Neutral Citation Number: [2022] EWCA Civ 970

Case No: CA-2021-000220 & CA-2021-003322

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
His Honour Judge Pelling QC (sitting as a Judge of the High Court)
[2021] EWHC 2400 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 19 July 2022

Before :

LADY JUSTICE KING
LORD JUSTICE POPPLEWELL
and
LADY JUSTICE CARR

- -

Between :

(1) SPIRE PROPERTY DEVELOPMENT LLP	**Claimants/ Respondents**
(2) HORTENSIA PROPERTY DEVELOPMENT LLP	
- and –	
WITHERS LLP	**Defendant/ Appellant**

- -
- -

Nigel Tozzi QC and Jonathan Scott (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants/Respondents**
Patrick Lawrence QC, Carl Troman and Diarmuid Laffan (instructed by **Clyde & Co LLP**) for the **Defendant/Appellant**

Hearing date : 21 June 2022

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Approved Judgment

This judgment was handed down remotely at 10am on Tuesday 19 July 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Lady Justice Carr :

A. Introduction

1. This appeal arises out of a claim for professional negligence brought by the Respondents, Spire Property Development LLP ("Spire") and Hortensia Property Development LLP ("Hortensia") (together "the Developers"), against the Appellant, Withers LLP, a firm of solicitors ("Withers"). In 2012 Withers was retained on the Developers' purchases of two high-value Grade II listed properties in Fulham, London SW10: the King's Chapel (also referred to on occasion as St Mark's Chapel) and the King's Library (also referred to on occasion as The Sloane Building) (together "the Properties"). Spire purchased the King's Chapel on 6 November 2012 for £7.8million. Hortensia purchased the King's Library on 23 November 2012 for £34million. The two properties share a common boundary and were to be re-developed in parallel. In January 2014 the Developers contacted Withers following their post-acquisition discovery of three extra-high voltage electric cables ("HVCs") running under both development sites and owned by UK Power Networks ("UKPN").

2. In 2018 the Developers commenced proceedings against Withers alleging breach of contract and/or negligence on its part, in summary:

   i) In failing to make sufficient searches or enquiries so as to identify electrical lines and/or wayleaves and/or electrical apparatus on the Properties prior to purchase in 2012 ("the 2012 claim");

   ii) In failing to investigate and advise adequately in 2014 as to the Developers' rights and remedies upon the discovery of the HVCs ("the 2014 claim").

3. Following a nine-day trial in January 2021, in a judgment dated 24 September 2021 ("the Judgment"), HHJ Pelling QC ("the Judge") found in the Developers' favour on both the 2012 and 2014 claims. He determined:

   i) That Withers had acted in breach of contract and negligently in 2012 in failing to carry out relevant searches which would have revealed the existence of the HVCs prior to the exchange of contracts. He dismissed the claim for damages in respect of a lost opportunity to secure a price reduction and various other claims for additional costs, save in respect of one element of additional expenditure. Damages (and interest) in the sum of just over £584,000 were awarded;

   ii) That Withers had also acted negligently in 2014 in failing to advise the Developers of their rights in the event that UKPN could not prove that it held a wayleave or other lawful authority in respect of the laying (or maintaining) of the HVCs. Withers should have advised that, in that event, the Developers could require UKPN to move the HVCs at its own expense, or alternatively obtain compensation under the Electricity Act 1989 ("the EA") by application to the Lands Tribunal. Damages (and interest) were awarded for the value of the Developers' lost chance to obtain compensation, assessed at just under £1.5million.

4. Withers' challenge on appeal is limited to a challenge to the Judge's finding on the 2014 claim that Withers owed a tortious duty of care to the Developers to advise them as to their rights and remedies against UKPN. Its outcome turns on whether, on the specific facts in question, the Judge was right to hold that Withers did assume such a duty (and whether or not the Developers' reliance on Withers, as found by the Judge and not challenged on appeal, was reasonable).

B. The relevant facts in summary

Background

5. The Developers were special purpose limited liability partnerships ("LLPs") owned by Prime London Residential Fund ("the Fund"), a fund managed by Savills Investment Management (UK) Limited ("SIM"), a vehicle for investment in high-value prime residential property developments in London - the "super-prime" market. The Fund's business model was to purchase prime London sites through LLPs and engage a development partner. The development partner would be a corporate entity with a small stake in the relevant LLP and charged with pre-acquisition investigations into the property, acquiring planning permission, and managing the development. Withers was responsible for setting up the Developers and also advised in relation to the corporate and financing aspects of the proposed development of the Properties.

6. The Fund's development partner in relation to the Properties was Tenhurst Limited ("Tenhurst"), a company founded by a well-known property developer, Mr John Hunter ("Mr Hunter"). Mr Hunter was a director of Tenhurst; his fellow director was Mr Barnaby Joy ("Mr Joy"), a qualified solicitor, property developer and consultant. Mr Joy had studied law at undergraduate and postgraduate level. He went on to train and qualify (in 2002) at a London city law firm. He had left full time solicitorial practice a year later in order to work in real estate development and construction. Thereafter he had held various senior management positions in the real estate industry, both in the UK and abroad. He started working for Tenhurst in 2011 and was appointed a director in 2012. His position and working title at Tenhurst was that of "Commercial Partner", in which capacity he was responsible for all legal issues, as well as for structuring and negotiating real estate transactions, raising equity and debt, investor reporting, troubleshooting sites, and generally trying to ensure the continued viability of the business.

7. In September and October 2012 Withers was retained to act on the acquisitions by the Developers of the Properties. The client and conveyancing partner in charge was Ms Emma Copestake ("Ms Copestake"), who had qualified in 1999 and became a partner in 2008; her assistant was Ms Hannah Robinson ("Ms Robinson"), a senior conveyancing associate, who had qualified in 2007. Ms Copestake had a longstanding professional relationship with Mr D'Arcy Clark of SIM. Withers had been retained and continued to be retained by the Fund on several other developments, including (in 2013) on the purchase of another property known as Milliner House, located very close to the Properties.

8. Formal engagement letters were sent out by Withers (in September/October 2012) on each proposed purchase in the normal way. During the course of its retainers, amongst other things, Withers provided reports on title (dated 9 October 2012 on the King's

Chapel and 23 October 2012 on the King's Library). The presence of the HVCs was not identified by Withers prior to the Developers' purchases of the Properties.

9. Subsequent to the purchases, in August 2013 and as a result of specialist investigations into subsoil conditions, the existence of one of the HVCs was discovered. In October 2013 it was established that there were three HVCs along the cable route traversing the Properties. At a project meeting in late October 2013 the Developers instructed engineering consultants, Hoare Lea, to contact UKPN in order to discuss the possibility of moving the HVCs. At the end of November 2013, however, that instruction was put on hold in order to reduce the risk of objection by UKPN to planning permission applications that had been made earlier that month by Hoare Lea to redirect the HVCs.

10. In November 2013 the Developer's project managers, Martin Brooks Associates ("MBA"), contacted a specialist engineering consultant, Mr Tony Dredge ("Mr Dredge"), to make enquiries regarding the HVCs. On 4 December 2013 MBA asked Mr Dredge, amongst other things, whether he would have expected the HVCs to be shown on any pre-purchase searches. Mr Dredge responded by email the next day to the effect that he would have expected the presence of the HVCs to have been discovered "at the legal stage of any purchase as there should be a Wayleave Agreement in place with UKPN or National Grid (or whoever installed the cables) to allow them access to the cable run throughout its length. This is a legal document and should have come to light on the legal searches". Within minutes MBA had forwarded this email on to Mr Hunter with the opening remark: "Rotwe[eil]er barks and looks like men in wigs for a mauling!!!!"

11. On 12 December 2013 Mr Joy asked Ms Robinson for copies of the reports on title on the Properties, which Ms Robinson duly provided to him.

12. MBA met with Mr Dredge on 28 January 2014 with discussion of timescales for relocating the HVCs, possible routes and works required, budgets and "what is the situation if no way leave [sic] was found in the searches" on the agenda.

<u>The key exchanges between the Developers and Withers between 2 January and 3 February 2014</u>

13. It is necessary to set out the direct exchanges between Mr Joy and Ms Robinson relating to the HVCs between 2 January and 3 February 2014 in full detail.

14. On 2 January 2014, Mr Joy called Ms Robinson advising her of the discovery of the HVCs. Ms Robinson's manuscript attendance note read:

> "Barnaby Joy call HRR 12.25pm
> - Barnaby Joy had asked us to send reports →issue has arisen
> + is large, electric cable running under site about 1 m below
> Surface – runs from Kings Rd to Fulham Rd – may affect works
> - Tenhurst never even saw report before transaction
> - BJ wanted to know what came up + what would reveal by searches
> → HRR will need to look back at file and revert"

15. This was the first that Ms Robinson had heard of any problem with an electric cable running underneath the Properties. Mr Joy's evidence was that Ms Robinson became very defensive upon being informed of the discovery of the HVCs. He asked her why the HVCs had not been identified prior to purchase and explained that he wanted to know what came up and what would have been revealed by the searches. Her attendance note was not a complete record. Ms Robinson had also stated that the search which would have specifically identified the HVCs (ie a UKPN/utility search) was not a standard search. Any difference of recollection between Mr Joy and Ms Robinson in this regard is immaterial for present purposes. Ms Robinson's internal email to Ms Copestake later that day recorded that Mr Joy "wanted to know if we had any info on the cable and what we would normally investigate about such matters".

16. On 3 January 2014 Mr Joy attached a survey produced by a firm called Pulse Mapping Ltd showing the route of the HVCs to an email to Ms Robinson:

> "Morning Hannah
>
> Attached is a PDF showing the path of the cable we talked about yesterday (it is marked in double red line).
>
> Perhaps you can give me a call when you've checked out the background?
>
> Many thanks
>
> B"

17. Ms Robinson did not call back. Rather, on 6 January 2014, she replied by email (copied to Ms Copestake) ("the 6 January email") as follows:

> "Dear Barnaby
>
> Thank you for the email below. I have reviewed our reports on the purchase of The Sloane Building and St Mark's Chapel in relation to your query concerning the electrical cable you have referred to.
>
> The pre-contract report for The Sloane Building refers to various rights and obligations in relation to the electricity sub-station transformer chamber which is located on that property (paragraph 2.8), and likewise there are various rights and obligations relating to the transformer chamber at St Mark's Chapel, as referred to in the report for that property (paragraph 3.7). We clearly flagged up in advance of exchange the existence of two sub-stations and ancillary cables in the vicinity of the property. Any further searches are not conclusive and the only sure-fire way of ascertaining routes is to carry out trial holes.
>
> Kind regards,
>
> Hannah"

18. On 13 January 2014, Mr Joy responded by email (copied to Ms Copestake) ("the 13 January email"):

> "Dear Hannah
>
> From what you are saying I think the conclusion is that the existence of this cable did not emerge from the normal search procedures at acquisition? It seems strange that they didn't turn up on the title docs as one would have thought that some sort of easement would be required for a third party to lay such a cable on our land. Wouldn't such a doc be registered on the title docs? If a cable was laid without some sort of legal doc, then perhaps we could argue that no permission has been granted and therefore we could potentially ask for the cable to be moved NOT at our expense. The issue we face is that the cable will need to be moved for us to do our developments and the costs will be high.
>
> It's not really related to the sub stations specifically as it is a cable that runs from the King's Road right through to the Fulham Road.
>
> The map we sent over (which shows the cable) was specifically commissioned by us and so would not be a matter of public record.
>
> We will report this to the board in due course.
>
> Thanks for your help.
>
> Kind regards"

19. Mr Hunter appears to have been copied in (blind) or sent a copy of Mr Joy's email; for on 14 January 2014 he followed the email chain on with a response to Mr Joy, copied to Ms Copestake and Ms Robinson ("the 14 January email"):

> "All
>
> It's probably a blessing this wretched cable doesn't come up on the radar. Otherwise national grid would be … giving us the run around on planning. As agreed, we will be keeping our heads down and preparing an approach to National Power to divert when it is we have a consent and as well the 6 weeks of JR has elapsed.
>
> In the meantime, as planned, we will alter the sequence of works so that this diversion is not on our construction programme critical path in respect of both schemes.
>
> Thanks
>
> John"

20. On 16 January 2014, Ms Robinson replied directly to the 13 January email (copied to Ms Copestake) ("the 16 January email"):

> "Dear Barnaby,
>
> In response to your email below, there was nothing revealed in our pre-contract due diligence specifically referring to the cable shown marked in double red lines on the plan you sent to me. However, as per my previous email, we did report on the sub-station and ancillary cables in the vicinity of the property. Utility providers have statutory rights of access to lay cables etc so there would not necessarily be any mention of the cable in question on the title.
>
> I note John Hunter's subsequent email and that you will be approaching National Power in due course to divert the cable.
>
> Kind regards
>
> Hannah"

21. Shortly before 4.30pm on 28 January 2014, the day of MBA's meeting with Mr Dredge, Mr Joy emailed Ms Robinson again, copied to Ms Copestake, Mr Hunter and Mr Michael Plummer (an independent consultant and development partner on the Properties working at Tenhurst) ("the 28 January email"):

> "Dear Hannah
>
> Just following up on the below.
>
> Couple of points arising:
>
> 1. Should the existence of the cable not have come up on the radar as a result of seller's replies to enquiries, even if it didn't appear on the title docs?
>
> 2. Could you elaborate slightly on the statutory rights of access point? Does this mean that UK Power could have laid the cable at Sloane and KC without having any kind of legal permission from the owners? It would seem impossible that the owners of the sites were not aware of such a large cable being laid on their property.
>
> 3. If, as there surely must have been, there is some kind of legal documentation relating to the laying of the cable on either site, then the question remains as to why this hasn't shown up on our radar?
>
> We need to decide how we are going to approach UK Power about this issue, so would be very helpful to get your thoughts on the above. The better prepared we are the more likely we will succeed in getting the cable moved.

Many thanks.

Kind regards”

22. Ms Robinson responded to Mr Joy by email timed 12.15pm on 3 February 2014 (copied to Ms Copestake, Mr Hunter and Mr Plummer) (“the February email”):

“Dear Barnaby

In response to your email below and using the same numbering:

1. The seller can only provide such information as they may have and there were no wayleave agreements or deeds of easement relating to any electricity cable revealed in the seller’s replies to enquiries, other than the rights relating to the electricity transformer chambers. In addition, St Mark’s was acquired from receivers and therefore the information provided was extremely limited and they had no knowledge of the property whatsoever.

2. Utility companies have statutory rights of access onto private land to lay pipes, wires, cables and other service infrastructure. Under the Electricity Act 1989, electricity companies can acquire a wayleave to install an electric line on, under or over private land, together with rights of access of inspection, maintenance and replacement. A wayleave can either be agreed or can arise where the owner of occupier fails to respond to a notice requiring him to grant a wayleave or gives it subject to conditions unacceptable to the electricity company. Wayleaves, whether acquired under the Electricity Act 1989 or granted by a landowner do not need to be registered at the Land Registry. It is therefore possible that a wayleave was granted sometime ago when the cable was originally laid and was not known to the seller. In relation to the Sloane Building, the seller acquired the property in 2010 and before then it had changed hands in 2009 and 1999. Prior to 1999 it appears that the site was owned by the local authority. The seller may therefore not have been aware of the cable. As to St Mark’s, the receivers will have had limited information and are unlikely to have known about such matters.

3. Please see comments above.

Kind regards

Hannah”

23. Mr Joy replied by email within the hour (at 12.54pm) (copied to Ms Copestake, Mr Hunter and Mr Plummer) to say: “Thanks Hannah”.

Subsequent events

24. Later on 3 February 2014 Mr Joy forwarded Ms Robinson's email on to MBA and Mr Hunter "VERY confidentially":

> "Seems we may well be stuck with it from a legal perspective, but I suppose at least there is no realistic way we could have known about it beforehand.
>
> Over to you and John to agree how we proceed…"

25. On 31 January 2014 the Developers had been referred to Mr Johnson of Hoare Lea as an expert in dealing with UKPN and who could lead the negotiations on potential relocation of HVCs. It was decided not to communicate further with UKPN pending expiry of the time periods for seeking judicial review of planning permission decisions.

26. From May/June 2014 onwards, however, Hoare Lea enquired repeatedly as to whether UKPN could produce a wayleave in support of its right to lay the HVCs.

27. On 12 September 2014 Mr Lathbridge of UKPN indicated that UKPN had not been able to locate any wayleave or other authorisation to lay/maintain the HVCs. Mr Lathbridge said that he would assume that UKPN had no legal right. Mr Johnson emailed Mr Joy and Mr Hunter identifying this as a "significant negotiation point. They will remain covered by the Act". The Developers did not return to Withers seeking advice in the light of this information.

28. The HVCs were not moved and as a result the Developers had to make adjustments to the proposed developments. The difficulties created for the development of the King's Chapel were significantly greater than for the King's Library. No claim for compensation from UKPN was made under the EA.

C. The Developers' rights against UKPN

29. The legal position in relation to the Developers' rights against UKPN, as found by the Judge, can be summarised as follows.

30. As to the general law:

    i) An owner or occupier of land can consent to an electricity company installing and/or keeping installed an electric line on, under, or over the land and having related access to the land. This is known as a voluntary wayleave. A voluntary wayleave is a contract or licence: it does not create a proprietary interest in the land itself, but confers a personal right on the electricity company. (See *William Tracey Ltd v Scottish Ministers* [2016] CSOH 131 at [3]; and Schedule 4 to the EA ("Schedule 4") at paragraph 8(1)(c), concerning wayleaves which cease to be binding by reason of a change in ownership of occupation of land);

    ii) A wayleave may also be granted by the Secretary of State pursuant to paragraph 6 of Schedule 4, on the application of the electricity company. Such an application can be made in two scenarios:

a) under paragraph 6(1), where it is "necessary or expedient" for the electricity company to install and keep installed an electric line on, under or over any land, and the owner/occupier of the land has been given a notice to give the wayleave, but has failed to do so (or demands terms to which the electricity company objects);

b) under paragraph 6(2), where a wayleave in respect of an existing electric line has come to an end in accordance with its terms, or has ceased to be binding on the owner/occupier of the land due to a change in the land's ownership or occupation, and the owner/occupier has given notice to the electricity company to remove the electric line;

iii) A wayleave granted by the Secretary of State is usually called a necessary wayleave, compulsory wayleave, or statutory wayleave;

iv) A voluntary wayleave does not bind an owner/occupier of land subsequent to the owner/occupier who entered into it. A necessary wayleave, by contrast, does bind subsequent owner/occupiers (see paragraph 6(6) of Schedule 4). Paragraph 6(3) contemplates that a necessary wayleave will continue in force for a fixed period specified in the wayleave; and in practice that period is usually 15 years. (See paras. 1.5 and 6.16 of Electricity Act 1989 – Guidance for Applicants and Landowners and/or Occupiers – Application to the Secretary of State for Energy and Climate Change from 1 October 2013, for the grant of a Necessary (Compulsory) Electricity Wayleave or Felling and Lopping of Trees Order in England and Wales, Department of Energy & Climate Change, January 2014. See also paragraph 8(1)(a) of Schedule 4 concerning wayleaves which expire due to lack of time.).

31. On the facts, the Judge found that:

i) Had a voluntary wayleave been granted by one of the Developers' predecessors in title to UKPN, or one of UKPN's predecessors, prior to acquisition of the Properties by the Developers, such wayleave would have expired (at the latest) when the Developers acquired the Properties;

ii) Had a statutory wayleave been granted, it is probable that such wayleave would have expired "[in] or about May 2003, unless renewed". That finding was based on the assumption that the HVCs were first laid no later than 20 May 1988. This assumption arose out of a London Electricity Board ("LEB") Drawing, which was revised on 20 May 1988. The LEB was the relevant predecessor entity to UKPN. The LEB Drawing shows the route followed by the HVCs across the Properties;

iii) Assuming that any statutory wayleave had i) not been for a fixed period of over 24½ years (ie the period from May 1988 to November 2012) and/or ii) not renewed, the Developers had been entitled in 2014 to serve notice on UKPN pursuant to paragraph 8 of Schedule 4 requiring UKPN to remove the HVCs.

32. Faced with such an application, UKPN would have had a choice: it could have complied with the notice by removing the cables, or it could have applied for a "necessary wayleave" from the Secretary of State pursuant to paragraph 6 of Schedule 4. The Judge

found that UKPN would have applied for a necessary wayleave. If UKPN had made a successful application for the HVCs to remain in place, the Developers would have been entitled to compensation, in an amount to be determined by the Lands Tribunal (if not agreed by way of settlement), under paragraph 7 of Schedule 4.

D. The trial and the Judgment

33. At trial, as recorded in the Judgment at [82], it was the Developers' case that in responding as she did on 3 February 2014 to Mr Joy's email of 28 January, Ms Robinson assumed a duty of care to advise them correctly as to their rights by tendering advice that Ms Robinson knew or ought reasonably to have known that the claimants would rely on and therefore that she came under a duty to carry out the task carefully, which required advice as to the remedies available to the claimants. The negligence pleaded in the Particulars of Claim was as follows:

> "28. The advice set out in Ms Robinson's email of 3 February was negligent. Ms Robinson failed to advise Spire and Hortensia as to the legal position if UKPN did not have documentation in support of its right to lay cables through the King's Properties and/or in respect of their rights generally against UKPN. Ms Robinson's 3 February email indicated that UKPN may have had the right originally to lay the HVCs through King's Properties pursuant to a wayleave. She failed to advise that Spire and Hortensia would or might have rights and remedies against UKPN, for example if UKPN had originally installed the HVCs pursuant to a wayleave which did not bind Spire and Hortensia…"

Under "Particulars of Breach" the Developers alleged that Withers:

> "(4) Advised Spire and Hortensia negligently in respect of their rights in relation to the HVCs/Cable Route 379 (including, without limitation, by failing to follow their direct instructions to investigate and advise as to their rights with respect thereto adequately or at all) once it had been discovered. In particular, Withers failed or failed adequately or correctly to advise Spire or Hortensia regarding their rights against UKPN in relation to the HVCs/Cable 379, including that:
>
> (a) Spire and Hortensia were entitled to have the HVCs/Cable Route 379 removed at UKPN's expense; or
>
> (b) Alternatively, Spire and Hortensia were entitled to be compensated by UKPN."

34. Withers' position at trial in relation to the 2014 claim was that in the February email Withers had only provided information, and not advice. Any breach of duty was denied. At [83] the Judge recorded Withers' position as follows. The 2014 claim was hopeless because:

i) Withers was not retained in relation to dealings between UKPN and the Developers; and

ii) Mr Joy did not ask for or receive any advice on the remedies available to the Developers against UKPN.

35. The Judge's analysis so far as material was as follows. He described the "key liability issue" as "whether Withers owed the claimants a duty of care in respect of advice provided by Ms Robinson to Mr Joy in February 2014 concerning the claimants' rights against UKPN under the [EA]". He went on to identify those rights as set out at section C. above. It is to be noted that the identification of those rights involved the application of the benefit of hindsight, since the analysis rested, at least in part, on the contents of the LEB Drawing. That drawing had only emerged during the course of the 2012 claim (as evidence of the search which it was alleged that Withers should have carried out at the time).

36. The Judge went on to reject Withers' defence based on the lack of retainer. The absence of a retainer was "essentially immaterial". As for Withers' suggestion that Mr Joy did not ask for or receive any advice on the remedies available to the Developers, that was wrong on a proper analysis of the relevant email exchanges.

37. In his judgement, the 28 January email contained a request for advice concerning UKPN's rights of access and how the claimants might get the HVCs moved otherwise than at their expense. The advice in response was given in the 3 February email. By paragraph 2 Ms Robinson purported to give advice concerning rights of access under the EA. She did not give any advice concerning the rights that the Developers had or might have against UKPN. By providing an unqualified substantive answer to Mr Joy's request, so held the Judge, Withers assumed a duty of care in relation to the content of its advice, referring to *White v Jones* [1995] 2 AC 207 ("*White v Jones*"). That Withers did not charge for the advice was immaterial. The 28 January email sought advice, as Ms Robinson understood, because she provided advice.

38. Further, the Judge found that Ms Robinson knew or ought to have known that Mr Joy would rely on her advice. There was no other point in her responding, and she did not qualify her response in terms of reliance. And Mr Joy did reasonably rely on the February email as advice that there was no solution available to the Developers. The Judge referred to and accepted Mr Joy's oral evidence, including the following passage:

> "I felt that this was such unequivocal advice as to lack of position, that there was nowhere else to go with it, and that is just the way, you know I understood the advice as it was written."

39. In those circumstances, he went on to conclude that Withers had been in breach of duty by failing to advise that the position was essentially as set out in paragraphs [30] and [31] of section C. above or by identifying further information that would be required or why such information would be relevant. (Mr Tozzi QC for the Developers fairly accepted that some of the Judge's findings on breach went too far, for example, in suggesting that Withers ought to have advised of the "usual" fixed period (of 15 years) for statutory wayleaves. But any overstatement is immaterial for present purposes.)

40. The Judge held that the basis on which Ms Robinson proceeded was plainly negligent. She did not at any stage read the EA. Her advice was derived from sources that were not even recognised textbooks but commercially available practice notes. It was inconceivable that she would not have realised the implications of Schedule 4 for the Developers, had she "taken the trouble to read the provision as plainly she ought to have done" (or said that the task of providing comprehensive advice was something for specialist counsel/that required a separate retainer and payment).

41. Thus, Withers ought to have advised that the Developers were entitled to have the HVCs removed at UKPN's expense, alternatively to compensation from UKPN.

E. The parties' respective positions on appeal

Withers' position in summary

42. As set out above, Withers challenges the Judge's conclusion that Withers owed a duty of care to advise the Developers as to the rights that they would hold against UKPN under the EA in the event that UKPN was unable to demonstrate a right to lay and maintain the HVCs. Withers brings a secondary (essentially parasitic) challenge to the Judge's finding that it was reasonable for the Developers to rely on the absence of advice as to their potential rights against UKPN as positive advice that there were no such rights. It is said that the issues raised are essentially issues of law readily amenable to review by an appellate court.

43. Withers accepts that, in so far as Ms Robinson volunteered advice in response to Mr Joy's questions, Withers assumed a duty to exercise reasonable care in the giving of that advice. But that duty did not extend to a wide-ranging analysis of the remedies that might exist if it turned out on enquiry that UKPN had no right to lay/maintain the HVCs, something that would have required considerable research.

44. It is said that the Judge was wrong to find a duty of care to advise as alleged, in summary because:

i) Mr Joy did not ask Ms Robinson to advise generally on the rights that the Developers would or might enjoy against UKPN if it turned out that UKPN had not been entitled to lay the HVCs (or, at least, could not prove such entitlement);

ii) Ms Robinson did not purport to give any such advice;

iii) It would have been premature to address the issue. The obvious time to do so would have been upon receipt of UKPN's response. Any advice on the Developers' rights generally against UKPN was bound to be informed by consideration of precisely what UKPN had to say for itself;

iv) Moreover, the work required for reasonably careful and comprehensive advice on all issues would be substantial. It would not have been limited to a reading of the EA; it would have involved wider research, including of authorities (in relation to voluntary wayleaves for example);

v) The Developers were highly sophisticated. When dealing with such a (former) client in relation to highly valuable Properties and a potentially very expensive problem, it was entirely reasonable to suppose that, if the Developers wanted

advice on their rights and remedies against UKPN, they would ask for it (in terms).

45. Withers contends that, on a close reading of the emails, there was no reason why Ms Robinson should have understood that she was required to advise on the strategies that might be deployed if it turned out that UKPN had no right to lay/maintain the HVCs. The questions being posed of her were focussed on the past: asking who knew about the HVCs at the time of the purchases and why they were not discovered by Withers. There was every reason why a reasonably careful solicitor in her position would have supposed that the necessary enquiries would be made. The time for advice on remedies would be at the conclusion of those enquiries.

46. If that was a position that could permissibly have been adopted by a reasonably competent solicitor exercising reasonable skill and care, as it clearly was, then the 2014 claim fails (see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 ("*Bolam")* at 586-7 and *Williams v Michael Hyde* [2000] Lloyd's Rep PN 823 at 829-830). The Judge was wrong to find otherwise. The absence of the relevant question, on at least a reasonable construction of the relevant correspondence, should have been determinative, absent some exceptional circumstances justifying treating the solicitor as under a duty to answer a question that had not been asked. Reliance is placed by analogy with the outcome in *Amersfort Ltd v Kelly Nichols & Blayney* [1996] EGCS 156 ("*Amersfort*").

47. The corollary of the fact that Mr Joy did not ask Ms Robinson to advise, and she did not in fact advise, on remedies against UKPN in the event that there was no right to lay/maintain the HVCs is that there could be no reasonable reliance by the Developers on her advice as meaning that the Developers had no useful rights against UKPN.

48. In his oral submissions Mr Lawrence QC emphasised that the gist of the claim was a negligent omission to advise amounting to positive advice that there was nothing to be done, even if UKPN could not produce a wayleave. That was the only advice that could materially have affected the outcome for the Developers (because in the event UKPN could not produce a wayleave and conceded that it had to proceed on the basis that there was none). On that basis, any sensible reading of the relevant email exchanges showed such an analysis to be flawed. There was no advice (by necessary implication or otherwise) that the Developers would have no legal recourse in the event that UKPN could not produce a wayleave, something yet to be investigated.

The Developers' position in summary

49. The Developers contend that the Judge's reasoning cannot be faulted. The emails from Mr Joy, culminating in his email of 28 January 2014, contained requests for advice concerning UKPN's rights of access and how the Developers might get the HVCs moved otherwise than at their expense. The second numbered question and the final paragraph of Mr Joy's email of 28 January 2014 "contain a clear request by Mr Joy for advice from Withers in respect of UKPN's statutory right of access, and how the [Developers] should approach UKPN to get the cable moved" (which, as Mr Joy had previously made clear, he wanted done "NOT at [the Developers'] expense").

50. Although the second question in the 28 January 2014 email only referred to statutory rights, Ms Robinson chose in the February email to address voluntary wayleaves as

well. Having elected to address both voluntary and statutory wayleaves, it was not open to her to tell "only half the story". She came under a duty to advise that any voluntary wayleave could not assist UKPN. As for statutory rights, Ms Robinson advised as to part of the statutory scheme under the EA, namely the means by which a wayleave could have been acquired by UKPN. Although Ms Robinson stated (and the Judge found) that she had not looked at the EA, the effect of her advice was to summarise parts of sub-paragraphs 6(1)(b) and 6(6)(a) of Schedule 4. She failed to summarise what was said in paragraph 6(3) of Schedule 4 or that any rights under the wayleave could have expired. She was under a duty to explain not only how such rights could arise, but also how they would expire on change of ownership (if voluntary) or after a fixed period (if statutory), in either case giving the Developers a right to serve a notice on UKPN to remove the HVCs. Instead, she suggested explicitly that once rights of access had been acquired by UKPN, they did not need to be registered, and implicitly that they continued, so that the Developers would be bound by them.

51. A reasonably careful and skilful solicitor in Ms Robinson's position would have reviewed the relevant statutory regime and given an explanation of the relevant parts of that regime. That would not have required a wide-ranging analysis of the remedies that might exist; the context of the emails was not limited to whether the HVCs should have been identified by Withers prior to purchase. The 28 January email was not a request limited to the three numbered questions. Ms Robinson was not entitled to assume that the necessary enquiries would be made of UKPN.

52. Further, by way of context, the Developers point to the fact that, had Withers not been negligent in 2012, the HVCs would have been identified prior to purchase. One might have expected a firm of Withers' repute to be astute to protect the interests of its clients, if only to make amends for its previous negligence. They go so far as to describe Withers' reliance on the absence of a specific question from Mr Joy as "quite shameful". In any event, Mr Joy posed the relevant question. And the absence of a formal retainer needs to be seen in the context of the 2012 retainer, the fact that Ms Robinson recorded her time on the exchanges in 2014 to the Withers' matter number for Hortensia's purchase of the King's Library, and the fact that at the time of the emails in January and February 2014 Withers had a retainer to advise in relation to the financing of the project and were therefore in one sense the Developers' current solicitors, not merely formerly retained. Moreover, Ms Robinson at no stage sought clarification or indicated that a separate retainer was required.

53. Mr Joy's understanding of the February email, namely that UKPN had essentially an unfettered right to lay the HVCs and there was nothing that the Developers could do about it, was a wholly reasonable understanding and interpretation of Ms Robinson's unqualified advice. In his oral submissions for the Developers, Mr Tozzi emphasised that the advice was not caveated in any way: it was not expressed to be provisional or incomplete in any way; there was no suggestion that it could not be relied upon or that a formal retainer was required or that, for example, specialist counsel was needed.

54. Finally, on the first ground of appeal, the Developers contend that their position is reinforced by the decisions in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 ("*Manchester*") and *Khan v Meadows* [2021] UKSC 21 ("*Khan*"). Reference is made to the majority's approach to the scope of a professional's duty which was said to be governed by the purpose, objectively judged, for which the advice was sought. Mr Joy sought advice on UKPN's statutory rights of access to lay cables

in emails which expressly identified the purpose for which such advice was being sought as being whether the Developers "could potentially ask for the cable to be moved NOT at our expense ..." and for the Developers to know "how we are going to approach [UKPN] about this issue ... The better prepared we are the more likely we will succeed in getting the cable moved." When Ms Robinson provided advice to Mr Joy in her email of 3 February 2014, the purpose of the duty assumed by Withers, judged on an objective basis by reference to the purpose for which the advice was being given, was to assist the Developers in their approach to UKPN for the cables to be moved at no cost.

55. As for the second ground of appeal, Mr Joy's evidence, accepted by the Judge, demonstrates that it was reasonable for him to expect to be told the (full) legal position regarding UKPN's rights.

F. The relevant law

56. In terms of a solicitor's contractual duties owed under a retainer, the relevant legal principles on current authority can be summarised as follows:

i) The solicitor's duty is limited to carrying out the tasks which the client has instructed and the solicitor has agreed to undertake. The court must beware of imposing on solicitors duties which go beyond the scope of what they are requested and undertake to do. The duty is directly related to the confines of the retainer;

ii) However, it is implicit in the retainer that the solicitor will proffer advice which is "reasonably incidental" to the work that they have agreed to carry out;

iii) In determining what advice is "reasonably incidental", regard should be had to all the circumstances of the case, including the character, sophistication and experience of the client. More burdensome responsibilities are likely to be placed on solicitors if their clients are inexperienced or vulnerable and more limited responsibilities for experienced or sophisticated clients. The extent of the burden that the allegedly incidental task places on the solicitor will be relevant. Claims that the solicitor was obliged to take expensive and burdensome allegedly incidental steps are unlikely to find favour. In determining what is "reasonably incidental" to the solicitor's engagement, regard may be had to the level of fees charged.

(See generally *Midland Bank Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 ("*Midland Bank*") at 402 to 403; *Minkin v Lansberg* [2015] EWCA Civ 115 ("*Minkin*") at [38]; *Lyons v Fox Williams LLP* [2018] EWCA Civ 2347 ("*Lyons*") at [41] to [43]; *Carradine Properties Ltd v DJ Freeman & Co* [1982] WLUK 229; [1999] Lloyd's Rep PN 48 at 12-10 and 12-13; *Football League Ltd v Edge Ellison (a firm)* [2006] EWHC 1462 (Ch); [2007] PNLR 2 at [270]; *Bank of Ireland v Watts Group plc* [2017] EWHC 1667 (TCC); 173 Con LR 240 at [61].)

57. The general principle is thus that a retained solicitor owes no duty to go beyond the scope of their express instructions and give advice in relation to other matters. This is subject to the qualification that the duty extends to giving advice that is "reasonably incidental". This is an elastic phrase, similar to that adopted in *Gilbert v Shanahan* [1998] 3 NZLR 528 ("*Gilbert*") (at 537) to the effect that "matters which fairly and

reasonably arise" in the course of carrying out express instructions are to be regarded as coming within the scope of the retainer. But it must have its limits, consistent with earlier authority and as demonstrated by subsequent authority. Thus, in *Credit Lyonnais SA v Russell Jones & Walker* [2002] EWHC 1310 (Ch); [2003] PNLR 2 ("*Credit Lyonnais*") at [28], approved in *Minkin* at [37]), it was held that, where a solicitor becomes aware of a risk to the client in the course of doing that for which they were retained, it is the solicitor's duty to inform the client. In so doing, the solicitor is neither going beyond the scope of their instructions or doing extra work on such matters. In *Denning v Greenhalgh Financial Services Limited* [2017] EWHC 143 (QB) Green J, agreeing with *Credit Lyonnais* at [28], commented (at [53]) that it would only be in "obvious" cases that an extended duty to advise would arise. There would have to be a "close and strong nexus" between the retainer and the matter upon which it is said that the professional should have advised. In *Lyons* it was held that the solicitor was not under a duty to advise on the meaning of disability insurance policies taken out for his benefit by his employers, something which the solicitor could not have done without thorough examination of the policies and a certain amount of legal research. At [42] Patten LJ confirmed that:

> "Neither *Credit Lyonnais* nor *Minkin* are authority for the proposition that the solicitor is required to carry out investigative tasks in areas he has not been asked to deal with, however beneficial to the client that might in fact have turned out to be."

58. Beyond this, it is now well-established that a solicitor retained by a client will owe a concurrent independent duty of care in tort (see *Midland Bank* and *Henderson v Merrett Syndicates* [1995] 2 AC 145 at 190B).

59. Where there is no retainer, different considerations arise. The concept of assumption of responsibility as identified in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*") remains the foundation of the tortious liability (see *NRAM plc v Steel and another* [2018] UKSC 13; [2018] 1 WLR 1190 at [24] followed in this jurisdiction by the Supreme Court in *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43; [2019] 1 WLR 4041 (at [7])). The reference to "voluntary" assumption in *Hedley Byrne* (at 529 and 530) must not be taken to mean that the solicitor needs to consent to the claimant placing responsibility on them. Rather, the doing of the act implies a voluntary undertaking to assume responsibility. Thus a solicitor is taken to have voluntarily assumed a legal responsibility where they undertake responsibility for a task: "it is the undertaking to answer the question posed which creates the relationship" (see *White v Jones* at 273g). The fact that information or advice is provided gratuitously negates neither the assumption of responsibility nor the requirement to perform the tasks so assumed with reasonable skill and care.

60. Whether any responsibility is assumed, and the extent of any such assumption, is to be judged objectively in context and without the benefit of hindsight. Thus, an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the claimant (see *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 at [181], endorsing *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 637). The primary focus must be on exchanges which cross the line between the solicitor and the claimant (see for example *Williams v Natural Life Health Foods* [1998] 1 WLR 830 ("*Williams*") at 835G). A fact-sensitive enquiry in each case is necessarily required.

61. Illustrations of the application of these principles in practice can be found in, amongst others, the following cases: *Amersfort*; *Stronghold Investments Ltd v Renkema* [1984] 7 DLR (4th) 427 ("*Stronghold"*); *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co (a firm)* [1987] 1 WLR 916 ("*County Personnel*"); *Gilbert*; *Doolan v Renkon Pty Ltd* [2011] TASFC 4; [2011] 21 Tas R 156 (*"Doolan"*); *Investors Friend Ltd v Leathes Prior* [2011] EWHC 711 (QB) ("*Investors Friend")*; *Crossnan v Ward Bracewell & Co* [1984] PN 103 ("*Crossnan*"); *Cade v Cade* 71 SASR 571 ("*Cade*"); *Campbell v Imray* [2004] PNLR 1 ("*Campbell*"); *Shepherd v Byrne and Partners LLP* [2017] EWHC Ch; Lloyd's Rep FC 8 ("*Shepherd*"). These authorities fall into two categories: those involving the scope of a solicitor's duty under a retainer (see *Stronghold*; *County Personnel; Gilbert; Cade; Investors Friend* and *Shepherd*); and, more pertinently for present purposes, those involving "one-off" enquiries from former or prospective clients: (see *Amersfort; Doolan; Crossnan* and *Campbell*). Given the importance of the factual detail in each case, the drawing of analogies is not instructive. However, the statement of Kennedy J in *Crossnan* (at 106) is helpful. Once the solicitor in that case made the election, without qualification or disclaimer, to assist the plaintiff as to how he could obtain funds to pay legal costs:

> "…it became the duty of [the solicitor] to exercise reasonable skill and care in the performance of the limited task he had undertaken to perform."

62. There are two further issues of law to address:

    i) The role, if any, of the *Bolam* principle in framing the scope of any assumption of responsibility;

    ii) Whether or not, where there is no retainer and liability rests solely on an assumption of responsibility, the solicitor's duty extends to matters "reasonably incidental" to the tasks that the solicitor has volunteered to undertake.

63. As to the first question, as set out above, Mr Lawrence for Withers contends that, if the view taken by Ms Robinson as to the scope of the task that she accepted was one which a reasonably competent solicitor could have adopted (as he says it clearly was), then the Developers' case on scope of duty must fail. The standard of care which a professional must exercise is limited to the exercise of the ordinary skill of an ordinary competent person exercising that particular art (see *Bolam* at 586-587).

64. This is a novel suggestion, unsupported by any authority to which the court was taken and not one propounded at trial. It wrongly conflates the question of scope of duty with breach. As set out above, the question of scope of the duty assumed by the solicitor has to be assessed as a matter of objective construction. The touchstone of liability is not the state of mind of the defendant (see *Williams* at 835G). This is both principled and fair. As to principle, whether or not a duty of care is exacted on the facts, and the scope of that duty, is a question of law. As to fairness, the person requesting the advice should be entitled to proceed on the basis that the solicitor has assumed responsibility for that which, on an objective basis, the relevant communications suggest that they have. The *Bolam* principle is directed only at the separate question of the standard of care to be exercised once the scope of duty/retainer has been established.

65. As to the second question, Mr Lawrence was prepared to accept (in answer to a query from the court) that a solicitor assuming responsibility for a specific task assumes responsibility for something "necessarily implicit" in that task. But his position is that, in the absence of a retainer, there is no room for any extension of the scope of a solicitor's assumed duty by reference to "reasonably incidental" matters. He points to the fact that in an extra-contractual situation the solicitor receives no remuneration and cannot limit their duties or exposure to damages.

66. These matters are relevant in the sense that there is no retainer and so no opportunity for the parties to define and circumscribe their respective obligations. There is also potentially a broader, conceptual objection: the professional chooses to assume responsibility for a specific task or exercise: no more and no less. It can be said that there is no room for the implication of any wider obligation in the *Minkin* sense. The giving of certain advice is either within the scope of the responsibility assumed or without.

67. On the other hand, if the scope of a solicitor's contractual duty is comprised by what is in, and "reasonably incidental" to, the express terms of a retainer, there is an argument that if a solicitor assumes responsibility for providing advice by reference to the terms of the advice sought, the document containing those terms is akin in a tort case to the retainer in a contract case; and that same principle should be applied to the terms of the request. The terms of the request can be said to perform the function in tort which the retainer does in contract.

68. Ultimately, the debate does not need to be resolved on this appeal and the issues were not argued out fully before us. I would therefore prefer to express no concluded view upon it.

69. Finally, I refer briefly to the twin decisions of *Manchester* and *Khan*. These decisions were handed down in June 2021, and so between the hearing before the Judge and the Judgment. Given that the focus of Withers' defence before the Judge was on whether Withers was giving any advice at all in 2014, it is unsurprising that no reference was made to them. However, the change of emphasis in Withers' position on appeal brought them into focus and the parties were asked by the court to address what, if any, relevance they might have to this appeal.

70. The decisions in *Manchester* and *Khan* addressed the concept of scope of duty in the tort of negligence as illustrated by the decision of the House of Lords in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*; *South Australia Asset Management Corpn v York Montague Ltd* [1997] AC 191 ("*SAAMCO*"). The majority opinion was set out in the speech of Lords Hodge and Sales. The majority suggested a six-stage analysis as a useful (though non-prescriptive) approach to placing the scope of duty principle in the tort of negligence: see *Manchester* at [6]; *Khan* at [28]. The second question asked what were the risks of harm to the claimant against which the law imposes on the defendant a duty to take care. It held (at [4]) that the scope of that duty was "governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given" ("the purpose test") and at [17] that "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."

71. Although, as set out above, the Developers argue that the decisions in this respect support their position, I consider that the purpose test is inapposite to the question arising here, namely the content of the duty owed by the professional as a matter of conduct. By contrast, the purpose test was formulated in order to address the recoverability of damages; to that end it is relevant to ask whether the scope of the professional's duty extended to certain risks in respect of activities which the professional was required to perform. The purpose test addresses the question of scope of duty in law (and the *SAAMCO* principle), rather than the extent of the duty in the first place. Indeed, the purpose test was formulated for a different exercise and on the assumption that the professional's obligation to advise fell within the scope of duty (as reflected for example in the use of the words "negligent advice" in [17] of *Manchester*).

Analysis

72. The basis of any liability in this case is an assumption of responsibility by Withers. There was no contractual duty to advise. Withers freely accepts that it assumed a duty of care to exercise reasonable skill and care in giving the answers that it chose to give to the specific questions asked of it by Mr Joy in the 28 January email. But it contends that it assumed no wider duty. The central question is therefore the scope of the assumption of responsibility on the facts.

73. That scope, and in particular whether or not Withers assumed responsibility to advise on the Developers' rights and remedies against UKPN in relation to the HVCs, is a question of objective construction of the relevant exchanges that crossed the line between the parties, specifically the February email responding to the 28 January email. In carrying out the exercise of construction, the relevant email exchanges are not to be read as if they were formal legal documents, and must be considered in the context that they were exchanges between a solicitor and former client who were familiar to each other and involved in ongoing professional relationships on other projects. At the same time, the Developers were both highly experienced and well-resourced, dealing with super-prime market properties and surrounded at all times by a host of property development specialists in multiple disciplines. Mr Joy himself was a sophisticated professional and someone whose communications and any requests Withers was entitled to take at face value.

74. The central question in short is whether, on a proper construction of the relevant emails, by answering the 28 January email as Withers did in the February email, Withers assumed a duty to advise "as to the legal position if UKPN did not have documentation in support of its right to lay cables through the King's Properties and/or in respect of their rights generally against UKPN".

75. I start with the contextual communications leading up to the 28 January email. They consist of an opening telephone call from Mr Joy to Ms Robinson on 2 January 2014 followed by five emails spread over the following fortnight.

76. On 2 January 2014 Mr Joy telephoned Ms Robinson in relation to the HVCs out of the blue. He wanted to know if Withers had any information on a large electric cable running under the development site and what Withers would normally investigate about such matters. He sent across a PDF plan showing the path of the cable to Ms Robinson by email the following day.

77. Thus, from the very outset, there was implicit criticism of Withers by the Developers (or at the least the very real potential for criticism down the line). (Withers' potential liability for having failed to identify the HVCs at the time of purchase had of course been flagged up internally at the Developers, as evidenced by MBA's email to Mr Hunter on 4 December 2013.) The situation was delicate and the context for the communications – and an objective interpretation of those communications – was a guarded and restrictive, rather than an open and expansive, one.

78. Ms Robinson's reply in the 6 January email stated that she had reviewed Withers' reports on title. She identified certain sections in the reports, asserting that Withers had "clearly flagged up in advance of exchange" the existence of two sub-stations and ancillary cables in the vicinity of the property. Any further searches would not be conclusive; the only "sure-fire" way of ascertaining routes was to carry out trial holes. It was an obviously defensive response, (and one of course rejected as inaccurate by the Judge on the 2012 claim).

79. In the 13 January email Mr Joy followed up on this response. He wanted confirmation that the existence of the cable did not emerge from Withers' normal pre-acquisition search procedures. He stated that he thought it strange that the existence of the HVCs had not shown up on title documents, since one would have thought that some sort of easement would be required for a third party to lay such a cable. So he asked whether such documents would not be registered on the title documents. He went on to observe that, in the absence of some sort of legal documentation, then perhaps the Developers could argue that no permission had been granted and so ask for the cable to be moved "NOT" at their expense. The issue was that the cable needed to be moved in order for the developments to proceed and the cost of that would be "high". He observed that the issue was not "really related" to the substations (which Withers had identified pre-exchange). He informed Ms Robinson that he would report "this" to "the board" in due course. He thanked Ms Robinson for her help.

80. By this email, Ms Robinson was made aware that i) the cable needed to be moved; ii) that would be expensive; and iii) Mr Joy was considering the possibility of the Developers arguing that no permission for laying the cable had been granted, with the result that they could ask for the cable to be relocated at someone else's cost. She was not asked to (and did not) comment, let alone advise, at any stage on that possibility.

81. I do not consider this to be an unduly legalistic or unrealistic objective interpretation of the 13 January email. Consistent with his initial approach, Mr Joy's only questions for Ms Robinson related to the question of what had happened at the time of purchase in 2012, an issue which he was continuing to probe. Had Mr Joy in the 13 January email been seeking advice on the possibility of getting the HVCs moved at someone else's expense, then he would no doubt have been unhappy with (and followed up immediately on) Ms Robinson's response in the 16 January email, which was completely silent on the issue.

82. In the 16 January email Ms Robinson confirmed that there was nothing revealed in Withers' pre-contract due diligence specifically referring to the cable shown marked on the plan that Mr Joy had sent her on 3 January. She referred again, however, to Withers' report on the sub-station and ancillary cables in the vicinity of the Properties. Again, in the context of answering Mr Joy's question as to why nothing had shown up on the

title documents, she commented that there would not necessarily be any mention on title documents, because utility providers had statutory rights of access to lay cables.

83. She "note[d]" from Mr Hunter's email that the Developers would be approaching UKPN in due course to divert the cable. Mr Joy was therefore on notice that Ms Robinson understood that there would be further discussion and activity between the Developers and UKPN in relation to the HVCs.

84. There were no further communications from Mr Joy after the 16 January email until 28 January 2014. Thus, the setting for the 28 January email was that Mr Joy had been probing Ms Robinson on the question of what had been discovered and what could or should have been discovered in relation to the HVCs at the time of purchase. Mr Joy's enquiries and Ms Robinson's answers had all been backward, not forward, looking.

85. It is convenient and appropriate to consider the 28 January and February emails together. At the outset, it is to be noted that the 28 January email was "following up" on Ms Robinson's response in the 16 January email. As indicated, that response was focussed on past events, namely what was known and not known in 2012 (and the reasons for that state of knowledge). Secondly, the language of Mr Joy's request is striking. Mr Joy asked Ms Robinson for her "thoughts". On the central second question, he asked her only to "elaborate slightly". Even allowing for the informalities of email communications, this is not the language of a request for definitive advice by a commercial developer on a point of potentially significant financial value.

86. The first question ("Q1") asked whether the existence of the HVCs should "not have come up" as a result of sellers' replies to enquiries, even if they did not appear on the title documents. Mr Joy was continuing his search for answers as to how the HVCs had been overlooked in 2012. Ms Robinson answered it by essentially exonerating the sellers. The sellers could only provide such information as they had and there were no wayleave agreements or deeds of easement revealed, other than the rights relating to the electricity transformer chambers. In addition, the receivers selling the King's Chapel had extremely limited information and no knowledge of the property.

87. The second question ("Q2") and Ms Robinson's answer to it are central. Q2 asked Ms Robinson to "elaborate slightly" on "the statutory rights of access point". Mr Joy asked whether that meant that UKPN could have laid the HVCs without having any kind of legal permission from the then owners. It seemed impossible that the owners were unaware of such a large cable being laid on their property.

88. The "statutory right of access point" was a reference back to Ms Robinson's explanation in the 16 January email that there would not necessarily be any mention of the HVCs on the title documents because utility providers have statutory rights of access to "lay cables etc". That is to say, it related (again) to the question of knowledge in 2012.

89. Ms Robinson's answer to Q2 also related to that question. Thus she (correctly) identified the possibility of both voluntary wayleaves and statutory wayleaves under the EA. In either case such wayleaves "do not need to be registered at the Land Registry". This was why it was "possible that a wayleave was granted sometime [sic] ago when the cable was originally laid and was not known to the seller". Ms Robinson was explaining how the seller may not have known of the existence of the HVCs. Still focussing on knowledge, she then went on to trace the chain of ownership of the King's

Library, commenting again that the seller might therefore not have been aware of the cable. As to the King's Chapel, she pointed again to the receivers' likely lack of knowledge.

90. As set out above, it is argued for the Developers that Q2, when read with the final paragraph of the 28 January email, was a clear request for advice going beyond a narrow answer to Q2: it sought advice on the Developers' negotiating position with UKPN more generally. Specifically, it was a request for advice on the Developers' potential rights and remedies against UKPN.

91. I disagree that this is a proper objective construction of the 28 January email. In the final paragraph, Mr Joy asked expressly for Ms Robinson's thoughts "on the above." "[T]he above" was the three questions. Consistent with that, Ms Robinson responded to those questions "using the same numbering". Objectively, she was not assuming responsibility for anything going beyond answering those three questions. As indicated, those questions and answers went to the question of knowledge at the time of purchase. Ms Robinson's advice did not go near the wider issues of the Developers' potential rights and remedies, issues which would in any event have been highly sensitive from Withers' perspective, given its potential liability for having failed to identify the HVCs pre-acquisition.

92. The fact that Mr Joy stated that the purpose of seeking answers to the questions above was in order to help the Developers decide how to approach UKPN (even taking into account the previously mentioned possibility of attempting to have the cables removed at no cost to the Developers) does not lead to a broader construction. Ms Robinson was asked in terms to provide her thoughts on three specific questions. It was not for her to second-guess how or why her answers to the three questions might assist the Developers when they chose to approach UKPN in due course. In any event, Ms Robinson was not privy to the Developers' detailed strategy behind the scenes. There could have been many reasons why a fully informed understanding of the reasons for the non-discovery of the HVCs at the time of purchase would be relevant to or useful in formulating the Developers' approach to UKPN.

93. Thus, by answering Q2 in the manner in which Ms Robinson did, Withers is not to be taken as having assumed a duty to advise on the wider questions of potential rights and remedies.

94. This conclusion is reinforced by the uncertainty of the factual position at the time, a significant contextual point. Neither the Developers nor Withers knew when or with what legal authority, if any, UKPN (or any predecessor) had laid the HVCs, and on what legal basis, if any, UKPN was maintaining them. Indeed, Ms Robinson's response to Q2 emphasised that uncertainty, referring to the possibility of a wayleave having been granted "some time ago".

95. For the avoidance of doubt, I reject the Developers' argument that Withers' position should be assessed on the basis that the LEB Drawing was available to it in 2014. The Developers rely on the fact that, had Withers not failed in its duties in 2012, the LEB Drawing would have been obtained at that stage. However, Withers' position in 2014 is to be judged by reference to the facts as they then stood, not on the basis of a purely hypothetical situation. The fact that the LEB Drawing was not available through fault on Withers' part does not alter that analysis.

96. The position in terms of possible wayleaves was thus completely unknown to Withers. It was something to be explored in the future, as necessary. It was known to Withers that the Developers would be taking the matter up with UKPN in due course, when the Developers deemed the time right to do so.

97. There was some discussion on appeal as to whether, in responding to Q2 Withers ought at least to have advised that a voluntary wayleave is a personal right which does not bind subsequent occupiers and that statutory wayleaves are for fixed periods only. But this is not how the case was advanced before the Judge and in any event Mr Lawrence made it clear that Withers' position would have been that any such finding would have been wholly inadequate for the purpose of the Developers' claim in terms of causation.

98. The third question "Q3" has not received much attention but, like Q1, it is not to be ignored. It asked why if, "as there surely must have been", there was some kind of legal documentation relating to the laying of the HVCs on both sites, this had not "shown up on our radar". Again, Mr Joy was probing the past (and implicitly pointing the finger either at the sellers of the Properties and/or at Withers). Qs 1, 2 and 3 were all of a piece: on the face of it, Mr Joy was attempting to find out from Withers what had gone wrong in 2012.

99. For these reasons I disagree with the Judge's broad conclusions in [83] and [85] of the Judgment that, as a matter of construction, Withers assumed a responsibility to advise the Developers of their rights and remedies against UKPN. The Judgment does not contain an analysis of the relevant exchanges in the detail set out above, no doubt because the focus before the Judge was not the scope of the responsibility assumed, but rather whether or not any duty was assumed at all (as reflected in [78] of the Judgment). Given the thrust of Withers' defence at this stage, he was focussing on whether Withers was advising, as opposed to merely providing information, not on the question of what Withers was advising on.

100. The suggestion that a duty on Withers to advise on rights and remedies against UKPN arose because such matters were "reasonably incidental" to the matters for which Withers had assumed responsibility was not an aspect laboured by Mr Tozzi. Rather, his central submission was that the Developers had clearly asked for advice on the question of remedies against UKPN. However, I should add that, in the event that there is a place for the imposition of a duty to advise on "reasonably incidental" matters in a non-contractual context such as the present, the question of what remedies the Developers might have against UKPN in relation to the HVCs was not a matter "reasonably incidental" to the matters for which Withers assumed responsibility. Ignoring the extent of the burden involved in researching and giving such advice (which may look relatively straightforward with the benefit of hindsight, but would not necessarily have appeared so in January 2014, not least given the factual uncertainties), Withers' assumed duty related to the circumstances surrounding the non-discovery of the HVCs in 2012, and not potential avenues of redress against UKPN going forward.

101. Thus, whilst it was reasonably foreseeable that Mr Joy would rely, and he could reasonably rely on Ms Robinson's answers in so far as they went, it was not reasonably foreseeable (and Mr Joy could not reasonably rely) on her answers as amounting to provision of comprehensive advice on the Developers' actual or potential rights and remedies against UKPN in respect of the HVCs.

102. In reaching this conclusion, I bear in mind that the Judge accepted Mr Joy's evidence that, as a matter of fact, Mr Joy did rely on Withers' lack of advice in the February email (as to the existence of potential rights and remedies for the Developers) as advice that there was "no solution available to [the Developers]". This is said by the Developers to lend weight to their position. However, just as Ms Robinson's subjective understanding of the scope of the requests being made of Withers does not determine the scope of Withers' assumption of duty, nor can Mr Joy's subjective reaction to the advice given do so. What matters is an objective assessment of the scope of the responsibility assumed. That assessment, as set out above, demonstrates that Mr Joy's treatment of the lack of advice in the February email as to the existence of potential rights and remedies for the Developers as positive advice that there was "no solution available to [the Developers]" was not a reasonable one.

Conclusion

103. For these reasons, I would allow the appeal. On a fair and objective reading of the relevant email exchanges in context, Withers did not assume legal responsibility to the Developers to advise on the legal position if UKPN did not have documentation in support of its right to lay cables through the Properties and/or in respect of their rights generally against UKPN.

104. The outcome turns on no more than the application of well-established principles to the specific facts of the case. It is nevertheless clear that there are lessons to be learned on both sides. As Mr Lawrence submitted, it is important that solicitors are able to respond courteously and constructively to "one-off" requests for information or advice from former or potential clients or third parties without fear of creating legal liability. At the same time, when volunteering any such information or advice, solicitors need to take care to identify the limits of any assumption of responsibility in order to avoid the risk of litigation such as the present. Equally, those seeking information or advice from solicitors on an informal basis need to take care to understand the potential limits of the exercise and the extent to which they can reasonably rely on any response.

Lord Justice Popplewell :

105. I agree that the appeal should be allowed for the reasons given by Carr LJ. I add a few words of my own only because at one time I was attracted to the interpretation of the emails for which the Developers contend.

106. As Carr LJ's judgment persuasively explains, there is nothing prior to the 28 January email in which the Developers sought any advice for the purposes of any approach to UKPN, notwithstanding that Ms Robinson knew and appreciated that the Developers intended to make such an approach and to deploy any available argument that the cables should be removed or redirected at UKPN's own cost. There are two insuperable difficulties with the Developers' case that the effect of Q2 and the final paragraph of the 28 January email is that they were doing so in that email.

107. The first is that it treats Q2 as asking two separate questions, one being about "statutory rights of access" generally (which is to be construed in the light of the final paragraph) and the other being the specific question in Q2 which follows. However, any reasonable reading of Q2, before coming to the final paragraph of the email, would treat it as a single question: the "elaboration" about statutory rights of access being inquired

after was whether it meant that UKPN could have laid the cable without any kind of permission from the then owners. This is further reinforced by the elaboration sought being a "slight" one, suggesting that it was limited in scope. Ms Robinson answered this question in the affirmative by her explanation in her Q2 answer on 3 February. She gave all the advice which was asked for in Q2.

108. In order for the final paragraph to convert Q2 into the general inquiry about statutory rights for which the Developers contend, it would have to be read as consistent *only* with such an extended inquiry, going beyond one relating to the question whether the cable could have been laid without the then owners' permission which was the limited extent of the language of Q2 itself. It could only be read in such a way if the limited inquiry *could not* be of any relevance to an approach to UKPN. However as Carr LJ has observed, Ms Robinson could properly have regarded the answer to Q2, confined as it was to knowledge of the cables at the time of purchase, as something which might assist the Developers in their approach to UKPN, at least by way of background: such an approach would usefully be informed by knowledge of arguments as to whether anyone was at fault in the existence of the cables not previously having come to light, and in particular whether UKPN would be able to say that it was the fault of the sellers or the Developers. There is therefore nothing in the language of the final paragraph to change the plain meaning of the single question in Q2.

109. The second difficulty is that the 28 January email asks only about UKPN's *rights*, namely its statutory rights to lay the cable; it makes no inquiry as to any *remedies* against UKPN. A case might have been advanced that advice as to the rights should have included advice that wayleaves, whether voluntary or statutory, were of limited temporal duration, such that the relevant issue vis à vis UKPN was not merely whether one or other had originally been granted; and perhaps that a failure to advise that they were temporary was tantamount to advice that they were not temporary in the light of what Ms Robinson knew from the emails was Mr Joy's current thinking. This was the critical misapprehension under which Mr Joy was labouring, having made the reasonable commercial assumption that the original owners must have known about the laying of the cables and would not have permitted it unless UKPN had a contractual or statutory right to do so at the time. That was not, however, the case pleaded or pursued against Withers, either at first instance or on appeal, which was unequivocally one of a duty to advise on current remedies, and a breach by failing to do so, not a breach in failing to advise that wayleaves were of temporary duration and might have expired (statutory wayleave) or would have done so (voluntary wayleave). Had that been the case advanced, a causation question would have arisen as to what the Developers would have done with the information. They might have assumed that they would have a remedy against UKPN if the original permission to lay the cables had expired. Mr Lawrence may or may not be right that such a case on causation would have foundered as a result of the subsequent inquiries made to UKPN for sight of the wayleave upon which the latter relied. Those are questions on which there were no findings because they did not arise on the pleaded case, which was unequivocally one of a duty to advise on remedies, and a breach in failing to advise that the Developers would, in the absence of a valid current wayleave, be entitled to insist upon removal at UKPN's expense or compensation instead.

Lady Justice King :

110. I also agree.