



Neutral citation number: [2019] EWHC 911 (Ch)

IN THE HIGH COURT OF JUSTICE

HC-2017-000219

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHANCERY DIVISION)

Thursday 11 April 2019

Before:

STEPHEN JOURDAN QC SITTING AS A HIGH COURT JUDGE

Between:

(1) COLIN FRANK ANDREWS

(2) IRENE ANDREWS

(and all those individuals listed in schedule C annexed to the Particulars of Claim)

Claimants

and

MESSER BEG LIMITED (previously known as RWP Solicitors Limited)

Defendant

and

DAVID LOWE QC

Third Party

Roger Stewart QC instructed by Withers LLP for the Third Party

Michael Pooles QC and Francis Bacon instructed by Reynolds Colman Bradley LLP for the Defendant

The Claimants were not present or represented

Hearing date: 19 December 2018

Draft judgment circulated: 4 March 2019

JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Main Action

1. On 23 May 2017, this claim was commenced by 101 individuals, the Claimants in this claim, against the Defendant, their former solicitors, whom I will refer to as “RWP”.

The brief details of claim provided in the claim form state that:

“Each Claimant seeks damages from the Defendant in respect of loss sustained as a result of the Defendant’s negligence and breach of contract in connection with a claim brought by the Claimants and others against various corporate entities associated with the Bank of Scotland and Barclays Bank under action number HC 09C00918 and case number CH/2009/PTA/0603 and the settlement thereof. The defendant was retained to act as the Claimants’ solicitor in relation to the said claim. Further, each Claimant seeks interest on the damages awarded herein”.

2. I will refer to the claim commenced on 23 May 2017 by the Claimants against the Defendant as “the Main Action”. I will refer to the claim brought by the Claimants and others against various corporate entities associated with the Bank of Scotland and Barclays Bank as “the 2009 Litigation”; the first claim forms in that litigation were served on 8 May 2009.
3. The 2009 Litigation related to money borrowed by each of the Claimants from a subsidiary of either the Bank of Scotland or Barclays Bank (“the Lenders”) on the terms of a “shared appreciation mortgage”, which I will refer to as a “SAM”. Under a SAM, the borrower had to repay the loan on the sale of the borrower’s house or the death of the borrower or on the borrower wishing to redeem, and the Lender then received the loan plus a share of the appreciation in the value of the house. In the 2009 Litigation, the Claimants sued the Lenders, seeking relief from the terms of the SAMs under s.140A the Consumer Credit Act 1974 and the Unfair Terms in Consumer Contract Regulations 1994. The 2009 Litigation was conducted under a group litigation order (“GLO”). It ended in July 2010 with a settlement agreement being entered into pursuant to which the claims against the Lenders were withdrawn on terms that there was no order as to costs.
4. In the Main Action, the Claimants allege that they were advised by RWP to fund the claim against the Lenders on the basis that each claimant against a Lender should contribute £5,000 to a fighting fund (“the Private Funding Strategy”). They say that pursuant to the Private Funding Strategy they paid around £1.3 million to RWP to fund

the claim against the Lenders, that none of this was returned to them following the withdrawal of the claims, and that of that sum, around £800,000 was paid to two counsel instructed by RWP - Mr Lowe QC and Mr Henderson, who acted as Mr Lowe's junior.

5. They allege that it was an incident of RWP's duty of care to the Claimants that RWP would discuss with the Claimants whether their potential liability for the Lenders' costs might be covered by existing insurance or whether specially purchased insurance might be obtained. They say that any reasonably competent litigation solicitors with experience of conducting litigation of the kind proposed should, in 2008, have known that it was possible to structure litigation funding by the provision of legal services by way of conditional fee agreements ("CFAs") in respect of which an uplift of up to 100% on base fees could be charged in the event of the claim succeeding, with after-the-event insurance ("ATE Insurance") providing cover against any costs liability to a successful defendant, and with self-insured ATE Insurance being available, meaning that the premium would only be payable in the event of a successful claim. They say that this had to be addressed at the outset or at an early stage.

6. They allege that RWP was under a duty:
 - (1) to take all reasonable steps to investigate such alternative funding arrangements after 11 August 2008 and by no later than early 2009;
 - (2) to advise the Claimants of the possibility of and potential availability of such alternative funding arrangements;
 - (3) to advise the Claimants, if such alternative funding arrangements could not be offered by RWP, that it was in their interests to consider whether other lawyers could offer such alternative funding arrangements;
 - (4) to advise the Claimants that it was most unwise to commence legal proceedings without having such alternative funding arrangements in place, given that in the absence of such arrangements there was an obvious and very

substantial risk (by no later than February 2009) of a funding shortfall and the prospect of having to discontinue;

- (5) having negligently allowed the Claimants to litigate without such alternative funding arrangements in place, to monitor closely the costs being incurred and to limit expenditure on disbursements.

7. They make 8 allegations of negligence against RWP:

- (1) Failure to give sufficient consideration to, or advise on, the funding of the proposed litigation and the obtaining of ATE Insurance in relation to potential liabilities for the opposing parties' costs.
- (2) Failure to recognise or advise on the fact that the Private Funding Strategy was very likely to lead to expensive failure because £1.3 million was insufficient to fund the litigation beyond preliminary procedural hearings; RWP had taken no steps to provide for the funding of the remainder of the litigation; the Lenders had instructed well-known City firms who were bound to incur very substantial costs in defending the litigation; it was therefore overwhelmingly likely that at some point the borrowers would be faced by potentially very substantial liabilities for adverse costs which they could not afford to pay, in circumstances in which they had no means of taking the litigation to trial and this would create a position in which the best available outcome would be that which occurred, namely discontinuance on a 'drop hands' basis.
- (3) Failure to recognise, or advise on, the enormous advantages which would flow from the adoption of a CFA/ATE funding regime.
- (4) Failure to monitor and limit the expenditure on disbursements, in particular counsel's fees.
- (5) If RWP and instructed counsel were unable or unwilling to contemplate accepting instructions on the basis of a CFA or partial CFA, then RWP

should have but did not tell the Claimants to seek advice from lawyers who were prepared to contemplate such instructions.

- (6) Failure to take sufficient steps to investigate the terms on which a CFA/ATE funding arrangement might be available.
 - (7) Failure to give sufficient advice on the Claimants' possible exposure to adverse costs orders, and as to the steps which might be taken to obtain insurance in relation to such exposure.
 - (8) Accepting instructions to act in substantial multi-claimant litigation when its ignorance of the funding arrangements which were then available to claimants made it unable to carry out its instructions competently.
8. They say that they had a good prospect of success against the Lenders, and if competently advised would have entered into a CFA/ATE funding arrangement. Bearing in mind that the claimants in the 2009 Litigation were able to provide a contribution of £1.3m to the costs, they say it would only have been necessary for the CFA to have related to part of the legal costs. With a CFA/ATE funding arrangement in place, they say that the Lenders would probably have compromised the 2009 Litigation on a basis favourable to the Claimants, or they would have taken the litigation to trial and would have won; alternatively they were deprived by RWP's negligence of a substantial chance of achieving that favourable outcome.
9. In their Defence, served on 7 August 2017, RWP deny liability to the Claimants. RWP say their advice about funding was not negligent and that they carried out a sufficient investigation of the terms on which a CFA/ATE funding arrangement might be available, and that it would not have been possible in the market in 2008/2009 for the 2009 Litigation to have been financed on a CFA/ATE basis. RWP themselves would not have acted on a CFA basis, as they made clear to the Claimants.

The Part 20 claim against Mr Lowe

10. On 1 August 2017, RWP issued an additional claim under CPR Part 20 against Mr David Lowe QC, claiming an indemnity in respect of, or a contribution towards, any damages or costs awarded in the event that the Claimants' claim against RWP succeeds, under the Civil Liability (Contribution) Act 1978. This provides that if a person, D, is liable to another person, C, in respect of any damage suffered by C, then D may recover an indemnity or contribution from a third person, T, who is also liable to C in respect of the same damage (whether jointly with D or otherwise). The amount of the contribution recoverable from T is such as may be found by the court to be just and equitable having regard to the extent of T's responsibility for the damage in question.
11. The basis of RWP's claim against Mr Lowe is not that Mr Lowe breached a duty owed to RWP. It is that Mr Lowe breached a duty owed to the Claimants, and that if RWP is liable to the Claimants in respect of the loss pleaded in the Particulars of Claim, then Mr Lowe is also liable to the Claimants in respect of that loss.
12. CPR part 20 allows a defendant to make an additional claim (which used to be referred to as a part 20 claim) against a person who is not already a party by issuing an appropriate claim form. CPR r.20.7(4) provides that particulars of an additional claim must be contained in or served with the additional claim. RWP's claim against Mr Lowe was initially pleaded in Particulars of Additional Claim served on 1 August 2017 ("the Original PAC").
13. On 8 February 2018, Mr Lowe applied to strike out the Original PAC and for summary judgment dismissing the additional claim against him. On 23 February 2018, RWP served an amended version of the Original PAC. On 12 April 2018, Fancourt J. heard the application. He held that the amended version of the Original PAC disclosed no properly arguable case, and ordered that it be struck out. He declined to give judgment dismissing the additional claim, as he considered it was possible that RWP might be able to plead a properly arguable claim and that it should be given the opportunity to do so. He rejected Mr Lowe's submission that it was a fanciful and not a real possibility that CFA/ATE funding could have been obtained for the Claimants at the relevant time, such that no loss can, in any event, have been caused. He held that, in

view of detailed particulars of likely funders having been provided by the Claimants to RWP, that was an issue which could only be resolved at a trial. His judgment has the neutral citation number [2018] EWHC 2692 (Ch).

14. In his Order dated 12 April 2018, Fancourt J. directed that if RWP wished to serve replacement Particulars of the additional claim they had to do so by 10 May 2018 and in default the additional claim would be treated as discontinued.
15. On 10 May 2018, RWP served new Particulars of the additional claim on Mr Lowe. On 21 June 2018, Mr Lowe served a Defence to the claim pleaded in those new particulars, and also a request for further information under CPR part 18. On 20 July 2018 RWP served a reply to that request for further information.

The applications before me

16. On 15 October 2018, Mr Lowe applied to strike out the additional claim under CPR r.3.4(2)(a) on the ground that the new Particulars of the additional claim disclosed no reasonable grounds for bringing the claim against Mr Lowe. On 14 December 2018, RWP served an amended version of the new Particulars of the additional claim, and I will refer to that amended version, which was the one I have to consider, as “the New PAC”. On 17 December 2018, the Defendant applied for permission to rely on the New PAC i.e. applied for permission to amend the version of the pleading which had been served on 10 May 2018.
17. The application by the Defendant to rely on the New PAC and the application by Mr Lowe to strike out the claim against him as disclosing no reasonable grounds for bringing the claim against him were heard by me on 19 December 2018. The applications proceeded on the basis that if the New PAC do disclose reasonable grounds for bringing the claim against Mr Lowe, permission to amend should be given but otherwise it should not.

The principles applicable to an application to strike out a claim on the grounds that it discloses no reasonable grounds for bringing the claim

18. Both Mr Stewart and Mr Pooles made brief submissions on the applicable principles. I did not understand there to be any issue as to what they are. I will summarise the principles which I propose to apply.
19. CPR r.3.4(2)(a) provides that the court may strike out a statement of case, including an additional claim brought under r.20.7, if it appears to the court that the statement of case discloses no reasonable grounds for bringing or defending the claim. Practice Direction 3A paragraph 1.4(3) gives, as an example of a case where the court may conclude that a pleaded claim falls within rule 3.4(2)(a) “those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.”
20. The function of a pleading which asserts a claim, including an additional claim, is to set out a concise statement of the facts on which the claimant relies as giving the claimant a cause of action against the defendant: see CPR r.16.4. The claimant should state all the facts necessary for the purpose of formulating a complete cause of action against the defendant. Such a pleading needs to give the defendant such reasonable and proportionate information about the facts alleged as is required to enable the defendant to understand the case he has to meet and to prepare his defence. This is clear from PD18 paragraph 1.2 which states that a request for further information should be “strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.”
As Teare J said in *Towler v Wills* [2010] EWHC 1209 at [18]:

“The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies ...”.

21. If the pleaded facts would not, if proved, make out any legally recognised cause of action, then the Court may strike out the pleading, or may permit the claimant a further opportunity to attempt to plead a legally sustainable claim. In *Soo Kim v Youg* [2011] EWHC 1781 (QB) at [40], Tugendhat J said: "... where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right".
22. In deciding if the pleaded case discloses a reasonable ground for bringing the claim, the court must assume that the facts pleaded will be proved at the trial and determine whether, if those facts are proved, the claimant has a realistic prospect of securing the relief claimed against the defendant. A realistic claim is one that carries some degree of conviction; a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
23. If the question of whether there is a realistic prospect of the claim as pleaded succeeding turns on a short point of law, it may be appropriate for the Court to decide it because, if it is clear that the claim is bad in law, the sooner that is determined, the better: *Mellor v Partridge* [2013] EWCA Civ 477 at [3(vii)] per Lewison LJ. However, where the dispute relates to an area of the law which is uncertain and developing, the court will not strike out the claim unless the law is such that the claim is certain to fail, because in such a case: "...it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out": *Barrett v Enfield London Borough Council* [2001] 2 A.C. 550 at p.557 per Lord Browne-Wilkinson. In such a case, even if it is strongly arguable that such a claim will fail, the court ought not to strike it out unless it is certain to fail: *Richards (T/A Colin Richards & Co) v Hughes* [2004] PNLR 35 at [22-30].

The application of those principles here

24. The claim made against RWP in the Main Action was said by both Mr Pooles and Mr Stewart to be a very weak one on the facts. I am not able to form a view on that, not having heard from the Claimants. However, both counsel accepted, rightly in my view,

that I have to determine these applications on the basis that the Claimants will succeed in proving all the allegations they make against RWP and I will proceed on that basis. Similarly, Mr Lowe disputes some of the factual allegations against him pleaded in the New Additional Particulars of Claim, but Mr Stewart on his behalf accepted, again rightly, that I must determine this application on the basis that those allegations will be proved.

25. Mr Pooles emphasised that RWP strongly disputes the claim against it made by the Claimants and said that RWP was therefore in a difficult position in making a claim against Mr Lowe. The claim against Mr Lowe required the assumption to be made that the Claimants' claim was a good one, but as that assumption is false it is difficult for RWP to plead the claim against Mr Lowe. He submitted that the Court should allow latitude to RWP in the light of that. Mr Stewart submitted that RWP, having chosen to sue Mr Lowe, had to plead a legally sustainable claim against him which provided him with sufficient information to prepare his defence, and that RWP could not excuse a failure to do so by saying that the claim against RWP was a bad one. I agree with Mr Stewart's submission on this point. As he said, if RWP required further information from the Claimants in order to be able to adequately plead its claim against Mr Lowe, it could seek such information from the Claimants. Mr Pooles did not submit that the court should permit RWP to defer pleading the additional claim until some later point in the progress of the Main Action e.g. after disclosure.

The New Particulars of the Additional Claim

26. The New PAC begins by identifying the parties. At paragraph 5, it summarises the allegations made by the Claimants against RWP in the Main Action.
27. At paragraph 6 it refers to RWP's Defence in the Main Action and at paragraph 7 it alleges that if, contrary to RWP's Defence, RWP is held liable to pay damages to the Claimants, RWP will seek an indemnity or contribution from Mr Lowe in such amount as the Court considers fair and reasonable under the 1978 Act for the reasons set out below in the pleading.
28. Paragraphs 8 and 9 provide what is said to be a summary of the claim against Mr Lowe. Paragraph 8 alleges that Mr Lowe provided advice through RWP, to Elaine

Williams, Patrick Brooking, Colin Andrews and Harold Fisher, who were the members of a “Steering Committee” which represented the members of two action groups which had been formed to further the interests of borrowers and also to “prospective and actual claimants”, as to the manner in which they might obtain the remedies he advised might be available, the operative procedures; and “the practical steps required including the funding of the process”. Colin Andrews, one of the members of the Steering Committee, is the First Claimant in the Main Action.

29. Paragraph 9 alleges: “The advice and communications provided by Mr Lowe summarised below demonstrate an assumption of responsibility by him to the Steering Committee and the borrowers including the Claimants and that such assumption of responsibility fell within the scope of the duty of care which Mr Lowe consequently owed to the Claimants”.
30. The pleading does not say what Mr Lowe assumed responsibility to do. In the reply to the part 18 request served on 20 July 2018, RWP said that it was not necessary for it to say what it is that Mr Lowe assumed responsibility for; RWP said that its case was set out fully in paragraphs 8 and 10-50.
31. Paras 10-50 plead factual allegations about various events which are said to have occurred between 7 May 2008, when Mr Lowe is said to have been informed that RWP was retained by the two action groups and was instructed by RWP to advise in writing on the prospects of successfully challenging the validity of shared appreciation mortgages, and 28 January 2010. It is alleged that during that period Mr Lowe advised frequently on the funding of the claim against the Lenders.
32. The most important allegations appear to me to be as follows:
 - (1) In May 2008, Mr Lowe was instructed by Mrs Messer of RWP to advise the action groups in writing on the prospects of successfully challenging the validity of any or all of the SAMs. He then spoke to Mrs Messer and said the claim would need to be a class action involving all those “prepared to subscribe” by which it was understood that he meant all those prepared to

provide funding. He said the 12-year limitation period would run out by the end of 2008 for those SAMs taken out in 1996.

- (2) In July 2008, having obtained a fee estimate from Mr Lowe's clerk, Mrs Messer of RWP advised the Steering Committee that counsel's fees to the end of the trial would be about £3.25m plus VAT and RWP's fees would be about £206,250. She suggested that if there were 1,500 SAM borrowers wishing to take part in the action, a contribution of £5,000 per head would raise a fighting fund of £7.5m which she thought should be ample.
- (3) At consultations with Mr Lowe in August and September 2008, Mr Lowe said he agreed that £5,000 was a reasonable sum to invite prospective claimants to contribute; that funding arrangements were fundamental and that therefore the right amount of claimants were needed fairly quickly to proceed. He advised that large numbers were wanted, and that "several thousands of claimants will make a huge difference." He advised that it was necessary to identify the claimants and get the issue of funding sorted. He said that hopefully there would be more than 1,000 claimants and he would like to see several thousand. He advised that no-one should be put forward as a claimant unless they put themselves down for the contribution required and made a contribution to the fund. He gave a target of 4 weeks from 12 September 2008 so that the Steering Committee could know whether or not they were going ahead. The advice given by Mr Lowe in consultation in August and September 2008 is said by RWP to have "reflected the fact that he approved and adopted the advice given by Mrs Messer as to the appropriate means of funding the action". In the reply to the part 18 request dated 20 July 2018, it is alleged that at the consultations in September 2008, Mr Lowe either expressly or implicitly approved and adopted the proposed method of funding. So it is not alleged that he devised the funding strategy but that he endorsed it.
- (4) Also in September 2008, it is said that Mr Henderson, Mr Lowe's junior, produced a draft newsletter to be published by the action groups, copied to Mr Lowe, which strongly encouraged every SAM holder to contribute £5,000

to a fighting fund, saying: “If enough money for costs is not forthcoming, the Group Action cannot start and your opportunity is lost once and for all”.

- (5) Following a radio interview with Mrs Messer in late September on the “Money Box” programme, where she was asked why RWP were not proposing to act in the litigation on a CFA basis, she emailed Mr Lowe to say that her response had been to say that RWP was a small practice and this is big litigation and she cannot afford to run it that way, and

“No win, no fee is usually no win no fee to the solicitor unless all others e.g. Counsel and experts agree to the like arrangement and client has to pay those or premium to cover those and we don’t have the luxury of time to arrange such things anyway, can you think of anything else I might say to get away from any “fat cat” accusation? It was said in context of “these people have no money so why do they have to pay you when they could get a CFA?” I suggested that whilst there may be some big firm out there willing to do it, I knew of no one thus far and I was offering my services on a private paying basis only.”

- (6) Mr Lowe replied shortly afterwards with two emails setting out a number of possible points which could be made to justify not running the litigation on a CFA basis. In the second, he said:

“Ideally, we do not want this dealt with in the interview since the bit/some shortened version of what was said might incite some firm(s) to come forward and say “We would do it”: the likelihood must be that they would not, when they found out what was involved, but the process might destroy the momentum and kill everything off. The really big firms (magic circle) would not want to take this on anyway because they would have difficulties in litigating against the Banks.... A CFA is unrealistic. The case is going to take quite a time (it will not be sorted out before the end of 2010 in any event, and it cannot be compromised before then because the class will not have closed). Being quite realistic, it could take 4 to 5 years, allowing for appeals. Does that not really make a CFA unrealistic? Do you get CFAs on long term litigation? Other points to this effect – CFA unrealistic (I do not know anything about the practicalities of CFAs: but you will):

(1) Would you not need to have a separate agreement with each client? Think of the logistics.

(2) How would you define success? The granting of relief by the Court is a rather a simple criterion. Looking at individuals you will know from “Your Questions Answered” Q.9, that if relief is granted, the outcome will have a different effect for every claimant (and indeed the effect will not work itself out until the property is eventually sold which could be years hence.)”

- (7) Also in late September 2008, Mr Lowe amended draft terms of business and a memorandum to be used by RWP which he knew would be provided to each SAM borrower considering becoming a claimant in the proposed claim against the Lenders and which were very likely to be relied on by a prospective claimant in deciding whether or not to become a part of the group action. These documents set out the Private Funding Strategy and included two questions and answers settled by Mr Lowe. The second question was: “Why are RWP Solicitors not fighting this case on a “no win, no fee” basis?” and the answer was as follows:

“RWP is highly successful specialist Practice, but it is a relatively small one and does not have the financial wherewithal to do it. Larger firms, who could possibly afford to fight this case on a “no win, no fee” basis, tend to be reluctant to bring actions against the high street Banks as many of the larger firms work closely with them. These considerations apart, for a whole range of reasons it is not considered that this Group Action is a suitable case to be fought on a “no win, no fee” basis. They include the following. Practical problems will arise if (as may well be the case) there are a large number of claimants, especially when the effect of the relief sought would or could differ so much as between individual claimants (see Q.9 above). The Group Action will be complex and large scale Litigation and the overall costs are likely to be substantial (see Q.16 above). Even ignoring the possibility of delay arising from any appeal, it is unlikely that the Group Action could be finally determined for a considerable time- a hearing on the merits would be unlikely to take place before the end of 2010 at the earliest and assuming that the Banks were prepared to consider the possibility of a compromise, it is most unlikely that the Banks would be advised or willing to enter into negotiations with a view to a compromise until such time as the class of claimants had finally closed (by the operation of the twelve year limitation period) in late 2010: a more realistic assessment would suggest that it could be some 4 to 5 years before the Group Action is finally determined, and this is certainly way beyond the sort of time-frame within which “no win, no fee” Litigation is normally conducted even in straightforward cases (often single issue cases) where costs are, relatively speaking, modest.”

- (8) Thereafter, starting on 3 October 2008, Claimants began to sign up to the group action and to pay the £5,000 contribution.
- (9) On 6 October 2008, Mr Lowe emailed Mrs Messer to say he was angry about an article in the Lawyer which wrongly gave the impression that Quinn

Emanuel was the lead solicitor in the proposed group action against the Lenders. He said:

“However since before the Money Box interviews I was concerned that someone might want to try to slip in on the basis of a promise of a CFA or some other arrangement which purported to give the clients the litigation at no cost: because it seemed to be that it was extremely likely that they would ultimately not come up to scratch – they would either show no interest, or would show interest on a basis which would involve the clients in significant costs (at the end of the day) and on the basis that they could bring about the end of the day, by pressing for a compromise which qualified as “success”, i.e. on terms that ensured that they did get paid. In the meantime, we would have lost momentum, perhaps irretrievably. The revised answer to Q.17 was intended to make it clear to this type of intervener that this was unlikely to be a case which would be attractive to the intervener on terms which would be attractive to the clients: and NB no “recoveries” by way of damages or compensation.”

- (10) By November 2008, despite a considerable marketing campaign, the anticipated numbers of SAM borrowers willing to fund the action had not materialised. Mr Lowe was asked to advise on a letter to be sent to the 225 clients who had by then retained RWP and also to be published on the action group’s website. He sent an email to RWP with a copy of the letter attached which he said he had reviewed and “tinkered with a little”. This letter advised that the options available to those individuals who had by that date contributed funds were to give up and obtain a refund of the contributions; carry on the publicity at least end December 2008; or in the week beginning 1 December 2008 begin the substantive preparatory work, instruct the barristers and identify and meet with experts.
- (11) RWP then instructed Mr Lowe and Mr Henderson to press ahead with the necessary preparatory work on 1 December 2008, as appears from Mr Lowe’s fee notes which start on 1 December 2008.
- (12) Mr Lowe was kept informed by RWP on a regular basis of the number of SAM borrowers who had signed up to the group action. By February 2009, he knew that the expected numbers of SAM borrowers willing to fund the litigation had not materialised, and that the chances of getting a substantial number of fully funded clients in after a GLO was made were more remote.

- (13) On 19 February 2009, Mr Lowe advised that “unless there is some dramatic change which occurs soon: (1) assuming we get the GLO in late March/early April, we will not have enough funding to be able to run the action to its conclusion on a fully funded basis or even a 50% CFA basis: (2) we cannot take (and act now on) a gamble as to how the number of clients, and amount of funding, would increase if a GLO were obtained: (3) it would not be right to expose existing clients to the risk of an adverse inter partes costs order if the proceedings are discontinued or lost”. He advised that the options for the existing borrowers who had signed up were: (1) to stop by March, unless there was some dramatic change in the meantime, and effect refunds of what remained; (2) apply for the GLO; or (3) continue the campaign to attract borrowers and try to increase the number of clients and the funding, but delay the GLO application. He said: “There may be other options. E.g., someone might be prepared to take the matter on a CFA (or some other) arrangement. We could communicate with Quin Emmanuel about the possibility of their doing it on a full CFA.”
- (14) Following that advice, RWP instructed Mr Lowe to draft the terms of a GLO and prepare the supporting materials for an application for a GLO. By 27 May 2009, RWP had only 441 clients who had 279 SAMs between them, which Mr Lowe was aware of.
- (15) The day after the hearing of the GLO application, 15 July 2009, Mrs Messer sent a letter to Chief Master Winegarten which had been settled by Mr Lowe in which she stated: “We are unable to afford to run these claims individually under conditional fee arrangements, as we do not have the resources to do so. No third party funder is interested in funding the clients’ costs as there will not be any monetary award or awards from which to take their fee, given that the relief sought involves a reduction or capping of the amount of a future liability.” The following day, Mr Henderson sent an email to Mrs Messer, copied to Mr Lowe, saying : “The word ‘individually’ is key: we cannot do 250 cases to trial on a CFA. However, without mentioning it to the CM or the Chancellor, we anticipate doing [the] group litigation from some point

onwards on a CFA. For the record, David and I think that the letter tells no lie.”

- (16) On 28 January 2010, after a hearing before Mann J at which he held that it was not possible for the determination of the issues to proceed without regard to the individual circumstances of the borrowers, Mr Lowe emailed Mrs Messer with an article from the Times dated 7 May 2009 about CFAs saying: “I put it to one side, because it looked as if it might be of interest if funding ultimately proved difficult ... I wonder whether it might be worth your having a word with Anthony Maton at Hausfield & Co LLP, who is mentioned in the article. Or even Nigel Tait at Carter-Ruck. Just a thought, because if someone who operates in financial litigation might be interested in taking on the case on a CFA, it might provide an alternative for the clients.”
33. Paragraph 51 then incorporates by reference paragraph 43 of the Particulars of Claim in the Main Action, which sets out the Claimants’ reasons for alleging that it was obvious that the Private Funding Strategy was likely to lead to the litigation leading to expensive failure. I have summarised those reasons in paragraph 7(2) above.
34. Paragraph 52 alleges that if, contrary to RWP’s defence, it was obvious that the Private Funding Strategy which was operated by RWP was likely to end in expensive failure, this should have been equally obvious to Mr Lowe as the underlying litigation progressed and as it became known to him between 26 September 2008 and 19 February 2009, in the circumstances set out in the New Additional Particulars of Claim, that sufficient numbers were not coming forward as had been expected.
35. Paras 53-54 plead the duty alleged to have been owed by Mr Lowe. Paragraph 53 alleges that, by accepting his instructions to act for the Claimants and by assuming responsibility to advise the Claimants and prospective Claimants in the circumstances set out above, Mr Lowe owed a duty at common law to exercise the reasonable care and skill to be expected of a reasonably competent barrister of his seniority and experience in providing advice to the Claimants and prospective Claimants through RWP and directly when advising the Steering Committee on behalf of the Claimants and prospective Claimants in consultation.

36. Paragraph 54 alleges that he owed a continuing duty throughout the period of his retainer, which is not identified but which I understand to mean the period from 7 May 2008 on, to advise on five matters:

- (1) the suitability and risks of the funding arrangement to be used by RWP;
- (2) whether the funding arrangement which was used was likely to lead to expensive failure for the reasons pleaded in Paragraph 43 of the Particulars of Claim in the Main Action;
- (3) whether it was prudent to commence and continue legal proceedings against the Lenders;
- (4) whether any alternative means of funding or pursuing the litigation should be sought or recommended; and
- (5) whether insurance protection against adverse costs should be sought or recommended.

37. Paragraph 55 pleads the alleged breaches of duty by Mr Lowe. It alleges that if, which RWP denies in the Main Action, RWP is found to have acted in breach of contract/breach of duty to the Claimants, Mr Lowe acted in breach of his own duties to the Claimants in three ways:

- (1) He failed to recognise or advise the Claimants through RWP that the funding arrangement which was intended to be used and was put in place by RWP from late September 2008 onwards was very likely to lead to expensive failure for the reasons set out in Paragraph 43 of the Particulars of Claim in the Main Action.
- (2) He failed to give advice through RWP to the Claimants that it was imprudent to commence and continue legal proceedings without having CFA/ATE funding arrangements in place.

- (3) He failed to ensure that any or any sufficient advice was given to the Claimants on their possible exposure to adverse costs orders.
38. In RWP's reply to the part 18 request, they declined to answer a question arising under paragraph 55 as to what advice it is alleged that Mr Lowe should have given, when, in what form and to whom. They said that this information was not necessary.
39. Paras 56-57 say that if, which RWP denies, any loss and damage sustained by the Claimants was caused by any breach of duty by RWP then to the extent that Mr Lowe is found liable to the Claimants in respect of the same damage, he is liable to RWP under the 1978 Act.

Mr Lowe's basis for submitting that the New PAC disclose no reasonable basis for suing him

40. Mr Stewart placed reliance on the fact that Fancourt J had struck out the Original PAC, and on observations made in his judgment. The Original PAC was pleaded on the basis that Mr Lowe owed the same duties to the Claimants as RWP. Fancourt J. held that this was not arguable. He held that it might be arguable that Mr Lowe had assumed a duty to the Claimants to advise on the funding of the 2009 Litigation, but no such claim had been adequately pleaded. At paras 43-44 he said:

“43 I therefore consider it appropriate to strike out the amended particulars of claim as disclosing no properly arguable case for these brief reasons: first, the amended particulars of claim plead a mirror duty on Mr Lowe generally to advise on funding if RWP is liable to advise on funding. That, I am satisfied, and to a large extent is now conceded, is not properly arguable as a matter of law. A barrister does not have the same duties as a litigation solicitor to advise generally on funding of litigation. RWP therefore cannot simply allege that Mr Lowe had a co-extensive duty of care, which is what the amended particulars of claim in substance do.

44 Second, what may, and I emphasise “may”, be a properly pleadable case based on a voluntary assumption of a duty to advise, as identified in the course of argument, is not pleaded adequately, and what component facts or parts of an adequate pleading are present are obscured by the existing allegations...”.

41. At paras 48-49 he said:

“48 The third main question that was raised before me was whether it was arguable that Mr Lowe was in breach of any duty of care by not advising the claimants in different terms. Given that I have held that the particulars of claim should be struck out on the basis that the pleaded case does not fairly disclose the case that RWP now pursues against Mr Lowe and does plead a case that cannot succeed, this issue does not strictly arise. RWP’s case, as it emerged in argument, is that, because Mr Lowe did involve himself in the process of giving advice to claimants or would-be claimants, or both, if the claimants establish, as against RWP, that RWP were in breach of their duty to advise, it necessarily follows that Mr Lowe was also in breach of his duty to the claimants. There is no distinction therefore on RWP’s case between the duty that RWP owed to the claimants to advise them on funding and the duty that Mr Lowe assumed. Whether or not Mr Lowe was negligent and in breach of any such duty will depend, in my judgment, in part on exactly how extensive his duty to advise is, as pleaded against him, partly on his responsibility as the barrister instructed by a firm of litigation solicitors and partly on the facts relating to funding that Mr Lowe either knew or should have known.

49 Whether any allegation of negligence on the basis now sought to be advanced by RWP against Mr Lowe would have a real prospect of success therefore cannot, in my view, fairly be determined under Part 24 in the abstract, without a properly pleaded case of the extent of the duty to advise that Mr Lowe is alleged to have assumed and particulars of the respects in which the advice given in the four particular documents relied on was negligently wrong and/or additional or different advice should have been given on the basis of his responsibilities and state of knowledge or facts that he should have known at the time. If RWP seeks to serve replacement particulars of claim for an indemnity or contribution, it must fully plead such matters and Mr Lowe can then consider whether or not any arguable claim is disclosed.”

42. Mr Stewart said that having regard to those paragraphs in Fancourt J’s judgment, Mr Lowe was entitled to expect that any replacement particulars of the Additional Claim which did allege that Mr Lowe had voluntarily assumed a duty to advise on funding would set out fully:

- (1) what facts are relied on in respect of funding that Mr Lowe is alleged to have known, or which it is alleged he should have known;
- (2) the respects in which the advice given by Mr Lowe in respect of funding is alleged to have been negligently wrong and/or additional or different advice should have been given by Mr Lowe.

43. Mr Stewart submitted that the New PAC does not plead any of those matters adequately, and as a result Mr Lowe does not know the case he is supposed to meet. He argued that the reason that the New PAC does not adequately plead those matters is not because Mr Pooles and Mr Bacon are unable to plead a professional negligence claim. Rather, it is because if they did plead those matters adequately it would then be obvious that there is no basis for a claim by the Claimants against Mr Lowe. He described the New PAC as setting out what he referred to as a “blancmange” of facts, followed by some very general allegations of the duties that the facts gave rise to and alleged breaches of those duties. He said that a pleader would only adopt this approach if they had a bad case. He emphasised that there was no allegation that Mr Lowe knew or should have known about the availability of alternative methods of funding the claim. He said that any advice about funding that Mr Lowe gave was given to RWP not to the Claimants, pointing out that Fancourt J. said in paragraph 28 of his judgment that the advice given by Mr Lowe to Mrs Messer after the Moneybox interview “was clearly advice given to Mrs Messer about how best to promote the scheme”.

44. His submissions were summarised in his skeleton argument at paragraph 23:

“There are two essential bases for the renewed application each of which is sufficient to justify the striking out of this action:

(a) The first and substantive ground is that the Claimants' substantial case against the Defendant is that the wrong funding strategy was adopted which arises out of what are alleged to be breaches of duties to consider funding by the Defendant solicitors qua solicitors. It simply does not follow that because Mr Lowe knew of that strategy and assisted its implementation, he is in breach of duty in failing to advise that an alternative strategy should have been adopted. No particulars or information are provided as to the basis of such a case

(b) The second procedural point is that the Defendant, despite being given every opportunity, has failed to articulate any coherent pleaded basis upon which Mr Lowe is responsible for the strategy. This is plainly linked to the first point but it is notable that the Defendant has eschewed any attempt to identify: (i) Precisely what knowledge it is alleged Mr Lowe as a competent barrister should have had but did not have; (ii) Precisely what facts and matters Mr Lowe either knew or should have known which should have caused him to advise that an alternative funding strategy be adopted; (iii) Precisely what advice it is alleged that Mr Lowe gave which was negligent.

(c) All of these matters should have been pleaded in accordance with what Mr Justice Fancourt said in paragraph 49 of his judgment.”

RWP's submissions

45. Mr Pooles took me through the New PAC and asked me to read the Particulars of Claim, Defence and the other documents attached to the New Additional Particulars of Claim, which I have done. He submitted that the New PAC made clear the case that Mr Lowe has to meet and gave Mr Lowe sufficient information he needed to prepare his defence.
46. He said it was clear from Mr Stewart's skeleton argument that Mr Lowe did understand the case against him. The case in essence is that Mr Lowe knew the funding strategy proposed by RWP, endorsed it, and assisted in its implementation. If, as the Claimants allege but RWP denies, the advice to use that funding strategy was negligent, then Mr Lowe was just as much responsible for that negligent advice as RWP, having promoted that strategy. The facts pleaded show that Mr Lowe became the team leader advising on putting together the claim, including the funding strategy. He was involved in many aspects of the preparation of the claim, going far beyond the traditional role of counsel. If, however, further information was needed to enable Mr Lowe to understand the case, the appropriate application was for further information, not to strike out the pleading.
47. He submitted that the facts here were very unusual – leading counsel advising on the funding of a proposed group action – and it would be wrong to determine whether leading counsel did owe a duty of care in those circumstances on assumed facts, bearing in mind the principle I have summarised in paragraph 23 above.
48. He accepted that a barrister instructed by a solicitor would not ordinarily have any duty to advise in relation to the funding of the claim, unless specifically instructed to give such advice. He said, however, that if a barrister does give such advice, they assume a duty to use reasonable skill and care in giving it and that is what happened here.

Decision

49. Having carefully reviewed the New PAC and the replies to the part 18 request in relation to it, I consider that the pleading can only fairly be read as alleging that, by giving a number of specific pieces of advice about funding, Mr Lowe assumed a

general duty, similar to that owed by a solicitor, to advise in relation to the funding of the claim.

50. There is no pleaded allegation that specific pieces of advice given by Mr Lowe were wrong and negligent in specific respects and that, absent that advice, but with correct advice from Mr Lowe, the Claimants would have acted differently.
51. Rather, the allegation is that Mr Lowe, by giving the advice he did give in relation to funding, effectively assumed responsibility for considering how the action should be funded and advising on that, and in keeping that matter under review as the action progressed.
52. It is alleged that he owed a continuing duty throughout the period of his retainer, from 7 May 2008 on, to advise on funding including the suitability and risks of the funding arrangement to be used by RWP, whether any alternative means of funding or pursuing the litigation should be sought or recommended, and whether insurance protection against adverse costs should be sought or recommended.
53. I do not consider that there is any realistic prospect of the court holding that, on the facts pleaded, Mr Lowe did assume a general duty of that kind to advise on funding.
54. A solicitor is generally obliged to discuss with his client how the litigation is to be funded: *Jackson & Powell on Professional Liability* (8th ed) paragraph 11-182. Paragraph 34 of the Particulars of Claim alleges that it was an incident of RWP's duty of care owed to the Claimants that RWP would (1) give the Claimants the best information possible about the likely overall cost of the matter both at the outset and as the matter progressed; and (2) discuss with the Claimants whether their potential liability for the Lenders' costs might be covered by existing insurance or whether specially purchased insurance might be obtained. That is admitted in the Defence.
55. A barrister instructed to act for a client by a solicitor in relation to actual or contemplated litigation, however, owes no duty to the client to advise on the funding of the claim, unless specifically instructed to advise on that issue, as Mr Pooles rightly accepted.

56. If a barrister chooses to give advice in relation to the funding of the litigation, the barrister will owe a duty to use reasonable care in giving the specific advice given, but that does not mean that the barrister, by giving specific advice, assumes a continuing duty to keep the question of funding under review and to advise on it as and when required as the matter progresses. The facts pleaded in the New PAC, if proved, establish that Mr Lowe did give advice in relation to funding issues on a number of occasions. They do not, in my view, give any support at all to the allegation that he assumed a general duty to advise on funding.
57. I do consider, however, that there is a realistic prospect of the court holding on the pleaded facts that Mr Lowe owed a duty to the Steering Committee, including Mr Andrews, and the members of the two action groups represented by the Steering Committee, and then to individuals who instructed RWP from October 2008, to ensure that the advice he did give in relation to funding was given with the reasonable skill and care to be expected of a competent barrister of his seniority.
58. It may be, as Mr Stewart submitted, that the advice which was given to Mrs Messer prior to October 2008 is properly to be regarded as having been given to RWP alone, and not also to the Steering Committee and the members of the action groups who were represented by the Steering Committee. Fancourt J. clearly thought that was the case in respect of the advice given by Mr Lowe after the Money Box interview. However, I do not feel able to make that determination on a summary basis. Mr Lowe was originally instructed by RWP on behalf of the members of the two action groups, and I think there is a realistic prospect of the court determining that all the advice he gave subsequently is to be regarded as given to the members of those groups. It is clear that the First Claimant, Mr Andrews, was one of those members and other Claimants may also have been members of one of those groups.
59. As to the position of borrowers who were not part of either of the action groups, and who first instructed Mr Lowe through RWP in October 2008 or subsequently, neither counsel cited any authorities on the law which applies for the purpose of determining when, to whom, and to what extent a duty of care will be treated as having been assumed by a professional. The issue is whether a barrister who settles documents concerning anticipated litigation, knowing that they will be shown by his instructing

solicitor to prospective clients who are expected to instruct the barrister through the solicitor in relation to the litigation, owes a duty of care in respect of the contents of the documents to clients who instruct him as a result. Mr Stewart argued that no such duty was owed. I do not think that point is suitable for summary determination. I think it is an issue which should be decided after the facts have been found, applying the principle summarised in paragraph 23 above.

60. However, I do not think that the New PAC plead adequately a case of negligence in respect of any specific advice given by Mr Lowe. In my view, for such a claim to be adequately pleaded, it would need to identify, in respect of each piece of advice that Mr Lowe gave which is said to have been wrong and negligent:

- (1) What advice it is alleged Mr Lowe should have given on that occasion.
- (2) The facts that Mr Lowe knew or should have known at the time which should have led him to give that advice.

I think it probably also needs to be pleaded that if the wrong advice had not been given, but correct advice had been given, the Claimants would have acted differently to the way they did in a way which would have left them in a better position.

61. In my view, it is clear from paragraph 49 of Fancourt J's judgment that he expected any new pleading of the additional claim against Mr Lowe to give particulars of the respects in which specific advice given by Mr Lowe "was negligently wrong and/or additional or different advice should have been given on the basis of his responsibilities and state of knowledge or facts that he should have known at the time". I agree with that, and I also think that probably, in order to plead a valid cause of action, it must be alleged that the failure to give correct advice influenced the decisions of the Claimants in a way which caused them loss and damage.

62. The question then arises whether I should strike out the New PAC immediately, or whether I should first give RWP a yet further opportunity to amend them again in order to try and plead a valid cause of action against Mr Lowe.

63. At the end of the hearing, I raised with counsel the question of what I should do if I considered the existing version of the New PAC did not adequately plead the claim against Mr Lowe. Mr Pooles submitted that I should in that case give RWP a further opportunity to plead the claim, while Mr Stewart argued that I should not. However, the point was only addressed briefly, and I will not make a final decision on it without allowing counsel to make further submissions on the handing down of this judgment. I would not in any event be willing to make a decision on the point without first seeing a draft of the amended version of the New PAC.
64. In the draft of this judgment circulated on 4 March 2019, I said that the way I proposed to deal with the position, subject to any representations to the contrary made after this judgment was distributed in draft, was as follows:
- “(1) I will provide this judgment in draft to counsel in the usual way and then allow 6 weeks before I hand it down.
- (2) In that time, RWP can decide if it does want to seek permission to amend the New PAC to plead allegations that specific advice given by Mr Lowe was negligent. If it does wish to do that, then a draft of the amended version of the New PAC must be served and sent to me within 4 weeks from the draft judgment being provided.
- (3) Unless the parties can agree an order, I will then hear submissions at the handing down of the judgment on what order I should make, including whether RWP should be permitted to amend the New PAC and continue with the additional claim, or whether the additional claim should be struck out. Skeleton arguments and drafts of the proposed order should be exchanged and filed with me 2 clear days before the date fixed for the hearing.”
65. Both parties subsequently stated that they were content with that course of action. On 1 April 2019, RWP’s solicitors wrote to me saying that RWP had chosen not to seek permission to amend. The parties were subsequently able to agree an order in the light of this judgment and I will make an order reflecting that agreement, striking out the additional claim.