Neutral Citation Number: **[2022] EWHC 3122 (TCC)**

Case No: A50BM035

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN BIRMINGHAM**
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 6 December 2022

**Before** :

**HER HONOUR JUDGE SARAH WATSON**

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**Between :**

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| **MICHAEL GRIFFITHS AND MARGURITE GRIFFITHS** | **Claimants** |
| **- and –** | |
| **CLIFTON EARL GILBERT** | **Defendant** |

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**Mr George Woods** (instructed by **Knights plc**) for the **Claimants**
**Mr Avtar Khangure KC** (instructed by **Aspect Law**) for the **Defendant**

Hearing dates: 2 August 2022 to 5 August 2022 and 30 August 2022

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# JUDGMENT

**HER HONOUR JUDGE SARAH WATSON:**

## BACKGROUND AND SUMMARY OF CLAIM

1. In these proceedings, the Claimants, Mr Michael Griffiths and Mrs Margurite Griffiths, claim damages for fraudulent misrepresentation from the Defendant, Mr Clifton Gilbert ("Mr Gilbert"). Mr Gilbert was director and shareholder of C E

Gilbert (Building Contractors) Limited ("CEG"). His son, Mr Nathan Gilbert ("Nathan Gilbert") also worked for CEG.

2. In 2008, Mr and Mrs Griffiths entered into a contract with CEG to build a substantial house at Whitegates Farm, Ilmington, Armscote, Stratford upon Avon ("the Property") in which Mr and Mrs Griffiths intended to live. The contract price was nearly £2 million.

3. Mr and Mrs Griffiths allege that Mr Gilbert represented to them that CEG would take out NHBC cover to the full build costs of £2 million. Mr Gilbert denies that he made that representation. His case is that he only ever said that CEG would obtain a standard NHBC policy, which has a limit on claims for defects of £1 million.

4. CEG obtained standard NHBC cover for the Property. Mr and Mrs Griffiths brought claims for defects with the Property and for asbestos contamination of the surrounding land. NHBC instigated their Resolution process pursuant to the warranty. Mr and Mrs Griffiths were unhappy with NHBC's response and withdrew from the process. They commenced arbitration proceedings against CEG, claiming damages for defects with the Property and contamination of land.

5. Mr and Mrs Griffiths commenced this action against Mr Gilbert in May 2014. It was stayed in July 2015 pending the outcome of the arbitration against CEG. An award was made against CEG in the arbitration in October 2018 for substantial damages and costs. CEG was unable to meet the award and went into insolvent liquidation.

6. Mr and Mrs Griffiths sought to recover from NHBC sums awarded in the arbitration. In a negotiated settlement, NHBC paid them a total of £1 million plus indexation under the warranty. Mr and Mrs Griffiths allege that, had the cover been for £2 million, they would have made a higher recovery from NHBC than they did. Mr Gilbert does not accept that is the case. He argues that, even if there had been a £2 million limit of cover for defects, NHBC would not have paid a higher sum than they did, because the NHBC cover would not have extended to some of the claims awarded by the arbitrator.

## The Claimants' case

7. The parties agree that, during discussions before the contract was made, Mr Gilbert told Mr and Mrs Griffiths that CEG was registered with NHBC, would imminently receive A1 Builder status with NHBC and that CEG would obtain an NHBC warranty for the Property. The parties agree that they understood that the NHBC warranty would be NHBC's Buildmark warranty.

8. Mr and Mrs Griffiths allege that, before the contract was made, Mr Gilbert represented to them that the NHBC cover would be for the full value of the build costs of nearly £2 million. They allege that the representation was made both orally and by Mr Gilbert providing draft costings breaking down the proposed lump sum price during the course of the negotiations for the contract. They allege that the inclusion of the figure of £7,000 shown against "NHBC" in the "Fees" section of the first of the draft costings and the figure of £10,500 in the second of the draft costings were representations that Mr Gilbert had obtained quotations for those amounts from NHBC for the premium for cover for the full build costs and that CEG would take out that cover. They allege that they relied on those representations in entering into the contract with CEG and that they would not have entered into the contract had that representation not been made.

9. They also allege that, after the contract was made, Mr Gilbert represented to them that CEG had taken out NHBC cover for the full build costs by including in valuations issued as claims for payment sums for NHBC fees. They rely on valuation no 1 dated 30 May 2008, in which £8,400 was claimed, and valuation no 7 dated 10 March 2009, in which the balance of £2,100 was claimed. They claim they relied on those post-contractual representations in continuing to pay CEG's claims for payment without taking steps to obtain the cover they expected.

10. They allege Mr Gilbert is personally liable for those representations, as they were made fraudulently, knowing that he had no intention to arrange for CEG to put in place such cover.

### The Defendant's case

11. Mr Gilbert denies he ever represented that CEG would provide a level of cover in excess of NHBC's standard Buildmark cover, which has a claims limit for defects to the Property of £1 million. In the Defence, he also alleges that he made clear that the cover would be the same cover as he had obtained for a substantial house CEG was building at Braggington, with which Mr and Mrs Gilbert were familiar, and would be for £1 million. He also states in his Defence that he did not know until this litigation began that NHBC offered Buildmark cover over the standard £1 million cover.

12. He denies that the figures in the draft costing against "NHBC" in the "Fees" section of the draft costings were solely for NHBC cover. His case is that they included membership of NHBC, contractors' all risk insurance and public liability insurance. He also says the figures were just approximate estimates of those costs within in a breakdown of a total fixed price contract and, like other fees identified in the draft costings, if those estimates were not spent, they would be part of CEG's profit. He denies that the draft costings amount to representations as to the actual cost to CEG of NHBC cover.

13. He also denies that the inclusion of claims for payment in the valuations amount to a representation that there was NHBC cover for the full build costs.

14. Further, he denies that any representations were made by him on his own behalf. His case is that he acted at all stages in his capacity as director of CEG, who were the proposed contractors.

## PRELIMINARY PLEADING POINT

15. Mr. Khangure KC argues that, as the allegation that Mr Gilbert represented that the NHBC cover would be for the full build costs is contained only in the Reply and not in the Particulars of Claim, it does not form part of the Claimants' case for trial and, without that allegation, the claim must fail. He argues that the allegations set out in the Particulars of Claim were true, and it is only if Mr Gilbert represented that the NHBC warranty that CEG would obtain would cover the full build costs that the Claimants might succeed in their claim.

16. Mr Khangure relies on the case of *Martlet Homes Limited v Mulalley and Co Limited* [2021 EWHC 296 (TCC) in support of the argument that it is not open to the Claimants to argue the case by reference to allegations which appear only in the Reply.

17. The Re-amended Particulars of Claim include allegations that Mr Gilbert represented that CEG would procure Buildmark cover. Paragraphs 6 and 7 of the Re-amended Particulars of Claim include allegations of representations that CEG would put in place cover for the "*full cost of putting right damage*". In the Defence, Mr Gilbert pleaded that that he had stated that the Property would have the same £1 million Buildmark cover as CEG had procured for Braggington, which was a comparable development. The Claimants provided more detailed allegations of the allegations as to the representations in the Reply. They alleged that the Defendant had represented that the NHBC cover would be "*for the full value or full build cost of the Property*" or *"for the full value of the Property, the build cost of which was just under £2 million*" and that "*the Company would take out and charge a fee for NHBC cover for the full value of the Property at the price set out in [the draft costings document]*". At trial, the Claimants did not pursue the case that Mr Gilbert had represented that the warranty would be for the "*full value of the Property*". The Claimants' case at trial was that representation was for the full value of the work or the full build cost, which was £2 million.

18. No application was made to amend the Particulars of Claim to include the allegations in the Reply.

19. Mr Woods argued that the Defendant had understood the Claimants' case from the Reply for a considerable length of time, the parties had dealt with the allegations in the Reply in their evidence and also that HHJ Grant, when making case management directions, had directed that amendments be made to the Particulars of Claim and given permission for the Reply.

20. I do not consider the question of any directions given by his HHJ Grant affect the question of whether the alleged representations are properly pleaded so as to form part of the Claimants' case for trial. When the court gives case management directions, it does not advise the parties or alter the rules of pleading. The court

sometimes directs that a statement of case that lacks clarity should be better particularised. Its failure to point out that an allegation in a Reply should be in the Particulars of Claim does not mean the court has made any ruling that affects the issues for trial.

21. Mr Woods also argued that the allegations in the Reply were responsive to the Defence, which pleaded that warranty offered was limited to £1 million, and was clarification of the existing cause of action, not the introduction of a new cause of action.

22. In my judgment, Mr Khangure is correct that allegations as to the representations relied on should be in the Particulars of Claim. However, in this case, the Particulars of Claim do include the allegations of a representation that there would be cover for the "*full cost of putting right damage".* It is clear that the particulars in the Reply were intended to clarify the case in the Particulars of Claim, and not set out a new or separate cause of action. The claim was not argued on the basis that there were separate representations, those set out in the Particulars of Claim and those set out in the Reply. The allegations in the Reply were clearly intended as clarification of what was meant by "*full cost of putting right damage*".

23. The Defendant pleaded in his Rejoinder to the particulars in the Reply. He and Nathan Gilbert gave evidence on the allegations in the Reply. The parties have clearly proceeded on the basis that the Claimants' case includes the allegations in the Reply and that the representations on which the Claimants rely are those set out in the Particulars of Claim, as clarified in the Reply.

24. Further, without the clarification in the Reply, the Re-amended Particulars of Claim could be read as meaning that an unlimited warranty would be provided, rather than that any warranty would be sufficient, no matter what its limit. Whilst that was not the Claimants' case at trial, as their case was that the representations made were that there would be NHBC cover for the full build costs (and not that there would be an unlimited warranty or that there would be a warranty for any other amount), I do not agree with Mr Khangure's argument that, without the allegations in the Reply, the claim must fail.

25. In my judgment, whilst it would have been preferable for the Particulars of Claim to be amended to include the allegations set out in the Reply, in the circumstances of this case, it would be wrong to exclude from consideration the allegations in the Reply, which serve to distil and clarify the cause of action pleaded in the Particulars of Claim rather than introduce a new cause of action.

**THE ISSUES**

26. This is the trial of the issue of liability only. Since a claim in deceit is not actionable without loss, the parties are agreed that any decision as to liability is subject to the issue of whether the Claimants have suffered loss, which would be determined at any trial on quantum.

27. The parties agreed a list of issues in relation to liability. They are as follows:

    27.1. What representations did the Defendant make to the Claimants in relation to the provision of NHBC cover?

    27.2. Were these representations false and made fraudulently?

    27.3. Is the Defendant personally liable for these representations?

    27.4. Did the Claimants or did the First Claimant rely upon such representations?

    27.5. What is the consequence of the emailed letter of intent?

28. The issue of whether, had the cover been higher than £1 million, Mr and Mrs Griffiths would have recovered more from NHBC than they did is not an issue for this liability trial.

**THE LAW**

29. The applicable law is not in dispute. In the words of Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601, [2007] 1 Lloyd's Rep 555 at [251]:

> *"The elements of the tort of deceit are well known. In essence they require (1) a representation which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on"*

30. To establish fraud, the Claimants need to prove the absence of an honest belief in what the Defendant said. In the words of Lord Herschell in *Derry v Peek* [1889] 14 App. Cass 337:

> *"fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false."*

31. In the case of an implied representation, the court must consider what a reasonable person would have understood was being implicitly represented. I was referred to the words of Foxton J in the case of *SK Shipping v Capital VLCC* [2020] EWGC 3449 (Comm):

> *"In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "to show that the representor intended his statement to be understood by the representee in the sense in which it was false" per Morritt LJ in Goose v Wilson Sandford and Co [2001] Lloyd's Rep PN 189 at para [41]."*

*32.* In the words of Rix LJ in *The Kriti Palm* [2006] EWCA Civ 1601, in the case of an ambiguous statement, it is *"essential that the representor should have intended the statement to be understood in the sense in which it was understood by the claimant (and of course in a sense in which it is untrue) or should have deliberately used ambiguity for the purpose of deceiving him and succeeding in doing so."*

**THE CHRONOLOGY**

33. Mr Gilbert was born in Jamaica and his early life was spent assisting his family on their small farm there. After coming to the UK, he was apprenticed as a

bricklayer with John Laing Construction. By the time he left to set up business on his own account, he was managing a substantial project for them. Mr Gilbert's company, CEG, built houses on its own behalf for sale. Until the contract with the Claimants, it did not do building work for other people. Mr Gilbert's evidence was that the 250 or so houses that CEG had built had the benefit of NHBC cover. CEG had only had one claim for defective work, which was settled for £1,000 or £2,000. At the time the parties entered into negotiations to build the Property, CEG was being approved as an A1 builder with NHBC as a result of its good claims history, which reduced the premiums it had to pay for cover.

34. Nathan Gilbert worked for CEG at the same time as studying for a Masters degree in Building Management. He explained in his oral evidence that he attended college one day a week.

35. It is clear from Mr Gilbert's and Nathan Gilbert's evidence that Mr Gilbert is a hands-on builder, who spends his time at site and not in the office. Both gave evidence that Nathan Gilbert would send emails in Mr Gilbert's name, and that Mr Gilbert was happy with this arrangement. Nathan Gilbert said his father had never sent an email in his life. Mr Gilbert described his "machine" as his office and Nathan Gilbert said he would sometimes disturb his father in his digger if an urgent email required his attention, but often he would not. Mr Gilbert's evidence was that he had administrative support from his wife and a quantity surveyor. Nathan Gilbert explained that there had been administrative support from a secretary when he started working for CEG. Mr Gilbert said he did not generally personally complete applications for NHBC cover.

36. Mr Griffiths is clearly a highly successful businessman. He described himself as having been Chief Executive and Chairman of a number of companies and acknowledged he had experience of considering spreadsheets and financial information. He and Mrs Griffiths had previously bought a new property from Persimmon, which had the benefit of NHBC cover.

37. The discussions between the parties began after Nathan Gilbert visited the offices of Mr and Mrs Griffiths' architect, Mr John Bradley, and noticed the plans for the Property. Nathan Gilbert contacted Mr and Mrs Griffiths to show interest in CEG

carrying out the building work. The parties met on various occasions, including when Mr and Mrs Griffiths visited a substantial house that CEG was building at Braggington. That was a speculative project for sale on the open market with an estimated sales price of between £2.4 million and £2.7 million. Mr and Mrs Griffiths became regular visitors to Braggington.

38. Mr Griffiths' evidence was that, at a meeting in mid-October 2007 at Braggington, he explained that they had had experience of a problem with a newbuild property they bought from Persimmon, and NHBC cover was important to them. Mr Gilbert and Nathan Gilbert do not agree with that evidence.

39. Over a period of a few months, the parties negotiated for the building works. CEG used Castons King, Quantity Surveyors, to assist with costing the work. By email on 13 November 2007, Nathan Gilbert sent to Mr and Mrs Griffiths a price for the work of £1,733.680.

40. Mr Gilbert's evidence is that the parties met at Mr and Mrs Griffiths' home on 3 December 2007 to discuss the specification of the house. His evidence is that he said that CEG was registered with NHBC and had recently been awarded A1 status with NHBC, that the house would be built to NHBC standards *"as with Braggington Grange, as it was a comparable development with £1 million cove*r." His evidence is that he did not mention £2 million NHBC warranty cover and never mentioned it at any meeting or communication. He says that this was the only time he communicated with them about NHBC warranty cover before November 2009. Nathan Gilbert's evidence is that his father told the Griffiths that the house "*would benefit from NHBC cover – the standard cover of £1 million*". Mr and Mrs Griffiths do not recall the specific meeting on that date. However, they deny they were ever told that the cover would be for £1 million. They dispute the authenticity of a note made by Nathan Gilbert recording that discussion.

41. On 15 February 2008, Mr Griffiths asked for a breakdown of the price for which CEG had quoted and detail as to the specification. On 16 February 2008, Nathan Gilbert sent to Mr Griffiths a breakdown of the costings and a brief specification. The specification identified PC sums for various elements such as doors, kitchen, etc.

42. Nathan Gilbert's evidence was that, because CEG usually only built houses for sale rather than as a contractor, it was used to providing breakdowns only for the purposes of budgeting and releasing bank funding, rather than for entering into contracts with third parties. Those costings did not need to be precise. Mr Gilbert's and Nathan Gilbert's evidence is that Nathan Gilbert produced the draft costings using the template they usually used for their own projects for funding purposes and the breakdown provided was similarly approximate to the costings he would generally produce. I accept their evidence. The template includes a column "undrawn balance", which is clearly relevant to drawing funds from the bank. The trial bundle contained CEG's costings for its development at Braggington, which were in the same form. Apart from one figure, all the figures are round, to the nearest £100. Most of the figures are round to the nearest £1,000.

43. The breakdown contains figures for the various elements of the work. Included in the list of costs under the heading "*Fees*" are the following: "*Architect £3,000; Engineer £12,000; Ground Investigation £1,680; Building Control £6,600; NHBC £7,000*".

44. On 28 February 2008, Mr Griffiths emailed Mr Gilbert and Nathan Gilbert in the following terms:

> *"Dear Cliff and Nathan, We seem to be at a standstill regarding the project. The problem centres around the budget and the costings. In particular, the PC sums for the staircase, kitchen, including utility room, internal doors, floors, bathrooms etc. We are trying to get ball park numbers for these items, however, the figures look as though they will substantially exceed the figures in your costings. We are anxious not to put you in a difficult position nor do we wish to go forward with any possibility for misunderstandings about what is included in the scope of the work and the budgeted price. I am unsure how we can resolve these issues.*"

45. From this email, it is clear that Mr and Mrs Griffiths were concerned that the draft costings may not include sufficient amounts in the PC sums for the likely actual costs of the items included as PC sums. They were concerned that the PC sums were too low for the items they wanted so the budgeted price would be exceeded.

46. Further costings were prepared by Castons King on 14 March 2008. On 19 March 2008, an e-mail was sent in the name of Mr Gilbert to Mr Griffiths in the following terms:

> *"Further to our conversation today, I would like to confirm that the figure of £1.9986m is the very lowest we can carry out the above work for."*.

47. CEG provided Mr and Mrs Griffiths with further draft costings, breaking down the higher price. In the revised draft costings document, the figure for NHBC had increased from £7,000 to £10,500.

48. Work began on site before the contract was executed. Mr Gilbert and CEG were concerned that they were working at risk as there was no contract in place and asked for a letter of intent. Mr Griffiths sent a letter of intent to CEG on 30 April 2008, in the following terms:

> *"Dear Cliff, Thank you for calling me today and for the update. You requested that I provide you with a letter of intent regarding the construction of a new house at the above location. I can confirm that, subject to contract, I wish to appoint you to carry out the design and build of the property. I look forward to receipt of the updated contract."*

49. On 1 May 2008, a further e-mail from Mr Griffiths was sent to Mr Gilbert in the following terms:

> "*Cliff, Sorry, I did not realise you wanted me to refer to the price in the letter of intent. I am in London tomorrow on the 8:40 am train but will ask Maggie to come over to see you at the site."*

50. On the evening of 2 May 2008, a meeting took place at Alveston Manor Hotel at which the parties ironed out the final details of the proposed contract. The parties gave different accounts of that meeting. Mr and Mrs Griffiths' evidence was that the meeting was with Mr Gilbert and Nathan Gilbert did not attend and that the parties went through the costings line by line and discussed them in detail. Mr Griffihs' evidence was that Mr Gilbert confirmed they would have full NHBC cover for the increased build costs. Mr Gilbert and Nathan Gilbert both gave evidence

that they both attended that meeting and that the parties did not discuss the costings in detail but discussed and agreed the figures to be included for PC sums within the total price that had already been quoted.

51. At 21.31 on 2 May 2008, an e-mail was sent in Mr Gilbert's name to Mr and Mrs Griffiths. Mr Gilbert's evidence and that of Nathan Gilbert was that the email was sent by Nathan Gilbert in his father's name. I accept their evidence on that point. It is clear to me from his evidence that Mr Gilbert left paperwork and correspondence to his son (or others) wherever possible. In addition, Nathan Gilbert had been dealing with the costings and liaising with Castons King. The email was in the following terms:

> *"It was great seeing you both today in good health. I would like to confirm the following in reference to the above site. The PC sum for the kitchen - £70,000; the PC sum for the bathroom - £40,000; the PC sum for internal doors: £400 per door; we have allowed for stone fireplaces at a sum of £8,000; we have also allowed for re-siting and extending the garage to become at 3 car garage with ancillary accommodation above. We will carry out the above work as to the current specification for the full sum of £1,998,680.00*."

52. The total price quoted in that email following the meeting at Alveston Manor was exactly the same as the price previously quoted. The e-mail of 2 May 2008 confirmed the specific amounts allowed within that contract price by way of PC sums for the various elements such as kitchens, bathrooms etc. It did not make reference to any other detailed costings.

53. On 15 May 2008, CEG and Mr and Mrs Griffiths entered into a JCT Design and Build Contract (2005 edition). The contract was prepared by Castons King for CEG. The contract included an obligation on CEG's part to insure the building works but did not make any reference to any obligation to provide NHBC cover. The Claimants' architect, Mr Bradley, was named as the Employer's Agent. However, he had no further involvement in the project. Unusually for a building project of this scale and value, Mr and Mrs Griffiths did not engage an architect or quantity surveyor to oversee the work or monitor the payment process on their behalf.

54. The building work progressed on site and interim payments were made pursuant to valuations issued by CEG. Mr and Mrs Griffiths allege that those valuations were representations that CEG had taken out NHBC cover to the value of the build costs. The first valuation, dated 30 May 2008, included a claim for payment of £8,400 against the entry "NHBC" and showed an undrawn balance against that item of £2,100. Valuation 7, dated 10 March 2009, included a claim for payment of the balance of the £10,500 identified as the cost against the entry "NHBC".

55. On 5 November 2009, Mr Griffiths sent an email to Mr Gilbert in the following terms:

> "*You have charged me £10,500 for NHBC which I assume is for their sign off and guarantee of the property. Please would you let me have copies of their inspection reports to date. In the past 48 hours several things have come to light which concern me. The beam at the rear of the house is apparently sitting far too far forward….."*

56. On 5 November 2009, Mr Gilbert responded that there was nothing wrong with the steel and said "*we will supply you with the information required from the NHBC*."

57. On 11 November 2009, Mr Griffiths emailed Mr Gilbert saying that he assumed they were "*fully insuring the property and its contents against "the usual risks… fire, theft, vandalism, damage howsoever caused.*" In his oral evidence Mr Griffiths accepted that the correspondence at this time relating to insurance referred to buildings insurance and not to NHBC cover.

58. On 12 November 2009, he emailed Mr Gilbert as follows: *"With regards to the NHBC they say that you have not paid them and that the property does not have an allocated number. I have passed onto them my concerns regarding the beam at the rear of the property is now exposed and which you said was a structural issue. If it is a structural issue then I would like to know why and to have confirmation that it is not an issue that I need to be concerned about. Why, if you have not paid the NHBC, have I paid you?"*

59. It is clear from the content of the correspondence between the parties at this time that they were in a dispute and feelings ran high over issues that are not directly relevant to this dispute.

60. NHBC's records, which were disclosed shortly before trial pursuant to a request from the Claimants and with the Defendant's agreement, show that Mr Gilbert telephoned NHBC on 12 November 2209. The file note reads:

> *"Mr Clifton Gilbert rang through and confirmed plot details as follows:- detached, three storey house, no basement, traditional construction with selling price of £2.5 million. Landowners to occupy. Explained to Mr Gilbert that the maximum cover would be £1.0 million, if more cover was required would need to refer to commercial. Mr Gilbert thought that this would be sufficient. Quote issued."*

61. Later that day, Mr Griffiths sent an email to Mr Gilbert which included the following:

> ".. *Finally I find the NHBC situation completely unacceptable. You led me to believe that the house was covered by the NHBC when in fact you have not paid them*."

62. It is not clear what Mr Griffiths meant by "*that the house was covered by the NHBC*" since NHBC do not issue cover until completion and so a house is never "covered" during construction. They reserve their right to refuse to offer cover if they are not satisfied that the building work meets their requirements. From the correspondence in the trial bundle and from parts of the original Particulars of Claim that have since been abandoned (which included a pleading that Mr Gilbert had represented that NHBC would inspect the property at every stage of instruction and that work would not proceed without approval from the NHBC inspector), it is clear that Mr Griffiths wanted NHBC to check the building work as it progressed. He raised issues of concern with NHBC as the building work was progressing, before they had offered to issue warranty cover to him and before they were in any contractual relationship with him.

63. On 13 November 2009, an email was sent in Mr Gilbert's name to Mr Griffiths saying, among other things, "*In regards to the NHBC, I do not know what has gone wrong, but it will be solved*". At that time, he had in fact spoken to NHBC and obtained a quote. CEG paid NHBC the premium of £3,088.16 shortly afterwards.

64. On 18 November 2009 Mr Griffiths emailed NHBC as follows: *"I am the owner of the above site. ..... Throughout the construction the Builder lead (sic) me to believe that the NHBC were fully involved in making inspections consistent with a final certificate and guarantee being issued. I have paid the builder a substantial premium for the security of having the NHBC involved. I called you the other day regarding some problems with the builder only to be told that you do not have a record/number allocated to this property. Please would you confirm what is the status of this project and if you have carried out any inspections of it and if so when. As NHBC certification is a vitally important part of this new build I am obviously very concerned to know if I have been totally mislead (sic) by the builder."*

65. On 20 November 2009 Mr Griffiths sent an email to Mr Gilbert as follows: *"I refer to our conversation yesterday regarding the NHBC and my concerns surrounding the information given to me by them. Having called the NHBC they advised me that the property did not have a number and that you had not paid them. You have assured me that the property has been inspected by the NHBC. I am advised that a book should be kept on site to confirm their visits and inspections. I have asked to see this ... you have confirmed that the NHBC have carried out all the required inspections and that a certificate will be issued and a 10 yr guarantee will be granted by them. ... please would you let me have written confirmation that this is the case."*

66. From this, it is clear that Mr Griffiths' concern was that, because the premium had not been paid, NHBC may not be checking the work on site. Mr Griffiths' evidence was that it was very important to them that CEG was NHBC registered and that NHBC would be inspecting the work as it progressed. In fact, CEG had given the required site notification and NHBC had carried out the necessary inspections as the development had progressed. However, for some reason that is unclear, the premium had not been paid.

67. On 23 November 2009, Patricia Brown of NHBC sent an email to Mr Griffiths confirming that the Property had been registered for Buildmark Newbuild. She provided the policy number and confirmation that the site was under inspection. Ms Brown singed herself as "Contact Centre Assistant".

68. On 2 December 2009, Mr Griffiths spoke again to NHBC. In his witness statement, he said that he was beginning to doubt Mr Gilbert's honesty and he "*rang to enquire about the levels of cover that they offered for a newbuild with a build cost of around £2m. I was told by Ms Waghorn that she would look into it and respond to me by email. I received that reply the following day and was told that an estimated Buildmark warranty fee for works up to a cost of £2 million at the Property was £5,838.37."*

69. On 3 December 2009 Emily Waghorn of NHBC sent Mr Griffiths an email headed "*NHBC Buildmark Warranty Estimate*" in the following terms:

> "*Further to our conversation yesterday, we can give an endorsement up to a maximum of £3,000,000. For any property with a sale value over £1,00,000 we can insure for the build cost only. I believe that you said that the build cost was £2,000,000 so an estimate for the Buildmark warranty fee is £5,838.30."*

70. Her email is signed with her name and the word "Commercial" under it. It appears that she was in the Commercial Department of NHBC. From this, it appears that Mr Griffiths, having spoken to a Contact Care Assistant previously, had been referred to the Commercial Department, which deals with bespoke cover exceeding the standard Buildmark warranty. From the email, it is clear that he told Ms Waghorn that the build cost was £2,000,000. From his witness statement, which refers to the estimate being for works up to £2m "*at the Property*", it appears that she knew the identity of the property to which the quotation related.

71. Later that day, Mr Griffiths responded to Ms Waghorn as follows:

> *"Thank you for this information. I have a question please. What checks do you insist on making before you will insure a new build property. In other words, how frequently do you inspect the work and more specifically what do you focus on specifically?"*

72. From this, it appears that Mr Griffiths was concerned to establish what was NHBC's inspection regime, presumably to understand the extent to which they would be likely to identify possible defects as a result of their inspections.

73. Practical completion is deemed to have occurred on 12 October 2010.

74. Mr and Mrs Griffiths had issues with the work. They engaged Mr Dan Ryde, a Quantity Surveyor with Pyments, to advise them.

75. On 5 January 2011, Mr Ryde emailed Mr Gilbert asking, among other things, that they provide Mr Griffiths with a copy of the NHBC certificate as a matter of urgency as without it he was unable to insure the property. Later that day, Nathan Gilbert sent to Mr Ryde "*a copy of the NHBC document as previously supplied. Also in the pack is the homeowners guide which I shall hand to you in person*".

76. On 17 January 2011 Mr Griffiths wrote to CEG stating that Practical Completion was deemed to have been achieved on 12 October 2010, and stating that there were defects as previously notified on 8 November 2010. On 31 January 2011, Mr Ryde emailed Mr Griffiths to say that "*Nathan will deliver by hand a copy of the NHBC cover document to site this evening. You will then be able to ensure the heating is covered and can notify the NHBC of the issues*."

77. From this, it appears that Mr Griffiths received the NHBC certificate at the latest on about 31 January 2011, and possibly earlier, on 5 January 2011.

78. On 8 February 2011, Mr Griffiths signed the acceptance of NHBC's offer of cover. The form included the purchase price of the home and the site. Mr Griffiths put in the figure of £3 million (which he explained was £1 million for the land and £2 million for the cost of the work). The NHBC certificate of cover showed a £1 million limit of cover.

79. Mr Griffiths' evidence was that, when he received the certificate, he simply filed it and did not notice until later that it was limited to claims up to £1 million and not £2 million.

80. On 11 April 2011, Mr Griffiths emailed Emily Waghorn of NHBC in the following terms:

"*I have now received the NHBC certificate from you but the builder appears to have insured the property for £1 million when he charged us £2 million to build it and charged us £10,000 for NHBC. Can you help me understand this please? Thank you.*"

81. I note that he does not say in that email that Mr Gilbert had promised to insure the property for £2 million, for the full build costs, for the full value of the Property, or for any other sum. He makes no reference to any representation or promise from Mr Gilbert or CEG. Instead, he simply states that the cover is for £1 million when the builder had charged £2 million for the work and he had paid £10,000 for the warranty and asks for NHBC's explanation.

82. On 17 April 2011, Mr Griffiths sent an e-mail to Technical Services Support General Enquiries at NHBC in the following terms:

"*I have a complaint which I reported some time ago and remains unanswered. The builder CE Gilbert and Son Ltd charged me £10,000 for the NHBC cover. He charged me £2 million to build the house at his insured it for £1,000,000. This doesn't seem right to me and I would appreciate your comments.*"

83. Again, I note that Mr Griffiths did not say at that time that Mr Gilbert had promised £2 million of cover or cover for the full build costs. He does not even assert that the level of cover is wrong. Instead, he seems to be questioning NHBC as to whether it is wrong.

84. On 5 May 2011, Mr Griffiths sent an e-mail to his advisers, Pyments, saying *"we believe that the NHBC position should be fully researched and understood as it seems to me that underinsurance will prejudice any claim that might be forthcoming. On the basis that Cliff has done nothing that can be trusted, a future structural problem may well arise and a claim being averaged down substantially by the NHBC may leave me exposed.*"

85. From this, it appears that Mr Griffiths understood that, like buildings or contents insurance, a claim under the NHBC warranty would be reduced pro rata if the property was "underinsured". He wanted to investigate the NHBC position. His concern does not appear to be that the potential claims could exceed £1 million, but

that there is a risk that any claim would be reduced as a result of underinsurance. In fact, that is not how the NHBC warranty works. Unlike insurance such as buildings and contents insurance, it appears NHBC do not pro-rate claims but permit house owners to claim up to the maximum level of cover, even if the property covered is worth more than that limit. His concerns about "underinsurance" leading to a claim being "averaged down" were unfounded.

86. On 9 May 2011, NHBC responded:

> *"I understand that Emily Waghorn from our commercial department did reply to you in December 2009 expaling (sic) we could endorse the plot and extend the cover on the builder's confirmation…. At the time of registration C Gilbert and Son asked for normal £1 million of Buildmark Newbuild cover and they have never requested a higher cover. Due to the fact that the property is fully built and the insurance is already in place we cannot amend this. The fees paid for Buildmark Newbuild insurance are based on the specific builder's premium rating with the NHBC and also the selling price of the unit.*"

87. There followed several emails in which Mr Griffiths asked NHBC for clarification as to the position if there were a serious claim and the property appeared underinsured, to which NHBC responded by reference to the cover in the policy. Mr Griffiths appears to have become frustrated during this correspondence. It appears to me that the reason for this is that NHBC did not understand that he did not understand how the policy operated. It appears that Mr Griffiths did not understand that, whilst premiums were set by reference to the sales price of the property, the limit of cover was £1 million, and the concept of a property being "underinsured" did not apply to an NHBC warranty in the way that it does to buildings insurance.

88. In one such e-mail, Mr Griffiths wrote as follows:

> *"Please note... the £2,000,000 is the cost has been paid the build house not the sale price. He has charged and has been paid £10,000 for full NHBC cover and it was not until the policy arrived did I discover he had only covered the property for £1 million. This is not the only dishonest dealings I'm going to*

*expose regarding the builder. I have been cheated and I need to know what the NHBC are going to do about it..."*

89. Again, I note that the complaint to NHBC is the charge for £10,000 and there is no reference to Mr Gilbert having promised cover of £2 million or the full build costs. The allegation is that the builder had charged for "full NHBC cover".

90. Mr and Mrs Griffiths became involved in further correspondence with NHBC. On 14 October 2011, their then solicitors, Spearing Waite wrote to NHBC. They said:

*"The Policy was arranged by the Builder, which is an NHBC registered builder. The build cost of the Property was approximately £2 million but the builder wrongly arranged cover to a maximum of £1 million, leaving our clients in a precarious position where the Property is under insured by at least £1 million. The property is consequently subject to uninsured risk and is unsalable unless and until this position is rectified.*

*.....Our clients' position is simple. The maximum liability under the Policy needs to be increased to cover the build cost of the Property. On 3 December 2009, your Emily Waghorn wrote to our clients by e-mail confirming as follows:-*

> *"For any property with a sale value over £1,000,000 we can insure for the build cost only. I believe that you said that the build cost was £2,000,000 so an estimate for the Buildmark warranty fee is £5883.37."*

*A copy of the e-mail is enclosed. We consider it represented confirmation by you that you would increase the maximum level of cover under the policy to the build cost of the property ie in the region of £2 million. By their subsequent emails, our clients have sought to implement that this increase in cover, but you have failed to take any substantive action at all. Our clients have written to you no less than 23 separate occasions, but no progress has been made. This is entirely unacceptable.*

*……. As a separate matter and of equal importance, you will appreciate that our clients had been seriously misled and prejudiced by the builder, which did*

*not put our clients on notice that the property had not been protected to the full extent of the build costs. In addition, the builder charged our clients £10,000 for arranging the policy when the premium actually payable would have been less than half that sum . Please confirm exactly what was paid by the builder to you in respect of the policy.*

*It seems to us that it is incumbent upon you to take appropriate action against the builder in respect of this behaviour, both as a consequence of the severe prejudice caused to our clients and in view of the significant damage done by this action to the reputation of NHBC and the perceived value of the Buildmark policies generally. We would make the following observations.: -*

*As the charge made by the builder to our clients was clearly more than twice the actual costs of it obtaining the cover, the builder's conduct was in breach of Rule 21 of the Rules for Builders and Developers registered with NHBC ("the Rules"), which prohibited the builder from making a charge to our clients for NHBC cover unless that charge was included in the contract for the Property.*

*We believe you are in a position under Rule 14 of the Rules to require the builder to pay the additional premium which will be due in respect to the policy when the maximum amount of cover is increased.*

*Please confirm what action you intend to take against the builder in view of the above."*

91. I note that this letter does not include an allegation that Mr Gilbert expressly agreed to cover the property for £2 million, or for the build costs. Instead, it asserts that the builder "*did not put our clients on notice that the property had not been protected to the full extent of the build costs"*.

92. The Claimants also seem to have been under the impression that NHBC would be concerned about reputational damage to the perceived value of Buildmark policies. From this, it appears that the Claimants understood that NHBC would be concerned that a £2 million property was insured with a limit of £1 million, which suggests that they understood that NHBC would have an issue that the Property was

"underinsured". However, it is clear that NHBC did not have an issue with builders taking their standard cover for properties valued at over £1 million, and that properties were not "underinsured" under NHBC warranties in the same way as they might be under a buildings policy, where claims might be reduced if a property was insured for less than its rebuilding costs. Also, Rule 14 of NHBC's Rules for Builders relates to charges for premiums, not levels of cover. Under paragraphs 14 (b) and 14 (c) of the Rules, NHBC can reassess the charges if the actual selling price of a property exceeds the anticipated selling price (in which case the premium paid would be too low). Rule 14 does not provide that NHBC can increase the level of cover.

93. Finally, it is of note that the Claimants alleged that Ms Waghorn's email of 3 December 2009 was a representation that NHBC would increase the level of cover to £2 million.

94. NHBC responded in due course by agreeing to talk to their reinsurers with a view to providing a further £1 million of cover, to be underwritten by Aviva at the rate of £7 per £1,000 of build cost. They also suggested the alternative would be for the builder to take out cover directly with NHBC. Surprisingly, in the light of the allegations in this claim, the Claimants did not contact Mr Gilbert to complain as to the level of cover or to pursue that option. Instead, they asked NHBC to pursue obtaining a quotation for increasing the cover. On 14 December 2011, NHBC offered to increase the cover to £2 million for an additional fee of £4,362.51. This offer was not accepted. Mr Griffiths' evidence was that his solicitors advised him that they needed to disclose potential claims before accepting the offer of cover and so the cover was never increased.

*95.* On 8 March 2012, Spearing Waite wrote a letter to the Claims Department at NHBC setting out various claims for defects. Under the heading "*provision of the policy*" they said as follows

> *"We refer you to our previous letter to you dated 14 October 2011 ... Our client was charged £10,000 by the builder to obtain full NHBC cover with an indemnity limit of £2,000,000. However the premium paid by it to you was less than half that sum and the builder only obtained cover with an indemnity limit*

*of £1,000,000. Had they been aware of this, our clients would obviously not have accepted a policy which did not cover the build costs of the Property. Indeed, you will be aware that our clients contacted you on this basis when they discovered that the indemnity limit of the policy, as purchased by the builder, was only £1,000,000. ……..*

*"…….It was a crucial factor in our clients selection of the builder that it was not only NHBC registered but highly rated due to an absence of previous claims having been made against it. In fact, it is our clients' position based on their own experience and the independent evidence which has been obtained that, at best, the builder lacked the competence to construct the property to any reasonable standard. In addition it was reasonable for our client to expect that NHBC would … monitor the progress of the construction whether in conjunction with the building control or otherwise, to ensure that basic building regulations standards were being met and not sign the property off as having been satisfactorily completed (ie substantially in compliance with NHBC requirements) when it so clearly had not been"*

96. Under the heading "*Confidentiality*" they said:

*"in view of the issues raised in this notification, you will appreciate that our clients may need to pursue claims against one or more other parties, including the builder, to the extent that the level of cover available under the Buildmark policy is insufficient to cover all remedial costs, or otherwise. Disclosure to the builder of the information contained in this letter all the documentation enclosed with it could jeopardise any such claims. It is for that reason that we require your undertaking not to disclose that information or documentation to the builder or any other third party without our clients' express permission."*

97. Given that the letter was principally a letter of claim identifying alleged defects with the Property and complaining of inadequate NHBC cover, it is very odd indeed that the Claimants asked NHBC to keep the contents of the letter confidential.

98. On 12 April 2012, Spearing Waite wrote to CEG in relation to the insurance requirements under the JCT contract. They asked for a copy of the policy. It is of

note that still no mention was made of the allegation of "underinsurance" in relation to the NHBC policy.

99. It is clear that, at this time, not only had the Claimants not put CEG or Mr Gilbert on notice that they considered he had taken out insufficient NHBC cover, but they had positively taken steps to attempt to conceal the potential claim from him.

100. On 1 May 2012, NHBC wrote to Spearing Waite. They explained in that letter that, whilst they noted from Spearing Waite's letter what the Claimants' expectations may have been, it was important to understand that NHBC had no contractual agreement with them in relation to the construction of the property and their involvement was solely in relation to the provision of the Buildmark cover. They observed they had no involvement in Building Regulation compliance in relation to the Property. They also pointed out that it was only when NHBC received payment of insurance premiums from the builder and they are satisfied that the construction is acceptable that they will be prepared to provide Buildmark cover. They also commented that they could not understand how disclosing the contents of Spearing Waite's letter of claim to CEG could possibly prejudice any claims against CEG.

101. Despite the correspondence with NHBC in which Mr Griffiths stated he considered he had been cheated, it appears that neither he nor his solicitors notified Mr Gilbert of his concern that the cover NHBC cover was inadequate until shortly before this claim was issued.

102. These proceedings were issued in 2014 and stayed pending the outcome of the arbitration proceedings against CEG. The final award in the arbitration was dated 19 October 2018. CEG were unable to meet the payment they were ordered to make in the arbitration and went into insolvent liquidation. The stay in these proceedings was lifted on 24 November 2021.

## THE EVIDENCE OF THE WITNESSES

### Mr Griffiths' evidence

103. Mr Griffiths gave evidence as to the oral representations.

104. In his witness statement, he said:

> *"Mr Gilbert was charming and helpful, extolling the quality of the build and his vast experience in building high quality homes that were fully covered by the NHBC."*
>
> *"He placed great emphasis on what he described as his "A1 NHBC rating" and explained that the got this rating due to his claims experience being so low which he said reduced the NHBC premiums. He went on to say that he had never had a substantial claim against him and that his properties carried full NHBC cover."*
>
> *"My wife and I made it clear to Cliff Gilbert that as a result of our traumatic past experiences (and what we imagined were the very significant cost of the remedial works to the house) we required an NHBC registered builder to build our new house. This would give us comfort that the house would be well built and that the NHBC would guarantee that any problems and defects were resolved."*
>
> *"I explained to Mr Gilbert that I could only imagine what the rectification and decontamination costs must have been that and that having such a devastating experience we were paranoid about our choice of builder and that having full NHBC cover for the total cost of the building was an absolute priority"*
>
> *"Mr Gilbert responded and assured us that if we engaged him to build our house he would obtain NHBC for the full cost of the build so what we would be protected should any serious defects arise."*
>
> *"… there was no mention of cover being limited to £1 million"*
>
> *"Mr Gilbert…. Confirmed that the Property would be fully inspected at every stage by NHBC, SDC Building Control and that his appointed structural engineer would inspect the structure."*

105. In his oral evidence, he accepted that *"[i]t was never suggested in the negotiations with Mr Gilbert that he was going to provide 2 million of cover. He was going to provide full cover for the cost of the build."*

106. It was put to him in cross examination that the representation was that CEG would take out the NHBC product called NHBC Buildmark cover, which it did. He responded:

> *"So if you're somebody having a new house built and you wanted to be protected by the NHBC, you simply say to the builder this is [what I want], he quotes a price because that is the price he's agreed with the NHBC subject to the cost of the build. So that's the determining factor in terms of the rules for builders."*

*107.* He was asked if he knew how NHBC cover works and he responded:

> "*I think I know how the builder is supposed to apply for it*" and "*it's not by reference to 50 per cent of the value.*"

*108.* When it was put to him that it was not by reference to build costs either, he said:

> "*but if you look at the rules for builders, it says exactly that, that the price that they - they ask the builder to confirm in the site notification document is the full cost of the selling price*."
>
> "*He sold me £2 million worth of work in the Property."*

109. He was asked about paragraph 19 of the Re-amended Reply, which reads as follows:

> *"If the Defendant knew that the warranty he intended to take out was limited to £1 million he was obliged to correct his earlier representations as to full cover in clear and explicit terms in circumstances where the Defendant had made representations as to full cover and he believed or should have believed that the Claimant understood that cover was for the sum of £2 million or the full build cost of the Property."*

110. He was asked whether he thought that the Defendant should have understood "*full cover*" to mean either build costs or £2m. Mr Griffiths said:

> *"Well, that's because if he did the site notification he should have done which had a price on it, he would have known that it was 2 million. He was obliged*

*to tell the NHBC what the cost of the build was or what the selling price was in order for them to quote a premium. He didn't do that. He told them it was 50 per cent of the cost of the build and took out corresponding insurance on that basis"*

111. He also said:

*"Nowhere in the NHBC booklet does it say you are going to get 50 per cent of the value of the property that you've just bought, from Persimmon or anybody else, 50 per cent. Nowhere does it say that. And had it said that or had the defendant said that we were only going to get 1 million of cover, we would never have employed him at all."*

112. In answer to a question from his own counsel as to his understanding of the effect of insuring for less than the level of risk when he met Mr Gilbert, he responded that

"*It was never contemplated in my mind that we would enter into any agreement that didn't insure the property that we're going to build for the full build cost.*"

113. He went on to say that

"*The reason we wanted it was because of the devastation that was a Persimmon home, where I think the cost of rectification was more than the build cost."*

**Mrs Griffiths' evidence**

114. Mrs Griffiths was very upset when she came to give evidence and she was not cross examined at length, as Mr Griffiths was the main witness. She supported Mr Griffiths' evidence and confirmed that her evidence was that Nathan Gilbert had not been present at the meeting at Alveston Manor and that they had gone through the draft costings in detail.

**Mr Gilbert's evidence**

115. Mr Gilbert gave evidence that the discussion about NHBC cover was at the meeting on 3 December 2007, when he said the Property would be covered by the

same standard £1 million warranty that CEG had for Braggington. It was put to him in cross examination that he had not said that. He maintained his position.

116. Mr Gilbert was cross examined as to his understanding of the adequacy of the cover taken out. He said it was a warranty that was fit for the property. He struggled to put into words what that meant. He said he had built 250 houses and had never had a claim for £1,000. He said:

> *"So from my point of view, when I looked at a policy relating to a warranty for building I'm going to do, if I -- if I said to somebody – "I need -- I'm going to build a house, sell them a house, and it's £1 million and I need £1 million warranty" then that person shouldn't be buying a house off me because that house is going to fall down."*

117. He also said:

> *"I could explain a little bit in my own basic way. The NHBC come and examine a property as it goes along. So as they inspect the property and you build the property, you can, as it go by and you pass different stage, then you -- the risk or what have you would reduce as you go along. So for adequate insurance is to put right, in my opinion, defective work that the NHBC said is actually defective work under the policy that they want to put right."*

118. It is clear that Mr Gilbert did not consider that the limit on an NHBC policy had to be for a sum that matched the value of a property, its price, or the costs of building it. He considered it needed to cover the likely costs of remedying defects that might exist, bearing in mind NHBC's process of inspection during the building process, which he considered reduced the risk of defects existing when the property had been built.

119. Although NHBC's file note of his conversation with them when he called them on 12 November 2009 is inconsistent with Mr Gilbert's pleaded case that he was unaware before the litigation that NHBC offered cover in excess of £1 million, he conceded when he saw that file note that he must have known what NHBC told him at the time, though he had later forgotten the conversation.

## Nathan Gilbert's evidence

120. Nathan Gilbert gave evidence that, at the meeting of 3 December 2007, his father said that there would be standard NHBC cover of £1 million. He also gave evidence that it was his practice to write notes in an A4 notebook but that he had mislaid that notebook at the time of the meeting. He therefore made notes in a smaller notebook. About 6 to 8 months later, when he found the A4 notebook, he transcribed the notes from the smaller notebook and also added anything else that he could remember. He explained that he wanted to keep all the notes in the same place. The smaller notebook contains a record of the meeting which makes no reference to any discussion about NHBC warranty. The larger notebook has a similar record but also contains a note: "*NHBC - agreed same cover as Braggington = £1M as a comparable (maximum cover).*"

121. Nathan Gilbert was asked about the draft costings and it was put to him that he knew that Mr and Mrs Griffiths would rely on the content of the costings and the specification. His evidence was that the discussions about the costings were about getting what Mr Griffiths wanted for the price he had budgeted and getting what he wanted within the PC sums.

122. It was also put to him that he did not attend the meeting at Alveston Manor on 2 March 2008. He was adamant that he did attend the meeting and that he recalled Mr Griffiths referring to the bride at a wedding that was taken place at the same time at Alveston Manor as a "train wreck". It was suggested that he had not written the e-mail later that day to confirm the agreed PC sums and that Mr Gilbert had written it. He said that his father had never written an e-mail in his life and that he had written that e-mail.

123. It was put to him that Mr and Mrs Gilbert had gone through the documents and the cost analysis line by line. He did not agree.

## ANALYSIS AND FINDINGS

### ISSUE 1 – WHAT REPRESENTATIONS WERE MADE?

### The oral representations before contract

124. The following aspects of the evidence are relevant to this issue.

The meeting on 2 December 2007 and Nathan Gilbert's notes

125. Mr and Mrs Griffiths ask me to find that the note about NHBC cover in the A4 notebook is not genuine and that Mr Gilbert did not say at the meeting that the level of cover would be the same as Braggington, being the standard NHBC warranty for £1 million.

126. I am aware that it is common practice for construction professionals to keep day books, diaries or notebooks as records of events and reminders to themselves. I do not find it surprising that Mr Nathan Gilbert decided to transcribe his notes from one notebook to another so that they were all in his main notebook. Of course, it is possible that the entry in relation to NHBC could have been added later for the purposes of the litigation. However, it is not in dispute that both notebooks were disclosed simultaneously in the arbitration proceedings. No attempt was made to withhold the existence of the earlier notebook or the fact that it did not contain the record contained in the A4 notebook. That is not the action of an individual fraudulently creating records for the purposes of litigation. I find that the record is a record of Nathan Gilbert's recollection of the discussion at the meeting, albeit that it was written at least eight months after the meeting took place.

127. I note also that it was CEG's development at Braggington, which was a similar development to the property, that was the focus of Mr and Mrs Griffiths assessment of the quality of CEG's work. I do not find it surprising that Mr Gilbert would have mentioned the cover for Braggington or the fact it was for £1 million. As is clear from Mr Gilbert's evidence, he considered £1 million of cover to be adequate cover for a property such as Braggington or the Property, notwithstanding the fact it was considerably lower than the build costs of both properties. I consider it likely that

he would believe the existence of NHBC cover of £1 million to be a positive thing, rather than a negative.

128. I find that Mr Gilbert did say at the meeting on 3 December 2007 that the Property would be covered by the same, £1 million warranty as applied to Braggington.

The meeting at Alveston Manor on 2 May 2008

129. I prefer the evidence of Mr Gilbert and Nathan Gilbert on the question of who attended, and what was discussed, at the meeting at Alveston Manor. It is clear to me from the correspondence in the trial bundle and from the evidence of the parties that Nathan Gilbert dealt with the detailed costings for CEG. He prepared the detailed draft costings with assistance from Castons King. It would be unlikely that he would not attend a meeting to discuss the amount that should be allowed in the contract price for PC sums. He gave detailed evidence of his recollection of the meeting, including as to the wedding that was taking place at the same time and Mr Griffiths' comments about the bride. I find that Nathan Gilbert did attend the meeting at Alveston Manor.

130. It is clear from the correspondence both immediately before and after the meeting at Alveston Manor that the focus of the discussions was on the PC sums included within the total contract price, as Mr and Mrs Griffiths wanted to ensure the PC sums were high enough to enable them to obtain the finish they wanted within the contract price. Mr and Mrs Griffiths did not explain what discussion took place in relation to the other lines in the costings or why it was necessary to discuss them. They would have no particular interest how the remainder of a fixed price, lump sum contract was broken down between the various elements. There would be no reason for them to be discussed.

131. Also, importantly, the email that Nathan Gilbert sent on behalf of Mr Gilbert shortly after the meeting recorded only the PC sums that had been agreed. If the parties had been concerned as to how any other elements of the total price were to be broken down, it is likely that they would have been recorded.

132. I prefer the evidence of Mr Gilbert and Nathan Gilbert on this issue. I find that there was no detailed or line by line discussion of the draft costings at the meeting and that the NHBC warranty and its cost were not discussed at that meeting.

Lack of explanation for seeking cover limited to the build costs

133. Mr Griffiths' evidence as to his previous experience with Persimmon was that he believed that that the costs of that claim for contamination exceeded the build costs. He was therefore aware that potential claims might exceed the cost of building. He did not explain why, at the time he discussed the contract with Mr Gilbert, he wanted NHBC cover for the build costs, as opposed to the value of the Property or some other figure, such as a sum that might be adequate to cover the likely costs from the sort of contamination that had occurred at the house they bought from Persimmon. Of course, he later learned that NHBC only offer cover for the build costs for properties with sales prices over £1 million. However, there is no evidence that he knew that at the time of the discussions with Mr Gilbert. Without knowing that NHBC's maximum cover for high value properties was by reference to the cost of the build rather than their price or value, it is not clear why Mr Griffiths expected the cover to be for the build costs rather than, say, the value of the Property.

Mr Griffiths' reliance in his evidence on NHBC's Rules for Builders rather than what was said

134. Mr Griffiths' oral evidence was illuminating because he answered questions as to whether Mr Gilbert had done what he promised (ie obtain Buildmark cover) not by reference to what Mr Gilbert said to him, but by reference to NHBC's Rules for Builders. There is no evidence that Mr and Mrs Griffiths were aware of those rules before they obtained them in the context of this claim. The rules would not have informed their understanding of the representations that Mr Gilbert made at the time they were made.

135. Mr Griffiths' answer to the suggestion that Mr Gilbert had done what he said he would do was that he had not followed the rules, rather than to refer to anything Mr Gilbert actually said. I had the impression that it was the Rules for Builders, rather than Mr Griffiths' recollection of the precise discussions, that informed the claim.

136. Mr Griffiths' oral evidence was also illuminating because it showed that, even at trial, and despite the availability of documents that he had himself disclosed as to the terms of Buildmark cover and the Rules for Builders, he believed that the reason why the cover was limited to £1 million was because, in breach of NHBC's requirements for builders taking out cover for a property, Mr Gilbert misrepresented to NHBC by 50% the "*selling price*" and took out "*corresponding insurance on that basis*". However, he is mistaken in that belief.

137. The attendance note disclosed by NHBC shows that, when Mr Gilbert obtained a quotation for the cover, he estimated the sale price of the Property to be £2.5m. That was higher than the cost of the building work and must have reflected his understanding of the likely sale price of the Property should it be sold, including the value of the land. The reason NHBC limited the cover to £1m was not because of any misrepresentation on Mr Gilbert's part, but because he took out a standard Buildmark Newbuild warranty which was limited to that level of cover whatever the price of the property covered. Mr Gilbert, quite correctly, gave NHBC his estimate of the likely selling price of the Property, which was higher than the build costs. They were able to assess the premium by reference to the sales price, as they require. He did not misrepresent the position to NHBC. NHBC understood that CEG was taking out standard cover for a property with a selling price of £2.5 million and did not appear to have any issue with that.

138. As I understand the position, Mr Griffiths is simply wrong in suggesting in his evidence that Mr Gilbert was breaching NHBC's rules or the way that the cover was intended to be taken out. The Claimants themselves disclosed documents obtained from another builder, showing the pricing structure of NHBC's policies at a time before this policy was taken out, when NHBC's standard limit of cover was £500,000. It shows that an additional premium of is payable per £100,000 over £500,000 and a higher rate may be payable for properties over £2 million, though that would not affect the maximum insured value of £500,000. It is clear that NHBC anticipate that builders may take out standard cover for properties with selling prices very significantly in excess of the limit on the standard Buildmark warranty.

139. Despite having himself disclosed those documents, Mr Griffiths maintained at trial that the fault lay with Mr Gilbert for misrepresenting the position to NHBC and under-insuring under NHBC's Rules.

Mr Griffiths' email to Mr Gilbert of 5 November 2009

140. In his email to Mr Gilbert of 5 November 2009 referred to above, Mr Griffiths said: "*You have charged me £10,500 for NHBC which I assume is for their sign off and guarantee of the property."* (emphasis added). The fact he was making an assumption that the figure was for NHBC's "sign off and guarantee" is inconsistent his having understood from detailed "line by line" discussions of the costings that that figure was for an NHBC warranty to cover full build costs. It is also inconsistent with his having relied on that understanding at the time the contract was made.

Mr Gilbert's contact with NHBC in December 2009

141. The Claimants argue that Mr Gilbert's conversation with NHBC is inconsistent with his pleaded case that he did not know until the litigation began that NHBC cover was available over the standard £1 million level. I do not consider that there is anything sinister about that change in Mr Gilbert's evidence. The conversation with NHBC took place in 2009, over 12 years before the re-amended Defence was filed. Standard NHBC cover was for £1 million. CEG had taken out standard NHBC cover in the past for about 250 properties. They had not sought any higher cover for Braggington, which had a build cost of £1.24 million and a likely sales price of between £2.4 million and £2.7 million and which they were planning to sell on the open market. He clearly did not anticipate that a £1 million warranty would not satisfy a potential purchaser of Braggington. It is clear that NHBC were willing to offer their standard cover, knowing the value of the Property to be £2.5m. Any higher insurance would be for bespoke cover and is likely to have seemed something out of the ordinary to him. I do not find it surprising that, 12 years after the event, Mr Gilbert had forgotten he had been told about higher cover being available from the Commercial Department and I accept his evidence that he had forgotten about it.

142. I also accept his evidence that he understood the risk to be covered by NHBC as less than the cost of building the house, as he considered that the cover was for defects (as defined by NHBC's policy) and because the inspection regime would limit the likely extent of such defects. Rightly or wrongly, as he explained it colourfully in his oral evidence, he did not consider there was a risk of remedial costs of £2 million on a house that cost £2 million to build under NHBC's inspection regime.

Mr Griffiths' contact with NHBC in 2009

143. Mr Griffiths' evidence was that he was unaware, until about April 2011 that the Property was covered by only £1 million of NHBC cover. However, he made enquiries of NHBC in December 2009. It is clear that, at this time, he was concerned about two issues: building insurance or contractors' all risk cover and NHBC cover. On the former issue, he exchanged emails with Mr Gilbert and eventually received confirmation that CEG had sufficient cover. On the latter issue, he telephoned NHBC at that time. Following that conversation, Ms Waghorn of NHBC sent to him the e-mail of 3 December 2009 referred to above, providing an estimate for £2 million cover for the Property.

144. Mr Griffiths' evidence is that, even after his conversation with NHBC and after receiving that email, he did not understand that the NHBC cover was limited to £1 million. His evidence is that he telephoned NHBC to check the cost of the cover in the draft costings because he was becoming concerned that he had been overcharged. He said he had enquired about the cost of cover because of his growing mistrust of Mr Gilbert. He did not satisfactorily explain why he was concerned that he might have been overcharged related to the NHBC premium and not other fees shown in the draft costings. He said the difference was that the NHBC were to offer 10 years' protection cover, whereas an architect does a job and disappears. That might explain why he would be concerned to check that cover was in place or the limits on the cover. It does not explain why he would be concerned to check whether he had been overcharged for it. When asked why he was concerned about overpaying for the NHBC premium, he said it was because the NHBC have said that for £2 million of cover, the premium is £5,800. However, he

did not know that until he had contacted NHBC to ask the question, so it cannot have been the reason for contacting NHBC

145. Further, he is a former Chairman and Chief Executive of companies and clearly has commercial experience. He knew he had agreed a fixed price, lump sum, contract. With the exception of the costs that were covered by PC sums, he could not have expected to obtain any refund for any overcharge or overestimate of the various elements that made up the price, any more than he would have expected to pay more if the estimate proved to be an underestimate.

146. Mr Griffiths' explanation as to why he was concerned to check the cost of NHBC cover does not make sense.

147. Further, in correspondence between Spearing Waite and NHBC, NHBC told Spearing Waite that in 2009 they had offered to extend the limit of cover to £2 million. The Claimants, through Spearing Waite, argued that Ms Waghorn's email of 3 December 2009 was confirmation that NHBC would increase the maximum level of cover to the build costs of the Property of about £2 million. That does not appear to be consistent with Mr Griffiths' evidence that, even after receiving that email, he understood CEG had already taken out cover of £2 million.

148. Mr Griffiths' initial contact with NHBC was with a Contact Care Assistant. His later conversation was with the Commercial Department, where Ms Waghorn worked. That would suggest he must have been put through to the Commercial Department which deals with bespoke cover for properties to be covered for more than the standard level of cover of £1 million. Mr Griffiths' evidence was that the estimate he received was for £2 million cover for the Property. It is clear from her email that she was providing an estimate for cover, not confirming the premium already paid for existing cover. It seems unlikely that Mr Griffiths would have understood from his discussions that cover was already in place for the Property for £2 million.

149. I find that Mr Griffiths knew in late 2009 as a result of his contact with NHBC that the Property was not covered for £2 million and that it could be covered for that amount for a premium estimated by Ms Waghorn in her email at £5,838.37.

Lack of complaint on receipt of the certificate showing the level of cover.

150. In January 2011, Mr Griffiths received the certificate for the Buildmark cover from NHBC. It states on its face "*maximum insured value £1,000,000*". Mr Griffiths' evidence was that he had simply filed this without looking at it. I do not find that credible. Mr Griffiths confirmed in his oral evidence that he had been Chairman and Chief Executive of companies. He had taken the trouble to contact NHBC to enquire about the cover and its costs in 2009. At the time, he had engaged Pyments to advise him. He had been waiting for the certificate so he could insure certain aspects of the Property which he was unable to insure without the NHBC certificate. In addition, as is clear from correspondence from Dan Ryde of Pyments, he was waiting for this certificate so he could notify claims to NHBC. When the certificate arrived, he already knew he would make claims under the warranty. He also completed NHBC's acceptance form, which required him to give information as to the value of the price of the property, which he put at £3 million. It does not seem likely that he would not have noticed the limit of £1 million, which was clearly stated on the face of the certificate, if he had been expecting the cover to be £2 million. It was not until April 2011, when he notified the issue to NHBC.

Lack of prompt complaint to CEG or Mr Gilbert after April 2011

151. Had Mr Griffiths been expecting the limit on the policy to be £2 million, it would be expected that he would have raised that with Mr Gilbert or CEG immediately. Mr Griffiths claims he was "cheated" by Mr Gilbert. It is unusual for someone who feels they have been cheated to withhold their complaint for several years before making it to the person who cheated them.

152. Even if I am wrong in my finding that Mr Griffiths knew from his contact with NHBC in December 2009 that the Property was not covered for £2 million and even if I am wrong that he was aware of the limit of cover when he received the certificate in late January 2011, it is beyond doubt that he was aware of the limit in April 2011. Mr and Mrs Griffiths raised the issue of the level of cover with NHBC. However, they did not raise the issue with Mr Gilbert or CEG for a further two or three years. On the contrary, his solicitors expressly asked NHBC to keep the contents of the correspondence confidential from CEG. No adequate explanation was given for

this delay. In oral evidence, in response to a question as to why no complaint as to the level of cover was made to Mr Gilbert at the time, Mr Griffiths said that at that time they had written to him notifying him of defects and asking for proposals and two years later he denied receiving that notification. That did not answer the question. He could not have known at that time that Mr Griffiths would deny receiving notification of defects two years later. Nor does it explain why he would not notify him of this, different, issue.

153. Nor was there any explanation for the request to NHBC to keep the complaints confidential. As I have already remarked, it is very odd indeed that the Claimants made that request. Other than the risk that some of the contents of the letter of complaint may be inconsistent with claims they may have intended to pursue against Mr Gilbert or CEG, or the risk that the CEG would contradict the allegations and that might harm the Claimants' negotiations with NHBC, it is hard to imagine what possible prejudice there could be from NHBC disclosing the complaints to CEG.

154. The fact that no complaint as to the level of level of cover was made for over two years after the latest possible date it was discovered and instead the claim was pursued against NHBC on terms requiring them to keep the allegations confidential from CEG is inconsistent with Mr and Mrs Griffiths' position that Mr Gilbert had cheated them by fraudulent misrepresentation.

The development of the Claimants' case

155. As set out in the chronology above, when Mr Griffiths first raised the issue of possible "underinsurance" with NHBC, he did not allege that Mr Gilbert had cover of £2 million or the full build costs. Instead, he pointed out that the build costs had been £2 million and that the cover was £1 million and that he had paid £10,500 for cover, asked for their comments and said that it "*did not seem right*". If the representations alleged had been made, it is extremely surprising that the correspondence with NHBC does not mention them.

156. When the issue was first raised with NHBC by Spearing Waite, the correspondence did not contain any allegation that Mr Gilbert or CEG had expressly represented that the cover would be for £2 million or for the full build cost. Instead,

the correspondence gives the impression that the Claimants understood that cover for the full build costs was NHBC's requirement and that the underinsurance would cause reputational damage to NHBC as it undermined the value of NHBC warranties.

157. In their letter of 14 October 2011, they said: that the builder *"did not put out clients on notice that the Property had not been protected to the full extent of the build cost."* That suggests that no positive representation was made as to the level of cover, and the Claimants were relying on what they allege Mr Gilbert did not say, not what he did say. That is not consistent with their case that he represented there would be cover for the full build costs.

158. In the same letter they also said: "*In addition, the Builder charged our clients £10,000 for arranging the Policy when the premium actually payable will have been less than half that sum."* That suggests that the Claimants were relying on the amount they had paid in support of their claim that NHBC should increase the level of cover, rather than what they had been told.

159. Their letter also refers to the Rules for Builders and alleges that the builder was in breach of the Rules for Builders.

160. Had Mr Gilbert orally represented that cover for the full build costs would be obtained, it would be expected that the Claimants' solicitors would have said so in their correspondence to NHBC instead of relying on what was not said, on the amount charged and alleged breach of the Rules for Builders.

The history of the allegations in the pleadings

161. In the Particulars of Claim, the allegation that was made was that Mr Gilbert had represented that CEG would "*obtain an NHBC warranty in the Claimants' name to put right damage caused by defects in the building works in the event that the Company failed to complete the works satisfactorily*"; and that "*the Company would take out the NHBC product called NHBC Buildmark Cover".* It also contained an allegation that the draft costings included provision for fees including a line for NHBC and the quotation was "*a representation that under the building contract the Company would take out NHBC insurance cover to cover the full cost*

*of putting right damage caused by defects in the building works at the property.*" It is noteworthy that there was no reference to any oral representation that the cover would be for £2 million, for the full costs of the work or for the value of the Property, at that stage.

162. Further, the wording of the alleged allegations in the Particulars of Claim appear closely to echo the wording of the NHBC warranty, giving the impression that, rather than being informed by Mr and Mrs Griffiths' recollections as to discussions held at the time, they were informed by the terms of the NHBC warranty documents.

163. In the Reply the Claimants alleged that "*the Defendant represented that the Company would procure an NHBC warranty for the full cost of building works at the Property*"; that the Defendant represented the Claimants would have cover *"for the full value of the Property, the build cost of which was just under £2 million*"; that "*the Company would take out and charge a fee for NHBC cover for the full value of the property at the price set out in [the draft costings document]*" and that the Defendant knew he would not obtain a warranty "*for the full value or full build cost of the Property*"

164. These allegations as to the discussions including references to build costs or full build costs or the value of the Property were not made until the Reply was served. Even then, the allegations are not clear, in that they refer both to the value of the Property and build costs, which would appear to be inconsistent allegations. The value would usually be a higher figure than the build costs. Mr Gilbert estimated £2.5 million as the selling price when he spoke to NHBC to effect the cover; Mr Griffiths put the total price at £3 million, being £2 million for the cost of the work and £1 million for the land, when he accepted NHBC's offer of cover. An allegation that there would be cover for the value of the Property would presumably mean cover in excess of the build costs. The case that the cover should be to the value of the Property was not pursued at trial, but I note that it was pleaded despite its inconsistency with the Claimants' evidence at trial.

Conclusion as to oral representations

165. For the reasons set out above, I find that Mr Gilbert did not orally represent to Mr and Mrs Griffiths that CEG would obtain NHBC cover for the full build costs

or for £2 million. I find that the only representations he made were those he admits, being that CEG was an NHBC registered builder about to acquire A1 status, that the Property would be built to NHBC standards and that CEG would obtain an NHBC Buildmark warranty which would offer the same, standard, cover of £1 million as CEG had obtained for its development at Braggington.

**Representations in the draft costings**

166. Mr and Mrs Griffiths allege that the inclusion of the figures of £7,000 and then £10,500 against "NHBC" in the draft costings showing the breakdown of the contract price was a representation that Mr Gilbert had obtained a quotation from NHBC for a premium to cover the full build costs for those amounts and that CEG would take out such cover.

167. The Defendant's witnesses' evidence is that the NHBC line in the draft costings included not only the NHBC premium but also NHBC membership, all risks insurance and public liability insurance for the duration of the works. Nathan Gilbert's evidence was that the increase from £7,000 to £10,500 was not merely the result of the build costs increasing from about £1.7 million to nearly £2 million, but because the costings had originally assumed the work would take one year whereas he considered it would take 18 months.

168. Mr Gilbert did not accept that including of the figures in the "Fees" section of the costings was a representation that precisely those sums would be spent on the items identified. He said they were sums which might be spent or, if he did not, were for CEG to retain. For example, if CEG did not need architectural help, it would retain the sum in the "Fees" section for the architect. Given the contract was a fixed price contract, that would appear to be correct.

169. It was put to the Defendant's witnesses that the profit was included in the preliminary costs section of the costs schedules. They did not agree. That does not surprise me. The total figure for preliminaries is a little over 11% of the total contract value and would be unlikely to be sufficient to include all the costs of the preliminaries and all CEG's profit. They also gave evidence that they had not known at the time that NHBC did not permit any mark-up on their premiums if charged to customers.

170. Mr Griffiths' evidence was that he understood that the figures for NHBC were fees that would be paid to NHBC. However, I note the following facts.

170.1. The figure for NHBC was a round number - £7,000 in the first draft costings and £10,500 in the second draft. It would be surprising if premiums for warranty cover were such a round figures. In my judgment, a reasonable person would not expect round figures of £7,000 and £10,500 to be the exact premiums payable for NHBC warranty cover for build costs of £1,737,680 and £1,998,600 respectively.

170.2. Mr Griffiths accepted in cross examination that the fees would have an element of profit in them. In re-examination, he was asked about this and said that profit is not allowed to be charged to customers by NHBC. He also said he thought he had been asked in cross examination about the whole proposal. However, he had been asked expressly whether the individual elements in the "Fees" section of the costings – ie architects, engineer, ground investigation, building control, NHBC – would contain an element of profit, and he answered "yes". In addition, Mr and Mrs Griffiths did not know at the time the costings were provided that NHBC prohibited builders from charging a mark-up on the policy premium, so they would not have understood at the time that there should be no profit element charged on the NHBC fee.

171. In my judgment, a reasonable person with the knowledge that Mr and Mrs Griffiths had at the material time would not understand the draft costings to be a representation that CEG would pay exactly £7,000 or £10,500 for the NHBC warranty, any more than they would understand that fees paid to an engineer would be exactly £12,000 or that the costs in the other sections in the draft costings were precise. In the context of the lump sum contract that the parties were negotiating, it would be reasonable to understand that the figures were no more than rough estimates of an appropriate breakdown of the overall price quoted.

172. In any event, at the time the draft costings were provided, Mr and Mrs Griffiths did not know the premium that would apply to cover with a limit of £2 million. It was not until late 2009 that Mr Griffiths learned the approximate cost of £2 million cover. Without that knowledge, I do not understand how, even if they believed the

figures in the draft costings were solely for the NHBC premium, the figure could be a representation to them as to the level of cover. Only someone who knew the premium payable by CEG for £2 million of cover could draw a conclusion as to the level of cover from knowing the premium. Without knowledge of NHBC's premium structure, the inclusion of any particular figure would not lead to an expectation as to the level of cover.

173. I find that the draft costings did not amount to a representation as that CEG would obtain cover to the full build costs.

**Representations after the contract was formed**

174. The Claimant's case is that valuations sent by CEG, particularly valuation no 1 dated 30 May 2008 and valuation no 7 dated 10 March 2009 were representations by Mr Gilbert that the CEG had taken out cover for the full build costs. I have found that including the figures in the draft costings was not a representation as to the level of cover. In my judgment, the same is true of the valuations. Even if they could be considered to be representations that the premium had been paid, they do not amount to any representation as to the level of cover, for the same reasons.

175. I find that they did not amount to representations that CEG had paid for any particular level of cover, whether full build costs or £2 million.

**ISSUE 2: WERE THOSE REPRESENTATONS MADE FRAUDULENTLY?**

176. The question of whether the alleged representations were made fraudulently does not arise, since I have found that they were not made at all. The only representations that I have found were made are those admitted by Mr Gilbert.

177. For completeness, I should add that I am satisfied that Mr Gilbert did not understand that Mr and Mrs Griffiths expected the Buildmark cover to extend to claims above the standard level of cover offered by NHBC of £1 million and did not intend them so to understand.

177.1. As I have found, he expressly mentioned the fact that the standard cover was for £1 million, as it was for Braggington.

177.2. He knew that Mr and Mrs Griffiths had experience of NHBC warranties as a result of having had such a warranty in relation to the property they bought from Persimmon. He would have no reason to expect they did not understand NHBC cover.

177.3. CEG had only taken out the standard cover for Braggington, a speculative project for sale on the open market with a similar value to the Property. From this it appears that he did not anticipate that potential buyers would expect more than the standard £1 million cover, even when buying a house for £2.4 to £2.7 million.

177.4. As he explained in his evidence, he did not consider there was a need for cover for defects to the value of £2 million for a property that cost £2 million to build.

177.5. It is clear from NHBC's file note that, when they mentioned to Mr Gilbert that higher cover might be available, he said that he considered £1 million to be adequate. Given the cost of the additional premium (probably less than £3,000, from the Claimants' evidence as to the estimate they had received from NHBC in late 2009) compared with the total value of the contract (£2 million), it seems unlikely that Mr Gilbert would have knowingly taken out cover less than he knew the Claimants were expecting.

177.6. Importantly, the allegation is that he fraudulently promised £2 million cover when he knew CEG would provide only £1 million of cover. Mr Gilbert knew that the NHBC certificate would be provided to the house owner on completion. He could not be expecting Mr and Mrs Griffiths not to notice that CEG had taken out cover for half what he had promised. It seems to me inherently unlikely that he would dishonestly promise £2 million of cover knowing that he intended to obtain £1 million of cover when he knew Mr and Mrs Griffiths would discover that they had been defrauded as soon as they received the certificate of cover. It seems even more unlikely that he would do so in the light of his evidence that he had been warned by an estate agent and various others against dealing with the Claimants, including before the contract was made.

177.7. In my judgment it is inherently unlikely that, to save less than £3,000 on a £2 million contract, Mr Gilbert would fraudulently represent to Mr and Mrs Griffiths that he would obtain twice the cover he intended to obtain, knowing that the fraud would be certain to come to light on completion.

**ISSUE 3 IS THE DEFENDANT PERSONALLY LIABLE FOR THESE REPRESENTATIONS?**

178. Since I have found that the representations alleged were not made and there was no fraud or dishonesty on Mr Gilbert's part, he is not personally liable.

**ISSUE 4: DID THE CLAIMANTS OR DID THE FIRST CLAIMANT RELY UPON SUCH REPRESENTATIONS?**

179. This issue is academic since I have found against the Claimants on the issue of the representations that were made.

**ISSUE 5: WHAT IS THE CONSEQUENCE OF THE EMAILED LETTER OF INTENT?**

180. This issue is also academic because I have found the alleged representations were not made. However, for the sake of completeness, I do not consider the letter of intent would have had any effect. Mr Gilbert had given evidence in the arbitration that it was inadequate. It did not make any reference to any agreed price for the work. It did not constitute a binding contract for the work for which the parties eventually contracted under the JCT contract. Had I found that the alleged representations been made and relied upon in entering into the JCT contract, the existence of the letter of intent would not have precluded reliance on those representations.

**CONCLUSION**

181. I find that that Mr Gilbert did not make the alleged misrepresentations. He did not act fraudulently or dishonestly. He is not liable to the Claimants.