



Neutral Citation Number: [2019] EWHC 314 (Ch)

Case No: BL-2018-000525

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

Rolls Building, 7 Fetter Lane,
London, EC4A 1NL

Date: 20/02/2019

Before :

MASTER SHUMAN

Between :

(1) CAPITA PENSION TRUSTEES LIMITED	<u>Claimants</u>
(2) DAVID STOCKS	
(as trustees of the Sea Containers 1990 Pension Scheme)	
- and -	
(1) SEDGWICK FINANCIAL SERVICES LIMITED	<u>Defendants/ Respondents</u>
(2) SEDGWICK NOBLE LOWNDES LIMITED	
(3) MERCER LIMITED	
- and -	
DENTON HALL (A FIRM)	<u>Third Party/ Applicant</u>

Fenner Moeran QC (instructed by **Burges Salmon LLP**) for the **Claimant**
Andrew Mold (instructed by **Stephenson Harwood LLP**) for the **Defendants/Respondents**
Farhaz Khan (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Third Party/Applicant**

Hearing dates: 19 September 2018, 9 November 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

.....
MASTER SHUMAN

MASTER SHUMAN :

1. This is an application by the third party to strike out paragraphs 28 to 31 of the defendants' additional claim which relate to an alleged retainer between the defendant and the third party ("the third party's retainer") and would have the effect of disposing of the additional claim in its entirety or for summary judgment on paragraphs 28 to 31 of the additional claim with the same effect.
2. The proceedings involve allegations of professional negligence arising out of negligent advice alleged to have been given by the defendants in respect of the administration of the Sea Containers 1990 pension scheme ("the 1990 scheme"). The 1990 scheme purportedly equalised benefits for members who became employees on or after 1 January 1991 by deed and rules dated 26 April 1995 ("the 1995 deed and rules") but left members who had become employees before 1 January 1991 unequalised. There was an attempt to equalise pre-1991 members benefits with effect from 1 February 1996 on the terms set out in an announcement ("the 1995 announcement"). This attempt¹ at equalisation and amendment failed; Capita ATL Pension Trustees Ltd v Gellately [2011] EWHC 485 (Ch). It took until 29 October 2003, when a new consolidated deed and rules were executed ("the 2003 deed"), for the 1995 amendments to be effected.
3. The largest element of the claim concerns a purported attempt in 1995/1996 at equalising benefits for male and female members, together with certain other incidental amendments. There are smaller heads of claim relating to the administration of benefits for the British Rail Members, rates of revaluation of contracted-out benefits (the GMP fixed rate revaluation claim) and various administrative errors claims. For present purposes I can ignore these smaller heads of claim.
4. The claimants are the current trustees of the 1990 scheme. The defendants provided administrative, consultancy and actuarial services in relation to the 1990 scheme. The claimants allege that the defendants provided legal services, which is denied. The third party is a firm of solicitors who provided legal services to the trustees and employers of the 1990 scheme at various times. The defendants have made a Part 20 claim against the third party seeking an indemnity or a contribution.
5. The third party's application is made by application notice dated 5 April 2018. In respect of strike out the third party relies on CPR rule 3.4(2)(a) that the third party retainer pleading discloses no reasonable grounds for bringing the claim and/or (c) that the third party retainer pleading is in breach of CPR rule 16 and PD16.
6. The third party's application is supported by 2 witness statements of Edward Foss, solicitor, dated 5 April 2018 and 5 September 2018. The defendants oppose the application and rely on 2 witness statements from Helena Berman, solicitor, dated 9 August 2018 and 11 September 2018. In addition they rely on a witness statement of Lynn Collins dated 9 August 2018, a former employee of the 1st and 2nd defendants, setting out the third party's role in relation to the 1990 scheme.

¹ There was an earlier attempt which also failed but that is not part of the claim.

7. I have 4 lever arch bundles before me and a smaller bundle dealing with issues arising after the hearing on 19 September 2018. I have had the benefit of extensive skeleton arguments by Mr Khan and Mr Mold, supplemented by oral submissions.

THE LAW

Strike Out

8. Pursuant to CPR 3.4(2),

“3.4(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

...

(c) that there has been a failure to comply with a rule, practice direction or court order.”

9. The notes to the White Book 2018, at 3.4.2 reiterate that a claim should not be struck out unless the court is certain that it is bound to fail. Paragraph 1.4 of Practice Direction 3A gives examples of cases where the court may conclude that particulars of claim disclose no reasonable grounds for bringing the claim: claims which set out no facts indicating what the claim is about; claims which are incoherent and make no sense; and claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant.
10. Mr Mold submits that these examples confirm that the jurisdiction under r.3.4(2)(a) is only to be exercised in an extreme case. He says that approach accords with the emphasis in the authorities that the Court should only strike out a claim ‘in plain and obvious cases where the court can be certain that the claim is bound to fail’; Oysterware Ltd v Intenor Ltd [2018] EWHC 611 (Ch) at paragraph 40. I do not accept the gloss placed upon CPR 3.4(2)(a) by Mr Mold, that it may only be used in “an extreme case”. I go back to the rules and specifically the test for strike out set out in set out in CPR 3.4(2)(a) “that the statement of case discloses no reasonable ground for bringing the claim”: that is the test to be applied.
11. Mr Mold also submitted that a strike out application should not normally require examination of the evidence but instead it should be clear, on the face of the statement of case, that it discloses no reasonable grounds for bringing the claim.
12. Under CPR PD 16 para 7,
- “7.3 Where a claim is based upon a written agreement:
- (1) a copy of the contract or documents constituting the agreement should be attached to or served with the particulars of claim and the original(s) should be available at the hearing, and

(2) any general conditions of sale incorporated in the contract should also be attached (but where the contract is or the documents constituting the agreement are bulky this practice direction is complied with by attaching or serving only the relevant parts of the contract or documents).

7.4 Where a claim is based upon an oral agreement, the particulars of claim should set out the contractual words used and state by whom, to whom, when and where they were spoken.

7.5 Where a claim is based upon an agreement by conduct, the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done.”

13. Where a statement of case is found to be defective the court should consider whether the defect may be cured by amendment and allow a party an opportunity to amend: Kim v Park [2011] EWHC 1781 (QB) Tugendhat J at paragraphs 40 to 41.
14. Mr Mold and Mr Khan referred me to McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775. Lord Woolf MR at 792 to 793 set out the purpose of a statement of case, albeit this was in the context of a libel claim and the defendants applying to reamend particulars of justification to plead conspiracy.
15. Although I was not referred to Towler v Wills [2010] EWHC 1209 Teare J’s analysis of the purpose of pleadings is uncontroversial and helpful.

“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; ...”

19. It is not fair and just that the Defendant cannot be sure of the case he has to meet. It may well be that, with appropriate legal advice, the Claimant could have pleaded a concise, clear and particularised case against the Defendant but that has not been done. If the Amended Particulars of Claim are not struck out there is a very real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations

which are not pursued, that he will be impeded in his defence of allegations which are pursued and that the Court will not be sure of the case which it must decide.”

Summary Judgment

16. Pursuant to CPR 24.2 a court may give summary judgment on the whole of a claim or on a particular issue if:

“(a) it considers that—

(i) the claimant has no real prospect of succeeding on the claim or issue; ... and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

17. In the notes to Volume 1 of the White Book 2018 at 24.2.3 it is commented that,

“In order to defeat the application for summary judgment it is sufficient for the respondent to show some “prospect”, i.e. some chance of success. That prospect must be “real”, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word “real” means that the respondent has to have a case which is better than merely arguable”. ... The respondent is not required to show that their case will probably succeed at trial. A case may be held to have a “real prospect” of success even if it is improbable. However, in such a case the court is likely to make a conditional order...”

18. The hearing of a summary judgment application is not a summary trial. The court will therefore only consider the merits of the respondent’s case to the extent that it is necessary to determine whether it has sufficient merit to proceed to trial. As Lord Hope of Craighead said in Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 at paragraphs 94 -95,

“94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is — what is to be the scope of that inquiry?”

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear

as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman* , at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

19. Both parties referred me to Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch). The claimant as vendor brought claims for breach of contract and breach of fiduciary duty in relation to a series of contracts for the sale of subscriber contracts to a mobile telephone service for commercial multi-user GSM gateways and an agency agreement whereby the vendor would act as the purchaser’s agent. Lewison J, as he then was, granted reverse summary judgment on part of the claim, allowing the account and inquiry to go to trial.
20. At paragraph 15 he summarised the principles to be applied on a summary judgment application brought by a defendant,

“15. ... The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 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] FSR 63 ;

vii) On the other hand it is not uncommon for an application under Part 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.”

21. The evidential burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. If credible evidence is adduced in support of the application then the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof is not high. As the notes to the White Book 2018 24.2.5 emphasise,

“the Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by

the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it”.

22. The other limb of the summary judgment test must also not be overlooked, that there is “no other compelling reason [for] a trial”.

THE FACTUAL MATRIX

23. The 1990 scheme is a final salary/defined benefit, formerly contracted out, occupational pension scheme. It was set up in 1990 to take over the provision of pension benefits to certain employees of the Sea Containers group when their existing pension scheme, the Sealink (UK) Limited Pension Scheme, moved away from the Sea Containers group on a company sale. The members included some former members of the British Rail Superannuation Fund pension scheme.
24. There was another earlier pension scheme, the Sea Containers 1983 pension scheme (“the 1983 scheme”), which was also subject to a two stage equalisation exercise within a similar time frame.
25. The defendants have referred in the papers before me to “the company” as Sea Containers Services Limited, sponsoring employer of the 1983 scheme and the 1990 scheme, and to the “trustees” as either the trustees of the 1983 scheme or the 1990 scheme.
26. The relevant people referred to in the documents before me include:
- i) On behalf of the company and trustees at material times: Alison Clarke in the personnel department and her assistant Carol White; Danny O’Sullivan and Mike Stracey who gave instructions on behalf of the company and the trustees;
 - ii) On behalf of the defendant, Lynn Collins, formerly benefits consultant who advised on the 1983 scheme and the 1990 scheme;
 - iii) On behalf of the third party: John Sabel, pensions solicitor and partner, and Jane Wolstenholme, pensions solicitor, who worked with him; then when they left the third party, Ewan Horn who became head of pensions at the third party.
27. It is the claimants’ pleaded case that the third party² and Hammonds³ were appointed as solicitors to the trustees and company from time to time, albeit not under a general retainer as alleged by the defendants in their additional claim. The 1990 scheme reports and financial statements from 1992, including specifically the periods from January 1994 to March 1995 and March 1995 to March 1996 record that the third party are the solicitors to the 1990 scheme. By letter dated 11 April 1997 the trustees of the 1990 scheme appointed the third party as legal advisers to the 1990 scheme. Presumably this was following the Pensions Act 1995 and the coming into force of SI 1996/1715 on 6 April 1997, which required such appointments to be made in writing.

² Between 1990 and 1999.

³ Since 27 September 2000.

28. The 1990 scheme was established by an interim deed dated 21 August 1990 (“the 1990 Interim Deed”), a document drafted by the third party.
29. A helpful summary of subsequent events is set out by Henderson J, as he then was, in Capita ATL v Gellately,

“6. ... The original documentation of the Scheme, although it was entered into a few months after the European Court of Justice had given its ground-breaking decision in the Barber case (Barber v Guardian Royal Exchange Assurance Co [1991] QB 344), nevertheless provided different minimum pension ages (“MPA”) and normal retirement dates (“NRD”) for men and women. An attempt was then made to equalise benefits for new joiners in 1991, but this was not done by deed as the relevant enabling provision required. However, the Scheme was then administered on the footing that the changes had been validly introduced, and in April 1995 a Definitive Deed and Rules were executed. In December 1995 a further attempt was made to equalise benefits, and to make various other changes to the benefit structure, for all members. Again, however, this was not done by deed, but by an announcement sent to members, and the position was only formalised by way of a deed in 2003. Meanwhile, the Trustees had administered the Scheme on the footing that the December 1995 changes, like their predecessors in 1991, were valid and effective.”
30. There were two stages to the equalisation process in respect of the 1990 scheme.
 - i) In 1991 there was an attempt to equalise benefits of post-1991 members by means of equalising their minimum pension age at 62 and their NRD at 65. This was subsequently held by the court to be ineffective, although at the time it was considered to be effective. The third party drafted the 1995 deed and rules, dated 26 April 1995, on the basis that equalisation for post-1991 members had taken place in 1991.
 - ii) In respect of pre-1991 members, the second equalisation exercise was carried out in 1994 to 1995 under which pension ages for all male and female members were intended to be equalised with effect from 1 February 1996. The equalisation changes were contained in the announcement sent to members on 21 December 1995, the 1995 announcement. This exercise was also subsequently held to have been ineffective as the 1995 announcement alone did not satisfy the requirements of the 1990 scheme’s amendment power.
31. It is this second part of the equalisation exercise that is relevant to the issues before me.
32. Shortly after the 1995 announcement it is alleged by the claimants that the 1st defendant, followed by the 2nd and thereafter the 3rd defendants were instructed to review the 1995 deed and rules and draft a replacement. This process took until 29 October 2003 when a new consolidated deed and rules were executed (“the 2003 deed”) which successfully effected the 1995 amendments.

33. From 1 February 1996 onwards the defendants successively administered the 1990 scheme on the basis that the 1990 scheme had been amended in accordance with the terms of the 1995 announcement.

THE PROCEEDINGS

34. The claim was issued on 9 September 2015 but only served on the defendants on 27 July 2017. There was a prolonged pre-issue and pre-service period. I am told that matters were complicated by the Sea Containers group's insolvency and chapter 11 proceedings in the United States of America, proceedings being brought in respect of the 1990 scheme and the 1983 scheme and a difficulty with assessing quantum. The defendants served their defence on 26 September 2017 and an additional claim against the third party on 5 October 2017. The third party served its defence on 4 December 2017.

35. In summary the claimants allege that:

- i) the 1st defendant advised the trustees of the 1990 scheme on the 1995 amendment exercise and negligently failed to advise that a deed or board resolution should be used.
- ii) The defendants in administering the 1990 scheme, reviewing the 1995 deed and in drafting the 2003 deed negligently failed to identify that the 1995 announcement was an ineffective amendment and advise the trustees of this fact.
- iii) The defendants negligently failed to advise the trustees that time was of the essence in executing the replacement deed and rules.

36. The defendants allege that:

- i) they did not provide legal services to the trustees and that the third party was responsible for advising on the legal formalities required for amending the 1990 scheme in relation to the 1995 announcement.
- ii) They were entitled to assume the 1995 amendments were effective.
- iii) They were only instructed to update the 1995 deed in 1999.

37. Additionally the defendants are putting forward various other defences and a claim of contributory negligence.

38. The agreed case summary summarises the defendants' contribution claim against the third party as "alleging that the third party should have advised the trustees of the requirements for an effective amendment to the 1990 scheme. The third party denies the claim, including on the basis that it was not retained or instructed, or otherwise owes a duty, to advise on the formalities of equalisation."

THE APPLICATION

39. Mr Khan criticises the way in which the defendants' additional claim has evolved in the statements of case and a further document entitled "further particulars", although I

am unclear about the status of the latter. It is necessary to set out the pleading in relation to the third party's retainer at some length.

40. Paragraphs 28 to 31 of the defendants' additional claim provide,

“28. Denton Hall was appointed and/or agreed to act for the Trustees and/or Principal Employer (Sea Containers Services Limited) (“the Company”) and/or the Sea Containers group (including Sea Containers Limited) (“the Sea Containers group”) from an unknown date prior to the Scheme's creation (including in respect of the Sealink Scheme) until 1999, for reward, as solicitors responsible for legal advice in connection with the Scheme, including in relation to formal documentation for the Scheme.

29. The scope of services provided by Denton Hall included inter alia:

a. The drafting of the formal and informal Scheme documentation (including the Interim Deed and the 1995 Deed and Rules); and

b. The provision of legal advice in connection with the Scheme, including but not limited to legal advice in connection with:

i. The drafting of formal and informal Scheme documentation;

ii. The effect of any formal or informal Scheme documentation;

iii. ensuring that amendments to the Scheme complied with the Scheme's governing documentation (in particular clause 26 of the Interim Deed and clause 21 of the 1995 Deed); and

iv. equalisation of members' benefits under the Scheme.

30. It was an implied term of Denton Hall's retainer that Denton Hall, including its servants and agents, would exercise the degree of skill and care to be expected of reasonably competent specialist pensions solicitors in providing legal advice in connection with the Scheme, including any formalities for amendment to the Scheme in compliance with clause 26 of the Interim Deed and/or clause 21 of the 1995 Deed.

31. Further or alternatively Denton Hall owed duties of care in tort to the Trustees in the same terms as the contractual duties set out above.”

41. Specifically in relation to the 1995 Announcement the defendants plead,

“36. The defendants averred that Denton Hall advised on equalisation (including in respect of the benefit changes set out

in the 1995 Announcement) and were responsible for legal advice in connection with the Scheme, including in relation to amendments to the Scheme in compliance with the Scheme's governing documentation (including clause 26 of the Interim Deed and/or clause 21 of the 1995 Deed".

42. At paragraph 37 the defendants set out the facts that they rely on to assert that the third party provided advice:
- a) At a meeting on 10 February 1994 between Alison Clark, the third party (John Sabel and Jane Wolstenholme) and the second defendant (Lynn Collins⁴) the third party advised on the 1990 scheme, although the meeting had been arranged to obtain advice in respect of the 1983 scheme. The third party advised it would be advisable to seek member consent before making changes to the 1990 scheme, that was the method adopted in the 1995 announcement.
 - b) The third party by letter dated 28 February 1994 advised Danny O'Sullivan on the need to obtain member consent in connection with proposed benefit equalisation. Arguably this was in connection with the 1983 scheme but the defendants assert that it was legal advice in respect of both the 1983 scheme and the 1990 scheme.
 - c) A meeting on 15 March 1995 at the third party's offices: the memorandum dated 24 February 1995 Alison Clark to Danny O'Sullivan noted a tentative timetable for equalisation and "to continue with our plan to meet with Denton Hall to ensure complying with law sooner rather than later"; 10 March 1995 the 2nd draft of the 1995 announcement was faxed to the third party ahead of this meeting; and by letter dated 17 March 1995 Lynn Collins wrote to Ewan Horn (the third party) effectively saying she was awaiting his comments on the draft announcement.
 - d) In drafting and providing legal advice on the 1995 deed and rules, which were executed on 26 April 1995, they purported to document changes made in 1991 but they were not effective to retrospectively change post-1991 benefits. I do not follow how this is said to evidence advice given by Denton Hall and therefore by inference the scope of the retainer. Furthermore the claim is in respect of the second stage of equalisation, those members who joined prior to 1991.
 - e) A fax dated 29 November 1995 from Ewan Horn to Lynn Collins, copied to Alison Clarke, confirming that the third party had considered and provided advice on the draft announcement.
 - f) A fax dated 19 December 1995 in which Ewan Horn advised Lynn Collins on the requirement for member consent to contribution changes and suggested further changes to the draft announcement. However

⁴ Pleaded as Lynn Collins attending the meeting.

clause 21 of the 1995 deed required amendments to be made by deed or board resolution.

43. The third party took issue with this pleading in its defence, specifically set out in paragraphs 8 to 10. In summary the third party's defence is that: (1) there was no general retainer between the third party and the claimants in relation to the 1990 scheme and no responsibility to provide legal advice to the 1990 scheme including in relation to formal documentation; (2) such advice as the third party gave in respect of the 1990 scheme related strictly to employment law matters; and (3) the documents relied upon by the defendants as tending to show that the third party gave advice on the formalities of equalisation for the 1990 scheme show that the third party gave employment law advice: paragraph 11. In broad terms this mirrors the claimant's reply to the defendants' defence, paragraphs 8 and 14. The third party's defence simply denies paragraph 36. At some length the third party analyses the evidence relied upon by the defendants and asserts that it does not contain direct evidence of the third party providing advice nor can it be construed to give rise to such an inference: paragraph 32(1) to (7) of the defence.
44. The defendants' reply to the third party's defence at paragraph 10.1 to 10.3 pleads,
- “10.1 The Defendants do not aver that any retainer existed between Denton Hall and the Scheme (which is the allegation denied in paragraph 11(1)). Denton Hall's retainer or retainers was (according to the claimants and as averred by the defendants) with the Trustees and the Company.
- 10.2 For the avoidance of any doubt, the defendants have not and do not assert that this claim is based on the breach of any overriding “general retainer” between the third party and the Scheme or the third party and the Trustees/Company.
- 10.3 The defendants' case is that, at or around the same time as drafting the 1995 Deed and Rules (which constituted advice in relation to formal documentation the effect of that documentation (including amendment to the Scheme)), the third party was instructed to advise on the 1995 Announcement on (amongst other things) equalisation (including amendments to the Scheme) (the occasion set out in paragraph 37 of the particulars of additional claim). It is the defendants' case that, when providing that advice, the third party was in breach of contract and negligent in failing to advise on the documentary formalities required to satisfy clause 26 of the interim deed (which Denton Hall had originally drafted) and/or clause 21 of the 1995 deed (which Denton Hall had drafted or was in the process of drafting) (as set out in paragraph 38 of the particulars of additional claim).”
45. In a document entitled “further particulars” dated 9 August 2018, settled by counsel and with a statement of truth attached, the defendants seek to expand upon paragraphs 28 to 31 of the additional claim. In respect of the contractual claim the defendants seek to rely on 3 events.

- (1) A fax dated 10 March 1995 sent prior to a meeting that took place at the third party's offices on 15 March 1995 to be read it is said against the backdrop of the third party's prior involvement in advising in respect of equalisation in February 1994. This is already relied on in paragraph 37 of the additional claim.
- (2) A fax dated 28 November 1995 with an updated draft announcement requesting Ewan Horn's "comments/input" and his reply on 29 November 1995. This is also relied on in paragraph 37 of the additional claim.
- (3) A fax sent by Lynn Collins to Ewan Horn on 11 December 1995 asking if a change in the definition of 1990 scheme pay will increase members' pension contributions and whether they needed to sign a form to agree to this. On 19 December 1995 Ewan Horn responded giving advice. The latter is also set out in paragraph 37 of the additional claim.
46. At paragraph 6 the defendants seek to set out the obligations that the third party were under as a result of the 3 facts I have referred to at paragraph 45 and as a result of the matters pleaded in paragraph 37 of the additional claim.
47. Mr Khan categorises these documents as three iterations of the contract claim. He submits that the first iteration, the additional claim, "is a series of vague assertions without any factual basis to support them.... It fails to provide even the bare minimum pleading of a contract" and is incoherent. He submits it should be struck out.
48. He is also critical of the defendants' attempt to 'rescue' the pleading in its second iteration, the reply. He suggests that it is inconsistent with the additional claim.
49. I agree with Mr Khan that the claim should be set out in the primary pleading. The reply is not the correct place for a party bringing a claim to set out its case. That point applies with equal force to the "further particulars" document.
50. Mr Khan also submits that the duty in tort is parasitic on the contractual claim and therefore cannot survive if the contract claim cannot survive. The tortious duty is pleaded on the basis that the third party "owed duties of care in tort to the Trustees in the same terms as the contractual duties set out above". This is a concurrent liability. The duty arises from the nature of the relationship between the trustees and the third party and the service that the third party was performing. It is pleaded in such a way that the scope of the duty of care is no greater than the implied terms under the contract.
51. Whilst Mr Khan is right to be critical of the pleadings, on an application for strike out I must be satisfied that the statement of case discloses no reasonable grounds for bringing the claim. The third party has isolated paragraphs 28 to 31 of the additional claim as being susceptible to a strike out. The additional claim cannot be diced in such way and those paragraphs cannot be read without regard to the factual matrix set out in the additional claim and the facts relied upon by the defendants to support its case that the third party provided advice. Mr Khan tells me this it is unusual that both parties to the contract deny the contract. That feature without more cannot be determinative of the issue.

52. Mr Khan submits that the court “should not tolerate a pleading which alleges a contract said to have been agreed on an “unknown date”. However this is not a simple case where the third party was asked to advise on an isolated matter on a specific date or within a specific time period. The defendants, on their case, did not retain the third party, the claimants did. It is accepted by all parties that the third party was retained both in respect of the 1983 scheme and the 1990 scheme. The third party drafted the 1990 deed, the 1995 deed and rules and was involved in the 1995 announcement. The defendants’ pleading is that on a date prior to the creation of the 1990 scheme until 1999 they were solicitors responsible for legal advice in respect of the 1990 scheme. One of the issues between the parties is the nature of the third party’s retainer. The defendants appear to allege that the third party acted under a general retainer, as is alluded to in the additional claim by describing the third party as “solicitors responsible for legal advice in connection with the scheme”; a position rejected by the claimants and the third party. The defendants themselves appear to have rowed back from that in their reply, although of course their case should be set out in the additional claim not the reply or “further particulars” document.
53. When one further analyses the scope of the retainer set out in paragraphs 28 to 31 of the additional claim, within the context of the additional claim, what is being pleaded is that the third party was instructed to draft documents in order to achieve equalisation of members’ benefits under the 1990 scheme and to provide advice in respect of the effect of the scheme documentation.
54. Contractual duties may be written, oral or inferred from conduct. Where the parties act as if the relationship of solicitor and client existed, even though there is no express written agreement to that effect, an implied retainer may be inferred from their conduct. That might arise where a solicitor is retained to act in a past transaction but reviews documents in respect of a subsequent transaction. All the circumstances, for example, meetings, attendance notes, correspondence, have to be examined to see if a retainer can be inferred.
55. Mr Khan accepted that the contractual claim was partly pleaded through conduct, in particular paragraphs 36 and 37 of the additional claim, but on analysis that conduct did not give rise to a contractual claim. A failure to carry out a necessary step may be a breach of the general duty to exercise skill and care rather than a breach of a specific duty that is implied in the retainer. So a solicitor may need to give advice if it is reasonably incidental to the work that he or she is carrying out. The third party’s response is to say that the facts relied upon by the defendant are equally explicable as incidental to the retainer to advise in respect of employment law. That would militate against this issue being determined on a summary basis, it is a triable issue.
56. I am satisfied that the defendants have pleaded a contractual claim between the claimants and the third party which enables them to bring this additional claim for a contribution or indemnity. In addition they have pleaded a concurrent tortious claim. Such a claim is a separate cause of action and as a general proposition I consider that it is wrong to categorise a concurrent claim as parasitic, that would be to suggest that it has no independent life and is reliant on the contractual claim for sustenance. It may be that it will stand or fall with the contractual claim but that will be dependent on the factual matrix.

57. I do not accept Mr Khan's analysis that the defendants have pleaded 3 iterations of a contract which are inconsistent with each other. In respect of the document entitled 'further particulars' each of the events relied on have been pleaded in paragraph 37 of the additional claim, albeit I accept not in paragraphs 28 to 31. I do however agree with Mr Khan that the defendants need to set out their case on the third party's retainer, both in contract and in tort, in the additional claim. Insofar as the defendants appear to be alleging a general retainer in their primary pleading but redefining this in their reply at paragraphs 10.1 to 10.3 to a more specific retainer that needs to be amended and the claim set out in a more coherent and orthodox manner in the additional claim.
58. In respect of the application for strike out under CPR 3.4(2)(a) I am tasked with determining whether the additional claim discloses no reasonable grounds for bringing the claim. I consider that it does disclose reasonable grounds and that it is not bound to fail.
59. Whilst the test for summary judgment is different and requires me to examine the case more widely the analysis above remains relevant.
60. The nub of the third party's case is that when one analyses the evidence advanced by the defendants it is an important feature of that evidence that one must look at events in 1994 to see the context in which the defendants allege that there was an instruction (or arguably an ancillary duty arose) in 1995 to 'equalise members' benefits.
61. Mr Khan submits that there are a limited number of contemporaneous documents which are relied upon by the defendants as evidence of the contract. He enjoins me to 'grasp the nettle' as I am "as well placed as a trial Judge would be in determining if Sedgwick has any real prospect of proving an agreement between the Trustee and the Company, and [the third party]." He invites me to infer that the defendants have or ought to have by now carried out a search for documents which evidence the alleged contract and that their best case on the documents is set out in the present pleadings. He also submits that in virtually all cases of communication received by the third party in respect of the 1990 scheme it emanated from the defendants and that if anyone was to have disclosable documents it is the defendants. He suggests that the defendants are waiting to see if a retainer document emerges from disclosure and that is not a good reason for allowing the additional claim to continue. I accept as a general proposition it is not acceptable to allow a party to wait and hope that something may emerge in the disclosure process when they have had sufficient time to carry out extensive searches. However the additional claim is not pleaded on the basis that a mythical retainer letter will emerge but rather it is pleaded on the basis of this case's discrete factual matrix, the role of the third party in both the 1983 scheme and the 1990 scheme and the defendants' analysis of certain documentary evidence. I will deal further with the issue of disclosure later in this judgment as following the hearing of this application Mr Khan sought to introduce further correspondence to underpin his submissions that no further documents will be found.
62. The third party submits that the witnesses of fact will not add much to the interpretation of the contemporaneous documents. In so far as the defendants suggest that the oral evidence is likely to be important in establishing the scope of the duty owed by the third party Mr Khan submits that this is a baseless assertion. However he primarily relies on the fact that Lynn Collins has said that she has "no recollection

whatsoever” of any of the events or documents relied upon by the defendants in giving rise to the contract. Indeed it is over 20 years since the events in question took place. That is to misdescribe the sum of her evidence. In her statement Lynn Collins records that she was a benefits consultant at the defendants and in that capacity she advised on the 1983 scheme and the 1990 scheme. She had already had some 7 years’ experience in the pensions industry before she joined the defendants as a consultant. At paragraph 3 of her statement she states,

“Perhaps unsurprisingly, given the passage of time, I have little recollection of some of the documents in LC1 or some of the specific meetings and events to which the documents relate. However, I have used those documents to assist in refreshing my memory and I have endeavoured to make clear in my statement when I recall specific matters and when I am providing my view based on what a particular document means with the benefit of my knowledge of the relevant events.”

63. At paragraph 12 she says,

“Denton Hall were the Schemes’ lawyers who advised on the various ‘legal issues’ that arose in relation to the Schemes during this period, one of the most significant of which was equalisation. Denton Hall also drafted much of the documentation for the Schemes (including, in respect of the 1990 scheme, the original deed establishing it) and provided comments on (or revised) some of the documentation initially drafted by Sedgwicks. The trustees looked to Denton Hall to provide advice on such legal issues and Sedgwicks deferred to Denton Hall on such matters.”

64. Lynn Collins goes on to specifically deal with the third party’s role in respect of the 2nd stage of equalisation of the 1990 scheme. At paragraphs 38 to 40 her evidence is,

“38. ... it is my understanding and recollection that Denton Hall, as the Schemes’ lawyers, were instructed to advise on the legal requirements for implementation of the second stage of the equalisation process in relation to the 1990 Scheme. Having considered the documentation annexed at LC1, and provided to me by the defendant solicitors, it is my belief that the purpose of the meeting with Denton Hall in March 1995 was to obtain such advice.

39. I now understand that, before the second stage of the equalisation process (and the other benefit changes intended at that time) could take effect, an amendment needed to be made to the rules governing the 1990 scheme and that issuing an announcement alone would not be effective. This is the very type of issue on which I would have expected Denton Hall to advise at the meeting on 15 March 1995 (given what I had stated in my fax of 10 March 1995 was the purpose of that meeting).

40. As is clear from the events set out above and confirmed by my subsequent letter to Ewan Horn dated 14 February 1996... Alison Clark and I looked to Ewan Horn to advise on the terms of the 1990 scheme rules (and more generally in respect of pension law issues that arose in relation to the 1990 scheme) and deferred to him on matters of pensions law. I therefore believe that, if Ewan Horn had advised, at the March 1995 meeting or on some other occasion, that an amendment needed to be made to the rules governing the 1990 scheme before the second stage of the equalisation process could take effect (and the announcement itself did not effect such an amendment), Miss Clarke and I would have acted on that advice and Miss Clarke would have sought to instruct either Denton Hall or the documentation team at Sedgwicks to draft the necessary documentation.”
65. Helpful as the parties’ solicitors witness statements are, ultimately they are the authors’ analysis of the documents before them and based on their client’s instructions. Lynn Collins is a witness of fact, no matter how poor her recollection is of precise events and documentation. The overall thrust of her evidence is that her understanding was that the third party was instructed to advise on the equalisation process of the 1990 scheme, which by implication included both post-1991 members and pre-1991 members.
66. Mr Khan also refers me to and relies heavily on the contents of a letter from the claimants’ solicitors dated 2 August 2018 to the defendants’ solicitors. That letter responded to a request for information from the defendants’ solicitors dated 12 January 2018. Responses were specifically limited to the period between 1994 and 1995. The claimants’ position is that during this period the third party was instructed on a piecemeal basis by the trustees or by the defendants or by the trustees via the defendants to provide specific advice where requested. They identify 3 occasions when the third-party received instructions: on or around 15 March 1995; on 28 November 1995; and 11 December 1995. They assert that the meeting of 10 February 1994 and the subsequent letter dated 28 February 1994 were concerned with employment issues in respect of the 1983 scheme not more general legal advice in respect of both schemes.
67. Rather than making matters clearer what this letter illustrates is that there is a fundamental issue between the parties in this claim, an issue that requires a determination following the parties giving oral evidence, and specifically that evidence being tested under cross-examination. Whilst I entirely agree in an appropriate case the court should ‘grasp the nettle’, evaluate the evidence and order summary judgment where the claim is not realistic, where it does not carry some degree of conviction, I do not accept that this is the case here. Indeed in order to carry out the elaborate analysis that Mr Khan urges me to undertake I am conducting a mini-trial. I am being asked to reject summarily the evidence of Lynn Collins, without having heard her give evidence and without her being tested in cross-examination. Similarly where they are available I assume the other protagonists at the material time, Alison Clark, John Sabel, Jane Wolstenholme and Ewan Horn would give evidence at trial, I have not heard from them in evidence.

68. For completeness I will go on to look at the contemporaneous evidence and the arguments put forward by the parties.
69. In relation to the 1994 background, Mr Khan submits that the fact that there is no direct evidence that the third party was specifically advised to and did provide advice in respect of the equalisation exercise in respect of the 1990 scheme is fatal. He goes on to analyse various documents. For example, a fax from the defendants to John Sabel dated 8 February 1994 which asks for advice on “contractual considerations” including the “contractual position for 1990 scheme members”. It is said that this is the employment contract consequences of equalisation. A meeting followed on 10 February 1994 and advice was given by the third party following that meeting in a letter dated 28 February 1994. That letter is not limited to employment issues as Mr Khan submits. The first part of that letter under the heading ‘Amendment to Pension Scheme’ states that the power of amendment of the scheme does not permit amendments which reduce the benefit accrued to or in respect of any member at the date of the amendment without the consent of the member, although it is accepted that it may have some impact on accrued benefits. It goes on to advise, “To comply strictly with the Deed, consent should be obtained or the risk is that the validity of the amendments could be attacked in the future. They could be held invalid and of no effect leaving the Scheme with a greater equalisation problem in the future”. This was in respect of the 1983 scheme. Lynn Collins in a fax dated 3 March 1994 to Danny O’Sullivan analyses that advice with a caveat that “we are not registered to give legal advice and therefore what follows is commentary only”. Mr Mold submits that the third party mistakenly relies on the 1983 scheme documentation to undermine the case. All this line of argument in respect of the 1994 background documents reinforces my view that I am being asked to conduct a detailed analysis of the documents, being invited to summarily dismiss the evidence of Lynn Collins and effectively conduct a mini-trial. Whilst I have considered each of the documents that Mr Khan relied on and the counter-arguments by Mr Mold, it is unnecessary for me to set out those documents. The same over-arching point applies.
70. I also remind myself of the context. The third party drafted the 1990 interim deed and indeed went on to draft the 1995 deed and rules. The 1995 deed and rules wrongly assumed that equalisation had already been effected. The third party was also involved in the 1983 scheme which also attempted to effect changes, unsuccessfully. The defendants’ pleaded case is that the use of an announcement requiring member consent was consistent with the implementation methodology that the third party had advised the trustees to adopt in respect of the 1983 scheme. Further the use of an announcement followed by a retrospective amendment to the scheme rules was also consistent with the implementation methodology the third party had advised the trustees to adopt in respect of the equalisation for post-1991 members.⁵ There was a previous announcement used to effect equalisation, without success. All of this of course does not automatically give rise to a duty to advise on the legal formalities necessary to equalise the members rights under the 1990 scheme. It is a matter for the defendants to prove a duty arising in contract or in tort and the scope of that duty. However the third party’s role was arguably more extensive than simply advising on employment issues in respect of the 1990 scheme. The test to be applied is whether the defendants have no reasonable prospect of succeeding on the claim. I do not need

⁵ The defendants’ defence to the claim, paragraph 40.

to find on a summary basis that they are bound to succeed. Indeed Mr Khan makes cogent arguments on behalf of the third party but those are matters that should be left for trial.

71. The 10 March 1995 fax and 15 March 1995 meeting.
- i) Mr Khan submits that this is the key part of the defendants' case: this is when it is alleged that the third party was instructed by the defendants, on behalf of the claimants, and they gave advice in respect of the formalities of equalisation. Lynn Collins has no independent recollection of the meeting and Mr Khan criticises her evidence as being abstract and speculative, asking rhetorically how can that evidence improve at trial?
 - ii) On 10 February 1995 Lynn Collins sent a fax to Alison Clark copied to Danny O'Sullivan. It specifically deals with the 2nd draft of the 1995 announcement. She raises points for the claimants to consider and goes on to say, "you indicated when we meet that it might be useful to have a further chat with someone at Denton Hall. I have not yet had the opportunity to set up a meeting but will do so by speaking to them on Monday."
 - iii) On 10 March 1995 Lynn Collins sent a fax to Justin Harrington/Ewan Horn and copied this to Alison Clarke. The subject of the fax is "Sea Containers 1990 Pension Scheme". The fax refers to telephone conversations and that there is a meeting at the third party's offices on 15 March with Alison Clarke. "The main purpose of the meeting is to discuss some proposed equalisation and other changes from the point of view of pensions and employment law. Draft announcements outlining the proposals are attached."
 - iv) I note that contrary to the third party's case this is not limited solely to employment issues. Indeed Ewan Horn, as his predecessor John Sabel, was a pensions law specialist.
 - v) It seems to me to be more than merely arguable that the third party was instructed to provide advice on the legal effect of the 1995 announcement; even if instructions were not express they may have been reasonably incidental to the work that the third party was instructed to carry out.
 - vi) A meeting appears to have taken place on 15 March 1995 but there was no follow up correspondence from the third party or notes in respect of that meeting.
72. By fax on 28 November 1995 Ewan Horn was asked for comments/input on the draft 1995 announcement. Mr Khan submits that the proposed equalisation had been on hold since March 1995 and the third party had not been instructed to do anything. By inference the nature of the work to be undertaken by the third party was limited as the defendants had stated they hoped to issue the announcement before the end of November, although it was not issued until 21 December 1995. Mr Khan finally submits that there was no express instruction to advise on formalities, none is pleaded, and a duty cannot attach to a narrow request sent late in the day.

73. In response Mr Mold emphasises that Ewan Horn was a senior pension lawyer at the third party and the comments/input sought are not limited to employment issues. Mr Mold interprets the response in a wider context; the changes that were due to be effected a few months later were not simply matters of employment law but they were amendments under the 1990 scheme. Mr Mold puts this in the context that the third party had drafted the 1995 deed and rules in respect of post-1991 members benefits, which were executed on 26 April 1995, albeit they did not effect the necessary changes. At no point did Ewan Horn say that changes needed to be made by deed and that an announcement would not be sufficient. I consider that there is an issue between the parties on what duties arose from the 28 November 1995 fax and the scope of those duties. This cannot be viewed in isolation given the complicated factual matrix and the existing relationship between the third party, the claimants and the defendants. Again this is an issue that needs to be determined at trial.
74. Finally, Mr Khan refers me to the fax from Lynn Collins to Ewan Horn dated 11 December 1995 which asked him for advice on whether members should be asked to sign and return a form agreeing to a change in their contribution levels. This arose he submits out of a point raised by the third party in its comments/input to the draft 1995 announcement. This he suggests relates not to the formalities of the proposed equalisation exercise but to certain employment law consequences of changes to the 1990 scheme. Mr Khan again submits that there was no express instruction to advise on formalities, none is pleaded, and a duty cannot attach to a narrow request for employment law advice. Ewan Horn replied on 19 December 1995 and also appears to have spoken to Lynn Collins on that day. His recommendations appear to have been followed because amendments were made to the draft 1995 announcement in accordance with his advice.
75. Mr Mold again interprets this request as being a pension law issue not an employment issue. I do not know at this juncture whether this is an issue of semantics between the parties or not: I have not heard argument on the scope of the retainer for “pensions law” advice and “employment law” advice, how far they differ given the factual matrix and what ancillary duties may arise. He goes on to say that this is consistent with the defendants’ case that the third party was still involved in providing advice in respect of the 1990 scheme. If this was an allegation in isolation then I would be inclined to accept the third party’s arguments that this did not give rise of itself to a duty of care and that the scope of that duty of care was to advise on whether the legal formalities of the equalisation exercise had been complied with. However it cannot be viewed in isolation as this is part of the factual matrix of this case.
76. Mr Mold also made submissions in relation to the second part of the summary judgment test, a vital part that can sometimes be overlooked by parties. He submits that there are compelling reasons for this case to go to trial. It will require investigation of the role of the third party, the interaction between the claimants, the defendants and the third party and their respective responsibilities and duties. The role of the third party is part of the defendants’ defence to the main claim. There will be no saving of court resources and effectively the claim will be litigated in respect of the third party’s role when they are not a party to the proceedings. He referred me to Iliffe v Feltham Construction Ltd [2015] EWCA Civ 715, paragraph 72.
77. For the reasons that I have set out above I consider that the claim has a realistic as opposed to a fanciful prospect of success. I do not need to determine that the claim is

bound to succeed, simply that it is a realistic claim, that there is some degree of conviction. In that context I consider that the second limb of the summary judgment has also not been satisfied. This is not therefore an appropriate case for summary judgment.

78. The position on disclosure was raised before me on the first day of the application. Mr Mold in his skeleton argument and his oral submissions reminded me that disclosure had not yet been given. The defendants had identified some 72,000 potentially relevant documents. The defendants' solicitors considered that it was highly likely that further documents relevant to the additional claim would be disclosed. The defendants' impression from the claimants' solicitors letter dated 25 August 2017 was that the third party had lost its files. However in Edward Foss' first statement he stated at paragraph 65 (d)(iii) "Mr Horn could not specifically recall boxing up Denton Hall's files but he anticipated that the claimants would have requested that they be transferred to whichever firm they chose to use going forward. Had that been the case, he did not believe that Denton Hall would have kept a copy of the papers. This would explain the limited documents that Denton Hall has been able to locate."
79. In a letter from the defendants' solicitors addressed to the claimant's solicitors and the third party's solicitors dated 14 September 2018 referring to a telephone call between all the parties on 12 September 2018 to discuss disclosure,

"Documents held by Squire Patton Boggs

1.7 You stated on the call that you are currently liaising with Squire Patton Boggs to confirm how many documents they hold, and your letter dated 13 September 2018 confirms that you have not yet collected documents/data from Squire Patton Boggs. You also confirmed on the call that, in light of the Third Party's suggestion that their files may have been passed to Squire Patton Boggs, your search of Squire Patton Boggs' files would include a search for those files previously held by the Third Party. It would therefore seem to follow that there is (at the very least) a reasonable prospect that search of the documents held by Squire Patton Boggs will produce further documents that are relevant to the duty owed by the third party to the claimants."

80. Following the hearing I started to receive further correspondence relating to disclosure issues. This was precipitated by my clerk making enquiries about the parties' availability for the purposes of listing a hearing to hand down judgment, deal with consequentials and conduct the outstanding costs and case management conference. It started with a letter from the claimants' solicitors dated 23 October 2018, although of course they played no part in the third party's application. In that letter the claimants' solicitors emphasised that Ewan Horn did not state that a handover of papers had taken place, he suggested it was a possibility. They went on to state that they had asked Squire Patton Boggs (SPB) to carry out a search but they were unable to find any relevant documents. Although they then went on to state that, "It is our view that it is highly unlikely that we will find any documents and/or

information were handed over to SPB by Denton Hall.” I do not see how that follows from the first proposition. They attach an email from Wendy Hunter at SPB who set out the search processes which they had recently undertaken in respect of certain “client codes”.

81. There then followed a raft of letters from the parties; the claimants’ solicitors dated 29 October 2018; the defendants’ solicitors dated 26 October 2018 and 31 October 2018; and the third party’s solicitors dated 26 October 2018. It is inappropriate and highly irregular to litigate an application that has been heard through subsequent correspondence. I therefore listed the application for further argument on a date when all parties could attend, 9 November 2018.
82. Mr Khan submitted that the evidence contained in the correspondence was admissible. Both counsel referred me to Vernon v Bosley No 2 [1999] QB 18. In the context of an application to reopen a case in light of new disclosure the Court of Appeal explained that such a course would only be permissible with (i) the permission of the court and (ii) in special circumstances and not “unless the document is of real significance and there is otherwise a risk of injustice”. Mr Khan submitted that I am simply exercising a case management discretion and that it is materially different to a case heard at trial. Although of course if I determine the application in favour of the third party I am effectively striking out the additional claim. He says that the claimants’ solicitors have found nothing in their searches. Insofar as the defendants mount their opposition to the application on a ‘smoking gun’ theory, that there is a strong likelihood that further relevant documents will be disclosed, that is undermined by this recent correspondence.
83. Mr Khan with some fortitude pressed this point before me despite the claimants’ solicitors having sent an email at 4:30 PM on 8 November 2018 retracting their view in the letter to the court dated 23 October 2018. After some questioning by me Mr Khan finally accepted that this email may “factor against my application”.
84. I have not determined the application on the basis that there may be documents that emerge in the disclosure process. Indeed I have at some length analysed the statements of case by reference to the test for strike out and summary judgment. I have analysed the factual matrix and the specific documents that the parties have referred to. I have concluded that this is not an appropriate case for striking out, although I do require the defendants to amend their additional claim so that it forms one coherent pleading of the facts and matters relied upon in support of the allegation of the third party’s retainer and its scope. I have also concluded that this is not an appropriate case for summary judgment. I have not come to those conclusions on the basis that there may be some evidence that emerges on disclosure.
85. If the third party had wished to rely on further evidence and the thrust of Mr Khan’s submissions remained that no further documents will be disclosed I would have expected that to be set out in a witness statement from SPB who conducted that exercise and from the claimants’ solicitors as to the parameters of their request to SPB. Instead what I have before me is correspondence that was sent to the court by the claimants’ solicitors. I entirely agree with Mr Mold’s observations that, “the hearing process requires parties to submit evidence relevant to the hearing in advance, make their submissions at the hearing and then, once the evidence and submissions close, the court will deliver its decision. Adherence to this process is essential for

reasons of procedural fairness and practical efficiency. If it is not followed, or departed from without good reason, it leads to unfairness and an unjustifiable use of the court's and parties' resources.”

86. I have considered the correspondence in the context of the parties' further submissions. Upon analysis that correspondence leaves me in the same position as in September. Indeed there is an acceptance by the claimants' solicitors in their email dated 8 November 2018 that there are gaps in the search that was carried out by SPB, that is no criticism of SPB.
87. Insofar as Mr Khan made an oral application to admit further evidence I dismiss that application for the reasons that I have set out above. Unless it is a matter of extreme urgency I would expect such applications to be made by application notice and supported by evidence. When I say evidence I am referring to a witness statement signed with a statement of truth not a raft of correspondence sent in piecemeal fashion to the court.