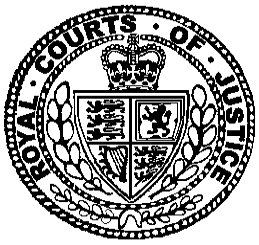

Neutral Citation Number: [2025] EWHC 2974 (Ch)

Case No: BL-2025-000402

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 13 November 2025

Before:

MR JUSTICE RAJAH

- -

Between:

POWIS STREET ESTATES (No. 3) LIMITED	**Claimant**
- and –	
(1) WINSTON & STRAWN LONDON LLP **(2) MR BENJAMIN PILLING KC**	**Defendants**

- -
- -

Thomas Grant KC and **Adam Smith** (instructed by **Keystone Law Ltd**) for the **Claimant**
Paul Mitchell KC and **Teen Jui Chow** (instructed by **Womble Bond Dickinson LLP**) for the **Second Defendant**

Hearing dates: 21-22 October 2025

- -

APPROVED JUDGMENT

Mr Justice Rajah :

Introduction

1. The Claimant ("**Powis**") has brought a professional negligence claim ("**the Present Claim**") against its former solicitors (the First Defendant, "**W&S**") and leading counsel (the Second Defendant, "**Mr Pilling**"). Mr Pilling applies for summary judgment in relation to the claim against him. W&S has served its Defence and has made no application for summary judgment.

2. Powis' claim against Mr Pilling is for professional negligence in relation to Mr Pilling's work (in respect of which he was instructed by W&S) concerning a claim ("**the Underlying Claim**") which was pursued by Powis against a firm of solicitors, Wallace LLP ("**Wallace**"), and a firm of property agents, Cradick Retail ("**Cradick**"), and in particular Mr Pilling's work in relation to the Particulars of Claim in that claim, which he drafted ("**the Underlying PoC**"). The Underlying Claim concerned alleged failings by Wallace and Cradick in their work in relation to the sale by Powis, out of a substantial freehold estate it owned at Woolwich, of properties known as 138-152 Powis Street ("**138-152**") and 132-136 Powis Street ("**132-136**"). Conduct of the Underlying Claim passed from W&S and Mr Pilling to other solicitors and counsel, and in due course it was settled on terms favourable to Powis. In these proceedings, Powis contends that it could have done even better in the Underlying Claim. It says that W&S and Mr Pilling failed to identify an alternative – better – way of putting the claim against Cradick. Powis maintains that if only the claim against Cradick had been put in that alternative way, Cradick would have paid more to settle.

The Factual Background

3. The following factual background is taken from the Particulars of Claim and the documents which have been produced. Mr Pilling accepts that for the purposes of this application the facts as stated in the Particulars of Claim must be assumed to be true.

The Sale of 138-152

4. Powis is a property investment company owned by a consortium of investors. The investors were represented by Tony Khalastchi, Alex Barnett, Michael Baker, Franco Sidoli and Keith Rodwell.

5. In or prior to 2011, Powis engaged Cradick to sell 138-152 and 132-136. Cradick, acting through its principal Mr Cradick, negotiated the sale of 138-152 to a company called Dagmar Ventures Limited ("**Dagmar**") and on 23 May 2011 heads of terms ("**the Heads of Terms**") were agreed. One of the terms agreed concerned overage:

> "*The parties agree that in respect of future sales of the private residential accommodation should these exceed £315 per sq ft per flat any overage less sale costs, not taking into account any inducements, will be divided between the parties on a 50/50 basis. This condition is to run with the title and will bind successors in title*".

6. The term concerning overage did not specify any time period within which overage would be payable.

7. Wallace was the firm of solicitors retained by Powis to act for it in relation to the sale of 138-152. On 26 May 2011, Wallace sent a draft contract to the purchasers' solicitors which provided for an "*Overage Period*" of *"5 years starting on the date of this Agreement"*. This was in contrast with the heads of terms which did not provide for any limited time period within which overage would be payable. There is no documentation which sheds light on why this clause was included in the draft contract and it was not thereafter mentioned in correspondence with Dagmar. Wallace's letter to Powis of 7 July 2011 summarising the terms of the proposed deal just prior to exchange of contracts informed Powis of the Overage Period but said no more about it.

8. On 16 August 2011, Powis and Dagmar exchanged contracts ("**the Dagmar Contract**"). The Dagmar Contract contained an Overage Period of "*5 years*

starting on the date of this Agreement" and did not contain any provision requiring reasonable (or any) endeavours to be used to build out the development and sell the residential units within the Overage Period or a reasonable time.

9. Under the terms of the Dagmar Contract, Dagmar was in broad terms only required to complete the purchase after it had obtained planning permission. This meant that completion of the Dagmar Contract did not take place until 6 June 2013. Dagmar simultaneously sold 138-152 to Laxcon Development Limited "**Laxcon**", which ultimately developed 138-152.

10. Contracts were exchanged for the sale of 132-136 on 19 August 2013, to Provenance Pub Limited ("**Provenance**"). Cradick and Wallace also acted on behalf of Powis in relation to this sale. The plan attached to this contract conflicted with that used in the Dagmar Contract, and gave rise to a boundary dispute between Powis, Laxcon and Provenance.

11. On 23 January 2015, Laxcon's solicitors wrote to Powis to inform it that Laxcon would place on hold any sales of residential units at 138-152 until after 16 August 2016 (i.e., five years after the date the Dagmar Contract was exchanged). The effect was that Powis did not receive any overage payments. All the flats were sold between 16 August 2016 and approximately mid-2017, and overage of £4,797,970 would have been payable to Powis, had the Overage Period not expired prior to these sales taking place.

The Underlying Claim

12. Powis retained W&S as its solicitors in relation to claims against Cradick and Wallace for professional negligence during the negotiation, drafting and finalisation of the Dagmar Contract.

13. W&S advised Powis in relation to those claims and engaged in pre-action correspondence with both Cradick and Wallace.

14. On 1 August 2017, Powis sent letters of claim to Wallace and Cradick. The letter to Wallace recorded that Powis had decided to bring a claim against Wallace for the inclusion by Wallace of an Overage Period without instructions from Powis. The letter to Cradick asserted that it was liable for not questioning Wallace's inclusion of an Overage Period in the Dagmar Contract.

15. On 15 August 2017, W&S issued a claim form against Cradick and Wallace. Following this date, W&S continued to advise Powis in relation to those claims and continued to engage in correspondence with the solicitors of both Cradick and Wallace.

16. On 10 November 2017, Kennedys Law LLP ("**Kennedys**") provided a letter of response ("**the Kennedys LoR**") to the letter of claim sent to Cradick. As part of that response Kennedys said that Cradick "*do not give instructions on behalf of clients in relation to material matters without authority from those clients*" and

> "*3.1 The Heads of Terms dated 19 May 2011 did not expressly provide that there would be any time-limit on the payment of overage. However, [Cradick] considers that any buyer would have been highly unlikely to agree to unlimited overage.*
>
> *3.2 In any event, unlimited overage was plainly not accepted by Dagmar, which is why Wallace appear to have included a 5 year overage period in their first draft of the Sale Agreement*".

17. On 13 December 2017, Clyde & Co LLP ("**Clyde**") provided a letter of response ("**the Clyde LoR**") on behalf of Wallace. Clyde stated that, as evident from the communications in the files of Wallace and Cradick, the primary contact of Wallace for reporting and instructions was Cradick; and "*On or around 25 May 2011, Jackie Boot [of Wallace] had a telephone conversation with Cradick about the terms of the Dagmar contract, including the overage, and it was agreed that it would have a period of five years."*

18. Mr Pilling is an experienced barrister who is a specialist in professional negligence litigation and is King's Counsel. In February 2018, W&S on behalf of Powis instructed Mr Pilling to advise as to the merits, and generally, and to prepare draft particulars of claim.

19. The detailed 47-page instructions were supported by 6 files of documents, which included a complete set of chronological documents based on the files of Cradick and Wallace, and the letters of claim and response. The instructions identified four heads of claim, the first of which related to the inclusion of the Overage Period. W&S said:

> "*Wallace appear to have unilaterally included the [Overage Period] despite the parties having made no provision for it in [the heads of terms] and without having received any instructions from [Powis] or any request from Dagmar to do so*".

W&S noted the alleged conversation between Jackie Boot and Cradick referred to in the Clyde LoR but noted that no file note or evidence of this conversation had been provided.

20. On 1 and 6 March 2018, there were lengthy telephone calls between Mr Pilling and W&S in relation to the case. Mr Pilling advised in consultation on 7 March 2018. The notes in relation to that consultation indicate that Mr Pilling advised that the case against Wallace was stronger than the case against Cradick and that Mr Pilling's assessment was that the conversation alleged by Wallace between Jackie Boot and Cradick seemed highly unlikely to have taken place.

21. On 13 April 2018, W&S provided further instructions to Mr Pilling to finalise the Particulars of Claim. The documents accompanying the instructions included detailed questionnaires completed by amongst others Mr Khalastchi and Mr Barnett as to relevant events ("**the Questionnaires**").

22. It is clear from these documents that none of the representatives of Powis, and in particular Mr Khalastchi who was Cradick's primary point of contact, had any recollection of any discussion of an Overage Period in relation to the Dagmar Contract.

23. The further instructions explained the further researches which had been conducted by W&S and concluded in relation to the Overage Period that there was "*no evidence of communication within the documents between any of Wallace, Cradick,* [*Powis' representatives*] *or any of the individuals acting for the buyers of 138-152 suggesting the inclusion of a 5-year time limit, or any time limit, for the overage period.*"

24. The Underlying PoC prepared by Mr Pilling spanned a number of different areas, including a claim against Cradick to the effect that it had negligently prepared the plans which were attached to the Dagmar Contract. The result was that Powis could not sell the neighbouring property, 132-136; and it ended up in a dispute with Laxcon over the title to part of 138-152.

25. In relation to the inclusion of the Overage Period Mr Pilling pleaded (at paragraph 16) that Wallace did not consult Powis about the inclusion of this provision. He noted the alleged conversation between Ms Boot and Mr Cradick and pleaded that Powis had no direct knowledge of any such conversation. This was the factual foundation of the claim against Wallace (at paragraph 37.1) that Wallace had negligently included the Overage Period voluntarily, without any request from the purchasers to do so, and without any instructions from Powis.

26. In relation to Cradick, Mr Pilling pleaded a claim as follows:

> *"37.2 … Wallace has asserted that Ms Boot [of Wallace] discussed the terms of the draft contract with Mr Cradick [of Cradick], and that they agreed that there should be a five year overage period. As to this:*
>
> *37.2.1 If this assertion is correct, Cradick was negligent in failing to point out to Wallace that the heads of terms simply provided for overage to be paid, without any time limit on when it fell to be paid; and that by volunteering a time limit Powis would be conceding a significant commercial advantage where it was under no pressure to do so. Cradick ought also to have pointed out that it did not have authority to agree to such a concession on Powis's behalf, and that such a concession should not be volunteered without advising Powis of the options open to it, and obtaining instructions as to how to proceed.*

37.2.2 If this assertion is incorrect, Cradick was negligent in not pointing out to Powis and / or Wallace that there was a significant and commercially important disparity (to Powis's disadvantage) between the agreement as to overage reflected in the heads of terms, and the agreement as to overage reflected in the first draft contract prepared by Wallace".

27. The Particulars of Claim were served on 19 April 2018.

The Defences and Reply

28. Wallace and Cradick served Defences. Both Defences asserted that Cradick had instructions from Powis to instruct Wallace to include a 5-year Overage Period. Cradick's defence (at 16(d)(i) and 38(b)) asserted that Cradick had discussed the Overage Period with Powis and Powis instructed Cradick that a 5-year overage period was acceptable.

29. After taking instructions, Mr Pilling pleaded a Reply to those paragraphs of Cradick's Defence. The response included this:

> *"4.3 The allegation, in paragraph 16(d)(i) is lacking in any particulars: notably the individual with whom the discussion is alleged to have taken place is not identified. Powis is not aware of any such discussion taking place, and accordingly paragraph 16(d)(i) is not admitted, and Cradick is put to strict proof thereof. In any event, it is averred that Powis did not know, at any material time, that the five-year overage period had been volunteered by Wallace and/ or Cradick on its behalf nor was it ever advised on the commercially available alternatives".*

30. Powis' Reply to Wallace (at paragraph 9.2) said that "*for the avoidance of doubt, it is denied that Mr Cradick discussed the inclusion of a five-year overage period with Powis, or obtained its agreement that such a period should be included in the contract of a sale".* The Reply pleaded that "*even if (which is not admitted)*" Wallace had been instructed by Cradick to include the Overage

Period, Wallace was still at fault, amongst other things, for failing to provide any advice to Powis in relation to the Overage Period.

31. So Powis' case was clearly pleaded by Mr Pilling as being that Wallace had acted without instructions from Powis in including the overage clause, and that even if there had been a conversation between Mr Cradick and Ms Boot as alleged by Wallace, Mr Cradick had no instructions from Powis, and that did not absolve Wallace from liability. Powis' belief that the facts stated in the Particulars of Claim and the Replies were true was certified by Statements of Truth signed by the partner at W&S with conduct of the litigation.

Events After the Close of Pleadings in the Underlying Claim

32. In November 2018, W&S ceased to act for Powis and was replaced by Forsters in December 2018.

33. On 7 April 2019, the new solicitor for Powis, Mr Jonathan Ross (who, now at Keystone, still acts for Powis) emailed Mr Pilling to share his concerns regarding the claim. His view was that a five-year overage period in and of itself was not necessarily insufficient; the problem had been that the boundary dispute (caused by Cradick's negligence in drawing up plans) had slowed the otherwise expected progress of the development, and then the ultimate developer, Laxcon, had held back on starting sales. Mr Ross said:

> *"The real failure of Wallace as I see it was to not include in the Overage Schedule any obligation on the Developer to carry out the works and use reasonable endeavours to complete sales within the 5 year period. …*
>
> *So I think my main points for discussion are as to whether we have focussed on the right claims against the Defendants (and Wallace in particular) in this regard and whether we can make them good re causation if it was Laxcon who delayed the works to avoid liability."*

34. Mr Ross' focus was therefore that there might be a better way of putting the claim against Wallace. He had no questions or observations to make about the way the claim against Cradick was pleaded. Mr Pilling's response engaged with Mr Ross' concerns about the claim against Wallace.

35. At some point after that email, however, Powis instructed new leading counsel, Mr David Halpern KC. Privilege has not been waived in relation to the instructions given to and advice received from Mr Halpern, but in any event on 25 July 2019 Powis applied to amend the Underlying PoC.

36. On 21 May 2021, Deputy Master Smith heard Powis' application to amend and granted some but not all the proposed amendments. The amendments not allowed are characterised by Powis as the claims which Mr Pilling negligently failed to plead. The Court decided that these claims were each statute-barred and new claims not satisfying the conditions referred to in CPR r.17.4(2)". The proposed amendments were in almost identical terms to the sub-paragraphs of paragraph 38 of the Particulars of Claimin this action which sets out what Powis describes as "the Relevant Claims". The Relevant Claims against Cradick in broad terms relate to (a) a failure to include a best endeavours provision in the Heads of Terms and (b) a failure to advise Powis as to the risks of the Overage Period running from exchange of contracts rather than completion:

> *"(1) Failed to negotiate with Dagmar to include in the Heads of Terms a provision requiring Dagmar (or its successor in title) to use all reasonable endeavours to undertake and complete the development and sell the residential units within a reasonable time and/or within the overage period; alternatively Cradick failed to advise Powis directly or through Wallace that such a provision should be included;*
>
> *(2) On the contrary, despite knowing that Powis wished to include an obligation to build, negligently advised that it was "very doubtful" that Dagmar, or indeed any purchaser, would agree to such a provision …*
>
> *(3) Failed to advise Powis that the overage period (if any) should run from the date of actual completion or alternatively the Effective Date under the Dagmar Contract and not from the date of exchange of contracts*

(4) Failed to advise Powis that the consequence of starting the period from the date of exchange was that it would effectively be significantly less than five years, because of the length of time which it would take to obtain planning permission (including the necessary S.106 Agreement) and then to await the expiry of the Judicial Review period prior to completion;

(5) Failed to advise Powis that there was a significant risk that the overage period drafted by Wallace would expire before the date when the development might reasonably be expected to have been completed and the residential units sold, especially if (i) there was no obligation on Dagmar as set out in sub-paragraph (1) above and (ii) the overage period was as short as five years from the date of exchange of contracts"

37. Trial witness statements were exchanged in January 2023. Mr Cradick's evidence stated that he suspected that once the Heads of Terms were considered by the solicitors, the need for an overage period was picked up, and Dagmar came back and negotiated that point with him; that he would then have taken instructions from Powis on the point over the telephone; and he would then have instructed Wallace to include the overage period. Mr Khalastchi's witness statement on behalf of Powis states that he was the main contact between Powis and Cradick and Wallace in relation to the Dagmar Contract and continued to maintain (at 28(i)) that there had been no discussion of the Overage Period with Powis in 2011.

38. By a Settlement Agreement dated 23 April 2023, Powis settled its claims against Cradick and Wallace, pursuant to which Wallace agreed to pay Powis £1,050,000 and Cradick agreed to pay Powis £740,000 in addition to an earlier payment by it of £125,000.

39. Powis says if these claims pleaded by Mr Halpern had been in the original draft of the Underlying PoC, then Cradick would have settled not for £865,000 but for "*at least*" £3,600,000, together with a further £565,185.79 in respect of Powis' costs of the Underlying Claim.

The Present Claim

40. At paragraph 47 of the Particulars of Claim in the Present Claim, Powis alleges that, by not pleading the Relevant Claims, Mr Pilling was negligent:

> *"47. In particular Mr Pilling KC should have (but failed to) include each of the Relevant Claims in the Particulars of Claim, alternatively one or more of them; and should have (but failed to) advise that each of the Relevant Claims, alternatively one or more of them, be included in the Particulars of Claim. This is in the light of the following circumstances:*
>
> *(1) It was apparent from the information provided to Mr Pilling KC, and Mr Pilling KC should have (but it is inferred failed to) appreciate, that each of the Relevant Claims was a claim of real merit and significant value, and, yet further, that the Relevant Claims were the best claims (in the light of their merits and value) available to Powis against Cradick (or which would have been available against Cradick Retail LLP, had Cradick Retail LLP acted);*
>
> *(2) The obvious difficulties which Mr Pilling KC should have (alternatively did) anticipate would be faced in obtaining permission to amend the Particulars of Claim after their service so as to include the Relevant Claims, or any of them, in the light of the expiry prior to 19 April 2018 of the limitation periods under the Limitation Act 1980 applicable to the Relevant Claims"*

41. It will be noted that the complaint is that it was apparent from "*the information provided to"* Mr Pilling that the Relevant Claims later pleaded by Mr Halpern were the best way of putting the case against Cradick. The "*information provided to*" Mr Pilling is not particularised. Mr Grant says all the information relied upon is pleaded in the Particulars of Claim, but which parts of the Particulars of Claim are not identified. The relevant information is the information given to Mr Pilling as part of his instructions to settle the Particulars of Claim which were served on 19 April 2018, and I have summarised that above at paragraphs 3 to 27.

The relevant principles

42. The test for summary judgment in CPR r.24.3 provides:

> *"24.3. The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—*
>
> *(a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and*
>
> *(b) there is no other compelling reason why the case or issue should be disposed of at a trial".*

43. The principles to be applied in deciding whether a party has "*no real prospect of succeeding on the claim*" were summarised by Lewison J 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: Royal Brompton Hospital NHS Trust v Hammond (No.5) [2001] EWCA Civ 550;*

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. Thus 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: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

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. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

Breach of duty/standard of care

44. In *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198, the House of Lords restricted a barrister's immunity from suit for negligence to the conduct of a court hearing and work intimately relating to it. Subject to that immunity,

barristers owe the same duty to their client to take reasonable skill and care as other professionals. Lord Diplock expressed the test at 218:

> *"Those who hold themselves out as qualified to practise [in a profession], although they are not liable for damage caused by what in the event turns out to have been an error of judgment on some matter upon which the opinions of reasonably informed and competent members of the profession might have differed, are nevertheless liable for damage caused by their advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do."*

45. Lord Diplock further stated at 220-221:

> *"No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. ... The kind of judgment which a barrister has to exercise in advising a client as to who should be made defendant to a proposed action and how the claim against him should be pleaded, if made with opportunity for reflection, does not seem to me to differ in any relevant respect from the kind of judgment which has to be made in other fields of human activity, in which prognosis by professional advisers plays a part. If subsequently a barrister is sued by his own client for negligence on what he advised or did in the particular case, he has the protection that the judge before whom the action for negligence against him will be tried is well qualified, without any need of expert evidence, to make allowance for the circumstances in which the impugned decision fell to be made and to differentiate between an error that was so blatant as to amount to negligence and an exercise of judgment which, though in the event it turned out to have been mistaken, was not outside the range of possible courses of action that in the circumstances reasonably competent members of the profession might have chosen to take."*

46. A test which imposes legal liability on a professional only if the person does that which no reasonably competent member of the relevant profession or part of the profession would have done in the same situation is a test which sets a high threshold.

47. It is clearly not sufficient that the impugned decision can be shown to be an error. Lord Wilberforce in *Saif Ali* said at 214:

> *"Much if not most of a barrister's work involves exercise of judgment—it is in the realm of art not science. Indeed the solicitor normally goes to counsel precisely at the point where, as between possible courses, a choice can only be made on the basis of a judgment, which is fallible and may turn out to be wrong. Thus in the nature of things, an action against a barrister who acts honestly and carefully is very unlikely to succeed."*

Lord Salmon said at 231:

> *"I am far from saying that if the advice or document turns out to be wrong, it necessarily follows that he who gave or drew it is liable for the loss caused by its imperfection. The barrister is under no duty to be right; he is only under a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent."*

48. It is clearly not sufficient that another reasonably competent barrister might have done something differently; see *Matrix Securities Ltd v Theodore Goddard* [1998] P.N.L.R. 290 at 321.

49. Lord Diplock's reference to a "*blatant*" error is therefore sometimes used as a shorthand to describe this high threshold – i.e. that the error is one which no reasonably competent barrister of similar seniority and purported experience would have made; see Sullivan LJ, giving the approved judgment of the Court

of Appeal in *Pritchard Joyce & Hinds (a firm) v Batcup* [2009] EWCA Civ 369, [2009] P.N.L.R 28 at [97].

50. A decision on whether a point should or should not be pleaded is an exercise of judgment. There is no requirement that a pleader pleads every point that can be pleaded or runs every argument that can be run. A judgment has to be made as to the best way to present the case. That is part of the art of pleading. In *McFarlane v Wilkinson* [1997] P.N.L.R. 578, the Court of Appeal struck out a claim that a barrister had negligently failed to plead a point. In rejecting a submission that a barrister had an obligation to plead any properly arguable point which had a prospect of success Brooke LJ observed at 604:

> "*The exercise of judgment is an exercise in which demands are made on a barrister's intellect, erudition, practical experience and, often, intuition. Very often indeed the decision whether a point should be pleaded draws on all four of these qualities...*"

51. As that case makes clear, in a case where a barrister is accused of professional negligence for failure to plead a point, the question is simply whether no other reasonably competent barrister would have failed to plead that point. Brooke LJ (with whom Hutchison LJ and Saville LJ agreed) said at 601:

> *"It follows from this that if a barrister omits to plead a cause of action in a situation where no other reasonably competent barrister, acting with ordinary care, would have failed to plead that cause of action, then he or she will be liable to compensate the client if loss flows foreseeably from that negligence. If on the other hand other reasonably competent barristers holding themselves out as competent to practise in the relevant field and acting with ordinary care might also have decided not to plead that cause of action, then there will be no question of professional negligence."*

52. Where no complaint is made about the advice given by counsel which precedes the act said to be negligent, and upon which the allegedly negligent act is obviously predicated, it is very difficult to see how the impugned act can possibly be negligent: *Moy v Pettman Smith (a firm)* [2005] UKHL 7, [2005] 1

W.L.R. 581, per Lord Hope at [21]; Lord Carswell at [58] – [59]. The other members of the House agreed with Lord Hope and Lord Carswell.

53. Finally, the tribunal assessing whether any error that has been identified is negligent will be astute to ensure that it holds counsel to the standard of reasonable competence and not a higher standard. Baroness Hale observed in *Moy* at [26], that the court usually assumes that it can rely on its own knowledge and experience of advocacy to make the judgment whether a barrister's conduct has fallen short of the standard; and that this assumption brings with it "*an obvious risk that a judge will ask himself what he would have done in the particular circumstances of the case. But that is not the test*".

54. Sedley LJ in *Batcup* at [103] gave the following helpful guidance:

> *"Secondly, in a system which populates its senior bench from the practising profession, an outside observer might discern equal and opposite risks of excessively sympathetic and excessively critical appraisals of the conduct of legal practitioners. In holding, as this court does, that Underhill J has erred in the latter of these directions, we ought also to recognise his desire to maintain a high standard of professional trustworthiness. The law does not, however, demand either omniscience or infallibility in lawyers any more than it does in doctors or architects. The law's standard of reasonable competence means not only that there will be errors which are not compensable but that legal advisers are not expected to divine every claim that a client may theoretically have."*

Suitability for summary judgment

55. Mr Grant submits that this case is not appropriate for summary judgment for a number of reasons.

56. Firstly, he submits that a fuller investigation of the facts will add to or alter the evidence before the trial judge in material respects. He points to the fact that Mr Pilling has filed no Defence or evidence setting out his explanation of why he

pleaded the Underlying PoC as he did, and that neither Mr Pilling nor W&S have said that the documents they have disclosed are all the relevant working papers, drafts and attendance notes that they have. There may be more. There might therefore be further evidence on (a) what information was provided to Mr Pilling in conference and telephone calls and (b) what Mr Pilling considered at the time to be the strengths of the claim against Cradick.

57. I have taken into account the possible gaps in the evidence but do not regard any gaps as significant. It is highly unlikely that instructions were given to Mr Pilling in conference and in telephone calls leading up to the conference on 7 March 2018 which were not reflected in the subsequent further written instructions to Mr Pilling from W&S to settle the Underlying PoC. It is highly unlikely that telephone calls discussing the draft Underlying PoC contained anything relevant to this claim. The material instructions and information were given to Mr Pilling in his detailed instructions before and after his conference. A new legal team took over the case from W&S and Mr Pilling and conducted it for years to an eventual settlement. With all that knowledge of the case, it is telling that Powis is not able to even speculate about what material fact was or could have been known to W&S prior to 19 April 2018, and might have been disclosed orally to Mr Pilling, which is not included in the documentation that was put before him.

58. As for documents and evidence which shed light on Mr Pilling's thought processes, on Powis' pleaded case, Mr Pilling's thought processes have no particular relevance. The key question is not why he did what he did, but whether no other competent barrister of similar standing and ostensible experience would have done the same thing on the information available to him.

59. The question for determination is whether there is a real prospect of Powis establishing that no reasonably competent barrister of Mr Pilling's seniority and ostensible experience would have failed to plead the Relevant Claims. Mr Grant's second submission as to why summary judgment is not appropriate is that this is a substantial task that is not analogous to the determination of a "*short point of law or construction*" and involves an impermissible "*mini-trial*". It is

relevant to this submission that Mr Mitchell accepts that all the pleaded facts in the Particulars of Claim against Mr Pilling must be assumed to be true. I have concluded that in this case the question to be determined is analogous to a point of law or construction, and if after a relatively short hearing of one and a half days, I can safely form a view that there is no realistic prospect of Powis succeeding in its claim against Mr Pilling then I should do so. Plainly, if the question for determination is one which would benefit from further evidence or more detailed submissions, then it would not be safe to do so. If, however, the answer is clear, then it is in the interests of justice and the overriding objective that a bad claim is brought to an end as soon as possible.

Negligence

60. Mr Pilling's decision to plead a claim that Wallace had no instructions from Powis in relation to an overage clause was ultimately an exercise by him of his judgment as to what his client's best case was at the time of the pleading. It is impossible to list the factors which go into the exercise of that judgment, but examples are his client's instructions, what the evidence at trial might show and strategic or tactical considerations as how to achieve Powis' objectives.

61. The pleaded case of negligence against Mr Pilling does not identify what Mr Pilling is said to have done wrong other than to assert that on the information available to him he should have appreciated that the Relevant Claims against Cradick were better claims than the ones pleaded. It is not explained why. Nothing is pleaded as to why any other silk of similar standing would have appreciated this. This does not seem to me to be an adequately particularised plea of negligence against Mr Pilling.

62. Mr Grant, in his oral submissions, took me to the documents and evidence upon which he relied and said that any defect in the particularisation of the pleadings against Mr Pilling could be rectified.

63. Mr Grant's primary point is that on the information which Mr Pilling had before 19 April 2018 he should have realised that Powis was wrong in its contention that Powis had not given instructions to Wallace via Cradick for the overage period. If Powis *had* given instructions to Wallace via Cradick then the better claims would (he said) have been against Cradick not Wallace and the claims pleaded in para 37.2.2 of the Underlying PoC were too limited. I observe that it has not been established by a court or conceded by Powis that Powis did give such instructions. Indeed, Powis continued to maintain that it did not give such instructions and that was at the forefront of its case in the Underlying Claim with its new legal team from July 2019 until the case settled on 23 April 2023. When witness statements were exchanged in January 2023, Mr Khalastchi continued to maintain that there had been no discussion at all between Powis and either Wallace or Cradick in relation to the Overage Period.

64. Nevertheless, Mr Grant says that any competent barrister would have realised that Powis must have given instructions to Wallace. He points to the inherent unlikeliness of professionals like Cradick and Wallace acting without instructions and to the absence of any surprise on the part of Powis to the reference to the Overage Period in the 7 July 2011 letter from Wallace. He refers to one of the Questionnaires, which was prepared by Mr Barnett who (while saying he had no recollection) assumed that Powis would have been consulted about inserting the Overage Period in the Dagmar Contract. He also relies on the Kennedys LoR which made the general statement that Cradick did not give instructions on behalf of clients in relation to material matters without authority for them and that the Overage Period must have been prompted by an objection from Dagmar.

65. This is looking at the weight of the evidence as at 19 April 2018 through the wrong end of a telescope. The instructions of Powis, and Powis' belief as verified by the Statement of Truth on the Particulars of Claim, was that it had not authorised the inclusion of the Overage Period. The detailed analysis of W&S had concluded, having reviewed all the evidence, including the documents referred to by Mr Grant, that it appeared that Wallace had acted

without authority. There were no documents at all (as one might expect to see) showing how Wallace had come to introduce the Overage Period, which was not mentioned in the Heads of Terms, into the Dagmar Contract. There were no documents (as one might expect to see) showing discussion of the introduction of the Overage Period internally within Wallace, between Wallace and Dagmar or between Wallace and Cradick. Wallace had asserted that the instructions from Cradick were supposedly given orally in a telephone call between Ms Boot and Mr Cradick, but no attendance note (as one would expect to see) and no other evidence had been produced to show that such a call had taken place. Mr Cradick made no mention of the call in his the Kennedys LoR and clearly had no specific recollection of what had happened. None of the Powis representatives (including Mr Barnett, and perhaps more significantly Mr Khalastchi who was Cradick's principal point of contact) had any recollection of discussions about the Overage Period and most said that if it had been brought to their attention they would have reacted differently.

66. There was ample material upon which a competent barrister could conclude that there was a good prospect of establishing at trial that Powis had not given instructions for the overage period and indeed Powis' replacement legal team, including leading counsel, continued to maintain that case to a successful settlement. There is no realistic prospect of establishing that all other competent barristers of Mr Pilling's seniority and experience would have concluded that, contrary to their instructions, Powis must have given instructions to Wallace via Cradick. It is likely that the reverse is true - that no competent barrister of Mr Pilling's seniority and experience would have concluded that, contrary to their instructions, Powis must have given instructions to Wallace via Cradick – but Mr Pilling does not need to meet that threshold.

67. Mr Grant's fallback point is that Mr Pilling should in any event have pleaded the Relevant Claims against Cradick as "*the best claims*". In one sense they are arguably "*better*" claims than those pleaded in paragraph 37.2.2 of the Underlying PoC because they are not as limited. However, the claims against Cradick cannot be regarded in isolation.

68. The structure of paragraph 37 of the Underlying PoC makes clear that the primary target was Wallace, and this was in accordance with Mr Pilling's advice in consultation to Powis that the claim against Wallace was the best claim. It has not been suggested that this was negligent advice which is perhaps unsurprising as Wallace drafted the Dagmar Contract.

69. Mr Pilling was clearly alive to the potential claims against Wallace and Cradick relating to the failure to include a best endeavours clause or to secure that the overage period ran from completion rather than exchange of contracts. This is because he pleaded those issues as compounding Wallace's negligence for acting without instructions – paragraph 37 of the Underlying PoC. It was possible to include a concurrent claim against Cradick along the lines of the Relevant Claims. Such a claim did not need to be conditional on a court determining that, contrary to its case, Powis had in fact given instructions to Wallace to include the Overage Period.

70. Whether to plead such a concurrent case arises regularly in cases, and requires an exercise of judgment. In this case, such an exercise of judgment required the pleader to weigh up strategic issues – such as whether pleading a concurrent case showed a lack of confidence in the claim against Wallace and weakened the prospects of settlement by Wallace. Or whether it was a tactical mistake which permitted Wallace to deny liability and maintain that Powis should sue Cradick. Or whether it shifted the litigation and costs burden of pursuing Cradick from Wallace, by way of a claim for contribution and indemnity, unto Powis.

71. Mr Grant was unable to explain why all other competent barristers in Mr Pilling's position would have weighed up all the considerations and concluded that a more fulsome concurrent claim should be brought against Cradick. This is plainly a judgement call and the course taken by Mr Pilling was one which many barristers would have chosen. There is no realistic prospect of showing that no other competent barrister of his seniority and experience would have made a similar decision.

Conclusion

72. I am satisfied that I can safely conclude at this early stage of these proceedings that Powis has no realistic prospect of succeeding in its claims against Mr Pilling. I grant summary judgment in favour of Mr Pilling.