

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (Ch D)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 10th July 2020

Before:

HIS HONOUR JUDGE EYRE QC

Between :

1) VALLEY BROOK INVESTMENTS LIMITED	<u>Claimants</u>
2) ANDREW MINES - and - HUAM LIMITED	<u>Defendant</u>

Mr. Brad Pomfret (instructed by **Eversheds Sutherland (International) LLP**) for the
Claimants

Mr. Nicholas Broomfield (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing date: 11th - 12th March 2020

JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am on 10th July 2020.

HH Judge Eyre QC:**Introduction.**

1. In October 2016 the First Claimant bought Imperial Chambers in Prince Albert Street, Crewe (“the Property”) from Ajay Magon. The Property was an office building but the First Claimant’s intention was to convert it into residential units. The First Claimant is wholly owned by the Second Claimant and was a single purpose vehicle formed for the purpose of the purchase and development of the Property. The Defendant is an architects’ practice. It had prepared various plans and drawings of the Property for Mr. Magon addressing the potential conversion of the Property into residential units. On 17th February 2016 the Defendant provided to the Second Claimant three documents (“the Drawings”) which were amongst those which had been prepared for Mr. Magon. The despatch of the Drawings had been preceded on 2nd February 2016 by a conversation or conversations between the Second Claimant and Mr. David Vokes of the Defendant. There is considerable dispute as to what was said on that day and the resolution of that dispute will be a key aspect of addressing the issues before me.
2. The Claimants say that the First Claimant relied on the Drawings when buying the Property and that as a consequence of those dealings the Defendant owed a duty of care to each Claimant; that the duty was breached; and that the breach caused loss. The Defendant takes issue with each of those contentions.
3. District Judge Matharu had ordered the trial of preliminary issues and that trial before me took place almost immediately before the restrictions imposed in response to the Covid-19 pandemic. The preparation of this judgment has been regrettably delayed by the consequences of those restrictions and the demands which were placed on judicial time in the immediate aftermath of the imposition of the restrictions.

The Parties’ Cases in Outline.

4. The Claimants say that the First Claimant bought the Property relying on the Drawings. They say that it was central to the purchase of the Property and particularly the purchase at the price paid that it would be possible to convert the existing building so as to provide sixteen residential units and that they relied on the Drawings as showing that this was possible. They say that the Defendant knew that the purchase was to be by a company to be formed by the Second Claimant as a single purpose vehicle for the purchase and development of the Property. The Defendant assumed responsibility to that company (which turned out to be the First Claimant) by sending the Drawings to the Second Claimant. The Defendant owed a duty to exercise reasonable care and skill to ensure that the Drawings accurately represented the area of the Property’s footprint and of each floor and that the layout and area of units depicted in the Drawings was achievable. There was a breach of that duty in that the footprint of the Property was not shown accurately. It is said that the Drawings showed an area approximately 30% greater than in fact existed. This meant that the layout and area of units depicted in the Drawings could not be achieved and that the Property could not be redeveloped so as to accommodate sixteen apartments. The Claimants say that this meant that the First Claimant

paid £116,000 more than the Property was truly worth and in addition damages are sought to reflect the further development potential the Property would have had if its area had been as depicted in the Drawings.

5. The Defendant says that there is no valid claim by the Second Claimant. This is because the purchase was by the First Claimant and any loss was suffered by that company. Any claim by the Second Claimant as the owner of the entire shareholding in the First Claimant is precluded by the rule against the recovery of reflective loss. The Defendant says that no duty was owed to the First Claimant because the Drawings were not provided to that company which did not exist when they were supplied and the Defendant was not aware of its potential existence. In addition the Defendant says there was no assumption of responsibility to either Claimant on its part. The Drawings were provided to the Second Claimant simply by way of general assistance to indicate the layout of the Property and in circumstances where it was not reasonable for the recipient to rely on them in regard to the purchase of the Property. The Defendant says it was or should have been apparent to the First Claimant that the Drawings were not a replacement for a survey and the First Claimant should have obtained its own survey before buying the Property.
6. The Defendant then contends that even if a duty was owed it was limited to exercising care and skill in preparing feasibility or concept drawings setting out a potential layout without measurements and representing the layout of the Property. The Defendant denies any breach of that duty. The alleged loss is denied and the recoverability of the sums claimed by the Second Claimant is denied. Finally the Defendant alleged contributory negligence on the part of the Claimants in failing to obtain advice from a surveyor and in relying on the Drawings when it was not appropriate to do so.

The Preliminary Issues.

7. By an order sealed on 6th November 2019 District Judge Matharu ordered a trial of the following preliminary issues:
 - “a) to ascertain whether the Defendant owed to either or both of the Claimants a duty of care; and
 - b) the scope of the Defendant’s duty of care to either or both of the Claimants, in the event that the duty of care is established.”
8. Those were the issues before me.

The History and the Parties’ Dealings.

9. There is considerable common ground between the parties but some significant differences as to key events and as to the proper interpretation of the parties’ actions.
10. The Property had been offices but had the benefit of planning permission approving a change of use to residential use. In 2014 the Defendants had been engaged by Mr. Magon and acting through Oliver Cotton had provided sundry documents including the Drawings to him. The Defendant says that these were

produced so that Mr. Magon could assess the feasibility of converting the Property into residential units. They had been produced without a survey having been undertaken and did not, in the Defendant's contention, purport to show accurate or measured areas.

11. In early 2016 the Second Claimant was negotiating with Mr. Magon with a view to the purchase of the Property. A major issue between them was price and the amount which the Second Claimant was prepared to pay was dependent on how many residential units could be formed out of the Property. Mr. Magon was contending that the Property could be modified to accommodate sixteen residential units with a further six if an additional storey were to be added. On 1st February 2016 in support of that contention Mr. Magon forwarded to the Second Claimant the text of an email which he had been sent by Mr. Cotton of the Defendant in 2014. The email said that the Defendant's layouts indicated that the Property could accommodate eight units on each floor with a further six in the proposed roof extension. In the email Mr. Cotton had also said "please note this layout is preliminary and that it would be possible to reconfigure the layout to fit more units into the available space." Mr. Magon forwarded as attached to Mr. Cotton's email three plans. These were dated February 2014. They were similar to the Drawings as described below but bore areas and more detailed descriptions on the plans themselves and identified Mr. Magon as the client. They also bore a "Note" saying:

"Areas indicated may vary and are subject to recalculation following the completion of a detailed measured survey of the existing building."

12. The forwarded email and the plans made it clear that the Defendant had been involved with the Property and that it had drawn up those plans. They also bore the Defendant's contact details. It is common ground that on 2nd February 2016 as a result of receiving that email and those plans the Second Claimant telephoned the Defendant and spoke to David Vokes. Mr. Vokes had not been involved in the Defendant's earlier work for Mr. Magon. There is, however, considerable dispute about the number and content of the conversations on that day.
13. In his witness statement the Second Claimant had said that he had spoken to Mr. Vokes twice on 2nd February 2016 but having seen his phone records he now says that there were three conversations. In the first call he gave Mr. Vokes the client number from the correspondence which Mr. Magon had provided. That was a short call which was followed by a longer conversation after Mr. Vokes had obtained the plans. There was then a short final call in which it was confirmed that Mr. Vokes did not require a written brief but was prepared to proceed on the basis of the Second Claimant's contact details.
14. Mr. Mines says that he told Mr. Vokes that he was considering buying the Property but would do so through a single purpose vehicle because of the financial benefits of doing so including the availability of entrepreneur's relief. He mentioned Greenhouse Property Management Ltd as being one of his companies of which he believed Mr. Vokes might have heard. He also said that he had worked with Knutsford Construction through a different company,

Smithfield Court Ltd. The Second Claimant told Mr. Vokes that Mr. Magon was saying that it would be possible to fit a minimum of sixteen residential units into the Property. He explained that he was seeking information from the Defendant to check whether that was right or not and to ensure that the proposal to fit eight units on each floor of the existing building was viable. Mr. Vokes said that the Defendant had undertaken a full survey in the past and had been involved with the Property since the 1990's. Mr. Mines told Mr. Vokes that he was contemplating engaging the Defendant on the project if he bought the Property. He says that he asked for an estimate of the fees which the Defendant would charge for providing a copy of the drawings which had previously been provided to Mr. Magon. Mr. Vokes said that there would be a minimal cost for providing copies of the previously prepared drawings.

15. Mr. Vokes's recollection of those exchanges as set out in the Defence and his witness statement was markedly different. His account was modified to a degree in the course of cross-examination and some of the differences removed but a number of differences remained. Mr. Vokes's recollection was of a single conversation in which the Second Claimant had said that he was calling on behalf of Greenhouse Property Management Ltd and in which there was no mention of the intention to incorporate any other company to buy the Property. There was, Mr. Vokes says, no discussion of the use of single purpose vehicles for property purchase and development. The Second Claimant said that he was intending to buy and develop the Property and asked if the Defendant still had the drawings which it had prepared previously. Initially Mr. Vokes's evidence was that he said that he would need to get the file from the archives and that he had searched the Defendant's records after the end of the conversation. However, in the course of cross-examination he explained that although the file was in the Defendant's archives he had been able to call up some documents electronically and was able to view some drawings on screen while talking to Mr. Mines although he did not look at them in detail. He told Mr. Mines that accurate measurement would require a survey and that he would need to go to the Property to produce new drawings. Mr. Vokes says that he felt that the Second Claimant was checking to see whether the Defendant had information to confirm whether what Mr. Magon had said was correct and he accepted that the Second Claimant was checking to see if what Mr. Magon had told him about the possible number of units was correct.
16. Mr. Vokes accepts that there was an exchange about payment for copy drawings and that he said that there would be a minimal fee if the drawings could be obtained without searching the Defendant's archives. However, he believes that he said that a written brief would be needed to take the project forward and to draw up plans for the conversion of the Property. Mr. Vokes accepts that he asked the Second Claimant to send him an email following the telephone conversation but says that this was to check the latter's contact details and credentials with a view to getting a feel for a potential client.
17. The attendance note prepared by Mr. Vokes is in very short terms and appears to consist of items noted down in the course of a conversation. It gives the Second Claimant's name and mobile phone number. It states "Greenhouse

Property Management Ltd” and on the line below “Knutsford Construction”. The number of the planning permission obtained for Mr. Magon is noted down as is the client number, M1277, which had been allocated by the Defendant to Mr. Magon under the word “Crewe” with a side note saying “Crewe building from A J Magon”.

18. The Second Claimant checked his phone records the day before the hearing and provided copies of his mobile phone bill for 2nd February 2016. Although these were produced very late there was no question as to the genuineness of this document. It showed three phone calls on 2nd February 2016 to the Defendant’s office. The first at 12.59 lasted 4 minutes and 2 seconds; the second at 14.01 lasted 17 minutes and 23 seconds; and the third at 15.29 lasted 2 minutes and 19 seconds.
19. At 15.32 on 2nd February 2016 the Second Claimant sent Mr. Vokes an email simply stating “as discussed” under the heading “contact email”. Mr. Vokes replied 1 minute later saying “Received ‘loud and clear’ ...” under the heading “Job No. M1277/A1”.
20. On 9th February 2016 Mr. Vokes emailed the Second Claimant. The email was headed “Imperial Chambers- Crewe”. In the text of the email under the words “Job No. No. M1277/A1” and a repetition of “Imperial Chambers- Crewe” Mr. Vokes said:

“Has there been any movement on the project?
“I have checked our files and we don’t appear to have any structural survey information but our feasibility plans were based on a trace of a survey we did in 1998
“I will look forward to hearing from you”
21. The Second Claimant replied on 15th February 2016 saying:

“Have been away sorry – no movement as such. Was waiting for you to send any drawings you had on file so I could try to get my head around the layout, particularly the mansard roof if poss?
“I’m also waiting on the info from the planning consultant about the office to resy [ie residential] planning details”.
22. Mr. Vokes replied to that email on 17th February 2016 again giving the same “Job No” and then using the title “Imperial Chambers Feasibility Floor Plans”. He attached the Drawings and said:

“Please find attached a copy of the initial feasibility layouts. I would be grateful if you treat them confidentially as we don’t believe we received clear instructions from the client on his thoughts although the plans were I believe sent to him and an initial feasibility fee was settled.
“We didn’t take the scheme any further forward and I believe the client then instructed another architect to submit his change of use application but we were not sure if our drawings were used.
“I will look forward to hearing from you.”
23. Mr. Mines replied saying “of course – they won’t go any further”; explaining that he was currently in France; and adding “I’ll have a look at them in more detail as soon as I’m back and see where we can go”.

24. The Drawings consist of three documents: a “proposed ground floor plan layout”, a “proposed first floor plan layout”, and a “proposed second floor plan layout”. Each is said to be “scale 1:200@A3”. At the time the plans were sent the Property consisted of the ground and first floor only. Each drawing was in a similar format and consisted of a coloured plan on which various residential units were drawn but on which no measurements were recorded and a “Schedule of Accommodation” listing the units and giving an area. Thus the ground floor plan identified unit A-01 as being a two bedroom unit of 83.10m² and unit A-02 as a one bedroom unit of 57.13m². The ground and first floor plans each identified eight units with the areas and descriptions as one or two bedroom being the same for each of those floors. The proposed second floor layout identified six units. Each of the plans were dated March 2014. The project was described as being “proposed change of office use to residential Imperial Chambers, Crewe” and bore “M1277” as the “project number”. The client name was said to be “confidential” and the status of the document was said to be “planning”. Each bore a box containing a copyright notice saying that “figured dimensions only are to be taken from this drawing. All contractors must visit the site and be responsible for taking and checking all dimensions relative to their work. [the Defendant] are to be advised of any variation between drawings and site conditions” and then in block capitals “Do not scale off this drawing – if in doubt ask”. Unlike the February 2014 plans which Mr. Magon had forwarded to the Second Claimant the Drawings did not bear the Note which I have quoted at [11] above.
25. The Defendant says that it provided the Drawings solely to enable the Second Claimant to understand the layout of the Property. The Claimants say that they were provided as confirmation that it would be possible to convert the existing building so as to accommodate eight residential units on each floor.
26. The First Claimant was incorporated on 24th February 2016 and is wholly owned by the Second Claimant. The First Claimant bought the Property on 10th October 2016 for £442,000.
27. After the Second Claimant’s email acknowledging receipt of the Drawings there were no further exchanges between either Claimant and the Defendant until October 2016. However, on 11th October 2016 (the day after the purchase) the Second Claimant telephoned Mr. Vokes. Mr. Mines told Mr. Vokes of the purchase and arranged a meeting on site on 13th October 2016. That meeting was held and exchanges between the Defendant and a structural engineer engaged by the First Claimant followed. On 1st November 2016 the Defendant prepared drawings of the existing layout and uploaded these to its CAD system. These bore the project number M1277 and gave the client’s name as Andrew Mines Ltd. The Defendant had discovered the name of that company when Mr. Vokes undertook a search of companies associated with the Second Claimant and printed off the return which showed four such companies. One of those was Andrew Mines Ltd. Mr. Vokes said that he had undertaken that search (or rather arranged for an employee of the Defendant to undertake the search) after the telephone conversation of 2nd February 2016 in order to get information about a potential new client. Mr. Vokes said that Andrew Mines Ltd had been identified as the client on the 1st November 2016

documents because he thought it was unusual that Mr. Mines should have a company in his own name and that it was for that reason that the Defendant described that company as being the client rather than Greenhouse Property Management Ltd or any other of the four companies with which the search had shown the Second Claimant to be associated. It is to be noted that Mr. Vokes said that Greenhouse Property Management Ltd was the only company which Mr. Mines had mentioned on 2nd February 2016. The account Mr. Vokes gave in his witness statement was that the Second Claimant had said that he was phoning on behalf of that company.

28. As I have already indicated the determination of the conflicting accounts of the events of 2nd February 2016 is of crucial importance to the resolution of the Preliminary Issues because of the light which it throws on the subsequent exchanges and in particular on the basis on which the Drawings were sent to the Second Claimant. I have set out the accounts of the Second Claimant and Mr. Vokes at [14] – [16] above. Both of those gentlemen were markedly nervous in the giving of their evidence. I am satisfied that each of them was seeking to give his honest recollection of what was said. They were, however, giving evidence in March 2020 about a conversation or conversations which had taken place just over four years before. In addition I have to be conscious of the fact that each gentleman was inevitably recollecting matters from a particular viewpoint. I also have regard to the common human capacity and tendency for a witness genuinely but mistakenly to recollect past events as having actually happened in the way in which the witness now with hindsight believes they would, or indeed should, have happened. In the light of that my conclusion as to what happened on 2nd February 2016 must be reached by assessing their evidence through the prism of the contemporaneous documents and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should normally regard as more likely to be an accurate account of what happened. In this case the direct documentation in respect of the conversations on 2nd February 2016 is markedly sparse. It is limited to Mr. Vokes's very short attendance note and the telephone records which I have summarised above. Some limited assistance can, however, be derived from the contents of the subsequent emails.
29. I have concluded that in respect of their conversations the evidence of Mr. Mines is to be preferred to that of Mr. Vokes for the following reasons:
- i) The phone records which Mr. Mines produced confirmed that instead of the single conversation which Mr. Vokes had recalled there were three. In addition the second call was for rather longer than Mr. Vokes had believed was the case. The pattern of the calls accords with the account given by the Second Claimant of an initial brief discussion; a later longer discussion after Mr. Vokes had been able to look at the Defendant's records; and a short discussion confirming that the Defendant would proceed on the basis of the Second Claimant's contact details and without a written brief (an aspect also supported by

the email sent shortly after the phone call). Faced with the phone records Mr. Vokes accepted that he was incorrect in believing that there was just one conversation. This demonstrated that he was striving to give honest evidence but also showed the limitations on his recollection of the conversation.

- ii) Similarly although in his statement Mr. Vokes made no reference to any discussion about a fee for providing copies of the Drawings in his oral evidence he accepted that he had said that there would be a minimal fee for this. He thereby accepted the substantial accuracy of Mr. Mines's recollection in that regard.
- iii) Mr. Vokes answered many questions at considerable length but had difficulty in addressing the questions which he was asked rather than stating what his general approach was. At several points his answer was to say that he "would have" or "would not have" taken particular action. I am entirely satisfied that Mr. Vokes was not seeking to be evasive in his answers. I take account of the nervousness which he clearly felt about giving evidence and remind myself of the limited weight which is to be given to a witness's demeanour. Nonetheless, I formed the clear impression that he had limited direct recollection of the events of 2nd February 2016 but was instead explaining the steps which he believed he would have taken or the comments he believed he would have made.
- iv) The attendance note taken by Mr. Vokes was sketchy. It amounted to the jotting down of a name and some limited details. That is an understandable course but it does mean that the note cannot be relied upon as a contemporaneous record of the conversation as a whole in the same way as a more detailed attendance note might have been.
- v) Mr. Vokes portrayed the initial call from Mr. Mines as a "cold call" and sought to downplay the extent to which he wanted the Defendant to be engaged in the project. I do not accept the suggestion which Mr. Pomfret for the Claimants made to Mr. Vokes that the Defendant was in particular financial need of the business. Nonetheless Mr. Vokes at the time was clearly keener for the work than he now accepted. He was driven to concede that he regarded the development of the Property as an interesting project and in my judgement the email of 9th February 2016 demonstrates a wish for the Defendant to be involved.
- vi) Mr. Mines was able to give detailed evidence about the exchanges in relation to fees. That account is unlikely to be the product of a mistaken recollection and I have already said that I regarded both witnesses as seeking to give honest evidence. It follows that these aspects of Mr. Mines's evidence are to be seen as a genuine recollection.
- vii) I found Mr. Vokes's evidence that he was unaware of the use of companies as single purpose vehicles by property developers puzzling and unpersuasive. It indicated that Mr. Vokes was unwilling to engage

with matters which might be thought unhelpful to the Defendant's position. This contrasted with the detail which Mr. Mines was able to give about having explained to Mr. Vokes that he was influenced to act in this way by the availability of entrepreneur's relief.

- viii) I also found unpersuasive the evidence which Mr. Vokes gave as to the search for companies associated with Mr. Mines. This was an unusual step to take if no relationship had been formed and if the phone call from Mr. Mines was seen as one of many cold calls received by the Defendant. It is much more consistent with an adviser/client or quasi-client relationship having arisen or being actively contemplated. Although the search revealed four companies associated with Mr. Mines in his statement Mr. Vokes said that only two (Greenhouse Property Management Ltd and Andrew Mines Ltd) had been discovered. The explanation that the search was undertaken to get a correspondence address was unpersuasive and Mr. Vokes had no explanation for why he had not mentioned that the search had revealed four companies. Similarly the explanation for the use of Andrew Mines Ltd as the client on the November 2016 drawings is unpersuasive. At the least it shows something of a cavalier attitude to the identity of the client. It is moreover potent evidence that Mr. Vokes knew that Mr. Mines was going to be acquiring and developing the Property through a corporate entity and that the Defendant's relationship was to be with that entity.
- ix) There is considerable force in the point made by Mr. Mines that the whole point of calling the Defendant was to obtain confirmation of the accuracy of the assertion that Mr. Magon had made that the Property could be converted so as to accommodate sixteen units. If that was the purpose of the call then it is credible for Mr. Mines to say that he sought such assurance and believed he was being given it.
- x) I have reflected on the point that the conveyancing file shows that the solicitors ultimately acting for the First Claimant initially appear to have believed that the purchase would be by Mr. Mines in his own name. It is true that this does give some indication that the intention to use a company, whether a single purpose vehicle or not, for the purchase and development was not as fixed as Mr. Mines indicated in his evidence. It also gives some support to the argument that even if that was in fact the intention which Mr. Mines had he did not make that intention clear to those (including it would be said Mr. Vokes) with whom he was dealing. There is force in this argument but it cannot prevail against the weight of the other factors.
30. It is in the light of those matters that I find that the exchanges on 2nd February 2016 took substantially the form asserted by the Claimants. In particular there were three conversations. The Second Claimant explained and Mr. Vokes understood that the Second Claimant's purpose in calling was to obtain copies of the documents which had been prepared for Mr. Magon and that the purpose of doing that was to confirm that it would be possible to convert the existing building so as to have eight residential units on each floor. The

Second Claimant also explained the relevance of the practicability of such conversion to the questions of whether the purchase should proceed and, if so, at what price. It was also made clear that the purchase was likely to be by way of a company being used as a single purpose vehicle. Mr. Vokes had spoken of the Defendant's longstanding knowledge of the Property and had said that the Defendant had undertaken a survey of it in the past. No warning was given that a further survey would be needed. It was agreed that a modest fee would be payable for provision of the copy drawings. That was in the context that there was also discussion about the Defendant's potential involvement in the development if the purchase went ahead with both parties envisaging that the Defendant would be engaged in that exercise. It was agreed that a written brief would not be required at the current stage and that the Defendant was content to proceed on the footing of simply having the Second Claimant's contact details.

31. The conversations in the light of those findings had the effect that the Defendant regarded the company which was to buy the Property as at the least a potential client and that the despatch of the Drawings on 17th February 2016 was on that footing. That conclusion follows not just from my finding about the 2nd February 2016 conversations but also from the wording of the email exchanges between 9th and 17th February 2016 inclusive. The email of 9th February 2016 from Mr. Vokes chasing on progress and giving more information about the drawings which the Defendant had prepared is strongly indicative of this and the 17th February 2016 email supports that reading.

The Approach to be taken in determining the Existence of a Duty of Care.

32. Although they cited different authorities and used slightly different language there was not in reality any significant difference between Mr. Pomfret and Mr. Broomfield on the applicable law and the test to be applied in determining whether the Defendant did or did not owe a duty of care. The differences between them flowed from different analyses of the facts rather than different interpretations of the law.
33. Thus Mr. Pomfret placed emphasis on the importance of the nature of the relationship and on the degree of reliance which the advisor should reasonably have anticipated would be placed on the advice. In that regard he referred me to the potentially relevant factors listed thus by Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd v Price Waterhouse* [1998] BCC 617 at 720:

“The threefold test and the assumption of responsibility test indicate the criteria which have to be satisfied if liability is to attach. But the authorities also provide some guidance as to the factors which are to be taken into account in deciding whether these criteria are met. These factors will include:

(a) The precise relationship between (to use convenient terms) the adviser and the advisee. This may be a general relationship or a special relationship which has come into existence for the purpose of a particular transaction. But in my opinion counsel for Overseas was correct when he submitted that there may be an important difference between the cases where the adviser and the advisee are dealing at arm's length and cases where they are acting 'on the same side of the fence'.

- (b) The precise circumstances in which the advice or information or other material came into existence. Any contract or other relationship with a third party will be relevant.
- (c) The precise circumstances in which the advice or information or other material was communicated to the advisee, and for what purpose or purposes, and whether the communication was made by the adviser or by a third party. It will be necessary to consider the purpose or purposes of the communication both as seen by the adviser and as seen by the advisee, and the degree of reliance which the adviser intended or should reasonably have anticipated would be placed on its accuracy by the advisee, and the reliance in fact placed on it.
- (d) The presence or absence of other advisers on whom the advisee would or could rely. This factor is analogous to the likelihood of intermediate examination in product liability cases.
- (e) The opportunity, if any, given to the adviser to issue a disclaimer.”

34. Although Sir Brian Neill made reference in that passage to the threefold test enunciated in *Caparo Industries plc v Dickman* [1990] 2 AC 605 and the “assumption of responsibility” test as indicating the criteria on which liability was to be based Mr. Pomfret accepted that the situation here was not a novel one. He accordingly accepted that the existence or non-existence of a duty was to be seen by the application of established principles by reasoning by analogy from other cases rather than by applying the threefold test to a blank canvas. He did, rightly in my judgement, rely on the list of factors set out by Sir Brian Neill as indicating matters of potential relevance. Mr. Pomfret characterised the current case as a classic example of circumstances where a duty of care would arise with an architect providing drawings in the expectation that they would be relied on and that the architect would be engaged on the project in due course.
35. Mr. Pomfret reminded me that a professional can owe a duty of care even where he or she provides services gratuitously. He relied on *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] PNLR 25 as an instance of a case where there had been an assumption of responsibility even though the architect who provided professional services did so without seeking payment. The approach of the Court of Appeal there showed that particular regard was to be had to the scale and nature of the services being provided by the professional in question.
36. Mr. Pomfret did not suggest that a duty of care could arise if the relationship was so far removed from that of client and adviser that the adviser could not properly be regarded as having assumed responsibility to the potential claimant for the advice or if reliance on the advice was neither reasonable nor to be anticipated. His contention was that here the relationship amounted to that of client and adviser and that reliance on the Drawings was both reasonable and to be anticipated.
37. Mr. Broomfield did not in reality dissent from that characterisation of the legal test. He accepted and contended that the process to be undertaken was one of reasoning by analogy from other cases to see whether the circumstances were such that the Defendant could properly be said to have assumed responsibility to either Claimant for the Drawings. In that process he urged me to have particular regard to the nature of the relationship; the structure of the

transaction; and the extent to which reliance on the information provided was reasonable and to be anticipated. Mr. Broomfield helpfully referred me to *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736 where it was explained that the threefold test as set out in *Caparo Industries v Dickman* was only likely to be of assistance in novel cases and that in other circumstances the proper approach was reasoning by analogy from decided cases dealing with similar factual circumstances. He did not, however suggest that this meant that the list of potentially relevant factors as set out by Sir Brian Neill in *BCCI v Price Waterhouse* is no longer of assistance. Rather that list is to be seen as a distillation of factors which have been found to have been relevant when considering whether there is a duty of care.

38. Similarly, Mr. Broomfield's references to *Machin v Adams* (1997) 84 BLR 79; to *McCullagh v Lane Fox & Partners* [1996] PNLR 205; and to *James McNaughton Paper Group v Hicks Anderson & Co* [1991] 2 QB 113 amounted to illustrations of the courts emphasising the care that was to be taken when considering whether the relationship was such that there should be regarded as having been an assumption of responsibility and as showing that the reasonableness of and anticipation of reliance on the advice were potent factors in considering whether a duty existed. Thus in *Machin v Adams* regard was had to the importance of the adviser knowing the purpose for which the advice in question was required. In that case the architect was not to be regarded as having assumed responsibility to a person other than his client in circumstances where he did not know that the relevant letter would be relied upon by a person other than his client let alone the purpose for which it would be so used. Similarly *McCullagh v Lane Fox & Partners* is relevant for present purposes as demonstrating the need for the court to give careful consideration to the related questions of whether in the particular circumstances reliance on the representation in question was reasonable and reasonably to be anticipated and whether the representee could reasonably have been expected to obtain and rely on separate advice.
39. Mr. Broomfield did not suggest that a duty could not arise if there was a relationship akin to that of client and adviser where it was reasonable for the advisee to rely on the advice and reasonably anticipated that he or she would do so. Rather it was his position that in this case the relationship was not of that nature and that it was neither reasonable for either Claimant to rely on the Drawings nor to be anticipated that either would do so.
40. It follows that I am to decide whether the Defendant owed a duty of care by reference to the relationship between the parties and to the extent to which it was reasonable and to be anticipated that either Claimant would rely on the information from the Defendant. I am to make that assessment in the light of the approach taken in similar cases. The closer the relationship was to that of adviser and client or quasi-client and the more appropriate it was for a Claimant to rely on the Drawings without seeking further advice then the more appropriate it will be to conclude that a duty of care was owed. Conversely if the relationship was not akin to that of client or quasi-client and adviser and if it was unreasonable for a Claimant to rely on the Drawings rather than seeking

further advice and not to be anticipated that it would do so then the less scope there will be for holding that a duty of care was owed.

Did the Defendant owe a Duty of Care to the First Claimant?

41. The First Defendant was incorporated on 24th February 2016 and accordingly did not exist when the Drawings were sent one week earlier. It did exist at the time of the purchase and so at the date of the alleged reliance on the Drawings. The pleaded Defence does not take any point on this instead taking the stand that when the Drawings were sent the Defendant did not know of the First Claimant and was not assuming a responsibility to it. That was the approach also adopted by Mr. Broomfield.
42. That was an appropriate course and in those circumstances I can deal with the question of the effect of the date of the First Claimant's incorporation shortly. A duty can be owed to persons whose identity the relevant professional does not know if reliance by such persons on the professional's statement is reasonable and to be anticipated if the circumstances are otherwise such as to give rise to an assumption of responsibility. That proposition flows from *Hedley Byrne v Heller* [1964] AC 465 see per Lord Reid at 482 and Lord Morris at 493 - 495. The principle is of wide application and thus at 10-043 the editors of *Jackson & Powell on Professional Liability* cite the decision in *Shankie-Williams v Heavy* [1986] EGLR 139 (on rather different circumstances from those here) as authority for the proposition that a professional can be liable even if he does not know the precise identity of the third parties who relied on his work.
43. In *Playboy Club London v Banca Nazionale del Lavoro* [2018] UKSC 43, [2018] 1 WLR 4041 Lord Sumption (with whom Baroness Hale and Lords Reed and Briggs agreed) explained that the approach in *Hedley Byrne* was capable of expansion but that expansion was not without limits. Lord Sumption made it clear that although the person to whom responsibility was being assumed did not have to be identified they had to be identifiable explaining, at [10], that it was for this reason amongst others that the adviser's or representor's knowledge of the transaction to which the advice or statement is potentially relevant was of importance. In this regard it is also of note that at [24] – [25] Lord Mance emphasised the need for the categories of persons for whose benefit a statement was being provided being known but made it clear that there was no need for their identities to be known. It follows that there is no scope for an assumption of responsibility where there is no basis for believing that the advice or statement will be relied on by a person or persons other than the person to whom it is made directly. There can, however, be an assumption of responsibility in circumstances where it is reasonably to be anticipated that there will reasonably be reliance on the advice or statement by other persons for an identified transaction or transactions. The identities of those persons do not have to be known to the adviser provided they are capable of being ascertained.
44. Does it make a difference to the application of that approach that the First Claimant was not in existence at the date when the Drawings were supplied to the Second Claimant? There clearly would have been scope for an assumption

of responsibility (provided the other requirements were satisfied) if it had existed at that date. If the Defendant knew that the Second Claimant was to provide the Drawings to an existing single purpose vehicle company which would rely on them in respect of the purchase of the Property then responsibility could have been assumed even if the Defendant did not know the name of the company in question. In considering the effect of the First Claimant's non-existence at 17th February 2016 it is to be remembered that a cause of action in negligence accrues on the date when loss was allegedly suffered by reason of reliance on the Drawings. In this case that was the date of reliance and hence the date of the purchase of the Property when it is said that the First Claimant suffered loss. It follows that the First Claimant existed at the date when the cause of action is said to have accrued. In my judgement the effect of this is that if the First Claimant was in the category of those whom it was reasonably to be anticipated might reasonably rely on the Drawings for the purpose of the purchase then the fact that it had not been incorporated when the Drawings were sent to the First Claimant would not preclude a finding that there had been an assumption of responsibility to the First Claimant.

45. Here I have found that the Defendant knew that the purchase and development of the Property were to be through a single purpose vehicle in the guise of a company formed for that purpose. It knew that the Drawings would be used for the purposes of that company. In those circumstances if a duty of care would otherwise arise it is not precluded by the facts that the Defendant was unaware of the name of the company in question and that the company had not been formed at the time the Drawings were sent.
46. As I have explained at [30] and [31] above I have concluded that the relationship between the Defendant and the First Claimant was that of adviser and client/quasi-client. To adopt the language used by Sir Brian Neill in *BCCI (Overseas) v Price Waterhouse* they were "on the same side of the fence". In my judgement considerable light is thrown on the nature of relationship by the fact that the parties were proceeding not just on the footing that a modest fee would be payable for providing a copy of the Drawings but that both sides envisaged that if the purchase proceeded the Defendant would be engaged to assist in the development of the Property. Indeed this was what happened with the Defendant being telephoned the day after the purchase and invited to attend a meeting on site two days later.
47. I turn to consider whether it was reasonable for the First Claimant to rely on the Drawings and whether such reliance ought reasonably to have been anticipated. Those are in substance different ways of formulating the same test because if it was reasonable for the First Claimant to rely on the Drawings then such reliance should have been anticipated and conversely if the circumstances were such that it could not reasonably be anticipated that the First Claimant would rely on the Drawings then such reliance would not be reasonable.
48. The Defendant points to a number of matters which it says demonstrate that reliance on the Drawings was not reasonable and could not reasonably have been anticipated:

- i) The Defendant through Mr. Vokes placed considerable emphasis on the fact that the email of 17th February 2016 was entitled “Imperial Chambers Feasibility Floor Plans” and that in the text of the email Mr. Vokes described the Drawings as “the initial feasibility layouts”. Mr. Vokes said that on 2nd February 2016 he had told Mr. Mines that the Drawings were feasibility drawings and that the Defendant would need to go to the Property to prepare new drawings. As explained above I have concluded that Mr. Mines’s recollection of those conversations is to be preferred and that Mr. Vokes did not say that a further survey would be required. In any event Mr. Vokes accepted that although he would have told Mr. Magon what was meant by a feasibility plan he did not spell out the meaning of the term to Mr. Mines. The Defendant says that nonetheless “feasibility” is a term of art which Mr. Mines as a person experienced in property development would have understood. In his witness statement Mr. Vokes said:

“4.15 ... The purpose of an initial feasibility plan is to ascertain the potential of a site or building and [to] determine whether or not the initial design requirements or brief that has been considered by the client for the building is, itself, feasible.

“4.16 Feasibility plans are sometimes referred to as concept drawings and involve nothing more than conceptual or “blue sky” thinking followed by a sketch of what the potential for a building *could be*. They are entirely aspirational. Feasibility plans merely allow a client to narrow down their options and formulate a strategic plan for the design of their building before moving forward to commissioning a detailed drawing of their intended design (once it has been established that it is feasible) and incurring the costs associated with doing so.”

Even in the light of that account I am unable to see how a feasibility plan showing a number of units of particular sizes on a particular floor of a building could be interpreted other than as an indication that it would be possible for the building to accommodate that number of units of those sizes. In any event as between the Claimants and the Defendant I do not accept that the use of the word “feasibility” had the effect that reliance on the Drawings was not to be anticipated or was not reasonable. It is a normal English word having the meaning of possibility or practicability and I find that Mr. Mines neither did nor should have understood it as having a more limited meaning. The purpose of the Second Claimant’s approach to the Defendant was to obtain confirmation of the representation made by Mr. Magon that the building could be converted so as to accommodate eight residential units on the ground and first floors. Mr. Mines was checking to see whether that was in fact possible and the use of the word “feasibility” did not operate as an indication that the plans did not show this was possible. Indeed, in my judgement, the use of that word without qualification operated as an indication that it was possible.

- ii) Next it is to be noted that in his email of 15th February 2016 Mr. Mines asked for any drawings which the Defendant had on file so he could

“try and get [his] head around the layout, particularly the mansard roof”. In my judgement that indication from Mr. Mines may well be relevant as to the extent of the duty and the purpose for which it was appropriate for the First Claimant to place reliance on the Drawings but provides less assistance with the question of whether reliance was reasonable and to be anticipated. In this regard it is relevant to note that it was common ground in the evidence before me that the number of residential units which could be accommodated in the Property was dependent not just on floor area but also on the configuration or layout of the building and the units. In order for units to be accommodated in the building it had to be possible for there to be access to stairwells and for the units to have windows opening either externally to the building or onto an internal lightwell. It follows that layout as well as area was important and it is to be noted that the Drawings show units configured in such a way that each floor can accommodate eight units each of which has the necessary access to the stairs and to light.

- iii) It is relevant that the email of 9th February 2016 from Mr. Vokes said that the Defendant did not have “any structural survey information” in its files. However, the weight of this point is markedly reduced by the fact that those words are immediately followed by “but our feasibility plans were based on a trace of a survey we did in 1998”. That is a very important qualification stating in terms that a survey had been undertaken and that the Drawings had been prepared with reference to that.
- iv) The Defendant drew attention to the warning in the copyright notice saying that figured dimensions only were to be taken from the Drawings and that they were not to be scaled from. The Drawings contained no measured dimensions on the plans.
- v) The drawings which Mr. Magon had supplied to the Second Claimant had borne the Note quoted at [11] above. The Claimants had those drawings and had been alerted by that note to the need for recalculation and a detailed survey. That is a potent point although its force is tempered somewhat by the absence of that Note from the Drawings and the fact that the Drawings bore a later date than the documents which Mr. Magon had supplied.
- vi) There is also force in the Defendant’s contention that regard is to be had to the nature of the exercise in which the Claimants were engaged. The Property was being bought as a commercial exercise with a view to redevelopment. The Claimants’ case is that the number of residential units which could be formed in the building was of crucial importance to the viability of that exercise or at least to the price which was to be paid. In those circumstances it is a telling argument to say that it would have been appropriate for the Claimants to have obtained a report of their own based on a survey taken on their behalf. If that was the appropriate course then, the Defendant says, it was not to be anticipated that the First Claimant would rely on the Drawings.

- vii) The Defendant also makes the point that the Drawings had been prepared for Mr. Magon and not for either Claimant. That may be relevant to the question of the extent of any duty but it has less force in relation to the question of the reasonableness and foreseeability of reliance by the First Claimant. This is because the Drawings were supplied by the Defendant to the Second Claimant in circumstances where, as explained above, it was known that the Second Claimant was buying the Property through a single purpose vehicle such as the First Claimant. This argument would have considerably more force if the Claimants were bringing proceedings based on the documents which Mr. Magon had supplied to the Second Claimant on 1st February 2016 but it has limited weight in relation to the Drawings supplied directly to the Second Claimant with the knowledge that they would be used for the purposes of the company which was considering buying the Property.
49. I have already noted some of the factors on which the First Claimant relies in answer to the Defendant's arguments. The following are also of relevance:
- i) In the light of my acceptance of Mr. Mines's evidence about the conversations on 2nd February 2016 it follows that the Defendant knew the importance to the Claimants of being able to fit sixteen residential units into the Property and knew that the Second Claimant's purpose in contacting the Defendant had been to check the reliability of the assertion which Mr. Magon had made as to the capabilities of the Property in that regard.
 - ii) It also follows that the Second Claimant received the Drawings after having been told on 2nd February 2016 of the Defendant's longstanding involvement with the Property and that it had undertaken a survey in the past. The Defendant's email of 9th February 2016 said that there was no structural survey information on the Defendant's files. However, as explained above it confirmed that a survey had been undertaken in 1998 and also reinforced the reference which Mr. Vokes had made in the 2nd February conversations to the Defendant's longstanding involvement with the building.
 - iii) In my judgement there are two features of the Drawings which strongly support the reasonableness of the First Claimant's reliance on them and the foreseeability of such reliance. The Drawings consist in the case of each floor of a plan and a Schedule of Accommodation. The plan shows units in particular locations each having the requisite access to the stairs and to light. The Schedule of Accommodation identifies in respect of each unit whether it is a one or two bedroom unit and gives an area to two decimal places with a different area being given for each unit on the same floor. So as noted above and by way of example unit A.01 on the ground floor is said to have been a two bedroom unit with an area of 83.10m². That is an indication that considerable work had gone into the preparation of the Drawings and that calculations had been made by reference to measurements. In his oral evidence Mr. Vokes explained that the drawing and configuration of the units would

have been the result of a CAD exercise but the fact remains that the areas of the units must have been the result of a calculation from base dimensions in some way. There is considerable force in the First Claimant's argument that it believed that it had a drawing from architects who had longstanding knowledge of the building and who had previously undertaken a survey of it with that drawing showing how a particular number of units of particular sizes could be fitted into the building. The First Claimant says that in light of that and given that the intention was to engage the Defendant if the project proceeded there was no need to obtain a separate survey.

- iv) In his email of 17th February 2016 Mr. Vokes said that he was not sure if the Defendant's drawings had been used in the change of use application which Mr. Magon had submitted but suggests that they were capable of being so used. That is an indication that the Drawings were at least of sufficient reliability to have been used for that purpose.
 - v) The conclusion which I have already reached as to the nature of the relationship between the parties is also relevant to the questions of the reasonableness of the First Claimant's reliance on the Drawings and the foreseeability of such reliance. Here the relationship was that of client/quasi-client and adviser with the Drawings being provided for a modest fee in circumstances where it was envisaged that the Defendant would be engaged on the project in due course.
50. No one factor is determinative by itself but taking those matters in the round I find that it was reasonable for the First Claimant to rely on the Drawings without obtaining a further survey. It was reasonable for the First Claimant to rely on the Drawings for the purpose of confirming that the Property was capable of being converted so as to accommodate eight residential units on each of the two existing floors. I also find that such reliance was reasonably to be anticipated once the Drawings had been sent in that context.
51. I do not, however, find that it would have been reasonable for the First Claimant to place reliance on the Drawings in respect of the proposed second floor or that such reliance was reasonably to have been anticipated. Indeed, there was not in my assessment of the evidence reliance in that regard in fact. It was clear from the evidence of Mr. Mines that his primary concern was the capacity of the building as it stood. He knew that it did not have a second floor and that the proposal for the creation of such a floor was a proposal and no more. Although he was interested in the prospect of creating additional space and so additional units that was not the principal reason for the approach to the Defendant. The principal reason for that approach was to obtain confirmation of what Mr. Magon had said about the existing building and it was in relation to the existing building that the First Claimant relied on the Drawings.
52. In the light of those conclusions as to the relationship between the First Claimant and the Defendant and as to the reasonableness and foreseeability of the First Claimant's reliance on the Drawings I find that there was an assumption of responsibility and that the Defendant owed the First Claimant a

duty of care in respect of the Drawings. I will turn to the extent of that duty below.

Did the Defendant owe a Duty of Care to the Second Claimant?

53. No duty was owed to the Second Claimant. The Second Claimant was not intending to purchase or develop the Property in his own capacity but through a company. I have already found that this was explained to the Defendant in the conversations on 2nd February 2016. In those circumstances to the extent that reliance on the Drawings was to be anticipated that reliance was to be by a company owned by the Second Claimant and not by the Second Claimant. It follows that the Defendant did not assume responsibility to the Second Claimant in his personal capacity in respect of the Drawings. There is an additional factor which is that to the extent that the Second Claimant was at risk of suffering loss by reason of a deficiency in the Drawings that loss would be by way of a reduction in the value of his asset of ownership of the company in question. Such loss would be irrecoverable in damages by reason of the rule against the recovery of reflective loss. Initially I was attracted by the view that the operation of the rule against reflective loss was relevant to the question of loss and not to that of the existence of a duty of care and so was not a matter for consideration in determining the preliminary issues. On reflection I have concluded that is an artificial approach. The fact that any loss which might be suffered by the Second Claimant would be irrecoverable as a matter of law has some limited relevance because it is a further factor supporting the conclusion that in the particular circumstances there was no assumption of responsibility to the Second Claimant.

The Extent of the Duty owed.

54. In the Particulars of Claim at [17] it is said that the Defendant owed a duty of care with these elements:
- “a) a duty to ensure that the Drawings accurately represented the area of the Property’s footprint and of each floor;
 - “b) a duty to ensure that the layout and area of units depicted in the Drawings was achievable at the Property.”
55. In the Defence at [22.1] the Defendant says that the duty owed to Mr. Magon was limited to preparing feasibility or concept drawings in the circumstances and for the purposes set out at paragraph 6 of the Defence. At [6] a number of qualifications are said to flow from the fact that the drawings which were provided to Mr. Magon were indicative only. The Defendant denies that any duty was owed to the First Claimant but then at [22.2] says that any such duty was limited to provided drawings which either “satisfied the purpose for which they were initially created” (namely the purpose in relation to Mr. Magon set out at [22.1] and [6]) or “represented the layout of the Property”.
56. In his skeleton argument Mr. Broomfield formulated those two limbs in slightly different terms. He said that the first was a duty of care in the provision of feasibility drawings as defined in the evidence of Mr. Vokes. The second was rephrased as “the provision of drawings for the purpose of understanding the general layout of the Property only” because that was the

only reason given for requesting the Drawings in the email of 15th February 2016.

57. Mr. Broomfield referred me to the decision of HH Judge Wilson in *Lidl Properties v Clarke Bond Partnership* [1998] Env LR 662. The conclusion on the facts in that case is of no material assistance to me but I do adopt Judge Willson's statement of the appropriate approach when he said, at 690, that "the extent of the duty will arise out of the particular circumstances [in] which the information is required and imparted". I agree. In order to determine the duty which was owed I must have regard to the detail of the context in which the Drawings were provided; the purpose for which they were provided; and the respects in which it was reasonable for there to be reliance on them. Putting the same test a little differently I must have regard to the respects in which there was an assumption of responsibility for the Drawings.
58. It is that approach which provides the answer to Mr. Broomfield's rhetorical question of why the Defendant should owe a duty to the Claimant different from or greater than that which was owed to Mr. Magon. The argument that the duty to the Claimant is confined to that which was owed to Mr. Magon would have considerable force if the claim against the Defendant was being put solely by reference to the documents which Mr. Magon had supplied to the Second Claimant. That is not the case being mounted here. Instead the Claimants rely on the relationship which arose from the dealings between the Defendant and the Second Claimant and on the Drawings which were supplied to the Second Claimant in the context of that relationship and, as I have found, with a view to them being relied on by the First Claimant.
59. Determining the extent of the Defendant's duty by reference to that relationship and to the respects in which reliance by the First Claimant was reasonable and to be anticipated results in a duty different from and arguably narrower than that alleged in Particulars of Claim but rather wider than that set out as the Defendant's fallback position in the Defence. In my judgment as the Drawings were provided with a view to them being relied on for the purpose of confirming that the Property was capable of being converted so as to accommodate eight residential units on each of the two existing floors and responsibility was assumed by the Defendant in that regard. Accordingly, the Defendant owed the First Claimant a duty of reasonable care and skill to ensure that the Drawings accurately represented the capacity of the ground and first floors in respect of the number and dimensions of the residential units which could be accommodated in them.
60. I can deal briefly with Mr. Broomfield's argument that regard is to be had to the fact that the 15th February 2016 email requested the Drawings solely for the purpose of showing the general layout of the Property. I find that is an artificially narrow approach because the 15th February 2016 email does not stand alone. Instead it is to be read in the light of the conversations of 2nd February 2016 and the Defendant's emails of 9th and 17th February 2016. When it is seen in that context the consequences already noted follow.

Conclusion.

61. Accordingly, no duty was owed to the Second Claimant but a duty was owed to the First Claimant having the scope set out in [59] above.