Neutral Citation Number: [2014] EWHC 2212 (TCC)

Claim No: 0BS90655

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

Cardiff Civil Justice Centre

2 Park Street

Cardiff, CF10 1ET

Date: 3 July 2014

Before:

His Honour Judge Keyser QC

sitting as a Judge of the High Court

- -

Between:

(1) PETER KELLIE

(2) KELLY KELLIE

Claimants

- and –

WHEATLEY & LLOYD ARCHITECTS LIMITED

Defendant

- -
- -

Alex Troup (instructed by **Foot Anstey LLP**) for the **Claimants**

Marc Lixenberg (instructed by **Beale and Co Solicitors LLP**) for the **Defendant**

Hearing dates: 31 March, and 1, 2, 3 and 8 April 2014

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Judgment

H.H. Judge Keyser Q.C.:

Introduction

1. In these proceedings the claimants, Mr and Mrs Kellie, claim damages for professional negligence against the defendant, Wheatley & Lloyd Architects Limited.

2. The claimants' case is as follows. In 2004 they engaged the defendant to act as their architect in, among other things, the design and construction of a detached garage/workshop at their house. They indicated to the defendant that their favoured design for the garage/workshop was in the "Border

Oak" style, with a pitched roof, but the defendant advised them that such a design could not be achieved because it required planning permission that would not be forthcoming. As a result, and in accordance with the advice they were given, the claimants had the garage/workshop constructed in a different style and with a nearly flat roof. The defendant's advice was negligent, in that the garage/ workshop could indeed have been built in the desired style, having regard in particular to permitted development rights (PDR) attaching to the property. In consequence, the claimants have suffered loss, in that (a) the value of their house is less than it would be if the garage/workshop had been built to their preferred design and (b) it would have cost less to build a garage/workshop to their preferred design.

3. The defendant disputes each part of the case against it. It denies that the claimants expressed any wish for a construction of the design they now claim to have wanted. It says that its advice was proper in the circumstances and that the alleged losses are illusory. And it contends that the claim is statute-barred in any event.

4. At trial I received oral evidence from the claimants, from Mr John Wheatley, who was the senior director of the defendant company, and from a number of other witnesses of fact. The parties also adduced expert evidence in respect both of liability and of quantum of damages; I shall discuss that evidence later in this judgment.

5. I am grateful to Mr Troup for the claimants and Mr Lixenberg for the defendant for their excellent submissions.

Summary of the facts

6. The proceedings relate to a property ('the Property') called Middleton Barn, Little Hereford, near Ludlow. The Property had been owned and occupied by Mrs Kellie's parents. When her father died in July 2003, it became owned solely by her mother, Mrs Kelly.

7. In 2003 the Property comprised a two-storey detached dwellinghouse ('the Barn'), which was a converted agricultural barn, and a detached garage, set in about three-quarters of an acre of land. To the west of the Property is a highway, and to the north, east and south are fields. As viewed from the highway, the north end of the barn is at the left. The garden is broadly on two levels. At the back (east) of the house is a lawned area. To the north the land slopes up to a higher level, which is a small orchard that was planted by Mr Kelly. In 2003 the detached garage was behind (east) and to the right (south) of the Barn.

8. After her husband's death, Mrs Kelly did not want to move away from the area, nor did she want to live at the Property by herself. Therefore she asked her daughter and son-in-law, the claimants, to go to live with her at the Property. It was agreed that they would do so and that works would be undertaken at the Property to make it suitable for the three of them, as follows:

1)
The Barn would be upgraded, with a view to it being occupied by the claimants.

2)
The detached garage would be converted into a residential annexe for Mrs Kelly ('the Annexe').

3)

A new building (‘the Garage’) would be constructed for use as a garage and a car port and as a workshop for Mr Kellie, who had a collection of veteran and vintage motorcycles and a number of bicycles, on which he would wish to carry out work.

The claimants, who were both divorcees and had married each other earlier in 2003, intended to finance the works out of the proceeds of the sale of Mr Kellie’s previous house in Sutherland. (In the event, those proceeds proved insufficient and the claimants provided further funding by remortgaging both the Property and Mrs Kellie’s house in Cornwall.)

9. For convenience, I shall mention here what became of the ownership of the Property after it had been agreed that the claimants would move to reside there. In June 2005 Mrs Kelly transferred a 50% share of the Property to her daughter, Mrs Kellie, by a deed of variation. In April 2006 Mrs Kelly transferred three-quarters of her remaining 50% share to her son-in-law, Mr Kellie. In November 2006 she transferred to him her remaining 12.5% share. On 6 December 2006 the claimants, who were by then the beneficial owners of the Property, were registered as the proprietors at HM Land Registry.

10. However, to return to the events of 2003 and 2004: Mrs Kelly was the sole owner of the Property and Mr and Mrs Kellie had agreed to go to reside there on the basis I have explained. The services of an architect were required in respect of the necessary works. Mr Kellie enquired of the Royal Institute of British Architects, which provided to him the details of a number of architects in the vicinity of the Property. The claimants got in touch with some of the architects mentioned by RIBA, who however were not confident about obtaining planning permission for the Annexe. Mrs Kellie then searched on the internet for other suitable architects. She found the defendant company’s details, and she and her husband decided to get in touch with the defendant.

11. The defendant was a two-person architects’ practice based in Tenbury Wells, Worcestershire. The two architects, and the directors of the company, were Mr Wheatley and Mrs Lesley Lloyd. Mr Wheatley was the sole shareholder of the company; in evidence, Mrs Lloyd, who worked part-time, referred to him as her boss and to herself as his employee, and that was substantially though not technically correct. The practice was set up in about 2000 and continued until 2008, when Mr Wheatley retired. Both Mr Wheatley and Mrs Lloyd were Accredited Conservation Architects and had experience of planning practice and procedures in rural areas. The company employed Mr Jason Green as an architectural technician with responsibility for the production of drawings.

12. On 19 January 2004 Mr Kellie made a telephone call to the defendant. He spoke to Mrs Lloyd and had a brief discussion with her about his and Mrs Kellie’s intentions. Mrs Lloyd said that she would get Mr Wheatley to call Mr Kellie.

13. Mr Wheatley duly called Mr Kellie by telephone on 21 January 2004. Mr Kellie’s note of the conversation reads: “Mr Wheatley thought there was a possibility of doing something. He would have a look at Middleton Barn and discuss things with South Shropshire District Council. Ring him in a week if no news.” On 25 January 2004 Mr Wheatley made a drive-past observation of the Property, and on 26 or 27 January 2004 he spoke to Mr Kellie, whose note of the conversation records that he told Mr Wheatley that he and his wife “wanted to extend the kitchen and construct a garage”. Further conversations over the next three weeks concerned the need to obtain a copy of the original planning permission in respect of the conversion of the Barn. Mr Kellie’s evidence was to the effect that Mr Wheatley told him to bring to their forthcoming meeting some pictorial indication of the kind of thing he had in mind for the proposed garage/workshop.

The meeting on 19 February 2004

14. The initial meeting between the claimants and Mr Wheatley took place at the defendant's office on 19 February 2004. Although Mr Wheatley had held some preliminary discussions by telephone with planning officers of the local planning authority, details of the grant of planning permission for conversion of the Barn were still awaited. No attendance note of the meeting by Mr Wheatley has been found; his diary records that it lasted two hours, though his oral evidence implied that some of that period was taken up waiting for the claimants, who had difficulty in finding the office, and that the meeting itself was shorter. Mr Kellie's very brief note of the meeting records, "We discussed the development and [Mr Wheatley] thought it could be possible." It says nothing else about discussions regarding the planning merits of the proposed works and nothing concerning matters of design.

15. There is a significant issue between the parties concerning one aspect of the meeting, namely what was said about the design of the Garage and, in particular, "the Border Oak style". I shall discuss this issue in the following paragraphs. In the course of doing so I shall make some general observations on the evidence, as they arise in connection with this issue.

16. Border Oak Design & Construction Limited (BODCL) is a company based in Leominster, Herefordshire. It designs and manufactures buildings, both houses and outbuildings, with oak frames in a broadly traditional manner. Its current brochure for outbuildings states, "Our oak frames make use of a traditional post and beam principle with arched braces and oak pegs." Those features, which are illustrated in the numerous photographs within the brochure, together with a pitched roof, encapsulate "the Border Oak style", of which BODCL's products may be taken to be the archetype. The expression "the Border Oak style" is not a term of art, and outbuildings may be nearer to or further away from the archetype, as they show its features to a lesser or greater extent.

17. The claimants' evidence was that at the meeting on 19 February 2004 they gave to Mr Wheatley a catalogue from BODCL and told him that they wanted the Garage to be in that style, with a pitched roof if possible. They favoured that style because they liked it and thought it in keeping with the design of the Barn. In cross-examination Mr Kellie said that the catalogue was intended as a starting point for the design. Because of the importance of security, it would have been necessary to have doors instead of the open bays in the standard BODCL designs; a conventional double-pitch roof would be desirable but, if it were not feasible, an alternative would have been considered. However, according to the claimants, Mr Wheatley was immediately dismissive of the suggestion that the Garage be in the Border Oak style. He ignored the catalogue and told them that they would not be able to get planning permission for such a structure. Instead he advised them that the Garage would have to have minimal visual impact and that the local planning authority would only accept a building constructed into the bank adjacent to the Barn, with a single-pitch roof. Indeed, he advised them that they were unlikely to obtain planning permission for a garage/workshop at all, because the Barn already had a detached garage. Mr Kellie said that he was very disappointed that Mr Wheatley advised against the Border Oak style and was particularly concerned to be told that no permission at all might be forthcoming for a Garage. As to the latter point, Mr Kellie may have been concerned, but I do not think that the advice that no permission might be obtained could have come as any surprise; both his own evidence and that of Mr Wheatley suggest that this is in line with what he had been told by other architects. At all events, the claimants say that Mr Wheatley asked them to go away and prepare sketches of the proposed Garage, based on his advice as to what might be acceptable.

18. For the defendant, Mr Wheatley's evidence was to the effect that the discussion at the meeting was conducted in very general terms; the focus was on the claimants' wish to convert the existing detached garage into a residential Annexe, and the construction of a new garage/workshop was a secondary issue. As regards the Garage, he simply asked the claimants to go away and produce a

diagram of their proposals, showing its location and proposed design and dimensions. Specifically, Mr Wheatley denied that the claimants expressed a preference for a Garage in the Border Oak style. Although the claimants' evidence as to the substance of the positive advice regarding the design of the Garage was not challenged (namely that it should be of minimal visual impact, with a low roof, and set into the bank), the tenor of Mr Wheatley's evidence was in fact that such remarks were made not on 19 February 2004 but later.

25. It is right to say at the outset that Mr Wheatley's evidence was problematic in a number of respects. First, he said that after the meeting he recorded on his Dictaphone a note of what had transpired; I think it likely that he did so. However, no copy of that note has been produced and Mr Wheatley said that he did not know whether the recording had been transcribed or, if it had, what had become of it. The fact that Mr Wheatley's evidence concerning the meeting is unsupported by an attendance note means that the quality of the underlying recollection is open to doubt; it does not, though, mean that the evidence must necessarily be rejected. Second, the evidence of both Mr Wheatley and Mrs Lloyd in respect of mention of the Border Oak style changed shortly before trial. In his witness statement dated 11 March 2013 Mr Wheatley stated:

"At no time during this meeting on 19 February [2004] or in our previous or subsequent meetings do I recollect the Kellies mentioning any desire to have the garage/workshop constructed in the 'Border Oak' style. I feel certain that I would have remembered this if they had done so, because at that time I was aware of Border Oak buildings: fresh in my mind was a major problem with a Border Oak structure where I was acting as expert, which resulted in a successful claim for £1 million plus costs."

Similarly, Mrs Lloyd's statement dated 6 March 2013 said that she had first heard the suggestion that the claimants had wanted the Border Oak style for the Garage a few months before she made the statement; she had never heard the suggestion during the course of the project. But on 25 March 2014 Mr Wheatley made a further statement, in which he recalled a discussion at one of the early meetings—in his oral evidence he said it was at the first meeting, on 19 February 2004—when Mrs Kellie had mentioned Border Oak as a possible style, not for the Garage but for a proposed single-storey extension to the Barn. Mr Wheatley stated that he had advised against such a design, as being out of keeping with the adjacent part of the Barn. In her second statement, also dated 25 March 2014, Mrs Lloyd recalled a conversation in which, after a meeting with the claimants, Mr Wheatley had mentioned their interest in the Border Oak style; she did not, however, remember whether this was in connection with the Barn or the Garage, because she was not working on the project at the time. The circumstances in which both Mr Wheatley and Mrs Lloyd came to make supplemental statements to similar effect have not been fully explained. On balance it seems likely that Mrs Lloyd first recalled that Mr Wheatley had said something to her about Border Oak, that she mentioned it to him, and that his recollection was stirred by hers. It was not suggested by Mr Troup that Mr Wheatley's evidence was deliberately untruthful, and I do not think that it was. On the other hand, the possibility has to be borne in mind that Mr Wheatley, having been prompted to recover a very vague and unreliable recollection of some mention by the claimants of Border Oak, has subconsciously persuaded himself that the mention was nothing to do with the Garage. A third feature of the evidence tends to confirm that one should be cautious of treating Mr Wheatley as a reliable historian. On instruction, Mr Lixenberg challenged the claimants' evidence that the defendant's office had rooms adjacent to a main open-plan area and further rooms upstairs. Mr Wheatley gave evidence that his office was entirely open plan, with no rooms other than a lavatory and a kitchen. However, Mrs Lloyd confirmed that there were a kitchen, a lavatory and a print room upstairs, and that downstairs there was a small waiting area and a meeting room. I accept the evidence of Mrs Lloyd and the claimants that there was

a separate meeting room, apart from the open-plan office, although Mr Wheatley was unable to remember it. That inability is surprising, even though, in fairness to Mr Wheatley, it should be noted that the defendant appears to have moved offices at some date before his retirement.

26. I accept, as being consistent with the tenor of Mr Kellie's evidence and as being inherently plausible, Mr Wheatley's evidence that the focus of the meeting on 19 February 2004 was the conversion of the existing detached garage to a residential Annexe and that the question of the Garage was a secondary matter. In the light of all the evidence, it is likely that there was some mention of the Border Oak style at the first meeting, on 19 February 2004. The principal question is whether it related to the design of the Garage or to that of the proposed extension to the Barn.

27. Despite the problems with the evidence of Mr Wheatley on this matter, and after careful consideration of all of the evidence, I have come to the conclusion and find as a fact that the claimants mentioned the Border Oak style in connection with the extension to the Barn and not in connection with the Garage. This conclusion is based on a combination of reasons, which individually are of varying weight.

1)
The claimants' priority was not the new Garage; it was the conversion of the existing garage into a residential Annexe for Mrs Kelly and the renovation of the Barn for their occupation.

2)
The claimants' evidence tends to suggest that they made only one design proposal at the meeting on 19 February 2004, namely the proposal relating to the Border Oak style. Mr Kellie's evidence was to the effect that this proposal was made and the BODCL brochure was produced in response to a request by Mr Wheatley that some pictorial representation of the proposed Garage be brought to the meeting; it was not said that a similar request was made in respect of the extension to the Barn. This seems to me to be inherently improbable. It is more likely that Mr Wheatley would have requested (if he requested anything) something to show what they had in mind for the extension to the dwelling; if he wanted some idea of what was proposed for the Garage, he is the more likely to have wanted the same for the Barn. Similarly, it is unlikely that the claimants produced a brochure to show their intentions for the Garage, if they did not do something similar in respect of the dwelling, which was their priority.

3)
The claimants' plans for the renovation of the Barn included at the outset the construction of two extensions, one to house utility equipment (this was confirmed by Mr Kellie at the beginning of his evidence, when he corrected the impression given by his statement that it had always been intended to put a utility room in the new garage/workshop) and the other, at the south of the Barn, as a study with a pitched roof. The study extension was proposed to replace what was, by general and well-judged consent, an aesthetically displeasing conservatory at the side of the Barn. Both the function and design of the extension will have been matters of particular concern at the early stages of the discussion.

4)
There is some, though only limited, force in the defendant's submission that the section on outbuildings in the BODCL catalogue was so dominated by the open-bay design that it did not provide a plausible model on which to base the design of the Garage, having regard to the need for security. (It must be borne in mind that BODCL also makes houses; these are not, of course, constructed on the open-bay design.) The reason why this objection is not compelling is that the style shown in the

catalogue could have been taken as a starting point, though the claimants envisaged that shutters or doors would have had to be incorporated into the eventual design. Such adaptation would, it is true, involve a dilution of the Border Oak style, but it would be a variation on a recognisable theme.

5)
The reasons given by the claimants for favouring the Border Oak style have generally to do with its supposed congruence with the style of the Barn. I accept that not too much can be made of the point; it seems to me, however, that it is a factor that tends to support, albeit weakly, the view that the mention of the Border Oak style was in connection with alterations to the Barn rather than the style of the Garage.

6)
An architect is more likely at this preliminary meeting to have wanted information as to the proposed function of the Garage than to have sought aesthetic proposals. In fact, it was only later that Mr Kellie produced rough diagrams showing the general floor plan of the proposed garage/workshop and its relation to other features. (Mr Wheatley accepted what was put to him in cross-examination, namely that the annotation he had later added to one of the drawings, to the effect that it was given to him on 19 February 2004, was incorrect.) If Mr Wheatley had asked the claimants to bring some drawing or picture to the meeting on 19 February 2004, it is likely that the diagrams would have been produced at that earlier date.

7)
The claimants' evidence was to the effect that Mr Wheatley advised both that the Garage would need to have minimum visual impact and that it should be dug back into the bank behind the Barn: see the solicitors' letter of 2 April 2008 and para 13 of Mr Kellie's statement. I do not say that such advice could not possibly have been given at the meeting on 19 February 2004. However, by that date Mr Wheatley had done no more than pass the Property from the outside, apparently by driving past it in his car. It was not until 8 March 2004 that he visited the site. Although the point cannot be determinative, it is inherently more probable that advice about recessing the new building into the bank was given no earlier than Mr Wheatley's first inspection of the site. This is a further reason for doubting the accuracy of the claimants' evidence regarding the first meeting.

8)
Mr Kellie's initial note of the meeting does not mention anything about a preferred design for the Garage having been dismissed out of hand. Although the note is brief and cannot be regarded as any kind of proper attendance note, I think it reasonably likely that he would have recorded his disappointment at the advice and even some disgruntlement at the out-of-hand dismissal of what he says was significant research by Mrs Kellie.

9)
Less significant is Mr Kellie's reaction when, in due course, planning permission was obtained for a design for the Garage which was not in the Border Oak style at all. In a short note dated 11 June 2005 to Mr Green, Mr Kellie wrote (see paragraph 50 below), "Well pleased with the 'shed' approval." This does not take matters very far: someone who has been told at the outset that his preferred design is a non-starter and that planning permission for any outbuilding is by no means a foregone conclusion may very well be pleased to get permission for what is believed to be the best available option. Even so, it does cast an interesting side-light onto the claimants' present dissatisfaction with the design of the Garage.

10)

When the claimants' case was being put forward in 2007, there was no mention of the present contention that they told Mr Wheatley that they wanted a Garage in the Border Oak style. There is much force in the defendant's submission that, if those instructions really had been given, the point would have been mentioned at the outset. I shall explain this point further below.

28. The claimants' letter of claim, written by the solicitors who then acted for them, is dated 11 October 2007. Mr Kellie confirmed that he and his wife gave instructions jointly to the solicitors and that he reviewed important correspondence before it was sent out on their behalf. The letter of claim annexed a third revision of a schedule prepared on behalf of the claimants by Mr David Andrews, a Chartered Building Surveyor; the original schedule was dated 19 July 2007 and the third revision was dated 6 September 2007. The letter of claim (six pages) and the schedule (twelve pages) make allegations of broadly three sorts: design defects; deficient supervision of the builders under the subsequent building contract; and certification errors under the building contract. But neither document says that Mr Wheatley wrongly advised the claimants that they could not have a Border Oak style garage but would have to settle for something else. This is particularly important in the case of Mr Andrews' schedule, which contains the following passage on page 4:

"W+L failed to select an appropriate roofing material for the residential/traditional rural location. The failed to select a roof design that was any where near the optimum for the given situation. They failed to show any design skill or lateral thought. They failed to table alternative solutions or provide any options. Several alternatives existed to standard industrial profiled sheet steel for covering the garage roof. Other options would have been more expensive, however the client did not state that the design had to be the lowest possible cost, indeed the need for quality over cost was emphasized at design brief stage. ... Furthermore, there is no record of W+L challenging the planning requirements or suggesting that an acceptable garage design could be achieved by creating a complementary building, i.e. an architectural pleasing structure in its own right, rather than attempting to bury a square box shape structure into a bank side. W+L did not advise on the option of appealing upon unfavourable planning decisions. The garage design is a lost opportunity and the as built structure fails to add any aesthetic value to the property. … [A]t or around the same time, planning permission was granted (by the same LPA) for the erection of two large pitched roof out-buildings on the neighbouring site, i.e. Upper House Farm. This indicates that there was a very good possibility of obtaining planning permission for a vastly superior garage block at Middleton Barn."

In my view, it is very likely that, if Mr Andrews had been told that the claimants had asked the defendant for a Border Oak style Garage, he would have recorded the fact in this passage; the point is so material that, as Mr Lixenberg says, it could hardly have been passed over. Mr Kellie's evidence on this matter was inconsistent: at first he accepted that he had not told Mr Andrews that he had asked for a Border Oak style construction, but he then said that the point had been mentioned to Mr Andrews at the outset. Mrs Kellie said that she thought they had probably told Mr Andrews about their expressed preference for the Border Oak style, but she did not pretend to a recollection. As already indicated, I think it unlikely that Mr Andrews was told that the claimants had asked the defendant for a Border Oak style garage/workshop. This raises three questions: First, why did the claimants not mention the point to Mr Andrews? Second, why did they not advert to the point, which now assumes such importance, when the schedule was in the course of revision? Third, why did they not mention the point to their solicitors, or at least ensure that it was mentioned in the letter of claim?

29. For the claimants, Mr Troup submitted that the letter of claim and the schedule prepared by Mr Andrews had to be understood in context. Mr Andrews was a building surveyor, not an architect, and he was instructed to advise on the Garage "as built", rather than on possible alternatives to the

general design that was adopted. At the time when the letter of claim was written, the claimants were unaware that there were PDR attaching to the Barn and that the Garage could have been built in the Border Oak style. That possibility became apparent in the course of Mr Andrews' instruction; as a result, Mr Kellie made enquiries of the local planning authority, and when sufficient information as to PDR was to hand a further letter was sent by the claimants' solicitors on 2 April 2008, which referred specifically to the instruction regarding the preference for the Border Oak style.

30. I am not persuaded by that response.

1)
Although the letter of claim dated 11 October 2007 ranged far beyond issues of design and largely concerned the defendant's conduct in respect of the building contract, it did specifically allege that the duties owed by the defendant included a duty to ensure that its design was both functional and of "good appearance". The letter also specifically referred to the meeting on 19 February 2004 and to Mr Wheatley's suggestion that he prepare drawings and his subsequent preparation of drawings.

2)
Although the allegation of "design errors" does not necessarily have anything to do with failure to exploit PDR, and Mr Andrews seems to have been unaware of PDR, the emphasis on matters of general design and aesthetics in the passage set out above makes it hard to understand why the claimants' specific request regarding design was not mentioned in the letter of claim, if it was known of.

3)
BODCL was specifically on the claimants' mind during the very period when Mr Andrews' schedule was in the course of preparation and revision. On 25 July 2007 Mr Kellie spoke to a Mr Albright of BODCL's Leisure Buildings Division and wrote to him: "I have enclosed a few pictures of the 'shed' we want to 'hide', would it be possible to construct a building around what we have to make it a little more pleasing?" On 3 August 2007 Mr Albright replied: "We have looked at your proposal and the viability of 'wrapping' the existing building in an oak frame. Unfortunately, we have come to the conclusion that this would be outside the scope of our normal works and as such we would decline from quoting." This indication of difficulty regarding achieving a Border Oak style appearance by modification of the existing building makes it still more surprising that neither the letter of claim nor Mr Andrews' revised schedule mentions that the claimants had originally told Mr Wheatley that they wanted a Border Oak style for the garage/workshop.

4)
It should particularly be noted that, when he wrote to BODCL in July 2007, Mr Kellie clearly did not think that the Border Oak style was ruled out by planning considerations.

5)
I did not find the claimants' evidence to be otherwise so persuasive as to require a different conclusion from that which I have reached. It seems to me entirely possible, and in the light of other considerations likely, that their recollection of what occurred in 2004 has developed as a result of their subsequent dissatisfaction with the defendant, as particularised in Mr Andrews' schedule, and their communications with BODCL in 2007.

31. If, contrary to my finding, the claimants did tell Mr Wheatley that they favoured the Border Oak style for the Garage, they can have done so only as a tentative and general suggestion. Mr Kellie confirmed several relevant points in evidence: cost was important, because the claimants had a

relatively tight budget and would not have wanted to throw money at the garage/workshop; security was important and any design would have to incorporate secure doors and enclosed bays; a pitched roof was not essential, if it could not be achieved; the claimants did not want to become embroiled in a dispute over planning issues regarding the Garage. Even on the claimants' case, it is unrealistic to view them as having said, "This is what we want"; a tentative and passing mention is the most that is at all likely.

32. As to what Mr Wheatley said about the Garage at the first meeting, I think it was probably fairly limited. The discussion was mainly about other things and the claimants had not produced any indicative sketch to show what they wanted. It is probable that Mr Wheatley confirmed that there might be difficulties getting planning permission at all; the point should not be forgotten that the Property already had a garage and that the real point of issue concerned the loss of that garage by its conversion into a residence. Beyond that, he probably confirmed that any new building would have to have minimum visual impact, and asked the claimants to provide some sketches of what they had in mind at a forthcoming site meeting.

33. At the meeting on 19 February 2004, Mr Wheatley gave to the claimants some documentation relating to the defendant's terms of business. It is common ground that a contractual retainer came into existence. It is said, however, that the defendant failed to put in place a proper letter of instruction and a written record of the terms of the retainer; indeed, paragraph 9 of the amended particulars of claim avers that the defendant's conduct in this regard amounted to a breach of professional codes of conduct and practice. As I have not found this aspect of the case to be material to my deliberations on the issues arising from the pleaded case as to actionable breach of duty, however, I shall say no more about it.

After 19 February 2004

34. On 27 February 2004 Mr Wheatley spoke by telephone to a member of the planning department of Herefordshire Council, which had since 1 April 1998 been the relevant local planning authority in succession to Leominster District Council. That conversation was probably part of Mr Wheatley's continuing efforts to obtain a copy of the planning permission pursuant to which the Barn had been converted from its original agricultural use. I find that it was on 1 March 2004 that Herefordshire Council sent by fax to the defendant a copy of the planning permission, which had been granted by Leominster District Council on 2 June 1986. For present purposes the important feature of the planning permission was that it did not impose a condition that the PDR that would otherwise attach to the converted barn be removed. Although it was not unknown for Leominster District Council to omit the condition removing PDR—Mr Wheatley said that he had come across such cases previously—it was more usual to remove PDR from barn conversions, precisely in order to ensure that permission for one piece of rural development did not confer a right to additional consequential development.

35. In order to understand the relevance of the discovery that the Barn had PDR, it is necessary to explain what those rights were. In 2004, the relevant legislation was the Town and Country Planning (General Permitted Development) Order 1995 ("the 1995 Order"), which applied to all land in England and Wales, subject to certain provisions that had no application to the Property. Article 3 of the 1995 Order provided, so far as material for present purposes:

"(1) … planning permission is hereby granted for the classes of development described as permitted development in Schedule 2.

(2) Any permission granted by paragraph (1) is subject to any relevant exception, limitation or condition specified in Schedule 2.

(4) Nothing in this Order permits development contrary to any condition imposed by any planning permission granted or deemed to be granted under Part III of the [Town and Country Planning] Act [1990] otherwise than by this Order."

Part 1 of Schedule 2 to the 1995 Order set out several classes of permitted development within the curtilage of a dwellinghouse. Class E was in the following terms, so far as relevant:

"Permitted development

E. The provision within the curtilage of a dwellinghouse of any building or enclosure required for a purpose incidental to the enjoyment of the dwellinghouse as such …

Development not permitted

E.1. Development is not permitted by Class E if—

…

(c) where the building to be constructed or provided would have a cubic content greater than 10 cubic metres, any part of it would be within 5 metres of any part of the dwellinghouse;

(d) the height of that building or enclosure would exceed—

(i) 4 metres, in the case of a building with a ridged roof or

(ii) 3 metres, in any other case".

36. On 1 March 2004 Mr Wheatley called Mr Kellie by telephone to tell him that he had received a copy of the planning permission. Mr Kellie's manuscript note of the conversation states: "There does not appear to be any restrictions in the consent although expansion would probably be restricted to a % of the existing buildings house and garage[;] not sure on this one. John suggested we get some preliminary drawings together for provisional discussions with the planning people." It is of interest to note that Mr Wheatley was clearly addressing his mind to the implications of the 1986 planning permission. In cross-examination, he said that on receipt of the planning permission he did review his thinking on the claimants' proposals, but that at that stage he focused on their priority, which was the Barn and the Annexe, not on the Garage.

37. On 8 March 2004 Mr Wheatley attended for the first time at the Property, where he was shown around by Mr Kellie and met Mrs Kelly. I accept Mr Wheatley's evidence as to what happened at that meeting, which was to the following effect. As previously, the order of priority for the claimants was: first the Annexe, so that the Barn would be free for their occupation; second, the Barn, which required work to provide adequate living accommodation for them; and third the Garage. There was discussion about replacing the extension at the southern end of the Barn with a larger structure; Mr Wheatley was sceptical about the prospects for achieving this, but Mr Kellie wanted him at least to "test the water" with the local planning authority. In accordance with Mr Wheatley's previous request, Mr Kellie produced some rough sketches that showed what the claimants had in mind for the Barn and the Garage. Two sketches are particularly relevant for present purposes. One showed the proposed position of the Garage relative to the Barn. It showed an entrance and paved area to the north (left) of the Barn, leading to the Garage/Workshop, which was to the north-east of the Barn and on a west-east axis (i.e. perpendicular to the Barn). The paved area extended along the south side of the Garage/

Workshop. The second sketch showed the proposed layout of the Garage. The west side had double doors leading into a double garage that comprised roughly forty per cent of the total structure. The remainder of the structure comprised three bays or sections, which were accessible through doors on the south side: one was for “bike storage”, one was a “workshop area”, and one was marked “covered storage only (trailers)”. The position of the Garage as shown on the sketches indicated that it was to be built into the rising ground to the north of the Barn; that is where it was built. Mr Wheatley advised the claimants that what he calls the “cellular form” of the Garage, which I have already described, would be suitable for building into the bank, without the need for a retaining wall. (In the event, as mentioned below, it was concluded that a retaining wall was necessary.) There was further discussion concerning the layout of the Garage. One point mentioned was the requirement that it have a depth of six metres, in order to accommodate a particular large car.

38. Mr Wheatley set about the work of preparing designs for the Annexe. He also took Mrs Lloyd on a drive-by inspection of the property, in anticipation of her subsequent involvement on the project.

39. On 1 July 2004 the claimants attended at the defendant’s premises. While they were there, Mr Wheatley had a conversation by telephone with Mr Duncan Thomas, a senior planning officer at Herefordshire Council. There was some dispute in the evidence as to whether Mr Wheatley remained in the company of the claimants while this conversation took place or, as they maintain, went into another room and reported back to them afterwards. Nothing of importance seems to me to turn on the issue, but for what it is worth I prefer the claimants’ evidence that they were not in the same room as Mr Wheatley when he spoke to Mr Thomas. No notes of the conversation exist. Mr Wheatley and Mr Thomas spoke again on 8 July 2004, and it is possible that the details of the conversations have become conflated in Mr Wheatley’s mind. Again, that possibility does not seem to me to be important.

40. Mr Wheatley’s evidence was to the following effect. Mr Thomas made it clear that the Garage would have to be a modest structure with a low visual impact. Mr Wheatley suggested the possibility of achieving these requirements by having a building with a flat roof and enclosing it within the bank. Mr Thomas considered that this suggestion was appropriate, and he said that corrugated iron was an example of the kind of roof covering that was consistent with agricultural buildings in the area generally and those that had been built on the site. Regarding the Annexe, Mr Thomas considered that the existing double garage was suitable for conversion to a residential dwelling. However, he advised that any application for an extension on the Barn was unlikely to be successful.

41. Mr Thomas gave evidence on behalf of the claimants. Although there was a degree of tension between the written statements of Mr Wheatley and Mr Thomas, this was largely resolved in the course of the oral evidence. Unsurprisingly, Mr Thomas had no actual recollection of the conversations with Mr Wheatley. He said, however, that the local planning authority encouraged discussions before applications were made for planning permission. He also confirmed that he would have considered it important that the Garage be inconspicuous and have no harmful effect on the Barn. Although Mr Thomas said that in early discussions he would not seek to be prescriptive about matters of design, material and construction, he would have been willing to engage with suggestions made to him. The advice attributed to him by Mr Wheatley accorded generally with the kinds of thing he would have said. He would probably not have made a suggestion that corrugated iron be used, but he might well have agreed that it was a suitable material, if the suggestion had been made to him; there were better materials, however. He would not have favoured a flat roof in the literal sense, as they tend to be unsatisfactory. However, the Garage as constructed has a roof with a shallow single pitch; if that is what is meant, he would have approved a suggestion of such a design. A particular concern was that a building with a shallow pitch of the roof is less suitable for later conversion into a

dwelling; a shallow pitch would therefore be preferable on grounds of planning control. Another point emphasised in evidence by Mr Thomas—and one that Mr Wheatley said informed his advice and design on this occasion and generally—was the principle that the hierarchy of buildings on a site should be respected and maintained, so that buildings ancillary to the main structure (as, for example, outbuildings to a dwelling) should be physically subordinate to the main structure and not dominate or compete with it.

42. Mr Wheatley accepted that he did not tell Mr Thomas that there were PDR attaching to the Barn. Mr Thomas said in re-examination that knowledge of the existence of PDR would have been most material to him; he would have given advice as to what was capable of being achieved without the need for planning permission. However, this evidence has to be considered in a wider context. It is common ground that the Garage could not lawfully have been constructed without planning permission for engineering works to construct a suitable base. Mr Thomas said in evidence that, when considering an application for planning permission for engineering works to create a level surface, his first questions would be, “Why do you want it? What is it for?” In the light of the answers to those questions, the application would be viewed against the relevant planning policies. This is important, because it fundamentally affects the relevance of the PDR for a garage/workshop. Mr Thomas’s evidence—and I should make clear that no one suggested that his approach was wrong or inappropriate; indeed, it was accepted as being correct—indicates that the grant of planning permission for the engineering works will be judged by reference to the substantive planning merits of the development for which those engineering works are required. The need for planning permission for the engineering works accordingly makes it immaterial that the building to be constructed thereafter would not itself require planning permission. To put the point more specifically and bluntly: if planning permission would not be granted for a Border Oak style garage, but such a garage could in principle be built without planning permission under PDR; nevertheless, if the building of such a garage requires engineering works for which planning permission is required, such planning permission will be refused, because the substantive development would not have received planning permission. (I shall say more about planning issues later in this judgment.)

43. Mr Wheatley’s evidence was that both as a matter of principle and because of the practical advantage of maintaining a constructive relationship with the local planning authority, he proceeded in accordance with the views expressed by Mr Thomas. The design that he produced, with only a slight pitch on the roof and the structure built into the bank, complied with the planning authority’s requirements and avoided the inherently undesirable outcome of putting up a building that had an inappropriate visual impact. In the light of Mr Thomas’s evidence concerning planning permission for engineering works, it is relevant to note that Mr Wheatley’s evidence showed clearly that he was well aware of the need for such planning permission and that he would have regarded any attempt to divorce the planning permission for the solid base from the structure for which it was required as inappropriate; in other words, it was inappropriate to attempt to conceal the purpose of the base, in the hope of then utilising the PDR independently. Mr Wheatley also said in evidence that the requirement that the Garage have a depth of six metres effectively ruled out the use of PDR, because it would not have been possible to achieve a pitched roof structure with a height no greater than four metres (see paragraph 35 above).

44. On 12 August 2004 Mr Wheatley submitted to Herefordshire Council an application for planning permission for the conversion of the existing garage to a residential annexe. On 23 August he sent a copy of the application and associated documents to the claimants; the letter (which appears to be the first sent by Mr Wheatley to the claimants) included the following passage:

“Looking a little bit further ahead we have been giving more thought to the location of the garage/ workshop facilities. Given that it would be both your own and Mrs Kelly’s wishes that the Ash tree be removed, it will be possible to excavate into the bank to the east of the barn and thus conceal most of the garage/workshop from any normal view point.

The next move would be to carry out a measured and levelled survey or the site area concerned and to discuss with you the proposed garage/workshop accommodation and looking a step further ahead discuss also relationships with the barn and a possible extension to it, to accommodate your own needs.”

(The ash tree referred to is immediately to the east of the Garage; only the stump remains.)

45. On 31 August 2004 Mr Kellie replied with a number of comments arising out of and in connection with the planning application. One of the comments read as follows:

“Whilst we are very comfortable with the submission of the planning application, we are only prepared to proceed providing we are granted permission to construct the garage/workshop and modify Middleton Barn along the lines we have tentatively discussed.”

46. Mr Wheatley replied on 8 September 2004:

“Construction of garage/workshop and modifications to Middleton Barn: As we have discussed during telephone conversations, I have had a look at the relative levels of the land immediately to the north of the barn and know that garage/workshop accommodation can be provided almost within ground section profiles with very little projection above upper garden levels. Such a building would really only have a south ‘entrance’ elevation, which for practical purposes would not be visible from any external viewpoint. I mentioned this to the planning authority—they do not see a particular problem and have advised that an application for a garage/workshop could be submitted in sequence after the application for the conversion of the garage has been determined.”

47. Planning permission for the Annexe was granted on 4 January 2005.

48. Under cover of a letter dated 29 March 2005 the defendant submitted to Herefordshire Council an application for planning permission for the Garage, which was described as “Proposed car port, garage and workshop for personal use”. The drawings were prepared, to a design by Mr Wheatley, by Mr Green. The design was now for a car port, open at the south, in the west end of the Garage, with a double garage in the middle and a workshop to the east.

49. On 25 May 2005 planning permission was granted for the Garage in accordance with the application. The decision to make the grant was taken by the local planning authority’s divisional planning officer under delegated powers. The Delegated Decision Report contained an appraisal by Mr Thomas as the planning officer acting as case officer for the application. The appraisal contained a section referring to relevant planning authority and guidance. Mr Thomas recommended approval and said:

“This application proposes a stand-alone building that will be cut into an embankment that is on the north side of Middleton Barn. The building will be in an inconspicuous position so as not [to] have a significant impact on the setting of the converted building.”

(Shortly afterwards revised plans were drawn, showing that the positions of the garage and the workshop were to be reversed. This amendment was also approved.)

50. On 1 June 2005 Mr Green sent a copy of the planning permission for the Garage to the claimants. On 11 June 2005 Mr Kellie sent to Mr Green a note:

“Hi Jason, I assume you will handle the attached. Well pleased with the ‘shed’ approval. Best regards, Peter Kellie.”

51. In June 2005 the defendant issued a specification in respect of the Annexe for competitive tender. In August 2005 a revised tender was sought on the basis of the inclusion of works for the entire project, including the Garage and the Barn, with a view to achieving economies. An application for planning permission for the Barn was submitted on 19 August 2005 and, as was expected, was refused. The decision was taken to appeal against the refusal. Before the appeal was lodged, the claimants accepted a tender of £220,000 for the entire project from P.H. Postons & Son Ltd. On 7 November 2005 the claimants entered into a building contract (JCT: minor building works) with Postons. The “Architect/Contract Administrator” was the defendant.

52. Works on the Annexe commenced on 31 October 2005, before the signing of the building contract, and were ongoing when works on the Garage commenced at the end of November 2005.

53. During 2005 it had been recognised that Mr Wheatley’s initial belief that the Garage could be built into the bank to the north without the need for a retaining wall was incorrect. The drawings submitted in support of an application for Building Regulation approval in June 2005 showed that the design of the wall would be based on calculations to be provided by structural engineers. There was disagreement at trial as to the precise reason why a retaining wall was required. Mr Wheatley said that excavation of the bank had disclosed that there was a perched water table, which resulted in increased hydrostatic pressures in the bank. This explanation was challenged at trial, with particular reference to a photograph taken in or about November 2005, which was said to show, first, that there was no surplus of water and, second, that the bank had been excavated for a significant period of time without collapsing. Although the photograph does show a scene where there is no surplus water and no sign of the excavation collapsing, I do not think that it establishes that Mr Wheatley is incorrect in referring to the water table and the hydrostatic pressures as constituting the reason why a wall was required. The contention that Mr Wheatley is wrong on the point might be correct, but it has not been substantiated and the photograph is inadequate evidence to support it. Further, Mrs Lloyd, who was an impressive witness, confirmed that the need for a retaining wall arose from the higher than expected hydrostatic pressure. Anyway, despite the interest shown in this point at trial, I cannot say that I regard it as having any relevance to the issues in the case.

54. What is clear is that, after consulting engineers had provided calculations for the design, it was apparent that the cost of the retaining wall would be significantly more than anticipated. At a site meeting on 18 January 2006, attended by the claimants, Mrs Lloyd, Mr Green and Mr Postons of the building company, Mr Postons reported that the original tender had been based on a budget cost of £5,496 but that the cost of the structure required in the light of the engineering calculations was £9,850. The minutes of the meeting record that the claimants were “alarmed” by this increase, and Mrs Lloyd suggested that it might be possible to absorb it within the overall budget on a “swings and roundabout” basis. After the meeting, the claimants prepared a Note that set out their concerns and queries. The final comment reads:

“Had Wheatley Lloyd provided a cost estimate [scil. before the works on the Garage were commenced] it would have been preferable to downsize the garage design rather than compromise on the specification of the living accommodation as a result of the clients’ budget constraints.”

(In a letter dated 21 January 2006 to Mrs Lloyd, the claimants stated that the additional costs "cannot be considered": "We are not prepared to compromise the specification of any aspect of the project to accommodate this unexpected cost.) The fourth of the "questions" in the Note reads:

"We believe the need for the reinforcement of the wall was due to the potential loading imposed by the bank. Rather than increase the strength of the wall, why not 'batter' the bank and remove the problem!"

A further site meeting took place on 25 January 2006, when it was recorded that Postons and the defendant thought it likely that the "swings and roundabouts" approach would permit the additional cost of the retaining wall to be absorbed within the existing contract price. One possibility recorded in the minutes was:

"Consider scrape back bank behind retaining wall to reduce cost of backfill between the wall and bank."

At a site meeting on 15 February 2006 the matter was discussed again:

"[Mr Kellie] raised comments regarding what was said about the retaining wall …

[Mrs Lloyd] said that on reflection she was convinced that there had been no feasible alternative option to the retaining wall or its construction. It was not feasible to rake out the ground levels back instead. [Mr Postons] suggested that there would have been planning issues to contend with. [Mrs Lloyd] agreed that this would have been the case potentially causing delays and other cost implications."

On the basis of these minutes, it was put to Mrs Lloyd in cross-examination that she had not considered any alternative to a retaining wall until Mr Kellie raised the possibility in January 2006, and that even then she had not considered the possibility of removing the bank (rather than merely raking it back behind the retaining wall). Mrs Lloyd said that, on the contrary, she had at an early stage considered and rejected the possibility of battering back the bank. It was, she said, not feasible for two reasons: first, it would have involved a very considerable amount of excavation, resulting in greatly increased costs not only of engineering but of disposal of the excavated waste; second, the claimants' instructions were that the trees in the orchard on the top of the bank were to be preserved, and battering the bank back would have resulted in the loss of trees.

55. On 10 May 2006 the claimants' appeal against the refusal of planning permission for the works at the Barn was allowed and planning permission was granted.

56. The remainder of the narrative can be taken shortly. The claimants became seriously dissatisfied with both the standard of Postons' work and the performance of the defendant as Architect/Contract Administrator. Mr Wheatley says that the problems arose largely from constant interference from, and changes to the specification by, the claimants, which led to increased costs and delay. (The rights and wrongs of the matter might have been material to the issue of costings, considered below, though the evidence of the course of the works has not been sufficiently analysed to permit conclusions to be drawn. Happily the uncertainty in this regard does not affect the conclusions I shall reach.) The last Interim/Progress Payment Certificate was issued by the defendant on 24 November 2006; at that stage works on the Annexe and the Garage had been largely completed but works on the Barn had not commenced, and the claimants were refusing to permit Postons access to the Property to complete the works. On 6 December 2006 Mrs Lloyd wrote to the claimants, informing them that, until they both permitted Postons to return to the site to achieve practical completion of the works at the Garage and

paid the defendant's outstanding invoice, the defendant would not communicate with them further. On 30 January 2007 Mr Andrews, the building surveyor engaged by the claimants (see above), wrote to the defendant, terminating with immediate effect both the defendant's retainer and the building contract.

Planning Guidance

57. Both the factual evidence and the expert evidence made reference to matters of planning law and policy, and it will therefore assist to mention some of those matters before considering the expert evidence in a little detail.

58. At the material time, section 70 of the Town and Country Planning Act 1990 provided that, in dealing with an application for planning permission, the local planning authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations. Material considerations included national planning policy and guidance.

59. In 2005 the principal national guidance on planning policy in England was Planning Policy Statement (PPS) 1: Delivering Sustainable Development, which was based on a consultation document published in 1997 that itself contained in updated form material from an earlier Planning Policy Guidance Note 1. Paragraph 5 of PPS 1 contained guidance at a high level of generality on achieving "sustainable and inclusive patterns of urban and rural development". Paragraph 12 emphasised the importance of pre-application discussions. Design issues were addressed in paragraphs 33 to 39; again, the discussion is general and provides guidance for local planning authorities in the formulation of plans and policies. Some selections from the text must suffice here.

"33. Good design ensures attractive usable, durable and adaptable places and is a key element in achieving sustainable development. Good design is indivisible from good planning.

34. Planning authorities should plan positively for the achievement of high quality and inclusive design for all development, including individual buildings … Good design should contribute positively to making places better for people. Design which is inappropriate in its context, or which fails to take the opportunities available for improving the character and quality of an area and the way it functions, should not be accepted.

35. High quality and inclusive design should be the aim of all those involved in the development process. … This requires carefully planned, high quality buildings and spaces that support the efficient use of resources. Although visual appearance and the architecture of individual buildings are clearly factors in achieving these objectives, securing high quality and inclusive design goes far beyond aesthetic considerations. Good design should: …

- be integrated into the existing urban form and the natural and built environments; …

36. Planning authorities should prepare robust policies on design and access. … Key objectives should include ensuring that developments: …

- respond to their local context and create or reinforce local distinctiveness; …

- are visually attractive as a result of good architecture and appropriate landscaping.

38. Design policies should avoid unnecessary prescription or detail and should concentrate on guiding the overall scale, density, massing, height, landscape, layout and access of new development in relation to neighbouring buildings and the local area more generally. Local planning authorities

should not attempt to impose architectural styles or particular tastes and they should not stifle innovation, originality or initiative through unsubstantiated requirements to conform to certain development forms or styles. It is, however, proper to seek to promote or reinforce local distinctiveness …"

60. In 2005 local planning policy for the area in which the Property was located was set out in two local plans: the Leominster District Local Plan, and the Hereford and Worcester County Structure Plan. The local district plan was of more immediate relevance to the development at the Property. Policy A.2, headed "Settlement Hierarchy", contained the following provision:

"(D) Development will not be permitted in the countryside or in villages, hamlets or other groups of houses for which no settlement boundary has been defined unless it accords with one of the following exceptional circumstances: …

(vi) It is an extension to an existing dwelling or a building ancillary to the enjoyment of a dwelling house in accordance with policy A.56".

The explanatory text to the policy contained the following passages:

"3.19 … Small hamlets and groups of houses scattered through the District often have a distinctive character akin to the countryside where non-essential development should be resisted.

3.20 The protection of the wider countryside and high quality agricultural land is a basic planning principle. New development in the countryside will only be allowed where one or more of the exceptional circumstances listed in part (D) exist."

Mr Thomas referred to policy A.2, among others, in the Delegated Decision Report (DDR) in respect of the Garage. When he gave evidence he said that he considered policy A.2 to be the most relevant. He said that policy A.3, which was not mentioned in the DDR, was also of some, though lesser relevance:

"Development proposals should create an attractive built environment: where appropriate, they will be required to reinforce or establish a sense of place or identity. In considering proposals account will be taken of: …

(B) The inclusion of traditional rural design elements within buildings in the countryside".

61. Mr Thomas attached particular importance to Policy A.24, headed "Scale and Character of Development", which was mentioned in the DDR.

"When considering matters of scale and character the local planning authority will require proposals to satisfy the following requirements:

(1) The size of any buildings in terms of height, scale and mass should respect adjacent buildings and the spatial quality and form of prevailing use(s) within the area. …

(2) Materials should be used which do not strike discord with their surroundings but appear in harmony in terms of colour, form and texture;

(3) Building design should respect the density, general proportions and detailed features which are common and traditional to a particular settlement or area; …

(8) Proposals should not result in a cramped form of development when compared to their surroundings."

The explanatory text to the policy included the following passage:

“4.58 Development proposals should fit in with the existing character of the area and preferably represent an improvement in environmental terms. When considering planning applications, the Council will normally attach great weight to the impact of the proposed development upon both its surroundings and the settlement or area in general, particularly where these are small and rural in character and exhibit attractive landscape features such as narrow lanes, banks and hedgerows.”

62. The DDR referred to policy H.20 in the county structure plan.

“Residential development in the open countryside outside the green belt will not normally be permitted except where: …

(f) It is an extension to an existing dwelling which is in scale with the original dwelling and does not become the dominant feature.”

63. The DDR also referred to policy H19, headed “Alterations and extensions”, in the draft Herefordshire Unitary Development Plan, which came into force in March 2007, when it replaced the district local plan and the county structure plan.

“Proposals for the alteration or extension of dwellings or for buildings incidental to the enjoyment of a dwelling will be permitted where:

1. the original building … would remain the dominant feature;

2. the proposal is in keeping with the character of the existing dwelling and its surroundings in terms of scale, mass, siting, detailed design and materials;

3. the proposal would not be cramped on its plot … and would not adversely impact on the privacy and amenity of occupiers of neighbouring residential property; and

4. the level of resulting off street parking provision is in accordance with policy H16.”

Expert evidence on liability

64. Expert evidence on matters relating to liability was given for the claimant by Mr Kenneth Bate and for the defendant by Mr Colin Buggey, both of whom are chartered architects. They wrote their joint statement pursuant to CPR r. 35.12(3) together with the expert witnesses on matters relating to quantum of damages, namely Mr Linden Alcock and Mr David Prosser, chartered surveyors instructed on behalf of the claimant and the defendant respectively. Although I am not entirely sure that this assisted clarity, it does reflect the fact that the evidence from the different disciplines was to some extent interrelated. For convenience, I shall summarise the main parts of the evidence by reference to the liability and quantum issues separately.

65. Mr Bate and Mr Buggey agreed on certain matters.

1)
They were both critical of the defendant for failing to make a written record, whether by letter or attendance note, of the terms of its brief from the claimants. It was not suggested, however, that this was a matter that in itself had resulted in loss and damage to the claimants; its relevance was evidential. I shall therefore not discuss it separately.

2)

They agreed that PDR did not obviate the need for planning permission, because of the necessity of carrying out engineering operations to enable the garage/workshop to be built. Mr Buggey considered that the local planning authority would have required to know the purpose of the engineering operations and would have considered the planning merits of the entire works. This was specifically confirmed by Mr Thomas when he gave evidence.

3)
They agreed, as did Mr Alcock and Mr Prosser, that the Garage could have been located up to 7 metres further to the east (i.e. behind the Barn) and that this would not materially have affected the views to the north from either the Barn or the Annexe. In this connection, I should note that in his oral evidence Mr Prosser made clear that his agreement on this point was based on the assumption that it was the same Garage, that is, as built and with a nearly flat roof. He said that, if the building were to have a pitched roof, the views would be adversely affected.

66. The following points may be noted from Mr Bate's evidence.

1)
He thought that to say prescriptively that planning permission for a certain design would not be obtained would be "irresponsible" and therefore "not acting with appropriate reasonable care and skill". The appropriate advice could go no further than that, if an application was not in accordance with relevant planning policy, a refusal would be almost certain.

2)
He expressed the view that, even if the claimants did not express a preference for the Border Oak style, a reasonably competent architect would be expected to advise on the alternatives available, including those of that style. "Whilst I acknowledge that opinions on design are subjective, the design adopted and constructed does not in my opinion sit well in its surroundings. It is my belief that a reasonably competent architect would give greater thought to the alternative solutions, particularly if the solution may have an effect on the value of the property." However, in cross-examination he said that he did not know whether Mr Wheatley could be considered negligent if the following conditions were satisfied: (a) the claimants could not rely on PDR but had to make a planning application; (b) the claimants did not mention the Border Oak style; (c) the claimants wanted a large garage/workshop with headroom of 2.35 metres; (d) the claimants did not want to spend more than was necessary on the garage/workshop, because although necessary it was not their priority. He did, however, express the view that, if the claimants suggested the Border Oak style, it was negligent not to explore its feasibility.

3)
He considered it "very unlikely" that a planning application for a garage in the Border Oak style would have been refused. For this opinion he had four basic reasons. First, he relied on Mr Thomas's evidence as he understood it from his witness statement. Second, he attached importance to the fact that, as he put it, "precedents had already been set locally as to acceptable design/visual appearance"; other outbuildings in the area, including garages, were in the Border Oak style, and the fact that the detached garage (now the Annexe) had been constructed with a pitched roof set some precedent within the site. Third, he thought that, as planning permission was granted for the Garage which at its nearest point was less than 4 metres from the Barn, it was probable that planning permission would have been granted for a structure in the Border Oak style if it were placed at a greater distance from the Barn.

4)

Fourth, Mr Bate thought that (disregarding the need for planning permission for the engineering works) it was possible to erect a building, with a pitched roof, within the 4 metre limit of the PDR. The difficulty was that the dimensions of the building were such that, if it had a conventional pitched roof and if the height were measured from the ground level immediately in front of the Garage, the height would exceed the permitted height of 4 metres (Mr Bate thought it would be 5.15 metres, though Mr Buggey said it would be 5.8 metres). Mr Bate offered two solutions to this difficulty. First, he suggested that, instead of adopting a conventional pitch of 42.5º, it would have been possible to have a pitch of 22.5º. Second, he suggested that, if the Garage had been placed at a different part of the site, it might have been possible to construct it with higher ground abutting the back of the building, thereby taking advantage of the provision in Article 1(3) of the 1995 Order permitting ground level to be taken as the level of the highest part of the surface of the ground adjacent to the building.

5)
Mr Bate thought that, if the planning officer would not support the application for a building in the Border Oak or similar style, Mr Wheatley should have advised the claimants to at least consider taking advice from a chartered planning consultant: the cost would have been modest—Mr Bate suggested £300 to £400 for an initial discussion, though he accepted that as matters progressed the costs would have increased—and the potential benefits meant that the step ought to have been considered.

6)
Mr Bate expressed puzzlement as to the particular solution chosen for the construction of the Garage, namely burying it into the bank to the north with a retaining wall to hold back the bank. “An excavated revetment was necessary in any event … to permit the erection of the rear wall. In my opinion to have made this revetment at 45º would have permitted this to be a permanent bank, reducing the cost, less risk of future damp-related problems and making little if no (sic) difference to the visual appearance from the road or surrounding land. It would also have avoided the additional cost of a damp-proofed retaining wall.”

67. I should mention briefly at this stage some difficulties with the several planks of Mr Bate’s argument that planning permission would very probably have been given for a garage in the Border Oak style.

1)
Mr Bate’s understanding of the likely attitude of the planning officers was based on Mr Thomas’s witness statement. However, Mr Thomas’s oral evidence put a different complexion on things. When he was told what Mr Thomas’s oral evidence had been, Mr Bate said that he would challenge that evidence on the basis of the precedent that had been set on the site by the planning permission for the former detached garage (now the Annexe). This approach seems to me to be open to two objections. First, as regards issues of both liability and quantum it is manifestly untenable. It is one thing to say that permission for a certain structure ancillary to a dwelling at property A creates some precedent justifying permission for a similar structure ancillary to the dwelling at property B. It is quite a different thing to say that permission for one ancillary structure at property A creates some precedent justifying permission for a second and similar structure at property A. The former proposition may be correct, but the latter plainly is not. Second, as regards liability, with reference to failure to have regard to the supposed precedent set by the former detached garage (now Annexe) at the Property, Mr Bate said that he did not say that Mr Wheatley’s conduct was so incompetent that it fell outside what any reasonably competent architect would have done.

2)

In cross-examination, Mr Bate acknowledged that he had not investigated the planning history of the precedents he relied on—one, namely the former detached garage (now the Annexe), on the site and two in the wider vicinity. He accepted that the planning documents put to him in cross-examination showed that one of the nearby buildings relied on, a garage, must have been built either pursuant to PDR or in breach of planning control. Perhaps more damagingly, it was in connection with the failure to rely on the precedent set by local buildings that Mr Bate said that he was not saying that Mr Wheatley, in failing to pursue an application for planning permission for a Border Oak style Garage, had acted in a manner so incompetent that no reasonably competent architect would have acted similarly; he was saying that Mr Wheatley had failed to do his clients justice. Although Mr Troup re-examined on this point, by reference to the particulars of claim, and obtained an answer from Mr Bate that he did not think that Mr Wheatley had carried out his duties with reasonable care and skill, I was left in some doubt as to the standard being applied by Mr Bate.

3)
The contention that, as permission was granted for one structure within 4 metres of the Barn, permission would have been granted for a larger structure of different design a few metres further from the Barn is by itself unpersuasive. Positive reasons would have to be shown for the planning merits of the latter structure.

4)
As for the scope of PDR, there were at least four problems with Mr Bate's evidence. First, he was inconsistent as to the relevance of PDR. In his written evidence he suggested that, if the planning officer had not supported an application for a garage in the Border Oak style, advice should have been sought from a chartered planner, who would almost certainly have made it clear that PDR made an application for planning permission unnecessary. In cross-examination, however, he accepted that planning permission would have been required for the engineering operations and that such an application would have been determined on the basis of the application of normal planning considerations, including policy, to the development as a whole. Although this does not mean that PDR were necessarily irrelevant, it reduces their weight as a factor. Second, although the evidence was that it might have been possible to take advantage of Article 1(3) if the Garage had been placed at a different part of the site, the suggestion seemed to me to rest at the level of theory and possibility: neither in Mr Bate's evidence nor anywhere else that I can see was it demonstrated that this could in fact have been achieved or what precise engineering solution would have achieved it. Third, at this stage of the argument reliance on Article 1(3) is surely beside the point. The case for the claimants, as advanced by Mr Troup and in the expert evidence, accepted that planning permission was required for the engineering operations and that this would properly have been considered on the basis of the planning merits of the overall development. The crux regarding the garage/workshop is its relationship to the Barn: whether it is appropriately ancillary to the dwelling, whether the hierarchy of buildings is preserved, whether its style is appropriate, and so forth. These matters have nothing to do with the fact that there is a bank resting against the rear wall of the garage/workshop. A building that is inappropriate because of size, scale and dominance vis-à-vis the dwelling does not become appropriate because there is a bank at its rear. Mr Bate's position on this point gains specious plausibility only if it be assumed that the planning merits of the development as a whole are irrelevant. But that is just the point that both Mr Bate and Mr Troup conceded—correctly—to be false. Fourth, insofar as reliance is placed on the possibility of erecting a structure with a roof with a pitch of 22.5º, it is clear that the model of the Border Oak style is being departed from; the archetype is marked as much by the conventional pitch of the roof as by anything else.

5)
This last point highlights a difficulty with the way the claimants' case has been presented, which was noted by Mr Lixenberg. The claimants have not produced what he referred to as an Alternative Design, and it is therefore difficult to pinpoint what the defendant is said to have done wrong or what the consequences of that wrongdoing are said to be. With particular reference to the question of PDR, there appeared by the end of the case to be three alternative suggestions: first, that a full-sized building with a conventional pitched roof should have been built into the bank, thereby taking advantage of Article 1(3); second, that a full-sized building should have been built with a roof at a pitch of 22.5º; third, as appeared from Mr Troup's opening submission, that the footprint of the building might have been smaller than that of the Garage as built.

68. The following points may be noted from Mr Buggey's evidence.

1)
He noted that architects do not merely draw up plans in compliance with their clients' requirements but have their own ideas and values. Mr Wheatley was an accredited conservation architect and as such he would not only strive to meet his client's brief but attempt to do so by doing "the right thing" for buildings of the age and character of those already existing.

2)
He said that any normally competent architect ought to have reviewed the position on becoming aware that PDR had not been withheld. However, planning permission would always have been required for the necessary engineering operations. Further, it would have been impossible to achieve the required internal depth of 6 metres and internal headroom of at least 2.35 metres without exceeding the maximum permitted ridge height of 4 metres under PDR. Moreover, it was unlikely that planning permission would have been granted for a Border Oak style Garage, whether free-standing or in association with any necessary permission for engineering operations. The planning authority would have considered the application in the light of applicable planning policies. The footprint of the Garage was nearly that of the Barn itself; the Barn is low for a two-storey building; and the required headroom in the Garage means that its height with a pitched roof would have been at least 5.8 metres. (I should note that Mr Bate considered that it might have been possible to keep the height down to 5.15 metres.) Mr Buggey expressed the view that it was entirely reasonable of the defendant not to suggest a design in accordance with the Border Oak style; "indeed, it is unlikely that a normally competent architect, having familiarised himself with the site and planning context, would propose, or advise pursuing, this design."

3)
Mr Buggey disagreed with Mr Bate's view that the defendant should have suggested to the claimants the possibility of seeking an opinion from a planning consultant. He took the view that a competent architect was sufficiently able to deal with the necessary issues.

4)
Mr Buggey did not consider that there was sufficient evidence to justify Mr Bate's conclusion that a sloping embankment could have been constructed behind the Garage, thereby obviating the requirement for a retaining wall and reducing cost. Mr Bate considered that, even without a site inspection (Mr Buggey had not visited the site but had dealt with the case from drawings and photographs), the available information was sufficient to enable an experienced architect to express a view. However, Mr Buggey insisted that opinions could not be expressed on the basis of photographs

without proper analysis of the soil and accurate survey data relating to site dimensions and levels, ground conditions and the design of the bank.

69. Regarding the prospects of obtaining planning permission for a garage/workshop in the Border Oak style, at the end of his cross-examination it was put to Mr Buggey that, if one sought planning permission for engineering operations that were necessary in order to achieve development for which one had PDR, one would have a good chance of persuading the planning offer to support the application. Mr Buggey said that he had never encountered the situation but was inclined to agree with the proposition. I shall bear that answer in mind when forming my conclusions. However, such a tentative response to a hypothetical question, after much detailed cross-examination directed to the specifics of the case, must be viewed with caution and placed carefully in the context of all the other evidence.

70. Mr Buggey was asked about some hypothetical cases involving Border Oak style outbuildings. He was shown the BODCL brochure for outbuildings and asked about Model 2, Model 3 and Model 4.3. These are shown as having ridge heights of, respectively, 3.9 metres, 4.4 metres and 4.8 metres. It was put to Mr Buggey that, if the claimants had decided to buy off-the-shelf from BODCL, they would have had some genuine choice. He replied that the models would have provided only very limited garage facilities and would have been of little use as a workshop. This line of cross-examination did not seem to me to advance matters. None of the models comes close to meeting the claimants' requirements, either as to design or as to dimensions; I deal with this point further in paragraph 85 below. A further difficulty is that, if reliance is being placed on the supposed ability to build with the bank directly abutting the structure—only so could it possibly be feasible to achieve a ridge line within the scope of PDR, making use of Article 1(3) of the 1995 Order—a fully timber structure would be unsuitable. Partly for this reason, perhaps, it was put to Mr Buggey that a hybrid building could be constructed: Border Oak style at the front, and brick at the rear. He raised three objections to this: first, that aesthetically the essence of the Border Oak style would be lost; second, and more importantly, that the resulting structure would lack integrity, giving the appearance of something that it was not, and would on that account not be favoured by most architects (this, incidentally, was the precise objection raised to such structures on planning grounds by Mr Thomas when he gave evidence: a building "should not try to be what it is not"); third, the cost of such a building, if built to an acceptable standard, would be very high.

Expert evidence on quantum of damage

71. It is easiest to consider the remaining expert evidence by reference to the two broad issues that it addressed, namely (1) the enhancement of value that a Border Oak style garage would have achieved and (2) the amount by which the cost of constructing a Border Oak style garage would have been less than the cost of the actual Garage.

Difference in value

72. Mr Alcock stated: "Outbuildings constructed on these principles [that is, Border Oak method] are prestigious and add value considerably to a property, particularly when constructed within the curtilage of a period dwelling such as Middleton Barn." He was of the opinion that such an outbuilding would have been in keeping with the area—he produced photographs of three outbuildings in the vicinity that he said were to a greater or lesser degree in the Border Oak style—and that the appropriate pre-application discussions would have secured planning officer approval for such a building. He described the Garage as built as "an unattractive building of no architectural

merit” and said that it “visually detract[ed] from the property by virtue of its boring, longitudinal design and monopitch, profile-sheet roof and verge cladding”.

73. In his report, Mr Alcock expressed the opinion that the market value of the Property as at June 2006 would have been as follows (the corresponding valuations in September 2009 are shown in parentheses):

- Without the Garage: £609,000 (£560,000)
- With the Garage as built: £641,500 (£590,000)
- With a Garage in the Border Oak style: £674,000 (£620,000)

In the joint statement, he said that his long professional experience led him to the view that “a Border Oak Limited or Border Oak style outbuilding would add no less than £30,000 to the value of Middleton Barn.”

74. When he was cross-examined concerning this opinion, Mr Alcock was shown a photograph of a not entirely dissimilar building to the Garage, but with a pitched roof covered with man-made tiles. Subject only to changing the roof covering, Mr Alcock confirmed his opinion that, if the roof shown on the photograph were substituted for the roof that is present on the Garage, there would be a substantial increase in the value of the Property. When questioned further, he initially said that he could not put a figure on that increase in value. When pressed, he stated a figure of £10,000. However, he also confirmed that he stood by the figure of £30,000 mentioned in the joint statement. The relationship of the two figures was not explored; presumably the lower figure reflects the enhancement attributable to a pitched roof alone, while the higher figure reflects the full benefit of a complete structure in the Border Oak style. There is some difficulty with such an explanation, however, because the classic Border Oak style lacks the secure doors along the front of the structure, which do have the effect of altering the appearance of the building considerably. I should remark that Mr Lixenberg complained strongly about the difficulty occasioned by the imprecise concept of the Border Oak style.

75. Mr Prosser did not accept that an outbuilding in Border Oak style would make any difference to the value of the Property. There were many factors relevant to the value of any property: general and particular location; style of the property; accommodation and amenities; condition, and so forth. The most important factor in the valuation of the Property was its rural location, with views over the adjacent countryside. Matters such as the pitch of the roof or the manner of construction of the Garage were well down the list in order of priority, as well as being largely dependent on personal taste.

76. In the joint statement and in oral evidence Mr Alcock and Mr Prosser were agreed that “it [was] impossible to find meaningful comparable evidence with which to address this issue [namely, enhancement of value]”.

Difference in cost

77. The experts’ joint statement states an agreed premiss:

“It was agreed that the cost of the existing garage as built was £48,977.14 excluding VAT, based on contractor’s applications for payment. The figure includes the cost of excavation works.”

Having agreed that point, the experts did not record any further discussion on it.

78. Despite that agreement, the case for the claimants as advanced before me was that the cost of the Garage was considerably more than £48,977.14. It is convenient to summarise the evidence, both expert and factual, at this point.

79. The issue arises because of the difficulty in correlating the contractor’s applications for payment with the payment certificates under the contract. A total of nine Interim/Progress Payment Certificates were issued by the defendant as Architect/Contract Administrator. All were shown as issued under the single contract, with a contract price of £220,000. Those up to and including Certificate No. 6, which was issued on 4 May 2006, did not distinguish on their face between different parts of the total project.

- The total value of the works certified in Certificate No. 6 was £119,612.21. (I shall omit references to VAT.)

- On 25 July 2006 two certificates were issued: Certificate No. 7 (Garage), and Certificate No. 7 (Annexe). Each of those certificates gave a breakdown of the Contract Sum of £220,000: £67,672 for the Annexe; £40,794 for the Garage; and £111,534 for the Barn.

- Certificate No. 7 (Garage) certified the value of the works as £70,671.90, with the total amount payable being £67,138.31, and showed that amounts previously certified as due for payment were £57,845.70.

- Certificate No. 7 (Annexe) certified the value of the works as £61,992.00, with the total amount payable being £60,442.20, and showed that amounts previously certified as due for payment were £55,785.90.

- The sum of £57,845.70 and £55,785.90 is £113,631.60, which is the total value of the works certified by Certificate No. 6.

- Certificate No. 8 (Garage) was issued on 24 November 2006 and certified the value of the works as £73,756.51, with the total amount payable being £70,068.68, and showed that amounts previously certified as due for payment were £67,138.31. Accordingly Certificate No. 8 (Garage) follows on from Certificate No. 7 (Garage).

80. In his report, Mr Alcock said that the discrepancy between the amounts referable to the Garage in the certificates and the amount attributed to the Garage in the contract was unexplained, save for “the £9,000 specification upgrade for works which I am instructed was requested by Mr and Mrs Kellie after the quotation of £40,794 was received”. He did not specifically advert in this connection to the fact, which he mentioned in a different context, that the quotation was a budget price and was subject to alteration when the cost of the retaining wall was known. As had been mentioned above,

the wall was significantly more expensive than had been allowed for in the budget price, and it was proposed that the cost would be absorbed within the total contract price on a “swings and roundabouts” basis. Mr Alcock disregarded Certificate No. 8 (Garage), because he was instructed that the only additional costs in that certificate were for the excavation of a trench by a sub-contractor. He did not comment on the manuscript annotations on his exhibited copy of Certificate No. 7 (Garage): “+ variations”; perhaps that is the “specification upgrade”. He recorded that by June 2006 no works had commenced on the Barn itself.

81. On the basis of Certificate No. 7 (Garage), in his report Mr Alcock calculated the total cost of the Garage, inclusive of architects’ fees and VAT, at £87,565.13: £67,138.31 for the cost of the works; £11,749.20 for VAT thereon; £7,385.21 for architects’ fees calculated as a percentage of the cost of the works; and £1,292.41 for VAT thereon. The figure of £87,565.13 compared with the total figure of £53,213.40 that would be produced by the apportionment of the contract sum as shown on the later certificates. Although he did not do the arithmetic, it compared with approximately £65,212.50 if the specification upgrade is taken into account.

82. The exhibits to Mr Prosser’s report included Postons’ Interim Valuation No. 8, dated 19 October 2006. For the purposes of this judgment it is unnecessary to discuss this detailed document at length. The following observations will suffice.

- As against the contract price of £220,000, £101,886 was shown as the value of the contractual works to the date of the valuation. Of this, £39,894 was referable to the Garage, as against a tender value of £40,794.

- However, the total value of works to the date of the valuation was said to be £134,797.51. The difference was accounted for by variations to the specification in the original tender.

- As Mr Prosser observed in his report, the figure of £73,756.51 in Certificate No. 8 (Garage) appears to be arrived at by subtracting Postons’ valuation of work on the Annexe (£61,992) from Postons’ valuation of the total value of work done on the project as a whole (£134,797.51). I say “appears to be”, because the calculation actually gives a figure of £72,805.51. But the discrepancy of £951 does not call into question the basic nature of the exercise, and it must be accounted for either (as Mr Prosser thinks) by arithmetical error, resulting in overpayment to the contractor that would have fallen for correction on the final account, or by the addition to the Garage account of works to that value that are not found on the Postons valuation.

- Mr Prosser performed the exercise of going through the variations and additions on the Postons valuation. In his report he identified works to the value of £23,170.51 that did not relate to the Garage. If that be subtracted from £72,805.51, the works attributable to the Garage appear to be to the value of £49,635 plus VAT: a total of £58,321. In cross-examination Mr Prosser accepted that different decisions as to the attribution of works to the Garage might have been made. But the furthest that his evidence went was to increase the cost to £52,456.31 net of VAT (£61,636.16 inclusive of VAT).

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Mr Wheatley performed a similar exercise in his witness statement. He arrived at a figure of £58,939.61 plus VAT (£69,254 inclusive) as the costs attributable to the Garage. The difference between his figure and that of Mr Prosser reflects the attribution to the Garage of more of the items on the Postons valuation. However, Mr Wheatley went on to qualify the figure of £58,939 as follows:

“However, it must be borne in mind that the majority of the additions were specifically requested by the claimants and cannot legitimately be added to the cost of the Garage/Workshop for comparison purposes with an alternative Border Oak style structure, because they would have been added by the claimants whatever the design of the structure. [He gives specific examples and continues:] Other additions that need to be deducted include everything other than the retaining wall. It will be seen therefore that the true cost of the Garage/Workshop, after all client-requested additions have been removed, was (£39,894 + £8,881) £48,775.”

The figure of £39,894 is, of course, the value of the contractual works attributed to the Garage on the Postons valuation. The figure of £8,881 is the cost of the retaining wall.

83. As for the comparison, the experts’ joint statement recorded agreement that the Garage could have been located up to 7 metres to the east of its present position, without significantly impairing the quality of the views, and that this would have “given rise to the possibility of less excavation work … Mr Bate and Mr Alcock believe that the saving in cost due to less excavation could well have been over £3,000.” Mr Buggey and Mr Prosser accepted that excavation costs would have been reduced. (Mr Troup says that Mr Buggey accepted the reduction in cost as being £3,000, though that is not reflected in my note.) However, as I have mentioned (paragraph 65, above), Mr Prosser made clear that his agreement that the Garage could have been moved by up to 7 metres without affecting the views was based on the assumption that it was the same building, that is, the Garage with a nearly flat roof. If the building were to have a pitched roof, the view would be adversely affected. In his report, Mr Prosser said that the placing of a Border Oak garage on the lawn area would substantially detract from the value of the Property; I did not understand him to resile from that view.

84. Mr Alcock was of the opinion that planning permission for the engineering operations necessary for a garage in the Border Oak style would probably have been given, and he said that such a garage would have been significantly cheaper. Allowing for the claimants’ specification upgrade, and for the omission of the cost of excavation and construction of a retaining wall—“most or all of which cost I believe to have been unnecessary”—he said that the cost of the garage should have been no more than £50,000 plus VAT. He gave two possible methods of achieving such an outcome.

1)
Two BODCL Model 1.3 designs could have been purchased and placed either in a straight line or in an “L” configuration. The price of these from BODCL in 2009 would have been £31,316 plus VAT; the equivalent price in 2005, according to Mr Alcock, would have been about £27,231 plus VAT. To this would have to be added the cost of “services, internal partitions and external doors plus a concrete pad and whatever site works were necessary to achieve a level substrate”. Mr Alcock said: “I estimate that by siting the building differently to reduce or do away completely with the need for a retaining wall this could have been finished in 2009 for a total cost of less than £50,000 excluding VAT.” In the experts’ joint statement, Mr Alcock stated that, contrary to what his report said, Model 1.3 included a concrete base. He also acknowledged that he was not qualified to perform the costing exercise as a quantity surveyor.

2)

A garage in the Border Oak style could have been designed by the architect and constructed at a lower cost than the Garage that was in fact built. Mr Alcock gave two particular examples of such garages that his firm had designed. Both required only normal groundworks; neither involved a retaining wall, which Mr Alcock regarded as unnecessary at the Property also. One was a 12 metre x 6 metre single-storey building, the other a 9 metre x 6 metre building with an external staircase and rear office. Based on contractors' estimates, Mr Alcock estimated the total cost of construction of the buildings in June 2005 as approximately £32,135 and £28,250 respectively, inclusive of professional fees but excluding VAT.

85. The first of these alternatives gives rise to a very obvious problem, because BODCL's Model 1.3 units are not remotely comparable to the Garage as constructed. Model 1 is described as, "A simple and modest structure, ideal for a potting shed, a shelter or a studio." It has a width of 8.325 metres, so that two units would have a combined length slightly longer than that of the Garage. But its depth is only 3.8 metres, as against the required depth of 6 metres, which was achieved in the Garage. And the ridge height is only 3.9 metres. To achieve a depth of 6 metres would require Model 4. Two units of Model 4.2 would achieve a combined width of 11.2 metres, compared with the Garage's width of 15.6 metres. Two units of Model 4.3 would achieve the required width, a total of 16.65 metres. On the basis of the price lists produced by Mr Alcock, and allowing his suggested 15% reduction to provide the figures for June 2005, the total cost of those units would (by my reckoning) be about £39,676 plus VAT: £46,619. (Mr Prosser, who pointed out the difficulty in Mr Bate's approach, gave a figure of £41,322 plus VAT: £48,553.) To that are to be added all the additional costs mentioned by Mr Alcock, together with the specification upgrade, gravel drive and paved entrance in the original specification. No effort has been made to perform the additional costing exercise in a professional manner. In short, it is clear to me that Mr Alcock has simply not thought his argument through. I say nothing about what seems to me the frankly extraordinary notion that two such units of such dimensions and with pitched roofs could possibly be considered to be appropriate, having regard to the very proper planning concern with maintaining the hierarchy of buildings within the curtilage.

86. In his report, Mr Prosser expressed the view that a suitable alternative building from BODCL would have cost £83,385 plus VAT. (In the joint statement, he said that this was a conservative figure.) This compared, on a like-for-like basis, with £48,977 plus VAT for the existing Garage; this is the figure accepted by Mr Alcock in the joint statement. Elements of the calculation of the cost of providing a like for like BODCL product are doubtless open to argument. In fact, however, in the joint statement the issue taken by Mr Alcock and Mr Bate with Mr Prosser's comparison rested on two arguments: first, that a suitable Garage could have been provided by using BODCL Model 1.3 (as to this, see above); second, that a bespoke building could have been constructed more cheaply. This brings us back to Mr Alcock's two examples.

87. Together with Mr Buggey, Mr Prosser rejected the propriety of using the two bespoke examples given by Mr Alcock as a guide to price. No detailed costings had been provided, and it was impossible to know whether there was truly a like-for-like comparison with the Garage. Part of the disagreement concerned the detailed specification of the buildings. But part related to the referent of "Border Oak style". Mr Prosser and Mr Buggey took the expression to refer to buildings with traditionally jointed green oak structural frames and the use of "generously proportioned oak posts, beams, bracing members and trusses as a central design feature." They considered that Mr Alcock's examples were not of that type or quality. He responded that his clients were happy with the buildings and had not objected on grounds of method of construction.

88. As for specification, Mr Prosser, again in agreement with Mr Buggey, believed that the cost of upgrading Mr Alcock's examples to match the Garage, by for example the construction of inner skin block walls, block partition walls and fittings to match the Garage, would result in a substantially more expensive structure. The joint statement said: "They further believe that unless a fully costed specification is provided it is not possible to give meaningful consideration to this proposal."

Discussion

Duty of care

89. The existence of a duty of care in contract and in tort is not disputed. The nature of that duty is conveniently set out in Jackson & Powell on Professional Liability (7th edition, 2012) at para 9-128:

"As in the case of other professions the standard generally required of an architect in discharging his duties is the reasonable skill, care and diligence of an ordinary competent and skilled architect. The standard was more fully described by Windeyer J in the Australian case of Voli v Inglewood Shire Council [1963] A.L.R. 657 as follows:

'An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of sill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.'"

Breach of the duty of care

90. In the light of my findings regarding the allegation that the claimants told Mr Wheatley they wanted a garage/workshop in the Border Oak style, the allegations of breach of duty fall away. All of the substantive allegations in paragraph 11 of the amended particulars of claim—I disregard the particular identified as (f), that the defendant failed to make a written record of its instructions, as being an evidential matter and not itself bearing on the performance of the instructions or retainer—are premised on the facts set out in paragraph 10:

"During the course of a meeting which took place on 19 February 2004 at the defendant's offices, the claimants instructed the defendant that they wished the Garage to be designed in the Border Oak style with a pitched roof. The defendant, acting by its director Mr John Wheatley, advised them that planning permission would not be granted for such a design. Instead, the defendant, again acting by Mr Wheatley, advised that the local planning authority would only accept a Garage with a flat roof built into a bank in order to achieve minimum visual impact."

Regarding the allegations themselves:

a)
Allegation (a) is that the advice described in paragraph 10 was wrong and that Mr Wheatley should have advised that planning permission for the necessary engineering operations would probably have been given, with the result that "a Border Oak style garage with a pitched roof could thereafter have been designed and built" pursuant to the PDR. This allegation does not survive my rejection of the contention that the claimants told Mr Wheatley that they wanted a Garage in the Border Oak style.

b)

Allegation (b) is that Mr Wheatley failed to have proper regard to PDR when advising as to the prospects of obtaining planning permission for a Border Oak style Garage. Again, if the premiss is rejected, namely that the claimants had put such a style of Garage onto the table, so to speak, the allegation falls away.

c)
Allegation (c) is that Mr Wheatley failed to have regard to the precedent set by the presence of other Border Oak style outbuildings in the vicinity. But this again rests on the basis that the use of the Border Oak style had been raised for his consideration.

d)
Allegation (d) is that Mr Wheatley was wrong to be dogmatic about the outcome of any application for planning permission for a Border Oak style garage but should instead have advised that, if the planning officer would not support the application, the claimants should seek advice from a chartered planner. Again, this presupposes the facts alleged in paragraph 10, namely that the particular style had been mentioned as a preference and that Mr Wheatley was advising on it.

e)
Allegation (e) is an allegation that Mr Wheatley should have raised the matter of PDR with the planning officer and asked specifically whether, in the light of them, the planning officer would support an application for permission for a Garage in the Border Oak style. This supposes that he was specifically concerned with that style of design.

f)
The penultimate allegation, which has not been given any identifying letter, is that Mr Wheatley failed to advise the claimants of possible alternative designs that were similar to the Border Oak style. The allegation rests on the allegation that the claimants had put forward that style for specific consideration.

91. As I have said, the pleaded allegations are put firmly on the basis of the facts alleged in paragraph 10 of the amended particulars of claim. Regardless of the pleading point, however, it is clear that the allegations, with their focus on the Border Oak style, cannot survive the rejection of that factual basis. The Garage has the correct dimensions, layout and function. What then could be the basis of complaint? One possibility, in theory, might be that the design is so aesthetically displeasing that no reasonable architect would have come up with it; another might be that the cost of construction of the Garage was so great that an alternative design should have been thought of; another might be that the impact of the chosen design on the value of the Property as a whole, when compared to the impact on value that other designs would have had, was such that a different design should have been chosen. All such suggestions would in my judgment be entirely fanciful: the whole case is premised on the contention that there was a failure to implement or at least explore practicable and feasible instructions; once that contention has fallen away, the basis of the allegations of breach of duty falls away also. In fact, none of the possible suggestions that I have mentioned has any plausibility.

1)
As for aesthetics, I would regard it as incapable of being seriously argued that what the defendant designed is so displeasing that no competent architect could have designed it. It is, if possible, even less arguable that no reasonably competent architect would have failed to propose a design in the Border Oak style instead. (Mr Lixenberg’s further objection—namely, that the design which, it is said, should have been adopted has never been identified—may be noted without further comment at this stage.) No-one is bound to prefer, or even greatly to like, BODCL buildings or the Border Oak style. In

particular, no-one is bound to find such buildings more aesthetically or morally pleasing than what has been built. A significant element running through the evidence of Mr Thomas, Mr Buggey and Mr Wheatley was an aversion to building in a manner that was an imitation of the style of a bygone era or that lacked authenticity in that it gave the appearance of employing a traditional method of construction while in fact doing no such thing. Mr Bate and, in particular, Mr Alcock did not appear to share this aversion. I do not see any good reason for favouring their preferences over those of Mr Wheatley. More importantly, however, I would entirely reject any contention that an aesthetic or moral preference for design of the sort employed by the defendant was beyond the pale of reasonably competent architectural practice. And there is no evidence to support such a contention. Mr Bate expressed himself cautiously in his report: “Whilst I acknowledge that opinions on design are subjective, the design adopted and constructed does not in my opinion sit well in its surroundings.” That is a far cry from support for an allegation of negligence on aesthetic grounds.

2)
As for expense, for reasons set out below I reject the contention that it would have been cheaper to build the Garage in the Border Oak style. More importantly for present purposes, even on the claimants’ case there is no evidence that could justify the conclusion that any difference in cost was such that no reasonably competent architect could have overlooked it.

3)
As for impact on the value of the Property, the position is similar. I do not accept that there is any implication for the value of the Property in having a Border Oak style Garage rather than a garage of a different design; my reasons are set out below. But even if it had been established that a Border Oak style Garage would have enhanced the value of the Property, it would not have been established that a reasonably competent architect ought to have known of that difference, or that the failure to explore the value-enhancing properties of a Border Oak style Garage was a failure that no reasonably competent architect would have committed.

92. My conclusion as to breach of duty would not have been different even if I had accepted that the claimants expressed to Mr Wheatley a preference for a Border Oak style Garage.

1)
As I have made clear in paragraph 31 above, I am satisfied that, if indeed (and contrary to my primary conclusion) the claimants mentioned Border Oak in connection with the proposed garage/workshop, they did so only in a tentative and provisional way, indicating generally what their thoughts were; they did not purport to make any stipulation or give a firm instruction.

2)
Mr Wheatley was entitled and required to exercise his professional judgment on the matter of design. The views that he expressed in respect of design are in substantial accordance with those expressed by Mr Thomas, the planning officer, both at the time and in evidence. As appears in particular from the issue of materials, especially those for the roof of the Garage, the conversation between Mr Wheatley and Mr Thomas proceeded in part by the former making suggestions for the consideration of the latter. I can see nothing wrong in such an approach. And the practice of holding preliminary discussions with the planning officer is clearly in accordance with good practice: cf. Jackson & Powell on Professional Liability (7 th edition, 2011) at para 9-023. Generally, Mr Wheatley’s approach to sound design was in accordance with that of Mr Thomas. It was also in accordance with that of Mr Buggey.

3)

As has been mentioned in paragraph 67 above, Mr Bate's evidence gave only limited support to an allegation that Mr Wheatley had been negligent. I would not decide the issue of breach of duty merely on the basis of the form of words used by an expert, because it is the substance of the evidence that matters. But the substance of evidence can only emerge through the words in which it is expressed. In his report Mr Bate did not for the most part opine that Mr Wheatley had fallen below the standard of a reasonably competent architect. And in cross-examination he said in terms that he was not saying that no reasonably competent architect could have taken the course adopted by Mr Wheatley regarding the design of the building for which planning permission was sought. That answer seemed to me to give a fairer impression of Mr Bate's thinking—namely, that the matter was one of a difference of professional judgment—than his answer in response to some rather leading re-examination.

4)
Mr Bate did express the view that Mr Wheatley was "irresponsible", and therefore fell short of the standard of a reasonably careful and skilful architect, in being dogmatic, or "prescriptive", as to what planning permission would and would not be given. However, this is to take Mr Wheatley's advice out of context. In the circumstances of the most that can have been said about a Border Oak style structure, he was entitled to express a firm opinion, because he was giving practical and not theoretical advice. Further, he discussed the application with Mr Thomas, who confirmed his judgement.

5)
Mr Bate also criticised Mr Wheatley for failing to follow a line of enquiry, namely in respect of the possibility of obtaining permission for the Border Oak style. This complaint cannot stand, in the light of the strongest finding of fact that I could possibly have made in the alternative to the finding I actually made. But in any event it falls on the fact that Mr Wheatley exercised a reasonable judgement as to the appropriate design of the new structure, and one that was in accordance with that of the planning officer. There is nothing in the facts of the case that can have required him to pursue inappropriate design options.

6)
More generally, I agree with Mr Lixenberg that the case as advanced by the claimants was marked by a tension. On the one hand it was expressly accepted, both in evidence and in submission, that Mr Thomas was right to say that the application for planning permission for the necessary engineering operations would properly be determined on the basis of the substantive planning merits of the Garage for which those operations were required. On the other, the claimants' case proved unable to get away from reliance on the PDR, the relevance of which could only be by way of a trump of planning merits. The PDR themselves could only have been exploited by means of decisions regarding location and design that would both have contradicted the claimants' instructions regarding the preservation of trees in the orchard and have had other consequences that make it impossible to regard such a course as obligatory for the defendant to have taken. (I say more about this in the context of quantum of damages, below.)

Causation of damage

93. Because I have rejected the allegations of breach of duty, questions of causation of damage do not arise for determination. In the circumstances, I shall say only a little concerning the matter.

94. In order to consider whether a breach of duty has caused damage, it is necessary to identify the breach. In view of my decision on breach of duty, there is obvious artificiality in exploring that question in this judgment. However, the correct approach to the question is clear enough. Insofar as

causation of loss turns on what the claimants would have done, if they had been properly advised, they must prove on the balance of probabilities what would have happened. But insofar as the matter turns on what a third party (here, the local planning authority) would have done, the question is whether there was a substantial chance of the third party acting in the way suggested (here, granting planning permission for a Border Oak style Garage). If there was such a substantial chance, the degree of likelihood is dealt with at the stage of quantification of damages. This is set out clearly in the following passages in Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 1 W.L.R. 1602. In a lengthy passage beginning at 1609H, Stuart-Smith LJ, with whose reasoning and conclusions Hobhouse LJ agreed, said this:

“In these circumstances, where the plaintiffs’ loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.

(1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant’s act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.

Questions of quantification of the plaintiff’s loss, however, may depend upon future uncertain events. … It is trite law that these questions are not decided on a balance of probability, but rather on the court’s assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party …

(2) If the defendant’s negligence consists of an omission, … causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if [the defendant had done what it omitted to do]? This can only be a matter of inference to be determined from all the circumstances. …

Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. …

(3) In many cases the plaintiff’s loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?

Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson’s submission is wrong and the second alternative is correct.”

At 1614 E Stuart-Smith LJ continued:

“[I]n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”

95. Those principles would have to be applied in the light of the specific findings of breach of duty. Conscious of the degree of artificiality inherent in the exercise, I limit myself to the following observations.

1)
In the light of what Mr Thomas said to Mr Wheatley in conversation and to the court in his oral evidence, Mr Wheatley would have had to advise that the planning officer would not support an application for a Border Oak style Garage and that, if such an application were to be pursued, it was very unlikely to succeed at the initial stage and that, if it were to be pursued, the claimants would probably have to do either or both of two things, namely seek the assistance of a chartered planner and appeal a refusal of planning permission.

2)
I think it unlikely that the claimants would have done either of those things. They had a limited budget. They did not want to become embroiled in an unnecessary planning dispute concerning the Garage: see paragraph 31 above. The Garage was not their priority; although this litigation has made it seem otherwise, it was not of equal concern to the claimants with the Annexe and the Barn. The priorities regarding the Garage itself concerned its function, not its design. Even if I were wrong in my primary finding of fact, it is highly improbable that the mention of Border Oak was more than a tentative thought. I think it probable that the claimants would have been glad to have the planning officer’s support for a design such as was in fact adopted and would have accepted that position without pressing for anything further.

3)
Moreover, I think that the chance of the local planning authority granting planning permission for a Border Oak style Garage was no more than speculative. Mr Thomas’s view was clear, and the decision was taken by the planning officers under delegated authority. Nothing advanced by the expert evidence for the claimants indicates any good reason for supposing that Mr Thomas’s assessment of the planning merits would have been altered by arguments in favour of a Border Oak style Garage. Insofar as it is relevant to consider the possibility of a planning appeal, no ground for criticism of Mr Thomas’s views has been established. In this connection I refer to what is said below in the context of a discussion of quantum of damages.

Quantum of damage

96. In view of my findings on liability, issues of quantum of damage do not fall for decision. However, I shall set out briefly the conclusions I would have reached if it had been necessary to do so.

97. As to value, I do not accept that the value of the Property would have been enhanced if the Garage had been either a BODCL or a Border Oak style structure.

1)

The experts were unable to produce any comparable evidence. Perhaps that is not very surprising. However, it does mean that the claimants' case is advanced without any definite empirical evidence in support. The furthest the matter goes, as it seems to me, is Mr Alcock's assertion, reflecting his opinion on the basis of his experience, that Border Oak style outbuildings add considerably to the value of properties such as the Barn. However, Mr Prosser did not share that opinion.

2)
The question, in any event, is not a general one; after all, it depends on what is being compared. A Border Oak style garage might, perhaps, add considerably to the value of a property if there were no garage there before, or if there were an inadequate or unsightly structure there before. But it might, perhaps, add nothing at all to the value of a property if it were inappropriately large or poorly positioned and thus damaged the setting of the dwelling, or if its cost were negligible in comparison with the value of the property as a whole, or if there were some factor so outstanding as to be obviously determinative of the prices that the property could command. These are hypothetical instances but they make the point. The question is whether the value of the Property would have been enhanced if the Garage had been built in a different style.

3)
Nothing in the expert evidence was of assistance in providing empirical support for the answer given by Mr Alcock to the actual question. If and insofar as the matter rests on his evidence of opinion based on long personal experience, I make the following observations: first, that his evidence did seem to me to rest at the level of an appeal to personal authority, where there was no identifiable connection between specific instances of experience and the conclusion drawn from them; and second, that I regarded Mr Prosser as being comparably experienced and at least as personally impressive in his evidence as, and rather more measured than, Mr Alcock.

4)
I should say something about Mr Troup's criticism of Mr Prosser's evidence, which was that the opinion in his report was based on three supposed comparables that were in fact, as he acknowledged in the joint statement and in oral evidence, of no real assistance, yet he maintained his original opinion even when it lacked its original support: that he was (in Mr Troup's expression) a man with a conclusion but no premiss to base it on. The criticism has some force but does not affect my overall view of Mr Prosser's opinion. Both experts looked for empirical support through comparables. Mr Alcock annexed the fruits of his labours to his report but made clear that they did not assist one way or the other. Mr Prosser can be accused of seeking to make too much in his report of the absence of evidence. But this does not detract significantly from the point, also made in his report, that the relevance of the particular style of outbuilding is one of individual taste and personal preference. Ultimately his empirical premises are no better or worse than Mr Alcock's. But I considered Mr Prosser to be at least as impressive when giving evidence as Mr Alcock, and rather more plausible.

5)
Mr Alcock displayed some discomfiture when discussing figures in cross-examination. I have referred to the passage in paragraph 76 above. The initial answer, to the effect that it was impossible to assess the impact of the different roof in monetary terms, was open to obvious objection, both on grounds of logic—to say that a difference in market value cannot be measured in monetary terms is the same as saying that there is no difference in market value—and because it was in tension with the evidence in Mr Alcock's report to the effect that there was a monetary loss. Therefore I asked a question on this point. The figure of £10,000 was given in response to my question, but it was unclear to me how it related to the figure of £30,000 or more that is said to be the difference made to the value of the

Property by having a garage in the Border Oak style. I have already pointed out what I see as a difficulty in attributing the remaining £20,000 to features other than the pitched roof, namely that the other features of the classic Border Oak style are compromised aesthetically by the need to place features such as secure doors on the building. Further, Mr Alcock's argument on costs of construction was largely based on the irrelevance of observance of conventional construction techniques. I found his persistent support for the figure of £30,000 for enhancement/diminution of value to be highly unconvincing. A subsequent passage of his cross-examination seemed to me to present the distinct possibility that Mr Alcock felt obliged to defend that figure, because the litigation may have been encouraged in part by his expression in 2009 of the opinion that a Border Oak style garage would have increased the value of the Property by that amount.

6)
The logic of Mr Alcock's position seems to me to be merely specious. In cross-examination he said that he accepted that there was no problem with demand for a property such as the Property. (That must be right. It is in a very desirable location.) But he went on to say that there was an issue with demand, because the more attractive a property is, the more expensive it will be. There are at least two related problems with that argument. First, not all aesthetic factors will necessarily drive demand for a property. After all, it is not the beauty of its garage/workshop that drives demand for a residence like the Property; it is the fact that it comprises good accommodation in a barn conversion in a well-situated hamlet in Herefordshire. The question is one of fact, not logic; it is not solved by the formula that the more attractive a property is, the more expensive it will be, particularly where the feature in question at the property is a secondary feature such as an outbuilding. The second, related problem is shown by part of the same passage of Mr Alcock's cross-examination. Acknowledging that the Property is very attractive, he said that it would be enhanced by a Border Oak style garage: a buyer would pay more for such a garage. But then he said that many purchasers would settle for what was actually there; some would tolerate it for the time being; but some, who really did not like it, would seek a discount because of the roof. Mr Alcock seemed to think that this demonstrated that a Border Oak style garage would increase the value of the Property. I do not think it shows that at all. If it shows anything, it is merely that personal preferences will make some people unwilling to pay the market price for a thing. That is obviously true, but it does not advance consideration of the issue of market valuation.

7)
As will be apparent from the earlier discussion of liability issues, I do not accept the fundamental premiss of Mr Alcock's position, which is that the Border Oak style garage would clearly be preferable to the Garage that is there. There is, as it seems to me, something curious about the way the claimants' case has been advanced. All of the discussion of planning issues has proceeded on the basis that the combined effect of PDR and local precedent, both within and without the curtilage, would have made it likely that planning permission would have been forthcoming. The importance that the claimants have attached to the surprising discovery that PDR had not been removed when the Barn was converted indicates eloquently the belief that they might significantly affect the outcome of the planning process. Although the argument from precedent has been deployed more subtly, with emphasis placed on the compatibility of a Border Oak style garage with other buildings in the area, it is not free of the same undertone as the argument from PDR; this is shown by reliance on the presence of the former detached garage, now the Annexe, as constituting a precedent for a large detached structure with a pitched roof within the curtilage. I regard it as plain beyond peradventure that the Garage as designed by the defendant is both more hierarchically appropriate than a Border Oak style garage would have been and possessed of greater architectural integrity: the former,

because it is more obviously subsidiary to the Barn and less of a dominant structure in its own right—I agree with Mr Prosser and Mr Buggey in this regard; the latter, because it does not disguise its nature in some form of pastiche—the concerns of Mr Wheatley and Mr Thomas for honesty in a building are in my view entirely appropriate, and their objection to Mr Alcock's approach, which was that the appearance of traditional construction was itself sufficient even if it cloaked an entirely different method of construction, seems to me to be perfectly reasonable. I do not, for my part, see why these obvious virtues should be thought to be reflected in a lower value for the Property. Nor do I accept that all will think the Garage to be labouring under some aesthetic disadvantage when compared to a Border Oak style alternative, though no doubt some will think it does.

8)
If, as the claimants suggest, a structure with a pitched roof had been placed several metres to the east of the site of the Garage, several specific disadvantages would have resulted. First, the utility area in the Garage would have been made less convenient for the Barn. Second, the building would have had an adversely dominant effect on the garden. Third, the building would have encroached significantly onto a prime part of the garden, which is laid out to lawn. Fourth, there would have been some deleterious effect on the views to the north, both from the Barn and from the Annexe. In that last regard, Mr Prosser made clear in evidence that his acceptance that the relocation of the Garage to the east would not harm the views was premised on the existing structure with its nearly flat roof; a pitched roof would not be without effect. It is true that the view to the north is not the main view; it is, however, a view available at present. Mr Prosser's opinion that the placing of a Border Oak garage to the east of the actual location of the Garage would have a substantial adverse effect on the value of the Property seems to me to be plausible. I strongly doubt whether he is right to say that as much as 15–20% of the value would be lost, though it is unnecessary to reach a conclusion on that subsidiary point. But I think it far more likely that any effect would be to reduce rather than to increase the value of the Property.

98. As to costings, it has not been proved to my satisfaction that it would have been cheaper to construct either a BODCL garage or a custom-built garage in the Border Oak style.

99. The starting-point is the actual cost of the Garage. Mr Troup proposed three possible figures:

(i) The agreed figure in the joint statement: £48,977 plus VAT

(ii) Certificate No. 8 (Garage): £73,756.51 plus VAT

(iii) Mr Prosser's modification of the agreed figure, to take account of further items that were referable to the Garage: £52,456.31 plus VAT.

Mr Troup suggested that the defendant could not complain about the choice of the figure in Certificate No. 8 (Garage), because it had prepared the certificate which showed all items as referable to the Garage. That is clearly not a proper basis on which to proceed, when it is clear that many of the costs included within that certificate relate to the Annexe or other matters and not to the Garage. The choice between options (i) and (iii), the agreed figure or the modification of the agreed figure, is in my view a matter of complete indifference, provided that the comparison of costs is done on a like-for-like basis.

100. Mr Troup submitted that the cost of a BODCL garage would have been £42,500 or £49,300, depending on whether Model 1.3 or Model 2.3 was used: in each case, this represents the cost of two

units in 2006 together with an allowance of £19,000 for fitting, modification, services etc. I reject the submission that loss has been established on this basis.

1)
The starting-point is wrong, for reasons already indicated. Neither Model 1 nor Model 2 could provide the required depth; the argument proceeded on a misunderstanding of the relevant dimensions. If the correct model is taken, the cost of the units is about £39,676 plus VAT. If £19,000 is added in accordance with Mr Alcock's suggestion, the resulting figure is £58,676 plus VAT. This is more expensive than the Garage.

2)
Once it moves beyond the basic costs of the units, the claimants' argument lacks a sound basis. Mr Lixenberg rightly makes two related points. First, it is important to make a like-for-like comparison. To the extent that more items are included within the actual cost of the Garage, beyond the original contract price and the increased cost of the retaining wall, it is necessary to include them also in the Border Oak alternative. Second, it is necessary to do a costing exercise. The claimants' experts have not produced a specification for the proposed building and have not carried out the costing exercise. Indeed, in the experts' joint statement Mr Alcock specifically disclaimed competence to cost the proposed building as a quantity surveyor would.

3)
The best evidence of what it would have cost to construct a comparable BODCL garage is found in the evidence of Mr Prosser. He calculates the minimum cost to be £83,385 plus VAT. Arguments over the cost of soil disposal and of the retaining wall cannot alter the conclusion that the cost of providing a BODCL garage with comparable facilities to that of the Garage would have been significantly greater than those that were incurred.

101. So far as concerns the alternative of a Border Oak style garage (that is, a custom-built version, tailored to the claimants' requirements), the case is put on the basis of Mr Alcock's two examples. Mr Troup submits, on the basis of the figures in paragraph (2) (c) (ix) of the joint statement, that the construction costs would have been between £28,475 and £32,300. I make the following observations.

1)
Mr Lixenberg's complaint that the claimants have advanced their case without ever proposing an Alternative Design and specification for the garage has force. Mr Alcock's examples are merely illustrative; they are not said to be what the defendant ought to have designed. The exercise of showing the design, specification and cost of what ought to have been constructed has not been attempted. This makes it impossible to conduct a meaningful analysis of the evidence and issues or to form any sound conclusion as to comparative costings.

2)
Leaving aside questions of specification and detailed costing, neither example proposed by Mr Alcock is truly comparable, as neither is of the same dimensions as the Garage.

3)
Two particular savings are mentioned on behalf of the claimants: first, a reduction in the cost of excavations if the Garage had been moved 7 metres to the east; second, a substantial reduction in expense if, instead of designing a retaining wall, the defendant had provided for a sloping embankment behind the Garage. As I understand it, the total saving that could thereby have been achieved is said to be of the order of £12,000 plus VAT; it is possible, however, that what is being

alleged is that the £12,000 relates only to the elimination of the retaining wall, and that a further £3,000 would have been saved by reduced excavation costs. Whichever be the correct understanding of the case, I reject it. The most important point is that the breaches of duty alleged by the claimants do not include either (a) the selection of the wrong place for the Garage, whether on account of excavation costs or otherwise, or (b) negligence in including a retaining wall within the works. Neither of those points concerns the rejection of a Border Oak style design for the Garage. The evidence does not at all suggest that the inclusion of a retaining wall turned on whether or not the Garage was of the Border Oak style. It does not even suggest that the adoption of the Border Oak style would itself have resulted in reduced excavation costs; that reduction depends on the location of the structure—specifically, on it being 7 metres to the east of its present position—and not on its design. If the points as to excavations and the retaining wall are well made, they would apply just as much to the Garage as designed; if Mr Alcock and Mr Bate are correct, those points have nothing to do with the adoption of a Border Oak style. It seems to me that this aspect of the claimants' case amounts to no more than an attempt to find a loss of some quantifiable kind and attach it, artificially, to an entirely irrelevant allegation of breach; or vice versa.

4)
In his closing submissions, Mr Troup referred to Issue 11 in the agreed List of Issues, the comparison of construction costs, which said that it included consideration of whether the design of the Border Oak style garage "would have varied from the as-built garage in terms of its position and also so as to avoid the need for a retaining wall (a slope bank being constructed in its place)". However, he accepted that there was "a tension" between that issue and the pleaded particulars of negligence. In his written opening, Mr Lixenberg pointed out that the relationship between the pleading and the list of issues had been adverted to by the defendant's solicitors when proposing amendments, accepted by the claimants, to the list of issues: "It is only if the Border Oak style design would somehow have differed in a manner such that it would, by reason of that difference, not have been constructed with a retaining wall, that any cost saving may be of relevance."

5)
For the avoidance of doubt, I should say that the two alleged savings mentioned in the last sub-paragraph give rise to other problems. First, the issue regarding the retaining wall would require expert evidence, and indeed factual evidence, of a quite different kind from that which was adduced. The retaining wall was designed with input from consulting engineers; their evidence would have been material, as would expert evidence and technical evidence of the kind mentioned by Mr Buggey. Whereas the exercise that he was instructed to perform was, in his judgement and mine, perfectly capable of being carried out on paper, different considerations would have applied to the question of the need for and design of the retaining wall. Second, the fact (if it be such) that moving the Garage further east would reduce excavation costs does not entail either that there would be an overall saving of costs or that it would be negligent not to provide for the Garage to be moved further east by 7 metres. I have mentioned a number of factors when dealing with difference in valuation. Here I may also mention that the costs of the drive would have been increased as the Garage was moved further from the entrance to the Property. Third, I accept the evidence on behalf of the defendant that the preservation of the trees in the orchard was a specific concern and priority of the claimants in giving instructions to the defendant. The battering back of the bank would have been likely to result in the loss of between two and four of those trees, depending on where the Garage was placed. The defendant was entitled to take the view that that consequence was inconsistent with its instructions; I reject Mr Bate's suggestion that the claimants' instructions on this matter ought to have been

challenged. Fourth, the defendant did in fact give consideration to this question, as the evidence of Mrs Lloyd makes clear.

Two additional defences

102. I shall deal only briefly with two specific defences that were raised by the defendant: in the light of the decisions that I have made, they do not fall for decision; and, although Mr Lixenberg mentioned them in his written opening submissions and declined to abandon them, he chose not to respond to Mr Troup's detailed oral and written submissions in answer to them. I shall, however, say rather more about the second of the defences, namely limitation, because the questions to which it gives rise supplement what I have said above regarding the defendant's duties to the claimants.

The "no loss in law" defence

103. The first defence is set out in paragraph 16(a) of the Amended Defence: "Even if (which is denied) the defendant acted negligently, it is denied that the claimants have suffered any loss or damage. Even on the claimants' own case, they were not the owners of the Property at the relevant time." The matters referred to in this defence are those set out in paragraph 9, above. The argument was that at all times until after the Garage had been designed and planning permission had been granted for it, the claimants had no interest in the Property; any loss was suffered by Mrs Kelly and was wiped out upon transfer of the Property to the claimants: see paragraph 51 of Mr Lixenberg's opening submissions.

104. I would have rejected this argument for the reasons advanced by Mr Troup in his written and oral submissions. No difficulty at all arises in respect of the second head of loss advanced by the claimants, namely the increased costs of construction, because they were the contracting party and were paying for the Garage. As regards the first head of loss, namely the difference in value of the Property, the defendant was contracting solely with the claimants, not with Mrs Kelly, and Mr Wheatley knew that they were selling their properties and investing the proceeds into the Property and moving into the Barn. In those circumstances it was entirely foreseeable that they would suffer loss by reason of any breach of contract or negligence, and the courts lean heavily against allowing any disjunction between contractual privity on the one hand and property ownership on the other to result in a "black hole", in which the party that suffers loss is without a claim and the party that has a claim cannot recover for the loss. See Linden Gardens Trust Limited v Lenesta Sludge Disposals Limited [1994] 1 AC 85; Darlington Borough Council v Wiltshier Northern Limited [1995] 1 W.L.R. 68; and Alfred McAlpine Construction Limited v Panatown Limited [2001] 1 A.C. 518.

The limitation defence

105. The amended defence avers that the claim is statute-barred. Insofar as it is brought in contract, it is said to be barred by section 5 of the Limitation Act 1980, because the alleged breach of contract (namely the giving of negligent advice) occurred on 19 February 2014, which was more than six years before the issue of the claim form on 9 July 2010. Insofar as the claim is brought in tort, it is said to be barred by section 2 of the Act, because, if the claimants suffered any damage at all by reason of the advice they received, they first did so at the time when the advice was given.

106. As regards contract, it is correct that the pleaded date for the alleged breach of duty, namely the giving wrong advice, is 19 February 2004, which is more than six years before the commencement of the proceedings. However, the amended particulars of claim also state that planning permission for the Garage, in accordance with the defendant's design, was granted on 25 May 2005, that building

regulations approval was obtained on 20 June 2005, that the works to the Garage commenced on 30 November 2005, and that the last of the monthly certificates issued by the defendant under the building contract was dated 24 November 2006 and related to the Garage. Those dates are not contentious.

107. Mr Troup submitted that the defendant remained under a continuing duty to review its design of the Garage until that design was incorporated into the works. He referred to New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd [2000] EWHC 43 (TCC), [2001] Lloyd's Rep PN 243, where Dyson J had to consider the extent of an architect's continuing duty to review his design. The relevant part of the judgment is in paras [14] to [20] and is, I think, so clear as to be worth setting out fully.

"14. I accept the proposition that, although it is necessary to look at the circumstances of each engagement, a designer who also supervises or inspects work will generally be obliged to review that design up until that design has been included in the work: see Jackson and Powell on Professional Negligence 4th Edition para 2-17. In a number of cases, it has been held that this duty continues until practical completion: see Chelmsford DC v T J Evers [1983] 25 BLR 99,106, Equitable Debenture Assets Corporation Ltd v William Moss Group Ltd [1984] 2 Con L R 1, 24 and Victoria University of Manchester v Hugh Wilson [1984] 2 Con L R 43, 73.

15. But it is necessary to consider the scope of that duty in a little more detail. What does the duty to review the design entail? In what circumstances will an architect be in breach of that duty? I find it convenient to consider an example. Let us suppose that an architect is engaged on the standard RIBA Conditions of Engagement to provide the full service (as PTE were in the present case), including administering a building contract in a standard JCT form of contract. Suppose that he designs the foundations of a building (a large office block), the foundations are constructed in accordance with his design, and several years later, practical completion is achieved. Let us further suppose that the design of the foundations is defective and one which no reasonably competent architect would have produced: in other words, the architect was negligent. There can be no doubt that the architect commits a breach of contract when he completes the design and gives instructions to the contractor to construct the foundations in accordance with it. But in what sense and to what extent is the architect under a duty to review his negligent design once the foundations have been designed and constructed?

16. In my view, in the absence of an express term or express instructions, he is not under a duty specifically to review the design of the foundations, unless something occurs to make it necessary, or at least prudent, for a reasonably competent architect to do so. For example, a specific duty might arise if, before completion, the inadequacy of the foundations causes the building to show signs of distress; or if the architect reads an article which shows that the materials that he has specified for the foundations are not fit for their purpose; or if he learns from some other source that the design is dangerous. In such circumstances, I am in no doubt that the architect would be under a duty to review the design, and, if necessary, issue variation instructions to the contractor to remedy the problem. But in the absence of some reason such as this, I do not think that an architect who has designed and supervised the construction of foundations is thereafter under an obligation to review his design.

17. I do not accept that in every case where an architect has negligently introduced a defective design into a building, he is also by the same token in breach of a continuing breach of a contractual obligation to review his design. In Midland Bank v Hett, Stubbs & Kemp [1979] Ch 384, 403C, Oliver J said:

‘It is not seriously arguable that a solicitor who or whose firm has acted negligently comes under a continuing duty to take care to remind himself of the negligence of which, ex hypothesi, he is unaware.’

18. In my view, that observation is as apt to apply to an architect as it is to a solicitor. The position is quite different where the architect (or solicitor) knows, or ought to know, of his earlier negligence. When that occurs, then he may well be under a contractual obligation to review his earlier performance, and advise his client honestly and competently of his opinion. Whether he is in fact under such a duty when he has actual or constructive knowledge of his earlier breach of contract will depend on whether the contract is still being performed. If the contract has been discharged (for whatever reason), then the professional person may be under a duty in tort to advise his client of his earlier breach of contract, but it is difficult to see how he can be under any contractual duty to do so.

19. The foundation for the statement in the cases that an architect is under a continuing duty to review his design is the dictum of Sachs LJ in Brickfield Properties v Newton [1971] 1 WLR 862, 973F:

‘The architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge. It savours of the ridiculous for the architect to be able to say, as it was here suggested that he could say: “true, my design was faulty, but, of course, I saw to it that the contractors followed it faithfully” and be enabled on that ground to succeed in the action.’

20. But Sachs LJ was not concerned to explore the scope of an architect’s continuing duty to review his design. In my judgment, the duty does not require the architect to review any particular aspect of the design that he has already completed unless he has good reason for so doing. What is a good reason must be determined objectively, and the standard is set by reference to what a reasonably competent architect would do in the circumstances.”

108. Mr Troup pointed out that only after Mr Wheatley’s letter of 23 August 2004 did the defendant begin to work on the design of the Garage and that the incorporation of the design into the works took place in 2005 and 2006 (see above). I accept his submission that in the circumstances the defendant was under a continuing duty to review its design until well after 9 July 2004. Although a strict reading of the amended particulars of claim might construe them as limiting the moment of negligence and breach of contract to the original giving of the advice, which was said to be 19 February 2004, the wider facts and particulars of negligence there pleaded are in my judgment clearly sufficient to make the argument based on continuing duty available to the claimants; indeed, Mr Lixenberg did not suggest the contrary.

109. The conclusion that the claim is wide enough to encompass an allegation of negligent failure to give appropriate advice after 9 July 2004 is also sufficient to dispose of the limitation defence in respect of the tortious claim. Even if the defendant were correct to allege that the claimants suffered actionable damage at the moment when the original advice was given, the main damage would not have been suffered before the formal design of the Garage commenced and would be referable to the failure to discharge the continuing duty to review the design. In these circumstances it is unnecessary for me to enter into a discussion of the vexed question when actionable damage occurs for the purpose of a claim in tort; see generally on this the discussion in chapter 5 of Jackson & Powell on Professional Liability. However, the defendant has not identified the economic loss that was suffered by the claimants upon the giving of the incorrect advice on 19 February 2004 (if such advice were given), and I cannot see that they suffered any at all at that point.

110. Accordingly, I would have rejected the defence of limitation.

Conclusion

111. For the reasons set out above, the claim fails.

112. This judgment is to be handed down at a hearing in the absence of the parties. As they have not been able to agree the appropriate terms of order in respect of outstanding matters, I shall adjourn those matters for consideration at a further hearing and extend the time for applying for permission to appeal.

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