Case No: HT-2023-NCL-000003
Neutral citation: [2022] EWHC 3679 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS AT NEWCASTLE

BUSINESS LIST (ChD)

The Moot Hall, Castlegarth,

Newcastle upon Tyne, NE1 1RQ

Date: 05/10/2022

Before:

HIS HONOUR JUDGE KRAMER
(Sitting as a Judge of the High Court)
- -

Between:

PHILIP MORRIS

Claimant

- and -

(1) KNIGHTS PROFESSIONAL SERVICES LIMITED
(2) KNIGHTS SOLICITORS LLP
(3) KNIGHTS & SONS
(4) WILSON HORNE

Defendants

- -

- -

MR ANDREW BUTLER KC (instructed by **MORRIS LAW**) for the **Claimant**

MR BENJAMIN WOOD (instructed by **Reynolds, Porter Chamberlain LLP**) for the **First to Third Defendants**

- -

JUDGMENT

- -

Before HH Judge Kramer sitting as a judge of the High Court on 25 and 26 July with further written submissions on 27 and 28 July.

Judgment

1. This judgment deals with the application by the first to third defendants, dated 16 September 2021, for summary judgment or to strike out the claim against them and a reverse application for summary judgment and application to re-amend the Particulars of Claim by the claimant, dated 28 February 2022.
2. The third defendant argues that it is entitled to summary judgment as the claim against it is time barred. The first and second defendants claim that the claim against them should be struck out as the pleaded case is incoherent and cannot be saved by amendments proposed by the claimant. Further, the first to third defendants seek an order striking out the claim on the basis that it has been warehoused and constitutes an abuse of process as a result or because the claimant was in breach of a consent order of 25 January 2021 relating to the provision of further information and documents.
3. The claimant seeks an order for summary judgment on the claim against the third defendant on the basis that there is no sustainable limitation defence and no other grounds for contesting liability have been advanced. He also seeks permission to re-amend the Particulars of Claim to add to his particulars of negligence.

4. The claimant is represented by Andrew Butler KC and the defendants by Benjamin Wood, of counsel. The fourth defendant has not appeared and takes no part in the applications save that his solicitor, Mr Preece, has provided a statement in which he says that if the court concludes that the claim should be struck out for warehousing, that must also apply to the claim against his client and, in consequence, it should suffer the same fate.

Background facts

5. The evidence in this case is taken from the documents in the application bundle, which include the statements of Tamsin Hyland, the solicitor to the first to third defendant, James Preece (of Clyde & Co, the solicitor for the fourth defendant), and the position statement of David Morris, the claimant's solicitor, who is also his nephew; in order to avoid confusion I shall refer to the claimant as Mr Morris and his solicitor as Mr D Morris. Two further statements from Mr Morris and Mr D Morris were put into evidence shortly before the hearing. I heard argument as to whether these should be admitted. I ruled that they should and gave a judgment on that matter at the time of the ruling. The first to third defendants wish it to be recorded that they do not necessarily agree that which is in the claimant's statements but accept that for the purposes of the applications before me they can be treated as setting out the factual background save where the evidence is obviously improbable, such as where it is contradicted by a contemporaneous document.

6. The claimant, together with his business partner Christine Smith, were the directors and shareholders of Glenpath Holdings Limited, which through its subsidiary, Autism North Limited, operated long term homes for people with autism. The third defendant was a firm of solicitors. On 1 April 2008 the third defendant's practice was transferred to Knights LLP, the second defendant. The practice of that firm was transferred to Knights Professional Services Ltd, the first defendant, as from 2 May 2015.

7. The third defendant acted on behalf of the claimant and his partner in the sale of the company, Glenpath. Adrian Rushton, a commercial associate of that defendant, dealt with the transaction, in the course of which he drafted the sale and purchase agreement (SPA). On 9 November 2006, utilising the agreement drafted by Mr Rushton, the company was sold to Swanton Care & Community Ltd for an initial consideration of £16,077,842, subject to certain adjustments, and a deferred consideration under an earn-out provision which was stated to provide the claimant

with an option to continue to provide services to the purchaser for an "Earn-Out Consideration", calculated in accordance with the terms of the SPA. The option appears in Schedule 5 of the SPA, the relevant term of which provided:

"1.1 Mr Morris shall have the option for a period of 4 years from Completion and following such period such further period as shall reasonably be agreed between Mr Morris and the Buyer to provide the following services…"

The services to be provided can be summarised as finding up to seven new properties to be used as homes, overseeing their development and filling the places made available.

8. Just over £4 million was paid to Mr Morris under the earn out in the 4 year period. On 7 October 2010 Mr Morris asked for an extension of the period. On 27 October 2010 the buyer refused. According to the claimant and his solicitor, this refusal caused him to discuss the matter with Mr Rushton, who by then had become a good friend. He was put in touch with Andrew Davidson, a litigation partner at, what by then had become, Knights LLP. The date of these discussions is not apparent from the statements, but it is said that their response was that the option was mandatory and the refusal placed the buyer in breach of contract.

9. Subsequently, Mr Davidson and Mr Rushton stayed with the claimant when visiting Newcastle. They again discussed the buyer's refusal. The claimant says that Mr Davidson expressed confidence that he had a good claim for breach of contract. After some further deliberation, the claimant instructed Knights LLP to act for him in a claim against the buyer. The client care letter is dated 24 July 2013.

10. I will look in more detail at the chronology post the letter of instruction when considering the third defendant's arguments as to date of knowledge. For now, it is sufficient to record that, on 17 December 2013, the second defendant instructed the fourth defendant, a barrister, to advise in relation to the claim against the buyer, and advice was given to the claimant in a conference on 14 January 2014. On 6 March 2015, the claimant issued proceedings against the buyer seeking damages for breach of contract, valuing the claim at about £1.7 million. The first defendant took over the running of the claim as the successor practice to the second defendant on 2 May 2015.

11. The trial, at which the first and fourth defendants represented the claimant, was heard by HH Judge Bird between 12 and 16 December

2016. He handed down judgment on 24 March 2017. The claimant lost. The court decided that the term as to the extension of the option period, on its proper construction, was an unenforceable agreement to agree. In his conclusions, HH Judge Bird said:

"The agreement to agree set out in the contract is unenforceable. This is clear from the words of the contract and has the added benefit of according with common sense."

12. Morris & Co replaced the first defendant as solicitors for the claimant on 14 April 2017. There was an appeal, using different counsel, Alain Choo-Choy QC. This was heard on 28 June 2018. In a judgment handed down on 11 December 2018, the Court of Appeal upheld the decision of HH Judge Bird.

13. The claim form in the current claim was issued by the County Court Money Claims Centre on 4 November 2019, though it was delivered to the court on 25 October 2019, the earlier date being the relevant one for limitation purposes; see *Helens MBC v Barnes* [2006] EWCA Civ 1372.

<u>The application to strike out for warehousing and/or a failure to comply with a court order.</u>

14. I shall deal with this application first as, dependent on the decision, it may make my decision on all the other applications academic.

15. The power which the defendants ask me to exercise is that under CPR 3.4 which provides, in so far as relevant:

"(2) The court may strike out a statement of case if it appears to the court-

(a)…

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

16. In order to follow the argument, it is necessary to set out the chronology which preceded this application. The claimant's current solicitors first

wrote to Knights on 5 April 2017 asking for the file of papers for the sale of the company and the litigation file. They referred to an opportunity to seek permission to appeal but went on to ask Knights to put their insurers on notice of a potential claim in relation to the drafting of the earn out agreement and the conduct of the litigation. They made it clear that this was not a letter of claim. The letter pre-dated the dismissal of the appeal on 11 December 2018. Knights replied on 6 April 2017 asking for clarification of the claimant's grievance. They sent electronic copies of the litigation file on 24 April 2017 though it later transpired that this was incomplete as regards the provision of attendance notes with Mr Morris and with counsel; a note of attendance with counsel of 14 January 2014 was provided, but several attendance notes of meetings with Mr Morris and also with counsel were missing and not provided until 16 March 2022. These evidenced the strength of the advice received by the claimant and his own observations on the claim.

17. The claim form in these proceedings was issued by the County Court Money Claims Centre on 4 November 2019. The Claim Form, together with a Particulars of Claim, was served on 3 March 2020. On 13 March 2020, a Deputy District Judge at the Centre made an order staying the claim until 4 June 2020 to enable the parties to comply with the pre-action protocol for professional negligence; the claimant's application to stay was made without notice.

18. There was a further order made by consent of all parties. The order appears to have been finalised by the parties on 8 June 2020 but was not issued until 29 December 2020. The order provides, insofar as it is material:

    "1. The Claimant to serve a fully particularised Letter of Claim on the Defendants by 25 June 2020.

    2. The matter is stayed for a further period of 6 months until 04/12/2020 to enable the parties to comply with the Pre Action Protocol for Professional Negligence Claims."

19. The claimant sent letters of claim to the first three defendants and to the fourth defendant on 24 and 25 June 2020 respectively. RPC, solicitors for the first three defendants, wrote to the claimant's solicitor on 15 July 2020, asking for key documents, under the pre-action protocol, and his case on date of knowledge. Chasing emails were sent on 3 and 23 September. Mr D Morris, responded on 13 October 2020 apologising for

the delay, explaining that he was out of the office due to local lock down restrictions and would send a substantive response that week.

20. After further chasing correspondence from RPC on 23 October and 11 November, Mr D Morris replied, on 31 December 2020, that the date of knowledge started with HHJ Bird's judgment. He said that Knights had the key documents as they drafted the SPA and conducted the litigation. He also said that he had applied to amend the Particulars of Claim to correct typographical errors. He said that the fourth defendant had asked for copies of any documents in which Knights had advised on the merits of the action. He indicated that he did not wish to misrepresent matters to the fourth defendant but the electronic file he had been sent was difficult to follow. He asked if he could send copies of emails from Knights to his client. RPC's response, on 7 January 2021, was that it was up to the claimant what he disclosed to the fourth defendant. They criticised Mr D Morris for failing to provide a copy of the judgment of the Court of Appeal in the claim against the buyer, notwithstanding that it was available on BAILII, and complained that, by way of example, they could not answer the allegations that their defendants had failed to identify or advise on a conflict of interest without details as to how the conflict is said to have arisen and how it was said the advice on the litigation fell below the standard of the reasonably competent lawyer.

21. On 22 January 2021 Mr Preece, for the fourth defendant, emailed Mr D Morris to say he had discussed the case with RPC and they thought it sensible to seek a further 6 month stay. He said that he was awaiting documents from the claimant, but even if they were received, there would not be sufficient time to prepare defences. RPC also emailed the claimant's solicitor requesting agreement to the consent order, including the stay. Mr D Morris agreed to the order. He wrote to RPC on 25 January repeating that he had been asked by the fourth defendant for a copy of all advice given by Knights and that he did not want to misrepresent their defendants' position and requesting from them copies of all emails/letter/telephone attendances and physical attendances, limited to advice on the claim. The parties agreed to a further consent order on 25 January 2021. This gave the claimant permission to amend the Particulars of Claim. It also stayed the claim to 25 July 2021 and included the following paragraph:

"3.The Claimant provide clarification of the claim and documents requested by the Defendants by no later than 22 February 2021."

Mr Wood says that the claimant is in breach of this provision in the order.

22. On 27 January 2021 RPC wrote to Mr D Morris responding to his email of 25 January. They said they had already dealt with his request for documents in saying that it was up to him what he disclosed to the fourth defendant. They said they were waiting for a substantive response to their letter of 7 January, their letter of 15 July 2020 and a copy of the judgment of the Court of Appeal. They added that they could not provide their client's letter of response until they had this information. In fact, they had received a substantive response to the request for the case on limitation and for documents on 31 December 2020, albeit they did not accept that this was adequate.

23. On 28 March 2021, Mr D Morris sent Clyde & Co the one attendance note he had of the advice given by the fourth defendant. On 17 May 2021 RPC wrote to Mr D Morris complaining that without the information they had requested they could not produce a letter of response and stated that he had done nothing to advance the claim since issue. They wrote again on 27 July 2021 pointing out they had not received a reply. They complained of warehousing and identified what, they said, were deficiencies with the claim. Mr D Morris responded by email on 10 August 2021 to RPC and Clyde & Co, where he set out, in bullet points, his arguments on limitation and, to a limited extent, negligence, both as to the drafting of the SPA and the advice received as to the merits of the litigation. By a separate email the same day to all defendants, he indicated that there had been a letter of claim which set out detailed examples of negligence. The claim had been stayed to comply with the Protocol and to enable the defendants to investigate and there were further stays to explore settlement and ADR. He said that the claim had not been warehoused and would not be discontinued.

24. There was further correspondence between Mr D Morris and Clyde & Co in which the latter were saying that they could not respond to the claim without more documents and the former was saying that enough information had been supplied for the fourth defendant to respond. He did, however, say that he would provide a core bundle of documents after the August 2021 bank holiday. In the event, he sent to the fourth

defendant and other defendants on 7 and 15 October 2021, respectively, a large bundle of documents, made up of an indexed version of the first three defendants' files. By then, however, the first three defendants had issued their application to strike out of 16 September 2021.

25. Mr D Morris has sought to explain some of the delay in his second statement. He says that the files originally provided by Knights, for the purposes of pursuing the appeal, on 24 April 2017 were extremely disorderly. He said that they comprised a thousand individual pdfs in no logical sequence and that it was incomplete, in that it only contained the one note relating to a conference with counsel. The claimant had no relevant documents which Knights did not also have, which is the point he was making in response to the request for key documents. On 16 March 2022, RPC sent him a schedule listing 125 documents, which included attendance notes that had not previously been provided and 3 further records of conferences with counsel, together with 27 documents withheld on the grounds of privilege. Mr D Morris said that it was difficult to extract information due to shortcomings with the schedule and the identification of documents. These deficiencies resulted in him having to open and print off 89 pdf files and re-order the documents into 2 lever arch files. He did not explain why he had not replied to correspondence.

The law to which I have been referred

26. On the issue of strike out for failure to comply with the order of 25 January 2021 Mr Butler has referred me to *Candy v Holyoake* [2017] EWHC 373. Mr Wood has not referred me to any authority where such a severe penalty has been visited on a defaulting party on first complaint. In *Candy,* Warby J refused to strike out for non-disclosure. At paragraph 14 of the judgment he summarised his reasons. These included:

    a. Striking out is the ultimate sanction appropriate for only the most serious cases as it involves the deprivation of the Convention right to a fair trial.

    b. The defendant's defaults had not made a fair trial impossible.

    c. The claimant had other ways to enforce compliance by the defendant, short of striking out.

27. On the issue of warehousing, Mr Wood referred me to *Alfozan v Quastel Midgen LLP* [2022] EWHC 66 (Comm), a decision of HH Judge Pearce siting a judge of the High Court, in which he drew upon previous authorities to formulate various propositions governing a decision to

strike out for warehousing. From that judgment, and the preceding authorities to which HH Judge Pearce referred, the following principles may be stated:

a. "the courts exist to enable parties to have their disputes resolved" *Grovit v Doctor* [1997] 1 WLR 640 per Lord Wolf at p.647G-H.

b. Commencing litigation with no intention of bringing matters to a conclusion can amount to an abuse of process as this is a use of the court which runs counter to its purpose; *Alfozan* at [9].

c. A party may also be guilty of warehousing if, having commenced proceedings, instead of pursuing them in accordance with the rules they seek to do so at their convenience; *Arbuthnot Latham v Trafalgar* [1998] 1 WLR 1426, see per Lord Woolf at 1437C and *Asturion v Alibrahim* [2020] 1 WLR 1627 per Arnold LJ at [49].

d. "…it is well established that mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process": see *Icebird Ltd v Winegardner* [2009] UKPC 24 at [7] (Lord Scott of Foscote delivering the judgment of the Privy Council); *Asturion* per Arnold LJ at [47]

e. Warehousing may, but will not automatically, be an abuse of process. "It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question." *Asturion* per Arnold LJ at [61].

f. "Establishing whether the conduct is an abuse involves examining the state of mind of the Claimant." *Alfozan* per HH Judge Pearce at [15].

g. Long delay in the progress of the claim without explanation can lead to the inference that the claim has been warehoused; *Alfozan* per HH Judge Pearce at [49].

h. If the warehousing is found to be an abuse the court will not always strike out the claim, though it frequently will; *Asturion v Alibrahim* [2020] 1 WLR 1627 per Arnold LJ at [50].

i. There is a two stage test. The court should first determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim.

j. When the court is looking at the second stage of the analysis it must ask whether striking out is a proportionate sanction, taking into account that it has other powers of case management and should only be invoked where those powers appear insufficient to progress the claim. Where,

however, the court is satisfied that the claimant has no intention of progressing the litigation, neither considerations of proportionality nor the availability of less draconian powers are necessarily a bar to striking out the claim. *Alfozan* at [16].

k. The court must take into account that the other parties are under an obligation to progress the litigation, not only the claimant. This is a matter to consider at the second stage of the test, not the first: *Alfozan* at [18]

28. Mr Wood, taking his lead from the procedural facts of *Alfozan,* says that the chronology of this case evidences that the claim has been warehoused. He points to:

a. The lack of pre-action correspondence, save for the letter of 5 April 2017 asking for the files and asking Knights to put their insurers on notice of claims in relation to both the drafting of the SPA and the conduct of the litigation.

b. The Pre-Action Protocol for professional negligence claims was not followed prior to the issue of proceedings, which were themselves issued in November 2019.

c. The defendants first had notice of the issue of the claim when served on 3 March 2020, at the very end of the period of validity of the claim form- and as regards the third defendant was towards the end of the extended period of limitation upon which the claimant relies.

d. The claimant applied without notice for the claim to be stayed for 3 months, to 4 June 2020.

e. No meaningful progress was made during the 3-month stay because the letter of claim was not sent until 24 June 2020.

f. On 15 July 2020 the defendants asked how the case as to limitation was put and key documents were requested. There were chasers sent on 3 and 23 September 2020 but there was no response until 13 October 2020. The response promised a substantive response but that was not provided until 31 December 2020, following chasers on 22 October, 11 November and 25 November. The response signalled that the claimant was seeking further permission to amend the Particulars of Claim.

g. On 27 January 2021 RPC wrote to Mr D Morris saying they had yet to receive a response to their requests. The failure to provide

this had put Mr Morris in breach of the order of 25 January 2021 and is worthy of a strike out on its own.

h. RPC having indicated on 17 May 2021 there would be no further stay and on 27 July 2021 that there were deficiencies in the Particulars of Claim, Mr D Morris responded on 10 August 2021 with his bullet point explanation of the case on limitation and said he was compiling a bundle of documents. He rejected criticism of the Particulars of Claim.

i. Mr D Morris has not sought to explain why he has not replied to correspondence or why he left it till 22 June 2022 to apply to re-amend his Particulars of Claim.

29. Mr Wood argues that this is a case in which the discretion to strike out should be exercised. He relies upon:

a. This being a claim for professional negligence against solicitors, it is serious as it can cause reputational damage.

b. The allegations are old, relating to retainers dating from 2006, 2013 and 2015.

c. The claimant has not been timeous in seeking consent to amend, or in applying to amend, the Particulars of Claim, nor has he made proposals to pay the solicitor defendants' costs of amendment.

d. The proposed Re-amended Particulars of Claim is either fatally flawed or requires further case management to make it tenable and looks to have been put together in haste to meet the immediate need to put a document before the court.

e. Drawing on words in the judgment in *Alfozan* Mr Wood repeats what was said by HH Judge Pearce, where he said: *"The picture is of almost complete inactivity by the Claimant beyond the basics of issuing and serving the claim."* [36] and *"This history cries out for some explanation if the court is not to infer from it that the Claimant issued this case with no real intention of pursuing it."*[41]. At this point in the judgment, however, the judge was considering the inference of warehousing. The same criticisms, and others, did lead him to conclude that the claimant would not conduct the litigation correctly even if a lesser order than striking out were imposed.

30. Mr Butler deals with the free-standing complaint concerning the breach of the order of 25 January 2021 in a number of ways. Firstly, he points out that the terms of the order lacked precision and that the defendants did not need the clarification and documents sought in order to respond to

straightforward claims which had been fully particularised in the letters of claim.

31. Secondly, accepting that there was non-compliance he says there is mitigation as to the consequence of the claimant's failure in that the documents requested had come from the solicitor defendants and the fourth defendant had the attendance note of the 14 January 2014 conference by 23 March 2021. He should have been able to provide a response to the complaint as it is evident from the note that he gave very optimistic advice on the construction point which, that is to say the claimant's case on that issue, it was held neither accorded with the wording nor common sense. Furthermore, he relies upon the fact that an 803-page bundle of documents was sent to the defendants in October 2021.

32. Thirdly, he says I should adopt the reasoning in *Candy*. The ultimate sanction of strike out is disproportionate. The defendants had another remedy if they really needed the further information and documents, by way of a peremptory order which, following his reasoning, would have had to have been cast in much more precise terms. The defaults do not make a fair trial impossible and this is not a case where there has been a deliberate concealing of documents. All the documents had come from the first three defendants and, insofar as any party did not have highly relevant documents, it was the claimant and fourth defendant who the other defendants kept waiting by withholding highly material records of conferences and advice.

33. In response to the charge of warehousing, Mr Butler says that Mr Morris has no motive to bring a claim which he has no intention of pursuing in either at all or for some time. He has lost a lot of money as a result of an ineptly drafted contract and blindly positive advice as to the merits of his claim under the SPA. Furthermore, at the time of the 6 April 2017 preliminary notice to alert insurers, Mr D Morris had instructions to pursue an appeal against HH Judge Bird, as appears from his statement. It may be inferred, though it does not appear in terms in the evidence, that he was yet to receive instructions to pursue Knights. The proceedings were sent to the court 10 months after the adverse decision of the Court of Appeal. Up to that decision he hoped to succeed under the claim under the SPA. Had he done so, it follows that there would have been no need to bring the present proceedings.

34. Mr Butler submits that, although the first stay was obtained without reference to the other parties, it was inevitable their consent would have been forthcoming, as they consented to a further 6 month stay to follow the original 3 month one. To say that the claimant did nothing to progress

proceedings is a mischaracterisation as he sent detailed letters of claim to all parties in June 2020. Whilst he does not quite put it in these terms, in essence he is saying that the solicitor defendants' requests for clarification and key documents were humbug in that the letter of claim was sufficient to let them know the claim they were being asked to meet and they had all the documents and, importantly, most of key documents the claimant would wish to rely upon in the claim against the second and third defendants, i.e. those evidencing the advice he received, were in the possession of those defendants but had not been disclosed to him. He says that it is the defendants who have been seeking stays under the pretext that they are needed to respond to the letters of claim and to prepare a defence. Thus, to suggest that it is the claimant who has demonstrated an intention not to pursue the claim is wildly off the mark.

35. Mr Butler refers to Mr D Morris's difficulty in handling the files send by the solicitor defendants in 2017 and the continuing difficulty they caused with the lack of organisation of the March 2022 disclosure. He points to Mr D Morris's explanation that he was not able to work from his office during lockdown. He also points out that there were repeated requests for a copy of the Court of Appeal judgment as an example of calling for documents unnecessarily and using this as an excuse for foot dragging. Any of the defendants could have obtained a copy from Bailii.

Discussion and conclusion

The application to strike out for breach of the order of 25 January 2021

36. There should have been compliance with the order by 22 February 2021. The claimant accepts that he is in breach and Mr Butler apologised on his behalf. I am not going to strike out for these reasons. The claimant says that he has since given as much disclosure as he is able. This is not a case in which he was seeking to withhold information from the first to third defendants as, on the evidence, he only had copies of documents held by those defendants. The breach of the order did not create the risk that there would not be a fair trial. The order was not a peremptory one. It would not be proportionate to deprive the claimant of his convention right to access to the court to determine his dispute and a fair trial when the court has powers short of striking out to enforce compliance with the order. The solicitor defendants have sufficient information to investigate the claim; indeed, in my view, they had such information at the time the order was made, a matter I shall deal with when considering warehousing. Even if it was necessary to make some order at this stage to enforce compliance, it would need to be in very much more defined terms than the January 2021 order so that it was sufficiently clear what the

claimant was required to do so that the court could judge whether he had fallen short.

The application to strike out for warehousing

37. I start with some preliminary observations.

38. I have difficulty in accepting that waiting to the end of a limitation period to issue proceedings or serving the originating process just prior to the expiry of its validity, delays which are sanctioned by the law and rules, is, of itself, evidence of warehousing. I have similar difficulty in treating the failure to serve a pre-action protocol letter before issue as evidence of an intention to warehouse, certainly in a case where limitation is coming to an end; paragraph 4.1 of the protocol recognises that this may be necessary.

39. I note from *Alfozan* that in both the application by the first defendant, dealt with by Julia Dias QC, sitting as a judge of the High Court, and that of the Second Defendant, dealt with in the reported judgment of HH Judge Pearce, these were factors upon which reliance was placed. I am struck, however, that when the Court of Appeal refused permission in the first defendant's case, Males LJ said:

"1. There was ample reason for the judge to conclude that the claimant did not have a genuine intention to progress this claim and that it therefore constituted an abuse. The failure to take any steps once the proceedings had been served while giving no explanation for this course speaks for itself."

40. I was not told whether permission was given to rely upon a decision to refuse permission to appeal, but it was clearly relied upon in *Alfozan*. What is significant about what Males LJ said is that what 'spoke for itself' was the failure to take steps after proceedings had been served. That focus is consistent with the concept that a misuse of the court's mechanism, by bringing proceedings which the claimant does not intend to see through, or seeks to pursue at their leisure, is an abuse of process. Failures to act prior to the engagement of that mechanism cannot be, by definition, an abuse. I accept, however, that pre action conduct may betray a lack of commitment to a claim which can inform the court as to the whether the post service behaviour was intended to warehouse the claim.

41. Whilst there are similarities with *Alfozan* as regards the delays, the failure to provide documents and the production of defective pleadings, as well as the pre-service failings and delays upon which I have commented, there are also differences. For example, contrary to the solicitor defendants' contention, the June 2020 letters of claim set out the

claimant's case in a form consistent with paragraph 6.2 of the Pre Action Protocol for Professional Negligence. I do not accept Mr Wood's assertion, or that of Ms Hyland, that the defendants could not know the case they had to meet or that they had insufficient information to respond, save for the issue of documents to which I will come. The letter is there to be read and I don't propose to repeat its contents. In essence it told the third defendant that the negligence was in drafting an earn out agreement that was unenforceable. I agree with Mr Butler that if a solicitor is asked to draft an agreement to achieve a particular end but due to the drafting it fails to do so, that calls for an explanation. There is no question in this case that the solicitor was trying to draft an unenforceable agreement as Mr Rushton's response to the buyer's refusal to extend the option was that this was mandatory. The letter of claim also sets out the loss suffered due to the inability to enforce the contract. It also explains the way in which the case is put on limitation.

42. As against the first and second defendants the letter identifies that he had been led by them into pursuing a very weak case in reliance on the advice of the second and fourth defendant that he had a very strong case and that he should have been advised by the first, second and fourth defendants on the true merits, what the letter calls *"realistic advice"*. This is allied with an allegation that they were not aware of the leading authorities upon which the case depended. Whether or not they were negligent in coming to the conclusion they did as to the strength of the claim will depend upon the reasoning behind their advice, as to which, on the current evidence, only they know. There is also the allegation that he should have been warned that there was a conflict of interest and he should have been advised to protect his position as against the third defendant. Had he been properly advised, the claimant says he would not have spent money litigating and would have protected his position against the third defendant. He set out his losses as a result of pursuing the litigation.

43. I detect in the solicitor defendants' requests for more detail of the claim an unwillingness to recognise that they had sufficient information to respond. I take two examples. I have taken these examples as they are examples upon which RPC placed reliance in correspondence.

44. In a letter of 27 July 2021 Ms Hyland criticised the claimant's pleading. As regards the complaint that the earn -out extension was unenforceable she said: "*You have not particularised which part of the earn out clause you take issue with, what it should have said and why, in preparing the clause in the manner they did, our client failed to reflect your client's instructions and/or otherwise discharge their duty of care."* I do not accept that the third defendant could not understand what part of the earn out clause was the subject of complaint. It was self-evidently the part

which was the subject of the litigation over the SPA and which was found to be unenforceable. At paragraph 116, below, I deal with the point as to whether the claimant has to devise his own wording to make out his claim. As to how it failed to reflect instructions, it is specifically pleaded at paragraph 4 of the Amended Particulars of Claim that the agreement between the claimant and the buyer was that there was to be an option of a mandatory extension of time and that this was known to the third defendant who drafted the agreement. So that defendant knew what it was supposed to produce but adopted a formula of words which fell short of that end.

45. The second example is taken from a letter from Ms Murley, Ms Hyland's predecessor at RPC. On 7 January 2021 she said: *"You say that our client failed to identify and/or advise your client on the potential conflict of interest…yet you have not identified in what circumstances a conflict of interest arose."* Mr Wood argues that there is a doubt as to whether there could be a conflict of interest as, though these are successor practices, they are separate entities. Accordingly, once Mr Rushton's employment passed from the third defendant to the second and then first defendant, a risk of a conflict of interest evaporated. The fact that Mr Davidson who was managing the litigation had a connection with Mr Rushton in all firms, and it was the latter who had referred him to former, he treats as irrelevant. That was not the approach of the Court of Appeal in *Gosden v Halliwell Landau* [2020] EWCA Civ 42 where notwithstanding that Mr Laidlow, the allegedly negligent solicitor, had moved from Halliwell to Gately PLC both he and Gately were obliged to advise of the conflict; see *Gosden* per Patten LJ at [60]. What I take out of this is that the conflict in this case was obvious and did not need further elaboration unless the defendants sought to deploy an argument along the lines pursued during the application by Mr Wood.

46. My final general observations relate to the claimant's solicitor. In the face of evidence of delays in responding to correspondence, Mr D Morris has provided no explanation save to say that the files he received in 2017 were difficult to process. That is neither an acceptable explanation, given the period over which he possessed the files, nor is it an excuse for ignoring correspondence. I recognise, however, that I am concerned to draw inferences as to the claimant's reasons for not proceedings with the claim more swiftly. Albeit that the claimant acts through his solicitor, the drawing of such inferences can be clouded by concerns as to the competence of the solicitor conducting the case. There are indications that Mr D Morris was out of his depth.

47. First, he ignored the questions of the provision of documents when dealing with the protocol letter. Had he considered, as he later did, that he

did not need to provide documents as these were all in the solicitor defendants' control, he should have said so in his protocol letter. Second, he did not appreciate that the files he received were incomplete and the key documents had been withheld; in a case of this sort the first documents you would look for would be attendance notes recording advice to your client. Third, when asked for documents by the fourth defendant he thought it necessary to ask the other defendants if he could disclose emails from Knights to his clients. As RPC correctly observed, in their letter of 7 January 2021, it was up to him what he disclosed to the other defendant, though it is noteworthy that despite their constant request for key documents they did not ask for copies of these emails to be sent to them. Fourth, he agreed to the order of 25 January 2021 in terms which left the question of compliance open to a great deal of interpretation, particularly as it had been preceded by two very different requests for information. Fifth, the Particulars of Claim, even in its re-amended form contains seemingly irrelevant allegations, albeit the essential thrust of the claim is clear. Sixth, he does not seem to appreciate the conflict of interest between himself and his client in the striking out application, possibly complicated by family loyalty, in that his inaction may lead to the inference that the claimant has been warehousing even if that had not been his intention. This is different from the situation which used to arise on an application to strike out for want of prosecution, for there the intention of the claimant was rarely relevant. Here is it central. One would expect to see a statement from the claimant explaining his case as to the absence of an intention to warehouse and on the issue of date of knowledge, since this also featured in the application for summary judgment, Instead, Mr D Morris's first attempt to answer the application was to file a position statement which ignored his failures to reply to correspondence and sought to deal with limitation by providing his understanding of the claimant's state of mind. His second statement dealing with abuse of process also ignored his lack of response to correspondence and apparent inactivity. I am also struck that although Mr D Morris, at the second bite, produced a statement from his client setting out his case on date of knowledge, Mr Morris dealt with the warehousing allegation with no more than the bald statement that it was not his intention to delay proceedings.

48. All that said, I start by asking why this case has not proceeded in a timely fashion. There are three immediate reasons. The first is that the defendants have not served defences. Had this been done, the parties would have been sent directions questionnaires and the court's case management regime would have swung into action. Second, the case was issued in the County Court Money Claims Centre where, on this

occasion, a relaxed approach seems to have been taken to successive stays and there was no active case management. Third, the defendants requested the stay of proceedings pending receipt of documents and further particulars of the claim. The underlying reason is that the solicitor defendants asked for further detail as to the case on limitation, subsequently asked for further information and evidence in support of some of the allegations of negligence (the RPC letter of 7 January 2021) and also asked for key documents and professed that until these requirements were answered, they could not even respond to the letter of claim, let alone serve a defence.

49. It took Mr D Morris 7 months to provide a substantive reply to this request, i.e. one that stated more than that he would respond in due course, despite several reminders from both RPC and Clyde & Co. It is apparent from the correspondence that he had put forward personal circumstances for the delay, at one stage stating illness, at another, the fact he could not access his office due to lockdown. He did, however, appear to set out his stall on 31 December 2020, namely that the solicitor defendants had all the documents as they drafted the SPA and conducted the litigation, and that knowledge started with the judgment of HH Judge Bird, thereby re-iterating what was said in the letter of claim.

50. Mr D Morris's response was followed by RPC's letter of 7 January 2021, requesting a response in 7 days, which substantially expanded the request for information about the allegations and made the point that it was for the claimant to provide key documents as the burden was on the claimant to prove his case, it did not rest on the defendants to prove theirs. Mr D Morris did not reply to that letter.

51. The order of 25 January 2021 came about because Clyde & Co asked Mr D Morris for a stay of 3 months as they were still waiting for the documents they had requested from him in August 2020. RPC sent a draft signed consent order to Mr D Morris on 25 January 2021, asking if it was agreed. He replied that it was on the proviso that it was made subject to the parties agreeing to mediate following the response to the letter of claim but that if any party refused, the claimant reserved the right to ask the court to lift the stay. He also asked for copies of all documents containing advice to his client. RPC replied on 27 January 2021 but ignored the request for documents, which subsequent events show the solicitor defendants had, according to Ms Hyland's letter of 16 March 2022, withheld after a review of RPC's electronic files before passing on their files in April 2017; he letter apologised for the omission which she described as *"an inadvertent error."*

52. In relation to the fourth defendant there was some activity from the claimant's side as the only attendance note of his advice which had been disclosed by the other defendants, that of 14 January 2014, was sent to him together with an email elaborating on the claim against him. On 1 April 2021, Clyde & Co asked for further documents relating to other advice he had given as he was aware he had advised on several occasions. There was no response to that email until he was copied into an email of 10 August 2021 indicating he would be sent a bundle of documents.

53. As regards the solicitor defendants, there was a further period of 7 months of inactivity from Mr D Morris. He was chased by RPC in May 2021 and informed that there would be no agreement to any further stays and it looked as if his client was not pursuing the matter and on 27 July 2021 RPC set out a number of deficiencies in the way the claim was being run, alleged warehousing and threatened to issue an application to strike out if the claim was not discontinued. This prompted Mr D Morris's response of 10 August which stated the case would not be discontinued and setting out in more detail the case on limitation, negligent drafting and re-iterating what was said in the letter of claim as to conflict of interest. He denied warehousing, claiming that the stays had been obtained to enable the defendants to investigate the claims. He promised to send a bundle of documents which he said "*will help you to understand the claim better".* A bundle was emailed to the other parties on 7 October 2021, after further chasers and the issue of the application to strike out. It is said to be an organised version of the solicitor defendants' files, not a selection of key documents. On 15 October, Mr D Morris asked RPC for copies of notes of all conferences with counsel.

54. The overall impression of Mr D Morris's behaviour is that he did not actively progress the proceedings until prompted to do so when some action became essential as a stay was about to expire, save in relation to the provision of the note of conference to Clyde & Co, but by that stage he was subject to the January consent order, and even then, there was late compliance. The cumulative delay from service to the issue of the application to strike out is 16 months. Neither the claimant nor Mr D Morris has explained the claimant's inactivity during this time. The laggardly way in which this case has been prosecuted could give rise to an inference of warehousing.

55. There are countervailing considerations. There is Mr Butler's point as to Mr Morris having no motive to warehouse the claim. He was subject to a large costs order from the SPA proceedings and suffered, he believes, a substantial loss due his inability to enforce the extension option. He had an interest in recouping his losses as quickly as he could. Mr D Morris indicated that he made it a condition of the 25 July 2021 stay that he was

able to ask for the stay to be lifted if the response to the claim was not followed by mediation. He also took some steps to comply with that order by seeking the documents recording advice from the solicitor defendants and, belatedly, providing Clyde and Co with the note of conference and setting out some further detail of the claim against the fourth defendant in the accompanying email. Thus, he was taking some steps to pursue the action. There is also the question mark over Mr D Morris's competence which I have noted above. Insofar as it is relevant, the issue of proceedings in 2019 is explicable by the fact that the SPA claim was not finally disposed of until December 2018.

56. Looking at these factors in the round, what is striking is the minimal effort the claimant, through Mr D Morris, has been prepared to devote to what, he says, is a valuable claim and one which is potentially complex. The claim seems to have been run at minimal cost, evidenced by the lack of activity and the production of an in-house, defective pleading. It has the hallmark of a case issued in the hope that the other parties will come to the table and settle if the claim grinds on long enough. Such an intention is not in conflict with the motive articulated by Mr Butler or Mr D Morris's threat to seek a lifting of the stay if the parties did not engage in mediation. Accordingly, on balance, I am persuaded that Mr Morris issued this claim with no intention of pursuing the claim in accordance with the rules of court but his intention was to do so at his convenience and, in consequence, he is guilty of an abuse of process. I make it clear, however, that it is not an abuse of the process to issue a claim in the hope that it will settle. That is a hope shared by almost all litigants. The abuse is in issuing proceedings but, for no good reason, not getting on with them ,whether that is to prompt settlement by issuing in the hope that over time the opponent will lose heart or otherwise.

57. It follows from my finding that I must consider whether to exercise my discretion to strike out the claim against all defendants, for the intention was to warehouse the whole claim, not just that involving the RPC clients.

58. I accept that the allegations can cause serious reputational damage to the solicitors involved. Set against that is that Mr Morris has, on his account suffered considerable loss and has his own rights which should be vindicated. I also bear in mind that negligent or not, lawyers who draft unenforceable agreements or advise parties that they have a very strong case when it is established at trial that the case in law was otherwise suffer reputational damage anyway. I do not give the reputation issue much weight in the exercise of the discretion.

59. These are old allegations, but the law permits such allegations to be tried, albeit that as against the third defendant there is the limitation defence to overcome. I do not see this consideration as a compelling factor in the exercise of my discretion.

60. The Particulars of Claim still require amendment. This relates, however, to what may be called secondary allegations. The core allegations have always been present and are perfectly understandable. It is right that the dates upon which advice was given and what was said should be particularised, but the first and second defendant can hardly complain of this as they did not provide some of the documents which contain the detail until March 2022. These are the sort of documents with which, following *Gestmin v Credit Suisse* [2013] EWHC 3650, the court will be principally concerned.

61. An important consideration is whether there can be a fair trial. Whilst it is correct that the claimant was under an obligation to provide the key documents under the protocol and has to date only produced a bundle of all of the disclosure, less the most recently disclosed documents, on the evidence presented to me, it is a fact that all the documents relevant to the drafting of the agreement and the conduct of the proceedings have been in the hands of the solicitor defendants throughout. In view of the late disclosure by them of some of the advice documents, they have had the key documents longer than the claimant and had an ample opportunity to evaluate where these leave them vis-a-vis this claim. I do not see that the abuse which I have identified will prevent a fair trial.

62. I have to consider whether it is proportionate to strike out the claim. The court has wide ranging powers to manage the case to ensure that henceforth it is prosecuted in accordance with the rules, including the aims of the overriding objective. In *Alfozan,* HH Judge Pearce, when looking at this issue, considered that the fact that he was not persuaded that the claimant could be managed into prosecuting the action correctly was an important indicator adverse to the claimant in the exercise of his discretion. He relied upon evidence which demonstrated that even after giving security for costs the claimant continued to litigate without regard to the rules.

63. I do not see that this case cannot be managed so that it proceeds correctly. What this case has lacked, as I mentioned earlier, is active case management. The power to issue peremptory orders should be sufficient to ensure that if there is any further failure to comply with rules or orders, the case will proceed no further. Thus, I cannot envisage a situation where the drift which is in evidence in the current case continues. It follows that the late application to amend and the absence of an offer to

pay the defendants' costs of amendment do not figure highly in the factors militating in favour of strike out as these are (a) more of relevance to the fact of warehousing and (b) even if these are defaults, they can be readily managed by the court.

64. Weighing all the above aspects of the case, I take the view that it is not one in which I should exercise my discretion to strike out.

The Third Defendant's claim for summary judgment

65. Mr Morris accepts that he suffered damage when, on 9 November 2006, he entered into an SPA without an un-enforceable extension to the earn-out provision. As the primary limitation period for the claim in negligence and contract is one of 6 years, the primary limitation period had expired by the time of the issue of these proceedings. Whilst the defence has yet to be filed, it is accepted by the claimant that limitation is likely to be relied on. If he is to succeed, he will have to confine his claim to negligence and rely upon s14A of the Limitation Act 1980. This provides:

"14A.— Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual.

(1) This section applies to any action for damages for negligence, other than one to which section 11 of this Act applies, where the starting date for reckoning the period of limitation under subsection (4)(b) below falls after the date on which the cause of action accrued.

(2) Section 2 of this Act shall not apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.

(4) That period is either—

(a) six years from the date on which the cause of action accrued; or

(b) three years from the starting date as defined by subsection (5) below, if that period expires

later than the period mentioned in paragraph (a) above.

(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested

before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

(6) In subsection (5) above *"the knowledge required for bringing an action for damages in respect of the relevant damage"* means knowledge both—

(a) of the material facts about the damage in respect of which damages are claimed; and

(b) of the other facts relevant to the current action mentioned in subsection (8) below.

(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(8) The other facts referred to in subsection (6)(b) above are—

(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and

(b) the identity of the defendant; and

(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.

(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.

(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;

but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

66. The claimant says that he did not have knowledge more than 3 years prior to the delivery of the claim to the court. He puts his date of knowledge as

commencing when HH Judge Bird handed down judgment on 24 March 2017. The third defendant argues that he had knowledge long before that, and points to a number of occasions when he must have had constructive knowledge at the very least.

67. This is an application for summary judgment. The law as to the court's approach in dealing with summary judgment applications has been set out by Lewison J, as he then was, in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 Ch at [15]. It has been approved by the Court of Appeal in *AC Ward & Sons Limited v Catlin (Five) Limited* [2009] EWCA Civ 1098. It is sufficient that I summarise this part of the *EasyAir* judgment as follows:

    (i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

    (ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.

    (iii) In reaching its conclusion, the conduct of the court must not conduct a 'mini-trial'

    (iv) This does not mean the court must take at face value and without analysis everything that a claimant says in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents

    (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial

    (vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an

adequate opportunity to address it in argument,
it should grasp the nettle and decide it.

68. The burden of proving that the date of knowledge is within 3 years of the issue of the claim is upon the claimant; see *Haward v Fawcetts* [2006] I WLR 682 per Lord Mance at [106]. In considering the third defendant's summary judgment application I am not concerned with establishing whether on balance the s.14A claim is made out. In *Jago v Mortgage4You Ltd [2019] EWHC 533 (QB)*, May J, on an appeal from the County Court, approached a summary judgment application based on an allegation that s.14A could not be relied upon in answer to a limitation defence in this way. She said:

"...it seems to me at this summary judgment stage of the litigation, all that the claimant has to do to defeat the first defendant's application is to satisfy me that it is not fanciful for her to say that her date of knowledge arose within three years before the issue of proceedings and that it is again arguable by her that the contrary contentions of the first defendant either for a yet earlier date of knowledge than she contends for, or for fixing her with constructive knowledge are not so good as to render her claim fanciful"

For "fanciful" I read, the s.14A argument has no realistic prospect of success. That is the approach I propose to adopt.

69. The third defendant's solicitor, Ms Hyland, took a pleading point in her first statement, which filtered through to Mr Wood's skeleton. It was argued that since the onus is on the claimant to prove the date of knowledge, this has to be pleaded, yet the Amended Particulars of Claim does not set out the claimant's case on S14A. Quite apart from the fact that the assertion is factually inaccurate, in that paragraph 11 alleges a date of knowledge 3 years prior to 17 March 2020, i.e. the date of HHJ Bird's judgment pleaded at paragraph 23, and paragraph 12 of the pleading asserts that Mr Morris did not believe that he had suffered material damage as a result of faulty drafting and subsequent paragraphs explain why that is the case, namely the fact that the second defendant was very dismissive of the unenforceability argument and failed to advise him to seek independent advice, that is a very bad point.

70. In *Ronex v John Laing* [1983] 1 QB 398 a defendant applied to strike out a third party notice on the grounds that it disclosed no cause of action as the claim was statute barred. The application was refused at first instance and on appeal. Donaldson L.J., as he then was, said that:

"...it was absurd to contend that a writ or third party notice could be struck out as disclosing no cause of action, merely because the defendant may have a defence under the Limitation Acts...it is trite law

that the English Limitation Acts bar the remedy and not the right; and, furthermore, they do not event have this effect unless and until pleaded."

71. The third defendant's argument ignores the fact that limitation has yet to be raised as an issue on the pleadings. Until it is, the claimant cannot be expected to plead to it. He is not required to set out his case on limitation in anticipation that it will be raised by the defendant. Indeed, Mr Butler indicated that once the claimant sees how the limitation defence is put, not only will there be a reply dealing with s14A, but there may also be a pleading of fraudulent concealment under s32 of the Limitation Act. That is not a far-fetched suggestion given that the solicitor who produced the contract and the litigation partner of that, and the successor entities, did not inform Mr Morris of a conflict of interest whilst at the same time giving him very bullish advice as to the merits of his claim and, thus, directed him to look to the buyer to recover his losses.

72. The "knowledge" referred to in s14A has two components. The first is the claimant has knowledge that he has suffered damage which would lead a reasonable person who has suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment; see S.14A (6)(a) and (7). In *Haward* (above) at [107] and *Dobbie v Medway Health Authority* [1994] 1 WLR 1234 at 1241-1242, this was said to relate solely to matters of quantum and that questions regarding the evaluation and classification of the damage should be treated as falling within the second aspect of damage.

73. The second component of knowledge, which is relevant for present purposes, is that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; see S14A(6)(b) and 8(a). Knowledge that such an act or omission was negligent is irrelevant; see S14(9).

74. The degree of knowledge required was said by Lord Nicholls, at [7] in *Haward,* to be "comparatively straightforward." As to the degree of certainty required, he said, at [8]:

"...Lord Donaldson of Lymington MR gave valuable guidance in Halford v Brookes [1991] 1 WLR 428,443. He noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, takin advice, and collecting evidence; "Suspicion, particularly if it is vague and unsupported, will indeed not be enough, but

reasonable belief will normally suffice" In other words, the claimant must know enough for it to be reasonable to begin to investigate further."

75. Lord Nicholls considered the degree of detail required at [10]. He said that this usually arises in the context of knowledge of attribution. It was not necessary to have knowledge sufficient to draft a detailed pleading. He referred to a number of cases containing pithy statements as to the degree of detail required. In *Nash v Eli Lilly & Co* [1993] 1 WLR 782 Purchas LJ said at 799 that the plaintiff must know the *"essence of the act or omission to which the injury is attributable"*, in *Spargo v North Essex District HA* [1997] PIQR P235, at P242 Booke LJ referred to *"a broad knowledge of the essence"* of the relevant acts or omissions and in *Broadley v Guy Clapham & Co* [1993] 4 Med LR 328 at 332, Hoffmann LJ, as he then was, said *"one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which the complaint is based."* Lord Mance, in *Haward*, put it this way at [113]:

"Turning to the phrase "the act or omission which is alleged to constitute negligence", the word "constitute" is in my view significant. It indicates that the claimant must know the factual essence of which is subsequently alleged as negligence in the claim."

The contentions on limitation

76. Mr Butler says that the damage in this case is the entry into the unenforceable option extension. Mr Morris did not have knowledge that he had suffered any damage until HH Judge Bird ruled that the term was unenforceable. Thus, he did not know that the damage was sufficiently serious to justify instituting proceedings or that such damage was attributable to the act or omission of the third defendant.

77. He points to the fact the defendant buyer in the action before HHJ Bird put forward a number of defences as to why the claimant was not entitled to damages. It pleaded an alternative case, that even if the agreement, on its terms, was enforceable, extension could be refused on reasonable grounds, and that such grounds existed. Further, there was no loss, for it was denied that at the end of the 4 year option period there was room capacity for further placements to be filled.

78. Mr Butler referred to *Blackmores LDP(in administration) v Scott* [2015] EWCA Civ 999 as authority for the proposition that knowledge of the solicitor's error is insufficient; the claimant has to know the consequence of the error in order to have the requisite knowledge. He says that none of the defendants informed him that there had been an error in the drafting

with the result that the option to extend was unenforceable. He sought expert advice from the defendants about the allegation that the agreement was not enforceable and was given strong advice, both from them, and the fourth defendant, that it was. For the purposes of s14A(10), it was reasonable for him to seek advice from the Second and First Defendants, through Mr Rushton and Mr Davison, as they appeared to be suitable experts for this purpose at the time. He referred me to *Barker v Baxendale Walker* [2016] EWHC 664 and *Gosden v Halliwell Landau* [2020] EWCA Civ 42.

79. Mr Wood argued, on this last point, that the original solicitor cannot be an expert for the purposes of s14A (10). Only a solicitor independent of the alleged tortfeasor can be regarded as an expert upon whom the claimant can rely. He says that this is the effect of *Williams v Lishman, Sidwell, Campbell & Price* [2009] P.N.L.R. 34 and *Su v Clarkson Platou Futures* [2018] EWCA Civ 1115 and is implicit in s14A(7) of the 1980 Act. He says that the claimant cannot rely upon the advice he received from the defendants. In any event, though the claimant, by confirming his solicitor's position statement, says that he sought advice after the buyer refused to extend the option, no timescale is given. He says it does not matter what advice was received, from his own clients, because in the absence of evidence as to when advice was sought, there was a time when the claimant should have sought advice elsewhere which would have revealed that the problem lay with the drafting of the agreement. On this point he referred me to *Gravgaard v Aldridge & Brownlee (A firm)* [2005] P.N.L.R. 19. He also relies on that case as authority for the proposition that it is to be assumed that had Mr Morris gone to another solicitor in relation to the dispute with the buyer, they would have advised him that the drafting of the SPA agreement did not give him the certainty he claims he received from the solicitors and counsel who were instructed.

80. Mr Wood identified 6 dates and events which, taken individually, demonstrate that it is not realistically arguable that the claimant's date of knowledge was the handing down of HHJ Bird's judgment. They are as follows: (a) the date the claimant first saw the agreement and must have noticed that the mechanism of enforcement, suggested in his proposed re-amended particulars of claim, were absent; (b) the date upon which the buyer refused the extension; (c) a reasonable time after the buyer refused the extension; (d) the receipt of the buyer's defence and counterclaim alleging that the extension agreement was unenforceable; (e) the receipt of an email on 7 May 2015 from the first defendant referring to the prospects and (f) an email from Mr Morris to the first defendant in January 2016 which is said to evidence that Mr Morris realised that there

was a potential downside to the litigation. Mr Wood argues that each one of these put Mr Morris sufficiently on notice that he had a potential claim to investigate so as to start time running.

Discussion

81. I shall deal with Mr Wood's five dates and events first. These are relevant to the knowledge Mr Morris could acquire from facts observable and ascertainable by him.

82. Mr Wood's argument arises from the fact that whereas the claimant originally pleaded that the third defendant was negligent in failing to draft an enforceable SPA, he now seeks to add that it should have been made enforceable by ensuring the presence of a mechanism for enforcement to determine what would be a reasonable extension or make reference to an independent arbitrator. The premise for this argument is that if Mr Morris realises that this was required now, he must have realised it then and, thus, ought to have noted its absence. Of course, there would be no reason for Mr Morris to be looking out for an enforcement mechanism if, at the time of signing, he thought that he had an enforceable agreement. There is no reason to think that he did not. On his case, he had left the matter in the hands of a solicitor who had purported to produce a binding agreement. The fact that many years later, lawyers for the claimant particularise enforcement mechanisms is no evidence that Mr Morris should be expected to have regarded their inclusion as necessary at the time. Rather they go to demonstrating, in the light of the finding of HH Judge Bird, that there were ways in which the agreement could have been made enforceable. But those are suggestions that have arisen after the fact.

83. The second and third events starting time running can be looked at together. Mr Wood relies on the refusal to extend the option. He says that the starting point must be that the buyer must have had a reason to refuse to extend the option. One can not assume that it was acting irrationally. The refusal carried with it the implicit assertion that buyer was not bound to agree to the extension.

84. Mr Wood argued that the position of the claimant following refusal of the extension was very much like that of the claimant in *Dobbie v Medway Health Authority* (above). That was a case in which the claimant had an operation for the removal of a beast lump but during the operation the whole breast was removed. According to Mr Wood, that on its own was sufficient to start time running. That is, however, an oversimplification of the facts of *Dobbie.* Mrs Dobbie had elective surgery for the removal of a lump on 27 April 1973. The surgeon thought the lump cancerous and removed the whole breast as a result. At the time she had no reason to

question the surgeon's judgement and even after it became apparent that it was not, she accepted the view of the surgeon and the nurse that she was lucky that it was not malignant. In 1988, her daughter, as a result of hearing a radio programme, alerted her to the prospect that the removal of the breast was negligent. As a result, she sought expert opinion which indicated that it was.

85. Otton J, at first instance, found that within 3 years of the operation, Mrs Dobbie was aware that she had been admitted for the excision of a lump only, the left breast had been removed, the lump when examined had been benign, the decision to remove the breast had been taken before microscopic examination and the removal of the breast had caused her acute and prolonged anger, distress and psychological and physical damage. The Court of Appeal agreed with the judge's conclusion. Sir Thomas Bingham M.R., as he then was, said, at 1243E:

"The personal injury on which the plaintiff seeks to found her claim is the removal of the breast and the psychological and physical harm which followed. She knew of this injury within hours, days or months of the operation and she at all time reasonably considered it to be significant." (my emphasis)

Although he went on to say:

"she knew from that beginning that the personal injury was being capable of being attributed to an act or omission of the health authority"

that is against his reference to hours, days or months, and Otton J's findings as to what she knew about the absence of analysis and the fact that the lump had been benign.

86. The Master of the Rolls did not say that the removal of the breast, without more, started time running. Neither did Beldam LJ, who said at 1245H that Mrs Dobbie had knowledge within days of the operation on the basis that she knew of the act of the surgeon in removing the breast and the omission to carry out a test before doing so. In *Haward*, Lord Nicholls, at [14] said of Dobbie:

"The essence of the claimant's case was that she had suffered injury by the removal of a healthy breast, that is, her breast had been removed unnecessarily and something had gone wrong…Under the statute time did not begin to run until she knew of these acts or omissions. Until she was aware of these matters she could not know her injury was attributable to them."

87. The correspondence at the time of the refusal gave no indication that the enforceability of the agreement was being called into question. On 7 October 2010, Mr Morris emailed the buyer asking for a reasonable

extension of the earn out, explaining the circumstances which justified such a grant. On 27 October 2010, the buyer responded to the points made in justification indicating that there were financial reasons as to why there should be no extension, pointing out that since the agreement was signed the world had changed and they had to take into account a "new commercial reality."

88. All that can be gleaned from that correspondence is that the buyer did not accept that the justification for extension was made out. It does not lead to the inference that the buyer is stating that the agreement is unenforceable. It is not the experience of the courts that in matters of commerce parties only decline to comply with contractual obligations when they regard them as unenforceable. More commonly, they either look to mount some counter allegation to avoid their obligations or gamble on the counterparty doing nothing to prosecute their claims. I do not accept that it is not realistically arguable that Mr Morris can avoid the conclusion that he should have taken from the refusal that the enforceability of the contract was in issue or that he ought to have investigated whether it was drafted in a way to ensure that it was. It being sufficiently arguable that he was not on notice that he should investigate the adequacy of the drafting of the agreement at the time of refusal, the same applies to the suggestion that he was put on notice in the period which followed in which no issue had been raised as to its enforceability.

89. Turning to Mr Wood's fourth date. The buyer's Defence is dated 3 September 2015. Four defences were advanced as well a defence on causation of loss. Aside from the enforceability argument, it was alleged that the agreement was subject to approval by the buyer's board, which agreement was reasonably withheld, the defendant's refusal to grant a further period was reasonable and the claimant had failed to identify the further period which would be reasonable in the circumstances. The causation argument is that there was no loss as the buyer denied that there was room capacity for further placements at the end of the 4 year period. The averment that the agreement was void for uncertainty undoubtedly put the clamant on notice that this was a matter which had to be investigated, but the effect this has on the existence of knowledge has to be looked at against the background of the advice he was receiving. I shall look at that further when considering the relevance of the advice he received.

90. The 5th and 6th points at which it is said time should have started to run is said to be the 7 May 2015 and 16 January 2016 emails, said to show that Mr Morris must have realised that there was a downside. These also need to be looked against the backdrop of the advice being given. The email of 7 May does not express a view as to the claimant's chances of success on

the facts of the case. In an effort to explain why a 100% uplift is to charged on the CFA, the writer, Mr Davidson, says that any commercial case which goes to trial must be rated as having a 50% chance, hence the sizeable uplift. He goes onto say that he would consider lowering the success fee, particularly if the case settles before trial, as to which, he says earlier in the email, there is no reason to think that it won't.

91. Mr Morris's email of 12 January 2016 asks Mr Davison as to the threshold test to strike out a claim which he describes as being based on unilateral mistake. He appears to be encouraging the solicitors to proceed with a strike out application. I don't have Mr Davidson's response to the email although I see he emailed counsel to say he was trying to dissuade Mr Morris from pursuing such an application. There is a Knight's attendance note from 23 September 2016 which records that Mr Davidson is aware that Mr Morris is concerned that his solicitors are not making good on their threats to strike out parts of the defence and counterclaim. His explanation to Mr Morris for not pursuing such applications is that *"we are not interested in minor skirmishes, we are seeking to have things right at the end of the trial where we will win."* I see nothing in this correspondence to suggest that Mr Morris should have thought that he had other than a strong case, i.e. that the buyer's defence would fail. If anything, the effect of dissuading Mr Morris from pursuing an application to strike out removed his opportunity to hear from an independent source, i.e. the court, whether his claims were as strong as the first and second defendants led him to believe.

92. It is now convenient to look at the dispute concerning the relevance of the involvement of the second and third defendant in advising the claimant. Mr Wood has taken a contradictory approach as to their status. On the one hand he says that there was no conflict of interest in either acting as they are different entities from the third defendant, notwithstanding that he tells me that under the rules for solicitors' indemnity insurance, the insurers of a successor practice are liable to indemnify the liabilities of the predecessor. On the other hand, he argues that they are not independent of the third defendant so as to qualify as S14A(10)(b) experts. His argument on the absence of conflict also suffers from the fact that if he is correct in arguing that time started to run at the point of refusal, October 2010, the second defendant, who was instructed in July 2013, failed to inform Mr Morris that a potential limitation deadline would expire in October of that year.

93. Mr Butler does not seek to argue other than that when Mr Morris sought advice from Mr Rushton and Mr Davidson, it does not matter that the practice has moved from firm, to LLP to Limited Company, he is going back to the solicitors who were instrumental in the drafting of the

agreement. I approach this issue on that basis, which, on Mr Wood's argument about all three defendants not being capable of being suitable experts, is the most favourable to the third defendant.

94. Both sides accept that a solicitor would be an appropriate expert for the purposes of s14A(10). There is no jurisprudence which establishes that ss. 14A(7) and (10), on their terms, require that the expert is independent of the defendant. I have been referred to cases in which the negligent adviser has been treated as a suitable experts and cases in which they are not.

95. Mr Wood places considerable reliance upon an extract from the judgment given by HH Judge Reddihough, sitting as a judge of the High Court, in *Williams v Lishman, Sidwell, Campbell & Price Ltd* [2009] P.N.L.R. 34. This was a claim against former financial advisers, the first and third defendant, for losses arising from advice given to them to transfer their pension funds from an Executive Pension Fund to an Income Drawdown Plan and to take steps to reduce their losses. The claimants had been assured the increase in value of the IDP would more than match the rate at which they drew down on their pension, thus, there would be no erosion of their capital. In the event, there was a substantial erosion of capital and Mr Williams, one of the claimants, calculated that he was far worse off than had they stayed in the EPF. The third defendant, however, kept reassuring him that that the new fund would improve.

96. The transfer took place in 1997. In 2003, just under 6 years after they had transferred to the IDP, the third defendant advised the claimants that they should direct a clam against the first defendants for negligent advice and failing to warn them of the risks of the IDP. The claimants accepted that advice and agreed to the third defendant and a solicitor, the fourth defendant, representing them, notwithstanding that Mr Williams was aware that the third defendant had also advised from the outset. In October 2006 they went to other solicitors who issued the claim that year. The case came before HH Judge Reddihough on an application to strike out on the basis that the claims were statute barred. The judge found that it must have been clear to the claimants by May 2003 that their capital had substantially diminished and that as they had relied on express advice that it would not, they had knowledge for the purposes of S14A. Thus, by a matter of months, the claim was statue barred.

97. The claimants sought to argue that they were entitled to rely upon the advice and reassurance given by the third defendant to defer the date of knowledge. At [32] of the judgment, the judge said:

"I reject the submissions made on behalf of the claimants, that they were entitled to rely on the ongoing advice and reassurances of the Third Defendants and that amounted within the proviso to s.14(10) to taking

reasonable steps to obtain expert advice. In my judgment, that sub-section clearly contemplates taking advice from an expert independent of the parties whose conduct is being called or may be called into question."

Whilst the rejection of the case based on reliance on the third defendant is explicable on the facts of Williams, where the advice as to erosion of capital was said to be demonstrably wrong by May 2003, the assertion of the general principle runs counter to the authorities. Even in *Gravagard v Aldridge & Brownlee* [2005] P.N.L.R. 19*,* Mr Wood's further authority on the point, and which was referred to in *Williams*, the Court of Appeal went no further than to say that for the purposes of s.14A(10) the negligent solicitor, in that case, "*would not necessarily have been the appropriate person to advise."* per Arden LJ (as she then was) at [18].

98. The other principal authority on this point upon which Mr Wood placed reliance was *Su v Clarkson Platou Futures* [2018] EWCA Civ 1115. Mr Su brought a claim against two defendants alleging that, in 2008, they had made him personally liable under a futures contract whereas the contract ought to have between the counterparty, Lakatamia, and his company TTT. Neither TTT nor Mr Su bought back the futures position contracted for. Lakatamia sued both TTT and Mr Su. It obtained freezing injunctions against both based on affidavits alleging that they were both liable. The injunctions were confirmed at an inter partes hearing. The Court of Appeal heard a challenge to the injunction by Mr Su, arguing that there was no good arguable case that he was personally liable, but the court held that there was and it was a matter which had to be resolved at trial. By that stage, therefore, 2 puisne judges and 3 judges of the Court of Appeal had said that there was a good arguable case that Mr Su was liable under the agreement.

99. In November 2014 judgment was given on the claim in which it was held that Mr S was personally liable, along with his companies, to pay just over $37 million to Lakatamia under the forward contracts. He began proceedings against the defendants in November 2015. He relied upon the 2014 judgment as his date of knowledge. Teare J held, on an application for summary judgment, that he must have had relevant knowledge by the 18 July 2012, the date the Court of Appeal rejected his appeal against the freezing order. The Court of Appeal agreed. Kitchen LJ said, at [40]:

"By July 2012 Mr Su plainly knew enough to give rise to a real possibility that his personal liability under the FFA Contract was a direct consequence of and attributable to the acts of Clarksons and Mr Karakoulakis for they were responsible for negotiating and agreeing the terms of the contract."

In response to the argument that he relied upon his solicitor's advice as to the prospect of the claim he said at [42]:

"Finally and as for the evidence of Mr Su that he was advised in July by the solicitors then acting for him that they were confident that he would not be found liable at the trial, this seems to me to carry little weight. As Teare J observed, Mr Su has not waived privilege and has not disclosed any written advice that he received. But in any event, the test is objective and here the finding of the Court of Appeal that Lakatamia had a good arguable case is, to my mind, by far the most important consideration."

100. I compare what was said in *Williams* to the Court of Appeal decision in *Gosden v Halliwell Landau* [2020] EWCA Civ 42. Mr Butler argues that it has similarities with the current case in that Mr Gosden went back to the solicitor, Mr Laidlow, who had drafted an Estate Protection Scheme but, negligently, failed to protect the claimant's interest under the scheme by registering a restriction on the title. The solicitor had, by this time moved from Halliwell Landau, where the negligence had occurred, to another firm, Gateley LLP. The question as to the suitability of returning to the solicitor who was said to have been negligent, appears to have been raised as it was considered both by the judge at first instance and the Court of Appeal. At [60] of the judgment in the Court of Appeal, Paten LJ said:

"It seems to me that the claimants did act reasonably in choosing to go to Mr Laidlow in the first instance. He indicated that he was prepared to accept instructions in relation to the trust and how the Property had come to be sold. From the claimant's point of view, he was in many ways the obvious choice. He was…best placed, one might have thought , to provide the claimants with a relatively swift explanation as to what had gone wrong. It was not unreasonable for them to select him as their first port of call. We, of course, know that he was aware that the restriction had not been registered but did not disclose this to the claimant, even though it was, I think, part of his obligation to the clients to notify them that he could not act because they might have a claim against him. The fact that he and Gateleys chose not to make that disclosure is not something which should be held against the claimants."

101. In *Barker v Baxendale Walker* [2016] EWHC 664, the claimant was not held to have constructive knowledge as to negligent tax advice about an employee benefit scheme when he returned to the same barrister for advice when the scheme was challenged by HMRC. It does not appear that the defendant solicitor sought to argue this as a basis for imputing knowledge.

102. In *Blackmores LDP(in administration) v Scott* [2015] EWCA Civ 999 the appellants were held not to have s14A knowledge of their solicitor's negligence in failing to lodge a restriction against a manorial title with the consequence that the Adjudicator had a discretion to refuse to close of the title even if they later proved that the registration was mistaken. It was held that they did not have knowledge until the Adjudicator had handed down his decision. The solicitors who had negligently failed to enter the restriction and inform them of the consequences of such failure acted for the appellants throughout the registration dispute, including up to judgment by the Adjudicator.

103. In giving the judgment of the Court of Appeal, Vos LJ, as he then was, pointed out that it was not argued that the appellants had constructive knowledge. He said at [49];

"No doubt that was not argued for good reason, because whatever else might be said, Ms Scott and Mr Walker had, in April 2009 and before, taken reasonable steps to obtain expert legal advice."

Since this was the advice from Blakemores LDP, the judgment clearly contemplates that there are circumstances where the advice from the solicitor against whom the claim is later targeted can constitute expert advice for the purposes of 14A(10).

104. What the various cases to which I have been referred reveal is that there is no hard and fast rule as to whether "appropriate expert advice" for the purposes of s14A(10) can be that of the allegedly negligent adviser. Whether it is, or not, is highly fact dependent. The section requires the court to consider whether the claimant has taken all reasonable steps to take advice. Sometimes it will be clear that limiting oneself to the negligent adviser will not suffice, as was the case in *Williams*, in other cases, such as *Gosden*, it will. In this case, it is realistically arguable that recourse to the second and third defendants was all the reasonable steps that the claimant could have been required to take. As in *Gosden*, it was natural to turn to the solicitor who knew the background, having negotiated the agreement and dealt with its drafting and to accept his reference to Mr Davidson. Unlike *Su*, the claimant had not been given a steer from 5 judges as to there being a good arguable case that the agreement did not have the effect he claimed it had and Mr Morris has waived privilege, so there is more evidence as to the advice he received. Furthermore, he also took counsel's advice, which strengthens his position on subsection (10).

105. A further matter that is apparent from the cases is that it is not always the case that time runs from the court's ruling. In *Su*, it did not because the result of the decision of the Court of Appeal was that Mr Su

had sufficient knowledge of the essence of his claim. In *Blakemores*, time did not start to run until judgement because it was at that time that the appellants could be taken to have had knowledge of their damage, which was not the negligent failure to register the restriction but the consequent effect on the Adjudicator's powers. The case is not as clear cut on this point as it may be as the court was only asked to consider two potential dates of knowledge. The first was the date one of the appellants was informed of the failure to register the objection and the second the date of judgment. The Court of Appeal contemplated that there may have been some intermediate date as the appellants had been at the hearing and would have heard the arguments, but that was not the case advanced before it.

106. As it is sufficiently arguable on the part of the claimant that he did take all reasonable steps to seek advice, I need to look at the advice he received.

107. The advice of both the second and third defendant was unfailing supportive on the enforceability point. There is the evidence in Mr D Morris's position statement, confirmed by the claimant, that after the refusal the claimant discussed this with Mr Rushton who referred him to Mr Davidson. Whilst timings are not provided, it must have been before 24 July 2013. They told him the extension was mandatory. As, it was not till much later that the buyer raised the enforcement point and 2 solicitors and the fourth defendant have said it was a bad point, the case is quite unlike *Gravgaard.* There it was found that had the claimant gone to a solicitor about the claim by Lloyds over her property it would have been realised that the negligent advice of her solicitor as to putting her house into the joint names of herself and her husband, which exposed the property to her husband's creditors, would have had to have been investigated. Further, in *Gravgaard* the argument that had she sought legal advice, it would have been from the negligent solicitor, Mr Brindle, and that the outcome would therefore have been no different, was rejected as it was (a) questionable whether the subsection (10) contemplates a particular solicitor where there has, in fact, been no advice sought, (b) he may not have been a suitable adviser in the circumstances and, importantly (c) the claimant had not set out the necessary substratum of fact to make such a submission. Until she did there was no reason for the court to assume that Mr Brindle would have given inadequate advice; see Arden LJ at [18].

108. In the present case it is arguable that it was legitimate for Mr Morris to turn to Mr Rushton, in the first instance, as he did. Mr Morris received consistent advice from his solicitors and counsel that he had a strong claim. Unlike *Gravgaard,* there is a substratum of fact to support

the assertion that he would have received the same advice on day one following the refusal as he did in the succeeding years. Apart from the oral encouragement as to the strength of the claim after the refusal to extend in October 2010, referred to above, my attention was taken to the following:

a. On 24 July 2013, Mr Davison emailed the claimant with a draft of the letter of claim. He said "*the Agreement clearly anticipates that further time may be needed and the parties are to agree that extra time.*"

b. On 14 October 2013, Mr Davidson sent Mr Morris the buyer's response to the claim. He said *"They have put a little twist on the interpretation of the agreement in a few places."* He pointed to the agreement to agree argument, saying *"The terms are clear, it is just a question for how long they apply, which turns on whether or not approval has been unreasonably withheld."*

c. At a conference with counsel, the fourth defendant, at which Mr Rushton and Mr Davison were in attendance, Mr Morris was told by the fourth defendant that the second defendant's interpretation of the agreement was correct and the more he read the clause the more convinced he was. The attendance note records counsel saying the prospects were good, 60% to 70%, though it was difficult to give meaningful chances of success. This has to be read against counsel saying that he was confident the contract said what it appeared to say, the agreement to agree argument was nonsense and *"The doubt is as to what is a reasonable extension of time."*

d. On 22 July 2016, following disclosure, Mr Davidson emailed Mr Morris to say that there were no bombshells affecting the case on liability. He said *"Generally counsel remains as confident as before. Liability is the easier aspect."*

e. There is an attendance note form Mr Davidson in which he records that Mr Morris *"was minded that AD (Mr Davidson) made an offer on the basis that we've got a strong counsel's opinion, liability is not in issue."*

f. There is an email from Mr Davidson to a Joanne Beech in which he talks of a new Part 36 offer, which, in the light of the history, was not accepted. He talks of the amount of fees he can generate if the case succeeds and says *"Still strong advice on liability… so, mostly excited, occasionally twitchy."*

g. Mr Morris emailed Mr Davidson on 13 October 2016, with a copy to the fourth defendant, having been informed by Mr Davidson that the defendants had increased their offer.

h. On 10 December 2016 the fourth defendant emailed Mr Morris saying *"Their legal argument is waffle. You have got the rest in one."* Mr Morris replied on the same day, *"After the agreement to agree rubbish, virtually their entire case is based on the fact that they acted reasonably in refusing an extension because of the difficult financial constraints of the bank..."* He points to an analysis which he claimed pulled the rug from under them.

109. The current state of the evidence is that, unlike the claimant in *Su*, Mr Morris was never told that he faced an arguable or good arguable case on the enforceability point by his solicitors and counsel, let alone by 5 senior judges as in *Su*, and neither was his characterisation of the argument as *"rubbish"* or that there was no argument on liability, ever challenged.

Conclusion

110. I am not satisfied that the claimant has no realistic prospect of proving that his date of knowledge was that upon which judgment was given against him in the litigation against the buyer.

111. The essence of the claim is that the claimant suffered damage because the drafting of the option extension left this aspect of what had been agreed unenforceable. There is no evidence that he had actual knowledge until judgment was given. Such evidence as exists of his observations as to this aspect of the defence is that he regarded it as rubbish up to the point of trial.

112. When one looks at the evidence observable by him, it is apparent that until October 2013 all that the buyer had said was that it would not extend the option as circumstances had changed and they had paid out as much as they had originally budgeted for when entering the agreement. Thus, as far as Mr Morris was concerned his predicament was explicable by the fact he was dealing with a contract breaker. When he came to take expert advice, his view was reinforced. It is realistically arguable, in such circumstances, that he could not reasonably have been expected to acquire the knowledge that he had suffered the essential damage or that it was attributable to inadequate drafting until he lost before HH Judge Bird. Mr Morris's position is, arguably, similar to that envisaged in *Spargo* (above) where at p242 Brook LJ said of the claimant:

"…she will not have the requisite knowledge if she thinks she knows the acts or omissions she should investigate but in fact is barking up the wrong tree"

The claimant's summary judgment claim

113. Mr Butler argues that a solicitor who drafts a contract in such a way that it is, in part, unenforceable, is negligent. The burden has shifted to the third defendant to provide the circumstances which render this shortcoming innocent on his part. This defendant has not attempted to do in response to the application. He says that he has an unassailable case on limitation. I should find that the claim has been brought in time and, given the absence of an explanation as to the shortcomings in the drafting, give judgment for the claimant with damages to be assessed.

114. Mr Wood said that I should not give summary judgment against the third defendant as, other than limitation, I did not know what the defence was. This defendant was not under an obligation to file a defence in view of the claimant's summary judgment application by virtue of CPR 24(4)(2); there is also a consent order of 1 November 2021 dispensing with the service of defences until further order. That is a particularly bad point. Whilst there was no obligation to file a defence, in the face of a case which called for an answer, unless the defendant sets out the factual basis for resisting the claim, the court can be satisfied that its defence would have no realistic prospect of success. It has never been the case that a defendant can resist an application for summary judgment by asserting that, as the court does not yet know what the defence is, it is not in a position to say that it does not have one.

115. I was also taken to the first statement of Ms Hyland as to the some of the circumstances which preceded the making of the SPA. This does not, however, explain how it was that the third defendant managed to draft an unenforceable agreement.

Conclusion

116. If resistance to the claimant's application was limited to the lack of a defence and Mr Hyland's evidence, this would be a case for summary judgment. I agree with Mr Butler's point that the drafting of an unenforceable in the circumstances alleged, calls for an explanation. The claimant does not have to prove what formula of words should have been used to make the agreement enforceable, in the absence of an allegation that, in the circumstances, this was not possible. I am, however, not satisfied that the third defendant has no realistic prospect of defending the claim.

117. I cannot overlook that I have only found that the claimant has a sufficiently arguable case on limitation. It is for him to prove that case. It is entirely within his knowledge what he made of the terms of the agreement he signed and the events from October 2010 onwards. The defendants are not required to accept his word as to his actual knowledge or what he inferred from those events. It is far from rare for a well constructed limitation case on paper to fall apart under the pressure of cross-examination.

118. Furthermore, whilst there is an answer to the limitation case advanced upon the events relied upon by Mr Wood which is far from fanciful, that is not to say that the third defendant has no realistic prospect of success on this issue. Once the full facts are examined, these events may rise or fall in significance. I can take into account the evidence which can reasonably be expected to be available at trial. Here, all the main actors are likely to give evidence as to what passed between them. The significance of the events upon which Mr Wood relies will be looked at against the backdrop of such evidence.

<u>The first and second defendants' application to strike out for lack of coherence and the adequacy of the pleading and the claimant's application to amend.</u>

119. It is necessary to look at the two applications together as all defendants argue that not only should the proposed amendments not be allowed but that all the allegations in the statement of case, even if amended, are demurrable and ought to be struck out for that reason.

120. Ms Hyland advanced a further argument in her first statement. She said that paragraph 17 of the Particulars of Claim does not plead a retainer with the first defendant, referring only to the second and third defendant and there is no pleading of reliance on the first defendant. It is obvious from the rest of the pleading that this was an error as the pleading concerning the negligent management of the proceedings against the buyer are targeted against the first and second defendant. In the event, the first defendant accepts that this would be adequately dealt with by the proposed Re-Amended Particulars of Claim.

121. I shall start with the application to strike out as this has been argued on the basis of the contents of the re-amended Particulars of Claim.

122. Mr Wood referred me to *Pantelli v Corporate City Developments* [2011] PNLR 12 where, at [11] Coulson J, as he then was, said:

"CPR r.16.4(1)(a) requires that a particulars of claim must include "a concise statement of the facts on which the claimant relies". Thus, where

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

123. I was taken to parts of the proposed re-amended Particulars of Claim which it is said fall foul of this passage, leaving the defendants unable to ascertain the case they have to meet. Mr Wood says that such a pleading is an abuse of process, is otherwise likely to obstruct the just disposal of the proceedings or constitutes a failure to comply with rules of court. In consequence, the court's power under CPR 3.4 (2) to strike out the offending pleadings, or parts thereof, should be invoked.

124. He started with paragraph 23, the claim for loss and damage. This identifies the fact that Mr Morris lost the claim before HHJ Bird and refers to what the judge said he would have earned if the agreement had been enforceable, subparagraph 1, and legal costs due to pursuing the legal claim against the buyer, subparagraphs 2 to 4. Mr Wood says that the paragraph is incoherent and inconsistent as it does not identify which type of loss he is seeking against which defendant, so that it may appear that he is seeking the subparagraph 1 loss against the first and second defendants, who cannot be responsible for the loss of the bargain with the buyer. At best they should have told him not to waste his money in litigation.

125. I agree that the paragraph could have been more lucid, by stating which damage is sought from which defendant. It is sufficient, however, to enable the defendants to know the case they have to meet in that paragraph 23 states that the loss is that quantified by HH Judge Bird, i.e. what Mr Morris would have received if the agreement had been enforceable, and the costs of the litigation. It is evident from paragraph 20 of the pleading that Mr Morris's complaint is that had he been properly advised he would not have litigated the enforcement issue and protected his position as against the third defendant. Anyone looking at the pleading as a whole would realise that the third defendant was the target

of the loss due to the inability to enforce and the first and second defendant for wasting his money on litigation.

126. Mr Wood makes the further point that the claimant does not distinguish between the first and second defendant as to his claim for costs wasted. He makes the point that by the time the first defendant came into being, the litigation had started; the claim was issued on 6 March 2015 and the first defendant replaced the second on 2 May 2015. He says the most the first defendant could do by that stage, if the advice ought to have been that he should not litigate ,was extricate the claimant from the proceedings. The fact is, however, that they did not. Mr Davidson, gave as positive advice when acting on behalf of the first defendant as he had when acting for the second. From a chronological point of view, the first and second defendants are in the best position to know which costs were incurred when. They cannot be in doubt that the pre-2 March 2015 costs fall at the feet of the first defendant and thereafter they have both contributed. It may be that the first defendant wishes to argue that even if it had given the advice which it is alleged ought to have been given, there would have been some exit costs which would have been incurred in any event and would have to be offset against their liability; that is a matter for them to plead and prove. Why they should wish to do so when the current insurers are responsible for the losses caused by both defendants has not been explained.

127. Mr Wood argues that the particulars of negligence and breach of contract at paragraph 21 of the Particulars of Claim are defective as it does not identify which of the first and second defendant is said to be at fault. On the facts, subparagraphs (a) to (e) could be targeted at both of these defendants. Mr Morris is entitled to make these allegations against both. It is unrealistic for the defendants to suggest that do not understand the allegations against each relate to the time at which they were dealing with the case.

128. When Mr Wood came to the relevance of some of the allegations, there was considerably more force in what he said. Subparagraphs 21(b) and (c) allege, in various ways, that the claimant should have been told of the conflict of interest with the third defendant and been advised to pursue a claim against it or to enter into a standstill agreement pending the outcome of the litigation with the buyer. It is said that there is no link between this allegation and the damage claimed. Mr Wood is correct to a point. Had the advice been given, the claimant pleads that he would have protected his position against the third defendant and not pursued the buyer. Thus, there is a causative connection between the outlay on

litigation and the failure to give this advice. It is right, however, that what these allegations would also support is a claim that, if the claim became statute barred after 2 May 2015, which, adopting three of the dates/events on which the third defendant relies, it would, the first and second defendant are liable for losses due to the success of the limitation defence. At the moment, that is not pleaded, either as a specific particular of negligence or resultant loss. The fact, however, that these 3 subparagraphs could be relied upon to support losses due to the existence of a successful limitation defence does not lead them to be irrelevant as support for the losses due to the pursuit of worthless litigation.

129. The same cannot be said of 21(d) which can only be relevant to an allegation that the first and second defendant have caused the claimant to be at risk of a limitation defence by the third defendant. Whilst it is the case that such an argument would be available, in the alternative, it has yet to be pleaded as such and is at odds with the pleaded case.

130. Subparagraph 21(e) pleads a failure to take out any or adequate ATE insurance. Mr Wood argues that this is not consistent with the allegation that this was wasteful litigation for if that was so obvious, ATE insurance would not have been available. That on its own would not justify striking out the allegation as it is arguable, with some force, that insurance would have been available where the claim had such strong backing from solicitors and counsel. A stronger point, and one with which I agree, is that there is no factual case pleaded as to the circumstances giving rise to an obligation to take out ATE insurance or, as regards loss, what such insurance would have covered.

131. Subparagraph 21(f) is said to be both demurrable and include amendments which have no realistic prospect of success. The broad allegations is that there was a failure properly to prepare for trial. Some of the particulars seem to be directed at negligence in not appreciating that the case was unsustainable, e.g. the second f(i) - a failure to be aware of the leading authorities - which is adequately particularised in its amended form, and f(ii), failing to read the defendant's disclosure. Other allegations seem to be directed as an allegation that the case would have been won if properly prepared, i.e. the second f(ii)- a failure properly to argue part performance, (f)(iii)- the failure properly to prepare witness statements, (f)(iv)- failing to contact witnesses provided by the claimant and prepare their statements (f)(v)- getting material facts wrong, (f)(vii) failing adequately instruct counsel for trial. Yet further allegations relate to costs management, i.e. f(i) failing to provide the claimant with a realistic estimate of costs and f(vi)- failing to deal with cost budgeting correctly. Finally, at f(viii) there is an allegation that the solicitors did not make adequate part 36 offers or advise properly on the defendants' offers.

132. The following subparagraphs fall foul of the requirements of a Particulars of Claim, as set out in *Pantelli*. 21f (i), (ii) and the second f(ii), f(iii), (iv), (v),(vi),(vii) and (viii) are all so general that it would not be possible for the first and second defendant to work out what they should have done and what would have happened but for those omissions and the loss which eventuated. All of them, bar f(ii) are inconsistent with the pleaded case to the effect that this was litigation which was bound to fail.

133. Subparagraph 21(g) is an allegation that there was a failure to instruct counsel with necessary experience in contract law. Mr Wood says that there is a lack of detail as to what was wrong with counsel. The pleading says that he was not sufficiently experienced in contract law. On one view, it could be said that these defendants know the case they have to meet. They need to show that they reasonably concluded that he was suitably experienced. That is, however, too shallow a way to look at the allegation.

134. It is only if the defendants should have been aware that counsel was not suitable that it could be said they were negligent. If the claimant makes out that incompetent counsel was used, that does not prove negligence on the part of the solicitor. Generally, solicitors are entitled to rely upon counsel, provided they have been fully instructed; *Locke v Camberwell HA* [2002] Lloyd's Rep P.N. 23 at [29] per Taylor LJ, as he then was. If the solicitor becomes aware that counsel is not competent to conduct the proceedings, a duty to withdraw instructions arises; *Re A (A Minor) (Costs)* (1988) 18 Fam. Law 339 at 340 per May LJ. There is no factual basis pleaded as to why the solicitors should have doubted the competence of the fourth defendant or when this should have occurred to them. The pleading of this allegation is also, for that reason, inadequate.

135. Mr Wood also objects to the proposed amendments to paragraph 10 of the particulars of claim. 10(a) is inaccurate in that HH Judge Bird did not hold that the option was unenforceable due to length of the required extension being too vague. The amendment at 10(d) is objectionable as it states that the additional consideration which the claimant would have received was that stated by HH Judge Bird, yet the Court of Appeal said he should not have embarked upon valuing the consideration as it was not adequately evidenced.

136. On the amendment of paragraph 10 issue, Mr Butler recognises the force of the objections but says that these could be cured by removing the reference to the length of the clause being too vague in 10(a) and removing the words identifying the source of the figure claimed as lost consideration.

137. On the issue of striking out paragraph 20, the particulars of negligence as against the first and second defendant, he says that it does its job in setting out the case against these defendants in a concise way. *Pantelli* is not authority for the proposition that imperfect pleadings must result in a striking out. He points to the fact that the defendant in that case raised vague allegations of poor performance and professional negligence against a quantity surveyor. By consent, the defendant was ordered to provided a properly particularised defence and counterclaim, with an unless order in default. The proposed amended pleadings were vague and did not do that which Coulson J held they had to do in order to satisfy CPR r 16.4 (1)(a), and the defendants' statements of case were held to have been properly stuck out.

138. Mr Butler says in relation to both the amendments to paragraph 10 and those to paragraph 20, if I conclude that they are not proper amendments I should give the clamant time to put his house in order. Similar considerations apply to the application to strike out the particulars under paragraph 20.

The law

139. Mr Wood referred me to the law as applies to amendment, as to which there is much common ground. An amendment must have a realistic prospect of success to be permitted. The court has a discretion to permit amendments. Amendments should be permitted to enable a party to deploy its full case subject to the grant of permission being consistent with the overriding objective.

140. Mr Wood also referred me to the oft quoted passage from the judgment of Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020]EWHC 1504 (QB) at [10]. He omitted from the extract from the judgment, quoted in his skeleton, that Lambert J said that she was setting out a helpful list of factors *"when considering a case such as this."* That was an application to amend made very late in which it was argued, and held, that the trial date would have to be vacated, if the amendment were allowed. The application in the current case has been made before a defence has been served. The various factors identified by Lambert J as relevant to the exercise of the discretion in *Pearce* do not arise in this case. For example, there is no question of a trial having to be vacated or the interests of other litigants, or indeed the defendants, being potentially prejudiced. He added, however, that the overriding objective, includes at CPR 1.1(2)(f) *"so far as is practicable enforcing compliance with the rules, practice directions and orders"* Thus, amendments which would not comply with CPR 16.4(1)(a) should be disallowed. I regard it as axiomatic that if the proposed amendment would be liable to be struck

out for failure to comply with this provision in the rules, it is unlikely to have a realistic prospect of success.

141. Although I was not referred to authority on the point, as regards Mr Butler's suggestion that I should not strike out at this stage so as to allow him to put his house in order, I take note of what was said in *Kim v Park [2011] EWHC 1781 (QB),* where, at [40] Tugendhat J said:

"40. However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right."

142. I also have in mind the words of Saville LJ, as he then was in *British Airways Pension Trustees Ltd v Sir Robert McAlpine and Sons Ltd* [1994] 45 Con LR 81 at pages 4-5, where he said:

"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind, it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered when in truth each party knows perfectly well what case is being made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of litigants, nor an end in themselves, but a means to the end and that end is to give each party a fair hearing."

Conclusion

143. The amendments to paragraph 10 (a) and 10 (d) can be modified by removing some inaccurate factual content in the case of (a), and the reliance on the finding of HHJ Bird at (d). With those alterations they are realistically arguable, as is the amendment to 10(b). There are no countervailing reasons, such as those out in *Pearce*, for denying the claimant the opportunity for ventilating these matters at trial.

144. The amendments to subparagraphs 21(a), (b) and (c) also have a realistic prospect of success and are sufficiently particularised so that the defendants know the case they have to meet. The first and second defendants cannot be in any doubt from reading the pleading that the

claimant is saying they gave negligently over-optimistic advice as to the strength of his claim and the weakness of that of the buyer and they should have told him to seek independent advice which would have led to a more balanced view as to the prospects of success.

145. Sub-paragraph 21 (d) is not relevant to the case as currently pleaded and 21 (e) is not supported by a factual claim as to what was wrong about not taking out ATE insurance. All of 21(f), apart from the second 21 (f) (ii), suffers from the shortcomings identified in paragraph 132 (above). 21(g) does not set out a factual basis for the allegation which appears. These sub-paragraphs do not comply with rule 16.4 and obstruct justice in that they introduce allegations which prevent the court determining to what live issue in the case they relate and the defendant from investigating and producing an informed and reasoned response. The threshold to allow these amendments has not been met.

146. I am conscious, however, that the case has been pleaded by Mr Morris's solicitor but he now has the assistance of leading counsel who has asked for the opportunity to produce a new draft of the re-amended pleadings if I came to the conclusion that there was merit in the application to strike out. Some of the defective allegations could be converted into realistically arguable averments. For example, the claimant could support paragraph 21(d) by a pleading in the alternative that if his case against the third defendant is statute barred, the failure to issue protective proceedings against the firm in time has lost the claimant the opportunity of recovering his losses in such a claim; he has already pleaded the breach of duty, it is the consequence which is absent. Other allegations may benefit from particularisation, such as that related to failing to read the defendant's disclosure, 21(f)(ii) and getting material facts wrong 21(f) (v). Those allegations which could only be relevant to an assertion that the claimant would have won before HH Judge Bird if the case had been properly prepared cannot succeed as they are not compatible with the pleaded case.

147. At this stage, as the court will generally refrain from striking out unless it has given an opportunity to put matters right, what I propose to do with the application to strike out and amend is to remove the inconsistent allegations, i.e. those which can never be cured, by striking out the second paragraph 21(f)(ii) and (iii) and refusing permission to amend to add paragraphs 21f (iv), but to adjourn that part of the application relating to the other paragraphs which I have found to be defective to give the claimant the opportunity, requested by Mr Butler, to produce a new re-amended draft and, when produced, to decide whether it overcomes the shortcomings I have identified. I do so in the expectation that Mr Butler will approach the task in the realistic manner which he

displayed in submissions. That is a more efficient, in terms of time and cost, than refusing amendments which can be saved and striking out salvageable parts of the Particulars of Claim at this stage, leaving the claimant to seek amendment at some later stage to re-instate some of these allegations in a pleading with complies with the rules. To do so will ensure that the defendants do not need to plead to the claim until they have what will have to be regarded, in the absence of good cause, as the final version. I consider such an approach to be more in keeping with the overriding objective. It may be that a further hearing is required, but if good sense prevails, the re-amended draft should be in a form which can be agreed. In reaching this decision I have considered that part of the overriding objective, CPR 1.1(2)(f) which includes enforcing compliance with rules. My approach is designed to see that there is compliance with CPR 16.4 which can be achieved by suitable amendment. The defendants may say that the claimant has had his chance and now is the time for him to be penalised. In some cases that will be necessary to manage a case justly, but I remind myself that the stated object of CPR 1.1(2)(f) is compliance not punishment.

148. At the handing down of judgment directions will need to be given for the further conduct of this case, including compliance with the disclosure rules as they apply to the Business and Property Courts. In view of the location of counsel I am content to hand down remotely. I would ask the parties to attempt to agree a form of directions to be provided to me one clear day before the hand down.