Case No: 3XJ82722

IN THE COUNTY COURT AT OXFORD

St Aldate's, Oxford, OX1 1TL

Date: 20 September 2016

Before:

HER HONOUR JUDGE MELISSA CLARKE

Between:

TURLEY ASSOCIATES LIMITED	**Claimant**
- and -	
HENLEY HEALTHCARE LIMITED	**Defendant**

Mr Anthony Crean, QC and Mr Andrew Latimer (instructed by **Pannone Corporate LLP**) for the **Claimant**
Mr Gary Blaker, QC and Mr Christopher Jacobs (instructed by **Hodge Jones & Allen LLP**) for the **Defendant**

Hearing dates: 16 to 20 May 2016
Draft provided to parties: 29 July 2016

APPROVED JUDGMENT

Her Honour Judge Melissa Clarke:

A. INTRODUCTION

1. This is the judgment in a trial of preliminary issues. The Claimant ("Turley") is a planning consultancy with offices nationwide, including in Southampton. The Defendant ("Henley") owns and operates a number of nursing homes and care homes throughout the UK. It is owned by Dr Irandoust who is a director and Chief Executive Officer of Henley.

2. Henley retained Turley between March 2012 and July 2013 to advise in connection with a planning application to remove a planning condition limiting to 'the elderly' the profile of residents and patients for whom it could care at one of its care homes, Apple Hill Nursing Care, which is based in Hurley near Maidenhead in Berkshire ("Apple Hill"). Turley provided such advice through a director at its Southampton office, John O'Donovan. The planning application was made and was unsuccessful. Henley later successfully appealed that refusal with the assistance of different planning consultants.

3. Turley invoiced Henley for its professional fees on a regular basis. It billed a total of £66,870.77, and Henley paid £51,084.26. However, the last four Turley invoices, dated 31 May 2013, 28 June 2013, 31 July 2013 and 30 August 2013, remain unpaid. Turley claims in contract for unpaid professional fees of £15,786.51.

4. Henley counterclaims in damages for professional negligence, alternatively for breach of contract. Its case is that Turley failed to exercise the reasonable care and skill to be expected of reasonably competent planning consultants in its management and preparation of the planning application causing (i) delay in its submission and (ii) harm to its prospects of success. The value of the counterclaim has increased substantially since Henley filed its original Defence and Counterclaim on 15 October 2013 which valued the counterclaim at £16,000. An Amended Defence and Counterclaim of April 2015 increased the counterclaim to an unspecified sum 'not exceeding £50,000'. Following an unsuccessful application by Turley for summary judgment/strike out of the

counterclaim, Henley was permitted by order of His Honour Judge Harris QC on 6 May 2015 to file a Re-Amended Defence and Counterclaim ("RADC"), which now values the counterclaim at £3,625,943.64. The same order limited the scope of the trial before me to *"exclude the issues pleaded in paragraphs 17 onwards of the draft Re-Amended Defence and Counterclaim"*. Those paragraphs relate to causation and quantum on the counterclaim. Accordingly the matters before me are limited to: (i) issues arising on the claim; and (ii) issues of breach of contract and breach of duty arising on the counterclaim.

B. PROCEEDINGS AND PLEADINGS

Proceedings

5. The trial was heard over five days. Turley was represented by Mr Anthony Crean, Queen's Counsel, assisted by Mr Andrew Latimer, counsel. Henley was represented by Mr Gary Blaker, Queen's Counsel, assisted by Mr Christopher Jacobs, counsel. Mr Crean QC and Mr Latimer rely on their skeleton argument filed in respect of the hearing of Turley's application on 6 May 2015 and a comprehensive and helpful note for closing submissions. Mr Blaker QC and Mr Jacobs rely on the skeleton argument drafted by their predecessors, Mr Bowmer and Mr Moules, from a previously vacated trial date. I thank them for those documents and for the oral submissions of Mr Crean QC and Mr Latimer on the one hand and Mr Blaker QC on the other.

6. I heard five live witnesses during the course of the trial. Henley called two witnesses of fact, Dr David Irandoust and Mrs Frances Shillito. It called a planning expert, Mr Peter Wilks. Turley called one witness of fact, Mr Robert Lucas and one planning expert, Mr Steven Abbott. Each of those has filed one or more witness statements (or in the case of the experts, an expert report each and a joint report). Turley also relies on two witness statements of Mr O'Donovan in relation to which hearsay notices have been filed.

7. As the bulk of the proceedings relate to the counterclaim, and with the agreement of the parties, I heard Henley's case first and then Turley's.

8. The burden of proof is on Turley in respect of the claim and on Henley in respect of the counterclaim, in both cases to the civil standard.

The Pleadings

9. It is important to focus very clearly on the pleaded cases.

10. In paragraph 6 of the RADC, Henley describes the fees contained in the retainer letter issued by Turley of 15 March 2012 as *"estimated fees for the services identified in the letter"*, exclusive of VAT and disbursements. At paragraph 9 of the RADC it pleads an implied term under section 15 of the Supply of Goods and Services Act 1982 that the fees charged in respect of the services would be reasonable and reasonable in amount. Accordingly in my judgment it is not open to it to argue now, as Counsel for Henley sought to do at trial, that the retainer letter was a fixed fee contract. I do not permit it to do so.

11. The Particulars of Breach in the RADC are that *"in breach of contract and/or negligently Turley failed to exercise all the proper skill and care, diligence and competence to be expected of reasonably competent planning consultants in the prevailing circumstances as set out in paragraphs 4A, 5A and 5B of the Re-Amended Defence and Counterclaim"*.

12. The RADC states that *"the faults of [Turley] can be classified into (1) those relating to failure to exercise reasonable care and skill in the management and preparation of the Proposed Application causing delay in the submission of the application; and (2) those relating to the failure to exercise reasonable care in the management and preparation of the planning application causing harm to its prospects of success"*.

13. The pleaded particulars of breach can be summarised as follows:

    i) Delay: The preparation and submission of the planning application *"...should not take 14 months. Such delay was characterised by a general lack of a sense of urgency on the part of the Claimant and is attributable to the failure on its part to exercise the reasonable care*

and skill to be expected of reasonable competent planning consultants". Eight examples of breach said to be causative of delay are specified in paragraphs 11(1) to 11(8). All remain in issue. ("Delay Issues");

ii) Turley *"wholly failed to prepare an appropriate form of application when formulating its planning strategy and therefore formulated and pursued a flawed strategy"*. In particular, Turley should have made an application under section 73 of the Town and Country Planning Act 1990 for removal of Condition 18 instead of applying for a change of use to a community mental hospital. This is no longer in issue as Henley has abandoned the point. ("Section 73 Issue");

iii) Turley failed *"to have any or any adequate regard"* to the fact that National Planning Policy Framework ("NPPF") introduced in March 2012 had *"fundamentally changed"* the policy environment, in particular failing to *"articulate sufficiently clearly or at all that the saved development plans were out of date, no longer represented national policy and were inconsistent with the NPPF"*. Following the joint meeting of experts, this is no longer pursued by Henley. Henley's expert sought to reopen it in oral evidence, however. ("NPPF Issue");

iv) Turley *"wholly failed to include... as part of the [planning] application the contention that Condition 18 was wholly imprecise in its use of the word 'elderly' and therefore unlawful."* This remains in issue. ("Elderly Issue");

v) Turley *"failed to include... as part of the [planning] application sufficiently robustly and clearly the benefit of the proposed healthcare to be offered by [Henley] to meet unmet need."* This remains in issue. ("Needs Issue");

vi) Turley *"wholly failed to include as part of its planning strategy and as part of the application the discriminatory impact of Condition 18 and the applicability of the Equality Act 2010 and the Human Rights Act*

1998 with the result that seeking to uphold Condition 18 was unlawful." This remains in issue. ("EA/HRA Issue").

14. To the extent that there are other criticisms and allegations made between the parties which do not relate to the pleaded breaches of contract/duty, I will not consider them. For example Mr Lucas was cross-examined on allegations that Mr O'Donovan had rewritten Mrs Shillito's healthcare report without instruction. Mr Wilks in his report opined that Mr O'Donovan had a responsibility to resolve an alleged breakdown in relationship between him and Mrs Shillito. These do not relate to pleaded breaches. Mr Wilks, Henley's expert, confirmed in cross-examination that the six issues above were the extent of his criticism of Turley.

15. In paragraph IA(e) on page 2 of the RADC, Henley outlined its case on the Delay Issue as follows: *"The delay in the management and preparation of the planning application meant that [Henley] lost the chance of avoiding a suspension introduced by commissioning health authorities from around January 2013 onwards on the placement of younger adults with mental health difficulties"*.

16. In the particulars of loss in paragraph 18(1) of the RADC Henley pleads: *"By reason of the delay in the management and preparation of the Proposed Application [Henley] was subjected to a suspension by commissioning health authorities on the placement of younger adults with mental health difficulties. Had [Turley] acted competently and managed and prepared the proposed application with the care and skill to be expected of reasonably competent planning consultants the application should have been capable of submission by the end of 2012 or in any event before the introduction of the suspension of placements in early 2013. Had this been done the proposed application would have been made before those suspensions were introduced and [Henley] would have been able to avoid the introduction of the suspension on placements altogether."*

17. Turley submits that (i) the court should not be concerned with a contractual breach from which no loss flows and in relation to which only nominal

damages may be awarded, and (ii) where there is no damage there can be no negligence, and accordingly I should only be concerned with the Delay Issue from January 2013 onwards. Henley submits that His Honour Judge Harris QC's order of 6 May 2015 excludes paragraphs 17 onwards from the scope of this trial and accordingly I should not constrain my consideration of the Delay Issue in this way. I do not accept Henley's submission. By dealing with the matter as Turley suggests I am not, in my judgment, bringing loss into the scope of the trial but excluding from the scope of my judgment liability issues in relation to which no loss flows. The Overriding Objective of the Civil Procedure Rules requires me to deal with cases justly and at proportionate cost. CPR 1.1(e) makes it clear that proportionate cost includes "allotting to [a case] an appropriate share of the court's resources, while taking into account the need to allot resources to other cases". I am satisfied that it is not a proportionate use of the court's resources, by which I mean my time, to deal with issues in a reserved judgment from which no loss flows. That is time I could spend on other cases.

18. I note here for convenience that Henley does not plead a breach of section 14 of the Supply of Goods and Services Act and I have heard no argument on the point. Accordingly I do not consider it.

C. BACKGROUND AND CHRONOLOGY

19. The facts in this section are agreed or not seriously disputed save where specifically indicated.

Planning history

20. Apple Hill is located in the Green Belt. It was built as a private residence. In 1987 planning permission was granted for a change of use from residential use to use as a nursing home/residential care home in Class C2 of the Town and Country Planning (Use Classes) Order 1987 (the "Use Classes Order 87"). In 1992 planning permission for a two-storey extension was obtained. That extension was built, enabling it to operate as an 18-bed care home.

21. On 11 April 2005 planning permission was granted on the application of Eastwick Holdings Ltd ("Eastwick") for the construction of another extension, to provide a total of 40 beds and additional parking. That permission was granted by the Royal Borough of Windsor and Maidenhead ("RBWM") on the basis that, although it was considered to be inappropriate development in the Green Belt contrary to the development plan at that time in force, Eastwick had demonstrated very special circumstances, namely that the nursing home would provide a valuable service and the extension was necessary to make it financially viable. The planning permission was subject to a number of conditions. The relevant one for the purposes of this claim is Condition 18, which stated:

> *"Notwithstanding the provisions of the [Use Classes Order 87] the building shall be used only as a Residential Care Home for the Elderly and for no other purposes within Use Class C2 in the Schedule to that Order..."*

22. The reason for imposition of Condition 18 was:

> *"In the interests of the amenities of the locality and to control the introduction of other uses within the Use Class that might give rise to a greater degree of activity on the site to the detriment of the openness of the Green Belt and the safe flow of traffic on the adjoining public highway. Relevant policies: Local Plan GB2, DG1, Structure Plan C4, DL3."*

23. The extension was built by 2008 but Apple Hill was not then re-opened as a care home. Instead, Eastwick applied under section 73 of the Town and Country Planning Act 1990 ("TCPA 1990") to remove Condition 18. RBWM refused that application on 17 November 2008.

24. Eastwick engaged Turley (through a fee-earner called Richard Goodall) to act for it on an appeal against that decision. Following a public inquiry on 4 – 7 August 2009, that appeal was dismissed on 26 August 2009. The decision set out extensive reasons over a number of pages. The inspector rejected objections based on the lawfulness of the building, its suitability for the

proposed use, the physical impact on openness, fear of crime, local need and highway safety considerations, but reached the conclusion that: *"what is proposed would have harmful implications, notably in the form of a significant intensification of activity at the site and also in terms of a greater level of traffic movement to and from it. As such it would be in clear conflict with the development plan... such harm is not offset by the points advanced by the Appellant in support of the proposal which do not represent very special circumstances in my view. The harm is incapable of being overcome by the use of existing or additional planning conditions."*

25. The 2008 planning application and 2009 appeal were contested by the Apple Hill Action Group which was an organised group of local people.

Henley's operation of Apple Hill

26. Henley acquired Apple Hill under a lease from Eastwick in 2010. It re-opened it as a 40-bed residential care home for the elderly. In July 2011 it began to accept young adults with mental health problems and learning disabilities as residents and non-residential patients in *prima facia* breach of Condition 18. It is Henley's case that it only took that decision following a meeting with Simon Hurrell and Peter Carey of the planning department at RBWM at which they agreed to Henley admitting non-elderly residents. It is Turley's case that this decision was made without the knowledge or agreement of RBWM, for financial reasons, in full knowledge by Henley that it was in breach of Condition 18. This is a dispute I will need to determine.

Retainer of Turley

27. On 16 February 2012 Dr Irandoust of Henley and Mr O'Donovan of Turley met to discuss the possibilities of Turley advising on a fresh application to remove Condition 18. In March 2012 Henley instructed Turley to act for it. The fee-earner was to be Mr O'Donovan. Turley accepted the instructions on the terms and conditions set out in its detailed letter of engagement dated 15 March 2012 (the "Retainer Letter").

28. The Retainer Letter set out Turley's understanding of the planning history of the site and summarised the decision of the planning inspector in the 2009 appeal. Turley advised that the issues raised in that decision would need to be addressed with input from specialised consultants in the field of healthcare and highways. The Retainer Letter noted a number of different options for the use of Apple Hill discussed between Mr O'Donovan and Dr Irandoust in their meeting, under the heading "Proposed Use".

29. The Retainer Letter provided initial advice as to Turley's suggested approach to the application on pages 4, 5 and 6, including an initially-expressed view that the proposed use was not 'inappropriate development in the Green Belt' and accordingly it would not be necessary to argue that there were very special circumstances justifying the change in use such that an exception should be made.

30. The Retainer Letter provided a list of next steps, including a bullet-point list of proposed actions towards the goal of a successful application divided into three stages – Pre Application, Planning Application Submission and Post Application Submission. A 'Fee Budget' for each stage was set out with a "Total Fee Budget" of £26,000. The Pre Application Stage included bullet points for *"Identify and brief consultant team"* *"Review Strategy and Evidence"* and *"Advice regarding planning application strategy"*. The Planning Application Submission stage contained *"Draft planning statement"* *"Review other consultants' reports to ensure they are fit for purpose"* and *"Draft and submit planning application"*. The Post Application stage included *"Negotiations with planning officer"* and *"Advice on Strategy"*.

31. Finally the Retainer Letter acknowledged that Henley may wish to obtain leading counsel's advice and it gave an indication of the likely costs of doing so.

Assembling the planning application team

32. On 4 April 2012 Mr O'Donovan identified, and recommended to Henley, Gavin Maclean of Mott MacDonald Ltd as a suitable transport consultant and Andrew Paterson of Finnamore Ltd as a suitable healthcare consultant to work

on the application. Those recommendations were accepted by Henley. Turley's case is that Henley instructed these consultants directly. Dr Irandoust does not agree and in oral evidence said that Turley sub-contracted them itself. There is an issue about whether this also represents the position of Henley. This is a dispute I will need to determine.

33. On 11 May 2012 Mr O'Donovan, Mr Maclean and Mr Paterson had a team meeting with Dr Irandoust. Turley's meeting note describes the objective of the meeting: *"to agree the description of the proposed use and the evidence to support the planning submission"*. It notes the agreed proposed approach and tasks of each participant. The end of the note provides that: Mr Paterson *"expects to produce his report by the end of May"*; Mr Maclean would *"provide details of the survey work and report writing timescale in his fee proposal"*; and the planning application would *"be submitted as soon as it is possible to do so."*.

34. On 20 July 2012 Mr O'Donovan emailed Dr Irandoust the draft reports of Mr Paterson and Mr Maclean, stating: *"I confirm that my consultant team comprising Mott MacDonald, Finnamore Ltd and my practice expect to submit the planning application this month seeking the removal of the nursing home age restriction planning condition"*.

First Counsel's opinion required by Dr Irandoust

35. Dr Irandoust informed Mr O'Donovan that he wanted advice from leading counsel on the planning application. Accordingly, on 3 August 2012 Mr O'Donovan instructed Simon Bird QC to consider: the draft planning statement produced by Turley of the same date; the draft traffic and noise impact study of Mott Macdonald; and draft healthcare report of Finnamore of July 2012. He was asked to advise on: the strategy which should be adopted in the planning application; whether what had been done thus far was adequate and sufficiently robust; and the prospects of success.

36. Simon Bird QC provided written advice on 15 August 2012, in which he said that on the basis of the current documents, he saw no prospect of the application succeeding. He recommended that more robust and detailed

evidence be obtained on the range of health conditions for the anticipated younger residents and patients and the associated staffing and activity levels and that *"considerable further work be undertaken before any application is submitted."*

The Regulatory context

37. On 19 September 2012, Mr Hurrell and Mr Carey of RBWM Planning Department visited Apple Hill. That resulted in an understanding being reached that no planning enforcement action would be taken for breach of Condition 18 whilst the planning application was being prepared.

38. Mr Hurrell sent a follow-up email on 16 October 2012 thanking Dr Irandoust for his *"courtesy and candour"* at the time of the September visit, and asking Dr Irandoust to confirm whether he intended to apply again for a relaxation of Condition 18 as he had indicated during that visit. Mr O'Donovan provided Dr Irandoust with a draft letter in response, which he sent to Mr Hurrell on 22 October 2012. In that, he confirmed that he would be submitting an application for the removal of Condition 18 *"shortly"*, which would be supported by detailed reports by Mott MacDonald and Finnamore to address the concerns of the inspector in the unsuccessful 2009 appeal.

Second Counsel's opinion required by Dr Irandoust

39. Meanwhile, Mr Paterson of Finnamore issued a revised draft of his healthcare report in September 2012. Mr O'Donovan issued a revised draft of his planning statement and Mr MacLean of Mott MacDonald issued a revised draft of his traffic and noise statement in October 2012. Mr O'Donovan told Dr Irandoust that they were almost ready. Dr Irandoust insisted upon Counsel's opinion being sought again.

40. Accordingly, on 23 October 2012, Mr O'Donovan instructed Simon Bird QC to consider those revised drafts and advise on: whether the amended reports addressed the points that he had made in his previous advice; whether additional information was needed and if so, what; the proposed strategy for securing permission; and the likely prospects of success *"particularly in light*

of the Council coming under pressure from objectors to initiate enforcement action (i.e. when the application acknowledges the age restriction is not being complied with)."

41. Simon Bird QC provided such advice on 8 November 2012. He again raised issues in respect of Finnamore's report, including: that further detail was required on the proposed future use, and whether that was likely to be the same as the current use or not; and that the needs case needed to be stronger and clearer in its conclusions. He said that the Mott MacDonald report now largely addressed his previous concerns but advised certain clarifications and additional evidence should be sought. He was unwilling to provide his opinion on the prospects of success without seeing what additional evidence could be obtained. Mr O'Donovan circulated that advice to the consultant team.

The removal of Finnamore from the team by Dr Irandoust

42. On 10 December 2012, Mr Paterson of Finnamore wrote to Dr Irandoust stating that he would only address the issues raised by Simon Bird QC *"on condition that you agree to make the payment for the work* ***undertaken to date****. If you agree to this I will be able to complete this work by Wednesday 12 December."* (Mr Paterson's emphasis). Dr Irandoust decided that he was unwilling to continue with Finnamore and informed Mr O'Donovan of that.

43. On 13 December 2012, Mr O'Donovan asked Simon Bird QC if he could recommend an alternative healthcare specialist as *"sadly we have not made satisfactory progress with Finnamore Ltd and my client wishes to appoint an alternative healthcare specialist"*. He could not. In early January Dr Irandoust suggested Frances Shillito. Mr O'Donovan recommended Philip Micklemore of Laing Buisson but it became apparent within a few weeks that he was unable to become involved.

44. On 14 January 2013, Mr MacLean of Mott MacDonald emailed Dr Irandoust saying that he had heard that Finnamore had been *"stood down"* from the project and that Henley was looking for a new health advisor: *"For this reason it is likely to be some time before a planning application is submitted"*.

He pointed out that Simon Bird QC had signed off on the traffic and noise report as 'fit for purpose', asked for Mott MacDonald's invoice from August 2012 to be paid *"to enable Mott MacDonald to continue working on this project"* and stated that he would shortly raise invoices to cover the period from August 2012 to date.

Embargo by Commissioning Healthcare Authorities

45. Meanwhile, on 10 January 2013 the head of RBWM's Adult Social Care and Health Partnerships, Ms Seona Douglas, wrote to Dr Irandoust stating that she had been in touch with RBWM's Planning Department who were *"concerned there has been a breach of Condition 18"*. She said *"You will appreciate that all Health and Social Care Commissioners must act within the law and therefore RBWM will be explaining the situation to all commissioners who enquire about your home"*. She concluded by stating that: (i) she would be contacting the CQC to clarify the status of Apple Hill's registration; and (ii) she was aware of a single younger resident placed by RBWM at Apple Hill who would now be moved out to an alternative facility *"as soon as we can, taking account of her specific needs."* Ms Douglas copied this letter to a number of other commissioning bodies in Berkshire, Buckinghamshire and Oxfordshire on 11 January 2013 by way of attachment to an email entitled *"Safeguarding Suspension – Apple Hill Nursing Home"*.

46. The same day, Henley's solicitors Ridouts wrote to Ms Douglas objecting to that wide distribution of her letter to Dr Irandoust, on the basis that Henley had been in discussions with the Planning Department for some time about removing the current restriction and that a planning application was *"due to be submitted during the first week of February 2013."*

47. On 14 January 2013, Buckinghamshire County Council notified Apple Hill that *"as a result of information recently received regarding concerns on planning status at the home, I am writing to you today to advise that with immediate effect [we have] suspended any new placements at Apple Hill Nursing Home"* but that existing placements would continue. It stated that no

further placements would be made until it was satisfied that *"any necessary corrective action to be undertaken by you has been rectified"*.

48. Upon receipt of that letter, Dr Irandoust immediately sought to arrange a meeting with relevant people from RBWM's Planning, Adult Social Care and Legal Departments. On 15 January 2013 a meeting was arranged for 24 January. On 16 January, Mr O'Donovan wrote to Mr Hurrell of RBWM Planning stating that: (i) Henley were currently minded to submit an application seeking consent for the relaxation of Condition 18 so that Apple Hill could be used as a care home for up to 40 residents with dementia and mental health conditions; (ii) attaching Turley's draft planning statement and Mott MacDonald's draft traffic and noise impact study; (iii) stating that Finnamore and Laing Buisson would produce a healthcare report; and (iv) notifying him that at the meeting on 24 January he would like to discuss deploying RBWM's pre-application service.

Planning Contravention Notice

49. On 18 January 2013, RBWM issued a Planning Contravention Notice under section 171C of the TCPA 1990, stating that there may have been non-compliance with Condition 18 and seeking the provision of certain information from Henley within 21 days. That was completed and returned to RBWM on 12 February 2013.

New healthcare expert appointed by Dr Irandoust

50. On 24 January 2013, Mrs Shillito was engaged by Henley in place of Finnamore to write the healthcare report. She, Dr Irandoust, Mr O'Donovan and Henley's solicitor Johnny Landau of Ridouts had a meeting in which they discussed how to approach the later meeting with RBWM that day. Mrs Shillito took contemporaneous manuscript notes of that team meeting and the RBWM meeting, which she later typed up. At the meeting with RBWM, the council agreed not to take enforcement action if the proposed planning application was lodged 'expeditiously'.

Mrs Shillito's discrimination and equality concerns

51. Mrs Shillito's notes of 24 January 2013 include that she raised as a potential issue her opinion that Condition 18 seemed discriminatory and suggested that counsel be instructed to consider it. During February 2013 there were a number of emails between Johnny Landau of Ridouts, Mrs Shillito, Mr O'Donovan and Dr Irandoust discussing the discrimination point. Mr Landau and Mrs Shillito were pressing for counsel's opinion to be obtained. On 6 February 2013 Mr Landau circulated a prepared list of relevant questions to counsel in relation to these issues and forwarded them to Dr Irandoust and Mr O'Donovan, asking if Henley wished to proceed with instruction and if so whether this should be done through Henley or Turley. Neither responded.

Pre-application process

52. On 4 February 2013, Mr O'Donovan wrote to Suki Coe, Head of Development Control at RBWM asking for information on the pre-application process. She replied putting him in touch with Peter Carey, a case officer in the RBWM Planning Department. A pre-application meeting was arranged for 20 February 2013. Mrs Shillito produced a first draft of her healthcare report on 19 February 2013.

53. After the pre-application meeting with Ms Coe and Mr Carey on 20 February, which was attended by Mr O'Donovan and Mrs Shillito, Mr O'Donovan reported to Dr Irandoust and Mr Maclean that "*the clear message was that officers will not initiate enforcement action providing we submit an application in April or May and commit to convening a public consultation event after our early March meeting with planners.*" He sent a detailed email to Mr Coe and Mr Carey the next day minuting the meeting, requesting views on a number of points and seeking a follow-up meeting.

54. Another pre-application meeting was held with RBWM on 14 March 2013, which was attended by Mr O'Donovan and Mrs Shillito. Again, Mrs Shillito produced a second draft of her report the day before. On 19 March, Mr O'Donovan sent an email to Ms Coe and Mr Carey at RBWM, copied to the Henley team, setting out his understanding of the action points which had arisen from that meeting. Those included RBWM providing a response to the

draft healthcare and traffic reports and Mrs Shillito amending the healthcare report to include: a detailed description of the Independent Community Mental Hospital use; additional information concerning the use of the gardens and traffic movements, drawing on evidence from other care homes and mental hospitals substantiated by relevant data; and an explanation as to why a Green Belt location was preferable to alternative potential locations.

55. After the 14 March 2013 meeting with RBWM, Mrs Shillito started looking into visiting independent mental hospitals. On 2 April 2013 she wrote to Mr O'Donovan that she could not arrange visits to two hospitals until 17 – 19 April. On the same day, Mr O'Donovan spoke to Ms Coe at RBWM who told him there was an *"absolute deadline"* of 7 May 2013 for receipt of a planning application, after which she had been instructed to initiate enforcement action.

Consideration of obtaining a third opinion from leading counsel

56. At a team meeting on 16 April 2013 Mr O'Donovan is recorded as saying *"let Johnny [Landau of Ridouts] tease [the discrimination issues] through with a barrister if he would like"*.

57. On 19 April Mrs Shillito once again addressed her concerns about the discriminatory aspects of Condition 18 and re-iterated that she believed a legal opinion should be obtained. There appears to have been a decision by Dr Irandoust to ask Johnny Landau to obtain such an advice, as there is correspondence between Mr Landau and the clerks to Simon Bird QC about obtaining his opinion on these points. On 10 May Mr O'Donovan told Mrs Shillito that advice from leading counsel was being obtained. From 29 April through to 14 May 2013 Johnny Landau sent a number of messages to Dr Irandoust asking to be put in funds for the agreed brief fee. He had no response from Dr Irandoust, who was in the United States, until on 14 May he responded to the final request for funds by emailing Mr Landau to say *"I will call you on my return on 20 May"*. No funds or further opinion were obtained.

Pre-application report

58. On 3 May 2013, RBWM released its pre-application officer report. This advised that an application for change of use was necessary and would be resisted unless it could be shown that there was a need for a community health hospital which could not be met on a more sustainable site outside the Green Belt.

59. A consultant team meeting was held by Mr O'Donovan on 8 May 2013. He sent a briefing note/agenda out in advance. This highlighted extensive work needed on Mrs Shillito's report especially in relation to need. Dr Irandoust also attended the meeting. The notes from the meeting include the following: *"It was agreed that the proposed use is a Community Mental Health Hospital"* with the following listed excluded patients: *"no addictions, no forensic history, no out-patient services, no one under 18, the primary diagnosis will be mental health, we will not accept admissions during anti-social hours"*.

60. Mr O'Donovan emailed Mr Carey and Ms Coe or RBWM on 9 May 2013 stating that it would bolster the application by inclusion of information *"including the specifics of the community mental health hospital use which is proposed... greater need for a community mental health hospital... and will demonstrate why Apple Hill is a particularly suitable location..."*.

61. On 16 May 2013 Mr Carey extended the absolute deadline for receipt of the planning application to 21 May 2013. Despite the efforts of Turley and Henley (through its PR consultant), RBWM could not be persuaded to allow more time and made it clear that a failure to meet this deadline would be met with enforcement action.

Planning Application

62. Turley lodged the planning application supported by the planning statement and Mott MacDonald's traffic and noise report in support on 21 May 2013. Mrs Shillito's report was not ready. Accordingly the planning application stated that the Mrs Shillito's report on healthcare issues would be lodged later. She lodged that report on 13 June 2013.

63. On 20 July 2013 the RBWM planning officer recommended that the application be refused.

64. On 31 July 2013, the RBWM Development Control Panel report recommended that the Panel refuse the application, which it did the same day. RBWM sent a Notice of Decision to Turley on 2 August 2013 giving its reasons, namely: that the application would give rise to inappropriate development in the Green Belt contrary to saved policies GB1, GB2 and GB8 with no very special circumstances outweighing the harm to the Green Belt and the amenities of local residents. On 1 August 2013 Mr O'Donovan wrote to Simon Bird QC asking his opinion on the merits of an appeal.

Enforcement Notice

65. RBWM served an enforcement notice on Henley on 7 August 2013 seeking to enforce Condition 18 at Apple Hill. The Directorate of Adult and Community Services wrote to all of the commissioning authorities notifying them of the refusal of the planning application and service of the enforcement notice and stating that this would *"mean that if you have a resident within the terms of the breach at Apple Hill Nursing Home alternative arrangements will have to be made regarding their placement"*.

Appeal

66. Henley appointed Woolf Bond Planning on 5 August 2013 to be planning consultant in place of Turley for the purposes of lodging an appeal. On 11 September 2013, Woolf Bond filed an appeal (i) against the refusal of the planning application to allow change of use under section 78 TCPA 1990 and (ii) against the enforcement notice under section 174 TCPA 1990.

67. Henley obtained written advice from leading and junior counsel, Sasha White QC and Charles Banner. As part of their advice they expressed the view that Condition 18 was discriminatory under the Human Rights Act 1998 and the Equalities Act 2010 and so unlawful. The appeal proceeded to an inquiry which was held over five days in April, May and June 2014.

68. On 21 October 2014 the planning inspector allowed the appeal against the refusal of planning permission and against the enforcement notice. The reasons given included: (a) that RBWM's saved policies GB1, GB2 and GB8 were out of date and inconsistent with the NPPF; (b) a change of use was not to be regarded as development where both the existing and proposed new use were within the same use class of C2; (c) the removal of Condition 18 was therefore not a material change of use as it did not amount to development and so could not be 'inappropriate development in the Green Belt'; (d) there was no real case of harm in the form of noise, loss of openness or increased traffic movement attributable to the removal of the condition; (e) there was no need specifically for residential care beds for the elderly.

69. The planning inspector stated in her decision that Condition 18 was not unlawful and concluded that *"the meaning of the term 'elderly' is clear as a generality albeit difficulties might arise in practice in deciding whether condition 18 had been infringed. However, potential for such difficulties does not mean that condition 18 is void for uncertainty"*. The Human Rights Act and Equality Act arguments were not mentioned in the inspector's decision.

D. THE LAW

70. It is common ground that it was an implied term of the Retainer Letter that Turley would exercise reasonable care and skill in the provision of services to Henley and that it owed an equivalent duty of care to act with due care and diligence. It is common ground that the relevant standard of care is that to be expected of a reasonably competent planning consultant. This is the test derived from Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 per McNair J at p586: *"...where you get a situation which involves the use of some special skill or competence then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

71. Further guidance can be found in two cases relied upon by Henley: Saif Ali v Sydney Mitchell & Co (A Firm) [1980] AC 198, [1978] 3 All ER 1033, [1978] 3 WLR 849, [1978] UKHL 6 and Eckersley v Binnie [1988] 18 C.L.R 1. In Saif Ali, a case in which the House of Lords considered the extent of barristers' immunity in negligence, Lord Wilberforce described the standard: *"Those who hold themselves out as qualified to practise other professions, although they are not liable for damage caused by what in the event turns out to have been an error of judgment on some matter upon which the opinions of reasonably informed and competent members of the profession might have differed, are nevertheless liable for damage caused by their advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do."*

72. Later in his judgment Lord Wilberforce described the test to be applied by the court as follows: *"No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made."*

73. In Eckersley v Binnie, Lord Justice Bingham provided the following guidance on the reasonably competent professional: *"...a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession... He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."*

74. Both parties rely on the guidance given by Coulson J in the planning context in the case of Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] EWHC 1191 at paragraphs 177-179: *"[177]...There is no right or wrong way to make a planning application. Moreover, a planning consultant*

cannot guarantee success; generally he will only be liable for damage caused by advice which no planner who was reasonably well-informed and competent would have given: [Saif Ali v Sydney]. [178] I reiterate these principles at the outset because there was a marked difference of approach by the planning experts in this case. I consider that Mr Stock, the defendant's expert, approached the allegations against the defendant with these principles in mind. Mr Gardner, the claimant's expert, did not. Repeatedly, Mr Gardner accepted during his cross-examination that he could not say whether or not the defendant had acted in a way that no reasonably competent planning consultant would have acted. Instead, his approach was to identify various aspects of the application and say, in terms that he would have done things differently... [179] More importantly, whether an expert would have done something differently can never be a test of whether what the defendant actually did was negligent or not. To that extent, therefore, Mr Gardner's evidence was singularly unhelpful. Moreover, on occasions at least, there was a strong element of hindsight in his approach, despite the well-known warning that 'hindsight is no touchstone of negligence': Duchess of Argyle v Beuselinck [1972] 2 Lloyd's Rep 172 at 185".

75. Counsel for Turley asks me to consider the actions of Mr O'Donovan against the context of the *"multi-faceted evaluation which is at the heart of deciding a planning application"*. He submits that since the decisions made by planning officers and inspectors are decisions of judgment involving the exercise of an extremely wide discretion, not only is there is no 'right' way to make a planning application (per Elvanite) there is also a series of 'right ways' and professional planners will quite properly differ as to the approach to take in the facts of a particular case. Counsel for Henley cautions against undue reliance upon the statement of Coulson J in Elvanite that there is 'no wrong way' to make a planning application. He submits that although a mistaken professional judgment call may be harder to categorise as negligent, if it is one which no reasonably competent member of the profession would make, that is negligence whether or not you call it a mistake of judgment, and a negligent planning application is self-evidently the 'wrong way' of making one. I accept both of these submissions.

76. Indeed there are some parallels between a planning consultant choosing the arguments to put forward in planning application and a barrister choosing his arguments to put before the court in a matter involving the exercise of judicial discretion. As Lord Wilberforce said in Saif Ali: *"Much if not most of a barrister's work involves the exercise of judgment – it is in the realm of art not science. Indeed the solicitor normally goes to counsel [for advice] precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is unlikely to succeed."*

77. Similarly, Lord Salmon in Saif Ali: *"Lawyers are often faced with finely balanced problems. Diametrically opposed views may [be] and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he had been negligent."*

78. The principles I take from the authorities before me, therefore are that (i) a planning application involves the making of a series of judgments about what arguments to run and with what force; (ii) those judgments are fallible and may be wrong; (iii) the fact that one or more of those judgments turns out to be wrong is not probative of negligence; (iv) whether another planning consultant would have done things differently is not the test; (v) it is only if that judgment is one that no reasonably competent planning consultant would have made that it is negligent; (vi) this must be assessed without the use of hindsight.

E. WITNESSES OF FACT

Henley's witnesses of fact

79. Dr David Irandoust is the Director and CEO of Henley and 10 – 12 other companies, each which own or manage a specialist hospital. He filed two witness statements dated 3 March 2015 and 5 June 2015 upon which he was cross-examined and re-examined. Counsel for Henley submits that he was a

straightforward, credible and competent witness, who did not evade questions or wriggle out of answers. Counsel for Turley submits, in terms, that he was a liar.

80. I cannot accept Henley's submissions. I found Dr Irandoust to be an unsatisfactory witness in a number of ways. First, for the reasons that I give later in this judgment, I find him to have given untruthful evidence (i) that RBWM and other commissioning health authorities knew since July 2011 that Henley had admitted non-elderly patients in breach of Condition 18; and (ii) that Turley contracted directly with Finnamore and Mott MacDonald. Second, I found him to be highly resistant to making even appropriate concessions where he considered that might weaken his case. For example, it took him a long time in cross-examination to admit the self-evident fact that his decisions to instruct counsel for an opinion and replace Finnamore with a new healthcare expert came with some penalty in time. Third, I found his evidence in cross-examination about his history of non-payment and challenge to professional advisors' bills (particularly Woolf Bond and Ridouts) to be misleading and less than truthful, as is clear from the documentation presented to him in cross-examination.

81. I remind myself that although a witness may lie about something it does not mean that all his evidence is untruthful. However my findings do mean that my view of his credibility and reliability is adversely affected. For those reasons I treat his evidence with considerable caution and seek corroboration from the documentary or other evidence, or the inherent probabilities, before relying on it. I give it appropriately little weight.

82. Mrs Frances Shillito is the independent healthcare consultant used in this project in place of the de-instructed Finnamore. She filed a witness statement dated 20 May 2015 upon which she was cross-examined and re-examined. I accept Counsel for Henley's submission that she presented in oral evidence as a professional, credible witness who sought to assist the court to the best of her abilities. She gave a fair oral account within the limits of her recollection. I accept Turley's submission that her oral evidence was more credible than her written evidence which, in my judgment, displays a much less measured and

more partisan viewpoint. This is of less import than it might have been, as much of her evidence has proved to be of limited relevance. Accordingly I find her oral evidence to be credible and reliable although lacking in independence and I treat her written evidence with more caution, and give it more limited weight.

Turley's witnesses of fact

83. Since the claim was issued, Mr O'Donovan has retired. He did not attend the trial. Instead of filing a narrative witness statement in his own words, Mr O'Donovan has had several conversations with Mr Lucas, the Chief Executive of Turley. Mr Lucas has produced two witness statements dated 2 March 2015 and 20 May 2015 (and a third witness statement in connection with the Claimant's application for summary judgment/strike out dated 9 June 2015), which include his evidence of what Mr O'Donovan told him. He was cross-examined and re-examined on those witness statements. Mr O'Donovan has filed two witness statements dated 3 March 2015 and 20 May 2015 in which he confirmed he had read Mr Lucas's first and second witness statements respectively, and in each case he states *"I agree with the factual statements set out in that witness statement and where that statement refers to factual matters which I have informed Mr Lucas of, I confirm that I have so informed him and I believe those matters to be true."* Turley has filed Civil Evidence Act notices seeking to rely on Mr O'Donovan's witness statements as hearsay evidence on the grounds of his ill health.

84. This is unorthodox and unsatisfactory, in my view, for a number of reasons.

85. First, I have had no explanation why Mr O'Donovan's statement has been taken by Mr Lucas, who is not a solicitor, instead of by Turley's solicitors in the usual way. Competent solicitors are skilled in taking witness statements; they are aware of what they should and should not contain and of the importance of producing a witness statement in the witnesses' own words.

86. Second, Turley accepts that Mr Lucas had no personal involvement at all in the provision of the professional services to which this claim and counterclaim relates. He is based in the Manchester office and Mr O'Donovan ran this

matter out of Southampton. Mr Lucas had never met Dr Irandoust or any of the witnesses for Henley before. He had no previous dealings with Apple Hill. Despite that, Mr Lucas's first witness statement is thirty-seven pages of single-spaced text in 263 paragraphs. His second witness statement is 43 pages and 274 paragraphs.

87. Mr Lucas is in a perhaps not wholly unusual position of being a witness of fact defending a professional negligence (counter)claim who also has expertise and experience of the relevant profession and who is therefore able to present his opinions and make his own arguments about the standard of care reasonably to be expected of a competent practitioner and why the company of which he is the CEO has not fallen below that standard. He can also make relevant comment based upon his own professional experience. As the Court of Appeal in ES v Chesterfield and North Derbyshire Royal Hospital NHS Trust [2003] EWCA Civ 1284 and DN v London Borough of Greenwich [2004] EWCA Civ 1659 makes clear, upon which Turley relies, such evidence is admissible from a defendant who is a practitioner of the relevant profession when it would not be admissible from one who is a lay person. That includes the ability *"to rebut, as one professional man against another, the criticisms made of him by the claimant's experts"* (per Lord Justice Brooke in Greenwich at para 25).

88. However Henley objects to those parts of Mr Lucas's statements which go further than this. I accept its submission that Mr Lucas carries out an extensive and forensic review and critical analysis of all of the documentary and witness evidence and in doing so: makes statements of opinion on matters outside his area of professional expertise; cites legal authority and makes argument; and draws conclusions and makes findings that are not open to him to make. Such matters are not admissible. In doing so, in my judgment, he oversteps the constraints of his role into advocacy and seeks to usurp my judicial function. If I look just at one section in his second witness statement opened at random: in paragraph 208 he refers to Mrs Shillito making *"ridiculous accusations"* and *"unjustified complaints and allegations"*; in paragraph 210 he describes that she *"clearly influenced Dr Irandoust as the client"*; in paragraph 212 he finds

that *"Mrs Shillito had spent far too much time arguing and fighting battles with colleagues to get her own work done... in hindsight it is questionable whether Mrs Shillito had the experience and ability to produce a persuasive and relevant product"*.

89. I do not criticise Mr Lucas. He is not a lawyer and I have no doubt that he produced his statements with diligent hard work in the honest belief that he was assisting the court. In cross-examination Mr Lucas accepted that as well as speaking to Mr O'Donovan, he spent 3 or 4 days reviewing documents and took 3 or 4 days to produce each witness statement. I have no doubt he did.

90. I do, however, criticise Turley's solicitors for allowing Mr Lucas's witness statements to be filed in this form. The consequences of the abuse are obvious. The admissible evidence is obscured by inadmissible material. It is difficult to identify what is the attested witness evidence of Mr O'Donovan, what is the admissible evidence of Mr Lucas and what is inadmissible. It is unfair to the Defendant, who has had to expend time in dealing with those statements in the preparation for trial. Counsel for Henley was hampered in cross-examination by not knowing which parts the court is going to consider admissible and which it is not. I am faced with having to sift hundreds of paragraphs of text to assess the admissible evidence they may contain.

91. Counsel for Henley submits that any such sift is a difficult or impossible task. Accordingly, he asks me to give no weight to Mr Lucas's narrative evidence about what happened between March 2012 and August 2013, but only to that evidence which he can properly give in his capacity as managing director of Turley, including evidence about Turley's methods and practices for retaining, advising, managing and billing clients and its employees' professional obligations under the RTPI code. He submits that wherever there is a dispute of fact between Mr Lucas and Henley's witnesses, I must prefer the evidence of Henley's witnesses.

92. Turley submits that it has been given permission to adduce the evidence of Mr O'Donovan which affirms the evidence of Mr Lucas, and so the court cannot accord that evidence no weight as Mr O'Donovan has attested to its accuracy.

He submits that since Counsel for Henley did not cross-examine Mr Lucas on the factual evidence I must therefore accept it as uncontroversial.

93. I will not disregard Mr Lucas's statements. I will disregard those parts that appear to me to be inadmissible comment, inadmissible opinion, fact-finding or advocacy. I will also have regard to the evidence of Mr O'Donovan contained within it, but only to the paragraphs or part-paragraphs in relation to which Mr Lucas has specifically and properly identified Mr O'Donovan as the source of the information (as this is the only evidence which I can be satisfied that Mr O'Donovan has attested to as accurate).

94. As to the weight I give this evidence: I am satisfied that Mr Lucas is an honest and credible witness. I have no doubt that he did his best to assist the court. I find his oral evidence reliable and I give it appropriate weight, always reminding myself that in relation to his expert opinions, he is not an independent witness and his evidence does not have the weight of a CPR Part 35 expert.

95. The evidence to which Mr O'Donovan attests is hearsay. Counsel for Henley could not properly have cross-examined Mr Lucas on it and to the extent Turley criticises him for failing to do so, I reject that criticism as unfair. Of course this evidence has commensurately less weight and is less reliable than if it had been provided in a narrative witness statement from Mr O'Donovan, and if it had been tested in cross-examination, and if I could have seen Mr O'Donovan to assess his credibility and reliability. Nonetheless I give it some weight. Nor do I accept Henley's submission that where it contradicts the evidence of its own witnesses I must accept Henley's evidence. I will look for corroboration from other evidence and consider the inherent probabilities and the relevant weight of both accounts before deciding which is more likely than not.

F. EXPERT WITNESSES

96. Each party called an expert planning consultant. Henley's expert is Mr Peter Wilks, Senior Director of Nathaniel Lichfield & Partners Town Planning, Design and Economics Consultancy. Mr Wilks has 28 years experience as a

town planner. He worked in the early part of his career in the public sector in planning departments of local authorities, then spent 10 years in the planning and economics department of Chesterton estate agents. He has worked for his current planning consultancy for over ten years, advising both private and public sector clients. His report is dated 13 May 2015.

97. Turley's expert is Mr Steven Abbott, partner of Steven Abbott Associates LLP. His report is also dated 13 May 2015. Mr Abbott has forty years experience as a town planner, working from 1975 to 1989 as a planning officer and latterly a Principal Planning Officer in local government for a number of councils, all of which had planning responsibility for extensive areas of Green Belt. Since 1989 he has worked in the private sector in the planning consultancy he founded, based in the north of England.

98. I have no doubt that both experts have the necessary experience and expertise to act as experts to the court to assist it in carrying out the tasks it has to accomplish.

Henley's expert Mr Wilks

99. I found Mr Wilks to be an unsatisfactory expert witness for a number of reasons:

i) Mr Wilks makes a number of general statements in his report that Turley fell below the standard expected from a reasonably competent planning consultant. A bald unparticularised statement of this type is of little assistance to the court. When it came to particularising the specific advice, actions or omissions of Turley or Mr O'Donovan which no reasonably competent planning consultant would have given or done or omitted to do, per Lord Wilberforce in Saif Ali, Mr Wilks almost entirely failed to do so.

ii) Instead Mr Wilks reversed the test and produced lists of things that he opined *"a reasonably competent planning consultant would have done"*, the inference being intended, I suppose, that because Mr O'Donovan or Turley had not done them in that way, Turley was

negligent or in breach of contract. This is the wrong approach, as I have made clear in my discussion of the law. It assumes that there is only one 'right way' to make a planning application which is not the case. It takes no account of the exercise of a planning consultant's judgment and discretion in the approach he chooses take. It also relies, as it should not rely, upon hindsight. However to the extent Mr Wilks opines that Turley has omitted to act at all (rather than offers a different way of acting), I will consider such allegations carefully where relevant.

iii) Mr Wilks also fell into the trap in oral evidence of stating how he would have 'done it differently'. Again, this does not account for the wide range of potential approaches of a reasonably competent planning consultant. In my judgment it sets Mr Wilks up as the standard which must be met, failing which Turley is negligent. Of course that is not the standard. This is an easy trap to fall into, particularly in oral evidence, and it is a trap which also caught Mr Abbott. Without the failings identified in (i) and (ii) above I would not have considered it particularly significant. With them, it provides additional evidence of the incorrect approach of Mr Wilks to his task.

100. These three failures to properly evaluate Turley's service against the correct test mean that there are very few actions, omissions or advice properly identified in Mr Wilks' report, in my judgment, which support Henley's pleaded claim for negligence/breach of contract.

101. However this is not my only concern. On a number of occasions in his report, Mr Wilks adopted Henley's version of disputed issues as fact and then based his opinions on that. For example, he appeared to accept the disputed allegation that Mr O'Donovan had told Dr Irandoust that he would *"sort everything"* when initially instructed, and that formed part of the basis for his opinion that Turley acted as a lead consultant with a project management role. He appeared to accept Henley's disputed position that there was a *"need to replace Finnamore"* as healthcare consultants, and that formed part of the

basis for his opinion that Turley should have sought to recommend a replacement earlier than it did.

102. Counsel for Turley submits that Mr Wilks made a number of errors in his report and in cross-examination which call into question his competence. In particular he relies on: Mr Wilks' description of the Section 73 Issue as a *"critical error"* on the part of Turley, which has now been abandoned by Henley. He submits that Mr Abbott's assessment of Mr Wilks as *"wrong"* is justified; Mr Wilks' failure to correct his estimate of the prospects for obtaining planning permission using a 'non-negligent approach' at 60%, when the 'non-negligent' approach he relied upon was a section 73 application and not the application actually made; Mr Wilks' failure to carry out the comparative assessment of the 'non-negligent approach' against the application actually made by Turley to arrive at a figure for how likely it was that the 'non-negligent' approach would have achieved a better outcome, as he was specifically instructed to do (and which he accepted he had not done in cross-examination). Henley submits in relation to the first point that Mr Wilks does not concede that he was wrong on the Section 73 Issue but merely accepts that his concerns cannot found a negligence claim. In my judgment it therefore follows that his description of Turley's approach as a "critical error" within a report prepared for a negligence claim is wrong. Henley further submits that Mr Wilks' acceptance that the change of use application was 'not an inappropriate' course to follow shows that Mr Wilks is prepared to make appropriate concessions. I accept that submission so far as it goes. Otherwise I find all these criticisms to be valid and they do adversely affect my view of his competence.

103. Mr Wilks was also instructed to specifically address what Turley could have done differently to reduce the chances of RBWM placing an embargo on Apple Hill and taking enforcement action. He stated in his report *"In my view it is likely that RBWM would not have issued the embargo or the Planning Contravention Notice if the planning application had been submitted before the end of 2012, or failing that, commencement of RBWM's pre-application advice service. I believe RBWM would have allowed the planning application*

to run its course, before issuing the Planning Contravention Notice and possibly the embargo." In my judgment Mr Wilks' report fails to explain adequately or at all how he has arrived at this belief; what evidence he relies upon to form it; what the causal connection is between the submission of the planning application to the planning department of RBWM and the embargo imposed by the adult health and social care department of RBWM which to my mind is utterly unclear; or why he considers the issue of a Planning Contravention Notice to be 'enforcement action'. In cross-examination he conceded that the service of a Planning Contravention Notice does not constitute 'taking enforcement action' for the purposes of section 171A(2) TCPA 1990 and accordingly he had not properly addressed the question. Counsel for Turley submits that this latter point goes to both Mr Wilks' competence and his independence. I consider that all those failures adversely affect my view of his competence and his independence.

104. For those reasons, I find that I can place little reliance upon Mr Wilks' opinion. His report gives me very little assistance. I will deal with the arguments that it contains in the issues-based analysis below.

Turley's expert Steven Abbott

105. Henley submits that Mr Abbott was not a credible witness as he was evasive, failed to answer questions, and fell back on general statements that everything was a matter of judgment and discretion. I do not accept this as fair criticism. I found him to give clear, credible, evidence. He made appropriate concessions when necessary, as Counsel for Henley concedes in relation to Mr Abbott's concession that the RTPI Code of Conduct required professional indemnity cover which Turley did not have. The importance he placed on the exercise of Mr O'Donovan's judgment and discretion was, in my judgment, a valid opinion validly expressed.

106. Mr Abbott was generally very careful in his report and in his oral evidence to tie his opinions to the correct test, namely whether the advice, acts and omissions of Turley and Mr O'Donovan were those that no reasonable planning consultant would make. However he did, twice, in oral evidence

respond to a question about an action of Mr O'Donovan by saying *"well, I wouldn't have done it that way"* and in doing so fell into the same trap as Mr Wilks. However, in my judgment these were two mis-statements from an expert who was otherwise consistently applying the correct test in contrast to Mr Wilks who consistently failed to do so.

107. Counsel for Henley made two major criticisms of Mr Abbott's report. The first is that Mr Abbott carried out a critical analysis of Dr Irandoust's evidence in Chapter 7 of his report. Henley submits that in doing so he was usurping the fact-finding role of the court. It follows Mr Abbott's analysis of the documentary evidence in Chapter 6. The second criticism is that Mr Abbott heavily relied on Mr Lucas's review of the documents contained in his witness statement, in reaching his own opinions in Chapter 6.

108. I have considered these two chapters and the criticisms carefully. In relation to the analysis of the documentary evidence, it is true that Mr Abbott does repeatedly refer to Mr Lucas's review of documents. However on every occasion, apart from in paragraph 6.26 of his report, he also cross-refers to the underlying documents to which Mr Lucas's review relates and in my judgment it is clear from the report and from his answers in cross-examination on this point that he considers each of those documents independently before reaching his own opinion. Taking the chapter as a whole, I consider that he is following the structure of Mr Lucas's documentary review in order to carry out his own, rather than relying on it. Accordingly, I do not accept the validity of that criticism save that I will not consider paragraph 6.26.

109. In relation to Chapter 7, Mr Abbott draws out a number of claims, allegations and statements made in the witness statements of Dr Irandoust and Mrs Shillito and comments on them from a planning perspective. He does not, in my judgment, adopt disputed facts as fact and then base his opinions on them as Mr Wilks does. In offering his opinion of the claims, allegations and statements from the perspective of a planning expert, I consider that he has been careful to avoid supplanting the court as the decision-maker on factual issues and has stayed on the 'right' side of the line by providing material and opinions about relevant planning matters which arise out of those allegations

and statements, so that the court can form its own conclusions on the facts. In my judgment he has been successful, save in two paragraphs which were highlighted by Counsel for Henley in cross examination – the first sentence of paragraph 7.7 which I consider to be unnecessary comment and the first sentence of paragraph 7.11 which crosses the line towards a finding of fact. I will not consider these statements. For the reasons I give, I otherwise reject Henley's criticism.

110. For those reasons I find Mr Abbott's report and evidence to be of assistance to the court and I give it appropriately high weight.

Expert report of Mr Wilks - overview

111. In Chapter 5 of his report Mr Wilks states at 5.13 *"I have identified two areas where in my opinion [Turley's] approach fell below the standard one would expect from a reasonably competent planning consultant. First the management and preparation of the planning application was poor and this led to significant delays in submitting the planning application. Second the quality of the planning application submission was below standard and the approach adopted harmed the prospects of success".*

112. He then considers matters under the headings of 'Delays' (5.14 to 5.49) and 'Damage to Prospects of Success' (at 5.50 to 5.89).

113. In the 'Delays' section Mr Wilks repeats his opinion that *"the services undertaken by Turley did not fully meet the specification set out within the [Retainer Letter] and [the] standard of care and diligence fell below that expected from a reasonably competent planning consultant"*. He does not specify any action or omission by Turley or Mr O'Donovan as an act or omission which no reasonably competent planning consultant would have made. He makes a number of criticisms which do not refer to the standard of a reasonably competent planning consultant and from which he comes to the conclusion in 5.48 that Turley *"did not adequately fulfil their role as project managers in terms of (i) driving the planning application process to ensure the expedient submission of the planning application; and (ii) identifying, briefing*

and managing sub-consultants to ensure their work was both fit for purpose and prepared expediently".

114. In the 'Damage to Prospects of Success" section, Mr Wilks does not identify any actions or omissions of Turley or Mr O'Donovan which, in his opinion, no reasonably competent planning consultant would have done or failed to do.

115. Instead he identifies a number of actions and omissions which he opines that a reasonably competent planning consultant would have done, and leaves the court to come to the conclusion that because Turley/Mr O'Donovan has not done them, they must be in breach of contract or duty. As I have made clear, this is not the correct approach.

116. I will deal with his specific opinions issue by issue below.

Mr Abbott's expert report - overview

117. In Chapter 5 Mr Abbott opined that Turley (through Mr O'Donovan) provided services which did not fall below the standard of those that could be expected of a reasonably competent planning consultant judged in the context of all material facts, including the instructions from the Defendant and the nature and scale of the planning application in relation to which the Claimant was instructed.

118. His opinion was that *"Mr O'Donovan correctly identified that the material considerations were that the development was not an inappropriate development in the Green Belt, it did not involve new buildings and was not a material intensification that would harm Green Belt policy or amenity. He advanced a second line of argument, in accordance with Counsel's advice, that there were 'very special circumstances' (a need case) to improve Henley's prospects of obtaining planning permission if the Council disagreed that the development was not inappropriate. Mr O'Donovan's Planning Statement of May 2013 comprehensively sets out the material considerations... ".*

119. Mr Abbott also opined: *"I see no basis on which it could reasonably be argued that [Mr O'Donovan] failed to exercise reasonable care, he lacked the appropriate skill, he was not diligent, or he was incompetent in carrying out the instructions pursuant to the retainer"*.

120. He emphasises that although the planning application was refused, the appeal was allowed and in his opinion the planning inspector's appeal decision was *"largely based on the interpretation of Green Belt policy Mr O'Donovan identified at the outset"*. He further notes that the planning inspector's decision shows that Mr O'Donovan's view expressed from the outset that the development was appropriate (in policy terms) in the Green Belt and so there was no requirement to prove 'need' (i.e. 'very special circumstances') was correct – although Mr O'Donovan did run the secondary argument on need once Simon Bird QC had raised it. Similarly the arguments run at the appeal in relation to the Elderly Issue were rejected; and those run at the appeal in relation to the EA/HRA Issue formed no part of the inspector's decision. Accordingly in his opinion the planning inspector's decision validated the strategy and approach of Mr O'Donovan and Turley to the planning application.

121. I will deal with his specific opinions issue by issue below.

Joint statement

122. The experts met and produced a joint statement in June 2015 including a list of agreed issues. One of those agreed issues is in fact a disputed issue of fact, namely that *"Turley was not the main contractor with contracted sub-consultants"*. Accordingly I do not take it into account as that is a matter I will have to determine. Others relate to the abandoned Section 73 Issue. Those which remain relevant are:

i) The operation of Apple Hill outside the scope of condition 18 *"increased the prospect of enforcement action"*;

ii) It was appropriate for Turley to recommend the appointment of co-consultants to prepare healthcare and traffic impact reports in support of the application;

iii) Finnamore and Mott MacDonald were appointed by Henley following introductions from Turley (I discuss whether this is a disputed issue of fact in paragraph 136 below);

iv) Frances Shillito was appointed by Henley alone following its decision to dis-instruct Finnamore. This appointment was not based on Turley's recommendation;

v) In some cases Planning Consultants play the lead role where teams have been assembled to pursue planning applications, but in other cases they do not. In some cases the applicant/developer will take responsibility for leading/managing the team, where the planning consultant will only prepare the planning statement and be the named planning agent on the planning application submission. Planning consultants can take the lead role in coordinating and managing the planning application process and the team of consultants. The extent of the planning consultant's role will be dependent on the agreed terms of engagement;

vi) It was appropriate to obtain the input of planning Counsel during the preparation of the application;

vii) It was appropriate to use RBWM's pre-application advisory service;

viii) Mr O'Donovan advised and in his planning statement identified the up-to-date National Planning Policy Framework ("NPPF") Green Belt policy position and the 'out of date' Local Plan Green Belt Policies;

ix) These Local Plan policies were of limited weight given their out of date status;

x) The experts now agree that a planning application for planning permission for a change of use was not an inappropriate route to take;

xi) Neither expert is aware of a case where an age-related planning provision such as Condition 18 has been deemed unacceptable as a matter of law. The Planning Inspector stated in her decision that Condition 18 was not unlawful and concluded that *"the meaning of the term 'elderly' is clear as a generality albeit difficulties might arise in practice in deciding whether condition 18 had been infringed. However, potential for such difficulties does not mean that condition 18 is void for uncertainty"*;

xii) Decision-takers in planning applications can reach different decisions based on the same evidence/submissions.

123. They also set out their areas of disagreement. I will deal with these issue by issue below.

F. FINDINGS

124. There are a number of factual and legal disputes I need to resolve.

Did RBWM and/or the other commissioning health authorities know and approve of Apple Hill taking patients in prima facie breach of Condition 18 after July 2011?

125. It is Henley's case that it only took the decision to admit younger patients following a meeting with Simon Hurrell and Peter Carey of the planning department at RBWM in July 2011 at which they agreed to Henley admitting non-elderly residents. Dr Irandoust's first witness statement *"In July 2011 Apple Hill began to admit non-elderly residents... This was done with the knowledge and approval of RBWM"* and later *"[Henley] had not flouted Condition 18 at all – I had approached RBWM and openly agreed with their Head of Planning that we would admit 'non-elderly' clients because unless we did so the business was not viable"*.

126. In cross-examination, Dr Irandoust said that the decision to admit non-elderly patients to Apple Hill was one made *"collectively by the council and me together... I discussed it with the council and agreed that I would admit 40% of non-elderly clients until I submitted a planning application."* He said *"I*

had an agreement with them that I would put in an application and while it was pending I would not be in breach." Later he said *"I discussed it with the Health Authority and with Planning. They said they didn't want to enforce or take action"* so long as a planning application was put in.

127. His oral evidence was: that he was governed by the Care Quality Commission; that required him to be of the standing to be registered to run a home; the introduction of the Equality Act in October 2010 meant that Condition 18 was discriminatory against the non-elderly; and the CQC would deregister him if he discriminated against anyone. Accordingly, his admission of those non-elderly patients *"wasn't in breach of Condition 18. It was a judgment call. I either discriminated and lose my registration or work with council and resolve the problem."* This is not evidence to be found in his written statement and it is not an argument which Counsel for Henley has felt it appropriate to adopt in closing, perhaps because when pressed in cross-examination, Dr Irandoust admitted that he did, in fact, know at the time he admitted non-elderly patients that he was doing so in breach of Condition 18.

128. Dr Irandoust in cross-examination then informed the court that <u>all</u> of the commissioning health authorities who used Apple Hill were *"fully aware, absolutely"* from July 2011 that Apple Hill was in breach of Condition 18. He said that was because all such health authorities had carried out extensive due diligence on Apple Hill and Henley during the course of which Henley had sent them copies of Apple Hill's planning permission, so they would know of the Condition 18 restriction. Again, this evidence is not to be found in his witness statements.

129. I am satisfied that Dr Irandoust's evidence on these points is untruthful for the following reasons:

i) In my judgment it is contradicted by the letter of 10 January 2013 from Seona Douglas, the head of RBWM's Adult Social Care and Health Partnerships, in which she states that the Planning department of RBWM were concerned that Apple Hill might be in breach of Condition 18. This letter together with her action in immediately

notifying all of the relevant commissioning authorities that the placement of non-elderly patients at Apple Hill was in breach of planning is, in my judgment, highly probative of Ms Douglas having only recently discovered the breach.

ii) It is further contradicted by the letter from Buckinghamshire County Council of 14 January 2013 making it clear that it had 'recently received' information about the breach. I am satisfied that this is a reference to Ms Douglas's email of the day before. It is in my judgment inherently unlikely that Buckinghamshire would have sent this letter and placed the embargo on placements at Apple Hill if it had known since July 2011 that Apple Hill was taking non-elderly patients in breach of its planning permission. It is also, in my judgment, inherently unlikely that a commissioning authority would send patients to Apple Hill knowing that it was in breach of its planning conditions. The obvious risk is that RBWM planning would take enforcement action and that would leave vulnerable non-elderly patients with complex mental health and other needs facing the disruption of finding alternative facilities at short notice. That is, of course, what happened.

iii) Mr Abbott in his report gave his opinion on Dr Irandoust's statement that Apple Hill began admitting non-elderly residents with the approval of RBWM as follows: *"If correct, this was a surprising approach for a local planning authority to take given that it had imposed a condition restricting occupancy to elderly people, that the removal of that condition had been refused by the same authority in 2008 and dismissed on appeal in 2009 and there was a significant and active local opposition"*. In my judgment these are valid points and I find that it was inherently unlikely that RBWM was complicit in the breach of Condition 18 as Dr Irandoust claims.

Did Henley or Turley contract directly with Finnamore and Mott MacDonald?

130. Paragraph 11 (i) of the RDAC on page 12 alleges that *"[Turley] failed to engage consultants with appropriate expertise and experience to produce the*

reports required to support the planning application". In the Response to Turley's part 18 requests for clarification of the Amended Defence and Counterclaim, Henley denied directly retaining Mott MacDonald. It was not asked whether it had directly retained Finnamore and so did not make any statement relating to it. In response to an earlier question, Henley described the consultant team as being "assembled" by Turley whose obligation under the Retainer Letter was to "identify and brief" the consultant team.

131. In Dr Irandoust's witness statement at paragraph 45 he states that Mr O'Donovan identified Mr Paterson of Finnamore and Mr Maclean of Mott MacDonald as suitable consultants, and he states that he met with them at Mr O'Donovan's office. He is silent as to which party contracted with Finnamore and Mott MacDonald.

132. Mr Lucas deals with this at paragraph 70 to 73 of his first witness statement where he is clear that neither Mott MacDonald nor Finnamore was instructed or appointed by Turley. His evidence is that it is not Turley's practice to appoint co-consultants directly and it did not do so in this case. The documentary evidence shows that their letters of instruction were addressed to Dr Irandoust at Henley, not Turley. Mr Lucas confirms that no payments were made to either consultant by Turley; their fees were not included on Turley invoices; and the consultants did not seek their fees from Turley.

133. The skeleton argument adopted by Counsel for Henley states at paragraph 68(4) *"Henley does not suggest that Turley was a lead consultant in a legal sense so that the specialist consultants were legally sub-contracted through Turley."*

134. However, in cross-examination Dr Irandoust insisted that Turley was a main contractor who contracted directly with Finnamore and Mott MacDonald as sub-contractors. Counsel for Turley drew his attention to Mr Lucas's evidence but that did not cause him to alter his position, saying Mr Lucas "wasn't there". Dr Irandoust conceded in cross-examination, however, that Henley had paid Mott MacDonald its fees directly and his oral evidence was that Henley has not paid Finnamore because it disputes the value of the work done, and so

Finnamore remains unpaid. He did not say that Henley did not pay Finnamore's fees because it was not contractually bound to do so.

135. Counsel for Henley did not adopt Dr Irandoust's position in his closing submissions. He confirmed that he did not argue for Henley that Turley was a main consultant with sub-consultants.

136. I find that Henley contracted directly with Mott MacDonald and Finnamore. The evidence that it did so is overwhelming, in my judgment. The only person involved in this case who seeks to argue the point is Dr Irandoust. I have no doubt that Dr Irandoust's evidence was wrong. I have considered whether he could merely be mistaken in his belief, but he is an intelligent man and in the face of the evidence and, it appears, his legal advice, I do not believe he could be. Accordingly I am driven to the conclusion that he sought to misrepresent the position in order to strengthen Henley's case. The position is so clear from the documentary evidence that both experts had listed this in the joint report as an agreed issue. I do not believe they were seeking to make a finding of fact, but rather accepted this in the honestly held but mistaken belief that it was common ground. Accordingly I do not criticise them for this.

137. I note here that it is accepted by Dr Irandoust that Henley contracted directly with Mrs Shillito and this is also a working assumption of the experts and Mr Lucas.

Is the RTPI Code of Conduct an implied term of the retainer between Turley and Henley?

138. In Paragraph 10A of the RADC Henley pleads that it is an implied term of the Retainer Letter that Turley, through Mr O'Donovan, would observe the Code of Professional Conduct of the Royal Town Planning Institute ("RTPI") effective from 1 January 2012.

139. The burden of proof is on Henley to satisfy the court that the term should be applied, as it is the party that seeks to rely upon it.

140. The skeleton argument adopted by Counsel for Henley states in paragraph 52 *"There does not seem to be any resistance by Turley to the proposition that the contract of retainer was governed by the [Retainer Letter] and by the Code of Professional Conduct published by the RTPI."* In fact Turley does resist it, as is made clear in both the skeleton and note of closing argument of Counsel for Turley.

141. Counsel for Henley made very few submissions on this point. He did not seek to argue why such an implied term should be implied. In his closing submissions he criticised Mr Lucas for what he described as the "extraordinary" attitude he displayed in cross examination to breaches of the RTPI Code, but of course this does not go to whether it is an implied term of the Retainer Letter. He merely said that it was *"ultimately a question of fact – what was Henley and Dr Irandoust's understanding?"*

142. This is not the test.

143. Counsel for Turley submits both in the skeleton and the note of closing submissions that *"the test for an implied term is to ask: "is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"* Mediterranean Salvage & Towage Ltd v Trading & Commerce Inc *[2009] EWCA Civ 531 para 18* [sic – should be para 12] *(in turn quoting from Lord Hoffmann speaking in the Privy Council in* Attorney General of Belize v Belize Telecom Limited *[2009] UKPC 11, para 21"* and *"this test still includes the element of necessity"*.

144. Mediterranean Salvage was decided very shortly after AG Belize and I believe it is fair to say that Lord Hoffman's judgment, upon which it relies, has since been the subject of discussion, comment and further consideration both by the higher courts in England and Wales and abroad and also by academic lawyers (albeit particularly in respect to his discussion of the implication of terms as a form of construction of a contract). The Supreme Court has fairly recently undertaken a review of the relevant authorities relating to the implication of terms, including AG Belize, in Marks and Spencer plc v BNP Paribas Securities [2015] UKSC 72, and provided guidance as to the approach which

should be adopted by a court in considering the implication of a term, in particular at paras 18 – 21 of the judgment of Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed. The test that Lord Neuberger provides can be summarised for the purposes of this case as follows: that the implied term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective (or has commercial or practical coherence) without it.

145. At para 22 of Lord Neuberger's judgment he specifically deals with the test upon which Turley relies:

> *"22. Before leaving this issue of general principle, it is appropriate to refer a little further to Belize Telecom, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?". There are two points to be made about that observation.*
> *23. First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "[t]he legal test for the implication of ... a term is ... strict necessity", which he described as a "stringent test".)"*

146. Marks and Spencer v BNP Paribas is not cited by either party. I do not understand it to materially alter Turley's submissions, which are that: there is no necessity to incorporate the RTPI code; there is no evidence before me that Dr Irandoust even knew of its existence at the time of the Retainer Letter; and

there is nothing in the Retainer Letter itself or the circumstances at the time which would lead the court to consider that the reasonable reader would understand it to be implied. It does make it clear, however, that Henley's submission that it was a question of fact, namely *"what was Henley and Dr Irandoust's understanding?"* is not sufficient. In my judgment Henley's submission would not be sufficient even under AG Belize test, given the unilateral way in which it was expressed. If counsel wish to make further submissions to me in relation to Marks and Spencer v BNP Paribas, I will of course consider them before this judgment is handed down.

147. Subject to any further submissions the parties wish to make which may cause me to alter my view, I accept Turley's submissions and to those I add that I am satisfied that the Retainer Letter has commercial coherence without such a term being implied. I therefore find that there is no such implied term.

What is the meaning of "fit for purpose" in the Retainer Letter?

148. I believe it is common ground that the approach of the court in construing a contract should be that described by Lord Clarke of Stone-cum-Ebony JSC, with whom the other members of the court agreed, in Rainy Sky SA v Kookmin Bank [2001] UKSC 50, [2011] 1 WLR 2900. In paragraphs 20 and 21 he stated:

> *"[21] The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances."*

149. In my judgment the relevant background knowledge reasonably available to the parties at the time of the contract includes: the difficult planning history of the Apple Hill site; the fact that a previous planning application had been made and refused and an appeal had been unsuccessful; that Henley had accepted non-elderly patients at Apple Hill in breach of Condition 18; the real

risk of enforcement action being taken; the knowledge that local feeling was sufficiently strong against the proposed use for younger mentally-ill patients; that the Apple Hill Action Group had been formed; that Turley were planning consultants with planning expertise competent to give advice on planning matters; that Turley did not have specialist healthcare or traffic/highways expertise and would need assistance from such specialists.

150. Accordingly the reasonable person would not, in my judgment, have understood the parties to have meant that 'fit for purpose' was fit for the purpose of supporting a successful planning application, which is effectively the submission Counsel for Henley makes in stating that Turley should have *"acted as the link to steer them in the direction they need to go in to make the most effective application"*, because of course it is self-evident that *"the most effective planning application"* would be a successful one. I accept Turley's submission that that would amount to a guarantee and no planning application has a guarantee of success because of the nature of the wide discretion of the planning decision-makers. Even Mr Wilks put the chance of success of a planning application made to his own exacting standards (albeit a section 73 application) in the circumstances existing at the time of instruction at no more than 60%. To the extent that Dr Irandoust's evidence alleges that Mr O'Donovan gave him some sort of guarantee of success, I reject it.

151. However I do not believe the reasonable person would have put the standard so low as to have understood the parties to have meant that 'fit for purpose' was fit for the purpose of getting a submitted planning application validated by RBWM, as Counsel for Turley submits.

152. Counsel for Turley drew an analogy between a validated planning application and an application being made and accepted by the court without being rejected. It perhaps will not surprise the parties to know that I have seen many applications made and accepted by the court which could not conceivably be described as 'fit for purpose' and which have later been struck out as being wholly without merit. I have no doubt there are also validated planning applications which have no prospect of success, although Henley does not suggest that this is one.

153. Accordingly despite Counsel for Turley's stricture not to measure fitness for purpose against a *"vague standard to be found somewhere on a sliding scale"* between a valid application and a guarantee of success, I do look for the objective standard which falls between those two rejected positions. I am confident I can avoid vagueness. In my judgment I consider that the reasonable person would consider the parties to have meant that 'fit for purpose' meant fit for the purpose of supporting a planning application which a planning committee, acting within the ambit of its wide discretion, could properly allow. Accordingly whether or not Turley has 'ensured fitness for purpose' is, in my judgment, something which can only be assessed at the time of validation of the planning application. There is no point in assessing an early draft report against this standard because it cannot be known whether Turley will be able to ensure that standard is met.

G. EVIDENCE, SUBMISSIONS AND DECISIONS BY ISSUE ON THE COUNTERCLAIM

The Delay Issue

Witness evidence

154. Mr Lucas denies that Turley failed to exercise reasonable care and skill in managing and preparing the planning application or that there was a delay in submitting it. He produced a detailed timeline showing the progress of the project and identifying the most significant milestones. In paragraph 60 of his witness statement he summarises the timeline as showing:

i) A total project period from appointment to submission of the planning application of 14 months from March 2012 to May 2013 (and to validation of 15 months to June 2013);

ii) A principal evidence-gathering period of about 3 months from April 2012 to June 2012;

iii) Two references to leading counsel for opinion and document revision (in August and November 2012);

iv) Delay caused by Dr Irandoust replacing Finnamore with Mrs Shillito (December 2012 to 24 January 2013);

v) A pre-application process with RBWM of 10 weeks from mid February to early May 2013; and

vi) A report preparation period by Mrs Shillito of six months from January to June 2013.

155. Mr Lucas was not cross-examined on the timeline, which is unchallenged. Mr Lucas's evidence is that many of the factors which drove the timetable to 14 months were factors outside Turley's control. Those which pre-date January 2013 include Dr Irandoust's requirement for two references to Simon Bird QC and the delay caused by Dr Irandoust replacing Finnamore with Mrs Shillito. I accept that evidence, as Dr Irandoust accepted in cross-examination that he insisted on the references to leading counsel for his opinion and that he insisted on replacing Finnamore with Mrs Shillito and also reluctantly accepted that these were causative of some delay. I also accept as a matter of fact that Turley could not be responsible for any delay caused by RBWM's consideration of the pre-application.

156. Mrs Shillito had no involvement in the matter before 24 January 2013, i.e. after the embargo and suspension by RBWM and other commissioning health authorities. For reasons which will become apparent, her evidence does not assist me in relation to the Delay Issue.

157. Henley does not put forward any alternative timeline.

The experts' overarching opinions on the Delay Issue generally

158. As previously stated, in Mr Wilks' report he does not specify any advice, action or omission by Turley or Mr O'Donovan which he considers to be advice, action or omission which no reasonably competent planning consultant would have given or made and which is causative of delay. Instead he makes a number of criticisms, which apply no test or the wrong test.

159. Mr Abbott's report states that in his opinion: (i) the fact that the planning application took 14 months to lodge does not mean that there has been negligence; (ii) the Retainer Letter did not state that the application would be lodged by a specific date; (iii) he considers, having reviewed the documentation, that Mr O'Donovan's priority was to meet the (changing) deadline given by RBWM to avoid enforcement action, which he opines was the correct approach; the deadline for submission of a planning application was met and no enforcement action was taken until after the planning application was considered and refused; he does not recognise that Mr O'Donovan demonstrated a 'general lack of a sense of urgency' as stated in the RADC; (iv) the 14 months to lodging of the planning application is not unusual and, in his opinion, is wholly explained by the evidence before the Court.

Submissions

160. Counsel for Turley made the following submissions in opening:

i) Henley's pleaded case frames the Delay Issue entirely in the context of the failure to submit a planning application before the suspension of placements by RBWM and other commissioning health authorities in January 2013;

ii) the suspension of placements was entirely in the discretion of the commissioning authorities who chose to exercise their discretion upon becoming aware that Apple Hill was operating in breach of its planning permission;

iii) the decision to operate Apple Hill in breach of its planning permission was one taken by Dr Irandoust and Henley in July 2011 before Turley was instructed;

iv) there is no causal relationship between the failure to submit a planning application by January 2013 to the Planning department of RBWM and the decision of the commissioning health authorities, including the Adult Health and Social Care Department at RBWM, to impose the

embargo and suspension in January 2013, and no evidence of such a causal relationship has been produced by Henley. The commissioning authorities simply found out about the breach and made a decision not to send new patients to a facility operating in breach of planning permission;

v) Henley's argument appears to be that if Turley had acted faster, Henley would not have suffered the consequences of its own decision to operate Apple Hill in breach of its planning permission. This should be struck out under the rule of *ex turpi causa non oritur actio*;

vi) In addition, a professional negligence claim should not be brought on the basis of hindsight, so looking back and saying "it should have been done quicker" is insufficient;

vii) Even if, contrary to Turley's case, the court was satisfied that it would have been possible for Turley to make the planning application in a shorter period of time and that any delay over this time was entirely the responsibility of Turley, it still follows that any such delay would have made no difference to the outcome, as (a) there is no causal relationship with the embargo and suspension in January 2013 as described in (iv) above; and (b) no enforcement action was taken by RBWM planning until after the planning application was submitted, considered and refused at which point an enforcement notice was issued in August 2013 (which is 'enforcement action' under section 171A of the TCPA 1990). A Planning Contravention Notice is not an enforcement notice, as Mr Wilks conceded. Accordingly whether the planning application was submitted in January or June 2013 this would have made no difference at all to the taking of enforcement action.

161. Accordingly, Turley submits, the Delay Issue must fail.

162. Henley makes very few submissions to counter this line of argument. Counsel for Henley did not directly address it in the manner that Turley did. Henley submits that the commissioning health authorities did know from July 2011 that it was operating in breach of its planning permission, but I have rejected

that submission and found Dr Irandoust's evidence on the point to be untruthful. Counsel for Henley made general submissions about the requirement for Turley to operate with urgency and speed in the context of its awareness that Apple Hill was operating in breach of Condition 18, but did not specifically argue for a causal relationship between the failure to submit a planning application by the beginning of 2013 and the notification by Ms Douglas of RBWM of her discovery of the breach of Condition 18 on 10 January 2013 which triggered the embargo and suspension. I do not criticise him for this. Mr Wilks was specifically asked to address this point and he did so wholly unsatisfactorily, as I have found in my assessment of Mr Wilks' evidence, which left him in a difficult position. Henley concedes that Dr Irandoust's insistence on obtaining advice from leading counsel, which of course he was perfectly entitled to do, was causative of a few weeks of delay. In doing so I note that does not appear to take into account the need to implement the recommendations from leading counsel to the extent Mr O'Donovan in his professional opinion considered appropriate, a point made by Mr Abbott. In response to the *ex turpi causa* point, Henley submits that it was not illegal for it to operate Apple Hill in breach of planning permission, it merely opened it up to the risk of planning enforcement action being taken. I believe Turley concedes that point. If it does not, I accept it.

Decision

163. I accept all of Turley's submissions save that of *ex turpi causa*: (i) is evident on the face of the RADC; (ii) is in my judgment unarguable on the evidence; (iii) is undisputed; (iv) I accept for reasons already given; (v) I do not accept; (vi) I accept as a matter of law (Duchess of Argyle v Beuselink per Coulson J in Elvanite para 179); (vii) I accept as in my judgment Counsel for Turley's reasoning cannot be criticised given my finding in relation to (iv) and the concession in relation to enforcement action made by Mr Wilks which, as a matter of law, in my judgment is properly made. Accordingly I find that the Delay Issue must fail.

The NPPF Issue

164. Paragraph 11(10) of the RADC pleads *"[Turley] failed to have any or any adequate regard to the fact that the policy environment had fundamentally changed since 2008/2009 given the introduction of the NPPF"*.

Evidence

165. Mr Wilks states in his report that there were fundamental policy changes following the adoption of the National Planning Policy Framework. He opines that Turley failed to: articulate the changes sufficiently clearly; emphasise their importance to RBWM's consideration of the planning application; and adequately explain why the saved policies GB1 GB2 and GB8 were out of date. He states *"Mr O'Donovan was aware of these issues but in my view he could have made more of this line of argument"*. Despite having just stated that Mr O'Donovan was aware of the issues he immediately opines that *"Reasonably competent planning consultants would have been aware of the importance of these issues."*. In both iterations, this is the wrong test. He does not say that Mr O'Donovan or Turley dealt with the issues in a way which no reasonably competent planning consultant would have done.

166. Mr Wilks' opinion in his report is that the fact that the NPPF issues were either ignored or not accepted by the planning officers in the pre-application report and the development control panel report in May and July 2013 respectively means that Mr O'Donovan needed to provide a clear demonstration and explanation as to why RBWM's planning policies were now out of date. In his opinion, Mr O'Donovan failed to do that.

167. Mr Abbott in his report disagrees with Henley's pleaded case that the introduction of the NPPF 'fundamentally changed' the policy environment and Mr Wilks' description of the NPPF as causing 'fundamental policy changes'. He opines that there has been no fundamental change in the policy environment in respect of the Green Belt.

168. It is his further opinion that the Planning Statement produced by Turley makes the key point that 'saved' Policies GB1, GB2 and GB8 of the Local Plan were out of date and inconsistent with the NPPF and he disagrees with the

suggestion that this was insufficiently clearly articulated. He points to what he opines are clear and correct statements in the Planning Statement: that the saved policies were out of date, in paragraphs 4.13 and 5.19; that the saved policies were inconsistent with the NPPF in relation to the Green Belt, in paragraphs 4.16 to 4.21 and 5.19; and that the NPPF recognised that buildings could be reused within the Green Belt provided that this did not interfere with openness, in paragraph 1.18. Mr Abbott's opinion is that Mr O'Donovan made the appropriate and correct arguments relating to NPPF with the appropriate force.

169. In the experts' joint statement at paragraphs 2.15 – 2.17 they agree that: *"Mr O'Donovan advised and in his Planning Statement identified the up to date NPPF Green Belt policy position and the 'out of date' Local Plan Green Belt policies. Those Local Plan policies were of limited weight given their out of date status. The experts now agree that a planning application for a change of use was not an inappropriate route to take."*

170. Mr Wilks maintained his position in cross-examination that Mr O'Donovan had accurately described the policy context, identified the saved policies and stated that they were out of date two or three times within the planning statement, but had not provided any analysis and commentary as to why the policies were out of date, namely that they both pre-dated the NPPF and, crucially, were inconsistent with it. He said that following receipt of the pre-application report it was clear that RBWM had not recognised that those policies were inconsistent with the NPPF and did not treat them as out of date and so it was necessary for Mr O'Donovan to explain that clearly in the planning statement. He said in those circumstances it was a planning consultant's role to challenge RBWM's position and demonstrate why they were out of date. Mr O'Donovan had stated that he would demonstrate this in his report and consider the weight to be attached to the out of date policies, but had then failed to do so.

171. Mr Abbott in cross-examination said that Mr O'Donovan could have chosen to explain why each policy was out of date but that he did not criticise him for not doing so. He described it as a matter of presentation. His evidence is that

there are no rules about the content of a planning application so it is up to the planning consultant in the exercise of his judgment to decide what he includes and what he does not. He acknowledged that it was clear in the Pre-Application report that RBWM considered there was consistency between the policies and the NPPF. He conceded that Mr O'Donovan described in his report that he would 'demonstrate' why the saved policies were out of date but did not do so beyond stating that they were. He opined that it was not necessary for Mr O'Donovan to explain the statement further because *"It was an absolute. His view was that they were out of date. If you discuss it, you might shed doubt on that."*

Submissions

172. Turley adopts Mr Abbott's view that there has been no fundamental policy change brought in by the NPPF and relies on the Court of Appeal decision in Secretary of State for Communities and Local Government v Redhill Aerodrome Ltd [2014] EWCA Civ 1386 in which Lord Justice Sullivan at para 23 stated: *"...I do not accept the premise which underlies the Respondent's case, which was accepted by the Judge [at first instance], that the other policies 'wrapping around' the Green Belt policy in paragraphs 87 and 88 of the Framework are 'very different' from previous national policy (see paragraph 24 of the judgment), or that, as the Judge put it, there has been "a considerable policy shift": see paragraph 56 of the judgment."*

173. Counsel for Henley appears to concede in paragraph 46(4) of the skeleton argument that Redhill is authority for the finding that the fundamental nature of green belt policy was not changed by the NPPF, but describes it as *"irrelevant"*. Henley submits that Redhill did not decide that there was no change to green belt policy following the NPPF, as acknowledged in para 16 of the judgment which refers to change to "detailed aspects of Green Belt policy", and submits that Turley has misrepresented this point in the title to the relevant section in Turley's skeleton argument.

174. Counsel for Henley instead focuses its submissions on Mr Wilks' opinion that it was necessary for Mr O'Donovan to go further than he did in his planning

statement. He asks me to prefer Mr Wilks' evidence and find that Turley, through Mr O'Donovan, was negligent in the manner in which it presented its arguments on the NPPF Issue in the planning application.

175. Counsel for Turley says this latter point is a matter of judgment and discretion and it was dealt with within the range of reasonable responses of a reasonably competent planning consultant.

Decision

176. I respectfully reject Henley's submission that whether the fundamental nature of green belt policy was changed by the NPPF or not is irrelevant. This is integral to the pleaded case on the NPPF Issue that Henley has the burden of proving. If there was no such fundamental change, then, in my judgment, the NPPF Issue must fail. Henley's alternative argument about there being no change to green belt policy is a straw man, in my judgment. This is not a point ever argued by Turley and it has nothing to do with the pleaded case.

177. It is important to consider Redhill as a whole when seeking to understand the finding of the Court of Appeal on this point. The context of the Court's consideration is, in my judgment, more clearly understood by looking at paragraphs 22 and 23 together and also paragraph 34:

[22] It is true that the "policy matrix" (see paragraph 54 of the judgment) has changed in that the Framework has, in the words of the Ministerial foreword, replaced "over a thousand pages with around fifty, written simply and clearly." Views may differ as to whether simplicity and clarity have always been achieved, but the policies are certainly shorter. There have been changes to some of the non-Green Belt policies, and there have also been changes to detailed aspects of Green Belt policy, not all of which were identified in the Impact Assessment: see eg. Europa Oil and Gas v Secretary of State for Communities and Local Government [2014] EWCA Civ 825, [2014] JPL 1259.

[23] However, I do not accept the premise which underlies the Respondent's case, which was accepted by the Judge, that the other policies "wrapping

around" the Green Belt policy in paragraphs 87 and 88 of the Framework are "very different" from previous national policy (see paragraph 24 of the judgment), or that, as the Judge put it, there has been "a considerable policy shift": see paragraph 56 of the judgment.

...

[34] There is one respect in which it can fairly be said that there has been a change in policy. The Framework now places a presumption in favour of sustainable development at the heart of national planning policy: see paragraph 14 of the Framework. The Judge mentioned this new presumption in paragraph 47 of her judgment, but it does not assist the Respondent. One of the circumstances in which the policy that permission should be granted where relevant policies in the development plan are out of date (which was conceded by the Second and Third Respondent in respect of some of their development plan policies, see paragraph 12 of the Inspector's decision) does not apply is if "specific policies in this Framework indicate development should be restricted." Footnote 9 gives a number of examples of such policies. Those examples include policies relating to land designated as Green Belt. Thus, far from there being any indication that placing the presumption in favour of sustainable development at the heart of the Framework is intended to effect a change in Green Belt policy, there is a clear statement to the contrary."

178. I am satisfied that the effect of the judgment in Redhill was to find that the NPPF caused no considerable policy shift, and so it caused no fundamental change to the policy environment. It describes a process of clarification and simplification of planning policies, acknowledges some changes to the detail of policy, indicates in para 34 one change in policy of greater significance but makes clear that does not apply to land in the Green Belt.

179. This is enough, in my judgment, for the NPPF Issue to fail. For the purposes of clarity I will go one step further and find that I am also satisfied that the NPPF Issue must also fail as: (i) Henley's expert does not opine that Mr O'Donovan or Turley dealt with the issues in a way which no reasonably competent planning consultant would have done; (ii) It is clear, and agreed

between the experts, that the planning statement identified the relevant policies and stated clearly and unambiguously that they pre-dated the NPPF and were out of date; (iii) I prefer Mr Abbott's opinion that this way of dealing with them was within the range of reasonable responses of a reasonably competent planning consultant; and accordingly (iv) I am satisfied that the regard Mr O'Donovan paid to the NPPF framework in his planning submission was adequate.

The Elderly Issue and the EA/HRA Issue.

Evidence

180. Mrs Shillito's evidence is that her first thought on seeing Condition 18 was that it "*appeared inconsistent with the way in which health and social care services are regulated and potentially incompatible with the Equalities Act 2010 and Human Rights Act 1998*". She considers herself to have expertise in equality and discrimination issues from her work as a regulator at the CQC and the body which preceded it. Her evidence was that she mentioned these thoughts to Mr O'Donovan at the first meeting on 24 January 2013 and he "*seemed disinterested*". Despite raising the subject regularly in January, February, April and May 2013, Mr O'Donovan did not agree they were issues he should address in the planning application.

181. Mr Lucas's evidence is that Mr O'Donovan was not in a professional position to advise on the implications of the Healthcare and Social Care Act in relation to the Elderly Issue, nor on the Equality Act or Human Rights Act in relation to the EA/HRA Issue as legal issues were not within the professional expertise or duty or responsibility of Mr O'Donovan. It was Henley's decision whether to get advice of leading counsel on these matters and it did not.

182. Dr Irandoust's evidence is that from the first meeting with Mrs Shillito Ridouts thought these issues were "*good points and should be explored*" but Mr O'Donovan did not. He described him as "*refusing to accept*" Ridout's advice on discrimination. He agrees that he received the email from Ridouts asking whether leading counsel should be instructed but says: "*It was obviously for Mr O'Donovan as the lead consultant to follow up on this*". His

first witness statement is silent as to the agreement he had with Ridouts to instruct leading counsel at the end of April 2013 and his decision not to put Ridouts in funds to enable that instruction to take place.

183. Mr Wilks in his report opines that Turley recognised as an issue, but failed to challenge, the lawfulness of Condition 18 on the grounds of imprecision in the use of the word 'elderly' and *"therefore did not explore all potential avenues"*. He says that Mr O'Donovan raised the point, received an unsatisfactory response from RBWM and *"for some reason did not pursue the point further"*. He does not opine that a reasonably competent planning consultant has an obligation to explore 'all potential avenues', as submitted by Henley. Nor does he opine that Mr O'Donovan's failure to pursue the point is something that no reasonably competent planning consultant would do. He did say that was not an approach he would have taken. This is not the test.

184. Mr Wilks further opines in his report that: Mr O'Donovan was aware of the *"potential discriminatory impact of Condition 18"* in respect of the Equality Act 2010 and Human Rights Act 1998; he would not expect a town planning consultant to be an expert on these Acts, but Mr O'Donovan was *"dismissive of their relevance"*; he should have indicated he was not qualified to express an opinion and *"specialist legal advice should be sought"*; although Simon Bird QC was asked on two occasions to advise as to the prospects of success and did not raise or recommend these arguments be put forward, *"he is a planning counsel and was not specifically asked"* to opine on those discrimination arguments; Turley should have ensured that Henley sought this advice; it is not surprising Dr Irandoust did not incur the costs of receiving this advice based on the dismissive advice given by Mr O'Donovan.

185. Mr Abbott's opinion on the Elderly Issue and the EA/HRA issue is that Mr O'Donovan was not instructed to nor could he have provided legal advice. Mr O'Donovan was entitled to give his opinion on the relevance of these matters to planning, but it was a matter of discretion and judgment whether he should have advised his client to seek advice from a legal expert on this subject. He points out that leading counsel's opinion was sought on two occasions, and in each case advice on the strategy of the application was sought and given and

these issues were not raised. Henley also had the benefit of Ridouts' advice on this point. Mr O'Donovan did not think the points were worth making and his decision was validated by the planning inspector's conclusions.

186. The experts agree that neither of them is aware of a case where an age-related planning provision such as Condition 18 has been deemed unacceptable as a matter of law; and that the planning inspector stated in her appeal decision that Condition 18 was not unlawful and concluded that *"the meaning of the term 'elderly' is clear as a generality albeit difficulties might arise in practice in deciding whether condition 18 had been infringed. However, potential for such difficulties does not mean that condition 18 is void for uncertainty"*

Submissions

187. Henley submits that Mrs Shillito had legitimately raised valid points relating to the Elderly Issue and the EA/HRA Issue. In respect of the Elderly Issue Mr O'Donovan had raised this with Peter Carey at RBWM and had received an entirely unsatisfactory response which meant that he had a duty to address it further. In respect of the EA/HRA Issues Mr O'Donovan had simply ignored them. That was a breach of duty. Because these issues had been flagged up by someone who was an expert in her field (i.e. Mrs Shillito), it was *"imperative for Mr O'Donovan to put them forward"*. Henley submits that Mr O'Donovan had a duty *"to present all possible arguments"* so that Henley had as many strings to its bow as possible.

188. Paragraph 47 of Henley's skeleton argument sets out its arguments for the relevance of the human rights and equalities arguments under section 149 of the EA 2010 and section 6 of the HRA 1998. Henley submits that these are material considerations which planning decision makers must consider when determining applications for planning permission, and so they were material considerations for RBWM in this case. At paragraph 47(11) Henley submits: *"There is no good reason why those positive arguments in favour of Henley's application were jettisoned entirely given that they were clearly material considerations and were likely to have persuaded [RBWM] to grant planning permission"*.

189. Turley submits that it cannot provide legal advice and is not responsible for formulating legal argument. Legal arguments are outside the scope of the Retainer Letter and its duty of care. Henley was at all relevant times represented by solicitors and counsel.

190. In respect of the Elderly Issue Turley submits that an allegation of professional negligence for failure to take a point in relation to which neither of the two experts are aware of any case in which it has been successful, and which was run on appeal in this case but failed to succeed, cannot be sustained. The court cannot consider in these circumstances that no reasonably competent planning consultant would have failed to take the point in these circumstances, when Mr O'Donovan's decision not to take the point has been proven to be correct.

191. In respect of the EA/HRA Issue, Turley submits that both the human rights and the equalities arguments were run at appeal and played no part in the planning inspector's decision. Again, Turley submits that an allegation of professional negligence for failure to take a point which was run on appeal but failed to succeed, cannot be sustained. It makes the same point in relation to the Elderly Issue.

192. Counsel for Henley say that it is wrong to say that these points failed to succeed because (i) the planning inspector did not reject them; (ii) she just did not deal with them because she did not need to do so, as she held that there was no development and no inappropriate development.

Decision

193. Mr O'Donovan is not a lawyer. Nor is Mrs Shillito. Mr O'Donovan is, however, a planning expert. I accept his evidence that he made a decision not to raise these arguments as they would not, in his opinion, strengthen the planning application.

194. Henley did have the benefit of legal advisors. Dr Irandoust twice required Mr O'Donovan to obtain advice from Simon Bird QC. The advice Mr O'Donovan sought on each occasion specifically instructed counsel to consider whether the correct strategy was being adopted for the planning application. Simon

Bird QC did not advise that arguments relating to the Elderly Issue or EA/HRA Issue should be run.

195. Ridouts were advising Henley and considered the representations made by Mrs Shillito on a number of occasions. They did not advise that the discrimination arguments should be run. They did suggest from early February that a third opinion from leading counsel could be obtained, took the trouble to draft appropriate questions to form part of the brief, and eventually obtained Dr Irandoust's agreement to brief counsel towards the end of April 2013. Johnny Landau of Ridouts spent from 29 April to 14 May asking Dr Irandoust to put him in funds for the legal advice. Dr Irandoust said he would get back to him on 20 May, the day before the deadline for submission of the planning application. No such advice was obtained. That was his choice.

196. There can in my judgment be no criticism of Turley or Mr O'Donovan in these circumstances. Any argument that no reasonable planning consultant would have failed to run those arguments cannot, in my judgment, survive scrutiny of the circumstances. I accept Mr Abbott's evidence on this point. I am satisfied that such arguments could not have been included in the planning statement without legal input, as Mr O'Donovan could not properly advise on the content of legal submissions which fell outside the confines of planning law. I do not know what Mr O'Donovan was meant to do to persuade Dr Irandoust to obtain a further opinion on this point when the combined efforts of Mrs Shillito, who states that she is a discrimination expert and who cannot be accused of a lack of tenacity in seeking to argue these issues, and Mr Landau, who is Henley's solicitor, could not convince Dr Irandoust to spend the money to obtain such an opinion. Dr Irandoust variously says that it was up to Mr O'Donovan to brief counsel, which I do not accept, and then says that he did not brief counsel because Mr O'Donovan felt it would not take them anywhere with the planners. Accordingly, he relied on Mr O'Donovan's professional judgment from a planning perspective. It was Dr Irandoust's choice to prefer the planning expert's opinion to that of the discrimination expert and the legal expert.

197. Events show that Dr Irandoust showed great discrimination in doing so because it appears that Mr O'Donovan was exactly right. The planning inspector agreed with him on the Elderly Issue. The planning inspector agreed with him on the EA/HRA Issue. As Henley itself puts it, she did not deal with the EA/HRA arguments because she did not need to do so, as she held that there was no development and therefore no inappropriate development. That is exactly the point that Mr O'Donovan had been making since the outset of Turley's instruction. I reject the submission that it was imperative for Mr O'Donovan to put forward all possible arguments. Planning is a matter of discretion and judgment. Mr O'Donovan thought that raising these issues would cloud the matter. I accept Mr Abbott's opinion that decision was entirely within the ambit of his professional discretion. There is no evidence that putting forward additional arguments which were not successful at appeal would have increased the prospects of success in the initial planning application and Henley's submission to that effect is impossible to justify, in my judgment.

198. For those reasons I accept Turley's submissions and I am satisfied that the Elderly Issue and the HR/ERA Issue must fail.

The Needs Issue.

199. Mr Wilks in his report opines that Turley's *"poor management and coordination of the planning submission resulted in a failure to make a strong planning case of the unmet need for the proposed use and the benefits this would bring."* He acknowledges that Mr O'Donovan *"was made aware of these benefits"* and they were included within Ms Shillito's report but opines that *"they should have formed a more central part of the planning application submission"*. He does not state that Mr O'Donovan has dealt with the needs case in a way which no reasonably competent planning consultant would do. Instead, once again he applies the incorrect, reversed, test and opines that a reasonably competent planning consultant would draw out all the relevant evidence and benefits of an unmet need for mental health care into the planning submission.

200. In cross-examination it became apparent that Mr Wilks was not criticising the content or quality of Mrs Shillito's report. He accepted that Mrs Shillito was not inexpert or incompetent. He accepted that the planning application submitted by Turley was validated by RBWM and supported by evidence given by appropriately qualified experts. He agreed that a planning committee which considered it would not be acting absurdly or irrationally if they granted the permission sought. He agreed that Turley and Mr O'Donovan were entitled to assume that the report would be read and understood by the committee.

201. However he was unshaken that the planning statement did not adequately draw out the conclusions from Mrs Shillito's report and address the date within it. He said *"It doesn't take the next step – what is the significance and how does it relate to the planning issues the council has identified? You can't leave it to the council to draw conclusions. You need to make the case."*

202. Mr Abbott's opinion is that the Planning Submission covered the issue in a sufficiently robust fashion, presenting the argument as a secondary argument to the primary argument that the change of use was not inappropriate development in the Green Belt. In his opinion Mrs Shillito was appointed by Henley specifically to deal with those issues; they were issues not within the specific expertise of Mr O'Donovan; to the extent that the contents of Mrs Shillito's report can be criticised, those criticisms should be aimed at her and not Turley who is not responsible for the contents of the expert consultants' reports; the extent to which Mr O'Donovan cross-referenced the points made in her report in the planning statement was within the bounds of his discretion and judgment. It cannot be said that no reasonably competent planning consultant would have dealt with it in the same way.

Submissions

203. Henley submits that a planning statement should incorporate the key conclusions of the experts' reports and highlight the relevance of those conclusions to the planning policy and weight to be given to the material planning considerations. It submits that due to the difficult planning history of Apple Hill and the risk of enforcement action a very strong and clear planning

application was required which 'pulled out all the stops'. Mr O'Donovan failed to do so for the reasons Mr Wilks gives.

204. Turley submits that given the concessions Mr Wilks made in cross-examination there is "no basis – or even the shadow of a basis – for a finding of negligence".

Decision

205. This is the only issue in the trial, given my findings on delay, in which consideration of fitness for purpose of the consultants' reports could have been relevant. Given that Henley has not argued at trial that Mrs Shillito's report was not fit for purpose (and any such argument would appear not to be supported by its expert given his stated position in cross-examination), I will not consider the point.

206. This comes down to a difference in opinion between two experts as to the approach taken by Mr O'Donovan in the planning submission. As Mr Wilks does not opine in terms that such an approach is one no reasonably competent planning consultant could make, and as I give greater weight to the opinions of Mr Abbott for the reasons I have already given, in my judgment the Needs Issue must fail.

H. THE CLAIM

207. Turley seeks the payment of four invoices totalling £15,786 for services provided under the Retainer Letter. I have refused to allow Henley to put forward an unpleaded case that the Retainer Letter was a fixed price contract. I have found that the RTPI Code of Conduct, which contains provisions about the charging of fees, is not an implied term of the Retainer Letter.

208. The Retainer Letter predates the coming into effect of the Consumer Rights Act 2015. Accordingly I accept that there is a statutory implied term under section 15 Supply of Goods and Services Act 1982 that, if not expressly provided for in a contract, the fees charged will be reasonable. What is reasonable is a question of fact.

209. Time sheets relating to the fees billed are in evidence. Henley has not challenged them on the grounds of reasonableness. Nor has it challenged the reasonableness of the hourly rates at which the time has been charged. Nor does it seek to argue that the work was not carried out at all. Henley has paid all previous invoices without demur or complaint as to the fees charged. It makes no claim for restitution of fees already paid.

210. Accordingly I am satisfied on the evidence that the fees charged are reasonable for the services provided.

I. DECISION

211. For the reasons I have given, I give judgment for Turley on the Claim and dismiss the counterclaim.