Case No: G20CL025

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 20 January 2021

BEFORE:

HIS HONOUR JUDGE DAMIEN LOCHRANE

BETWEEN:

(1) THE LUXURY ITALIAN KBB CO LIMITED
(2) JNM HOME IMPROVEMENT AND CONSTRUCTION LIMITED

Claimants

- and -

(1) REMON BOUTROS
(2) HAKIMA BOUTROS

Defendants

MR M MYERS (instructed by Mr M Steer) appeared on behalf of the Claimants
MR A PRATT (instructed by Miss A Mizher) appeared on behalf of the Defendants

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JUDGMENT

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1. JUDGE LOCHRANE: This is the judgment at the conclusion of the trial in the case of The Luxury Italian KBB Co Ltd and J & M Home Improvement and Construction Ltd ("J & M Home Improvement") against Remon Boutros and Hakima Boutros. The claim relates to building works carried out on a property at 2 Waters Road, Kingston-upon-Thames, Surrey in 2018. The two claimant companies are represented by their director, Mr John Makkar. He is, as I understand it, the principal director, if not the only director, of both the claimant companies. The defendants are mother and son, the first defendant the son of the second, and they have lived in the property at 2 Waters Road since the 1990s. The claim principally is for sums outstanding in relation to building and renovation contracts in the sum of £64,206.57. In addition, there is a claim for contractual interest in the sum of £114,706.36. As pleaded (and I use the term loosely) there is a counterclaim for £22,982. The counterclaim has subsequently been withdrawn, and I shall return to it in due course.

2. I remind myself at the outset it is the claimants effectively which now bring these allegations and it is for the claimants to satisfy me on the balance of probabilities the evidence supports the conclusions the claimants seek. The court can only work on the evidence which is before it and on reasonable inferences which may be drawn from the evidence.

3. The parties have been extremely ably represented, Mr Myers for the claimants and Mr Pratt for the defendants. It is, I think, not unreasonable to say the defence has been chaotic and extremely badly pleaded. This is absolutely no reflection whatsoever on Mr Pratt, who has performed a heroic task, it seems to me, in attempting to extract a sensible defence from the documentation with which he was presented. It has also presented Mr Myers with extreme difficulty in determining what the case is he had to meet. So with respect to the defence, both counsel, it seems to me, have extremely professionally and entirely helpfully endeavoured in very difficult circumstances one to present and the other to challenge a case which is extremely difficult on the papers to determine.

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4. The background to the case is that, as I have said, Mr Makkar is the proprietor of the two companies, the first The Luxury Italian KBB Co, incorporated in 2011, the second J & M Home Improvement, incorporated in 2016. The broad business model is The Luxury Italian Co is a company through which building goods and particularly refurbishment goods are obtained from various sources at commercial rates, and the Home Improvement company is the company which carries out the building works and renovation works, the principal occupation of the two companies. Basically, they are together involved in the general construction and refurbishment of domestic buildings.

5. The two defendants, as I have said, have lived at the property since about 1998, and I do not actually know what either of them does. There is some reference to the second defendant working in some capacity in the Saudi Embassy. I do not know what the first defendant does by way of occupation.

6. The central feature of the relationship amlong these parties is that Mr Makkar and the two defendants are related to each other (I think perhaps by marriage, but nonetheless they are related), they are all of Egyptian extraction, having arrived in this country at different points in their lives. They have clearly been resident in this country for some considerable period of time, they clearly form part of a wider extended family and it is on this basis the arrangements were at least initiated for the purposes of conducting business between the two sets of parties. It is accordingly a business arrangement which is shot through with family complications. It is a scenario which the lawyers will appreciate is fraught with peril. The annals of British jurisprudence are replete with examples of family relationships forever soured by just this sort of arrangement. One does not have to look far in the media, both social and traditional, to find examples of the acrimony and misery which very frequently result from the almost inevitable rupturing of close relations when family business arrangements go wrong. I suspect building contracts feature more commonly than many others in such tales. Those who do not pay attention to the lessons of history, I am afraid, are condemned to repeat them.

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7. Mr Makkar, it appears on the evidence, has had his fingers burnt in the past in not dissimilar circumstances. It appears he was involved in providing services and works for another family member, Thuraya Zaki, née Boutros, and this evidently resulted in dispute and acrimony, resulting finally in Ms Zaki's brother settling her debts with Mr Makkar. In the circumstances it might be said objectively it was somewhat foolish of him to allow himself to be once again drawn into a family business arrangement.

8. The parties entered into some preliminary discussions in 2016, which involved among other things drawings being created by a Mr Gurpreet Benning of G T Designz for the purposes of renovation and refurbishment of the property in which the defendants live. Sometime in the middle of 2016 Mr Benning was instructed to prepare documentation, and he produced three sets of drawings in June 2016, approval of which from a planning point of view was not in fact achieved until 2017.

9. There were meetings between the defendants and Mr Makkar in the course of 2017, and I can cut through quite a lot of the to-ings and fro-ings by describing it simply as a process in which discussions were had, changes were made and indeed new plans, both by Mr Makkar and ultimately by Mr Benning, were produced.

10. This process brought itself to a first official quote being produced by Mr Makkar in March 2018. It appears in the bundle at B72, and it is an extensive document of about ten pages. The first thing to note about it is it is accompanied by an email from Mr Makkar in which he signs his name above the names of both of the two claimant companies, J & M Home Improvement and The Luxury Italian KBB Co. The quote is for works totalling £211,740 inclusive of VAT (that is, £176,450 net of VAT) in relation to the principal areas of the work, which were works to ground-floor extensions and the first-floor and roof; in the ground-floor extension a figure of about £1,300 per square metre and in the first-floor and roof areas about £1,000 per square metre. This was set against evidence Mr Makkar provided to the defendants at the time, in the context of the same documentation, of a commercial rate of similar constructions of about £1,800 to £2,200 per square metre. The first defendant in the course of his evidence cast some doubt on the validity of those references, but he

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produced no evidence whatsoever to suggest they were in any sense inaccurate. On this basis it is clear the evidence shows the quote the defendants were given involved a significant reduction from what might otherwise have been regarded as the then commercial rate.

11. The provision of the first quote resulted in yet further meetings. There was a meeting on 16 March with the defendants, Mr Makkar and Mr Stewart Hitchcock, who was the structural surveyor employed through Mr Makkar for the purposes of considering the structural issues which would result from the not-inextensive refurbishment and renovations contemplated. Following Mr Hitchcock's involvement, on 5 April a second quote was produced, page B83 and following in the bundle. This quote concluded with a figure of £214,500, again inclusive of VAT, a net figure of £178,750, for the work set out. This obviously included by then a consideration of the structural issues, but it was followed by the provision of structural drawings by Mr Hitchcock.

12. On 25 April, following obviously both the submission of the structural drawings and the quote on 5 April, the defendants (putting it briefly), having perfectly reasonably sought a number of different quotes in order obviously to assess the competitiveness of the quote provided by the claimant companies, obtained among others a quote from an organisation called Remi, page B129 and following. It is accepted they obtained a number of quotes, this was the only one which came to a total of less than was proposed by Mr Makkar on behalf of the claimant companies and it was this quote which was then sent on 25 April to Mr Makkar for his consideration, and, it is clear, to provide some pressure for him to lower his price to accommodate the difference between his and the Remi quote. The Remi quote is a total of £204,699.60, inclusive of VAT, and £170,583 net; so, a not very significant difference between the two quotes. Nonetheless, some time was spent considering whether or not in fact what was being quoted by each was the same. Again, it is apparent from the two documents (the quote provided by Mr Makkar and the quote provided by Remi) they do not quote on exactly the same basis. Broadly speaking they are similar, but there are significant aspects included in one which are not included in the other and vice versa.

13. What is clear from both these documents, however, and importantly, given what appears to be the defendants' case, from the Remi document, is whilst these quotes are not the same in every respect it is clear neither of them was intended to provide a cap on any future expenditure beyond the quote itself. It is very clear there are in both quotes many elements yet to be decided upon and/or priced, and, just from the point of view of the comparison, the Remi quote clearly does not involve, as far as I can make out, any reference to the not-insignificant works involved for example in moving the manholes, the removal of a rather dangerous floating chimney which was discovered or, indeed, importantly, the consideration of the input of the structural engineer and the steels etc required for the support of the property once various walls were removed in order to make an open-plan accommodation.

14. Whatever the basis upon which the Remi quote was supplied to Mr Makkar, there followed obviously some further consideration by him and, in an effort to match at least the price of the Remi quote, he produced on 1 May what is the final quote on any basis, prior to the work starting at least. This appears at page B167 through until B170, a figure inclusive of VAT £204,264, a net figure of £170,220.

15. That quote resulted in the agreement the claimant companies under the direction of Mr Makkar would then carry out the works. There has been throughout, at least until Mr Pratt's final submissions, no acceptance on behalf of the defendants this amounted to a contractual document. In any event, whatever this document is, and it was signed by both defendants as being an acceptable price, specification, terms and conditions etc, it was relatively swiftly followed by the commencement of works, on 16 May 2018. The works continued throughout 2018 until 15 or 16 December when the claimants say, following serial non-payment of outstanding sums and by this stage a failure to honour a further agreement in respect of payment which was reached at the beginning of December, the claimants and their subcontractors left the site with the works almost completed but not quite.

16. The intervening period is characterised by, unsurprisingly in the context of this kind of contract, multiple discussions involving changes, some of great significance and some

of much lesser significance. Also, to complicate things further in the context of these parties' relationships, the first defendant got married in Egypt in the middle of the period, in August/September time, and so he was *hors de combat* for some several weeks, his mother also for a period but rather shorter. Indeed, Mr Makkar himself, a guest at the wedding, was also out of the country and out of the loop, as it were, for at least a period of time at the end of August and the start of September.

17. When the dust had settled, after the first defendant's wedding, discussions resumed in October, and further changes were made. There were then increasing payment issues, the claimants would say, and the contract puttered on with further works obviously being carried out and certainly significant changes being made to the direction of the works, until the beginning of December. A meeting was convened, on 5 December, among the parties for the purpose of resolving issues which were beginning to arise and, in particular from the claimants' point of view, the failure of the defendants to honour arrangements for continuing payments. The meeting concluded with an agreement that a sum of £48,787.07 was then payable by the defendants. There was some acknowledgement there were other matters or other items which were disputed and the subject of potential further discussion. The conclusions reached at this meeting have become somewhat controversial in the course of the evidence.

18. A feature of the inadequacy of the defendants' pleaded case is it became apparent from their evidence in the witness box there was some dispute as to what were the terms of this meeting and what its conclusions actually meant. Whatever (and I shall come to it again in due course) occurred, the reality on the papers appears to be a figure well in excess of £48,000 was agreed as owing. The meeting resulted in a payment upfront of £10,000 in cash within a day or two, and this was the last payment which was made in settlement of the issues among these parties. Again, to cut a relatively lengthy story short, there was a significant amount of to-ing and fro-ing between the parties in the early part of 2019, which achieved nothing and resulted ultimately in this litigation.

19. The evidence I have seen is contained, among other things, in a bundle amounting to some 5,248 pages. It will come as no surprise to anybody familiar with civil litigation

in this country that in reality we have probably referred to rather less than 5 per cent of the pages contained in the bundle. It is in part a product of the chaotic state of the defence that the bundle contains a significant number of irrelevant documents, but as a general rule, I am afraid, perhaps understandably, bundles tend to contain significantly more documentation than is actually needed in the course of the trial as it develops.

20. There has been a significant amount of witness evidence. Mr Makkar has given evidence on behalf of the claimant companies. In addition Mr Makkar called a Mr Marius Antalut, a gentleman of Romanian extraction who has clearly been operating as a builder in this country for some considerable time, and he clearly has a longstanding relationship as an onsite builder with Mr Makkar and his companies. We also heard from Mr Harcharan Singh, who is, again, a gentleman who has a significant history with Mr Makkar and his projects. He is by profession a plumber and gas installer. We heard also from Mr Hitchcock, who, as I have said, is the structural engineer and surveyor employed on behalf of the defendants by Mr Makkar, his role clearly important in determining the structural issues and identifying the need for particular steel supports etc for a renovation/extension process as extensive as this.

21. There is in the claimants' evidence also a statement from Mr Adel Salama, he is a mortgage broker who dealt with the defendants. He was introduced by Mr Makkar. It appears no business was done between them, but he gives evidence about the approaches made to him by the defendants. Mr Pratt sensibly and realistically took the view there was nothing he needed to cross-examine Mr Salama about, and he was not actually called. So, his evidence was accepted. Finally, on behalf of the claimants Mr Baljit Singh was called. He, again, is a gentleman who has a considerable history of co-operative building works with Mr Makkar and his companies. He is by profession an electrician, and he worked, as did Mr Harcharan Singh, on this property, as indeed also did Mr Antalut.

22. On behalf of the defendants the two defendants themselves gave evidence, and in addition a Mr Baha Alssadi, who is the principal of an organisation called BAZZ Construction, which seems to specialise to an extent in electrics; and a Mr Khodair

Jaber, who is the principal of a company, KJ Corgi, which specialises in plumbing and gasworks. I shall deal with their evidence in due course.

23. In addition to those gentlemen a statement was filed from Ms Zaki, who was not called. Mr Pratt again sensibly took the view there was very little in her statement which would add anything to his case, and, whilst I think Mr Myers would have had questions for her had she been called, it is entirely fair to suggest there is very little she could possibly have added. It is of note, however, to mention that in her statement she makes no mention of her own previous dealings with Mr Makkar and his companies, which resulted, as I have said, in the dispute settled by her brother in 2015.

24. The bundle, as I have said, contains significantly over 5,000 pages. Somewhat surprisingly in the context of a dispute of this kind, it contains no admissible expert evidence. The defence, I am afraid, is appallingly documented. There is a Defence and Counterclaim, which, it has been acknowledged, were authorised by the defendants in the normal course, signed by the solicitor but clearly on their instructions, as they both accepted in the witness box. It is a particularly troublesome document. It is impenetrable in many respects and almost totally uninformative in the context of the case to be dealt with by the court. I find it difficult to recall a pleading of such length which managed to say so little of any relevance to the claim and the defence. It contains a number of unsupported, unsubstantiated and unparticularised allegations, which, as it turns out, bear little or no relation to the defendants' case as it came out in the evidence in court. I would not have been surprised to find it had been drafted by a litigant in person with the benefit of an afternoon's Google research, and it is of some considerable concern it appears to have at least had the input of a legally qualified professional.

25. The witness statements produced on behalf of the defendants bear little or no relation to what I would loosely call the pleaded case and almost no similarity, it has to be said, to the evidence they gave in the witness box. The Counterclaim pleaded by the defendants or on their behalf is made without any attempt to particularise or justify the claims in evidence. There has been no attempt, it seems, certainly none of which I am

aware, to obtain the proper evidence to support the Defence. There is no expert evidence of the quality and value of the work, despite the fact permission for it was earlier granted by one of my brethren in the context of the case management process for this hearing. There is a Scott Schedule has been produced, which is unsigned and is a particularly confused and confusing document. Again, the allegations made in it, which seem to bear little relation to either the loosely pleaded case or indeed the defendants' own evidence, is unsupported by any evidence, particularly of course expert evidence, as to the quality and value of the work as alleged in the Scott Schedule.

26. Frankly the defence is an absolute shambles. It is shocking to me, as I have said, that any qualified legal professional was involved in its preparation and presentation in the form in which it appears in the bundle. I give considerable credit to Mr Pratt in his heroic struggle to extract an arguable case from the defendants' documents. Nonetheless, the reality is whoever was responsible for marshalling and presenting the defendants' case in the documents and the evidence before the court singularly failed to provide any assistance to the court in assessing what might be the merits of the defendants' case. The absence of any coherent structure or rational legal framework for the defendants' case has in turn led to a significantly increased time spent in this trial. Mr Myers has been left in the position of having to cover all potential escape routes for the defendants, however fanciful, because neither defendant had condescended to particularise a plausible legal basis for the defence or the evidence relied upon to support it.

27. Turning then to the evidence. I have heard, as I have said, from the claimants' witnesses as I have listed, and my firm impression was in every case they were doing their best to recall as truthfully as they could the incidents at the time. Mr Makkar dealt in some considerable detail with the dealings among these parties, and his documentation, as highlighted by Mr Myers, sets out with slightly variable clarity but nonetheless in some considerable detail the dealings and, of particular importance in the context of this trial, the agreements at various stages reached for additional works and the costings thereof which were agreed and in many cases actually paid. The

claimants' witnesses were, and still are in some cases, left out of pocket by the failure of the defendants to, as the claimants would say, fulfil their obligations in relation to the contract and importantly of course pay the sums due.

28. I found the claimants' evidence collectively to be generally coherent and broadly speaking consistent, allowing of course for the vagaries passage of time when dealing with memories, which is inevitable in cases such as this. Conversely, the evidence I heard from the defendants themselves in particular was extremely unsatisfactory. Mr Pratt in his closing made a number of concessions on behalf of the defendants. First of all, he conceded the Counterclaim was unsustainable, and he withdrew it. I emphasise until that moment both the defendants had suggested in the witness box they did indeed stand by their Counterclaim, albeit, as I have said, there was really no evidence contained in their witness statements, or any of the documentation as far as I was able to discern, which supported the sums claimed or indeed the issues upon which those sums were based.

29. Mr Pratt further conceded the vast majority of the works contained in the claimants' list of works had in fact been completed or at least were very close to being completed when the claimants left the site. He suggested the only evidence upon which the defendants could rely in relation to unfinished works was the evidence of Mr Alssadi and Mr Jaber. He accepted there was no expert evidence upon which the defendants were able to rely in support of their contention of unfinished works or works which were of less value than claimed by Mr Makkar. He accepted the defendants' pleaded case had difficulties, in the Defence and the Scott Schedule and indeed the witness statements. He acknowledged on behalf of the defendants the document signed by them on 1 May was indeed a binding contract subject to variations at a later stage, and he conceded too there was evidence of payments to both the claimants, the point being that from the earliest stages the defendants had suggested they contracted only with the second claimant. In the early part of the trial I raised some concern about this as a point which was going to take up much time, the reality being the first claimant was involved, whether by way of direct supply or through J & M Home Improvement, and the issue seemed to me something of a red herring. In fact, Mr Pratt sensibly concedes

there is indeed evidence of payments and arrangements being made with both the claimants, so the suggestion the contracts were only with the second claimant is no longer pursued.

30. In respect of the two additional witnesses called on behalf of the defendants it seems to me, I am afraid, their evidence was really of little or no value, whilst I do not dispute for a second they were being entirely helpful insofar as they were able to be helpful. They were supposedly setting out some of the defects in relation to works which were either not carried out or carried out badly by Mr Makkar and his contractors, so as to justify some measure of complaint and/or discount in relation to the sums owing. However, the practical reality is both accepted they were present at the property only some three or four months after the claimants had vacated the premises, they had no idea what had occurred in between, save we have established at least three or four other interested contractors had been present onsite working potentially with the electrics, the plumbing and the gas. They had no idea, of course, either of them, what may or may not have been done to the works left by the claimants and their contractors by those contractors who had attended in the intervening period. As a result, the evidence they were able to give, it seems to me, is of negligible value, save in one small respect. Mr Alssadi was asked about the unfinished electrical works, which were unfinished not because of the fault of the claimants' contractors but because they all left the site unpaid and accordingly there were works which were unfinished. Mr Alssadi was asked about the potential value of the unfinished works. In the context of the negotiations surrounding the collapse of this arrangement between these parties, Mr Makkar conceded some £1,600-odd in relation to unfinished works, and Mr Alssadi accepted that was a generous concession in relation to the works he had carried out to complete, as it were, unfinished works on behalf of the claimants. Beyond that, as I have said, it seems to me their evidence was really of very little value.

31. Turning then to the evidence of the defendants themselves, it is contained, as I have said, in the pleadings (I use the term loosely), their statements and indeed to some extent in the Scott Schedule. The counterclaim, it seems to me, which, again it is worth remembering, they both accepted they had authorised, was effectively completely

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fabricated, in my view. There is no evidence to support any of the sums claimed. The sums were, save in one respect, basically round figures, which, on the evidence the defendants gave, were effectively plucked out of thin air. Mr Myers characterised the counterclaim as an attempt to intimidate Mr Makkar into withdrawing his claim, and it seems to me there may well have been an element of at least tit-for-tat in respect of the attempt to plead a counterclaim for which the defendants had and have absolutely no evidential justification. Indeed, the first defendant in respect of one of the elements of the counterclaim frankly, and rather disarmingly, accepted in the witness box it was a figure he had thought of and just simply rounded up to the nearest round figure.

32. The defendants denied in the early part of the preparations for this contract they had seen Mr Benning's plans. That, it seems to me on the evidence, I am afraid, is simply not credible. Albeit Mr Benning was referred by Mr Makkar, it is evident those plans were commissioned on the instructions of the defendants themselves, and they can only have been submitted on their behalf. It is clear the defendants accepted responsibility for Mr Benning's fees, and it can only have been their instructions upon which Mr Benning based his plans on their behalf. The evidence appears to show the plans were in fact drawn in June but not submitted until the following year. The basis for delay, on the evidence on the balance of probabilities, was the defendants' failure to pay Mr Benning's fees and, importantly, of course, the fees for submitting the plans to the local authority for approval. The suggestion by the defendants that Mr Benning in fact did all of this without consulting them and without, consequently, any expectation his fees would be paid, or indeed those fees he must otherwise have had to incur for the purposes of submitting the planning application, as I have said, simply is not credible. Unless Mr Benning is running a particularly fanciful and speculative architecture practice, of which there is no evidence at all, it is extremely unlikely, it seems to me, he would have carried out the work he did and, importantly, incurred the fees he would have done in submitting the applications, without the defendants' clear instructions and acceptance of responsibility for those fees.

33. Indeed, at B46 in the bundle there is a printout of some text exchanges between the second defendant and Mr Makkar in January 2017, in which it is clear the defendants

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were, or the second defendant at least was, in communication with Mr Benning, referred to as "Gurp", and also were discussing the content of his plans, the plans the defendants suggest they did not see until they were submitted later in 2017. Those plans subsequently were submitted and approved, in my judgment on the evidence on the balance of probabilities, with the full knowledge and instruction of the defendants. So, I am afraid, the defendants' evidence in respect of that is clearly not true.

34. The defendants also suggest and make it plain they were clearly working to a limited budget. To some extent this is reflected in the documentation, certainly in the initial stages. However, the second defendant suggested it was made plain to Mr Makkar from their early contact that they had the sums mentioned which were a cap beyond which he should not in any circumstances stray. It is a feature of the evidence, at least of the second defendant, that effectively all subsequent variations to this contact should have been included in that original capped figure.

35. There was also a suggestion on the defendants' behalf, until the concession made by Mr Pratt at the conclusion of the evidence, there was in fact no proper contractual documents, despite them having signed the document on 1 May showing they agreed the sums were reasonable and accepting the quote, and following which, as I have said, work commenced. Despite all of this, both defendants suggested in their evidence this was not a contractual document; indeed, they suggested they were persuaded to sign it by Mr Makkar only on the basis he needed a signed document for some insurance purposes. They suggested that throughout the deal had always been Mr Makkar was going to be working for cost only and they were agreeing only that work should be carried out and paid for on the basis of the submission of worksheets and invoices.

36. There is not another single shred of evidence to support those suggestions on behalf of the defendants. Towards the end of the contract there is some suggestion of the provision of this type of documentation by Mr Makkar in the context of the defendants no longer satisfying, as he would say, their obligations to pay. However, at the inception of the contract, and indeed in its early months certainly, there is not a single shred of documentary evidence to which I have been addressed in these 5,000-odd

pages in which it is suggested this contract was not based on the original signed quote form, but based exclusively on the requirement of the claimants, through Mr Makkar, to justify all claims for payment by submission of worksheets and invoices. Indeed, far from there being evidence to support such a suggestion as the basis for this contractual relationship, all the evidence, in my judgment, points very firmly to the contrary. I suspect that may have been at least in part the basis upon which Mr Pratt has been given instructions to concede the document signed on 1 May was indeed a binding contractual document.

37. Another aspect of the evidence which, it seems to me, points in the direction of clear findings as to credibility relates to a feature of the variations to the contract identified by Mr Makkar. This involved the separation of the property into two dwellings for the purpose of accommodating on the one part the second defendant and on the other part the first defendant and his new wife. The suggestion from Mr Makkar was he was told by the first defendant in the course of the contract that his then soon-to-be wife was balking at the idea of sharing with her soon-to-be mother-in-law, whom she knew either not at all or at least very little. Perhaps unsurprisingly, in human terms, she was somewhat reluctant immediately to move in with her mother-in-law.

38. The evidence given by the defendants in relation to this issue has been confused and in many respects unhelpful. It has been suggested on both of their behalves there was not a plan on their part to separate the property into two dwellings but simply there should be, as Mr Pratt put it, two separate living quarters in order they could as far as possible have a separate existence, whilst continuing to live in the same house. The first defendant, in his witness statement at paragraph 19, says he was planning on getting married, made Mr Makkar aware of this, asked for the first-floor drawings to be amended as they did not reflect what the final design should be and wanted the property adjusted in order to accommodate the two families. In his evidence in the witness box he suggested first of all there was not an intention he and his wife should in fact live elsewhere, and then under further examination from Mr Myers, he accepted he had considered in discussions with Mr Makkar whether or not he could rent out his part of the property to others whilst leaving his mother on the premises. He said he had

he had discussed this with Mr Makkar and he had felt, perhaps understandably, reluctant to leave the property with strangers living with his mother. In the circumstances he had then, he said, gone on to consider the possibility of letting his part in the property to members of his family in order to provide some comfort in relation to his mother's security.

39. The idea any of this could possibly have been contemplated on the basis of simply shared living accommodation with, as it were, quarters were barely separated seems to me to be frankly incredible. It seems very clear, even if the first defendant was indeed only contemplating the possibility of renting part of the property out to members of the extended family (which initially he was not), it could only possibly have been on the basis he was giving instructions at the time for the property to be separated into two distinct dwellings.

40. The evidence of the second defendant confuses the matter yet further. She told me in the witness box there had been no problem about the possibility of her living with her daughter-in-law and she had never understood there was a suggestion they should live, as it were, separately. Mr Myers took her to the transcript of a telephone conversation, which appears at page B158 in the bundle, in which she made it plain at the time she understood the first defendant was intending to live elsewhere with his wife. She said at one point, "At the end I found out why Remon was delaying things and coming and going is for he is not going to live with me at home as this is his future wife's request". Mr Makkar said, "What does she want?" and the second defendant said, "She wants her own place". This starkly contradicted the second defendants' own evidence in the witness box and also, it seems to me, adds significant weight to the clear indication these parties were, at one stage at least, giving instructions for the property to be divided into two separate dwellings in order at least part for of it potentially to be rented out, even if only to other members of the family. The evidence from the defendants was frankly untrue in some respects.

41. The defendants, as I have said, suggested at all stages they had made it plain to Mr Makkar they had a very limited budget and their discussions resulted in an estimate

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which was a cap; each of them in somewhat different terms but nonetheless both of them to this extent singing from the same hymn sheet. The Defence and Counterclaim at paragraph 18, with, I am afraid, characteristic inexactness, states after the discussions in May by phone, email and meetings in person Mr Makkar agreed he would match the Remi price and they decided to contract with him on the basis of what they called the final estimate. They made it known they had only access to £120,000, they say. This is an allegation contained in the Defence which at least suggests at that stage they agreed the final estimate, as they called it, and the contractual document signed on 1 May was indeed a contract and they, as they said, decided to contract with the second claimant on this basis. Again, without any attempt to particularise in terms of time, content or venue, it is suggested the meetings, phone, email etc resulted apparently in the express agreement by Mr Makkar that no further charges would be incurred without prior agreement.

42. There is not a single shred of other evidence to support these allegations. They are completely unparticularised, and the first defendant in the witness box was completely unable to provide any example, even by recollection of an oral conversation, of when these matters were agreed as suggested in the document he authorised as being true. Indeed, throughout they had both denied this was in fact a contract, despite, as I have said, the clear allegation in paragraph 18 of the Defence that they had indeed contracted on the basis of the May 2018 document. They both suggested they were persuaded to sign the May document simply on the basis it was some kind of general indication of matters to be further discussed, but they signed because Mr Makkar suggested it was needed for some kind of insurance. As I have said, this is not a suggestion made in what I loosely call the pleading, and there is no suggestion in the witness statements that was in fact the case. There is no evidence to support the suggestion in any respect save the evidence they both gave in the witness box, and there is no evidence to suggest what kind of insurance it was necessary for this document to be signed in order to obtain. Once again, I am quite satisfied the defendants' case in this respect is completely unsustainable. As I have said, it is not mentioned in the pleading, it is not mentioned in the witness statements, and it comes for the first time uncorroborated in the witness box.

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43. In relation to the suggestion that somehow, whether it be the sums quoted for in the May document or whether it be on the basis of some other sum proposed by the defendants, as suggested in paragraph 19 of the defence, there was some ceiling or cap on the sums which might the Defendants might be expected to pay for this contract, it is acknowledged by both of them, and it is absolutely plain both from the claimants' documents but also from the Remi document, there were extensive matters which were not included and were clearly going to need to be charged for. The suggestion from the first defendant, rather randomly, that he understood the figures contained in the May document, the contractual document, could go up or down by £5,000 or so - so he might either win or lose, as he put it - is, again, completely unsupported by any other evidence and is frankly fanciful. It would not take five minutes of reading of the claimants' final contractual quotation to realise the potential unquantified additions to contract, which are explicit in the contract itself, would be likely to amount to significantly more than £5,000, particularly for example in that it contains no provision for the fixtures and fittings both in relation to the kitchen and at least one, if not two, of the bathrooms. These in themselves, as anybody would know even from the most rudimentary understanding of these things, are likely to amount to significantly more than the £5,000 suggested by the first defendant. There is, again, no mention in the statements, although there may be one oblique mention in the pleading, of the invoice basis which is suggested, and insofar as it is mentioned in the pleading there is only a suggestion the production of invoices was a precondition for payment for materials, not for the payment of the sums contained in the contract generally.

44. The pleading goes on at paragraphs 20 to 22 to suggest there were terms and conditions which were either expressly or impliedly included in the contract. Those allegations are clearly made on the basis of the contract alleged in the Defence, the existence of which both defendants denied in the witness box. So, somewhat confusingly from everybody's point of view, despite the non-existence of this contract allegations are made as to terms which were included in it. The defendants both agreed at various points additional matters were discussed, agreed and indeed carried out, but the somewhat surprising suggestion from the first defendant in the course of his oral evidence was, far from the defendants owing Mr Makkar's companies any money at the

end of all this, it was the other way around; he and his mother are owed money by Mr Makkar. The allegation is made once again without any substantiation whatsoever, in the teeth of a number of concessions made at various stages, to which I shall return, that sums remained owing to the claimants at various points, including even a formal admission in the context of the proceedings themselves of a comparatively modest sum was owing. The first defendant's evidence in the witness box was they had been overcharged, without any substantiation, and the claimants should in fact be paying them money back.

45. As I have said, there simply is not a shred of corroborative evidence to support any of those contentions on behalf of the defendants; I reject those suggestions, and I take note of the impact all this has on the credibility of the defendants and such case as Mr Pratt was able to put on their behalf. Further, the defendants in the course of their evidence accepted, under cross-examination from Mr Myers, sums were paid explicitly in respect of some of those extras, for which, despite their contention payment was only ever to be made on the basis of invoices and worksheets, invoices had not yet been provided, although, again in evidence in the witness box, they suggested those sums were paid on the understanding invoices and worksheets would in due course be provided, once again without any supporting evidence of any kind.

46. A further novelty from the first defendant in the course of his evidence was he suggested, in response to questions from Mr Myers, that Mr Makkar had in fact not carried out quite a lot of this work on instructions at all, but he had embarked on, as it were, a frolic of his own, deciding to carry out works on the defendants' property off his own bat, without any suggestion of fees or sums being agreed for payment and without any authorisation or instruction from the defendants. This suggestion was made for the first time made by the first defendant in the witness box. It is entirely fanciful, I completely reject it as being without basis of any kind, and it is, apart from anything else, a completely irrational suggestion that a commercial builder would embark on unauthorised works of an extensive nature on a client's property without any prospect of being paid for them. It is, I am afraid, the work of a particularly inventive imagination.

47. There was a suggestion made in the course of the evidence of payments being outstanding for works already carried out in August 2018. Both defendants denied that. They were faced, again by Mr Myers in cross-examination, with the clear evidence of the existence, and indeed acknowledgement, of outstanding bills in the early part of August 2018. At page B406 in the bundle and following there is a schedule produced by the claimants dated 7 August which deals with the outstanding sums. The first defendant in his evidence suggested as far as he was aware by the time he went away for his wedding in the middle of August (he could not remember exactly when) there were no sums outstanding. He was directed to the evidence, which demonstrates very clearly Mr Makkar by then was raising concerns about outstanding sums, and he then changed his evidence to suggest he understood by the time he went away in August all outstanding sums would be paid by the end of August. The second defendant in her turn also denied initially they had failed to pay sums which had been duly incurred and requested under the terms of the contract, but when she was pointed to her own evidence, in which she acknowledged, in the course of a telephone conversation again, sums were outstanding, she changed her evidence to suggest what she was referring to were sums which were due on account. Those sums, she suggested, had been requested by Mr Makkar for future rather than past expenditure, despite the fact that in the course of the telephone conversation she herself, at page B394 of the bundle, said in the context of the request for payment, "I am just waiting for them to give me the loan from the bank, and I will transfer you the money for all the old items you are waiting for".

48. The second defendant's evidence is just not credible. I do not accept it; it is not, frankly, true. It is evident, again, despite their protestations they were up to date and only paying in respect of sums being requested for future expenditure, that by no later than the early part of August 2018 these defendants were already in arrears and they accepted this was in respect of items already incurred and for which they had already been billed.

49. Mr Myers suggested on a number of occasions to both defendants the problems which had arisen in respect of paying the sums requested for this contract were because they

had in fact run out of money, particularly given their initial assertions in respect of the sums of money they had available to them at the time the contract was concluded. He pointed out they had been referred to mortgage brokers, and indeed the evidence from the second defendant herself was they were waiting, in August at least, for money from Lloyds Bank in respect of a loan they had sought. Both defendants denied at any stage they were short of money for the purposes of paying for this contract or that was an explanation as to why it was they were not paying. The evidence, in my judgment, clearly points quite to the contrary. It is clear they were, in August at least (and B394 makes it plain), unable to pay because they were waiting for a loan from the bank, and it is also apparent the mortgage broker introduced by the claimant was approached certainly in the summer, and again in December, importantly, by the defendants. Even though they did not proceed with him it is apparent they were looking for financing to some extent to settle the bills being presented by Mr Makkar.

50. There is evidence of a meeting on 5 December 2018 in which the concerns Mr Makkar had about the lack of payment were being discussed. There is evidence in the documentation of follow-up emails which identify what was discussed in this meeting, and at B1016 there is a schedule, produced by Mr Makkar's wife, Mrs Maha Makkar, which sets out what apparently was agreed as being owing at the meeting. In fact, the schedule somewhat confusingly gives two figures: one is calculated on the spreadsheet showing the figure of £38,787.07 as being owing, and is one is automatically calculated on the spreadsheet; the figure underneath that, upon which the first defendant relied in his witness statement, shows at the meeting they agreed £38,652, which does not appear to be an automatically calculated figure. I suspect is a function of the figure being transferred perhaps from an earlier draft, but in any event the proper calculation in the numbers contained in the schedule seems to be the agreement of £38,787.07, and is reflected in the documentation Mr Makkar's wife sent to confirm the conclusions of meeting. So, the conclusion of the meeting was from the claimants' point of view there was an understanding in which the defendants accepted some £48,787.07 was owing, £10,000 of was paid in cash within a day or two, and furthermore a payment schedule had been agreed. There is attached to the emails a handwritten note of what the parties

agreed, which then feeds itself into the Excel spreadsheet to which I have referred at B1016.

51. The documentation also makes it plain there was a sum allegedly outstanding in addition to those agreed matters which was the subject of yet further discussion. In particular, there is a further schedule produced by Mr Makkar following the meeting, at page B1020 and following. It is dated 6 December. It sets out the items which have clearly been discussed as under dispute and comes up with an unpaid balance of £5,854.21, which is described thus: "Following our meeting on 5 December we have agreed the above to be discussed and agreed once you have gone through the receipts given". This was clearly the claimants' understanding of the conclusions of the meeting, and at page B534 the email exchange between Mrs Makkar and the second defendant identifies, in the email from Mrs Makkar on 7 December, the £38,787.07, which was the by then agreed outstanding amount the £10,000 having been paid on 6 December, attaches the handwritten agreement, and suggests that:

> "You have proposed you will be making a payment of £13,000-odd (that is, £9,251 plus £4,070), and the remaining balance after the above will be £25,465, and should be paid by the end of February."

She goes on to say:

> "The disputed balance is not in the above until agreed, as Remon is still going through the building materials for all of these. If you have a question please do not hesitate to contact me."

52. It is apparent, looking at the schedules Mrs Makkar produced, both the figure of £38,000-odd was agreed as being outstanding and payable and furthermore the additional sums which remained in dispute were the subject of a separate number on the schedules, £5,800-odd. Invoices had been supplied and the first defendant was going to revert in relation to the disputed items once those had been considered. The second defendant's response accepts £10,000 was paid, further there was a balance amounting to more or less the same figures outstanding, including £4,070, she says,

after the job was finished and the first defendant was going to be paying the VAT amount after they tried to get a loan, and she says:

> "We understand there is a dispute sheets that need to be solved. As soon as the disputes mentioned solved (inshallah) we will then know exactly the balance to pay and when."

53. That seems to be relatively clear on the documentation. However, at paragraph 75 on page B926 the first defendant's reference in his witness statement to the meeting is:

> "The meeting concluded with an agreed figure of £48,652. Mr Makkar's wife sent us a breakdown, and it clearly states following our meeting we've agreed the outstanding amount of £38,652.52, and there remained a disputed amount, it was of £5,854."

54. What is clear from that, of course, is Mr Makkar had indeed seen the schedule of sums agreed at B1016, because that is the only place where £38,652 figure appears; it is the £38,787 figure which appears in Mrs Makkar's email. It is clear the first defendant had indeed seen the schedule from Mr Makkar's wife and furthermore, of course, he had seen the second one, because at paragraph 76 he identifies the figure which was the disputed amount at stage. Nonetheless, despite all that, the first defendant denied in the witness box any sums at all were owing to the claimants, and he denied anything had been agreed at that meeting as being owing at the time. What he suggested was the figures were arrived at, which were recorded in the documentation as Mr Myers pointed out to him, and they were in fact a basis for negotiation only upon the basis they were awaiting further documentation by way of invoices and worksheets so as to justify the payment of any of those sums. The agreement had been one only in a broad context to allow for those figures to be further investigated by the provision of invoices. He suggested in his evidence in the witness box the entire £38,000 remained in dispute, and it was not just the £5,854 which was apparently agreed at the time and, as I said, tellingly, acknowledged in his own witness statement. All this, he suggested, in any event was subject to the production of invoices.

55. The second defendant, however, in her evidence said, far from these matters being agreed or indeed any schedule of payment being agreed, despite her own email already highlighted, in fact those sums were only agreed as being payable once the job was completed, despite her statement in the email that only the figure of £4,070 was identified as being owing once the job was completed. Under cross-examination from Mr Myers she changed her story yet further, to suggest regardless of whether or not the job was completed none of these sums was payable without the production of further invoices. She was pointed to the clear indication that the invoices had already been provided from the email of Mrs Makkar and it was, as it were, in their hands, but she continued to maintain the invoices had not been provided and it was because the invoices were not provided no further payments had in fact been made.

56. The second defendant suggested the reason why they failed to comply with the agreement, which, in my judgment, had very plainly been reached at the meeting on 5 December for the staged payments of the outstanding agreed sums, was because the claimants had failed to honour their side of the bargain: Mr Makkar had not provided the invoices for the justification of the figures. The reality is that is very plainly and clearly not true. It is very plain, in my judgment on the evidence, neither of these defendants is being frank about the conclusion of this meeting. It is extremely clear at the meeting a figure of £38,000-plus was agreed as being then owing, there was a smaller figure which remained disputed subject to investigation of invoices, which were already provided to the defendants and which the second defendant acknowledged the first defendant was in the process of examining. The reason why this agreement, involving clear concessions on behalf of the claimants, failed to reach fruition was not because, in my judgment on the evidence, the claimants failed to satisfy their side of the bargain, but on the contrary because the defendants failed to satisfy theirs. They paid the £10,000, there was a schedule of payments expected for the settlement of the other sums already agreed, and it was the defendants who failed, quite possibly as a result of lack of funds, to abide by their side of the bargain.

57. The defendants in their turn have produced, page B1031, a schedule of what they suggest is owing. It is dated January 2019. It is, as it turns out, on the evidence of the

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first defendant, pure, completely unsubstantiated, speculation on his part as to what might or might not be the value of the works which have been carried out, but, importantly for the purposes of this process and the context of the litigation, it is an acknowledgement that some £21,000-odd were likely to be owing. So, even on the first defendant's fanciful concocted figures, there is acceptance by the first defendant in his own schedule at B1031 in January 2019 that some £21,000 was still owing. By the time of his witness evidence, this has morphed into the assertion that, far from him owing anything, he is in fact owed.

58. Further, in addition to all these matters, the documentation on behalf of the defendants and the defendants' own evidence contained completely unsubstantiated allegations against the Claimant of dishonesty and VAT-fiddling, double-charging and double-dealing, none of which is supported in any sense by evidence. They reflect poorly on the defendants and indeed on their credibility. There is not a shred of evidence to support any of those allegations.

59. Those are many areas in which I found the evidence of the defendants to be completely unsatisfactory, contradictory, confused and, I am afraid, frankly in certain places to be dishonest. I found them to be evasive, and their evidence, as I have said, broadly speaking disingenuous at least, and on occasions dishonest. They are completely unreliable witnesses. There is no consistent, credible case presented by them for the court to consider, and in broad terms where there is any conflict between the evidence of Mr Makkar, and the witnesses on behalf of the claimants, and the defendants I unhesitatingly prefer the evidence of the claimants.

60. Turning then to the findings I make in respect of these matters. First of all I am satisfied on the evidence it was indeed the second defendant primarily who pursued Mr Makkar for the purposes of entering into this contract, and I am also satisfied Mr Makkar understandably had some reluctance and he was persuaded by the second defendant to provide these services. I am satisfied Mr Benning operated on the instructions of the defendants, and they were well aware the reason for the delays in submitting his plans for the approval of the planners was that his fees and the fees of

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the planning department were not being paid by the defendants. I do not accept on the evidence they never saw those plans before they were submitted on their behalf. I am satisfied, again from the documentary evidence I have seen and the evidence of the claimants' witnesses, the defendants were well aware at every stage of the plans which were under discussion among the parties. I am also quite satisfied on the evidence the defendants changed their minds regularly both before and after the contract was in fact entered into. I am satisfied the evidence showed the defendants, and in particular perhaps the second defendant, negotiated very hard on this contract and drove for whatever reason Mr Makkar to a contract price involved which negligible margins, playing primarily on their family connections in order to squeeze Mr Makkar to the best possible deal they could get. I am satisfied the evidence shows they did start out with a limited budget, but it is apparent to me too, in the course of their dealings with Mr Makkar and the claimants, they had hoped to get much more for their money than they had originally bargained for, once again playing on their family connections.

61. I am satisfied on the evidence the defendants were well aware throughout their dealings with Mr Makkar they were dealing in a contractual sense with both the claimant companies; the agreements were made, sums were paid and the documentation demonstrates they were dealing with both these companies, albeit the signed document on 1 May was headed only with the second claimant company. I am satisfied on the balance of probabilities the defendants signed the contract on 1 May having read and carefully negotiated its terms. It is apparent, again, from the evidence, as Mr Myers took particularly the second defendant to, that the defendants considered the terms carefully and insisted on the variation of the terms as to payment. They understood, in my judgment, evidently this was clearly a binding contractual document. In considering this matter in her evidence the second defendant, when asked about the variation upon which she had insisted in respect of the terms and conditions at page B170, said those were the terms and conditions and she had insisted on the amendment because she insisted it be taken out. "I said it must be changed," she said. "We had to do a proper contract which benefited both of us". It is clear, again, whatever they might have said subsequently, they considered this to be a contractual document and they negotiated hard and included variations they regarded as making it

fair on both sides. It is also clear they understood evidently, it is plain on the face of the document, it did not include numerous items for which extra would need to be charged in due course. I do not accept, I am afraid, they are truthful when they suggest the roof attic works were to be included in the original estimates. It is, again, very apparent what was finally carried out and what was finally agreed was significantly more extensive than what was being suggested in the original contractual document.

62. I do not accept the evidence the defendants give that the works to provide separate quarters in the property would and should have been included in the first contract arrangements is correct. It is very apparent, in my judgment from the evidence, some of which I have highlighted already, consequent upon the understandable reluctance of the first defendant's new wife to share her living arrangements with her mother-in-law, there was an understanding and a determination the property should be divided for the purposes potentially of renting either to third parties or for other family members. As I have already pointed out, it seems to me unsustainable to suggest these renovations or alterations should have been carried out on the that basis whoever took over occupation of the property would be sharing accommodation, effectively, with the second defendant.

63. Mr Pratt in the course of his closing submissions suggested this somewhat inexpert contractual document, and I accept it is less than ideal in many respects, should be taken to include various other documents, including, he suggested on behalf of his clients, the sum of the plans which were drawn up. It is a difficult submission, of course, for him to make, particularly given his clients' evidence throughout that was there was no written contract. The submission that the non-existent written contract should include other written evidence the defendants have identified is, as I have said, a somewhat problematic submission to have to make. Nonetheless, allowing for the fact I do conclude, as he now concedes, there was indeed a written contract, there is no evidence to suggest there were any other documents at the time included as part of those contractual arrangements. It is, as I have said, perhaps not an expertly drafted document, it leaves some matters unsaid, and it is not perhaps what the lawyers ideally would hope to see in the context of a building contract. Nonetheless, it is clear enough

on its terms, it seems to me, and importantly it makes plain there are significant areas of what was even then intended which were yet to be quantified and priced.

64. I accept on the evidence that subsequent to entering into this contractual agreement the defendants made numerous changes and attempted indeed in some respects to get some, indeed many, of them, on the cheap, in part by attempting to go behind Mr Makkar's back and persuade his workmen either to do it directly for a cheaper price, or to do the works they were suggesting without his authorisation to be included in the price they were paying him. The evidence does show, in my judgment, they were operating on limited funds, as I have said, clearly attempting to squeeze the maximum they could from Mr Makkar out of the sums they had. It is clear on the evidence they were short of funds at various stages. Particularly in August there is clear evidence they were waiting for a loan before they could pay, and it is apparent too by December they were seeking alternative routes of funding for continuing the contract. This may in itself explain to some extent why they were reluctant to pay the sums which were clearly due and owing under the contract. It is clear they were in arears for sums actually outstanding, certainly no later than July 2018, and their promises to pay were only partially kept.

65. I do not find on the evidence payment for this contract was conditional upon the additional provision of receipts and invoices by the claimants. There simply is not any evidence to support such a conclusion. There is some suggestion, as I have said, in the pleading that the payment for materials might have required justification by way of invoices. There is nothing in the defendants' witness statements to support that, and by the time they gave their evidence in the witness box the entire dealings between the claimants and the defendants had morphed into a suggestion no payments at any stage were to be expected without full justification by way of worksheets and invoices, and they were only to be paid on the basis of cost without any margin. This simply flies in the face of the evidence.

66. There is clear understanding, in December if nothing else, sums were due and payable irrespective of the provision of invoices, such sums as it was agreed remained in

dispute were the subject of invoices which clearly had been submitted. There is no suggestion in any part of the evidence that the documentation which had clearly been provided in December as justification of those outstanding issues was in any sense inadequate. The concessions made by Mr Makkar on behalf of the claimants in the December meeting, in my judgment, were clearly made on the basis it was a relatively desperate attempt at that stage by Mr Makkar to obtain some measure of satisfaction in relation to the very significant outstanding sums as they stood at the time. The defendants, in my judgment, obviously agreed in December there were substantial outstanding sums, and even allowing for the fact they attempted to wriggle their way out of that, as I have said, there remains a significant amount of evidence the defendants throughout accepted they owed some money. The first defendant's schedule in January (as I have said, without justification for how the figures were necessarily arrived at) shows a figure of £21,000. Even in the course of the proceedings, as I understand it, an admission has been made of some £6,000. However, this all transforms itself in the defendants' witness evidence into a suggestion that the claimants owe them money.

67. The practical reality is the evidence, in my clear conclusion, points very firmly to the fact that the simple issue is the defendants reneged on the deal. They had a deal; they knew what it was. Mr Makkar went to some considerable lengths on a number of occasions to point out in some detail what work had been done and what was owing in respect of it. There is not a shred of evidence to suggest that work in broad measure was not done or was not done to an adequate standard. Mr Makkar has given credit for incomplete works not actually carried out in the sum of some £6,000-odd, and that, it seems to me, is a more than generous concession in the context of this lengthy dispute. I accept the contract is not perfect, but it is clear enough about what was included and, importantly, what was not included, and there is no evidence, in my judgment, to support the suggestion any other documents or plans formed any part of the contractual documentation.

68. Turning then to the items claimed, paragraph 7 of the Particulars of Claim sets out the additional issues. As I said, given the shifting sands of the defendants' evidence in the

witness box it is a little difficult to pick out what was and was not accepted by the end of it, but it was accepted the professional fees were their liability ultimately to be paid and it's clear they had not been paid. There is no suggestion the items claimed under professional fees were in fact paid at any stage by the defendants, and so I am quite satisfied the claimants have made out the case for the recovery of £4,329 in relation to those fees etc.

69. The suggestion in relation to the gas and electric movements was that somehow the removal of the meters should have been included in the original contract. It is not included in the original contract, there is no reason to suppose it should have been included in the original contract, and, as Mr Myers has helpfully pointed out in the evidence, it is clear the arrangements for the removal of the meters, particularly the electric meters, were organised by the defendants directly with the electricity suppliers post the contract being concluded. So it is difficult to understand how it is suggested these works could have been included in the original contract when they were not then contemplated. It is not, of course, necessary inevitably in cases such as this for the meters to in fact be moved, but clearly that was the decision made by the defendants. It is something for which they are in the circumstances clearly liable and for which they have not on the evidence yet paid. So, I am satisfied the figures claimed in relation to the extra work for the gas and electric movements are also recoverable by the claimants. I should say the evidence in support of the defendants' request post the conclusion of the original signing of the contract is contained at page B216 of the bundle.

70. I am satisfied, again, the roof attic works as extensively expanded and the split of the property into two distinct dwellings were late additions on the defendants' instructions. I am afraid it is frankly absurd to suggest, upon reading the contract or in any practical sense that those extensive additional works were indeed included, as the second defendant suggested, in the original contract price. It is evident they required substantial reworking of works which had already been carried out, and indeed in some senses undoing the things which had already been done. They were clearly the subject of additional extensive costs, and it is very apparent from the documentation

Mr Makkar made this plain to the defendants at the time. The evidence, in my judgment, shows most if not all of the costs were agreed, and indeed, as Mr Myers has painstakingly pointed out in the course of the evidence, in many respects they were actually paid, and specifically paid in relation to additional items for the sums quoted by Mr Makkar.

71. Mr Makkar on behalf of the claimants produces, by virtue of his wife's efforts at page B1085 and following, a schedule of the payments made, including, as I have said, itemised matters which relate to these additional issues which were agreed. This is a document the defendants have had for some considerable period of time and to which there was effectively no sensible challenge. Whilst I think eyebrows at best were raised in relation to some items, neither of the defendants was able to suggest any of the matters set out by Mrs Makkar in the schedule was in fact inaccurate. The evidence, which I accept, from Mr Makkar is these sums were agreed, and in any event it is very apparent, for reasons I have already set out, the costs being presented by Mr Makkar for the works for which the defendants had contracted were rock-bottom. As I have said, there is absolutely no evidence to suggest these works were not in any substantial sense done or indeed done to an acceptable standard. These were, in my judgment on the evidence, agreed contractual items. Frankly if I had been asked to deal with these items on a quantum merit basis the only evidence I have is of Mr Makkar, and I have little hesitation in accepting it. It is clear from the discussions amongst the parties the defendants drove a very hard bargain, Mr Makkar had given them rock-bottom prices, and there is no reason to suggest, as I have said, the work was inadequately carried out or it was not of the value Mr Makkar had put upon it. So, even if I were, as I have said, dealing with this on a quantum merit basis I would be quite satisfied with Mr Makkar's evidence that these additional items, which it is not suggested have been paid for, should be paid for at the figure suggested, and as claimed by the claimants.

72. There is some question over an agreed reduction in the VAT the defendants might have been expected to pay. At page B492 there is at the end of a schedule in which it is suggested by the claimants, "We agreed you will pay the first two lines for the

structures VAT CIS only", CIS being a commercial arrangement for staged payments in VAT. "To be specific," it says, "you will pay VAT on £84,545 = £25,900". At B1017, again in the claimants' schedule, the suggestion is repeated. This is the post-December-meeting compromise in relation to outstanding sums, which the defendants have subsequently rejected. Nonetheless this is Mrs Makkar's document, in which she says, once again, "VAT on new structure of side rear extension on the £84,500 and £45,000, £25,900", and this is the figure included in the agreed outstanding sums, subject to the further outstanding sum, which was not agreed, of £5,800-odd, which is the subject of the other schedule. So, there is at least some evidence the defendants might rely on to suggest there may have been an agreement for a reduction in the VAT payable on the original contract deal. The evidence is not entirely clear, and it is not accepted by Mr Makkar that was indeed what was agreed; simply this was a quantification of the sums which remained outstanding in relation to those two items, the first two items of the original schedule.

73. The defendants suggest accordingly this was an agreement reached apparently not much later than the end of November that there would be a reduction in the VAT they would otherwise pay of some £8,144, as against the original VAT which was included in the original contract document in May. What is, however, unclear, and the defendants certainly did not provide any help with this, was how many of the other items in the original schedule had in fact already been paid by the time this calculation was done, including, of course, the VAT which would have been recoverable for those items. So, it is extremely difficult to tell, even on the defendants' case, just what sort of a concession in relation to VAT this actually meant; but it is clear from the numbers on the schedules that in excess of two thirds of the original quote had been carried out by the time the November document was produced; the sums outstanding, as I have said, amount to only about a third of what was originally quoted for. So, it is difficult in context, as I say, to understand from the documentation, and certainly from the defendants' evidence, just what sort of a concession this might actually have been. As I have said, if £25,900 was in fact the only outstanding VAT it is no concession at all. If on the other hand somewhere between the two this involved a writing-off of some VAT by the claimants, it is extremely unclear what actually that might have been.

74. If indeed this was a concession by the claimants, and it was an agreement to change the agreement in May so as to reduce the defendants' liability to pay VAT, it is extremely difficult to see what consideration there might have been for this change on the part of the defendants. Effectively all they were doing was agreeing to pay what they already owed, and in the context it might be seen simply as an effort by the claimants to attempt to encourage the defendants to pay something, which they were clearly by then reluctant to do. However, considering all the evidence and on the balance of probabilities I prefer the claimants' position. There simply is not evidence to support the defendants' suggestion this was indeed a material concession, other than simply a calculation of the sums which were actually still outstanding in relation to the original contract. I do not see evidence to support the suggestion there was indeed a binding agreement to vary the May contract to reduce the VAT which would otherwise be payable. Accordingly, I shall enter judgment for the claimants in the principal sum of £64,206.57.

75. Turning then to the question of interest, the contract provides for an effective annual interest rate of some 104 per cent, 2 per cent per week. The actual provision the defendants signed on 1 May says:

> "Any payment delays with the second instalment will result in the delay of the work process. If the final instalment is not paid within 15 days following the completed job a surcharge fee will be applied to the remaining balance at the rate of 2 per cent per week. In the case of a snag list the customer has a right to retain 10 per cent of the final instalments until the completion of the snag list."

76. So, the contractual position is that within 15 days of the completion of the project as agreed between the parties the sums remained payable. The Particulars of Claim put the date as 4 May 2019, when formal demand was made via the solicitors; so, some five months or so after the claimants had in fact left the site and following not-insignificant discussions amongst the parties. The contractual claim, then, in

relation to interest on behalf of the claimants is for a total sum of £114,706.36 to today. The defendants' position is this amounts to a penalty and is unenforceable as such. Mr Pratt makes the point in their submissions it is an exorbitant and unconscionable amount and is not a genuine pre-estimate of loss. The terms and conditions of the contract are set out in brief at the end of what is now accepted is the contractual document, and they include, as I have already pointed out, the amendment made at the insistence of the second defendant to reflect, as she put it, a contract which was fair to both sides.

77. As I have said, the evidence clearly indicates this was a contract which was negotiated pretty hard, Mr Makkar was persuaded on a number of occasions to reduce his costs, and it is apparent he operated throughout on the basis of little or no margin in any event, having given assurance in the first instance. As I have said, the defendants, the second defendant in particular, apparently insisted and achieved an amendment to the terms of payment, and what is very clear, and I am quite satisfied on the evidence is demonstrated, is this was an extraordinarily good deal from the defendants' point of view: they were getting a very bargain price for a very significant amount of work on their property. The price clearly agreed by Mr Makkar is in commercial terms a very low one, involving little or no margin for the claimant companies. As I understand it, the burden is on the defendants to show the interest provision was indeed a penalty.

78. I have been referred to a number of authorities, in particular *Chitty on Contracts* and also the cases of *Cavendish Square Holdings v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, known more colloquially as the *ParkingEye* case. The leading judgment of the Supreme Court in the *ParkingEye* case was delivered by Lords Neuberger and Sumption and expressly agreed with by Lord Carnwath. At paragraph 32 their Lordships say this:

> "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can

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have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance."

79. Later in the same paragraph they say:

"But compensation is not necessarily the only legitimate interest the innocent party may have in the performance of the defaulter's primary obligations".

Further, their Lordships say:

"33. The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe 'The court should not be astute to descry a "penalty clause"': *Robophone* [*Facilities Ltd v Blank* [1966] 1 WLR 1428] at p. 1447. As Lord Woolf said, speaking for the Privy Council in *Philips Hong Kong Ltd v Attorney General of Hong* [1993] 61 BLR 41, 59, 'the court has to be careful not to set too stringent a standard and bear in mind what the parties have agreed should normally be upheld', not least because '[a]ny other approach would lead to undesirable uncertainty especially in commercial contracts'.

34. Although the penalty rule originates in the concern of the courts to prevent exploitation in an age when credit was scarce and borrowers were particularly vulnerable, the modern rule is substantive, not procedural. It does not normally depend for its operation on a finding that advantage was taken of one party. As Lord Wright observed in *Imperial Tobacco Company (of Great Britain and Ireland) v Parslay* [1936] 2 All ER 515, 523:

'A millionaire may enter into a contract in which he is to pay liquidated damages, or a poor man may enter into a similar contract

with a millionaire, but in each case the question is exactly the same, namely, whether sum stipulated as damages for the breach was exorbitant or extravagant …'

35. But for all that, the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach. In connection, it is worth noting in *Philips Hong Kong* at pp 57-59, Lord Woolf specifically referred to the possibility of taking into account the fact 'one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract' when deciding whether a damages clause was a penalty. In doing so, he reflected the view expressed by Mason and Wilson JJ in *AMEV-UDC* [*Finance Ltd v Austin* [1986] 162 CLR 170] at p 194 that the courts were thereby able to strike a balance between the competing interests of freedom of contract and protection of weak contracting parties' […]. However, Lord Woolf was rightly at pains to point out this does not mean the courts could thereby adopt 'some broader discretionary approach'. The notion that the bargaining power and the position of the parties may be may be relevant is also supported by Lord Browne-Wilkinson giving the judgment of the Privy Council in *Workers* [*Trust & Merchant*] *Bank* [*Ltd v Dojap Investments Ltd* [1993] AC 573]. At p 580 he rejected the notion 'the test of reasonableness [could] depend upon the practice of one class of vendor, which exercises considerable financial muscle' as it would allow people 'to evade the law against penalties by adopting practices of their own'. […]"

80. At paragraph 26-195 the editors of *Chitty* say this:

"The rule against penalties has often been seen as anomalous because it applies even to clauses that are negotiated between experienced parties of equal bargaining power. In the *Cavendish Square* case Lords Neuberger and Sumption described it as an edifice which has not weathered well. The Privy Council has cited with approval the view of Dickson J in the Supreme Court of Canada that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression of the party having to pay the stipulated sum. It has no place where there is no oppression.

"Therefore, where there is no suggestion of repression the court should not be astute to decry a penalty clause. The courts are predisposed to uphold liquidated-damages clauses, but the predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.

"However, as it was put before, the doctrine was modified by the *Cavendish Square* case. The correct question is not whether one party secured the clause by use of equal bargaining power or oppression but whether or not the clause is a genuine pre-estimate of the likely loss. Whether a provision is to be treated 'as a penalty' is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question that has to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss.

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> "Similarly, in *Cavendish Square* the Supreme Court emphasised where a party has a legitimate interest in securing performance rather than damages the test of validity is whether the amount payable if the contract is broken is extravagant and unconscionable in comparison with interest. A clause may be a penalty even though it was freely negotiated between the parties of equal bargaining power."

81. At paragraph 26-167 the editors go on:

> "In *Cavendish Square* a majority stated whether a clause is a penalty is a question of construction. From this it follows, Lord Neuberger and Lord Sumption said, the test must be applied as at the date of the agreements, not when it falls to be enforced. A penalty clause is a species of agreement that is by its nature contrary to public policy. It also follows the application of the test does not involve a discretion and if the clause is penal it is wholly unenforceable. These points suggest the question is one the other courts have preferred to call one of characterisation rather than interpretation or construction. However, construction in the normal sense may also be relevant, though it is usually accepted the words used by the parties are not determinative. If the parties' intention was to compensate rather than to deter it seems the validity of the clause should be judged by whether it is extravagant by comparison to genuine pre-estimate test, disregarding any interest that might have justified the deterrent."

82. Mr Pratt referred me also to the case of *Jeancharm Ltd (t/a Beaver International) v Barnet Football Club Ltd* [2003] EWCA Civ 58, in which it is suggested at that stage at least the rule continued to be that there must be a genuine pre-estimate of damage.

83. Taking all those matters into account, it is important to assess the position the parties were in at the time when this contract was entered into. It is, in my judgment, very

clear on the evidence the parties were at the very least on an equal footing. Indeed, on a significant level it can be said the defendants got by far the better of the deal. Mr Makkar, it seems by pressure of the use of family ties, was persuaded into a deal which left him, on the evidence, with little or no margin, and I am satisfied that is the case. He was persuaded to match the price offered, not on the same basis, by another builder. The second defendant, it is apparent, in the course of their negotiations insisted on a variation to the terms, as I have said, on her own evidence, in an effort to ensure the contract was one which reflected a benefit to both sides. In the context of what was agreed then, the claimants and Mr Makkar clearly had to take responsibility for the payment upfront of materials and responsibility for the contractors' fees etc with very little slack in the funds which he was able to recover from the defendants. In a more commercial contract involving a significant measure of profit for the building company there could have been a time lag, as it were, to absorb temporary payment of outgoings whilst awaiting payment from the contracting parties. In this case there was very little cushion to allow these claimants to absorb the temporary outgoing payments with the profit, as it were, from previous payments. It is also clear, at page B503, Mr Makkar made plain to the defendants their failure to pay at one point of the contract was placing both his family and his companies at risk.

84. In my judgment, the evidence does show at the time the contract was entered into there was a genuine effort to ensure prompt performance of the contract took place in circumstances in which the financial arrangements from the claimants' point of view were extremely tight. At the time when the contract was entered into it could not, of course, possibly have been contemplated that the defendants' default in payment would be so considerable and over such a significant period of time. It could not have been contemplated when this contract and this particular term were agreed that it would have been invoked in due course for anything more than a comparatively short period. The defendants, on the evidence, had got a very good deal, and it seems to me a sensible *quid pro quo* was a regime which required prompt payment to reduce the claimants' exposure to potentially significant damage by having to incur costs on the defendants' behalf without, as I have said, any significant profit margin. In my judgment, in making the argument for this to be an enforceable contractual provision it seems to me

there is indeed, and Mr Myers has found, substantial straw for the bricks to construct this edifice.

85. In reality, it is only because the defendants had so spectacularly and over such a long period of time failed to honour their side of the bargain and pay the sums, a large proportion of which they admitted at various points contemporaneously, that this figure has been arrived at. In my judgment, the evidence demonstrates the defendants entered into this contract and signed this contract with their eyes open, having considered it carefully and negotiated its terms. They entered it on at least an equal footing with the claimants, if not, as I have said, exerting the pull of family ties on a better footing than the claimants. The terms and conditions they signed were as negotiated to the benefit of both, on the defendants' own evidence, and in those circumstances I do not find this clause can be described as a penalty. It seems to me at the time it was a proportionate and justifiable clause to deter non-performance and a genuine pre-estimate of the costs likely to be incurred by the claimants, admittedly in contemplation probably only over a short period of time, because the failure of payment would have left the claimants exposed to the costs of covering material and contractors' fees without any real fat to burn. It was designed to protect the claimants' business and supplies etc in circumstances where damages potentially were a long way away and might well not have saved the claimants' companies. It is clearly designed to enforce and encourage proper performance in straitened circumstances. In my judgment, in the circumstances it can be described as neither extravagant nor unconscionable, and so I give judgment further for interest in the sum of £114,706.36.

Epiq Europe Ltd hereby certify the above is an accurate and complete record of the proceedings or part thereof.

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