Neutral Citation Number: [2023] EWHC 2312 (Ch)

Case No: BL-2021-001184

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 September 2023

Before:

MASTER BRIGHTWELL

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Between:

(1) AMATHUS DRINKS PLC	**Claimants**
(2) CHARITON PLATON GEORGIOU	
(3) BABLAKE WINES LIMITED	
- and -	
(11) EAGK LLP	**Defendants**
(12) ALEKOS ANDREAS CHRISTOFI	

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Samir Amin (instructed by **Else Solicitors LLP**) for the **Claimants**
James Sharpe (instructed by **RPC LLP**) for the **Eleventh and Twelfth Defendants**

Hearing date: 7 August 2023

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Friday 22 September 2023

Master Brightwell:

1. This application concerns the sustainability of a claim in professional negligence against an auditor by the buyers and thus members of a company, in circumstances where the audit was to the knowledge of the auditor relied on by the buyers for the determination of the purchase price and where the auditor previously acted for the buyers when they were in the process of acquiring the company.

2. On 28 August 2015, the first and second claimants ("the buyers") entered into a share and purchase agreement ("SPA") for the acquisition of the entire share capital of the third claimant company. It is common ground that, before completion of the SPA, the first and second claimants retained the eleventh defendant to conduct due diligence in relation to the sale. The eleventh defendant ("EAGK") is a firm of accountants, and the twelfth defendant is a member of the firm who had direct dealings with the first and second claimants.

3. The claim was initially brought also against ten former shareholders and directors of the company. Because of matters dealt with at an earlier hearing and not relevant to this judgment, the claim now proceeds only against the eleventh and twelfth defendants. I will accordingly refer to the eleventh and twelfth defendants in this judgment collectively as "the defendants".

4. The defendants apply to strike out the claim against them, alternatively for summary judgment.

5. At the first hearing of the application on 11 May 2023, and for reasons given on that occasion, I came to the view that the facts and matters relied on by the claimants in support of their claim that the defendants had assumed responsibility to the buyers were not adequately particularised and I directed the claimants to file and serve amended particulars of claim. They have done so, and the defendants have filed and served an amended defence.

6. The amended particulars of claim allege at paragraph 6 that the price to be paid for the shares in the company was £1,700,454 plus a 20% uplift, to be subject to adjustment if the Completion Net Assets (as defined) were less than that sum, as derived from the Completion Accounts, to be ascertained in accordance with clause 6 of and schedule 9 to the SPA. Those Completion Accounts were to comprise a profit and loss account from 31 March 2014 to completion, and a balance sheet as at the date of completion.

7. The Completion Accounts were prepared by EAGK, who also produced statutory accounts for the company. There is a dispute between the parties, to which I will return, as to whether EAGK was retained by the company and/or

by the buyers for this purpose. In any event, EAGK issued a Completion Certificate for the purposes of the SPA on 22 September 2016. The claimants plead, and the defendants neither admit nor deny, that 'on 3 October 2016, the Buyers' solicitor wrote to the Sellers' solicitor to confirm that, the Buyers already having paid the Sellers £1,437,954, the Buyers were due a refund of £142,199, so as to make the total amount paid £1,0769,796 plus 20 per cent (£1,297,755). Such a refund was subsequently made by the Sellers.'

8. The claimants allege that it was later discovered that a fraud had been committed on the company in the period before the SPA was entered into, in that:

   i) Assets in the accounts had been double counted;

   ii) Cash receipts had been inflated and the difference between sums received and sums posted was shown in a payment contra account as a debt owed to the company by a customer when no such debt was owed; and

   iii) False invoices were created and added to the sales ledger and cash receipts were then credited against the false invoices.

9. The effect of this alleged fraud is said (amended particulars of claim, paragraph 22(a)) to be that it 'resulted in the apparent net balance sheet of the Third Claimant being inflated, as at 28 July 2015, by between approximately £290,000 and £400,000…. This would have resulted in the Buyers paying the Sellers between approximately £348,000 and £480,000 more than they should have done under the SPA.'

10. The claimants allege that EAGK had both a contractual and a common law duty to exercise reasonable skill and care in preparing the statutory accounts and the Completion Certificate, including a duty to undertake a reasonable and proper investigation of the company's accounts, books and stock sheets and to draw to the attention of the buyers any material irregularities which it discovered. They allege, in summary, that the defendants acted without reasonable skill and care in failing to detect the fraud alleged to have been committed on the company, causing loss to the buyers, who were then unable to take the steps they would have taken had they been aware of the apparent fraud much sooner.

The claim in contract

11. The claimants plead that the buyers retained EAGK to produce statutory accounts, and that a formal engagement letter was entered into between the buyers and EAGK on 7 September 2015. The defendants not only deny that contention, but contend that there is no real prospect of such claim succeeding

at trial and that summary judgment should be granted in their favour. The following matters are relevant to this question.

12. A schedule of engagement has been put in evidence and is headed "Bablake Wines Ltd". The first section heading reads, 'Your responsibilities as directors', above which is reference to an audit being carried out for the purposes of the Companies Act 2006. Paragraph 2.2 states as follows:

> 'Our report will be made solely to the company's members, as a body, in accordance with Chapter 3 of Part 16 of CA 2006. Our audit work will be undertaken so that we might state to the company's members those matters we are required to state to them in an auditor's report and for no other purpose. To the fullest extent permitted by law, we will not accept or assume responsibility to anyone other than the company and the company's members as a body, for our audit work, for the audit report or for the opinions we form.'

13. No copy of the separate letter of engagement attaching the schedule has been put in evidence by either side. The schedule indicates that it is to be read together with the Engagement Letter and EAGK's Terms and Conditions of Business (the latter of which included, at paragraph 4.1, a separate obligation of a contracting party not to provide EAGK's work to third parties without consent). Whilst not stated in evidence, both counsel indicated that their respective clients had not been able to locate a copy of the letter.

14. The schedule of engagement itself post-dates the entry into the SPA. Schedule 3, Part 3 to the SPA had required the sellers to cause a completion board meeting to take place at which there would be, 'approval of the appointment of EAGK…as the auditors of the Company…with effect from the end of the relevant board meeting'.

15. When the audited accounts, having been prepared, were sent out by Mr Christofi to Mr Georgiou on 26 April 2016 with an audit report, they were addressed to 'The Directors, Bablake Wines Ltd', together with a statement that, 'this report has been prepared for the sole use of Bablake Wines Limited. It must not be disclosed to third parties, quoted or referred to, without our prior written consent. No responsibility is assumed by us to any other person.' The report itself contained a further disclaimer in terms almost identical to paragraph 2.2 of the letter of engagement (set out above).

16. The court may grant summary judgment on a claim or an issue in favour of the defendants if it considers that the claimants have no real prospect of succeeding on the claim or issue, and there is no other compelling reason why the claim or issue should be disposed of at a trial: CPR r 24.2. The test to be applied was set out by Lewison J (as he then was) in his frequently cited

decision in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. For present purposes, the key points are that the claimants' case on the claim or on the issue must be realistic and not fanciful, meaning that it must carry some degree of conviction and be more than merely arguable. The court must not conduct a mini-trial, but must take account of the evidence that can reasonably be expected to be available at trial.

17. Addressing myself at this point solely to the claim in contract, accordingly, I ask whether there is a realistic as opposed to a fanciful prospect of the claimants succeeding at trial in showing that EAGK entered into a retainer in September 2015 with the buyers. I accept, as Mr Amin submits, that the written agreement falls to be construed as against the background matrix of fact. It is clear from the amended particulars of claim that the claimants rely on the written contract made on or around 7 September 2015 and not on any collateral or other contract. Mr Amin suggests that the contract may have been made by EAGK with both the company and with the buyers.

18. For the following reasons, however, I do not consider that there is any realistic prospect of the claimants showing that the buyers were parties to the contract with EAGK:

    i) The claimants have not filed any witness evidence in response to the application explaining why their case is that the retainer was made with the buyers. The witness statement of their solicitor, Ian Meadows, merely restates the contention of the claimants that the contract was made between EAGK and the buyers. The amended particulars of claim do not go beyond the assertion that the formal engagement letter was entered into between the buyers and EAGK on 7 September 2015. Whilst Mr Amin relies on the consideration that the evidence will emerge more fully at trial, the only matters relied on are in the documentary evidence summarised above. If it were the claimants' position that there were other facts and matters relevant to this particular issue, they should have been pleaded and set out in witness evidence on this application.

    ii) Whilst it is consistent with the term of the SPA requiring the appointment of EAGK as the company's auditors, the schedule of engagement is not at all consistent with the contract having been entered into with the buyers. It refers exclusively to matters concerning the company, and not at all with the requirements of the SPA in relation to post-completion matters, nor to the rights of the buyers in such regard.

    iii) As the amended particulars of claim acknowledge, the schedule of engagement stated that the engagement was to produce an audit report

in accordance with the provisions of the Companies Act 2006 concerned with the functions of the company's auditor. The report was also addressed to the company's members as a body together with a disclaimer of liability to third parties. The buyers had no interest in the company's audit other than as shareholders.

iv) Even if the letter of engagement was addressed to the buyers as well as to the company (and all the more so if it was not addressed to the company at all) it would therefore be inconsistent with the contractual documentation available, including the schedule of engagement which appears to be the document setting out the scope of the work to be undertaken. That scope made no reference to the terms of the SPA concerned with the ascertainment of the Completion Net Assets.

v) The claimants' real point, accordingly, is that the letter of engagement itself, which is not available to the court, might turn up before trial and might cast a different light on the documents which are available. Mr Amin relies on the fact that the defendants have not filed any evidence explaining the extent of the searches they have made for this document. Even though there is some force in this point, it appears the parties have searched for the document and that it cannot be found. Furthermore, and more importantly, I consider that it is fanciful to suppose that it may cast a different light on the documents that are before the court.

19. Accordingly, I will grant summary judgment to the defendants on the claim in contract. I do not consider that there is a realistic possibility of further material being available to the trial judge which may point towards the contract formed on 7 September 2015 having been made with the buyers, whether or not jointly with the company.

The claim in tort

20. The claimants plead separately that the defendants owed a common law duty of care to the buyers to exercise reasonable care and skill in preparing the company's accounts and the Completion Certificate, as further set out at [10] above.

21. As a result of the amendments made by the claimants following my order made on 11 May 2023, the claimants now rely on pleaded particulars in support of the allegation that the said common law duty arose as a result of an assumption of responsibility, or because it is fair, just and reasonable in the circumstances to impose such a duty. The facts relied on can be summarised as follows (amended particulars of claim, paragraph 29A):

i) There was an existing business relationship between the buyers and EAGK (and Mr Christofi in particular), the latter having been actively involved in the process of negotiating the SPA. Mr Christofi communicated directly with the buyers and their solicitors (both before and after 7 September 2015) and also communicated with the sellers and their agents on Mr Georgiou's instructions.

ii) The SPA required the buyers to procure Completion Accounts as soon as practicable after completion of the SPA.

iii) The accounts were prepared in accordance with the SPA, covering the period 1 April 2014 to 31 July 2015 and not for the company's usual accounting period.

iv) It was both known and intended by the defendants that the buyers would use the net asset figure in the accounts and the Completion Certificate to calculate the final price to be paid under the SPA. The reference to the company's members (as a body) in the disclaimer in the schedule of engagement is relied on in this regard.

v) The defendants were in possession of the documents provided by the sellers for the purposes of ascertaining the net asset value of the company, i.e. in accordance with the SPA.

vi) EAGK, via Mr Christofi, provided the Completion Certificate to the buyers separately from the accounts. This certificate, dated 22 September 2016, was addressed to 'The Sellers (the former shareholders in Bablake Wines Ltd) And The Buyers (Chariton Platon Georgiou and Amathus Drinks PLC)'. It was not addressed to the company.

22. The test as to when a duty of care to avoid economic loss arises was addressed by the Supreme Court in *NRAM Ltd v Steel* [2018] 1 WLR 1190 (a Scottish appeal, followed in England in *Banca Nazionale del Lavoro SPA v Playboy Club London Ltd* [2018] 1 WLR 4041, at [7].) At [24], after citing the seminal decision in *Caparo Industries plc v Dickman* [1990] 2 AC 605, and explaining why the House of Lords in that case had on analysis not adopted the threefold test of liability (foreseeability, proximity and whether it was just and reasonable to impose the liability), Lord Wilson JSC said the following:

> '24 In July 1994, in *Spring v Guardian Assurance plc* [1995] 2 AC 296, the House held that, in writing a reference for the claimant who had worked for them and who was now seeking work elsewhere, the defendants owed a duty of care to him. Lord Goff of Chieveley explained at p 316 that the basis of his conclusion was that the defendants had

> assumed responsibility to the claimant in respect of the reference within the meaning of the *Hedley Byrne* case [1964] AC 465. Weeks later, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, the House held that underwriting agents at Lloyd's owed a duty of care to a member in their conduct of his underwriting affairs even in the absence of any contract between them. In a speech with which the other members of the House agreed, Lord Goff held at p 181 that the case should be decided by reference to the concept of an assumption of responsibility. In *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. Lord Steyn remarked at p 837 that there was no better rationalisation for liability in tort for negligent misrepresentation than the concept of an assumption of responsibility. It has therefore become clear that, although it may require cautious incremental development in order to fit cases to which it does not readily apply, this concept remains the foundation of the liability.'

23. The editors of *Jackson and Powell on Professional Liability* (9th edn) at 17-050, put forward the following factors which a claimant must prove when suing an accountant or auditor of whom they were not at the relevant time a client:

> '…there may be cases where the accountant has undertaken a specific responsibility to a third party or class of third parties. In order to establish this, the claimant must prove:
>
> (a) that the accountant was aware of the nature of the transaction which the claimant had in mind;
>
> (b) that the accountant knew or ought to have known that his statement would be communicated to the claimant, either directly or as a member of a class;
>
> (c) that the accountant knew or ought to have known that the claimant was likely to rely on the statement in deciding whether or not to proceed with the transaction; and
>
> (d) that the claimant did rely on the statement.'

24. The editors then go on in the same paragraph to refer to the very disclaimer which is found in the schedule of engagement in this case, often now referred to as a *Bannerman* clause. Mr Sharpe accepts that, were it not for this disclaimer, it would be reasonably arguable that the defendants had assumed responsibility to the buyers for the accuracy of the accounts and for the statement in the Completion Certificate. He contends, however, that the disclaimer presents an insuperable barrier to the claim and that summary judgment should be entered in favour of the defendants accordingly.

The disclaimer

25. The principal authority relied on by the defendants is the judgment of Cooke J in *Barclays Bank plc v Grant Thornton UK LLP* [2015] 1 CLC 180, in which a *Bannerman* disclaimer in substantially, although not precisely, the same form as that in issue in the present dispute was held to preclude a claim. There, Barclays, a lender to a hotel group, sued Grant Thornton on the basis of an alleged tortious duty in relation to audit reports, claiming that it had negligently failed to identify the alleged fraud of two employees. Barclays relied on the fact that Grant Thornton had previously advised Barclays in relation to the group's finances, and that Grant Thornton knew or ought reasonably to have known that Barclays would rely on it to perform the audits competently. The judge assumed for the purposes of the application that Grant Thornton knew that Barclays would rely on its audit in order to determine whether to continue lending to the group (see at [35] and [84]).

26. Cooke J said that, in the absence of the disclaimer, it was arguable that a duty of care had arisen. He pointed out, at [8], that 'a statutory audit is of course essentially directed to the company and its members "as a body" since the accounts require approval in general meeting.' The reference in the disclaimer to the members as a body shows that the contractual duty was owed to the shareholders as a body, and not to individual shareholders (i.e. as investors or potential investors).

27. So, as a general proposition, an auditor owes no duty to a shareholder qua shareholder and 'the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders…will be recouped by a claim against the auditors in the name of the company, not by the individual shareholders': *Caparo v Dickman* at 626C-E (Lord Bridge of Harwich). This is a point that was forcibly made by Mr Sharpe by detailed reference to *Caparo v Dickman*. So far as it concerns the scope of an auditor's duty in tort as a general proposition, I would agree with him. An auditor does not without more assume responsibility to an individual shareholder when it enters into a contract with a company for auditing purposes.

28. In the *Barclays* decision, Cooke J went on at [41] to say the following, again heavily relied on by the defendants in the present case:

> '41 The existence of the duty of care is tied up with the issue of the disclaimer which would, if effective, negate any such duty. In my judgment, that is the correct analysis of the position as set out by Hobhouse LJ in *McCullagh v Lane Fox & Partners Ltd* [1996] PNLR 205 where, at paragraphs 223 and 227 he makes the point clear by reference the decision in *Hedley Byrne v Heller* [1964] AC 465. He disagreed with

the first instance judge's approach to the disclaimer as if it were a contractual exclusion and went on to say:

> "On such an approach it would need to be strictly construed and the argument was available that it did not as such cover an oral statement. But that is not, in my judgment, the right approach. It is not an exclusion to be construed. The right approach, as is made clear in *Hedley Byrne*, is to treat the existence of the disclaimer as one of the facts relevant to answering the question whether there had been an assumption of responsibility by the defendants for the relevant statement. This question must be answered objectively by reference to what a reasonable person in the position of [the plaintiff] would have understood at the time that he finally relied upon the representation."

It is to my mind self-evident that, if the "assumption of responsibility" test for determining the existence of a duty of care is applied, no one can be taken as assuming responsibility in circumstances where it is specifically negatived by him. The recipient is being told that, if he chooses to rely upon the representation, he must realise that the maker is not accepting responsibility to him for the accuracy of it.'

29. The judge then considered the parties' competing contentions as to whether Grant Thornton had assumed a duty of care to Barclays. One of the issues was whether the disclaimer satisfied the test of reasonableness for the purposes of the Unfair Contract Terms Act 1977, it being agreed that the Act did apply to the disclaimer. There is no suggestion by the parties in the present case that the 1977 Act applies here.

30. Cooke J weighed the principal factors, being the known purpose for which the non-statutory audit was required, and the absence of any letter of engagement between the parties, the absence of any fee, and the disclaimer (see [37] and [91]), with the parties' other submissions. His conclusion, at [91], was that:

> '91 ….In the face of a clear disclaimer, the absence of any letter of engagement or any fee paid by Barclays to Grant Thornton, the factors upon which Barclays relies both in that paragraph and as set out elsewhere in this judgment cannot outweigh the points that negate the existence of such a duty. The court here can be confident of its answer in circumstances where sophisticated business parties are able to protect their own interests and do not require the protection of the 1977 Act in the same way as small companies or consumers.'

31. The defendants rely on this conclusion here. They submit that, as in *Barclays*, all facts relied on by the buyers can be assumed in their favour and yet the

presence of the disclaimer prevents a duty from arising. If the claimants are right, it is said, the disclaimer would simply have no effect.

32. In reaching his conclusion, Cooke J accepted at [62] a key submission on behalf of Grant Thornton:

> 'As Mr Salzedo QC submitted, when determining the question of duty, the issue is not whether Grant Thornton realised that Barclays wanted audited accounts upon which it could rely and whether Grant Thornton realised it would rely on them but whether a reasonable person in the position of Barclays could properly consider that Grant Thornton was undertaking responsibility to it. Alternatively the point might be expressed as what a reasonable person would think Grant Thornton was doing. It is true to say that it is not unusual in the world of finance for commercial parties to rely upon the work of others for which they have not paid without having any enforceable rights in respect of that work. Reliance on such statements is then placed at their own risk. Whether Grant Thornton expected Barclays to rely upon the documents produced is therefore not determinative. An expectation of reliance, whilst disclaiming any responsibility should the person choose to so rely, cannot create a duty….'

33. It is clear that two considerations in particular weighed heavily in the conclusion that Grant Thornton had not assumed responsibility to Barclays. First, Barclays was a sophisticated commercial party operating in the world of finance. The presence of disclaimers in auditors' statutory reports was well known and Barclays was well aware of them (see at [63]). Secondly, there was no direct communication between the parties, and thus nothing beyond the known purpose for which the reports were required which could give rise to an assumption of responsibility (see at [83]). Therefore, there were no other potential facts which Barclays could pray in aid in support of its claim. All the facts on which it could rely were assumed in its favour (see at [84]).

34. Returning to the present case, Mr Amin submits that it is relevant to look at how matters developed after completion of the SPA. The allegation of breach of duty relates both to the accounts and to the later Completion Certificate, the latter being based on the former, so events up to the date of the Completion Certificate are relevant to an assessment whether there was an assumption of responsibility by EAGK to the buyers. I accept that submission. The fact that there were continuing communications between the parties after the date of the audit engagement is a relevant factor. In *Barclays*, there was no such dialogue at any relevant time. It is clear from the quotation from the judgment of Hobhouse LJ in *McCullagh v Lane Fox & Partners Ltd*, set out above, that one looks at the facts right up to the date of actual reliance (and thus not merely to whether there was objectively an assumption of responsibility as at the date of the contract with the company).

35. I consider it to be potentially very relevant that there were emails after September 2015 between Mr Christofi and Mr Georgiou, whilst the auditing process was underway, to which the buyers' (but not the sellers') solicitors were party. These could be said to convey the sense that Mr Christofi continued to see himself as part of or as a support to the buyers' professional team. A number of communications are pleaded in the amended particulars of claim. In one of them, on 18 February 2016, Michael Harwood & Co, Accountants, wrote to Mr Christofi on behalf of the sellers asking for information about the accounts 'in line with clause 2.4 of Schedule 9 of the Share Purchase Agreement'. That provision required the buyers to permit the sellers or their agents to review the buyers' working papers and such company books and records as the sellers reasonably required. Mr Christofi forwarded this email to the buyers' solicitors, copying Mr Georgiou, writing simply, 'We are dealing with their request'.

36. Whilst it may conceivably be said that this demonstrates nothing other than EAGK acting on behalf of the company, the reference to the Completion Accounts section of the SPA, and the direct communication with the buyers' solicitors only, suggest a continuing and direct commercial relationship of a kind which simply did not exist in the *Barclays case*, where the parties' commercial relationship was in the past. This seems to me to be potentially a distinguishing factor of some significance. Cooke J did not say that a disclaimer was a bar to an assumption of responsibility in all cases; he held that it was a bar in the circumstances of the case before him.

37. I consider that this continuing relationship is also relevant to another objection of Mr Sharpe to a finding of assumption of responsibility. He submitted that there may be a conflict of interest as between the buyers and the company, for the buyers had an interest in obtaining the lowest price. He also posited the question whether there might have been a duty of care to the sellers as well. I do not consider that there was an obvious conflict of interest, as the buyers as shareholders had an indirect interest in ensuring that the company's accounts were accurately audited, and this is in any event not a pleaded point. The continuing relationship with the buyers (i.e. but not the sellers) seems to me possibly to be a distinguishing factor such that there may arguably have been an assumption of responsibility towards the buyers but not to the sellers.

38. Mr Amin also relies on the (unpleaded) allegation that the disclaimer was not brought to the buyers' attention. The better argument may be that the existing and continuing business relationship between the parties (and particularly between Mr Georgiou and Mr Christofi) meant not only that EAGK knew that the buyers were relying on EAGK for ascertainment of the correct figure in the Completion Certificate, but that it positively intended that reliance (an

allegation that is pleaded by the claimants), again providing a distinguishing feature from the *Barclays* decision.

39. He further submitted that the reference in the disclaimer to the members is a sufficient feature to distinguish the *Barclays* decision (where the disclaimer indicated, confusingly, that the report was directed to the 'company's director as a body'). The meaning of the phrase, 'members as a body' is clear (as I have mentioned above), and does not connote the members individually. I do not consider that these words alone could lead to there being an assumption of responsibility, but their presence does not preclude reliance on the other points relied on by the claimants.

40. I also bear in mind that I have to take account of the fact that there will be disclosure and witness evidence of fact on these matters. In *Barclays*, the relevant facts could all be assumed in the claimant's favour as there were no direct communications to consider. In this case, if the claim proceeds to trial, there will need to be an enquiry into what was said orally and in writing over a period of many months which, in all the circumstances, may well also be relevant to the question of assumption of responsibility.

41. The question for me at this stage is, of course, only that of whether there is a realistic as opposed to a fanciful prospect of the claimants succeeding at trial in showing that there was an assumption of responsibility by EAGK towards the buyers in relation to the Completion Net Assets figure shown in the Completion Certificate. For the reasons I have given above, I consider that the claimants have an entirely realistic prospect of so showing, and I would not grant summary judgment on the claim in tort on this ground.

Breach of duty

42. The defendants' summary judgment application is also pursued on the further basis that the claimants have no real prospect of establishing breach of duty as the allegations of breach are not particularised (alternatively that the allegations should be struck out for that reason). Reliance was made by the defendants on the comments of Coulson J in *Pantelli Associates v Corporate City Developments (No.2)* [2011] PNLR 12, where he said at [17] that an allegation of professional negligence must generally be supported by a relevant professional with relevant expertise. The claimants have not yet obtained such expert support for their allegations of breach, although indicate that they will do so, saying that they require first from the defendants disclosure and inspection of a full list of the files in the possession of EAGK for the purposes both of the preliminary due diligence work and for the subsequent audit. They issued an application notice dated 25 April 2023 seeking such relief.

43. During the course of the hearing it became common ground that if I was minded not to dismiss the claim in negligence (which I am not) then I should make an order for this disclosure to be provided, and consequential directions. I consider that the claimants reasonably require to know precisely what documents the defendants had in order to plead precisely how EAGK is said to have breached its alleged duty of care. The claimants sought the order under CPR r 3.1(2)(m) (power to make any order for the purpose of managing the case and furthering the overriding objective), but I consider that such an order can be made under Practice Direction 57AD (governing disclosure in the Business and Property Courts), paragraph 5.11. The paragraph provides:

> 'In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.'

44. A party who issues a claim without first having sought an order for disclosure before proceedings begin under CPR r 31.16 is on the face of Practice Direction 57AD without a remedy if it wishes to seek disclosure of specific documents after issuing a claim in order better to particularise the claim. An order for disclosure of specific documents may be made under paragraph 18 of the Practice Direction 'at any stage', but only to vary an order for Extended Disclosure, usually made at the first case management conference.

45. In a case where a defendant pleads that a claim should be dismissed because it is not particularised in a material respect and that same defendant holds documents which would enable that particularisation to be carried out, it seems to me that the disclosure is necessary to understand the defence (for it will enable the claimant to determine whether the particulars sought by the defendant can be provided). If I am wrong about that, I would agree with Mr Edwin Johnson QC (as he then was), who held in *White Winston Select Asset Funds LLC v Mahon* [2019] EWHC 1014 (Ch), at [12], that there is a residual power to make orders for specific disclosure at a time before paragraph 18 of the Practice Direction takes effect, under the court's general case management powers in CPR r 3.

Causation and loss

46. Finally, the defendants apply for summary judgment also on the basis that the claimant's case on causation is incoherent and includes contradictory factual arguments.

47. Paragraph 31 of the amended particulars of claim pleads as follows:

> '*Had EAGK and/or the Twelfth Defendant not acted in breach, the Buyers would have not proceeded with the purchase of the shares, would have paid a lesser price for the shares and/or would have commenced proceedings against the Sellers for breach of their warranties in particular within 24 months of the completion of the SPA.*'

48. Mr Sharpe contends that it is not open to the claimants to plead competing counterfactuals; he submits that they must plead what they would have done and how any loss would have been avoided.

49. Mr Amin responds that the claimants are entitled to plead contradictory factual cases, even though he accepted they may have to pin their colours to a particular mast once expert reports have been obtained. In other words, the claimants are, he says, properly able to await expert evidence on what would have been revealed had there been no breach of duty.

50. In reality, the options open to the buyers if the alleged fraud had been revealed whilst EAGK's work was being done would have been to seek to rescind the SPA and/or to sue for damages (and for the latter of which the buyers have, it may be argued, lost the chance of success and recovery). They may well have been entitled to do both within the same proceedings. The SPA had already been entered into, so it would not have been open to the buyers simply to have decided not to proceed with the purchase.

51. On analysis, therefore, there are unlikely in the event to be competing counterfactuals, beyond what would have been claimed and awarded in proceedings had they been brought several years ago. Furthermore, a claimant can properly plead alternative sets of facts, supported by a statement of truth, provided that neither alternative is unsupported by any evidence and thus pure speculation or invention: *Clarke v Marlborough Fine Art (London) Ltd* [2002] 1 WLR 1731 at [30] (Patten J). I consider it open to the claimants to reserve their position at this stage as to precisely what the buyers would have done if there had not been what was on their case a breach of duty on the part of EAGK.

Conclusion

52. For reasons set out above, I will make an order granting summary judgment to the defendants on the claim in contract, but otherwise dismissing the defendants' application. Counsel should consider what consequential amendments are required to the statements of case in order to reflect this decision.