



Neutral Citation Number: [2018] EWHC 3623 (QB)

Case No: HQ15X02792

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 March 2018

**Before:**

**DEPUTY MASTER HILL QC**

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**Between:**

**HEIDI TOMLINSON**  
**- and -**  
**LAWVUE SOLICITORS**  
**TW SOLICITORS**

**Claimant**

**Defendants**

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**Heidi Tomlinson** (in person)  
**Peter Dodge** (for the **First Defendant**)  
**Benjamin Fowler** (for the **Second Defendant**)

Hearing dates: 7 and 12 February 2018

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**Judgment**

**DEPUTY MASTER HILL QC:**

***Introduction***

1. By this claim Mrs. Heidi Tomlinson brings proceedings against two firms of solicitors for professional negligence. The claims arise out of the subdivision of a buy to let property into two flats at 113a and 113b Imperial Road, Gillingham, Kent. Mrs. Tomlinson alleges that she funded the purchase of the freehold of the original single

property which was subsequently divided into the two flats. The freeholder was Mr. Michael Tomlinson.

2. The Second Defendant, TW Solicitors (“TW”), acted on the grant of the leases for the two flats on 1 October 2009. There is a dispute as to who they acted for: Mrs. Tomlinson asserts that it was her, but TW assert that it acted for Mr. Michael Tomlinson, not Mrs. Tomlinson. It is agreed that the First Defendant, Lawvue, acted for Mrs. Tomlinson on the subsequent grant of mortgages to be secured over the flats. The lender was Birmingham Midshires (a division of Bank of Scotland plc) and the mortgages were dated 10 February 2010 and 1 April 2010. Mrs. Omotayo Aruna-Spitaler was a partner in both Defendant firms and she had conduct of both transactions. It was necessary for Lawvue to act in respect of the mortgages element as TW was not a “panel” firm approved for such purposes.
3. After the mortgage transactions were completed, the relevant planning authority served an enforcement notice requiring the property to be returned to a single dwelling because the planning consent for the conversion into two flats had not been obtained. Mrs. Tomlinson alleges that she has suffered substantial financial losses as a result. Her case is that because of the planning enforcement issues she was not able to secure rental income from the flats; this meant she had to use her savings to repay the mortgages; this eventually proved impossible and ultimately she “lost” the flats; the Bank of Scotland placed a charge on another property from her portfolio (Eagles Close); her credit record was damaged meaning that she could not access further lines of credit and lost out on other development opportunities, specifically the Eagles Close project; and overall she has therefore lost profits and her career as a property developer.
4. The matter is currently listed for trial in early April 2018. The case came before me in early February 2018 for determination of a series of applications.

### ***The applications***

5. In total there were six applications referred to. They were, in chronological order, as follows:
  - (i) Lawvue’s application dated 31 July 2017 for relief from sanctions in relation to the late service of its witness evidence (“**application 1**”);
  - (ii) Mrs. Tomlinson’s application dated 3 August 2017 for strike out and/or summary judgment in light of Lawvue’s late service of its witness statements (“**application 2**”);
  - (iii) TW’s application dated 8 September 2017 in relation to specific disclosure and relief from sanctions/CPR 32.19 (“**application 3**”);
  - (i) TW’s application dated 3 November 2017 for strike out of and/or summary judgment on Mrs. Tomlinson’s claim on the ground that it has no real prospect of success (“**application 4**”);

- (ii) Lawvue’s application dated 16 January 2018 for strike out of and/or summary judgment on Mrs. Tomlinson’s claim on similar grounds (“**application 5**”); and
  - (iii) Mrs. Tomlinson’s application dated 29 January 2018 for permission to amend her Schedule of Loss (“**application 6**”).
6. Applications 2 and 6 did not appear to have been properly issued, sealed and served on the Defendants.
  7. In respect of application 2 there appeared to have been some confusion in the correspondence between Mrs. Tomlinson and the Court that had led to it not being properly issued. Mrs. Tomlinson was keen that I dealt with it. I heard full argument on the issues in question and counsel for Lawvue did not oppose me reaching a decision on it as it was effectively the “*flip side*” of Lawvue’s application 1.
  8. As far as application 6 was concerned, counsel for the Defendants argued that I should consider it *de bene esse*, when approaching their strike out/summary judgment applications (applications 4 and 5 above) – ie. that I should consider whether the strike out/summary judgment applications in themselves had merit, and then if I was minded to order strike out/summary judgment, consider whether if application 6 was granted, this would change my view. This seemed to me a sensible approach, not least because it was said that if strike out/summary judgment was not granted, then it was quite likely that application 6, once properly issued, would be agreed.
  9. It was agreed that application 3 was only relevant if applications 4 and 5 failed.
  10. Accordingly I have considered applications 1 and 2 first; then applications 4 and 5, (including *de bene esse* consideration of application 6); and then application 3.

***Application 1: Lawvue’s application dated 31 July 2017 for relief from sanctions in relation to the late service of its witness evidence***

11. This application was supported by the first witness statement from Christopher Lloyd, Lawvue’s solicitor. The background to the application was as follows. On 31 January 2017 Master McCloud had made a direction that witness statements (and hearsay notices where required) be simultaneously exchanged by 4 pm on 30 May 2017. By a consent order duly sealed by the Court on 26 May 2017 the parties agreed to extend time so that the date in this direction became 25 July 2017. As is usual, it was specified that pursuant to CPR 32.10 the maker of a witness statement not served in compliance with the direction may not be called to give oral evidence at trial unless the Court grants permission for the same.
12. On 11 July 2017, Lawvue’s solicitors emailed Mrs. Tomlinson asking that the deadline for exchange of witness statements be extended by a further 28 days. The same day she replied confirming her agreement to this. On 19 July 2017 TW’s solicitor emailed Lawvue confirming TW’s agreement to the extension.

Unfortunately for reasons explained by Mr. Lewis in his witness statement TW's agreement was not communicated to Mrs. Tomlinson before 4 pm on 25 July 2017. Mrs. Tomlinson understood that 25 July 2017 remained the deadline for exchange. She provided her witness statements in compliance with this deadline but the Defendants did not. She then issued her application 2.

13. The issues came before Master McCloud at a hearing on 21 August 2017. She directed that TW serve its witness evidence by 4 pm on 25 August 2017 and Lawvue do the same by 4 pm on 29 August 2017. Apparently accepting that it had been Lawvue's responsibility to communicate TW's agreement to the extension of time to Mrs. Tomlinson (and not TW's), she granted TW permission to call at trial the makers of those statements. Lawvue's application for an order in similar terms was adjourned. The Defendants duly complied with the new timetable for disclosure of witness statements.
14. Before Master McCloud, it was argued on Lawvue's behalf that their solicitor's email exchange with Mrs. Tomlinson agreeing to extend time amounted to a valid agreement for the purposes of CPR 3.8(4) notwithstanding the TW "*element*", such that they were not in breach of any rule and did not require relief from sanctions.
15. It was argued before me that the case for relief from sanctions was overwhelming. Applying the well-known principles set out in *Denton v T H White Ltd* [2014] 1 WLR 3926, it was said that (i) the failure to comply with the direction of Master McCloud was neither serious nor significant given that Mrs. Tomlinson had herself readily agreed to the extension of time in the first place; (ii) there had been a single inadvertent error namely the failure to communicate TW's written agreement to Mrs. Tomlinson and the reasons for this were innocent and understandable (the solicitor's absence on annual leave); (iii) Mrs. Tomlinson had failed to enquire as to whether or not time had indeed been extended by the agreement of both Defendants; (iv) even if she was justified in simply serving her own witness evidence without first checking the arrangements for exchange, no harm had been done because both the solicitors had confirmed that her witness statements had been returned to her unread, nor had she suffered any further prejudice; (v) it would be wholly disproportionate and unjustifiable for a law firm to be denied the opportunity to call as a witness the person with conduct of the relevant transactions; (vi) it would be absurd if Mrs. Aruna-Spitaler was permitted to give evidence in defence of one claim but not the other (TW having been given permission to rely on her evidence: see above); and (vi) the default has had little if any effect on the course of the proceedings.
16. In response Mrs. Tomlinson argued that (i) she had been prejudiced by this course of events as the Defendants had had longer to prepare their witness evidence than she had had; (ii) the delay had impacted unfairly on her ability to prepare her Schedule of Loss, because the Defendants had not informed her that the time for the schedule should be extended consequential to the extension of time for witness evidence; and (iii) overall she said that she had been put to additional expense, stress and cost by Lawvue's default, which had impacted on her particularly severely given that she is a litigant in person.

17. On balance I prefer the arguments advanced on Lawvue's behalf in support of their application. If the agreement reached between Lawvue and Mrs. Tomlinson did not amount to a valid agreement to extend time for the purposes of CPR 3.8(4), then I am satisfied that the case for relief is made out for the reasons Lawvue gave. I am not satisfied that any prejudice caused to Mrs. Tomlinson by this series of events justifies denying Lawvue relief from sanctions. Specifically it seems to me that her argument that this chain of events prejudiced her in the preparation of her Schedule of Loss is problematic given that (i) she had provided a preliminary Schedule of Loss with the Particulars of Claim; (ii) applications 4 and 5 rely on heads of claim in the Schedule of Loss and not specific figures relating to those heads of claim; and (iii) application 6 illustrates that the schedule is still not in final form even now.
18. Accordingly I allow what remains of application 1 and order that Lawvue has permission to call at trial to give oral evidence the makers of any signed statements exchanged in accordance with paragraph 3 of the order of Master McCloud dated 22 August 2017.

***Application 2: Mrs. Tomlinson's application dated 3 August 2017 for strike out and/or summary judgment in light of Lawvue's default with respect to witness statements***

19. This draft application was supported by a witness statement from Mrs. Tomlinson and responded to by the second witness statement from Mr. Lewis.
20. In support of her application for an order for strike out/summary judgment against Lawvue, Mrs. Tomlinson argued that (i) without the ability to rely on witness evidence, Lawvue had no valid defence; (ii) there is a reason to question the reliability and authenticity of Lawvue's Defence dated 9 December 2015 as Mrs. Aruna-Spitaler had apparently denied input into it; and (iii) this and various other apparent contradictions in the Defendants' positions raised questions about potential contempt of court such that strike out/summary judgment against Lawvue was merited.
21. Lawvue argued in response to this application that (i) CPR 32.10 provides that the sanction for failure to serve witness statements on time is the inability to rely on the evidence at trial, and there is no need or justification for any other sanction; and (ii) even if Lawvue was prevented from adducing oral evidence at trial it does not follow that their defence would fail given the contemporaneous documentary evidence on which they could rely.
22. As to the application for strike out, although she did not formulate it specifically in these terms, Mrs. Tomlinson's position was to the effect that Lawvue's actions with respect to witness evidence was such a serious abuse of process that strike out was merited. I do not accept this: as I have said above I consider that the reasons for the delayed service were understandable, and so there has been no abuse let alone abuse so serious that strike out (a remedy of last resort) is merited.
23. Alternatively, Mrs. Tomlinson sought strike out/summary judgment on the basis that absent permission to rely on oral evidence, Lawvue had no ability to defend the claim. I have now ordered in response to application 1 that Lawvue can rely on oral evidence

and so that point falls away. In any event I would have accepted that even without such oral evidence, there are points that Lawvue could make on the documents to seek to defend in the claim.

24. Accordingly I dismiss application 2.

***Application 4: TW's application dated 3 November 2017 for strike out and/or summary judgment on the ground that the Claimant's claim has no real prospect of success***

25. By this application TW argued that Mrs. Tomlinson's Particulars of Claim and Schedule of Loss should be struck out and/or summary judgment granted for TW. This application was supported by a witness statement from William Sefton, TW's solicitor.

*The legal framework*

26. In respect of the application for strike out TW relied on CPR 3.4(2)(a), which permits a court to strike out a statement of case which "*discloses no reasonable grounds for bringing....the claim*". The White Book at paragraph 3.4.1 makes clear that grounds (a) (and (b)) cover statements of case which are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and other cases which do not amount to a legally recognisable claim or defence.

27. In respect of the summary judgment application, the power to make such an order is set out in CPR 24.2, which permits a court to give summary judgment against a claimant on the whole of a claim or on a particular issue if – (a) it considers that 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*". As to this provision, the relevant legal framework was recently summarised by Lewison J in *EasyAir Limited v Opal Telecom Ltd.* [2009] EWHC 339 (Ch) at paragraph 15, thus:

- (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; and
  - (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.
28. The application notice had referred, in bold text, to CPR 24.5(1), providing that if Mrs. Tomlinson wish to rely on evidence at the hearing of the application, she should file and serve it at least 7 days before the hearing,
29. TW also relied on *Sainsbury's Supermarkets Limited v Condek Holdings Ltd and Others* [2014] EWHC 2016 (TCC) per Stuart-Smith J for the proposition that where a party making such an application has raised an issue and adduced credible evidence in relation to that issue, the respondent comes under an evidential burden to prove that their claim has a realistic prospect of success.

*TW's arguments on application 4*

30. In summary, TW's position was that strike out or summary judgment was merited on the basis that Mrs. Tomlinson has no reasonable prospect of proving that the alleged

losses were caused by any breach of duty by TW. Specific arguments were advanced with respect to (i) breach of duty; and (ii) causation and loss.

(i) *Breach of duty arguments*

31. The broad allegation of breach of duty made against TW is that they “*failed to protect the leasehold properties, as was previously agreed with Mr. Victor Tomlinson and the Freeholder (Mr. Michael Tomlinson) and as result the flats had to be converted back to one single dwelling at the expense of the claimant*”. This is found in paragraph 32 of the Particulars of Claim, albeit under a section headed ‘*Causation/losses*’. It was nevertheless agreed, as is appropriate, that for the purposes of these applications Mrs. Tomlinson’s claim at its highest should be considered.
32. Again taking a broad approach to Mrs. Tomlinson’s pleaded case, it is understood that the “*failure to protect*” alleged is that TW’s Mrs. Aruna-Spitaler provided advice that insurance could be purchased which would provide cover if the house was converted into flats without planning permission, to protect against planning enforcement action; and then TW failed to take out this indemnity insurance.
33. As indicated above there is an issue in this claim as to who TW’s retainer was with, in that Mrs. Tomlinson asserts that TW understood at all times that it was acting on her behalf, but TW asserts that it acted for Mr. Michael Tomlinson, not Mrs. Tomlinson. TW does not rely on this issue in support of its application for strike out/summary judgment as it accepted that it turns on competing constructions of the evidence, including disputed documents.
34. However, it was argued by TW that even if TW’s retainer was with Mrs. Tomlinson (i) there can be no duty to provide advice as to the existence of such indemnity insurance, or to fail to obtain it, as such insurance does not exist; and (ii) advising on the lack of protection against planning enforcement could not have been within the “*reasonable contemplation*” of the parties at the outset of the retainer, that being the applicable test (*Wellesley Partners LLP v Withers LLP* [2016] 2 WLR 1351 CA per Floyd LJ at paras. 74-80).

(ii) *Causation/loss arguments*

35. Under this head TW argued that (i) Mr. Victor Tomlinson, acting as Mrs. Tomlinson’s agent, accepts that he knew that there was no planning permission in place before carrying out the conversion works and so any breach of duty by failing to advise as to the lack of planning permission has caused no loss; (ii) Mrs. Tomlinson paid nothing for the leases and so has suffered no loss by entering into them and/or or as she paid for the freehold, has a beneficial interest in the freehold reversion by way of presumed resulting trust, the value of which is unaffected by the ‘loss’ of the leases; (iii) it cannot be liable for the cost of refurbishment/renovation as protecting the flats from enforcement action was not part of its duty (see above) and on the evidence it had no reason to believe that Mrs. Tomlinson was paying for any conversion works or that any such material works were being undertaken; (iv) this is not the sort of contract in relation to which damages for distress or inconvenience can be recovered as it was not



a contract to provide pleasure, relaxation of peace of mind (*Johnson v Gore Wood Co (A Firm)* [2002] 2 AC 1 at 37E-D, per Lord Bingham); and (v) any costs are not recoverable as damages but only in accordance with CPR 46.5.

*Mrs. Tomlinson's arguments on application 4*

36. Mrs. Tomlinson argued, in summary, that (i) there is a dispute of evidence as to whether Mrs. Aruna-Spitaler did provide advice that such indemnity evidence was available and her case is that such advice was indeed given; (ii) if, as Mr Sefton says in his evidence, such indemnity insurance is not in fact available, that shows that the advice she was given was negligent; (iii) the document dated 17 September 2009 which refers to a lack of conversion works is one of the disputed documents; (iv) Mrs. Aruna-Spitaler knew the background to all the transactions and so the losses flowing from her advice were foreseeable; and (v) in terms of causation, the decision to convert the flats was only made as a result of the advice in question from Mrs. Aruna-Spitaler, and the conversion led to the planning enforcement action and subsequent losses.

The losses claimed against TW on page 11 of the Particulars of Claim are (i) £180,000 to replace the “lost” flat; (ii) £60,000 for the cost of converting the property into two flats; and (iii) £7,000 of the cost of re-converting the property back into one dwelling. The Schedule of Loss dated 10 August 2017 added a claim for (iv) £180,000 in litigant in person costs and damages including for distress and inconvenience, £500 in travel costs and £600 in administration costs, to be apportioned between TW and Lawvue. It also changed the figure for the “lost” flat to £450,000 to replace both “lost” flats.

*Discussion and conclusions*

37. TW was plainly correct not to rely on the evidential dispute over who their retainer was with for the purposes of this application: that is a matter properly for trial and one that is not capable of summary determination (*Swain*).
38. Assuming for present purposes that the retainer was with Mrs. Tomlinson, then the scope of the retainer and the extent of the duty of care are key issues.
39. The retainer with TW was for the purposes of the grant of the leases. Whether or not there was any breach, this was not a contract to provide pleasure, relaxation of peace of mind (*Johnson*) and so in my view it is clearly appropriate to strike out that part of Mrs. Tomlinson's claim which refers to damages for distress or inconvenience, as TW assert. It is also appropriate to strike out the elements of the Schedule of Loss that refer to a claim for costs as those should be sought in accordance with the normal CPR provisions, but not as damages.
40. The issue of whether or not TW owed Mrs. Tomlinson a duty in respect of the indemnity insurance is, in my view, more complex. The test for the scope of the retainer is the “reasonable contemplation” one referred to above (*Wellesley Partners LLP*). It has also been said that it is implicit in a solicitor's retainer that s/he will be expected to proffer advice which is “reasonably incidental” to the work being carried

out; and that in determining what is reasonably incidental, regard must be had to all the circumstances of the case, including the character and experience of the client (*Minkin v Landsberg (Trading as Barnet Family Law)* [2015] EWCA Civ 1152, at paragraph 38).

41. Applying those principles to the situation here, Mrs. Tomlinson's case is that Mrs. Aruna-Spitaler was fully apprised of the background circumstances, and that the indemnity insurance issue was inextricably linked with the decision to convert the property and thus require the leases. Mrs. Tomlinson was, however, someone who had some experience of property development. On balance it seems to me that whether in this case it can be said that provision of advice on the indemnity insurance issue was within the "*reasonable contemplation*" of the parties and/or was "*reasonably incidental*" to the work being carried out is a fact-sensitive one, that cannot be resolved on a summary basis, not least in light of the other elements of disputed evidence such as the contents of the 17 September 2009 file note (which is said to prove that no such advice would have been given, but is disputed by Mrs. Tomlinson) and the need to have regard to all the circumstances (per *Minkin*). Moreover while it may be right that advice on indemnity insurance would not generally be expected in relation to advice on leases, the legal issue of whether that position is changed by Mrs. Aruna-Spitaler's alleged decision to provide positive, albeit incorrect, advice on the insurance issue (which may or may not have led to an assumption of some responsibility) was not fully explored before me. Overall therefore it does not seem to me that it can fairly be said at this stage that Mrs. Tomlinson has no reasonable prospects of success on this issue.
42. If there was such a duty in existence, then in my view whether it was breached is also a matter for trial in light of the conflicting evidence as to whether Mrs. Aruna-Spitaler did indeed provide positive advice about the ability to obtain indemnity insurance.
43. The issue of whether, assuming any such breach is shown, Mrs. Tomlinson can prove that she has suffered any recoverable financial losses, also seems to me one that cannot be determined in a summary way: she has argued what she presents as a line of causation between the provision of the incorrect advice and her financial losses, and while TW have averred, for example, that the chain of causation is "*broken*" by Victor Tomlinson's evidence that he proceeded in the knowledge that there was no planning permission in place, these issues are, in my view, ones properly for trial.
44. Accordingly I allow TW's application for strike out/summary judgment only insofar as I consider it appropriate to strike out those elements of Mrs. Tomlinson's claim that relate to costs and damages for distress or inconvenience.

***Application 5: Lawvue's application dated 16 January 2018 for strike out and/or summary judgment on the ground that the Claimant's claim has no real prospect of success***

45. The legal framework governing this application is as set out above in relation to application 4.

*Lawvue's arguments on application 5*

46. The application was supported by the third witness statement of Mr Lewis and the arguments made therein were developed further by Lawvue's counsel in written and oral argument.
47. It was argued that (i) a solicitor is not a general adviser on matters of business unless he specifically agrees to act in that capacity, and as such it not generally under a duty to advise whether, legal considerations apart, the transaction which he is instructed to carry out is a prudent one (Jackson & Powell on Professional Liability, 8<sup>th</sup> Edition, 2017, paragraph 11-176); and (ii) Lawvue was not instructed to advise on the business wisdom of the mortgage transactions.
48. However for the purposes of the application Lawvue:
  - (i) Accepted the arguability of Mrs. Tomlinson's case on liability, namely that Lawvue should have warned her that (i) it was not retained to advise on whether the house had been converted without planning consent and that (ii) if it had been so converted, the leases would be unlikely to be regarded as adequate security by a potential lender and there would be a risk of enforcement action by the planning authority; and
  - (ii) Accepted the arguability of Mrs. Tomlinson's factual case on causation, namely that had she been so advised the mortgage transactions would not have taken place.
49. The thrust of Lawvue's application was therefore in relation to the various heads of claim advanced. Lawvue argued that each head of Mrs. Tomlinson's claim should be struck out and/or summary judgment granted for them, in summary, on the basis that each head is (i) irrecoverable as a matter of law; or (ii) does not take account of benefits received by Mrs. Tomlinson. On that basis it was argued that Mrs. Tomlinson had no claim at all against Lawvue or one with such a nominal value that it would be an abuse of the court's process for her to be permitted to continue it.
50. Specifically, Mr Lewis's statement argued that (i) Mrs Tomlinson's claim relating to the mortgage instalments was flawed as this was the inevitable consequence of her having received the mortgage capital sums; (ii) the alleged disruption to the rental streams, the retrospective planning costs and the architects' costs were caused by Mrs. Tomlinson having taken on two defective leases in the first place (which was nothing to do with Lawvue), not by her mortgaging them (which was the area in which Lawvue were involved); (iii) the claims for £1,300 in legal fees to Lawvue would only be recoverable if there had been a total failure of consideration, which there had not been; it was not clear what the claim for other legal fees related to; and the general claim for legal costs, distress etc were irrecoverable for the reasons advanced by TW on application 4; and (iv) her claims for lost opportunity and loss of her career as a property developer and that of her husband did not have reasonable prospects of success given difficulties over causation, foreseeability and showing that the losses were within the scope of Lawvue's duty.

51. Counsel for Lawvue referred to *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, CA in support of the proposition that mere acceptance of a mortgage loan, as Mrs. Tomlinson had done, cannot amount to a loss.
52. Reliance was also placed on *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029 for the distinction between “*advice*” cases and “*information*” cases. The latter are said to apply where a professional adviser contributes a limited amount of material on which his client will rely in deciding whether to enter into a prospective transaction but the process of identifying the other relevant considerations and the overall assessment of the commercial merits of the transaction are exclusively matters for the client or possibly his other advisers. In such cases the defendant’s legal responsibility does not extend to the decision itself. It follows that even if the material which the defendant supplied is known to be critical to the decision to enter into the transaction he is only liable for the financial consequences of its being wrong and not the financial consequences of the claimant entering the transaction so far as these are greater. Otherwise the defendant would become the underwriter of the financial fortunes of the whole transaction by virtue of having assumed a duty of care in relation to just one element of someone else’s decision. Whether this principle was described as defining the scope of the duty or the extent of the liability for breach of it did not alter the way in which the principle operated. It was argued that Mrs. Tomlinson’s was an “*information*” case; that at best the failure to provide her with the information in question led to her accepting the mortgage loan; that this merely gave an opportunity for the losses to be sustained; and that any recoverable loss cannot exceed that attributable to Mrs. Tomlinson having accepted the loan which, per *Galoo*, must be nil.
53. Further, it was argued that (i) in terms of causation the point was stressed that Mrs. Tomlinson’s alleged inability to meet the mortgage obligations due to the disrupted rental streams was not caused by any actions of Lawvue but by the defective leases; (ii) the expenditure directly associated with the lack of planning consent was also said to be nothing to do with the mortgages; (iii) the claims for loss of profit etc were challenged on the grounds of causation, plausibility and foreseeability; and (iv) the same points about damages for distress and costs made by TW should lead to strike out/summary judgment on those claims.

*Mrs. Tomlinson’s arguments on application 5*

54. Mrs. Tomlinson’s arguments on this application can be summarised thus:
  - (i) Mrs. Aruna-Spitaler acted on both the leases and the mortgage transactions and was well aware of all the issues. She was therefore well aware of the lack of planning permission on the flats and so was under a duty to advise on the business wisdom of the mortgage transactions, specifically the problems that would be caused by the lack of planning permission, and thus the lack of good security in the flats;
  - (ii) Mrs Aruna-Spitaler and this Lawvue’s negligence was clear – they had failed to tell her or the Lender of the lack of planning permission, and thus the lack

of good security in the flats. They had therefore failed to comply with the requirements of the Law Society's Green Card guidance, the CML lender's handbook and the applicable CML Rule.

- (iii) The Bank of Scotland had said that no competent solicitor would have provided Certificates of Title in the circumstances that were present here, and that had they known of the full situation they would not have advanced the loan monies;
- (iv) It was indeed Lawvue's negligence that meant she had no rental income vehicle to pay back the mortgage loan;
- (v) The losses she had suffered due to Lawvue's negligence were foreseeable as Mrs. Aruna-Spitaler was well aware that she and Victor Tomlinson were property developers. They had an informal relationship as the correspondence showed. Mrs. Aruna-Spitaler would have known that if Mrs. Tomlinson could not arrange an adequate income vehicle to pay back the mortgage loan should not be able to make her monthly payments and would thus have a damaged credit rating;
- (vi) It was not fair to seek to strike out her Schedule of Loss given the pressure placed on her to prepare it caused by the delay in exchange of witness statements (see applications 1 and 2 above) and given that some of the figures still needed to be revised (see application 6); and
- (vii) The related proceedings between the Bank of Scotland and Lawvue had recently been settled.

*Discussion and conclusions*

- 55. As indicated above for the purposes of this application Lawvue accepted the arguability of Mrs. Tomlinson's case on duty of care and breach of that duty, as well as her factual case on causation (subject to its argument that any losses caused (i) would, in any event, as a matter of law, have fallen outside the scope of its duty: the *Hughes-Holland* point; and (ii) were caused by TW, not Lawvue). Accordingly the only issue for me to determine is whether those elements of loss which she says were caused by Lawvue's negligence should, as a matter of law, be struck out or summary judgment granted for Lawvue on them.
- 56. As to this issue, Lawvue's counsel helpfully grouped the various heads of loss claimed against Lawvue under four headings, which I adopt and consider in turn.
  - (i) *Expenditure directly associated with the mortgage transactions*
- 57. As far as I understand it this heading covers the monies which Mrs. Tomlinson had to pay from her savings to service the mortgages, in the absence of a rental income vehicle to pay back the mortgage loan.

58. Lawvue's primary case on this heading relies on *Galoo*. *Galoo* makes clear that a claimant can recover damages for breach of contract where it is the dominant or effective cause of the claimant's loss and not if it has merely give the opportunity for the loss to be sustained. Here, Lawvue argue that Mrs. Tomlinson's claim falls into the second, "*opportunity*" category. However Mrs. Tomlinson's argument, to the effect that her claim falls into the first category, is not in my view so obviously weak that strike out/summary judgment is justified: rather in my view it is for the trial judge having considered all the evidence to determine whether any proven negligence by Lawvue was indeed the "*dominant or effective cause*" of any losses by Mrs. Tomlinson.
59. Alternatively, Lawvue argues that Mrs. Tomlinson's alleged losses caused by the disruption to the rental income stream (which led to her having to pay the mortgages herself) was entirely unrelated to their actions, but attributable to her own earlier acquisition of defective leases. While I see the force in Lawvue's argument, again in my view the evidence and arguments are not so clear cut that strike out or summary judgment is merited. Accordingly I consider that this is also an issue for trial.
- (ii) *Expenditure directly associated with the lack of planning consent*
60. This heading covers the retrospective planning receipt and the architects' fees. I agree with the arguments advanced by Lawvue in respect of these items that taking Mrs. Tomlinson's case at it highest they can only relate to the actions of TW. Accordingly insofar as they are claimed against Lawvue they are struck out.
- (iii) *Claims for loss of profit etc*
61. Lawvue argued that the claims for "*loss of profit etc*" (namely the claims for "*missed opportunity*", loss of profit and impairment of credit rating) should be struck out on grounds of causation, plausibility and foreseeability.
62. Having considered the competing arguments I have concluded that these claims should not be struck out nor summary judgment be granted on the basis of the causation arguments advanced by Lawvue. I agree with Lawvue's counsel that the pleading as to causation is a little unclear (he described it as "*at best sketchy*"), but Lawvue has accepted for the purposes of this application that factual causation is made out, and indeed that Mrs. Tomlinson may have avoided some loss of profits "*but for*" entering into the mortgages. More specifically as I have said above I consider that the issue of what caused the disruption to the rental income stream is one fit for trial.
63. As to plausibility, I agree with Lawvue's counsel that there are elements of the claim, such as what happened to the mortgage monies, which continue to remain a little unclear; and the pleaded losses are high relative to the initial mortgage values, but these issues do not in my view justify strike out or summary judgment, especially given the concession that some loss of profit may have been suffered by Mrs. Tomlinson. Whether that was so, and if so who much profit was lost, is a matter to be determined at trial.

64. As to foreseeability, as Lawvue’s counsel set out, (i) the test in a contract claim is whether a reasonable person in the position of the contractbreaker would have had damage of that kind in mind as not unlikely to result from the breach; (ii) the test in a tort claim is whether at the time the breach was committed the damage or at least the type of damage must have been a reasonably foreseeable consequence; and (iii) if both contractual and tortious duties are owed, the relevant test for recovery of economic loss is the contractual one. Given that Lawvue has accepted that Mrs. Tomlinson may be able to show some loss of profit by the alleged breaches (see above), it seems to me that they have effectively accepted the arguability of her having suffered this type of damage and thus it being foreseeable. In addition if the test is that of a reasonable person in the position of the contractbreaker, regard may well need to be had to Mrs. Tomlinson’s evidence that the alleged contractbreaker here (Lawvue, through Mrs. Aruna-Spitaler) was someone who had a clear understanding of her business arrangements and the potential losses to her if the mortgage arrangements went “*wrong*”. Accordingly I do not consider that the test for strike out or summary judgment is met on these grounds either.

(iv) *Claims for costs etc*

65. The claim for “*costs etc*” (namely the legal costs, litigant in person costs, inconvenience, distress, travel and administration costs) should in my judgment be struck out for the same reasons as are given above in relation to TW.

#### *Conclusion*

66. Overall therefore I allow this application insofar as it relates to the claims for “*expenditure directly associated with the lack of planning consent*” and for “*costs etc*” as defined above which should be struck out.

#### ***Application 6: Mrs. Tomlinson’s application dated 29 January 2018 for permission to amend her Schedule of Loss***

67. I do not consider that application 6 makes any difference to the outcome of applications 4 and 5. If Mrs. Tomlinson wishes to proceed with it in light of what remains of the claim, then it will need to be properly issued and progressed. It may be capable of agreement.

#### ***Application 3: TW’s application dated 8 September 2017 in relation to specific disclosure and relief from sanctions/CPR 32.19***

68. This application was supported by an exhibit of documents and responded to by a statement from Mrs. Tomlinson dated 4 November 2017.

#### *The specific disclosure issue*

69. On this aspect of the application, it was argued that (i) Mrs. Tomlinson was in breach of paragraph 3 of the directions order made by Master McCloud on 10 May 2017, which required her to disclose any emails, text messages, WhatsApp communications, Facebook messages or other electronic communications between herself and Mr.

Michael or Mr. Victor Tomlinson concerning the creation of the leases; (ii) her disclosure statement made clear that she had not carried out a CPR-compliant search for relevant material as she had not searched computers and similar devices but had only searched for printed e-mails; and (iii) she had failed to include within her list of documents any documents that were but are no longer in her control, contrary to CPR 31.8(1).

70. TW said that the above material was fundamental to resolving a key dispute in the claim against them, namely “*the existence, nature and extent of the duty owed by the Second Defendant to the Claimant*” (as opposed to Mr. Michael Tomlinson). TW sought an order that (i) Mrs. Tomlinson be required to comply with paragraph 3 by a certain date; (ii) if she could only comply with it in any respect, she provide a witness statement explaining why; and (iii) her claim be struck out if she failed to comply with either (i) or (ii).
71. In response Mrs. Tomlinson appeared to question the basis on which Master McCloud had made the order she had, but said, in effect, that she had already explained the difficulties in securing access to her email accounts and other reasons why she had not provided disclosure or listed the material in question. She also referred to the cost of securing the services of a forensic computer expert to assist in this regard.
72. On balance in light of the centrality of the issue of who the retainer was with, and the potential evidence identified that might bear upon it, I consider that TW are entitled to the order they seek for the reasons given in the evidence in support of the application and the written and oral arguments.

*The CPR 32.19 issue*

73. Finally TW sought relief from sanctions under CPR 3.9 for its late service of its notice to prove documents under CPR 32.19.
74. CPR 32.19 provides that a party is deemed to admit the authenticity of a document unless he serves a notice that he wishes the authenticity of the document to be proved at trial.
75. Mrs. Aruna-Spitaler’s second witness statement at paragraphs 19-20 made clear that she disputed the authenticity of the invoice for £400 on which Mrs. Tomlinson relies as evidence of a retained with her. However no notice under CPR 32.19 was served when it should have been, namely at the latest on 25 August 2017 (the last date for exchange of witness statements). The application for relief from sanctions was made on 8 September 2017.
76. Mrs. Tomlinson opposed the grant of relief from sanctions for TW on this issue on the basis that no good reason for the default had been given.



77. I accept the arguments advanced by TW to the effect that (i) the breach was due to an oversight and was remedied shortly thereafter; (ii) Mrs. Tomlinson was well aware that the invoice was disputed; (iii) relief would have no further impact on the claim; and (iv) it would be artificial and unjust not to permit them to contest the validity of the invoice when that was clearly their case on the witness evidence.
78. Accordingly I grant TW relief from sanctions in respect of the CPR 32.19 issue.

***Consequential matters***

79. On receipt of my draft judgment on these issues Mrs. Tomlinson submitted a “*Reply*” to the draft judgment inviting me to reconsider my decision in various respects. I declined to consider this document as it appeared to be focused on persuading me to change my mind before judgment was handed down.
80. If Mrs. Tomlinson or either Defendant wishes to seek permission to appeal any part of my judgment from me they should make written submissions to that effect, addressing the appropriate provisions of the CPR, in the usual way.
81. I received various written submission on costs.
- (i) *Costs issues as between Mrs. Tomlinson and Lawvue*
82. On application 1, Lawvue argued that although the need for the application arose from a mistake on the part of its solicitors, there had been ample opportunity for Mrs. Tomlinson to prevent costs escalating by agreeing the application, not least in light of the earlier hearing before Master McCloud on 21 August 2017. Ultimately the application had succeeded, and as such Lawvue argued that costs should follow the event and that Mrs. Tomlinson should be ordered to pay their costs. In summary it was said that this was “*an initial trifling error*” which had been escalated into a costly dispute. If the Court was persuaded that there should be some percentage deduction from Lawvue’s costs to reflect the original error, this should be extremely modest. Mrs. Tomlinson argued that as the initial breach had been Lawvue’s, it should pay its own and her costs. She argued that Lawvue had caused significant increased costs and inconvenience to the Court and all parties through their “*litigation inefficiency*”. I prefer Lawvue’s submissions on this issue. I consider that Mrs. Tomlinson should pay their costs on this application for the reasons given by Lawvue’s counsel.
83. In respect of application 2, Lawvue argued that insofar as it was ever properly issued there was no basis for it and that there can be no doubt that Mrs. Tomlinson should pay their costs of it. Mrs. Tomlinson argued that Lawvue should pay her costs of the application as it was their breach of the directions order and litigation inefficiency which necessitated the application. I disagree. In my view the general approach should apply and Mrs. Tomlinson should be ordered to pay Lawvue’s costs on application 2.
84. In respect of application 5, Lawvue argued that the purpose of the application had always been to reduce the pleaded quantum of the claim and that significant elements of the pleaded heads of loss had been struck out by me. On that basis Lawvue argued

that I should (i) order Mrs. Tomlinson to pay its costs of the application albeit with some percentage deduction of, no more than, say, 30%, to reflect the fact that it was not entirely successful; or (ii) reserve costs to the trial judge on the basis that only at the end of the trial could the suggestion that Mrs. Tomlinson has pursued a vastly over-inflated claim be properly determined. Mrs. Tomlinson argued that the costs should be apportioned due to the fact that the application only partly succeeded and should also be “*costs to the case*” as she could not meet the financial burden of a costs order at this time.

85. I am satisfied that it is appropriate to make a costs order now and not to defer this issue to the trial judge. I consider that Lawvue succeeded in part on its application and succeeded in striking out two of the categories of loss that were in issue. However the arguments on the remaining two categories, on which Lawvue lost, took considerably more time. Overall I consider that the appropriate order is that Mrs. Tomlinson pay 30% of Lawvue’s costs of application 5. I do not consider it appropriate to defer the usual terms for payment of costs in light of Mrs. Tomlinson’s circumstances.
86. In further correspondence after Mrs. Tomlinson lodged her Reply document, Lawvue argued that I should make costs orders in respect of applications 1, 2 and 5 on an indemnity costs basis. It appears from further correspondence from Mrs. Tomlinson that the Reply document was borne out of her misunderstanding as to what consequential matters she was permitted to address upon receipt of the draft judgment. I am not satisfied that this or any other aspect of the case meets the “*out of the norm*” threshold for an order that she pay Lawvue’s costs on an indemnity basis.
87. Overall therefore my order is that Mrs. Tomlinson pay Lawvue’s costs on applications 1 and 2, and 30% of their costs on application 5, on a standard basis.
88. As to Mrs. Tomlinson’s costs of application 5, she has submitted a schedule of her costs on each application including application 5. I consider that she effectively won the majority of this application and so should be awarded 70% of her costs in accordance with the provisions set out in CPR 46.5.
- (ii) *Costs issues as between Mrs. Tomlinson and Lawvue*
89. As to application 3, that in relation to specific disclosure and relief from sanctions/CPR 32.19, TW succeeded in full. On that basis TW argued that it was plainly entitled to its costs. Mrs. Tomlinson argued that TW should pay its own costs of the application and her own costs, on the basis that this was an unnecessary application with regards to disclosure, causing her costs and inconvenience; and the sanctions application was only required because of their own administrative inefficiency.
90. I accept TW’s submissions on this issue. I conclude that Mrs. Tomlinson should pay TW’s costs of application 3 in full given that TW succeeded in full on it.
91. As to application 4, TW succeeded in part as set out above. TW argued that it should be awarded a proportion of its costs to reflect its success in reducing the claim; alternatively, as Lawvue had advanced, the issue should be reserved to the trial judge.

Mrs. Tomlinson argued as with application 5 that there should be apportionment and a delay in any order for payment given her circumstances.

92. Having considered all the arguments my conclusion is that Mrs. Tomlinson should pay 30% of TW's costs on application 4; and that TW should pay 70% of Mrs. Tomlinson's costs on application 4, on a standard basis.
93. I will allow a brief period of time for the parties to seek to agree the costs figures failing which I will proceed to summary assessment of them.