of the final account. He submitted that the defendants had already been provided with these details of the claim and had been able to respond substantively in correspondence. He submitted that a detailed breakdown of the claim was not required in the Particulars of Claim and that that would be a matter for the exchange of expert evidence.

46. In respect of both the complained of non-compliance with the rules and the Practice direction, Mr Levenstein's submission was that, if the defendants truly considered that they were unable to respond to this case without further information, it was open to them to make a request for further information under Part 18. They had not done so. The letter of response did not seek the information which the defendants now said was absent from the Particulars of Claim. Nor had the defendants pleaded a defence which, he submitted, could have consisted of bare denials and put the claimant to proof.

Discussion

47. Starting with the Practice Direction, even if I accepted the premise of the claimant's submission, namely that they had pleaded an oral contract, I would not consider this pleading of the contract to comply with the Practice Direction. Paragraph 33 does not set out the words used and they should not be a matter of inference as they can only be in this case. Most importantly, it is clear from the paragraph as a whole that the claimant has some case as to the original scope of contract works and services, the original contract sum (which is confusingly said both to be a price and to be estimated) and the build up of that contract sum (including provisional sums) but virtually none of that is set out and certainly not what either of the first or second defendants and Mr Caulfield on behalf of Liberty Homes is alleged to have said in that respect.

48. In any event, the Particulars of Claim do not state that the contract was an oral one and there is good reason to think that it was not. Even allowing for any relative informality with which these parties conducted themselves, the references to a scope of works, to an initial contract price and to provisional sums suggests that there were documents which were incorporated into the contract and that this contract was, at the least, one partly in writing or partly evidenced in writing. The Particulars of Claim wholly fail to identify these documents. It is almost inconceivable that the precise initial contract price of £2,037,590.36 was not set out in a document and by reference to specific works and services. Further, it is difficult to see how the final account relied upon could have been drawn up without such documents.

49. None of these matters is a merely technical breach, if there is such a thing, although they may be relatively easily curable. Without this information, neither the defendants nor the court can know what the claimant's case is as to the terms of the contract in respect of the scope of works which it is said Liberty Homes agreed to carry out nor what Liberty Homes was to be paid for those works. It follows from that that it is not possible to know the claimant's case as to what were the varied works and it is entirely unclear what the claimant's case is as to payment for variations. It may be that the claimant relies on the implied terms in section 15 of the Supply of Goods and Services Act 1982 and section 51 of the Consumer Rights Act 2015 but, in the absence of any pleading of the express terms of the contract, one cannot know.

50. I note, in passing, that the claimant also relies in paragraphs 12 and 82.2.5 of the Particulars of Claim on the Scheme as relevant to the assessment of the amount due on its final account. Firstly, the contract was one for the construction of a residential property to be occupied by Mr and Mrs Rajakanthan and the Act and the Scheme do not apply (see section 106). Secondly, the Act and the Scheme are concerned with time for

payment and not with the amount to be paid other than in the sense of the amounts of interim or stage payments.

51. So far as the concise statement of the claimant's case is concerned, the issue of what is a concise statement of the claimant's case involves an element of judgment. The rules do not invite a rambling narrative but equally they do not allow for a statement of case that amounts to little more than as assertion that the defendant owes the claimant a specified sum of money. As the White Book says at note 16.4.1, the claimant should state all the facts necessary for a completed cause of action. What those facts are will vary from case to case.

52. The purpose of the rules is well summarised in the decision of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm) at [18] and [19], explaining the purpose of the particulars of claim in terms of the understanding of the claim by both the defendant and the court:

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

19. It is not fair and just that the Defendant cannot be sure of the case he has to meet. ... If the Amended Particulars of Claim are not struck out there is a very real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, that he will be impeded in his defence of allegations which are pursued and that the Court will not be sure of the case which it must decide."

53. Although it was not cited to me, the observations of Coulson J, as he then was, in *Pantelli Associates Ltd v Corporate City Developments No 2 Ltd* [2010] EWHC 3189 (TCC) are also pertinent. In that case, a claim in professional negligence gave particulars of breach in the most general terms, in effect, placing the words "failed to" in front of contractual obligations. At [11] he said this:

"CPR 16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are "the facts" relied on in support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which address the specific allegations made."

54. In *Building Design Partnership Ltd. v Standard Life Ltd.* [2021] EWCA Civ 1973, Coulson LJ pointed out that this passage was not to be read as if it was confined to professional negligence claims and that these were the basic ingredients of any statement of case against a defendant.

55. This was a case in which the main issue the court had to address was the pleading of a claim by advancing a case on the basis of extrapolation. In that context, Coulson LJ warned against the assumption that a construction case had to be pleaded in every last detail and at [92] said:

"*I profoundly disagree with that assumption. The days of the court requiring parties in detailed commercial and construction cases to plead out everything to the nth degree are over. It is not sensible; it is not cost effective; it is not proportionate. The parties, with the assistance of the court if they cannot agree, are duty bound to find a way of trying out the principal issues between them in a sensible and proportionate way. Of course, in certain types of construction dispute, it will be necessary to investigate what Lord Dyson once called "the grinding detail" of such claims, but that investigation should only ever be commensurate with the overriding objective. Pleading out every last detail at the outset of the proceedings should not be regarded as the paradigm method of framing such disputes, particularly if there are more proportionate alternatives which still enable the defendant to know the case that it has to meet."*

56. So far as the claimant's case in contract is concerned:

(i) It must be necessary for the claimant to plead the contract – that includes how the contract was formed and, depending on how it was formed, the particulars required by the Practice Direction.
(ii) These are not just formalities. They enable the defendant and the court to know not only how the contract is alleged to have been formed but what the relevant terms of the contract are, whether express or implied.
(iii) Those terms need to be set out because without them there is no statement of the basis on which the sums said to be due are due, when they became due and how they have been calculated or assessed or ascertained.
(iv) It is unsatisfactory and confusing to advance a case which suggests that there are express terms of the contract relevant to payment – such as the existence of a contract price - but not to set out those express terms and then to rely instead on statutory implied terms.

57. In a case in the nature of a final account claim under a construction contract where there is a contract price for an agreed scope of works but a greater sum is said to be due, there must be some statement of the relevant facts – what additional works were carried out; what sums are claimed for them; the contractual basis for that claim. This may not need to be pleaded "to the nth degree" but without these basic facts there is no concise statement of the facts on which the claimant relies.

58. As I have already indicated above, the claimant's case appears to involve the propositions, firstly, that there was an initial contract sum for a specified scope of work, which included provisional sums and, secondly, that the final account claim includes the actual amounts expended against provisional sum items and that there were

significant additional works and/or services which increased the total amount due in respect of the works done and services supplied by over £2 million. At the risk of repetition, any adequate statement of the claimant's case must set out its case as to the make-up of that additional sum and the basis on which the sums that exceed the contract price are payable. It appears that some of that information is available somewhere and in some form. Paragraph 56 of the Particulars of Claim already refers to an original works schedule, a schedule of provisional sums versus actual costs and a schedule of variations but none of this is set out at all in a form that the defendants can respond to or the court can understand.

59. It is no answer to say that the defendants could have sought further information or pleaded bare denials.

60. It is incumbent on the claimant to comply with the rules and it cannot be right in principle that the burden should pass to the defendant to tease out the claimant's case. As ever there is a question of fact and degree. There may be cases in which a simple request for clarification could have been but was not made and the court will not exercise its discretion to strike out where that course has not been taken, but this is not that case.

61. CPR Part 16.5 deals with the contents of a Defence. The defendant must state which of the allegations in the Particulars of Claim he admits or denies and which he requires the claimant to prove. Where a defendant denies an allegation, he must state his reasons for doing so and, if he intends to put forward a different version of events, he must state his reasons for doing so. The notes to the White Book (note 16.5.1) summarise the rules as requiring "a comprehensive response to the particulars of claim". A Defence comprising entirely of bare denials would not comply with the rules and the suggestion that the applicants or other defendants should have progressed this action by serving defences comprising bare denials is misconceived. Nor is it incumbent on the defendants to respond to what they think the claimant's case is or might be based on correspondence or other extraneous material. As Mr Churcher submitted, the pre-action correspondence does not define the boundaries of the claim in court. In order to comply with the rules, the defendants need to have the claimant's claim set out in the Particulars of Claim. That is also necessary for the court to know the case the claimant advances and, in due course, to understand the defendant's defence.

62. A relevant consideration in the exercise of the court's discretion is also the case management of these proceedings in which regard must be had to the overriding objective. In due course there will be, in this litigation, a Costs and Case Management Conference at which a trial date will be set and directions given leading to trial. As part of that case management, and in accordance with what is now Practice Direction 57AD, if any party seeks Extended Disclosure, as they inevitably will, the parties will be required to complete a Disclosure Review Document including a List of Issues for Disclosure. In this case, the claimant has already wholly failed to comply with its obligation to give Initial Disclosure. On the basis of the Particulars of Claim in their current form, and particularly if the defendants were to respond with bare denials, the issues in any DRD would be in such general form as to be functionally useless. The parties will also be required to produce Precedent H costs schedules. Again on the basis of the Particulars of Claim, it would extremely difficult to provide any informed budgets for disclosure, witness evidence, expert evidence and trial. The claimant's

approach to this litigation which treats the articulation and particularisation of the claimant's case as something to be dealt with in expert evidence in due course and at trial is one that ignores decades of developments in case management in the Technology and Construction Court and its forerunner.

Conclusions on Four Oaks

Contractual claims

63. The pleading of the claimant's case in respect of Four Oaks will be struck out as against the first defendant pursuant to Part 3.4(c). If necessary, I will hear further argument as to the precise paragraphs to be struck out although it is to be hoped that that would be capable of agreement between the parties. The claims will not, however, be struck out and I will, following a further hearing, give directions for the re-pleading of this final account claim as against Mr Ragakanthan. For the avoidance of doubt, the paragraph making the claim for declaratory relief in respect of this final account is struck out for the same reasons.

64. This approach of striking out the pleaded statement of case but not the claim is consistent with that of Edward Pepperall QC, then sitting as a Deputy High Court Judge, in *Coghlan v Chief Constable of Cheshire Police* [2018] EWHC 34 (QB) at [93] and Pepperall J, as he had then become, in *Tejani v Fitzroy Place Residential Ltd.* [2020] EWHC 1856 (TCC) at [21].

65. Although the application is not made by the second defendant, I will similarly strike out the pleading as against the second defendant. It would make no sense for the pleading to stand as against Mrs Rajakanthan once it has been struck out as against her husband.

66. CPR Part 3.3 permits the court to make an order striking out a statement of case of its initiative. The court may give a person likely to be affected by the order the opportunity to make representations but the court may act without doing so. In the latter case, the order must state that the party affected may apply to have the order set aside, varied or stayed. In this particular instance, so far as the second defendant is concerned, the Order must so state, even though it is unlikely that Mrs Rajakanthan will have any issue with the order. I will come to claims against other defendants, but the same will apply in their cases.

67. So far as the claimant is concerned, it seems to me that the claimant has had ample opportunity to make representations in accordance with Part 3.3(2) and (3) at this hearing. Even where the claims which I will come to are against Mr Rajakanthan as a guarantor, the applicants put in issue the adequacy of the statement of case on the underlying claim and the applicants' case on the unjust enrichment claims is applicable to all claims made on this basis.

68. So far as the tenth defendant, NJCH, is concerned, as I have set out above, paragraph 57 of the Particulars of claim advances a claim for loss and damage against NJCH in the amount of the Four Oaks final account claim. As I read paragraph 56, there is no claim in debt against NJCH. The claim for damages is unsustainable. For there to be a claim for loss and damage there must be a breach of contract and, therefore, a contractual relationship between the claimant and the tenth defendant. No such

contractual relationship is set out in the Particulars of Claim. The claim should, therefore, in my judgment, be struck out under Part 3.4(a) as disclosing no reasonable grounds for bringing the claim against this defendant.

Unjust enrichment

69. The claim against the first, second and tenth defendants founded on unjust enrichment is pleaded without any further explanation of or particularisation of the circumstances that are said to give rise to the claim.

70. The claimant's in opposing this application could have provided that explanation and detail but it has not done so. The letter of claim at paragraph 28 said this (about all the claims):

> *"Alternatively, the goods, services and/or money provided/loaned give rise to a claim in restitution. It is beyond argument that each of the defendants was enriched at the expense of Liberty Homes with respect to the goods, services and/or money it provided. As (re)payment remains outstanding for those goods, services and loan, we maintain that such enrichment was unjust and that Liberty Homes is entitled to claim in quantum valebat, quantum meruit and for money had and received, respectively."*

71. In other words, the basis for the claim in unjust enrichment (and the associated claims for quantum meruit and quantum valebat) are advanced solely on the basis that sums due under the contract have not been paid. The Particulars of Claim, the evidence on this application and the submissions made on behalf of the claimant added nothing to this. Mr Levenstein's submission was that the "unjust factor" was self-evident and was the provision of valuable services not paid for. That is not an established "unjust factor" and, where there is a claim in contract, it is no more than a statement of the claim under the contract.

72. It is common ground that the fact of a contractual relationship between parties does not in and of itself preclude a claim for a restitutionary remedy and, as I have already said, there is in any case no contractual relationship between the claimant and the tenth defendant. That said, it cannot simply be the case that if a sum is owed by one party to another pursuant to a contract and is unpaid, a claim for unjust enrichment lies.

73. Mr Churcher submitted, rightly in my judgment, that there must be something more and that something more is what has been characterised in authority as "the unjust factor". The development of this area of law and the current position were both comprehensively and concisely set out by Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA 1149:

> *"55. Courts and commentators have broken down the conceptual structure of a claim in unjust enrichment into four elements: i) Has the defendant been enriched? ii) Was the enrichment at the claimant's expense? iii) Was the enrichment unjust? iv) Are there any defences …"*
> *…*

57. As regards the third question, the claimant must positively identify what has been described as "the unjust factor" (see Samsoodar v Capital Insurance Company Ltd. (Trinidad and Tobago) [2020] UKPC 33….. at [19] and Goof and Jones at 1/21). There is widespread judicial acceptance of this terminology and the need for an unjust factor (see for example Kleinwort Benson at 408-409[1]; Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd. [2008] EWCA Civ 1449….. at [50], [62] and [67]; *Test Claimant in the FII Group Litigation v Revenue and Customs Commissioners [2012] UKSC …. At [81]).*

58. It is the "unjust factor" that distinguishes the English claim in unjust enrichment from the civilian "absence of basis" approach. Examples of unjust factors include mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. These unjust factors are recognised because they establish that the claimant did not intend the defendant to receive a benefit in the circumstances, either because the claimant never had any intent to benefit the defendant in those circumstances or the intent was vitiated or qualified in some way.

59. An unjust enrichment claim is not based on a wide ranging and open-ended assessment of fairness (or justice) in the round, rather, it is a common law remedy requiring a claimant to make out an established category of "unjust factor" in order to trigger the claim. ….."

74. This analysis demonstrates why a claim in unjust enrichment will rarely be triggered where there is a subsisting contract and an available claim in contract. In such a case, the claimant patently intended the defendant to benefit from the provision of goods and services. The established unjust factors make it clear that the claim will only be triggered if there is some factor that vitiates that intention. Where there is a contractual dispute about payment, there is nothing to vitiate the intention that the claimant should benefit and the issue is what should be paid (contractually) for that benefit. Another way of looking at that scenario is that there is a legal obligation on the part of the claimant to confer the benefit so that the enrichment is not unjust. In *Dargamo* at [67], Carr LJ put it this way:

"… invalidity of a relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment. That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocation of risk agreed between the parties. On the contrary, as explained by Professor Burrows in The Restatement (at 3(6)), an "often overlooked but crucial" element of the unjust factors scheme is:
"…that an unjust factor does not normally override a legal obligation of the claimant to confer the benefit on the defendant. The existence of the legal obligation means that the unjust factor is nullified so that the enrichment at the claimant's expense is not unjust …""

75. No unjust factor is identified or discernible on the face of the Particulars of Claim. It follows that the claimant has failed to plead any basis for a cause of action against the first and second defendants in unjust enrichment and discloses no reasonable grounds for bringing the claim. There was an opportunity on this application for the claimant to explain the grounds for bringing a claim on this basis such that the court might not exercise its discretion to strike out. No unjust factor has been identified in the evidence

[1] Kleinwort Benson Ltd. v Lincoln City Council [1999] 1 AC 349.

or submissions on this application and thus no reasonable grounds for bringing the claim. It seems to me that the quantum meruit and quantum valebat claims must fall with it since no basis for them is set out other than the restitutionary claim. Accordingly, I will strike out these claims as against the first and second defendants.

76. So far as the tenth defendant is concerned, the position is even clearer. It is the claimant's position that the contract was entered into by Mr and Mrs Rajakanthan and that Four Oaks was constructed for their benefit and that they live there. The only pleaded involvement of NJCH is the payment of invoices. No benefit to or enrichment of NJCH is set out at all, nor is any unjust factor identified. The Particulars of Claim disclose no reasonable grounds for bringing this claim against the tenth defendant and it is struck out.

Foxley Lane

77. At paragraph 37 in Part 3 (Factual Background) of the Particulars of Claim, the claimant's case as to the contractual position in relation to property at 129 Foxley Lane, Purley, Surrey and 129A Foxley Lane is set out. This is repeated in Part 4 (Particulars of Each Claim) at Paragraph 58. The claimant's case is this:

    (i) In 2017, Kanagaratnam Rajamogan contracted with Liberty Homes to refurbish and extend an existing house at 129 Foxley Lane. This appears to be set out as factual background and the contract is not the subject of any claim in these proceedings which claims appear to relate to the subsequent engagement of Liberty Homes.

    (ii) Quoting paragraph 37:

    "He subsequently engaged Liberty to demolish the garage in situ, to convert 129 Foxley Lane into two separate flats (ground and first floor flats) and to build a second house on the property – 129A Foxley Lane. The contract price for the works to Foxley Lane and 129A Foxley Lane was agreed in the total sum of £600,000, comprising £150,000 for the former and £450,000 for the latter."

78. In paragraphs 37 and 58, the claimant states that 129 Foxley Lane is owned by Richard Rajamogan (Mr Rajamogan's son) and that Flat 1 is occupied by Natalie Dowding (Mr Rajamogan's daughter) and her husband, Forest Dowding, and that Flat 2 is occupied by Jason and Ruth Rajamogan (also family members). To distinguish them easily from the third and fourth defendants (whom I shall refer to as Mr and Mrs Rajamogan), and with no disrespect to them, I will use the first names of these family members when referring to them. Further, 129A Foxley Lane was gifted by Richard to Natalie and Forest but is where Mr and Mrs Rajamogan live.

79. At paragraph 62, the claimant says this:

    "Final accounts have now been prepared for both 129 (flat conversion) and 129A Foxley Lane (new build of a detached house), valuing them at £50,958 and £589,675, respectively. Nothing has been paid by the Defendants in respect of these works since their completion approximately four years ago, during which time both properties have appreciated considerably in value."

80. A claim is made against all of the defendants referred to in paragraph 78 above either for the contract price of £600,000 or for the sums set out in paragraph 62 of the Particulars of Claim. None of these defendants is a party to the current application but I will return to the position of these defendants below.

81. The claimant, however, also advances a claim against the Mr Rajakanthan:

(i) At paragraph 37, the claimant says that "Kanagaratnam Rajakanthan agreed to stand in as guarantor/surety for Kanagaratnam Rajamogan in the event the latter did not pay."
(ii) At paragraph 60, the claimant says that "regardless of the exact identity of the party (-ies) with whom Liberty contracted", none of the defendants against whom this claim is made has made any payments to Liberty and that includes "Kanagaratnam Rajakanthan who acted as guarantor/ surety in the event of non-payment".
(iii) In paragraph 63, these sums are claimed from the first defendant as loss and damage.
(iv) In paragraph 83.1, these sums are claimed from the first defendant as the unpaid price for the work done and services provided "pursuant to a contract made between the parties for the planning, design, alteration, conversion and construction of the properties …"; alternatively as damages; alternatively on the bases of unjust enrichment, quantum meruit or quantum valebat. There is again a claim for a declaration as to the true value of the final account assessed pursuant to the terms of the contract or the Scheme.

The position of the first defendant

82. On the face of the Particulars of Claim there is a claim against the first defendant for damages for breach of contract. There is, however, no contract alleged between the claimant and the first defendant in respect of the Foxley Lane works and the Particulars of Claim, therefore, disclose no reasonable grounds for bringing this claim against the first defendant. Similarly no basis for a claim in unjust enrichment, quantum meruit or quantum valebat is identified. All these claims against the first defendant should, in my judgment, be struck out pursuant to Part 3.4(a).

83. That leaves the claim against Mr Rajakanthan on the basis that he was a "guarantor/surety" for his brother, Mr Rajamogan. This claim is, in a sense, parasitic on the underlying claim in contract. The first defendant submits that that claim, or at least the relevant parts of the Particulars of Claim, should be struck out for failure to comply with the rules and Practice Direction, and for similar reasons as in respect of Four Oaks. I will deal with that basis of the application in the context of considering the position of the other defendants.

84. Whatever the position in relation to the contractual claim, the first defendant submits that this claim against him as a surety is bound to fail and should be struck out and/or summary judgment given. Firstly, it is submitted that the guarantee is wholly inadequately pleaded and that none of the matters required by the Practice Direction are set out. Secondly, and in any event, what is clearly not pleaded is that the guarantee was in writing and no document evidencing the guarantee is identified. Accordingly,

the first defendant says that any guarantee that may have been given is unenforceable by virtue of section 4 of the Statute of Frauds 1667. Section 4 of the Statute of Frauds provides, in effect, that a guarantee to answer for the debt or default of another is unenforceable unless *"the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by hum lawfully authorized."*

85. In his written submissions, Mr Levenstein sought to characterise the applicant as wilfully mischaracterising the claimant's case as concerns "the indemnities (and in the alternative, guarantees) provided by Mr Rajakanthan". He went on to submit that Mr Rajakanthan is repeatedly identified in the Particulars of Claim as a surety, a term which encompasses those who provide an indemnity as well as those who provide a guarantee. The requirement of writing does not apply to a contract of indemnity. In any event, he submitted that a written record of the guarantee is "demonstrated by Mr Rajakanthan" relying on certain paragraphs of the statement of Mr Crofton-Martin and the documents exhibited by him.

86. Apart from the requirement of writing, the distinction to be drawn between a contract of guarantee and indemnity is whether the liability of the surety is secondary or primary. As it is put in Andrews and Millett on the Law of Guarantees, 7th edition, at para 1-005:

"The essential distinguishing feature of a contract of guarantee is that the liability of the guarantor is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor. There is no liability on the guarantor unless and until the principal has failed to perform his obligations. ..."

87. The criticism of the applicant's characterisation of the claimant's case is misplaced. As I said above, the letter of claim said nothing about a guarantee or indemnity in respect of Foxley Lane. Then throughout the Particulars of Claim, Mr Rajakanthan is said to have acted as "guarantor/ surety" so that, at the very least, the case that he acted as a guarantor is advanced as the primary case. Although I accept that the term surety encompasses those who give an indemnity, it is not at all clear on the face of the Particulars of Claim (which elides the terms guarantor and surety) that this was the case the claimant intended to advance - even in the alternative. On the contrary, the words "to stand in as guarantor/surety… in the event [the third defendant] did not pay" (my emphasis) are the description of a secondary liability not a primary liability.

88. In the Particulars of Claim, the term indemnity is not used in connection with Mr Rajakanthan's guarantee of payment in respect of Foxley Lane at all. The term appears once elsewhere in the Particulars of Claim and, in contrast, does not appear in connection with Foxley Lane.

89. The first time it was argued that the contracts were contracts of indemnity was in Mr Crofton-Martin's statement. Mr Crofton-Martin refers to an e-mail exchange on 28 October 2020 which, he says, clearly acknowledges a liability on the part of the first defendant whereby "he agreed to indemnify the third defendant (and others) for sums due" arising out of the works at Foxley Lane and the petrol station loan. He continues: *"No objection is taken by the First Defendant who clearly agrees to indemnity the Second (sic) Defendant against the sums due from him to Liberty Homes in that email exchange. Further the said email exchange is confirmation in writing from the First*

defendant that he accepted liability to discharge third party debts owed to Liberty Homes albeit as a matter of fact it is disputed those sums have in fact been discharged. The email chain is not limited to the First Defendant recognising his obligation as an indemnifier, but also indicates that the First Defendant accepted a liability, in writing, to act as guarantor."

90. This assertion, therefore, appears to be based entirely on the e-mails Mr Crofton-Martin refers to. His argument – and it is argument not evidence - that the first defendant agreed to indemnify the third defendant (and others) is derived from the terms of the e-mails. Since these e-mails date from October 2020 and the relevant transactions are years earlier, this argument fails to distinguish between the contract of indemnity said to have been entered into and a later acknowledgment of liability and evidence of the nature of that liability.

91. Assuming that the claimant's case is one of oral contracts of indemnity, the Particulars of Claim are required to state that the contract is an oral contract and to state who said what to whom, when and where. Whilst it might seem obvious that what is alleged is that Mr Rajakanthan said something to Mr Caulfield, that is all there is. There is no indication of the words used and so no basis on which it is possible to tell whether the words used amounted to, or reasonably arguably amounted to, an indemnity rather than a guarantee. The only indication of the words used is the pleaded case that Mr Rajakanthan agreed to stand in for his brother if he could not pay and, if that is the gist of the words used, then they are the words of a guarantee.

92. If the claimant's case is that the contract of indemnity was acknowledged by the e-mails in October 2020, there is in my judgment nothing in those e-mails that could, on any reasonably arguable basis, amount to such an acknowledgement or, in the alternative, give rise to such a contract.

93. At 2.10pm on 28 October 2020, Mr Rajakanthan (using a NJCH e-mail address) e-mailed his brother, copying in David Caulfield on a Liberty Homes e-mail address. The e-mail read:

"Further to your telephone conversation, please see below communications. We are waiting to receive our over payment amount of £427k from Liberty Homes Limited. The amount due towards your Purley house and petrol station £750,000 is included <u>in our payments</u> and it is fully settled. Please forward to me the invoices for my files." (My emphasis)

94. None of the "below communications" was exhibited. The e-mail, taken at its highest, says that Mr Rajakanthan or NJCH has paid Liberty Homes sums that were due from Mr Rajamogan to Liberty Homes in respect of Foxley Lane and the petrol station (which I will come to below). It is a statement of payment not an acknowledgment of a guarantee of payment.

95. At 3.28pm Mr Rajamogan e-mailed Mr Caulfield, copying in Mr Rajakanthan. I set out the terms of that e-mail in full:

"After your phone call to me today, I just spoke with Kan and he told me that all my financial liabilities towards you was fully paid by him and you still owe him money and

not the other way. You did tell me that things are with the solicitors and courts. This is unfortunate, if the two of you can't come to any settlement over your financial disputes this may be the only way for the two of you to resolve this. However, please do understand my plight, I asked for financial help from Kan to pay your debt when I found out it was impossible for me to get a mortgage. He has agreed and now tells me my debt to you is fully paid by him and I am a free man. There is no point in harassing me over this again and again as Kan had said to me these sums were fully paid already. I am copying Kan to keep all in the loop.
I hope that you do realize, as I had no means to pay you, I had to rely on Kan to settle this matter on my behalf which he had done. If there is any remaining dispute between you then that is a matter for you and Kan as you will see from his confirmation e-mail below to me.
I hope that you will soon over come you financial problems and happy again."
(Emphasis added)

96. There is no response from Mr Rajakanthan to that e-mail exhibited. Leaving aside the absence of any confirmation from him of the content of the later e-mail, all that e-mail says is that Mr Rajamogan turned to his brother for help to pay a debt due to Liberty Homes/Mr Caulfield, and that Mr Rajakanthan did pay that debt. It may have been Mr Rajamogan's understanding that, if any further sum was due from him to Liberty Homes, that would be sorted out between Liberty Homes and Mr Rajakanthan. That is indeed consistent with his letter of response. But it is not an acknowledgement of or evidence of a contract of indemnity.

97. The claimant's alternative, or perhaps primary case, is that the same e-mails are sufficient memorandum or note in writing signed by Mr Rajakanthan to satisfy the requirement of writing for an enforceable guarantee.

98. It is not arguable that Mr Rajakanthan's e-mail at 2.10pm contains any such writing. Nor is it arguable that Mr Rajamogan's e-mail does. I repeat that it records only that he turned to his brother for help to pay a debt which Mr Rajakanthan paid. Even if I am wrong about that, it would have to be the claimant's case that Mr Rajakanthan's silence in response confirmed his agreement and was tantamount to his signature. That is not arguable.

99. I accept Mr Churcher's submission that the pleaded case is that Mr Rajakanthan was a guarantor; that, absent the necessary writing, that guarantee is unenforceable; that there is no such writing; and that there are no reasonable grounds for bringing this claim against the first defendant.

100. I would add for completeness that the claimant also placed significant reliance on the decision of the Court of Appeal in *Iliffe v Feltham Construction Ltd.* [2015] EWCA Civ 715 in support of the argument that it would be unjust to strike out claims against some of the defendants in circumstances where, as a matter of fact and law, their liabilities overlap. The *Iliffe* case arose out of a fire at the claimants' property during the course of construction. The claimants sued the main contactor and there was then what Jackson LJ described as a cascade of pleadings following the contractual chain. The Court of Appeal decided that the judge at first instance ought not to have given summary judgment against the first defendant/main contractor, at a time when the other defendants had not even served their defences and where both contractual responsibility

and causation of the fire were not sufficiently clear. At [36] and [71], Jackson LJ explained that the main contractor had, in its Defence, adopted a line of non-admissions as to the cause of the fire but that it would inevitably adopt the future pleaded defences of the third, fourth and fifth defences so far as it was advantageous to do so.

101. That was the background to [72] in the judgment on which Liberty Homes relied. There Jackson LJ said:

"When I stand back from the detail and look at this case in the round, I conclude that as at 20 June/3 July 2014 the position as to causation of the fire was not so clear as to justify the grant of summary judgment on liability in favour of the claimants. Also I think it was inappropriate to do so when similar issues remained to be determined at a full trial as between the other parties. In the particular circumstances of this case that constitutes a "compelling reason" not to enter summary judgment within the meaning of CPR 24.2(b). A judge in multi-party litigation must aim to do justice as between all parties involved in the case."

Jackson LJ further made the point that there would be far less cost saving than in other cases because the issues of causation would still have to be gone into and the claimants would have to participate in the trial in order to establish the quantum of their claim.

102. Mr Levenstein seeks to draw a comparison between that case and the present situation. In relation to Foxley Lane, in respect of which Mr and Mrs Rajamogan accept that a substantial sum is due to the claimant (but not from them), he submits that it would be unfair if, following a trial, Mr and Mrs Rajamogan were found liable to the claimant in this amount but were unable to pay and the claim against Mr Rajakanthan for the same sum had been struck out. The claimant would then, he submits, be unjustly deprived of any practical remedy.

103. In my view, however, the comparison does not hold good. In *Iliffe v Feltham* there was an issue of causation which affected all the defendants. In the present case, and leaving aside the unsustainable claim against the first defendant for damages, the legal basis of claim against the first defendant and the third and fourth defendants is wholly different. If the claim against Mr Rajakanthan is struck out, he will play no further part in this particular claim. The claim may proceed against Mr and Mrs Rajamogan but that is not a compelling reason to keep Mr Rajakanthan as a defendant. In the circumstances Mr Levenstein posits, the claimant may be left without a practical remedy but there is no unfairness in that because there is no legal basis for claim against Mr Rajakanthan.

104. I observe finally that, although *Iliffe v Feltham* was relied on generally, the Foxley Lane example is the only one that was offered by the claimant.

The position of the further defendants

105. No application is made by any of the other defendants to strike out the claims against them in respect of Foxley Lane. However, submissions were made in respect of these claims either because Mr Rajakanthan was said to be a guarantor or because he was said to be liable on the same basis as the other defendants. In these circumstances, I consider it appropriate for me to address the position of the other defendants and

consider whether the claims against them should be struck out of the court's own motion.

106. Firstly, a claim is made against the third defendant on the basis of a contract whether for payment of a sum due under the contract or for damages for breach of contract. Mr Churcher submits that there is nothing as to whether the contracts were oral or in writing or as to the terms of the contracts beyond a bald assertion of an agreed contract price. I agree. If the contract with the third defendant is said to be an oral contract, as Mr Levenstein submitted, the matters which the Practice Direction requires to be set out are missing. If the contract is said to be in writing or partly in writing, the relevant particulars are also absent. Further, no particulars of the build up of the alternative sum claimed are given at all. For all the reasons I have given in respect of the Four Oaks claim that does not provide a concise statement of the claimant's claim in accordance with the rules. This part of the pleading should be struck out but the claim itself will not be struck out and the claimant will have an opportunity to plead the case properly.

107. At paragraph 63 of the Particulars of Claim, the claimant also advances a claim for loss and damage caused by breach of contract against the fourth to ninth defendants, that is Mrs Rajamogan, Richard, Natalie, Forest, Jason and Ruth.

108. In Part 5, at paragraph 83.1, sums are claimed against the same defendants for work done and services supplied pursuant to a contract and at paragraph 83.2 the claim for damages for breach is repeated. Not one of these defendants is said to be party to a contract with the claimant and it follows that there can be no claim against any of them pursuant to contract or for loss or damage as a result of a breach of contract. The relevant parts of the pleading should be struck out as disclosing no reasonable grounds for bringing the claim.

109. The same sums are claimed against all these defendants in restitution and/or unjust enrichment. Claims are also made for quantum meruit and quantum valebat although no distinct bases for these claims is set out. The basis for the claim in unjust enrichment is found in paragraphs 60 and 61 (in Part 4) of the Particulars of Claim:

"60. At all material times, Kanagaratnam, Jane, Richard, Jason, and Ruth Rajamogan and Forest and Natalie Dowding were aware that Liberty had been contracted to refurbish 129 Foxley Lane and build a new house at 129A Foxley Lane. Regardless of the exact identity of the party(-ies) with whom Liberty contracted in the refurbishment and construction of the Foxley Lane properties (including Kanagaratnam Rajakanthan who acted as guarantor/ surety in the event of non-payment), none has made any payments to Liberty in respect of the same.

61. Minimally, this amounts to an egregious instance of unjust enrichment – seven of the Defendants are knowingly living in flats and a house effectively built for free by Liberty for them. This state of affairs was never intended to be the case and insofar as any of the Defendants asserts otherwise – namely, that no payment is due to Liberty for the acquisition and/or ongoing occupation of these properties – such a position defies common sense and practical justice."

110. At its highest, the claimant's case is therefore that (i) all these defendants knew that Liberty was carrying out works pursuant to a contract; (ii) that the sums due pursuant to

that contract have not been paid; (iii) that the defendants variously own or live in the properties; and (iv) that that ownership or occupation together with the knowledge that payment has not been made gives rise to a claim in unjust enrichment against persons who were not party to the original contract.

111. Nothing in that case identifies a recognisable "unjust factor". On the claimant's case, the works were done pursuant to a contract, the benefit of those works being for the contracting party, and in the expectation of payment by that contracting party. Liberty Homes has a subsisting claim for that payment. The defendants have been enriched not by Liberty Homes but by the disposition of the properties within the family. Even if they know that Liberty Homes has not been paid (which, in any event, is in dispute, as is apparent from the e-mails on 28 October 2020) that is insufficient to give rise to a claim in unjust enrichment. If Mr Levenstein's proposition were correct, in any case where there was a dispute about payment for construction works, a person to whom the property was sold or gifted would, if they had knowledge of the dispute, become liable to pay the amount in dispute – because they would have the benefit of the whole of the works knowing that the whole of the works had not been (or may not have been) paid for. Such a result would drive a coach and horses through the contractual relationships and be commercially unviable. The fact that these defendants are all part of the same family does not add or change anything.

112. I, therefore, exercise my power under Part 3.3 to strike out, as against all the relevant defendants, the claims in respect of Foxley Lane which are made on the basis of unjust enrichment (and the associated bases of quantum meruit and quantum valebat).

Assorted Care Home Works and Services

The contractual claim

113. In Part 3 (Factual Background), the claimant sets out its case as follows (at paragraph 40):
"Between 2016 and 2020, Liberty was engaged to provide building, refurbishment and facilities management services to various care homes .... under the control of Kanagaratnam Rajakanthan, including those owned by NJCH and RCHL (and, after its insolvency, RCTL) [the eleventh defendant]. The scope of these works and services was extensive, including building repairs and the preparation of planning applications. One of those care homes was Alpine Care Home in Sevenoaks, at which Liberty, inter alia, refurbished various rooms, installed a new heating system and built en suites. The works undertaken to Alpine and the other care homes are detailed below."

114. In Part 4 (Particulars of Each Claim), this case is expanded upon slightly and the thirteenth defendant, Uniquehelp Ltd., is also said to have been party to these arrangements. At paragraph 64, all three of these defendants (NJCH, RTCL and Uniquehelp) are said to have relied on Liberty for labour, materials and services in the running of their care homes. It is pleaded that:

"Many of the services provided by Liberty were carried out on an as-needed basis, pursuant to a broader repair and maintenance arrangement between the parties. The agreements for such works varied in formality but broadly entailed Liberty managing, servicing or otherwise attending the care homes to address building and planning

issues. Most, if not all, of such works were directly instructed by Kanagaratnam Rajakanthan."

115. In the following paragraphs 65-66, the claimant avers that the works and services carried out as far back as 2016 have been carefully documented and valued and that £157,622.81 remains outstanding. A brief description of some types of works is given but at paragraph 67 the claimant states that this list is far from exhaustive.

116. The sum of £157,622.81 is claimed against the first, tenth, eleventh and thirteenth defendants as loss and damage or on the basis of unjust enrichment. Following the pattern of the other final account claims, in Part 5 at paragraph 84, the sum is claimed firstly as the price due. This time the price is said to be due *"pursuant to a contract or series of contracts for the construction, general building consultancy, advisory, planning, management and professional services and works provided to the aforementioned Defendants"*. In paragraph 84.1 the sum is claimed in the alternative, as damages or in restitution and/or unjust enrichment, or quantum meruit, or quantum valebat.

117. On behalf of the defendants, Mr Churcher submits that the Particulars of Claim fail to identify whether these services were provided pursuant to one or more contracts and if so when and how these contracts are said to have been entered into. I agree. Further, he says that the terms of the alleged contract(s), including as to Liberty's entitlement to payment are not set out. Again I agree. On its face, the pleaded case is variously that Liberty was "engaged", that there was "an arrangement between the parties", that there were agreements for work instructed by the first defendant, and that there was a contract or contracts for works. It is impossible to tell who engaged Liberty and which of the defendants was party to the arrangement or the agreement(s) or the contract(s). There is no indication of whether the agreement(s) or contract(s) were oral or in writing or partly oral and partly in writing, and none of the particulars required by the Practice Direction is provided. In consequence, there is no case articulated as to the amounts which the claimant was entitled to be paid pursuant to the terms of the contract(s) for works done.

118. Further, even the claimant's description of the works carried out or services supplied varies from paragraph to paragraph and the generalised list of work is itself expressly stated not to be exhaustive. Despite the claimant's assertion that it has carefully documented the works carried out and how they have been valued, beyond the generalised descriptions of work and services which I have set out above there is no statement of the works carried out or the build up of the sum claimed. There is nothing that the defendants can sensibly respond to and nothing that the court can have regard to in order to understand the claimant's case.

119. For the same reasons that I have given in respect of the other final account claims, the parts of the Particulars of Claim that plead this contractual claim should be struck out for failure to comply with the rules and the Practice Direction but the claim is not struck out and the claimant will have an opportunity to set out its case properly.

Unjust enrichment

120. So far as the claims are made against all of these defendants in unjust enrichment are concerned, there is no case set out of any matter that could amount to an unjust factor. The claimant's case is simply an attempt to claim sums due pursuant to a contract or contracts on some other basis without any legal or factual foundation. The Particulars of Claim disclose no reasonable grounds for bringing these claims and they should be struck out.

14 Arden Grove

121. There is a further final account type claim in respect of a property at 14 Arden Grove, Orpington, Kent, which is the home of the mother of Mr Rajakanthan and Mr Rajamogan.

122. At paragraph 39, the claimant avers that in August 2015, the third defendant, Mr Rajamogan, instructed Liberty to convert the garage at this mother's house into a habitable space including a bedroom and a wetroom. The paragraph continues:

"Kanagaratnam Rajamogan was responsible for payment of these works in the first instance, although as they related to their mother's house, Kanagaratnam Rajakanthan once again agreed to stand in as guarantor/surety in the event Kanagaratnam Rajamogan did not pay. In the event, the works undertaken at 14 Arden Grove remain unpaid."

123. This case as to the contractual relationship is repeated at paragraph 77 (in Part 4). So far as the claim against the first defendant is concerned, it is said that neither the third nor first defendant has made any payments in respect of 14 Arden Grove and the latter *"agreed to cover the cost of such works in the event of his brother's non-payment"*. The basis of claim follows a now familiar pattern. The claim articulated in paragraph 78 (in Part 4) is only for loss and damage. In Part 5, paragraph 85.1, the claim is for "the balance of the price due to the Claimant for services provided, work done and materials supplied pursuant to a contract" (my emphasis). In paragraph 85.2, the same sum is claimed on any one of the alternative bases of damages for breach of contract, restitution and/or unjust enrichment, or quantum meruit or quantum valebat. The sum claimed is £47,689 plus VAT.

124. The application on behalf of the first defendant is again made to strike out on the basis both that the Particulars of Claim fail to comply with the rules and the Practice Direction and that the claim on the guarantee is bound to fail because of the absence of writing.

125. The first of these limbs is sufficient to strike out the relevant parts of the Particulars of Claim relating to the contractual claim. It might on this occasion be rather more readily inferred that the claimant intends to plead an oral contract for the works but the Particulars of Claim do not say so and, in any case, only identify one of the persons who made the contract and the date. There is no particularisation of the words used and it follows that, other than the broad description of the nature of the works to be carried out, the defendant and the court cannot know what the claimant's case is as to the works to be carried out and the terms as to payment. The lack of detail is compounded by the way in which the sum allegedly due is expressed – it is said both that the defendants have failed to make any payment for the works and, inconsistently, that the

sum claimed is the balance of the unidentified contract price. Further there is no case whatsoever set out as to how the claimed sum of £47,689 is made up and what works it is claimed for.

126. I take the same approach as I have done to the other final account claims and strike out the relevant parts of the pleading as against both the first and third defendants.

127. The claim in unjust enrichment is once again devoid of any identification of an unjust factor and any basis for this claim in law or fact. This claim (together with the quantum meruit and quantum valebat claims) are struck out as the Particulars of Claim disclose no reasonable basis for the claim as against the first or third defendants.

128. The claim against the first defendant is advanced on the basis that he agreed to stand as "guarantor/ surety". The same arguments are made by the claimant and the first defendant as in respect of his guarantee in respect of the Foxley Lane works. The Particulars of Claim, in my judgment, clearly set out a claim on a guarantee – that is a claim on the basis of the first defendant's secondary, and not primary liability, which only arises in the event of non-payment by his brother as primary obligor. No case is set out that the guarantee was made in or evidenced in writing. The guarantee is, therefore, unenforceable.

129. In his skeleton argument, and as I indicated above, Mr Levenstein submitted that a written record was "demonstrated" by the first defendant relying on evidence of Mr Crofton- Martin and the e-mails of 28 October 2020 which he exhibited. That submission was made generally in respect of all the guarantee claims. Even if I were wrong about the meaning and effect of those e-mails, they are solely concerned with the Foxley Lane property or properties and the petrol station and not with 14 Arden Grove.

130. On no basis, therefore, do the Particulars of Claim disclose reasonable grounds for bringing a claim against the first defendant on the basis of his guarantee in respect of payment for works at 14 Arden Grove and this claim is struck out pursuant to Part 3.4(a).

The Loan Claim

131. In Part 4 of the Particulars of Claim this is the first of the claims which is not a final account type claim.

132. The claim is first pleaded at paragraph 38 in Part 3 (Factual Background) and it is easiest to set out that paragraph in full:

"Richard Rajamogan is the director of JRN [the twelfth defendant]. His father, Kanagaratnam Rajamogan, is the company secretary. In March 2015, Richard Rajamogan approached Liberty and sought a loan in order for JRN to put down a deposit on a petrol station in Harbledown. A loan of £200,000 was approved by David Caulfield on behalf of Liberty and repayable by JRN. It was understood that the loan was repayable by Richard Rajamogan (company director) or his father, Kanagaratnam Rajamogan. In the further alternative, the loan was repayable by Kanagaratnam Rajakanthan, who acted as a guarantor/ surety (and who himself personally loaned a further £200,000 in respect of the petrol station purchase). The loan amount was

transferred to the client account of Hodders Law, a firm of solicitors representing JRN. Natalie Dowding was employed as a solicitor by Hodders at the time. Richard Rajamogan was also a client. The loan remains unpaid."

133. In Part 4, at paragraph 69, the claimant then says that on 26 March 2015, David Caulfield authorised Hodders to release £400,000 for the purchase of the petrol station, of which £200,000 was loaned by Liberty on the understanding that it would be repaid. Paragraphs 70 and 71 then read as follows:

"70. The identity of the debtor was not explicitly recorded at the time the loan was made. Even so, it was understood between the parties that the money was being loaned in order to purchase the petrol station, thereby making the debtor in the first instance its nominal owner (ie JRN) and alternatively its beneficial owners (ie its shareholders). The beneficial owners were Richard Rajamogan (JRN's sole director and majority shareholder) and his father, Kanagaratnam Rajamogan (who, as company secretary, procured the loan in the first place.

71. In the further alternative, Kanagaratnam Rajakanthan had personally guaranteed Liberty's loan (and has since incorrectly claimed to have repaid it). Liberty maintains that all are jointly liable in respect of repayment of this loan, which remains outstanding." (Emphasis added)

134. Lastly, in Part 5, at paragraph 86, the claim for £200,000 against Mr Rajakanthan, Mr Rajamogan, Richard and JRN is made on the basis that it is due as a debt; alternatively as "restitutionary damages" arising from unjust enrichment; as money had and received; as repayment guaranteed by these defendants; or on the basis of an account.

135. I am in complete agreement with the submissions of Mr Churcher that the pleading of this loan agreement is deeply unsatisfactory. Even allowing for some level of informality in the dealings between Liberty and the Caulfields on the one hand and the Rajakanthan and Rajamogan families on the other, these dealings in relation to a substantial sum are utterly vague. Once again, the claimant does not even identify whether the loan agreement (whoever it was with) was oral or in writing.

136. The natural reading of paragraph 38 is that it was Richard Rajamogan who procured the loan – he, it is said, approached Liberty for the loan. However, in paragraph 70 the claimant asserts that the loan was procured by Mr Rajamogan (senior). Whichever of these is the claimant's case, and assuming for the moment that the loan agreement was made orally, without any particulars of the words used, it is impossible to know for whom the claimant alleges Mr Rajamogan or Richard was acting – that is, whether for the company or any of the individual defendants. Further, it is only alleged that Mr Rajamogan procured the loan or that Richard approached Liberty for the loan and not that either of them entered into any loan agreement (whether on his own behalf or that of others). It may be that the position was and is unclear, and that the claimant is properly entitled to advance alternatives, but the defendants and the court are entitled to know, at the least, and in accordance with the rules, what the claimant says happened. If the agreement is said to have been oral, the defendants and the court are entitled to know what it is alleged to have been said and by whom. Without any such detail, the claimant has not even set out its case on the terms agreed as to when the loan was to be repaid and when and how any cause of action accrued.

137. I take the view that it is again right to exercise my discretion to strike out those parts of the Particulars of Claim that relate to the Loan Claim but not to strike out the claim and to afford the claimant an opportunity properly to set out its claim. As I have said, the application is only made on behalf of the first defendant but it would make no sense to strike out the statement of case only in respect of that defendant.

138. In this instance, I take a different view of the claim in unjust enrichment and one that is perhaps generous to the claimant. There is again no express pleading of anything that could amount to an unjust factor. However, the factual scenario is not only vague but somewhat unusual. On the claimant's case a substantial sum of money was loaned by it and placed in the hands of solicitors on the most informal of bases. Thereafter, Mr Caulfield was able to direct the payment not only of this money out of the solicitors' account but also the payment out of a further £200,000 which was paid into the solicitors' client account by another. The recipient is not identified but Mr Caulfield and/or the solicitors must know to whom the money was paid. Although there is nothing in this which immediately indicates a tenable claim in unjust enrichment, the factual scenario is sufficiently unusual and apparently uncommercial that I am not satisfied that there is not, to put it colloquially, something in it. It seems to me that it would be fair to first give the claimant the opportunity to set out its claim in unjust enrichment against a clearer factual background.

139. It is the first defendant's case, however, that I should strike out the claim against him in its entirety and/or give summary judgment because the only claim against him is as a guarantor and the same arguments as in respect of the other alleged guarantees apply. There is, however, one small but significant distinction in the way in which the case is put against Mr Rajakanthan and that is the wording in paragraph 71 which I underlined above. The claimant asserts that each of the defendants is jointly liable in respect of repayment of the loan. That in itself is a pleading of primary liability.

140. That is not consistent with the earlier case (in paragraph 38) that the loan was to be repaid by Richard Rajamogan, and, in the alternative, by his father, and, in the further alternative, by the first defendant. Nor is it consistent with the case (in paragraph 70) that the debtor was the company, JRN, and, in the alternative, Richard and his father, and, in the further alternative, the first defendant. Further, in the absence of any particulars of the guarantee – whether it was oral or in writing and the particulars required by the Practice Direction – it is not possible to know on what basis it might be asserted that the first defendant had undertaken primary liability. But given the variety of ways this claim is put, including the allegation of joint liability, it seems to me that the claimant should have the opportunity to set out its case, if it has one, as to the primary liability of Mr Rajakanthan in such a way as to disclose reasonable grounds for bringing this claim rather than strike out the claim in its entirety at this stage.

The Consulting (or Consultancy) Claim

141. The claimant sets out that, in May 2012, Regal Care Homes Limited, went into administration. At paragraph 35 (in Part 3), the claimant alleges that during this period of financial difficulty, the claimant was engaged to provide advice and that David Caulfield provided services and advice to Mr Rajakanthan to assist him in acquiring the assets of this company and transferring them to the eleventh defendant, RCTL. From

April 2015, he provided management advice concerning the operation and maintenance of the care homes owned by RCTL and he advised on business opportunities for NJCH, RCTL and Uniquehelp. The paragraph concludes:
"These services and advice were of considerable commercial value to the aforementioned Defendants and provided pursuant to an agreement that Liberty would be compensated for the same".

142. In Part 4 (Particulars of Each Claim), at paragraph 73, the assistance provided by Mr Caulfield, acting on behalf of Liberty, between 2012 and 2015 is alleged to have been provided to both Mr Rajakanthan and NJCH. Thereafter, it is said that Liberty also provided strategic and operational advice concerning the management of RCTL's business. There is no mention of Uniquehelp at all. "A conservative valuation" of Mr Caulfield's time and advice is given as £107,760 (excluding VAT) and that sum is claimed by the claimant. In the following paragraph the sum is claimed as damages or in unjust enrichment against all of Mr Rajakanthan, RCTL, NJCH and Uniquehelp.

143. Then in Part 5, at paragraph 87, the claimant first claims this sum as "the balance due for the consultancy, advisory, planning, management and professional services provided by the Claimant pursuant to a contract made between the parties". The parties, in this paragraph, is a reference to all of Mr Rajakanthan, RCTL, NJCH and Uniquehelp. The claimant then claims the same sum, in the alternative, as damages for breach; in restitution and/or unjust enrichment; on the basis of quantum meruit; or on the basis of quantum valebat.

144. There is notably only a case as to the existence of a single contract but there is no further particularisation of that contract. Given the parties against whom contractual claims are made, it seems that the claimant's case may be that there was a contract between Liberty and all of Mr Rajakanthan, RCTL, NJCH and Uniquehelp or between Liberty and any one of Mr Rajakanthan, RCTL NJCH or Uniquehelp. The Particulars of Claim do not disclose the claimant's case as to the parties to the contract and, again, do not state whether the contract was oral or in writing. Even allowing for a degree of informality, none of the particulars required by the Practice Direction for an oral or written contract is provided. There is, therefore, no explanation of the claimant's case as to the basis on which it was entitled to be paid; beyond some generic description of types of work, there is no identification of the services the claimant claims payment for; and there is no identification of the amounts claimed in respect of those services other than the "conservative valuation". In short, there is no concise statement of claimant's case. What there is a vague and generalised claim. Further, in this particular instance, the services are said to have been provided since 2012 and it may well be the case that some part of the claim is, in any event, time-barred but, whilst the various defendants can raise that potential defence, neither they nor the court can know if it is a good defence unless they know what is said to have become due and payable when and on what contractual basis.

145. In my view, the Particulars of Claim in respect of the Consulting Claim should be struck out as against all the relevant defendants but the claimant should have an opportunity to set out its case properly rather than the claim itself being struck out. I take this view in respect of the contractual claim and the other bases of claim. Although the Particulars of Claim do not, on their face, identify any unjust factor that would give rise to a claim in unjust enrichment, the lack of clarity as to the contractual

arrangements and the apparent involvement of multiple parties who may or may not have been party to those arrangements gives me some concern about striking out these claims in totality without any opportunity for the claimant to further explain the basis of claim.

The Rent Claim

146. At paragraph 36 (in Part 3), the claimant says that during the period of RCHL's financial difficulties, Liberty provided assistance to members of Mr Rajakanthan's family, namely Mr and Mrs Rajamogan and Natalie. The claimant's case is that in or around 2012, these defendants were unable to secure suitable accommodation and sought the help of Mr Caulfield, who offered them accommodation at Flat 11, Liberty Court, 10 Page Heath Lane, Bickley. That property was owned by Liberty Homes. The paragraph continues:

"It was verbally agreed between David Caulfield, on behalf of Liberty, and Kanagaratnam, Jane and Natalie Rajamogan, that accommodation would be provided on the basis that they would repay Liberty, although payment would not become due until they were financially able to do so. Kanagaratnam Rajakanthan was to stand in as guarantor/ surety in the event of non-payment. At the time of the agreement it was known by all parties that the monthly market rent was £1,600. Liberty agreed to a reduced monthly rent of £1,400 ..... The Rajamogans occupied the flat for 4 years, until approximately April 2016, at which point they owed Liberty the sum of £67,200 in rent (although such rent did not fall due until they were able to pay it). That money has never been paid."

147. In paragraph 75 (in Part 4), the claimant repeats that there was an express agreement between the Rajamogans and Mr Caulfield on behalf of the claimant pursuant to which it is entitled to the sum of £67,200. This statement of the claimant's case against the defendants comes far closer to complying with the rules and Practice Direction although it omits any statement as to when the £67,200 did fall due for payment. The claim against Mr Rajakanthan is again on the basis that he was a guarantor/surety who would stand in in the event of non-payment.

148. Paragraph 75 also sets out an alternative claim in unjust enrichment on the basis that the Rajamogans "would be unjustly enriched if they [were] entitled to enjoy four years of residential occupation without payment".

149. Lastly, in Part 5, in the Summary of Relief Claimed, at paragraph 88:

(i) At paragraph 88.1, the claimant claims the sum of £67,200 from Mr Rajakanthan and the Rajamogans as arrears of rent.
(ii) At paragraph 88.2, the claimant sets out alternative bases of claim. The first of these (paragraph 88.2.1) is "Payment of an outstanding debt (or guarantee/indemnity in respect of the same)".

150. The first claim against Mr Rajakanthan for arrears of rent makes no sense as he is not alleged to be party to any contract to pay rent. It is unclear what distinction the claimant seeks to draw between arrears of rent and an outstanding debt but, leaving that point to one side, the alternative basis of claim against Mr Rajakanthan is that on the

guarantee he is alleged to have given. This is the one occasion in the Particulars of Claim when the claimant positively pleads, in the alternative, that the first defendant gave an indemnity. It is submitted on behalf of the claimant that that is sufficient to save this claim and that, given the pleading of an indemnity, there could be no basis to strike out the claim merely because of the absence of writing. I do not accept that submission. The claimant's case as to the promise made by Mr Rajakanthan is sparse and the only particulars are that he stood in as "guarantor/ surety in the event of non-payment". As I have said above, that it is a clear pleading of secondary and not primary liability. There is no statement of any case that discloses reasonable grounds for bringing a claim based on Mr Rajakanthan having provided an indemnity and the mere use of that word does not create such a case. There is also no case set out that the guarantee was evidenced in writing.

151. The claim against the first defendant is struck out. Given the far more compliant, if not wholly compliant, pleading of the contract between the claimant and the Rajamogans, I do not consider it appropriate or proportionate to strike out the claim against them of the court's own motion. However, I will, in the further directions to be given, and exercising my case management powers, order the claimant to set out its case as to when the sum of £67,200 became due and in what circumstances.

Other claims

152. The claim for "All Claims" (paragraph 89) and the various claims for interest are all parasitic on the claims I have addressed above and will stand or fall with them.

The application for security for costs

The threshold test

153. The defendants apply for security for their costs pursuant to CPR Part 25.13 relying on sub-paragraphs (c) and (g) which provide that the court may order a claimant to give security for the defendants' costs if the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so (sub-paragraph (c)) or if the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him (sub-paragraph (g)).

154. In his witness statement, the defendants' solicitor, Mr Kirby-Turner, estimates the defendant costs at £600,000 plus VAT. He fully accepts that that is a broad brush estimate but he says that, given the generality of the claimant's case as set out in the Particulars of Claim, it is not practicable to give a more detailed estimate.

155. The claimant has most recently filed an unaudited Financial Statement to end October 2021 which states that it has net liabilities of £201,535. That reflects the fact that the claimant has transferred ownership of a number of properties to other companies. Mr Churcher submits that both the tests in sub-paragraph (c) and (g) are met. I agree, although I address further below the arguments of the claimant as to its financial status.

156. Mr Crofton-Martin in his statement denied that Liberty Homes would be unable to pay the applicants' costs. He said that Liberty Homes had traded profitably since 1986 and that the restriction on its doing so now was the freezing injunction. There was, he said,

no evidence that, if the freezing injunction were lifted, Liberty Homes would be unable to pay costs. Mr Crofton-Martin also argued that the freezing injunction was the functional equivalent of security. In the alternative, these were matters relied on as reasons why the court should not, in the exercise of its discretion, order security.

157. There is clearly reason to believe that Liberty Homes would be unable to pay the applicants' costs – on the face of the latest Financial Statement, it does not currently have the ability to do so. The claimant has divested itself of substantial assets in the form of freehold property and in the year to end October 2021 it traded at a loss. Contrary, to Mr Crofton-Martin's argument – and again it is argument not evidence - this has nothing to do with the freezing injunction which was not obtained until April 2022. There is no evidence relating to the position of the claimant after the freezing injunction was obtained. There is no evidence as to whether the claimant is still trading or could still be trading; no evidence that it has been prevented from trading by the freezing injunction; and/or that it could have traded itself back to a positive balance sheet if it had continued trading.

158. In any case, the argument advanced on behalf of the claimant misunderstands the effect of the freezing injunction which does not prevent the claimant from trading. The freezing injunction permits the claimant to dispose of assets in the normal course of business, subject to the requirement to give notice of any transaction of a value greater than £10,000. On the evidence before me on this application, there is no merit in the argument that but for the freezing injunction the claimant would be able to pay the applicants' costs.

159. In support of the second argument that the freezing injunction provided security for costs, Mr Levenstein relied on the decision of the Court of Appeal in *Bestfort Developments LLP v Ras Al Khaimah Investment Authority* [2016] EWCA Civ 1099. In his skeleton argument, Mr Levenstein submitted that so far as the applicants could establish that Liberty had taken steps which would make enforcement against its assets more difficult, that risk had been neutralised by virtue of the freezing order "which is tantamount to the security provided under r 25.13" and he cited the *Bestfort* case at [82].

160. The *Bestfort* case was concerned with an application for security against a person or body outside the jurisdiction and specifically as to whether it was for the applicant to prove that it was more likely than not that it would be difficult or impossible to enforce an order for costs or merely that there was a real risk that that would be the case. The court's decision on that issue was given at [77] in the judgment of Gloster LJ, holding that the test was one of real risk.

161. Gloster LJ then expanded upon her reasons for that conclusion. She drew an analogy with the test to be applied as to the risk of dissipation of assets on an application for a freezing injunction. At [82] she said:

"…. The analogy with the freezing order jurisdiction is particularly apt, in my view, because it reflects the test which a claimant has to satisfy in order to obtain protection for satisfaction of any judgment which it might obtain against a defendant. An application by a defendant for an order for security for costs is the converse side of the coin [in a footnote, she added that the analogy was not precise, since the freezing order

does not provide actual security for the claim]. *There should, it seems to me, be an appropriate symmetry between the two tests that respectively entitle a claimant to a freezing order to satisfy any judgment, and a defendant (or appellant) to security for costs. ….."*

162. The paragraph relied upon by the claimant, and the decision as a whole, is, therefore, concerned only with the similarity or symmetry of the tests the court will apply in terms of risk on an application of this nature for security and an application for a freezing injunction. It is not authority for the proposition either that a freezing injunction offers security for costs or that it "neutralises" the risk of inability to pay costs.

163. Looking at the position more broadly, and as I have set it out above, Mr Levenstein's submission appeared to be that the freezing injunction had neutralised the fact that the claimant had taken steps that would make it more difficult to enforce an order for costs against its assets. For that argument, he relied in part on the fact that the assets frozen were valued at around £6 million, whilst the claim by NJCH in the adjudication enforcement proceedings was for a net amount of £2,589,737. There was, therefore plenty of headroom for the satisfaction of a costs order.

164. That submission fails to recognise the effect of the freezing order. The injunction does not completely preclude the disposal of any of the assets/ properties referred to. The effect of the injunction is to prohibit the disposal of assets up to a specified value – or looked at another way – it prohibits a disposal which would leave the claimant with assets of less than that value. That value is based on the amount said by NJCH to be owed to it in accordance with the decision of the adjudicator. The freezing injunction is in place because of the claim made by NJCH to enforce the decision of the adjudicator. If summary judgment is obtained at the hearing in October, the assets that are frozen will or may be used to pay the amount due. In any event, once that amount is paid, it can be anticipated that the injunction will be discharged. If, on the other hand, NJCH fails in its claim for summary judgement, there will inevitably be an application to discharge the injunction. In other words, the function of the freezing injunction is not to provide security for costs and there is not and will not be any assets frozen in a value that represents security for costs.

165. There was a further suggestion that the claimant retained a beneficial interest in the properties transferred so that it still had substantial assets which would be available to satisfy a costs order. That argument was derived from the decision of O'Farrell J on the freezing injunction. At [42] she recited the evidence adduced by Liberty Homes on the application that the transfers of property amounted to dividends in specie or, in the alternative, cash payments. She said that counsel for NJCH had submitted "with some force" that a company may only make a distribution out of profits available for the purpose and that a dividend in specie or in cash could not be declared where it included monies that should be set aside for liabilities or charges which are likely to be incurred. She concluded:

"If, on analysis, there was no consideration in respect of the asset transfers, and they were not valid dividends in specie, Liberty Homes would retain a beneficial interest in those properties or be entitled to unwind the transaction pursuant to section 432 of the Insolvency Act 1986. For that reason, the court does not accept Mr Levenstein's

submission that no useful purpose can be served by continuation of the freezing injunction or that it is oppressive."

166. At [47], O'Farrell J further concluded that the evidence had established that Liberty Homes had divested itself of a substantial value of assets with the effect that there was a very real risk that it would be unable to satisfy any judgment against it.

167. What is, to my mind, clear from the judgment is that O'Farrell J was not in a position to make, and has not made, any binding decision that Liberty Homes retains a beneficial interest in the transferred properties or is entitled to unwind the transactions. Rather she decided that it was sufficiently arguable that that was the position that an order which applied to Liberty Homes and its property had some teeth. Further, she still concluded that Liberty Homes had divested itself of assets of substantial value and there was a very real risk that it would be unable to satisfy a judgment against it. Adopting the analogy with a security for costs application in a slightly different context from the *Bestfort* case, there is on the same basis, reason to believe that the claimant will be unable to pay the applicants' costs. By the same token, the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against it. The transfer of the properties is sufficient to satisfy that ground and, even if Liberty Homes does retain an unregistered beneficial interest in the transferred properties, to satisfy a costs order it would first have to obtain financial value for these properties by selling them through other companies or unwinding the transactions.

Discretion

The relevance of the freezing injunction

168. The order of security for costs nonetheless remains a matter for the court's discretion. The primary argument advanced by the claimant as to why security ought not to be ordered is that the freezing injunction provides that security. It will be apparent from what I have said already that I do not accept that submission. Nor do I accept, even it might otherwise be a relevant factor, that the freezing injunction has been or could have been the cause of the claimant's current financial position.

Stifling the claim

169. The second reason advanced by the claimant for not ordering security is an order for security would stifle Liberty Homes' claim. That argument is more usually advanced where the claimant's position is that the defendant's failure to pay sums due is the cause of the claimant's impecuniosity. That is because the fact that the claim may be stifled is a factor to weigh in the balance and the court has to consider whether the stifling of the claim would be unfair. The position here is very different and the claimant's financial position is the function of its having divested itself of its assets when it had already made these claims against the defendants and embarked on the pre-action process. That militates against the possible stifling of the claim being a factor that weighs in the claimant's favour as the possible stifling is very much a product of is own conduct.

170. Mr Churcher also relied on what was said in the decision of the Court of Appeal in *Keary Developments Ltd. v Tarmac Construction Ltd.* [1995] 3 All ER 534 at [6] and

by Eady J in *Al-Koronky v Time Life Entertainment Group* [2005] EWHC 1688 (QB) at [31]-[32]. In *Keary*, a case decided before the Civil Procedure Rules, Peter Gibson LJ made the point that, before the court refused security on the ground that it would unfairly stifle a claim, the court must be satisfied that it is probable that the claim would be stifled. As Mr Churcher rightly submitted that is a question of fact, although on the evidence that may be something that can readily be inferred. Peter Gibson LJ continued:

"However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, its shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation…."

171. In *Al-Koronky*, a case decided under the CPR, Eady J made the same observations, albeit without reference to *Keary*.

172. There is a tension in the claimant's case in this respect. Whilst arguing in his statement that the claim would probably be stifled, Mr Crofton-Martin also asserts that Liberty has access to significant assets within the corporate group worth several million pounds. I do not propose to recite his statement of the financial position of three of the Liberty companies which does not seem to me to be wholly accurate. From the Financial Statements:

(i) Liberty GB Ltd.'s Financial Statement to the year ended 31 October 2021 states in the notes that it holds freehold property valued at £3,602,422. Its total net assets, however, are £3,816, taking account of liabilities to creditors of over £3.5 million.
(ii) Liberty Holdings (Kent) Ltd's Financial Statement to year ended 31 October 2021 shows its total net assets as £4,619,272. The notes state that it holds freehold property with a value of £1,473,251 which is less than the value of Liberty Court when transferred to this company.
(iii) Liberty Investments (Kent) Ltd. holds freehold property valued at £413,925. It has creditors falling due within a year in the like amount and has nominal net assets.

173. Although the position may not be as positive as Mr Crofton-Martin asserts, it is clear from this that Liberty Holdings (Kent) Ltd. at least has the financial wherewithal to support Liberty Homes pursuit of this litigation if it chooses to do so. There is no evidence from the claimant as to whether this company would provide funding or not. There are two directors, Mr and Mrs Caulfield, and all the evidence before me is that the Liberty companies are all controlled by them. If any inference can be drawn it is there is a real prospect that Liberty Holdings (Kent) Ltd. would fund this litigation (and an order for security) rather than the contrary.

The applicants' cost estimate

174. Mr Levenstein also submitted that the application was "fundamentally undermined" by the failure of the applicants to even attempt a credible estimate of their costs. He relied

on the decision of Peter MacDonald-Eggers QC, sitting as a Deputy High Court Judge in *Tugushev v Orlov* [2018] EWHC 3471 (Comm). In that case, security was sought in respect of an application for a worldwide freezing order. The claimant, Mr Tugushev, had agreed in principle to provide security and to do so by way of a payment into court. The issue was, therefore, the amount of security and not the principle of whether it should be ordered. A high level costs estimate in a sum exceeding £3.3 million was put in evidence. The applicant suggested a 20% discount on the basis that if the order was discharged, the claimant/ respondent could expect to be ordered to pay costs on the indemnity basis.

175. The judge reviewed a number of authorities which provided guidance on the assessment of the amount of security and at [23] he ventured a list of principles applicable to the quantification exercise. In the present case, Mr Levenstein relied on sub-paragraph (8) as follows:

"Although I accept that the quantification of an order for security for costs is necessarily a "broad-brush" exercise of assessment, bearing in mind the possible prejudice to the respondent of too much security being ordered, the Court must interrogate the estimates of incurred and future costs provided by the applicant. This exercise will not nearly approximate a detailed assessment of costs, but it will be similar to a summary assessment or a costs budgeting exercise. To this end, it is incumbent on the applicant to provide a sufficiently detailed breakdown of costs in support of its application to satisfy the Court that the amount of security which will be ordered will provide the necessary protection to the applicant and avoid any unnecessary prejudice to the respondent. In the even that a sufficiently detailed breakdown is before the Court, in order to ensure that the security ordered provides the necessary protection to the applicant, the Court should resolve any doubt in favour of the applicant. However, if there is no sufficiently detailed breakdown of costs before the Court, any uncertainty arising from the inadequate breakdown should be resolved in favour of the respondent."

176. Having set out these principles, and in applying them, the judge was concerned by the lack of an adequately detailed breakdown of costs and by what, in some instances, he regarded as unreasonably or disproportionately high estimates of costs. He applied discounts to these figures to reach the figure he ordered to be given as security.

177. This decision is not itself authority for any proposition that the absence of a detailed breakdown of costs fundamentally undermines an application for security. What seems to be submitted on the claimant's behalf is that, in the absence of such a breakdown, the court cannot make any proper assessment on the basis of which it can order security and ought, therefore, to make no order at all or, in the alternative, that this is a factor which the court should weigh in the balance and which militates against ordering security.

178. In his statement, Mr Crofton-Martin, also expresses the opinion that the broad brush figure of £600,000 is obviously excessive as it represents 27.4% of the sums claimed.

179. It is, in my view, wrong in principle to suggest that an application for security for costs is fundamentally undermined by the absence of a "proper" costs budget but I agree that

it may be a factor the court can take into account in the exercise of its discretion. It can be more than that.

180. In the present case, I have every sympathy with the inability of the defendants to do more than give a broad brush estimate. The Particulars of Claim give little indication of the likely scope of the disputes, the disclosure, the factual evidence and the expert evidence, let alone the length of trial and likely trial preparation. The best the defendants can do is place some reliance on the material from the letter of claim and their response to that. The total sum itself is far from excessive.

Security from the Caulfields

181. Lastly, the claimant took issue with the terms of the proposed Order which required the security to be provided by way of a payment into court by Mr and Mrs Caulfield "as ultimate beneficial owners of Liberty and its related companies". It was submitted that this was tantamount to asking the court to making a third party costs order in advance of any establishment of a liability to costs and any application for costs from a third party. Mr Levenstein also rightly pointed out that there was no application under Part 25.14 for security for costs from a non-party.

Conclusions

182. The defendants have established that the test for security under Part 25.13 is met whether under sub-paragraph (c) or (g) and I am satisfied that I should exercise my discretion in favour of the defendants and order that the claimant provides security. The existence of the freezing injunction is irrelevant; I am not satisfied that it is probable that the claim will be stifled if security is ordered; and, in the circumstances of this case, I do not regard the absence of a detailed breakdown of costs as a reason not to order security.

183. Orders for security are often made on a staged basis. It is not possible to take that approach here on any structured basis because of the absence of any breakdown of costs. Doing the best I can and taking a broad brush approach, I will in the first instance order security for a modest sum of £150,000 representing costs to the first CCMC. By the time of the CCMC, there should be proper costs budgets and the applicants will have liberty to apply for further security in line with that budget. I emphasise that, in ordering a figure that is far lower than the overall costs estimate, I am not expressing any criticism of that figure or any concern that it is excessive.

184. The security is to be provided by the claimant whether by payment into court or some other satisfactory form of security – for example a suitable form of bond. It may be that the monies are provided by Mr and Mrs Caulfield personally or by other companies in the Liberty group but that is a matter for the claimant and I make no orders against non-parties.

185. I will determine at the further directions hearing the period within which that security is to be provided. In the event that the security is not provided by the due date, the proceedings shall be stayed, rather than struck out automatically, with liberty to the applicants to apply to strike out the claims against them.