



Neutral Citation Number: [2023] EWHC 624 (Comm)

Case No: LM-2022-000088

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING’S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2023

Before :

MS CLARE AMBROSE
Sitting as a Deputy High Court Judge

Between :

(1) OXFORD PROPERTY INVESTMENTS LIMITED
(2) SAPPHIRE DEVELOPMENTS SOLIHULL LIMITED
- and -
PETER LYNN & PARTNERS
(a firm)

Claimants

Defendant

Christopher Bond (instructed by **DLA Piper UK LLP**) for the **Second Claimant**
Nigel Tozzi KC (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 21 February 2023

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MS CLARE AMBROSE

This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 22 March 2023 at 10:30am.

Ms Clare Ambrose:

Introduction

1. This is the hearing of a number of applications relating to claims made by the Second Claimant against the Defendant for negligence in acting as its former solicitors. The damages at stake are currently estimated as being up to £21.5 million.
2. The Defendant was instructed to act in the purchase of a property in Solihull called Sapphire Court (“the Property”) and damages are claimed in respect of that transaction. By its application to amend the Second Claimant now seeks to make a claim for loss of anticipated profits on the residential development of two other properties, known as Oaklands (in East Sussex) and Newbury (in Newbury).
3. There are three live applications before me:
 - a) the Defendant’s application that the claim by the Second Claimant for loss of profits be summarily dismissed under CPR Part 24 (dated 26 October 2022);
 - b) the Second Claimant’s application to amend its amended particulars of claim (dated 19 December 2022);
 - c) the Defendant’s application for security for costs (dated 26 October 2022).
4. The issues in dispute are essentially whether the Second Claimant has a real prospect of success on its claims for loss of anticipated profits on the three properties, and whether security for costs should be provided by way of payment into court or a guarantee from related companies.

The procedural background

5. The claim was issued on 26 April 2022 by both the First Claimant (“OPI”) and the Second Claimant (“Sapphire”).
6. On 26 October 2022 the Defendant issued an application (together with the application for summary judgment referred to above) that the claims made by OPI be struck out under CPR Rule 3.4(2)(a), alternatively summarily dismissed under CPR Part 24.
7. On 11 November 2022 the First Claimant filed a notice of discontinuance of all its claims under CPR Part 38. It is common ground that OPI no longer makes any claim against the Defendant. This means that in practical terms for this hearing, the Defendant’s application to strike out claims made by the First Claimant is no longer in issue since those claims are no longer pursued.

The existing claim and the amended claim

8. Given that a large part of the applications depended on the merits and basis of the claim (and also the amendments put forward) it is perhaps useful to outline what is claimed (including the case that Sapphire has put forward in its re-amended case following OPI’s discontinuance) and the amendments put forward.

9. Both Claimants are property development companies. Sapphire is a wholly owned subsidiary of OPI. The managing director of both Claimants is Mr Shaun Savage.
10. Sapphire's case is that in 2017 and 2018 Mr Savage regularly instructed the Defendant to act for OPI or its subsidiaries on property transactions. In late 2017 OPI was introduced to the opportunity to purchase the Property. In November 2017 OPI instructed the Defendant to act for the special purpose vehicle that would be incorporated to purchase the Property. On 20 December 2017 Sapphire was set up as an SPV to purchase and develop it.
11. On 6 March 2018 Sapphire exchanged on a contract to purchase the Property and paid a deposit of £600,000. The completion date was set as 29 May 2018 (and subsequently deferred to 12 June 2018).
12. On or shortly before 12 April 2018 Sapphire (through Mr Savage) made a non-binding oral agreement in principle with another developer Mr John Downer under which it would be paid a finder's fee of £1 million plus VAT. On the pleadings there is an issue as to whether it was agreed on 12 April 2018 that a finder's fee of £1 million plus VAT would be paid on completion. However, it was accepted at the hearing that by 12 April 2018 the deal was for £600,000 to be paid on or before completion and £400,000 on or before 1 year later, and on around 9 May 2018 the two instalments were again changed to £500,000 plus VAT.
13. It also appears common ground that the structure of the deal was not finalised since initially it was expected that Mr Downer would use an SPV (called Streetsbrook) that would acquire OPI's shareholding in Sapphire. By around 18 April 2018 it was decided that instead of buying OPI's shareholding in Sapphire, the SPV would take a transfer from Sapphire (by novation or assignment) of its contract to purchase the Property. This transfer would take place on completion.
14. Sapphire's case is that the Defendant was instructed on 12 April 2018 to draft a deed of assignment or novation to document the non-binding oral agreement in principle and to negotiate to procure Mr Downer's agreement to those terms in order to give legal effect to it. In mid-April 2018 Mr Jeremiah (who was working as a consultant for the Defendant) expressly assured Mr Savage that the Defendant would carry out these instructions and Sapphire would not require development finance, and on 18 April 2018 Mr Savage instructed the Defendant to do all it could to get an early exchange and protect Sapphire's position, and to obtain a deposit in respect of the finder's fee. Mr Jeremiah assured Mr Savage that there was no need to obtain development finance and Sapphire was protected, and Sapphire relied on this assurance.
15. Sapphire maintains that the Defendant owed an obligation to Sapphire to ensure that it (Sapphire) was protected in its dealings with Mr Downer/ Streetsbrook by either advising it to obtain development finance in order to enable Sapphire to purchase the Property, or by procuring by the intended completion date a legally binding agreement with Mr Downer/ Streetsbrook on the same terms as the oral agreement made between Sapphire and Mr Downer. These duties went alongside its common law duty to carry out instructions with reasonable care.

16. It is claimed that in 2017/2018, and parallel to his plan to purchase the Property, Mr Savage was pursuing opportunities to pursue the development of the separate properties, Oaklands and Newbury, either through Sapphire or Newcos which would have been wholly owned by OPI, and that the finder's fee (of £1.2m) from the Property would have been made available to OPI and used to fund the deposits for Oaklands and Newbury which were around £350,000 and £450,000 respectively. Mr Savage had made offers through OPI for both these properties which had been accepted. Mr Savage had made Mr Jeremiah of the Defendant aware of the Oaklands opportunity during a telephone call on 17 April 2018 and of the Newbury opportunity in July 2017. Mr Savage informed Mr Jeremiah on around 16 May 2018 of his intention to pay the deposits for Oaklands and Newbury using the £1.2 million finder's fee to be received from Mr Downer's SPV.
17. It is alleged that Mr Savage (through OPI) had an offer accepted on
 - a) Oaklands on around 16 April 2018
 - b) Newbury on around 25 April 2018each with a deposit to be paid by a separate Newco (i.e. the Newbury and Oaklands Newco respectively) which would be incorporated by Mr Savage prior to exchange. Mr Savage intended to pay the deposits using the sum of £1.2 million to be received from Sapphire by way of Mr Downer's finder's fee.
18. Sapphire alleges that on the day of completion, i.e. 12 June 2018, Sapphire did not receive the £1.2 million it was expecting. Its evidence is that Mr Downer said he would only pay a finder's fee of £500,000. Sapphire says that it was too late to find finance to purchase the Property and it had no other choice than to agree to accept the reduced finder's fee of £500,000 which was only paid on 29 November 2018.
19. Sapphire's case is that the Defendant negligently assured it that it would be protected in its dealings with Mr Downer/ Streetsbrook and failed timeously to advise Sapphire to obtain development finance to purchase the Property on its own behalf, alternatively by the completion date it failed to procure a legally binding agreement on the terms agreed in principle with Mr Downer or obtain security from him for the finder's fee.
20. Its case is that by reason of the Defendant's breach of duty Sapphire did not receive the £1.2 million it was expecting on completion, Sapphire was unable to find development finance allowing it to purchase and develop the Property on its own behalf, and lost anticipated profit of £15.1 million on the development of the Property. Alternatively, Mr Savage was unable to fund the Oaklands or Newbury Newcos to pay the deposit required and the properties went back on the market and were lost. Alternatively, it lost £500,000 as the difference in net finder's fee agreed and actually paid.
21. Originally OPI claimed damages on the basis that it had suffered loss of profits estimated at around £13.4 million from the anticipated development of Oaklands, and/or at £8.1 million in respect of Newbury by reason of the Defendant's breach of duty, on the basis that these developments would have been pursued either by Sapphire or through alternative SPVs which would have been wholly owned by OPI and passed any profits onto OPI.
22. Sapphire claims damages by reason of the Defendant's breach of duty, on the basis that

- a) it suffered loss of profits estimated at £15.1 million from the anticipated development of the Property; alternatively
 - b) it has lost the sum of £500,000 being the difference between the finder's fee originally proposed and the fee actually paid to Sapphire.
23. Sapphire now claims that there was an error in the original particulars of claim in suggesting that the Newbury and Oaklands developments would have been pursued by Newcos wholly owned by OPI. Sapphire now applies to amend its case to say that:
- a) Mr Savage's offers to purchase Newbury and Oaklands were not made through OPI.
 - b) The Newcos by which the Newbury and Oaklands developments would have been pursued would have been wholly owned by Sapphire and would have passed any profits from the developments to Sapphire.
 - c) Sapphire expressly or impliedly retained the Defendant to act for it (or its Newcos) in respect of the Oaklands and Newbury developments such that the Defendant owed a duty to Sapphire equivalent to the existing duty and the duty included securing that the finder's fee was paid and ensuring that funds were available for the developments at Newbury and Oaklands (alternatively in the absence of such retainer, the scope of the duties owed by PLP to Sapphire in respect of its purchase of the Property included the same).
 - d) It was not OPI (or Newcos created for the purpose of these developments) that would have made profits on the Newbury and Oaklands development, but Sapphire.
 - e) But for the Defendant's breach of contract Sapphire (not OPI) would have been able to use the finder's fee to fund the deposit for Oaklands or alternatively for Newbury (either by itself or through the respective Newcos).
 - f) As a result of the Defendant's breach of duty Sapphire (not OPI) suffered the alleged loss of profits of £13.4 million on Oaklands and/or £8.1 million on Newbury (either on its own account or as the sole shareholder of each of the Newcos), and damages for those loss of profits are now claimed by Sapphire.
24. By its summary judgment application the Defendant asked the court to dismiss OPI's claims for loss of profit on Oaklands and Newbury (although, as explained above, these claims have now been discontinued so that part of the application is not in issue), and also Sapphire's claims for loss of profit from the anticipated development of the Property. By its amendment application Sapphire now seeks to amend its case to make a claim for the loss of profit on Oaklands and Newbury. Sapphire's claim for the sum of £500,000 as the difference in finder's fee is not subject to an application for summary judgment.

The evidence

25. The documents stretched to over 2500 pages and included:
- a) 2 statements from Mr Shaun Savage;
 - b) 2 statements from Mr Stuart Murdoch, Sapphire's solicitor;
 - c) a statement from Mr Adrian Jeremiah (who formerly worked as a consultant for the Defendant and whose advice to the Claimants in 2018 is alleged to be negligent, but whose statement is served by Sapphire in support of its case);
 - d) 3 statements from Ms Rhian Howell, the solicitor conducting the Defendant's defence.

The law

26. There was little dispute between the parties as to the relevant test under CPR Part 24 and both parties relied on the approach summarised by Lewison J in the often cited passage from *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15.

“the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

- i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91 ;*
- ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*
- iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*
- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”*

27. There was also common ground that the same test of real prospect of success applied on an application to amend and the onus lies on the party seeking to amend its case. In this

context Popplewell LJ explained in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33 [18]:

- (1) *It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc. v Aabar Block SARL* [2017] 4 WLR 164 at paragraph 27(1).
- (2) *The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at paragraph 42.
- (3) *The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41.*

28. As explained at paragraph 42 of *Elite Property Holdings*, the court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon.

SAPPHIRE'S AMENDMENT APPLICATION

29. The main focus of argument on the amendment application was in relation to the amendments by which Sapphire sought to bring claims for loss of profits from Oaklands and Newbury where previously OPI had brought those claims. This centred around paragraphs 18, 19, 20A, 21, 24, 25.2.1, 26 and 28.

30. There were some minor amendments relating to OPI's discontinuance which were not in issue. There were also some amendments relating to claims arising from the Property (i.e. paragraphs 9, 10, 11.1.1, 12 and 15.2) but it was common ground that these amendments stood or fell with the summary judgment application and I deal with them there.

Sapphire's case

31. Sapphire maintained that it had provided first-hand evidence from both Mr Savage and Mr Jeremiah to support the amendments. None of the evidence was inherently implausible or contradicted by the documents, and the proposed claims could only fairly be determined after a trial. It acknowledged inconsistencies in the position taken by Sapphire and also by Mr Savage. It pointed to Mr Savage's lack of legal expertise and that he had explained in his second statement how he had known from around 18 April 2018 that Sapphire would have purchased Oaklands and Newbury rather than Newcos owned by OPI and he had not realised paragraph 18 of the current Amended Particulars of Claim did not reflect this, and this was what had given rise to the further amendments. Sapphire suggested that any inconsistency on the part of Mr Savage was a matter for cross-examination at trial.

32. Sapphire argued that it had a real prospect of success in establishing a duty of care in respect of loss of profits on the Oaklands and Newbury developments. The “duty nexus test” as laid out in *Manchester Building Society* was a new legal tool, and could not be treated as some short legal point suitable for summary determination. Its development and application, especially in a fact sensitive context, was an exercise that should properly be left to trial when the court would have a firm foundation of fact against which it could be applied.

The Defendant’s case

33. The Defendant maintained a number of objections to the amendments:
- a) Sapphire had failed to identify a sufficient factual basis for alleging that it had retained the Defendant in respect of the Newbury and Oaklands developments.
 - b) Loss of profit on the Newbury and Oaklands developments was outside the scope of duty owed by the Defendant to Sapphire. On the basis of Sapphire’s pleaded case, the harm against which the law would impose a duty on the Defendant to take care was the risk that Sapphire would lose the finder’s fee and the deposit on the Property. There was no real link between the risk of harm as identified and the loss of profit on Oaklands and Newbury.
 - c) The claimed losses of profit in relation to Oaklands and Newbury are too remote to be recoverable.
 - d) The claims are bound to fail.
 - i) There are no contemporaneous documents to show that offers by Mr Savage to purchase Oaklands and Newbury were made or accepted.
 - ii) Mr Savage made a statement of truth in support of the Claimants’ case that agreements in respect of Newbury and Oaklands were made by OPI.
 - iii) Mr Savage knew that Mr Downer was only going to pay the finder’s fee in two tranches, and would not have paid £1.2 million on completion.
 - iv) There is no evidence that Mr Savage could ever have financed either of the Oaklands and Newbury developments, let alone both of them. They were, at best, inchoate ideas which Mr Savage may have been exploring.
 - v) After Mr Downer “chipped” on the finder’s fee Mr Savage made several complaints but never mentioned loss of profit on the Property or on Newbury and Oaklands.

The law on duty nexus

34. While there were issues as to the application of the law on determining the scope of a duty of care, the basic principles were not disputed. In particular *Manchester BS v Grant Thornton* [2021] UKSC 20 identified six questions arising in a negligence claim including:

- “(2) *What are the risks of harm to the claimant against which the law imposes a duty on the defendant a duty to take care (the scope of duty question)...*
- (5) *Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant’s duty of care as analysed at stage 2 above (the duty nexus question)”.*

35. The approach to be taken to these questions was stated [8, 13,17] to be that:

“The fact that the defendant owes the claimant a duty to take reasonable care in carrying out its (the defendant’s) activities does not mean that the duty extends to every kind of harm which might be suffered by the claimant as a result of the breach of that duty.

...

The scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case paid for

...

in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk.”

Discussion

Was the amended case bound to fail?

36. Before turning to the main disputed issues it is necessary to take account of some general points of complaint made by the Defendant regarding the proposed amendments, including some points conceded by Sapphire during the hearing.
37. Sapphire conceded during the hearing that there was insufficient evidential basis for the amendment put forward at paragraph 18 suggesting that Mr Savage would have pursued developments through Newcos that would have been wholly owned by Sapphire. While Mr Savage had signed a statement of truth supporting the proposed amendments his statement evidence maintained that it was very unlikely (although not impossible) that Sapphire would have developed the properties through a Newco. Accordingly the application to amend this part of paragraph 18 fell away. It also meant that the multiple references to Newcos throughout paragraphs 19, 20A, 21, 24. 25.2.1 also fell away.
38. Sapphire acknowledged at the hearing that the Response to the Request for Further Information it had served on 16 September 2022 had been superseded. Mr Savage had signed a statement of truth in respect of this further information which unequivocally asserted that on or before 18 April 2018 Sapphire was known to be the entity receiving the finder’s fee. It was also unequivocally stated that the Defendant was retained to act on behalf of OPI in relation to Oaklands and Newbury, and that OPI was the intended owner of the relevant Newcos and the intended recipient of the profits from the Oaklands and Newbury development opportunities. Sapphire fairly acknowledged that this was inconsistent with its amended case. It was also difficult to square with the evidence that Mr Savage put forward to explain the error that was said to justify the amendments.
39. Sapphire’s counsel also fairly accepted that its own evidence showed that as at 12 April 2018 it did not expect that a finder’s fee of £1.2 million would be paid on completion (i.e. ultimately on 12 June 2018) and this was not agreed. To the contrary it knew that Mr Downer had only agreed to pay an instalment on completion (at that stage agreed at £600,000 plus any VAT but later reduced to £500,000). This meant that paragraphs 6, 20, 21 and 23 of the amended case were materially incorrect and did not reflect Sapphire’s own evidence. These were errors of significance since the incorrect allegation that £1.2 million was expected to be paid on 12 June 2018 was key to the allegation that the Defendant was retained in respect of Newbury and Oaklands and that the finder’s fee

would pay the deposit. Plus, the essence of Sapphire's case in negligence was that the agreed finder's fee had not been secured and that this had caused the losses claimed.

40. Sapphire minimised these difficulties, suggesting during the hearing that corrections could be made to the amendments and the Response to the RFI. However, these were not good answers. First, the incoherence and inconsistencies were matters of substance, not mere typos or mistakes on dates. Secondly, Sapphire put forward no application to re-amend (or correct the further information). Thirdly, Sapphire had no excuse for these difficulties, it had not been taken by surprise on these complaints. The difficulties had been flagged up by the Defendant well in advance, and Sapphire had served 5 statements so it had a full opportunity to put forward a coherent amendment.
41. The Defendant also identified significant evidential weaknesses in Sapphire's claim for loss of profits. In particular, Sapphire's case as to having accepted offers on the Newbury and Oaklands properties was thin since there was no contemporaneous record of this. However, I accept that further statement evidence may emerge to support that case. There was also little evidence that Sapphire could have financed either development (let alone two) but these were matters of fact that I cannot summarily determine. In addition, while the likely expected finder's fee (i.e. £600,000 plus VAT) would not have covered both deposits Sapphire could possibly have used it to pay at least one of the deposits, and there was some evidence that it could have bridged a small shortfall to cover both deposits.
42. These difficulties did not individually justify refusing the amendments but they are part of the case against which the merits of the amended case and the more specific objections are to be considered. These shortcomings were relevant in that they gave rise to genuine doubts as to the coherence, plausibility and conviction of the proposed amended case. They supported the Defendant's argument that the amendments were a contrived attempt to keep alive a claim that was untenable when made by OPI, and was similarly lacking conviction and coherence when OPI was substituted by Sapphire.

Did Sapphire have a real prospect of success in showing that the Defendant was retained to act in respect of Newbury and Oaklands?

43. Sapphire's case was that the test to be applied in determining whether an implied retainer exists is whether viewed objectively the solicitor either knew or ought to have known that he was instructed.
44. The factual basis put forward by Sapphire for a retainer in its amended pleading was that the Defendant regularly worked for OPI and its subsidiaries, Mr Jeremiah had been made aware of Newbury in July 2017 and of Oaklands on around 17 April 2018, and on 16 May 2018 Mr Savage had informed the Defendant of his intention to pay the deposits for these two developments by using the sum of £1.2 million to be received on 12 June 2018. This factual basis is insufficient to show a real prospect of success in showing a retainer (whether express or implied) had been concluded in respect of Newbury and Oaklands.
45. Sapphire suggested I should take account of evidence of Mr Savage and Mr Jeremiah of further conversations where Mr Savage is said to have told Mr Jeremiah on more than one occasion, and certainly in an important conversation on 18 April 2018, that the finder's fee was needed to pay the deposit on Newbury and Oaklands.

46. These conversations were not pleaded but they would not have provided an adequate factual basis for the proposed retainer (or duty nexus). Sapphire maintained that there was no contemporaneous documentation to contradict Mr Savage and Mr Jeremiah's evidence. However, the mere absence of a direct contradiction did not mean that the evidence provided a sufficient factual basis for the amendment. Even taking the statement evidence at face value, it did not support the alleged retainer (or duty nexus). While Mr Savage and Mr Jeremiah may have had the conversations suggested, it was implausible to suggest that they gave rise to the pleaded retainer (whether express or implied).
47. The court is not obliged to take witness evidence at face value and without analysis. In deciding on the plausibility of a case and whether a fuller investigation of the facts is required it can take account of inconsistencies as well as contradictions with the contemporaneous documents. Sapphire's case on a retainer was inconsistent with the contemporaneous documents and lacked conviction. Both Mr Savage and Mr Jeremiah maintained they had made notes of what they said was an important conversation on 18 April 2018 but made no mention of Newbury and Oaklands. It was also significant that when Mr Savage entered into full and detailed correspondence complaining about the Defendant's conduct of its retainer there was no mention whatsoever of Newbury or Oaklands, let alone that these projects could be lost.
48. Overall, Sapphire's amended case on having retained the Defendant on the Oaklands and Newbury developments was implausible and did not have a real prospect of success.

Did Sapphire have a real prospect of success in alleging that the Defendant owed a duty of care extending to the risk of loss of profit on Newbury and Oaklands?

49. If Sapphire has no real prospect of showing that there was a retainer in respect of Newbury and Oaklands then this probably disposes of the issue as to whether there was a duty of care in respect of loss of profits on those transactions (and the question of remoteness). If there was no retainer then (subject to the pleaded duty discussed below) there was no coherent basis for imposing a duty of care.
50. However, there was full argument on the scope of the Defendant's duty and I may be wrong in finding that the Defendant was not retained in respect of Newbury and Oaklands (or that this disposes of the issue as to the duty of care owed). Accordingly, I consider the questions as to whether the Defendant's duty of care extended to loss of profits in respect of Newbury and Oaklands.
51. In its amended case at paragraph 20A Sapphire pleaded that even if it had not retained the Defendant in respect of Oaklands and Newbury, the duties owed to Sapphire in respect of its purchase of the Property included the duty to ensure that the finder's fee was available for the developments at Oaklands and Newbury. Although not pleaded, Sapphire argued that this arose because the transactions were intimately linked because of the intention to use cash from the finder's fee for the other developments.
52. This argument was a valiant attempt at an ingenious alternative plea. However, it was not coherent and it was telling that it had not been pleaded as part of the Defendant's duties in respect of the Property. There was no clear factual or legal basis to allege that even if a solicitor is not retained in respect of an additional transaction, it owes a duty of care as if it were retained because the additional transaction is intimately connected. Indeed, this

would be a startling argument. There was no additional factual basis to justify the alleged duty arising in the absence of a retainer and the case lacked conviction and plausibility. If there was no retainer in respect of Oaklands and Newbury then it could not realistically be said that the same duties arose out of the retainer that related to the Property.

53. Sapphire's more general arguments assumed a duty of care existed regarding Oaklands and Newbury, and maintained that questions as to the scope and nexus of the duty of care should properly be addressed against a firm foundation of fact at trial. It also said that it was clear from the evidence that the Defendant's duty to Sapphire extended beyond ensuring that Mr Downer honoured his oral agreement and the Defendant was guiding the whole decision-making process (by analogy with the Court of Appeal's approach in *Giambrone & Law* [2017] EWCA Civ 1193).
54. In arguing that there was sufficient nexus between the harm claimed and the subject matter of the Defendant's duty of care Sapphire relied on the same evidence that it invoked in justifying its amended case on a retainer, namely that Mr Savage had expressly told Mr Jeremiah that he was keen to do the deal with Mr Downer because it would let him do other deals, he told him that the offer on Newbury had been accepted and he had explained that the finder's fee was needed to pay the deposit.
55. The onus lay on Sapphire to show that its amendments contain the properly particularised elements of the cause of action relied upon and had a real prospect of success. I reject Sapphire's suggestion that the arguments going to the duty nexus are so fact sensitive that they can only properly be decided at trial, after disclosure and cross-examination. Here there was a question of law as to whether the disputed duty of care arose on the pleaded facts, in particular as to whether there is a sufficient nexus between the duty alleged and the losses claimed. There was no concrete basis to suggest that the arguments would be different at trial, especially after Sapphire had put forward such full evidence.
56. Even taken at face value the conversations that Sapphire now relied upon would not enlarge the pleaded duty in the amended claim or provide an alternative factual basis to justify the duties argued for, especially where the case now made was inconsistent with the contemporaneous documents (as explained above in relation to the alleged retainer). In deciding whether to allow any amendment (and certainly a significant amendment of this type) the court can decide whether, taking Sapphire's case at its highest, it is bad in law. While the court should take into account evidence that might reasonably be available at trial, it should not defer conclusions on the basis of speculation as to what might emerge that could justify an amendment or how the case might be better pleaded to establish a properly arguable cause of action.
57. I preferred the Defendant's analysis of the scope of the alleged duty of care. Even on its amended case Sapphire's pleaded purpose for retaining the Defendant was to procure a binding agreement with Mr Downer reflecting the agreement in principle or obtain development finance to purchase the Property on its own behalf. On Sapphire's own case the Defendant's duty of care was to ensure that Sapphire was protected in its dealings with Mr Downer/ Streetsbrook. Sapphire's pleaded case was that the Defendant's duty was either to ensure the finder's fee was secured or enable Sapphire to purchase the Property if Mr Savage wished. As is clear from the authorities, the Defendant's duty did not extend to every kind of harm that might be suffered as a result of the Defendant's breach of that duty.

58. On Sapphire's own case the harm against which the law would impose a duty on the Defendant was the risk of Sapphire either losing the finder's fee or the opportunity to purchase the Property using development finance. There was no real link between the risks of harm identified by considering the purpose enquiry, (i.e. the risk of Sapphire not being protected if Mr Downer failed to honour his agreement) and the risks giving rise to the harm allegedly suffered on the Oaklands and Newbury developments (i.e. the risk that Sapphire could lose the opportunity to purchase them and make the profits claimed).
59. The pleaded duty of care did not extend to the risk of losing profits on Newbury and Oaklands and there was no basis for reading it as extending to such losses. This was not a comparable case to *Giambrone Law* where the loss in question was the deposit paid on the very property that the solicitors had expressly been instructed to act on.

Did Sapphire have a real prospect of success in establishing that the loss of profit on Newbury and Oaklands is not too remote to be recoverable?

60. This argument was unlikely to arise if there was no retainer or duty of care in respect of loss of profits on Newbury and Oaklands. However, if I am wrong in finding that Sapphire's amendments lack any prospect of success on those elements, they also lack plausibility on this ground since the amended case must contain the properly particularised elements of the cause of action relied upon.
61. It was common ground that the relevant test for remoteness was the contractual one (*Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146). Sapphire maintained that where solicitors' negligence results in the claimant suffering losses from an especially lucrative future contract, those losses will be recoverable if they are (i) not unlikely to result from the breach; and (ii) known to the solicitors prior to the breach. It maintained that applying the traditional two limb test, losses will be recoverable if the solicitor had special knowledge of his client's intentions.
62. I test the amended case as it stands rather than on a hypothetical basis. It was not pleaded that the Defendant was aware that loss of profits on the Newbury and Oaklands developments would result from its breach of duty. The mere fact that Mr Jeremiah had been told about the developments, that an offer had been accepted and Mr Savage intended to use the finder's fee for the deposits falls short of establishing the special knowledge required to establish a recoverable loss.

Conclusion on amendment application

63. For the reasons set out above I do not allow Sapphire's amendments to the claims relating to loss of profits on Newbury and Oaklands. Given that OPI withdrew all its claims, paragraphs 18-21, 24, 25.2.1 and 26 of the Amended Particulars of Claim should now be struck out since they only remained in place as part of the amendment application.

THE APPLICATION FOR SUMMARY JUDGMENT

The Defendant's case on summary judgment

64. Sapphire had put forward some amendments relating to claims arising from the Property (i.e. paragraphs 9, 10, 11.1.1, 12 and 15.2). The main purpose of these amendments was to add two allegations. First, an allegation that Mr Savage remained interested in purchasing the Property if the agreement in principle with Mr Downer fell through. The second new allegation was that the Defendant owed a duty to advise on obtaining development finance in order to enable Sapphire (if Mr Savage wished) to purchase and develop the Property on its own behalf.
65. While the Defendant objected to these amendments the real issue was the broader one raised by the Defendant's summary judgment application, namely whether Sapphire had a real prospect of success on its claim for loss of anticipated profits on the Property. Accordingly the amendments and existing case are assessed together against that test; they fall or stand together.
66. The Defendant's case was that the claim for loss of profits should be summarily dismissed because it was outside the scope of the duty owed by the Defendant to Sapphire and it repeated its arguments on the duty nexus. It maintained that on the basis of the pleaded case the harm to Sapphire against which the law would impose a duty was the risk that Sapphire could lose the finder's fee (and the deposit), such that the alternative claim for loss of profits was outside the scope of that duty. The purpose of the Defendant's duty was to protect Sapphire in its dealings with Mr Downer and the harm against which the duty was imposed was the risk of Sapphire losing the finder's fee (and the deposit).
67. It maintained that the claim for loss of profits on the Property (including amendments to that case) should be dismissed since once Mr Savage had made the oral agreement with Mr Downer that was the only deal that he was interested in progressing. His questions about whether he needed to raise finance to complete the purchase of the Property were not because he intended to progress the development but because he was concerned that if Mr Downer reneged then he would forfeit the deposit, and be liable for an additional sum. The loss of profits from the development of the Property fell outside the purpose of the Defendant's obligations and duties.

Discussion

68. Both sides, for obvious forensic reasons, drew on similar arguments on the amendment and summary judgment applications. They each suggested they should win both applications. However, there were marked differences between the applications. In particular, there was a firmly arguable case that the Defendant was under a retainer related to Sapphire's intended purchase of the Property. Sapphire's position on this was consistent (and supported by the contemporaneous documents). In addition, the pleaded duty that the Defendant owed a duty to advise on obtaining development finance was directly related to the Property. Plus, Sapphire's position on this was consistent and it was backed by contemporaneous documents (even if these were open to challenge). By contrast there was no concrete basis for the retainer, the nexus or Sapphire's case to support the alleged duty to protect against loss of profits on Newbury and Oaklands.
69. Accordingly, Sapphire's allegation that there was a duty to advise on obtaining development finance had an arguable basis. Whether Sapphire could have obtained development finance or made the profit claimed were matters that could not be decided

summarily. The Defendant fairly maintained that the real issue went to whether the Defendant's duty extended to profits that would be made from developing the Property, and in particular whether there was a sufficient nexus between that duty and the loss of profits claimed.

70. Sapphire could show a real prospect of success on that issue. The purpose of advice on development finance was to enable Sapphire to obtain development finance for the Property if Mr Downer's oral agreement was not secured. The evidence showed that Mr Savage was asking about finance as an alternative to Mr Downer's agreement. While the risk of losing the finder's fee (and deposit) may have been the primary risk that the Defendant was instructed to protect against, Sapphire had a reasonable factual basis for alleging that Mr Savage had sought advice on development finance as a further safeguard against being let down. Accordingly, it was arguable that the risk against which the advice was sought extended not only to protecting the finder's fee (and deposit) but also the stronger position that Sapphire would have been in if it had access to development finance.
71. The Defendant fairly suggested that there was something very counterintuitive in Sapphire saying that if the Defendant had done its job properly then Sapphire would have been paid £1 million, but because it failed to secure the second tranche from Mr Downer it is entitled to recover damages in the sum of £15 million. However, this point does not negative a duty of care. It reflects the merits (including whether Sapphire could have made the profit claimed) and suggests that the order in which Sapphire has put its alternative cases on breach of duty and factual causation does not reflect common sense or its own case. On Sapphire's own case the Defendant's primary duty was probably to secure the oral agreement in principle. It was in this respect that it was more likely that it could have made a difference and recoverable losses (if any) are likely to be measured by reference to that breach of duty. It may never be necessary to consider the consequences of the alternative alleged breach of duty on advice to obtain development finance. However, the likely common sense outcome does not justify a summary dismissal of the alternative case.
72. For the reasons set out above the Defendant's application for summary judgment is dismissed. The amendments to paragraphs 9, 10, 11.1.1, 12 and 15.2 are allowed.

SECURITY FOR COSTS

73. The Defendant made its application for security for costs under CPR Part 25 on grounds that Sapphire is no longer trading and has minimal assets.
74. Sapphire accepted that it should put up some form of security in the sum of £500,000. The only issue was as to the form of that security. The Defendant sought a payment into court. Sapphire's position was that it had offered security by way of guarantee with the guarantors being OPI and each of OPI's twelve other subsidiaries (with joint and several liability). It suggested that the Defendant had been wholly unreasonable in rejecting this form of security. While it maintained the offer of a guarantee from OPI and its guarantors, it also submitted that the application for security for costs should be dismissed.

75. Neither side addressed the law but the Defendant referred to CPR Part 25. The White Book makes clear that the purpose of an order for security for costs is to protect a party against the risk of being unable to enforce any costs order they may later obtain. The court has a discretion as to the manner and form in which security is given. Most frequently a claimant is ordered to pay a specified sum into court but alternative modes may be ordered including payment to solicitors, or security by a bank guarantee. In principle it may be appropriate to order that security be provided by a guarantee provided by a third party such as a parent company or its subsidiaries. The court's discretion is broad but ultimately the test is whether an order would be just.
76. The Defendant maintained that a guarantee provided by OPI and its subsidiaries would not protect against the risk of being unable to enforce a costs order.
- a) The most recent accounts filed at Companies House for OPI (for the year ending 30 June 2021) were unaudited and showed OPI assets were only worth around £585,975 after deduction of liabilities. In addition the assets identified were mainly amounts owed by group undertakings.
 - b) In correspondence dated 19 October 2022 the Claimants' solicitors, DLA Piper, provided these accounts together with a letter and a spreadsheet dated 7 October 2022 from OPI's accountants. DLA Piper maintained that OPI's net assets amounted to around £5,894,908. The Defendant argued that this was incorrect because it used figures from the unaudited accounts without taking any account of activity between 30 June 2021 and 7 October 2022.
 - c) DLA Piper acknowledged that Sapphire is a non-trading entity.
 - d) Later evidence provided by Mr Savage and Sapphire's solicitor Mr Murdoch, including accountants' figures for "real world net asset positions" provided no reliable explanation or reconciliation of the figures and did not show available assets against which a guarantee could be readily enforced. There was no clear match between the subsidiaries put forward to provide a guarantee and the subsidiaries said to have assets.
77. In suggesting that security for costs should be ordered by way of a company guarantee Sapphire did not rely on its solicitors' figures for assets in the letter of 19 October 2022, or OPI's latest financial statement or the spreadsheet put forward by its accountants in October 2022. Instead it relied on Mr Savage's statements as to how he runs the companies, the first statement of Mr Murdoch, Sapphire's solicitor together with a letter dated 14 December 2022 from OPI's accountants, AGK Partners, together with around 2,000 pages of valuations of residential investment properties. These mainly included property assessments or surveyors' valuations provided to Mr Savage for the purpose of financing the purchase of buy to let properties. The valuations were dated in a fairly even range from between early 2019 to October 2022. Almost all the properties were listed as subject to a tenancy agreement, mainly for a 5 year period from completion, but others were periodic or on a shorter fixed term.
78. In his statement Mr Murdoch recounted a meeting with OPI's accountants where they explained that the valuation of OPI's assets in the accounts filed at Companies House did not correlate with current market value since it reflected historic acquisition costs. Properties held by OPI's subsidiaries are valued from time to time when a unit is refinanced, and the accountants keep a record of valuations. The accountants put forward a three-page spreadsheet giving a "real world net equity position" of the companies

owned directly or indirectly by OPI at approximately £5,412,093. The spreadsheet listed around 100 individual residential units, the property's address, the corporate owner, the type of title, the date of end of tenancy, the valuation figure, the valuation date and the sum owed. The "real world net equity position" (also described as the "real world net asset position") was the difference between the total of the valuations and the total sums owed. During the hearing Mr Savage volunteered that Sapphire could also offer a guarantee from subsidiaries that he owned (also listed within the spreadsheet), and the "real world net asset position" for these was put forward as £14,272,130 (giving a total net equity figure of around £19.7 million for companies owned by both OPI and Mr Savage).

79. Sapphire acknowledged that many of the valuations used to justify these figures were a few years old but explained that it was not practical to value the entire property portfolio. It pointed to the accountants' comment that prevailing market conditions had generated significant increases in real estate values such that the valuations were a very conservative overview of the true value of the portfolio.
80. Sapphire also acknowledged that the figures did not include properties currently being developed as these were difficult to value. Sapphire's counsel pointed to evidence that Mr Savage's businesses were successful such that properties under development would contribute to a significant increase to the net asset value. OPI's accountants put it more cautiously saying that the directors considered that there was value in the ongoing developments.
81. Mr Savage's evidence was that the cash in the property companies that he and OPI owns and controls is always being put to work. He explained that it would be highly detrimental to a property development company to tie up cash which could be used to make a significant profit on investment. If Sapphire was ordered to pay security for costs or any other sum of money then "we" would sell an asset or two to raise the cash sufficient to pay the costs. This would mean that "we" would liquidate an investment and lose out on profits to pay the debt.
82. Sapphire's counsel argued that making an order that sums be paid into court would give rise to undue prejudice in that the relevant companies would be obliged to sell a profit making asset to pay a debt that may never become due if no costs order was made.

Conclusions on security for costs

83. The Defendant identified strong grounds for showing that the guarantee proposed by Sapphire would not provide it with reliable protection. Sapphire's own evidence showed that OPI is a holding company which does not own real property itself. Its published accounts suggested its assets were limited. There were no accounts for the subsidiaries. The additional spreadsheet provided by OPI's accountants in October 2022, DLA Piper's explanation and the further material provided in December 2022 provided no reliable evidence that the proposed guarantee would be adequate security.
84. The figures given by OPI's accountants in December 2022 reflected what Mr Savage and OPI had asked them to provide, namely "a review of their investment property portfolio" based on third party valuations provided to Mr Savage. The "real world net asset" figures might be helpful in providing a ball-park estimate of equity based on the face of

valuations and bank debts. However, they were of very limited reassurance as evidence that a guarantee provided by OPI or the subsidiaries would be enforceable. The accountants did not provide independent confirmation of the valuations or the current ownership of the assets listed or the liabilities on the properties or the companies. There was no evidence of anything to stop assets being transferred away or charged. Mr Savage's evidence as to his confidence in the profitability of his developments provided limited additional assurance.

85. While Mr Savage said that the accountants kept records of outstanding bank debts for the subsidiaries, the information provided gave no reliable indication of the overall liabilities of the companies in question. The figures presented bore little relation to the information provided in OPI's published accounts. Indeed, while the accountants suggested that the published accounts reflected historic figures they also acknowledged that the valuation figures they relied upon for what they described as a "real world" equity position were historic figures.
86. Sapphire's evidence was that Mr Savage and OPI controlled well over 100 land registered properties. Mr Savage's evidence was that he successfully develops property to make a profit, not a loss and can sell an asset or two to raise cash. This all militates in favour of an order for security for costs by way of payment into court being made. It shows that Sapphire would be able to pay security into court. While this would cause some prejudice it was relatively limited (as Mr Savage suggested he would only have to sell one or two units out of more than a hundred) and would not stifle the claim. Sapphire's evidence of the scale of assets said to be available suggested that there would be no undue hardship in it having to meet an order for security. It would not be fair for the Defendant to bear the risk on the reliability of OPI and Mr Savage's companies, or in having to pursue them by way of enforcing a guarantee. Sapphire's own evidence suggested that properties were tenanted and would have to be liquidated in order to meet a costs order. All this evidence showed that the Defendant would be unfairly exposed to much more significant prejudice if it were left to enforce a guarantee from OPI or its subsidiaries. The Defendant could show that the available information as to OPI and the subsidiaries was at best opaque, and raised more questions than it answered.
87. Accordingly, the Defendant is entitled to an order that Sapphire pay £500,000 into court by way of security for the Defendant's costs.