Neutral Citation Number: [2023] EWHC 2340 (KB)

Case No: QB-2022-002369

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2023

Before :

MASTER SULLIVAN

- -

Between :

(1) MICHAEL PARTRIDGE	**Claimants**
(2) SUZETTE PARTRIDGE	
- and -	
HEALYS LLP	**Defendant**

- -
- -

Steven McGarry (instructed by **Direct Access**) for the **Claimants**
Michael Bowmer (instructed by **Mills & Reeve LLP**) for the **Defendant**

Hearing dates: 22 June 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 22 September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MASTER SULLIVAN

Master Sullivan :

1. The claimants bring an action against the defendant solicitor firm for damages arising out of their conduct of a claim for professional negligence against the claimants' previous lawyers, Mr Gomez of Gomez and Co, Mr Maguire and Mr Evans QC (as he was). Those lawyers represented the claimants at various times in a claim proceeding in Gibraltar arising out of the purchase of a property in Marbella known as "the French Castle".

2. I shall refer to this action as the current proceedings, the professional negligence action against the claimants' previous lawyers as "the 2017 proceedings" and the original action as "the Gibraltar proceedings". Although in the 2017 proceedings Gomez & Co and Mr Gomez were separate defendants, I shall refer simply to Gomez.

3. The defendant in the current proceedings applies to strike out the claim or alternatively for summary judgment against the claimants. It is submitted that the claim as pleaded has no real prospect of success, is incoherent in its failure to plead how any loss was caused by any action of the defendant and is abusive as it seeks to duplicate issues which are already in dispute in proceedings in the Senior Courts Costs Office ("SCCO").

4. The claimants' position is that the claim is an appropriately pleaded, complex and nuanced claim with real prospects of success and whilst it could be better pleaded, striking it out would be draconian.

5. The relevant principles I have to apply in determining whether a claim has no real/no reasonable prospect of success for strike out or summary judgment are the same, and are summarised in *Easyair Ltd V Opal Telecom Ltd* [2009] EWHC 339. In summary:

    (i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success;

    (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 court must not conduct a "mini-trial";

    (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;

    (v) 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) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case;

(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.

6. In respect of a strike out for abuse of process, abuse can include a claim which is incoherent.

7. I also remind myself that the standard of care and skill for a legal professional is that of a reasonably competent practitioner, and if they hold themselves out as a specialist, of a reasonably competent specialist. The claimant has to prove that any negligence has caused them to lose something of value which is a claim which has real and substantial rather than negligible prospects of success. That can include real and substantial prospects of settlement.

8. The application bundle comprised 5 lever arch files of documents and I was provided with a number of authorities prior to the hearing and a few afterwards. I was asked to read a number of the documents which were referred to in the course of the hearing in full, and have done so.

Summary of the factual background

9. In 2005, the claimants bought a property in Malaga known as "the French Castle". The claimants' case is that they paid €8 million. Of that €5.6 million was a loan provided by Barclays (based in Gibraltar). The claimants say that the balance of €2.4 million was paid by them via a third party based in the USA. I understand the sale documents refer to a €5.6 million purchase price.

10. For the purposes of valuing the property for the loan, Barclays instructed a valuer, Mr Gale of Seek International. Mr Gale's valuation was €8.35 million. The claimants later sought extensions of the loan and in 2006 Mr Gale provided an updated valuation (again instructed by Barclays) of €11m. The loan was extended by a further €815,000. A further loan was sought in 2008 and Mr Cohen of Savills was instructed by Barclays to provide a valuation. He provided a valuation of €15m. The loan was re-financed and total loan of €8,442,900 was agreed with interest set by reference to the Euribor rate of interest.

11. In 2011 the claimants say they discovered the property was worth significantly less than they had paid for it in 2005 and retained Mr Gomez to investigate a claim against Barclays. The claimants' case is that the French Castle was in fact only worth about €4 to €4.5 million at the time of the loans.

12. Gomez commenced a claim on behalf of the claimants in Gibraltar based on negligence and breach of fiduciary duty ("the Gibraltar proceedings"). No fraud claim was pleaded although there were discussions about a fraud claim. No claim was issued against the valuers. The retainer with Gomez ended in April 2012 and the claimants instructed Mr Maguire on a direct access basis by January 2013. In March 2013, Barclays applied to strike out parts of the Gibraltar proceedings. Mr Maguire provided a draft amended pleading including claims described as the "fraudulent valuation claim", the "Euribor claim", an Etridge duress claim and a separate "duress"

claim in respect of the third loan. The Euribor claim in fact referred to Libor manipulation and so was doomed to failure.

13. Mr Evans was then instructed in July 2013 in place of Mr Maguire. He was instructed for the hearing of the strike out application and for an application to amend the particulars of claim. He withdrew the fraudulent valuation claim at the strike out application.

14. On 13 December 2013, Chief Justice Dudley struck out parts of the claim and refused permission to amend. He found the affordability claim was legally unsustainable, bank lending is not fiduciary in character, and a mortgagee does not assume responsibility to a purchaser for a valuation provided by a professional valuer. He also found the Etridge plea was legally flawed. The Euribor amendment was refused as it referred to Libor matters.

15. It is said that the Gibraltar proceedings became irretrievably lost as a result of the striking out of various aspects of the claim, the consequent costs and unless orders.

16. The claimants then investigated claims against Gomez, Maguire and Evans for professional negligence. In November 2016 they entered into a conditional fee agreement with the defendant in respect of those claims. A claim form was issued in the Business and Property Court in December 2017 (the 2017 proceedings). The claims pleaded were (in summary) that each defendant advised and formulated claims against Barclays which were bound to fail and failed to advise on claims that should have been prosecuted, including a fraudulent enterprise claim and a claim for consequential losses.

17. All three of the defendants in the 2017 proceedings denied liability. The claims progressed to a mediation on 23 March 2019. At that mediation an offer of a global settlement in the sum of £575,000 to the claimants was made. That was broken down as a drop hands offer from Gomez, £75,000 from Mr McGuire and £500,000 on behalf of Mr Evans. The £500,000 on behalf of Mr Evans was the limit of his indemnity with the BMIF. The claimants were advised by the defendant and counsel, Mr Virgo, to accept the offer. They did not and the defendants (and counsel) subsequently terminated their retainer.

18. Although the course of the 2017 proceedings thereafter is not referred to in the particulars of claim in the current proceedings, the claimants instructed solicitors, BLM LLP, to act for them. They were not instructed on a conditional fee basis. The claim against Mr Evans was settled on 10 July 2019 for £475,615 on a global basis. The remainder of the 2017 claim progressed through to disclosure and exchange of witness and expert evidence. Trial was listed for 9 November 2020. In around July 2020 BLM came off the record and the claimants continued the claim as litigants in person. On 25 October 2020 the claimants settled the 2017 claim against Mr Maguire for £50,000 and Gomez for £100,000 on a global basis.

19. Whilst the 2017 proceedings were ongoing, the defendant obtained a freezing injunction against the claimants in August 2019 when it learned of the Evans settlement. The defendant issued a claim for their fees due under the terms of the conditional fee agreement in the Business and Property Court. In September 2019, that action was ordered to continue as an application under section 61 of the Solicitors

Act 1974 and remitted to the SCCO for management and determination by a costs judge. In their pleading in that action the claimants plead that the termination of the conditional fee agreement was a repudiatory breach of contract. The application was listed for trial in December 2020 but that was adjourned by consent following an application by the claimants in November 2020. The claimants were ordered to pay various costs within the proceedings which have not been paid and in April 2023 an order was made that unless the claimants pay the outstanding costs, in the region of £94,000, they be debarred from participating further in the proceedings and the application was to be listed for determination. I understand those outstanding costs remain unpaid.

The current action

20. The claim was issued on 20 July 2022. The particulars of claim plead causes of action in negligence, contract and breach of fiduciary duty. The particulars of breach of duties have two sub-headings;

    i) the failure to advise on additional claim as against Gomez (paragraphs 59-72);

    ii) the failure to advise adequately on the Claimants' consequential loss claim (paras 73-79).

21. It is said that further or alternatively the defendant placed itself into a position of conflict with the claimants in encouraging the claimants to accept the offer after mediation which was not in the claimants' best interest (para 80(1)) and that notifying the claimants of an intention to terminate was not justified by the terms of the contract and therefore the defendant wrongfully repudiated the conditional fee agreement (para 80(2)).

22. It is pleaded that the breaches caused loss and damage including loss of chance. That loss and damage is particularised as:

    i) the lost opportunity to recover substantial damages from Gomez, Maguire and Evans by reason of the failure to properly advise on, particularise and prosecute the 2017 claim (including the failure to advise on, particularise and prosecute the negligence claims against the valuers). This includes the consequential loss claims and the associated loss of a chance;

    ii) the professional fees incurred during the defendant's instruction;

    iii) the costs of instructing alternative solicitors and counsel; and

    iv) additional own costs wasted and adverse costs within the costs proceedings.

23. No amended pleadings were proposed. The reply in the bundle was not signed with a statement of truth. I was asked by Mr McGarry to proceed on the basis that if necessary such a copy could be provided and it seems to me sensible that I do so. The claimants' position is that there is enough in the pleadings as they are to proceed.

The defendant's submissions

24. It is submitted that there are four claims set out in the particulars of claim in the current proceedings, all of which are so vague they cannot be understood, and insofar as they can, they are obviously ill-founded based on contemporaneous documents or amount to an abuse of process.

25. The defendant relies on the fact, not pleaded by the claimants, that when their retainer ended in April 2019, the claimants had a sound and intact cause of action against the defendants in the 2017 proceedings which led to a settlement. It is submitted there is nothing pleaded that sets out the way in which the defendant's conduct of the 2017 proceedings compromised the way in which the litigation progressed.

26. I will summarise the submissions in respect of each of the four claims as understood by the defendant.

The valuation claim

27. In respect of the claim that there was a failure to plead that Gomez was negligent in failing to advise a claim against the original valuers, it is said this is ill-founded and incoherent. The claimants knew of the theoretical claim, Mr Virgo, counsel instructed by the defendant in the 2017 proceedings rightly advised that the valuer owed no duty of care when reporting on a high value property to a lender. It is submitted there is no allegation that the advice of Mr Virgo was wrong. It is further submitted that the claimants accepted that plainly correct advice.

28. It is submitted that whilst limitation was still intact against the valuers and after the termination of the retainer with Gomez, the claimants were advised by a barrister, Mr Yell, that they should seek an expert valuer's opinion if they wished to pursue such a claim. They did not obtain any expert valuation evidence. Given limitation was intact after the termination of Gomez's retainer any claim would be answered that they had not lost any cause of action by reason of anything Gomez had done or not done.

29. Lastly, there is no pleading explaining how any such failure caused the loss claimed. There is nothing pleaded as to what would have happened if such claim had been pleaded. It is fanciful and speculative to suggest such a claim would made any difference to the settlement against Gomez.

Consequential loss claim

30. In respect of the claim that the defendant failed properly to advance consequential loss claims, the defendant's position is that the claimants were asked on numerous occasions to provide evidence in order to plead a proper consequential loss claim and no evidence or instructions were forthcoming. Mr Bowmer provided an appendix to his skeleton argument with around 25 extracts from emails in the bundles requesting information from the claimants about the consequential loss claim.

31. Insofar as the consequential loss claim included the loss of a chance claim to use the money paid to buy the French Castle over and above the mortgage sums, there has never been any satisfactory documentary evidence to show they in fact paid a contribution of €2.4 million.

32. Again it is submitted nothing is pleaded as to how any failure caused any loss other than a bare pleading that it did. The pleading does not deal with the issues that the claim continued and included a claim for consequential losses.

33. There is also an allegation that the defendant failed to obtain expert evidence. The defendant submits that the orders in the claim made after the defendant had withdrawn included permission to rely on expert evidence. No causation is pleaded as to how the failure led to any loss.

Conflict

34. It is submitted that the claim at paragraph 80(1) that the defendants put themselves in a position of conflict is not a coherent pleading. The conflict is not particularised. It was a conventional cfa with a conventional termination clause if the claimants failed to accept the defendant's advice as to settlement. There is no allegation that the advice given at the mediation was negligent. Nothing is pleaded as to how any conflict caused any loss.

Termination of retainer

35. The defendant's position is that the claim that the defendant did not act lawfully in terminating the retainer is a matter already being determined in the SCCO. Whether the termination was a repudiatory breach such that the defendant has no entitlement to fees is expressly an issue in the SCCO claim. It is submitted that the SCCO is determining the issues and it would be an abuse to allow the claimants to bring these proceedings to participate in an argument from which they are debarred from participating in the SCCO. The defendant further submits that if the claimants succeed in the SCCO and there is some other relief available to the claimants arising out of any determination that the SCCO cannot deal with, the claimants can issue a claim at that point and the defendant would not take any issue estoppel point.

36. In respect of the losses claimed, it is argued that there is nothing in the particulars which shows what loss was caused by which alleged breach. The second head of loss claimed is self evidently incoherent, there is nothing to suggest the fees should never have been charged or were wholly wasted. The proceedings in the SCCO will be dispositive of the costs issues.

37. The Claimant's skeleton raised the argument that the termination of the retainer is causative of loss because the claimants were unable to secure representation on a conditional fee agreement ("cfa") or with disbursement funding following the defendant's termination of the cfa, which meant they did not have the funds to bring the claim to a successful conclusion. The defendants response is that such a claim is not pleaded it is also not clear that it has caused any loss. They had lawyers and the litigation was complete save trial. Such an argument lacks conviction and the claim that there would have been disbursement funding is hopeless as applications for disbursement funding were made by the defendant on the claimants' behalf and the claimants decided not to pursue it. When later they went back to the market in March 2019 they could no longer secure anything. The defendant cannot be responsible for that.

The claimants' submissions

38. The claimants maintain they were advised by the defendant throughout their instruction that the 2017 proceedings had significant value, about €2.5 million on the lowest valuation. At mediation however, the defendant advised the settlement of £575,000 was reasonable with no particular feature that was not known about before, save for Mr Evans' cover being limited to £500,000.

39. The skeleton argument of Mr McGarry says that the claims in the current proceedings are for:

    i) the failure to advise properly that there was a claim against Gomez for his failure to advise on a claim against the valuers and/or to protect against expiration of primary limitation at or about 21 December 2017. (It is the claimants' case that primary limitation against the valuers expired in December 2011 and the primary limitation in respect of the valuation claim against Gomez expired in around December 2017.)

    ii) deficient advice as regards a consequential loss claim/failure to prosecute it,

    iii) deficient advice as regards the global offer made at or about the stage of mediation,

    iv) improper termination of the retainer; and

    v) negligent exposure of the claimants to increased costs liability.

40. It is said the withdrawal of the defendant from the contingent retainer placed the claimants in an impossible position and meant they were required to instruct new legal representatives on a non contingent basis so their funds which had been earmarked for disbursements and expert evidence were required for their solicitor's fees. This meant that their ability to prosecute the claim was wholly undermined by the withdrawal. Whilst the 2017 proceedings were compromised, it is submitted the defendant's actions weakened their ability to prosecute the claim such that the chance to bring the claim to a valuable conclusion was lost. Paragraph 25 of the reply pleads that with the benefit of a cfa the claimants would have been in a position to obtain disbursement funding (or meet the fees for expert evidence).

41. Mr McGarry submits that the defendants are now saying that the claims were weak and hopeless and yet were not saying the same in the lead up to the mediation. Either the claims were reasonably strong and of significant value or they failed to advise the claimants of the weakness, exposing them to costs liability and submits that in either event the defendant acted without reasonable skill and care and was not acting in their best interest.

42. To make good those submissions, Mr McGarry took me through the advices of Mr Virgo (and I was invited to read them in full after the hearing). In September 2017, Mr Virgo advised positively on prospects of success on liability, in an addendum advice put those prosects at 65 to 70% chance of findings of negligence. In a note on quantum direct losses it was said there was a €2.5 million potential claim less the 50%

loss of a chance. In a note on the defences of the 2017 defendants Mr McGarry submitted that the assessment of the merits had not changed.

The valuation claim

43. With regards to the present pleadings, Mr McGarry refers to paragraph 30 in the particulars of claim in which it is alleged that Gomez failed to advance and claim or properly advise on the positive prospects of success of a claim against the valuer and that such failure was negligent. In paragraph 65 of the particulars of claim it is averred that it ought to have been obvious to Gomez that the first valuation was overvalued and therefore based on a negligent valuation. Paragraph 66 of the particulars of claim pleads that Gomez initially advised that the valuers did not owe a duty of care, that such advice is incorrect and later, after primary limitation had expired, Gomez advised differently. I note that it is not specified what the advice was or when it was given.

44. In paragraph 70, there is a positive pleading against the defendants. It is alleged that the defendant advised incorrectly and/or failed to advise adequately as to the reasonable prospects of success of bringing a claim against Gomez on this issue. It is pleaded further the primary limitation period expired at about 21 December 2011 and so the primary limitation period for a loss of a chance claim against Gomez expired on about 21 December 2017.

45. The defendant's case set out above on this issue is that there was never any potential or viable claim against the valuers. The claimants dispute this and I was taken to a number of authorities on this issue. Mr McGarry's position is that the suggestion that there is no duty of care is wrong, there might be a valid exclusion clause with a high value property but to say there is no duty of care is wrong. In this claim it is pleaded in paragraph 9 of the reply that the French Castle was a residential habitation so a duty was owed. Therefore there was a loss of an opportunity to advance the claim.

Consequential loss claim

46. Mr McGarry submitted that this is a nuanced case. Once the contingent retainer was ended and the claimants were obliged to pay fees, the chance to prosecute the claim to the maximum value was removed.

47. In respect of the claim that the defendant failed to instruct appropriate experts throughout the retainer, Mr McGarry submits that an expert valuation and expert ATE funding report were obtained, but in respect of the consequential loss claim, there was no evidence from a property or investment expert. An application was made after the termination of the retainer but it was resisted and the claimants could not afford funding for the hearing. This shows that the claimant was not able to prosecute the consequential loss claim as a result of the loss of the contingent retainer.

48. The reply pleads at paragraph 25 that if the claimants had the benefit of a cfa they would have been in a position to obtain disbursement funding (or meet the fees for expert evidence). The loss suffered is that pleaded in paragraph 28 of the reply, had they received competent advice, the claimants would have taken any necessary steps to convert the 2017 claim into a substantially more financially advantageous claim. So had the cfa continued they would have been able to fund all of the expert evidence.

Conflict

49. Mr McGarry's submission is there was deficient advice as regards the global offer made at the stage of the mediation for the reasons set out above; there had been no significant change since earlier advice of good prospects in a valuable claim. There is no pleading of negligent advice at the mediation and so I have understood this submission to be in respect of the conflict pleading in para 80(1) of the particulars of cliam (and as background more generally).

Termination of retainer

50. In respect of the argument that the claim for costs is an abuse of process it was accepted that there was a crossover between the SCCO proceedings and the claim under paragraph 80(2) of the particulars of claim but it was submitted the tortious claim is not affected by parallel pleadings in the costs jurisdiction.

51. In respect of the heads of loss claimed, it said the claimants have produced a detailed account of the scale of losses they expected to recover in the 2017 proceedings which forms the basis for the loss in the current proceedings, recognising that this is a loss of chance claim and therefore they would be reduced to reflect the chance of obtaining those damages. It is submitted that the chance of settling for a greater sum was wholly undermined after the cfa was terminated for the reasons set out above.

52. It was accepted that the pleadings were sparse on causation, but what is pleaded makes it clear the claim is that the impugned actions caused a loss of a chance to prosecute the negligent collusion claim and to prosecute the consequential loss claim. The particulars of claim plus paragraph 28 of the reply (set out above) set out sufficient detail for the defendant and the court to know the claimants' case on causation and loss.

Determination

53. I start by looking at what has in fact been pleaded. There is no application to amend and the claimants' position is that the current pleading, including the reply, sets out their case sufficiently. I will include the matters pleaded in the reply, despite the fact it is not signed with a statement of truth as that is a matter that can be remedied and would not of itself be a sufficient default to justify a strike out in this claim.

54. Once I am satisfied as to what has in fact been pleaded, I can then go on to consider whether there are real prospects of success on the pleaded case, and the arguments as to abuse of process.

55. The breaches of duty/contract alleged are that the defendant:

    i) advised incorrectly or inadequately as to the reasonable prospects of success in bringing a claim against Gomez for breach of tortious/contractual duties to advise that there was a potential and reasonable claim against the valuers (paragraphs 67/70 poc);

    ii) advised incorrectly or inadequately as to the reasonable prospects of success in bringing a claim against Gomez for breach of tortious/contractual duties to advise that the primary limitation period to a claim against the valuers would

expire in December 2011 and that the claim ought to be protected by issuance or a standstill agreement (paragraphs 68/71 poc);

iii) failed to properly advance a consequential loss claim against all defendants in the 2017 claim arising out of the negligence pleaded against them (paragraph 78); and

iv) failed to advance or prosecute a consequential loss claim based on the failure of Gomez to advance the claim against the valuers (paragraph 79 poc).

56. In addition, paragraph 78 of the particulars of claim alleges that there was a failure to instruct appropriate experts throughout the duration of the defendant's retainer. In submissions, Mr McGarry submitted this meant financial and valuation experts as to the consequential loss claim. The reply does not clarify what experts it is said the defendants failed to obtain.

57. The claimants also plead that the defendant placed itself in a position of conflict with the claimants whereby the defendant encouraged the claimants to accept an offer made by the defendants in the 2017 proceedings which was not in the claimants' best interest and without proper reason. The specifics of the conflict, or why the advice was not in the claimants' best interest is not pleaded nor is there a pleading that the advice to accept the offer was negligent. Mr McGarry's skeleton identified a claim that the defendant's advice as regards the global offer at the mediation was deficient. In my judgment that is not a claim that forms part of the pleaded case. There is no comprehensible pleading that the advice was wrong or negligent.

58. It is also pleaded that the notification of the intention to terminate the cfa was not justified by the terms of the contract and therefore the contract was unlawfully repudiated.

The valuation claim.

59. In respect of the valuation claim, which encompasses the pleaded matters set out at 55 (i), (ii) and (iv) above, Mr Virgo advised in October 2017 that it was his view that a valuer, reporting on a high value property, does not owe a duty of care to the purchaser.

60. Mr McGarry sought to demonstrate by reference to authorities, that the advice given was wrong, Mr Bowmer that it was right. I bear in mind the test is whether the advice was that which no reasonably competent lawyer would give. The advice was that of Mr Virgo but the defendant adopts it as correct. I was taken to numerous authorities including *Smith v Eric S Bush* [1990] 1 AC 831 and *Scullion v BoS plc* [2011] EWCA Civ 693 addressing whether a valuer instructed by a mortgagee owes a duty to the mortgagor and also to a relevant extract from Jackson & Powell on Professional Liability (9th Ed) at 10.37 to 10.40. Having considered those cases and the passage of Jackson & Powell, it seems to me the position is that the principle in *Smith v Bush* that the valuer did owe a duty to the purchaser applied in respect of a dwelling house of modest value. It does not apply to unusual or expensive properties or in commercial situations.

61. Although it is pleaded that the French Castle is a "residential habitation", this was not a purchase of a dwelling house of modest value such as in *Smith v Bush* and so it cannot be said there was a duty.

62. In this case it seems to me the position is that whether a duty is owed will depend on the character of the transaction, commercial or not, whether the overwhelming majority of such purchasers relied on valuation from a lender and what a valuer would expect. Of course this is a case where the valuation was in Spain. I note that the advice of Mr Yell to the claimants in November 2012 was that the claimants should find out if it was standard practice in Spain for both mortgagee and mortgagor to rely on the same valuation for a transaction. I note from Mr Bowmer's skeleton argument that the second valuation contained an express provision that it was for the sole use of the bank and I infer from that the others do not.

63. I cannot determine on a summary basis whether it was negligent to advise there was no duty of care owed by the valuers, although I have significant doubts that it was. Further evidence would be required in order to make that determination.

64. However I accept Mr Bowmer's submission that the claimants knew in November 2012 that there might be claims against the valuers, but that they would have to get expert valuation evidence. The claimants, it appears, did not do so.

65. I do not accept that the "loss of primary limitation" has in this case such relevance that it affects the settlement value more than negligibly. The undated note at page 911 from Mr Yell advised that they were still within limitation to bring a claim based on section 14A of the Limitation Act 1980. That seems to me to be obviously correct. That is about 8 months after the termination of the Gomez retainer. Mr Gomez would have had the defence to any claim that the claimants had not lost any cause of action of any value by reason of anything he had done or not done. Additionally, I note, according to the claimants' pleaded case, that Gomez does appear to have advised the valuers owed a duty of care, albeit outside the primary limitation period. The content of that advice has not been disclosed.

66. In the circumstances, I am persuaded that the claimants have not set out how the failure to plead the valuer claim against Gomez caused the loss complained of. On any view the claim against the valuers was not a certain claim, and Gomez had potential defences. Gomez did settle with the claimants. There is nothing pleaded as to how that extra claim affected the chance of bringing the claim to a more valuable conclusion. The only causation pleaded is that termination of the retainer meant that the claimants could no longer properly fund the litigation. The presence or absence of a claim in respect of the valuers against Gomez did not cause and cannot be said to have caused the termination of the retainer.

67. In my judgment it is fanciful to suggest that the valuation claim would have made any more than a negligible difference to the prospect of a greater settlement than that achieved.

Consequential loss claim

68. In respect of the claims that there was a failure to advance a consequential loss claim, I have seen the letters and emails referred to in the appendix to Mr Bowmer's

skeleton. They range in date from 2 December 2016 to 8 February 2019 and raise the issue repeatedly that the claimants needed to give some instructions on which the consequential loss claim could be founded.

69. I have also read the emails from pages 1167 to 1191 of the bundle which forms part of the correspondence between the claimants and the defendant. It raises issues as to the quantification of the claim. In particular Mr Bailey, on behalf of the defendant, asks for information as to the source of and proof of payment by the claimants of the €2.4 million to purchase the French Castle.

70. In an earlier email dated 5 April 2017, Mr Bailey states the lack of any documents supporting quantum is a stumbling block in progressing the claim. On 15 May 2018 Mr Bailey asked the claimants, "please provide the evidence you paid the €2.4 million. I have asked for this on numerous occasions and you still haven't provided it".

71. On 8 February 2019 the claimants were asked to provide evidence in respect of the purchase price and evidence in support of the consequential loss claim. In respect of both it was said that the lack of evidence would weaken the claim and in respect of the purchase price could lead to severe difficulties in being able to progress the claim. Similar points had earlier been made in an email 29 November 2018.

72. At page 1167, in a long email dated 12 March 2019, Mr Bailey notes that there is little or no doubt that all of the 2017 defendants are in breach of their duty of care but the issues are around quantification of loss. He notes given the difficulties he has raised around the evidence, that he was not able to advise on the value of the cliam and said the claim would almost certainly fail if the judge were to find they did not pay the balance of the purchase price as they allege. That was essentially repeated on 20 March 2019.

73. The consequential loss claim included a claim that the €2.4 million invested in the French Castle would have been used to buy other properties. Whilst I remind myself that I should not conduct a mini trial, I can look critically at the pleadings in the light of contemporaneous documents. Paragraph 76 of the particulars of claim avers that the claimants were advised in advance of the mediation in March 2019 that they had a significant claim with the prosects of achieving (excluding interest and the deduction for a loss of a chance) around €5 million. This appears to be a refence to advice given in February 2018. Paragraph 77 of the particulars of claim states that nothing had materially altered throughout the litigation of the 2017 proceedings to justify a departure from that assessment.

74. Neither the particulars of the claim nor the reply deal with the requests for evidence that were made.

75. There is significant correspondence over the course of the retainer post dating the advices referred to by Mr McGarry indicating the consequential loss claim required evidence from the claimants in order to properly advance the claim. The claimants did not provide that before the termination of the retainer. In the light of the correspondence in my judgment, there is no real substance in the claimants case that the advice on the claim did not change up to the mediation. The correspondence referred to above, and the full reading of the advices is not in my judgment consistent

with that pleading. All of the matters raised are the sort of matters which would be capable of affecting a lawyers assessment of the merits and quantum of a case. It is also difficult to see in that light what expert evidence is it is suggested the defendants should have obtained during the course of their retainer.

76. In respect of the failure to obtain expert evidence in respect of the consequential loss claim, the lack of particularity as to what expertise it is being said it was a breach not to have obtained is in my judgment a significant failure to adequately plead that particular allegation. That is especially the case where some expert evidence was obtained and an application for permission for other expert evidence was also made subsequently in the proceedings.

77. There is in my judgment no real prospect that the claimants will succeed in arguing that there was a loss of a chance of a more significant settlement than that achieved as a result of the consequential loss claim not being advanced because of anything the defendant did or did not do. The contemporaneous documents indicate that the claimants failed to provide the requested evidence required in order to pursue the claim.

Conflict

78. In the absence of any pleaded allegation that the advice was negligent at mediation, I am unable to understand the pleading at paragraph 80(1). The mere fact of giving non negligent advice that leads to a termination of the retainer is not an actionable conflict. It is a situation that is expressly provided for in the cfa agreement. I do not accept this is a pleading that the advice in the mediation was deficient. Insofar as it is, it would have to set out the ways in which the advice is said to be deficient in order to be understood.

Termination of cfa

79. This allegation is being determined in the SCCO. Given the stage of proceedings in the SCCO it seems to me that it would be an abuse to allow this part of the claim to proceed in the Kings Bench Division. The same issue cannot be litigated in two different parts of the High Court at the same time for the usual reasons of risk of inconsistent judgments, and effect on the administration of justice in respect of allocation of court resources. In addition, in circumstances where a party has a debarral order against them in one forum, it would be an abuse to then allow them to make the same claim in another. I note that the defendants have expressly stated that if the claim succeeds in the SCCO no estoppel points would be raised in respect of a later claim for losses arising out of that finding.

80. It seems to me that the pleadings in paragraph 80 must be struck out.

81. In respect of causation, it is pleaded that those breaches caused loss and damage including loss of a chance to obtain significant damages and those matters set out at paragraph 83 including the lost opportunity to recover substantial damages from the 2017 Defendants. In terms of any pleading as to causation, that is what would have happened but for the breaches which would have led to chance of a better settlement, it is pleaded that until the termination of the cfa, the claimants were in a position “to

obtain disbursement funding (or meet the fees for expert evidence)" (paragraph 25 reply).

82. The pleading that the claimants were not able to get litigation funding as a result of the termination of the retainer is also inconsistent with the contemporaneous documents. The litigation funding had been refused prior to the termination of the retainer. In the light of my judgment above, I need not consider the alternative pleading that the claimant would have had sufficient funds to progress the matter but for the termination of the retainer. However I accept the submissions of the defendant that in the absence of any pleading as to what the claimants would have done but for the loss of the retainer and how that would have given a chance of a greater settlement, the claim has no real prospect of success.

83. Finally I also accept the defendant's submission that the claim for the professional fees incurred during the course of the defendant's retainer, insofar as it is not being dealt with in the SCCO proceedings, has no real prospect of success given that it cannot be said that the fees should not have been charged or were wholly wasted.

Conclusion

84. In summary, I accept that as currently pleaded, the claim has no real prospect of success and is an abuse of process insofar as it duplicates the issues in the SCCO.

85. Before I strike out a claim, I must consider whether there are any lesser steps that can be taken. I have considered whether, on the information I have seen, there is a realistic claim that could be pleaded that the advice at mediation was deficient. It is not clear to me in what way it could be said to be deficient. In the light of the evidence I have seen, it is not obvious in what way it is said the advice was deficient. In addition to the above issues, the claimants have not really dealt with the issue that Evans' indemnity limit was £500,000 and its effect on settlement. In those circumstances I cannot see that it would be appropriate to allow the claimants a chance to amend their pleaded case. It is not clear what any such amended case would be.

86. In those circumstances and for the reasons set out above, I will strike out the claim.

87. I will hear any submissions as to the consequential order at a date to be arranged.