Neutral Citation Number: [2025] EWHC 261 (Comm)

Case No: CC-2023-BHM-000033

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (KB)

Birmingham Civil Justice Centre
The Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 10 February 2025

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Larkfleet Limited	**Claimant**
- and -	
Armstrong Energy Limited	**Defendant**

- -
- -

Joseph Sullivan (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Lucy Colter (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing date: 2 December 2024

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Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

Introduction

1. The Claimant's claim is in two parts. The first part is a claim for damages in negligence arising from the Claimant's entry into a Novation Agreement on 5 July 2017. The potential liability under that part of the claim is about £7M. The second part is a discrete claim in contract or pursuant to a purpose trust, for damages or equitable compensation ("the Thornborough claim"). The value of this second part of the claim is £145,973.20.

2. The Claimant sets out its case in the Particulars of Claim dated 5 December 2023. By its Defence of 26 February 2024, the Defendant denies the claim on a number of bases, taking issue with the key factual allegations made, and disputing that it has any liability. The Claimant provided Further Information relating to its claim following a Part 18 Request made by the Defendant. The Claimant's Director Mr Hick signed the statement of truth to that Further Information on 14 May 2024. The Defendant sought further clarification of the Claimant's responses by letter of 8 July 2024. The Claimant replied by letter dated 31 July 2024.

3. The Court listed a Costs and Case Management Conference for 2 December 2024.

4. On 6 August 2024 the Defendant made an application for reverse summary judgment and/or to strike out the claim pursuant to CPR Part 3.4(a)(b). The parties agreed that this application should be heard at the hearing fixed for the CCMC. I heard argument and reserved judgment. That judgment has been delayed somewhat by my absence from Court.

5. The Defendant's application notice gives five grounds, the first four of which relate to the claim in negligence, and the fifth to the Thornborough claim. I summarise:

    (i) the claim is time barred;

    (ii) there is no real prospect of establishing that the Defendant owed the Claimant a duty of care in relation to the advice/assurances the Claimant alleges were given to it by the Defendant;

    (iii) there is no credible evidence that the alleged assurances and advice were given;

    (iv) there is no real prospect of establishing reliance or causation in relation to the same; and

    (v) there is no real prospect of establishing that there was an agreement as alleged by the Thornborough claim.

6. The Defendant relies upon the witness statements of:

    Andrew Newman, a Director of the Defendant of 5 August 2024

    Kathryn Lister, the Defendant's solicitor, of 6 August 2024

    Alan Yazdabadi, a former employee of the Defendant of 6 August 2024

    Stephen Mahon, a former Director of the Defendant of 6 August 2024.

7. The Claimant relies upon the witness statement of its Director, Karl Hick, of 4 October 2024. The Defendant's evidence in reply is set out in witness statements from Mr Newman of 1 November 2024 and Mr Yazdabadi of 31 October 2024. Mr Hick made a second witness statement on 29 November 2024. Whilst it was late, I take it into account.

8. The approach of the court to applications such as this one is well established, and it is unnecessary to refer to the many authorities before me in any great detail. The application to strike out is, in reality, an application under CPR Part 3.4(2)(a). Here I must assume that the facts relied upon by the Claimant are true; see Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) at [27]. In effect, I have to be satisfied that the claim is "unwinnable" and that continuing the claim is without any possible benefit to the Claimant and would waste resources on both sides; see Master Marsh in *MF Tel Sarl V Visa Europe* [2023] EWHC 1336 (Ch) at [32]. The approach is sometimes summarised by the guidance that the court should only strike out a claim in a clear and obvious case.

9. The classic summary of the principles applicable to a summary judgment application is set out in the judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]:

> *(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 E.R. 91;*
>
> *(ii) a "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*
>
> *(iii) in reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;*
>
> *(iv) this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements 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: ED&F Man Liquid Products v Patel at [10];*
>
> *(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;*
>
> *(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment;*
>
> *(vii) On the other hand it is not uncommon for an application under Pt 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.*

10. Central to the Claimant's resistance to the summary judgment orders sought by this application is the proposition that the court should not conduct a "mini-trial". Mr

Sullivan refers to the decision of the Supreme Court in *Okpabi & others v Royal Dutch Shell plc* [2021] 1 WLR 1294, where at [107] Lord Hamblen emphasised that at this interlocutory stage, the court ought not to be:

> *... drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on the evidence . The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupportable was the court referred to the Court's task at this stage*

11. Ms Colter referred to three relatively recent authorities at first instance which go to this aspect of the summary judgment exercise. Firstly the decision of Nicklin J in *Amersi v Leslie* [2023] EWHC 1368 (KB). Having referred to the passage in *Easyair* above, he said this at [142]:

> *(5) Nevertheless, to satisfy the requirement that further evidence "can reasonably be expected" to be available at trial, there needs to be some reason for expecting that evidence in support of the relevant case will, or at least reasonably might, be available at trial. It is not enough simply to argue that the case should be allowed to go to trial because something may "turn up". A party resisting an application for summary judgment must put forward sufficient evidence to satisfy the court that s/he has a real prospect of succeeding at trial (especially if that evidence is, or can be expected to be, already within his/her possession). If the party wishes to rely on the likelihood that further evidence will be available at that stage, s/he must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up.*
>
> *(6) Lord Briggs explained the nature of the dilemma in Lungowe v Vedanta Resources plc [2020] AC 1045 [45]:*
>
> > *"On the one hand, the claim cannot simply say, like Mr Micawber, that some gaping hole in its case may be remedied by something which may turn up on disclosure. The claimant must demonstrate that it has a case which is unsuitable to be determined adversely to it without a trial. On the other, the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue ..."*

12. Secondly the decision of Cockerill J in *King v Stiefel* (see above) at [21]:

> *The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that- even bearing well in mind all of those points – it would be contrary to principle for a case to proceed to trial.*

13. Thirdly the decision of HHJ Keyser KC in *Maranello Rosso Limited v Lohomij BV and others* [2021] EWHC 2452 (Ch) at [19]:

> *... The court will not conduct a mini-trial and, in circumstances such as the present, will be mindful that full disclosure has not yet taken place and that there might be more evidence to come. Accordingly, where there are disputed questions of fact, it will not generally attempt to determine where the probabilities lie. However, and importantly, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of anybody; where it is clear that a factual case is self-contradictory or inherently incredible or where it is contradicted by the contemporaneous documents, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis.*

In other words, in the appropriate case the court is entitled to say that a claim has no real prospect of success when it relies upon evidence which is implausible, self-contradictory or contradicted by the contemporaneous documents.

Factual Background

14. The Defendant was incorporated in 2012, and at the material times carried on business as an investment manager. It was regulated by the Financial Conduct Authority and authorised to arrange transactions. It was not authorised to provide financial advice. The Claimant and its associated companies, were involved in developing projects involving solar power. From about 2013, the Defendant was involved in arranging funding for projects put together by the Claimant. Mr Newman gives some detailed evidence about the structure of the relationship between the Defendant and a subsidiary of the Claimant called Lark Energy Limited ("LEL") in the early paragraphs of his first witness statement. The structure of the arrangement appears to be common ground. Mr Hick refers to it in shorter terms in his witness statement at paragraphs 9-11.

15. The essence of the relationship was this. LEL would identify and develop a project. A special purpose vehicle ("SPV") would be incorporated to purchase and hold the relevant development rights (planning permission, lease and grid connection). The SPV would be owned by (or sold to) investors identified by the Defendant (the Defendant's "high net worth individual clients" as Mr Hick describes them), whose money would pay for the purchase of the relevant development rights. The SPV would contract with LEL to build the solar farm. This is referred to as the Engineering, Procurement and Construction contract, or "EPC". LEL would be paid for the work it did pursuant to the EPC by the SPV when certain milestones were met. Importantly, LEL's performance obligations under the EPC contracts were guaranteed by the Claimant.

16. The Defendant's case is that it acted on behalf of the investors, and the SPV (when it was formed) see Newman (1) paragraph 17.5. That included releasing payments to LEL when milestones were met, and finding a purchaser for the solar farm. The SPV also entered into an Operations and Maintenance Contract ("O&M") with LEL to operate and maintain the farm when it had been completed. The Defendant did not

charge fees for introducing the investors, or for anything it did until the farm was sold, when they took a share of the profit. Its case is that it was not acting for LEL or advising LEL in any way.

17. There were many such projects; Mr Hick lists nineteen in his witness statement. At paragraph 13 of his first witness statement he says that: *In practice, the Solar Projects were managed, run, and controlled by Armstrong on behalf of the SPVs.* He says that Mr Newman was a Director of five of the SPVs, Mr Yazbadabi was a Director of two, and that Mr Mahon too was central to the SPVs and the solar projects:

> *It was Armstrong that negotiated the terms of the EPC and O&M contracts, that controlled the release of all payments relating to each Solar Project including the milestone payments under the EPC and O&M contracts, and that dealt with any defects or issues at the sites of the Solar Projects. It was Armstrong that Larkfleet liaised with in relation to the assignments and novations from LEL to LPSL in respect of the Facility Agreement and the EPC and O&M contracts. Armstrong was also involved in the sale of the Solar Project sites to third parties once construction was complete.*

At paragraph 15 he says that:

> *... Armstrong therefore had control over the Solar Projects and the SPVs and had substantial knowledge about the Solar Projects and LEL's and LPSL's work in relation to the Solar Projects.*

18. On 4 July 2014, LEL and the Claimant entered into an agreement with UK Solar (Hartwell) LLP by which Hartwell purchased project rights from LEL and made an "advance payment" of £3M for the development of the solar project. The Claimant guaranteed LEL's obligations under this agreement. Hartwell were advised by the Defendant, and Mr Newman was a Director of Hartwell for a year or so in 2014-15. Mr Newman refers to this agreement as a "quasi-loan"; see paragraph 51 of his first witness statement.

19. Then on 18 September 2015, the Claimant and LEL entered into a "Facility Agreement and Guarantee" ("the Facility Agreement") with UK Solar Projects Limited ("UKSPL"). Mr Newman provides some detailed evidence of the background to this agreement. For the purposes of this application, I am bound to focus on the terms of the written document. This provided (amongst other things) for UKSPL to provide LEL with a secured loan facility of £5,166,668.89. The Facility Agreement refinanced the £3M provided to LEL by Hartwell, provided for £315,123 of "advance interest" on the "advance payment", and for £1,851,545 of new funding. The Defendant gave a guarantee for LEL's obligations under the Facility Agreement; see bundle page 604. I return to the terms and effect of the guarantee in the discussion under Ground 1 below.

20. Paragraph 15 of the Particulars of Claim alleges that

> [The Defendant] *assured and advised Larkfleet that there was little risk in it entering into the Facility Agreement as guarantor because the repayments required thereunder would be funded through payments received from the Solar Projects and, since it had control of those projects, there was little risk that the projects would not complete as planned.*

21. In the Further Information provided Mr Hick says that the advice/assurances were given by Steve Mahon and Andrew Newman to Mr Hick orally, prior to entry into the Facility Agreement. It is not suggested that anything was ever put into writing, or that any record was made. None is produced or referred to by Mr Hick in his witness statements to date.

22. At paragraphs 23 to 24 of his first witness statement, Mr Hick says this:

> *23. I recall that we entered into the Facility Agreement to provide LEL with some additional working capital but also because Armstrong wanted to put the Facility Agreement in place for its own purposes. … I recall Armstrong personnel being desperate to put in place the Facility Agreement because it would set up a new mechanism for paying down the Advance Payment but also because of the pressure they were under from investors.*
>
> *24. I recall clearly that I only agreed to Larkfleet being a guarantor because I was assured that there was minimal chance of the guarantee being called. In fact I recall there being express an agreement with Armstrong that the chances of the guarantee being called were negligible. These discussions were between myself and my team members at Larkfleet and Andrew Newman, Steve Mahon and Alan Yazdabadi at Armstrong.*

23. At paragraph 28 of that statement, Mr Hick says this:

> *I was confident that the assurances, advice, and agreements provided by Armstrong were reliable because the plan was that LEL would be able to make the repayments due under the Facility Agreement from the sums it would be paid by SPVs pursuant to their EPC and O&M contracts with LEL. The ability to make payments under the Facility Agreement was therefore under the control of Larkfleet entities and Armstrong. LEL was to perform the EPC and O&M contracts and the SPVs, which were controlled by Armstrong, were to make payments pursuant to those contracts, which would be used by LEL to make payments under the Facility Agreement.*

The Defendant disputes making any such agreement, or giving any such advice or assurance, and emphasises that there is nothing in writing from the time which supports what Mr Hick says.

24. Mr Hick's witness evidence involves a widening of the pleaded allegation, and now involves Mr Yazdabadi. There are other points of difference in the formulation of the advice – "little risk" is now said to be "minimal chance" or "negligible", and the discussion is described as an agreement, but I regard these as differences of form rather than substance, or at least arguably so.

25. In his first witness statement at paragraph 84 and following, Mr Newman sets out what he describes as LEL's difficulty in meeting payments under the Facility Agreement. LEL had cashflow issues, and Mr Newman's evidence is that in 2016 the financial position of LEL began to deteriorate. He refers to OFGEM's concerns about the accuracy of information LEL had submitted in support of a subsidy application and the subsequent audit. He also says that relations between the parties deteriorated significantly, and that delay in selling the "ASH Projects" put severe financial strain on LEL.

26. Mr Hick does not respond to those matters in his witness statements, but it is apparent that by 2017 LEL was in serious financial difficulty, and that Larkfleet was looking to transfer LEL's obligations under the Facility Agreement to another Lark company, Lark Power Services Limited ("LPSL"). The consequence was a Deed of Novation ("the Novation Agreement") dated 5 July 2017. The Claimant's case is that this was a new arrangement by which the Facility Agreement was varied. The important elements of the agreement for these purposes are that (i) LEL's debt was extinguished and replaced with a debt owed by LPSL; and (ii) Larkfleet guaranteed LPSL's debt. LEL went into liquidation on 17 July 2017, shortly after the Novation Agreement was executed.

27. The Claimant's case is that it entered into the Novation Agreement on the basis of its continued reliance upon the advice and assurances which had been given to it by the Defendant prior to the Facility Agreement; see paragraph 16 of the Particulars of Claim. In the Further Information provided the Claimant confirms that it did not seek further advice or assurances but relied on the advice/assurances given orally prior to the entry into the Facility Agreement.

28. The Defendant's position on continued reliance is summarised by Mr Newman at paragraph 93 of his first witness statement:

> *It simply cannot have done so. Circumstances had radically changed …*

29. At paragraph 31 of his first witness statement Mr Hick counters that argument by saying that not only did he understand that the advice and assurances continued to apply, but that that was what he believed the Defendant intended because:

> *… the discussions regarding the Novation Agreement proceeded on the same terms as the original discussions. Now that the LEL had been replaced by LPSL, and insolvency was not a concern, the discussions took place on the basis that, again, there was little risk that the guarantee would be called*

Given that no further advice or assurance was sought, the "basis" of the discussions referred to by Mr Hick would not appear to be the consequence of anything said or done by the Defendant. There is no evidence from Mr Hick beyond what I have set out here. Had there been anything of significance on this point, Mr Hick would no doubt have set it out in his witness statement.

30. The Defendant explored this aspect of the matter in the Request for Further Information. By Request 15 the Defendant asked the Claimant to clarify what reliance it alleged Larkfleet was able to place on assurances and advice given in September 2015 when entering into the Novation Agreement. The response was that the request was not understood. The Defendant pressed the point in its letter of 8 July 2024 (bundle 861-862):

> *9.1 Please clarify and explain what reliance your client was allegedly able to place in c. July 2017 on assurances and advice allegedly given in September 2015 where the circumstances were different and where in particular (i) LEL asked UKSPL to enter into a Novation Agreement due to its impending insolvency and (ii) LEL had not been able to accredit projects with OFGEM …*
>
> *9.2 Please also explain how the alleged advice and assurances could have caused your client to enter into the Novation Agreement and could thus*

have caused your client any loss in circumstances where it was already committed as guarantor under the Facility Agreement and effectively had no choice but to continue to guarantee the debt owing.

31. The response was provided by letter dated 31 July 2024 (bundle 868):

> *Larkfleet was able to place reliance in c. July 2017 on assurances and advice given … prior to Larkfleet entering into the Facility Agreement because Larkfleet understood that those assurances and advice continued to apply after the novation of the Facility Agreement to LPSL. The assurances and advice given objectively meant, were intended to mean, and were understood to mean that, in the normal course of matters, there was little risk in providing a guarantee because the repayments required would be funded through payments received from the Solar Projects, and since Armstrong had control of these projects, there was little risk that the Solar Projects would not make the required payments. These assurances and advice continued to apply once the Novation Agreement was in place and insolvency not a concern.*

The reply appears to accept that the assurances and advice could only continue to be relied upon "in the normal course of matters", and suggest that once the issue of insolvency had been dealt with, they continued in force.

32. The balance of the cause of action is briefly pleaded. The advice/assurances are said to be given negligently, because there was in fact a substantial risk that the Solar Projects would not yield the sums required to make the repayments due under the Facility Agreement, and a reasonable person in the Defendant's position would have known that. Loss and damage is pleaded at paragraph 20 of the Particulars of Claim

> *But for Armstrong's negligence … LPSL and Larkfleet would not have agreed to enter into the Novation agreement. Larkfleet has suffered loss and damage equal to the sums for which it is liable under the Novation Agreement.*

33. In due course LSPL failed to keep to the repayment terms agreed, and UKSPL made demands for payment. In due course, a settlement agreement was entered into with SPVs, which quantified the losses for which a claim is now made.

Ground 1

34. The Claim Form was issued on 4 July 2023. The claim is for negligent misstatement, and the cause of action accrued when actionable damage occurred. The Claimant's case is that actionable damage occurred on 5 July 2017, on the execution of the Novation Agreement, and not before. If that is correct, the claim is in time. The starting point for the Claimant is that the damage it claims arises from its liability under the Novation Agreement rather than the Facility Agreement. Whilst liability under the one agreement replaces the other, the liability under the one is to be distinguished in law from its liability under the other. Indeed, the liability under the Facility Agreement was extinguished by the Novation Agreement.

35. The Defendant's response raises three lines of argument. The first is that the sum of just over £7M claimed by the Claimant includes £1,345,722 paid pursuant to the Facility Agreement in 2016; see paragraph 32.2 of Ms Lister's witness statement. That is apparent from the Further Information provided by the Claimant at Request 6 (bundle page 41-42), where a list of the payments is provided. The Claimant's case is to the effect that its claim is only for the loss it suffered as a consequence of entering

into the Novation Agreement, and that anything else is not recoverable; see footnote 6 to paragraph 40 of Mr Sullivan's skeleton argument.

36. The Defendant's second argument is that regardless of the loss the Claimant seeks to recover by this claim, if it had suffered an actionable loss as a result of the negligent advice it relies upon prior to 5 July 2017 (in other words loss pursuant to the Facility Agreement) that loss completed the cause of action, and time began to run. Its case is that the Claimant suffered such a loss upon entering into the Facility Agreement because from that date it was "locked into the debt". The Defendant's case is that this is more than a contingent liability.

37. The Defendant refers to two matters in particular. Firstly, that the terms of the guarantee themselves are sufficient to establish such a loss. Clause 13 of the Facility Agreement (bundle page 604) is headed "GUARANTEE" but provides for a guarantee of LEL's payment and performance, and for a separate obligation as principal obligor to provide an indemnity. Clause 13.3 refers to obligations described as "direct, primary and unconditional" to pay sums due from LEL or perform LEL's obligations "on demand". By clause 13.4, the Claimant gave up certain rights, including the right to prove as a creditor in the insolvency of LEL.

38. Secondly, that the Claimant funded LEL's payments under the Facility Agreement. The Claimant accepts that it funded LEL's liabilities; see the Further Information at Request 20.

39. Ms Colter submits that this is a situation which is analogous with that described by the editors of Jackson and Powell (9th ed) at para 5-067.

> … a client of a financial adviser will suffer loss and damage when he makes an investment or acts otherwise to his detriment in reliance upon negligent advice. Where the complaint is that the breach of duty by the financial adviser caused the claimant to make an investment which carried a greater degree of risk than was appropriate, damage is suffered when that investment is made and the claimant is exposed to the risk, even if the risk does not materialise at that point and there is a chance that the investment actually made will outperform that which should or would have been made.

This passage draws upon the judgment of Dyson LJ in *Shore v Sedgwick Financial Services* [2008] EWCA Civ 863; see at [32] [37] and [46]. The facts of that case are not the same as this one, for there the investor gave up one safer investment to invest in another risker investment, and so suffered a detriment, but the treatment of what is a loss (as opposed to a contingent loss) is of assistance.

40. Here the Claimant's case is that it acted on the advice or assurance of the Defendant when entering into the Facility Agreement. That led to it undertaking obligations which exposed it to a risk of loss. On its case that risk was not minimal (as it says it had been advised) but substantial.

41. What is "damage" for these purposes is to be considered in the context of claims for pure financial or economic loss. Ms Colter submits that this is not a case like *Law Society v Sephton* [2006] UKHL 22, where the Law Society's liability was contingent. In this case the consequence of the Claimant's reliance upon the advice was that it acted to its detriment. I agree that this is not a "pure contingent liability" case such as *Sephton*. There was a detrimental change in the Claimant's position in undertaking the

obligations pursuant to the Facility Agreement, and (on its case) an increased risk of loss which can properly be seen as loss for the purposes of completing the cause of action.

42. Mr Sullivan's response to these submissions was to the effect that any loss pursuant to the Facility Agreement was irrelevant. The cause of action the Claimant pursued was a consequence of its entering into the Novation Agreement in 2017 in reliance upon the 2015 advice. It was true that it also relied on the advice when it entered into the Facility Agreement, but that was not a constituent element of the cause of action it now pursues. I asked Mr Sullivan if what he was submitting was that there were two causes of action arising from the same advice. He said that he was.

43. Mr Sullivan referred to the speech of Lord Morris in *Hedley Byrne v Heller* [1964] AC 465 at 496:

> *In logic I can see no essential reason for distinguishing injury which is caused in reliance upon words from injury which is caused by a reliance upon the safety of the staging to a ship or by a reliance upon the safety for use of the contents of a bottle of hair wash or a bottle of some consumable liquid. It seems to me, therefore, that if A claims that he has suffered injury or loss as a result of acting upon some misstatement made by B …*

44. Mr Sullivan emphasises that reliance is an essential ingredient for a claim for negligent misstatement. Whilst the advice in this case was only given on one occasion, Mr Sullivan submits that it was relied upon on two separate occasions and for two separate purposes. In those circumstances there are two separate causes of action, or at least arguably so.

45. Mr Sullivan explored a hypothetical example. An adviser was asked to give advice about the repayment of a loan. He gave negligent advice and in reliance upon that advice, his client took out a small loan facility. Six years later, still relying upon that advice, he took out a much larger facility. If this was a single cause of action, the loss caused by taking out the larger loan could never be recovered. That could not be correct.

46. If the advice had been repeated or confirmed in 2017, then I can see that a separate cause of action may arise. But here there was only ever one piece of advice, which was relied upon by the Claimant and caused it loss. Reduced to its basics the issue is whether a subsequent reliance upon the same advice could give rise to a second cause of action. I was not referred to any authority to the effect that it could not, and the opportunity for further consideration has not clarified the issue. Mr Sullivan submitted that even if instinctively I was against him, where there is no decided case, it was not appropriate to determine the issue summarily. Upon reflection, I agree with that submission.

Grounds 2 and 3

47. Ms Colter took these grounds together. Ground 2 is that there is no real prospect of establishing that the Defendant owed the Claimant a duty of care in relation to the advice/assurances given about entering into the Facility Agreement when it entered into the Novation agreement, and ground 3 is that there is no credible evidence that the alleged assurances and advice were given.

48. The Claimant's case is that a duty of care arose in 2015, when, in the course of discussions about the Facility Agreement, the Defendant's representatives gave the advice/assurances I refer to above. If there is sufficient to establish an arguable case on duty in 2015, the court then has to consider the position in 2017. That can be analysed in terms of the scope of the duty undertaken (or responsibility assumed) and/or in terms of whether it was reasonable for the Claimant to continue to rely upon the advice/assurances in 2017.

49. Starting with the position in 2015. The Claimant identifies three aspects of the factual relationship which it says supports its case. Firstly that the parties had a long standing relationship which was more than simply a commercial one. There was a degree of cooperation and mutual interest in the way they worked together. Secondly, that when it came to the question of whether or not the SPVs would be in a position to finance the work LEL was to do, the Defendant had a degree of inside knowledge and control. Here the involvement of the Defendant in the running of the SPVs and the projects more generally is of potential relevance. The Claimant says that in reality the Defendant controlled the SPVs and accordingly had substantial control over the payments which would be made to LEL under the EPC and O&M contracts, which would in turn be used to make the repayments to UKSPL. Thus it was reasonable for the Claimant to rely upon the advice/assurances it gave. Thirdly, the Defendant knew that the Claimant would rely on the advice/assurances when entering the Facility Agreement, because that was the context and reason for giving that advice.

50. Ms Colter submits that this is simply not a case where a duty would arise. These were parties on opposite sides of a commercial relationship. That is correct to an extent, but I take Mr Sullivan's point that the relationship is more complex (or nuanced) than that. There are disputes on the evidence as to the nature of the relationship and the degree of control the Defendant had over the SPVs and the projects, but I cannot sensibly determine those matters on this application.

51. However, the evidence the Claimant relies upon in relation to the giving of the advice/assurances themselves is thin. Firstly, there are no documents which support the Claimant's case at all. That is in the context of otherwise well documented commercial agreements. It might be expected that something would have been put in writing, or some reference made to this advice, particularly if (as Mr Hick says) it was so important. Mr Hick's second statement raises the prospect of relevant documents being found. But that possibility is remote at best. The advice goes back nearly 10 years and is alleged to be given orally. Moreover, the Claimant has been considering the possibility of this claim for some time, and if it thought that there might be some documents which supported its case, it is to be expected that it would have taken serious steps to find them. If there were any documents to find, the (overwhelming) probability is that they would have been identified and/or disclosed by now.

52. Secondly, Mr Hick's evidence of the advice/assurances in his first witness statement is sparse. It provides the bones of the case, but in some of the more material passages, simply follows the pleaded case, and gives little in the way of detail. Nor is there anything from any of the Claimant's "team members" to whom the advice/assurance was said to be given. That ties in with the third point, which is that the evidence has shifted.

53. That said, this is not a case where there are contemporaneous documents which contradict the Claimant's case, or where the Claimant's case is shot through with

internal contradictions. Mr Hick's evidence is that the Defendant wanted the Facility Agreement in place for its own purposes, and that the parent company's guarantee was a necessary element of that. Mr Sullivan's submission is that the Claimant's case that this advice was given is plausible. I regard the Claimant's evidence as weak, but it is not possible to say that it is so weak that this aspect of the case has no realistic prospect of success.

54. Key to the issue of duty in the context of this case, is whether it was reasonable for the Claimant to rely upon this advice as it did. Ms Colter referred to Lord Wilson's judgment in *Steel v NRAM Limited* [2018] UKSC 13 at [19]:

> *What is noteworthy for present purposes is the emphasis given in the decision in the Hedley Byrne case to the need for the representee reasonably to have relied on the representation and for the representor reasonably to have foreseen that he would do so. This is expressly stressed in the speech of Lord Hodson at p 514. In fact it lies at the heart of the whole decision: in the light of the disclaimer, how could it have been reasonable for the appellant to rely on the representation? If it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it. If it is not reasonable for a representee to have relied on a representation, it may often follow that it is not reasonable for the representor to have foreseen that he would do so. But the two inquiries remain distinct.*

55. There are real problems for the Claimant in establishing its case in 2015, but those problems are considerably greater in 2017. Taking the two inquiries in turn: was it reasonable for the Claimant to rely on the advice in 2017? By this stage LEL had experienced significant financial problems, such that it became necessary to novate the arrangements. Removing LEL from the equation meant that the Claimant was no longer obliged to meet its liabilities pursuant to the guarantee in the Facility Agreement. But it had faced that prospect. The Claimant appears to accept that it was the Lark companies who wanted to novate the agreements to LPSL and approached the Defendant. The Defendant's position is summarised in the letter from Mr Mahon to LEL of 28 April 2017, where he says:

> *… as Directors of [UKSPL] we have a fiduciary duty to our creditors and shareholders to make sure that in agreeing to the Novation we do not reduce the security that they currently have in place …*

There is nothing in that letter which is consistent with the Defendant continuing to advise or assure the Claimant that there was a minimal risk of it being called upon to meet a guarantee.

56. In his evidence Mr Hick emphasises the importance of the 2015 advice to the Claimant becoming a party to the Novation Agreement in 2017. It is striking that in those circumstances, the Claimant made no inquiry of the Defendant (whether written or oral) referring back to the advice given in 2015, and asking whether the Defendant was still prepared to assure the Claimant that the risks of its guarantee being called on were minimal. On any view, the position in 2015 was significantly different to the position in 2017. The Claimant relies on the fact that the basis of the arrangements remained the same. But that misses the point. The contractual structure may be the same, but that does not mean that an assurance given some time before in different circumstances still stands. Mr Sullivan submits that the evidence of the discussions

between the parties in the run up to the Novation Agreement will inform the factual inquiry. But even if I accept that the position in relation to the control over the solar projects remained the same as it was in 2015, and that Mr Hick believed that the 2015 advice still stood, on the most favourable view of the facts there is no realistic prospect of a court finding that the Claimant's reliance was reasonable.

57. The second inquiry is whether it is reasonable for the Defendant to have foreseen (in 2015) that the Claimant would rely on this advice in 2017. In my judgment it is plainly not. Even if it were reasonable in 2015 for the Defendant to foresee that another party to this commercial arrangement would rely upon an oral advice/assurance that the risks of the guarantee being called on were minimal, it cannot be reasonable to expect it to foresee that the same advice would be relied upon in different circumstances in 2017. It would be quite extraordinary to impose a duty to that effect in these circumstances, particularly in the absence of some attempt to confirm that the advice still stood. There is no real prospect of the Claimant establishing that the Defendant owed it a relevant duty of care.

58. Ground 4 relates to causation and factual reliance. If the claim has progressed this far, then there will be issues of fact to determine. Given the views I express above, it is unnecessary for me to explore those in this judgment.

Thornborough

59. This aspect of the claim is separate from the negligence claim. The claim is pleaded at paragraphs 21-23 of the Particulars of Claim. It turns on whether or not there was an agreement that a sum of money received by the Defendant was to be offset against LEL's liability to UKSPL. The claim is denied.

60. Mr Hick's first witness statement deals with the issue at paragraphs 47-48:

> *47. As regards Larkfleet's claim in relation to Thornborough Solar Limited ("Thornborough"), my recollection is that it was agreed with Armstrong that the repayment of £145,973.20 due to Thornborough, which was one of the Solar Project SPVs, would be paid to Armstrong (instead of to LEL which was the original plan) to be used to offset against the sums owed to UKSPL under the Novation Agreement. This was discussed in emails including an email dated 31 January 2018 and an email dated 28 February 2018.*
>
> *48. However Armstrong did not do as agreed and instead of applying this sum against the Novation Agreement, they transferred it to a third party.*

61. Mr Yazdabadi's evidence is that there was no such agreement, and that the emails the Claimant relies upon provide no support for the Claimant's case. He provides some contemporaneous evidence which tends to support the Defendant's position. Ms Colter submits that on the evidence there is no triable issue. Whilst the Claimant's case on the documents is not a compelling one, I do not regard it as one which has no real prospect of success. I agree with Mr Sullivan's submission that Mr Hick says that there was an agreement, and that will have to be tried.

Conclusion

62. The Defendant's application for summary judgment succeeds on the negligence claim, but fails on the Thornborough claim. I invite the parties to agree a minute of order,

and to begin the process of agreeing directions for the Thornborough claim. Given its limited scope, it would be appropriate for the Shorter Trial Scheme.