Neutral Citation Number: [2020] EWHC 404 (Comm)

IN THE HIGH COURT OF JUSTICE Claim No LM-2019-000155
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL

Thursday 27 February 2020

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

JOHN HALL
(in his own right and as assignee of **1st CLASS LEGAL (IS) LIMITED)**
Claimant

- and -

(1) SAUNDERS LAW LIMITED
(2) SUBIR KUMAR KARMAKAR
(3) SAUNDERS & PARTNERS LLP
Defendants

- -

Mr Paul Mitchell QC
(instructed by *Knights Plc*)
appeared for the Claimant

Mr Daniel Shapiro QC and Mr James Sharpe
(instructed by *DAC Beachcroft LLP*)
appeared for the Defendants

Hearing dates: 12, 13 February 2020

- -

……

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

MR SALTER QC:

Introduction

1. This dispute concerns the extent of the duties (if any) owed by solicitors who conduct funded litigation to those who provide the litigation funding. The claimant in this action, Mr John Hall ("Mr Hall"), sues in his own right and as assignee of 1st Class Legal (IS) Ltd, a litigation funder that is now in liquidation. The second defendant, Mr Subir Kumar Karmakar ("Mr Karmakar"), is a solicitor of the Senior Courts. The first and third defendants are firms of solicitors of which Mr Karmakar was a partner or member at various material times. In this judgment, I shall refer to 1st Class Legal (IS) Ltd as "the Funder", to the first and third defendants as "Saunders" and to the defendants together as "the Solicitors". For the purposes of this application, it has been agreed that I should assume that the assignment from the Funder to Mr Hall is valid and should make no distinction between the first and third defendants.

2. In very broad outline, the complaint made in this action is that the Solicitors did not communicate to the Funder various pessimistic views expressed by counsel as to the prospects of success of the action being funded. It is said on behalf of Mr Hall that those omissions were a breach of the tripartite funding agreement between the Funder, Saunders and Malicorp Limited ("Malicorp"), the claimant in the funded action. I shall refer to that agreement, as it is referred to in the Particulars of Claim, as "the Saunders Funding Agreement". Mr Hall also asserts that those omissions were a breach of a common law duty of care and/or of a fiduciary duty owed by the Solicitors to the Funder. Finally, Mr Hall alleges that those omissions were each the result of a conscious decision made by Mr Karmakar personally, as a result of which Mr Hall has (he says) a claim against Mr Karmakar in the tort of deceit.

3. The Solicitors now apply for the action to be summarily dismissed, relying both on CPR part 24 and upon the court's powers under CPR part 3.4(2) to strike out a statement of case. Again in very broad outline, the Solicitors' case is that that the claim for breach of contract is bound to fail because, on the true interpretation of the Saunders Funding Agreement, the Solicitors were themselves under no duty to pass on to the Funder the pessimistic views of counsel about the action's prospects of success. Any such duty was owed only by their client, Malicorp. The Solicitors also say that, in the absence of any such contractual duty to the Funder, they can be under no equivalent tortious or fiduciary duty. The Solicitors therefore say that the claim against them, whether based on contract, tort or fiduciary duty, is misconceived in law. As for the action in deceit against Mr Karmakar personally, the Solicitors say that that too is bound to fail, as it is not based upon any positive statement but only upon a pure omission to speak. They also make various complaints about what they say is the failure of Mr Hall's advisers to plead such a serious allegation properly and specifically in the Particulars of Claim.

4. The Solicitors' application was issued on 27 September 2019. It was supported by two witness statements: the first witness statement of Mr Jack Holling, a senior associate in the firm of solicitors acting for the Solicitors, which was made on 26 September 2019; and the first witness statement of Mr Karmakar made on 27 September 2019. Mr Hall's response to the application is supported by the first witness statement of Ms Melissa Worth, who is a partner in the solicitors acting for Mr Hall. Ms Worth's witness statement was made on 25 November 2019. It was answered by a second witness statement made by Mr Holling on 10 December 2019. At the hearing before me, the Solicitors were represented by Mr Daniel Shapiro QC and Mr James Sharpe. Mr Hall was represented by Mr Paul Mitchell QC. I am grateful to all counsel and to the teams behind them for their assistance.

Background facts

5. At least for the purposes of this application, the essential background facts were not in dispute:

   5.1 On 4 November 2000 Malicorp entered into a contract ("the Concession Contract") with the government of the Arab Republic of Egypt ("Egypt") to design and construct a new airport at Ras Sudr and thereafter to operate that airport for 41 years. On 12 August 2001, Egypt purported to cancel the Concession Contract.

   5.2 In April 2004, Malicorp began arbitration proceedings against Egypt in the Cairo Regional Centre for International Commercial Arbitration. In due course, a three-person tribunal was constituted, consisting of an arbitrator appointed by Malicorp, an arbitrator appointed by Egypt, and a tribunal chairman. On 19 February 2006 the Judicial Administrative Court of the Egyptian Council State set aside the arbitration clause in the Concession Contract and ordered the suspension of the Arbitration. The tribunal member appointed by Egypt then resigned. The remaining tribunal members nevertheless issued an award ("the Award") dated 7 March 2006, in which (while rejecting Malicorp' claim for breach of the Concession Contract) they awarded Malicorp USD 14,773,497 by way of damages, interest, costs and expenses under Article 142 of the Egyptian Civil Code.

   5.3 Malicorp thereafter attempted to enforce the Award in France. That attempt was unsuccessful, as were further arbitral proceedings brought by Malicorp in the International Centre for the Settlement of Investment Disputes, in which Malicorp sought to allege that the cancellation of the Concession Contract by Egypt was state expropriation.

5.4 In about February 2011, Malicorp then instructed Balsara & Co Ltd ("Balsara") to act for it in proceedings which Malicorp proposed to bring to enforce the Award in England. Balsara was a firm of solicitors in which Mr Karmakar had the equivalent status to a "partner", and he was the person who had primary responsibility for the Malicorp file.

5.5 Balsara helped Malicorp to apply for litigation funding and after the event insurance in connection with these proposed proceedings. On 5 August 2011, Balsara and Malicorp jointly submitted an "ATE Insurance and Litigation Funding Proposal Form" ("the Proposal Form") to the Funder. The Proposal Form was signed by Mr Towey, a director of Malicorp and by Mr Karmakar on behalf of Balsara.

5.6 The introduction to the Proposal Form stated:

> **The solicitor, in conjunction with the client, should complete this form. All material facts need to [be] disclosed .. Failure to disclose a material fact may invalidate any subsequent insurance/funding agreement .. Once completed the form should be checked for accuracy and signed by both solicitor and client**

Under the heading "Insurance & Funding", the Proposal Form stated:

> **Funding is only available for actions where a financial remedy is sought, and where prospects of success are at least 60-65% ..**

Under the heading "Please state your views as to the prospects of success", the box labelled "70%" was marked with a cross. In the Declaration box immediately above the signatures, the Proposal Form stated that:

> **I/We declare and affirm that all information provided by the proposer and the legal representative in this proposal form is true and correct to the best of our knowledge and belief and that no material facts or information had been withheld**

5.7 On 11 November 2011, the Funder, Malicorp and Balsara entered into an agreement ("the Balsara Funding Agreement") under which the Funder agreed to provide funding to Malicorp for the proposed action.

5.8 On about 15 November 2011 the Funder, on behalf of Gable Insurance AG ("Gable"), issued a Litigation Costs Insurance Policy ("the ATE Policy") to Malicorp. Subject to the Policy Wording, the ATE Policy provided an indemnity to Malicorp up to a limit of £350,000 against any failure to recover the amount of its own legal costs in the proposed proceedings and against any liability to pay Egypt's costs. On 16 December 2011, Gable

(acting through the Funder) issued a Policy Endorsement increasing the total cover under the policy to £1,476,200.

5.9 The Policy Wording of the ATE Policy included (inter alia) the following provisions:

> **1. Compliance**
>
> **(a) The due observance and fulfilment of the terms and conditions of this Policy insofar as they relate to anything to be done or complied with by the Insured and the Legal Representative and the truth of the Insured's statements and answers made or given that the time of entering into the agreement to include but not limited to the Insurance Proposal Form with the Insurer and which may subsequently be included in a statement of truth shall be conditions precedent to any liability of the Insurer to make payment under the Policy.**
>
> **(b) The Insured and the Legal Representative shall conduct the Proceedings with due care and diligence and shall take all reasonable steps to minimise or avoid the costs and expenses payable under the Policy ..**
>
> **..**
>
> **4. Progress of the Proceedings**
>
> **(a) In acting for the Insured under this Policy the Legal Representative acknowledges and accepts his responsibilities hereunder**
>
> **(b) The Insured and the Legal Representative shall keep the Insurer informed in writing as promptly as reasonably practicable of all material developments in the Proceedings**
>
> **(c) The following shall be conditions precedent to the Insurer's liability to make payment under this Policy:**
>
> **(i) that the Insured shall at all times allow the Insurer direct access to the Legal Representative and any documents held by him and further that the Insured shall cooperate fully with the Insurer in all matters including but not limited to waiving all rights of privilege and confidentiality in favour of the Insurer**
>
> **(ii) that the Insured shall unconditionally allow the Insurer (or its duly appointed agent) to inspect or to receive from the Legal Representative any information, document or advice whether privileged or otherwise and at the request of the Insurer shall instruct the Legal Representative to**

release to the Insurer the entire file of papers relating to the Proceedings

..

8. Policy Void or Voidable

In the event of misrepresentation, misdescription or non-disclosure of any material particular by the Insured in relation to either the formation of the contract for this insurance or the conduct of the Proceedings, the Insurer shall become entitled to avoid this Schedule ab initio forthwith upon giving notice of such avoidance to the Insured and the Premium paid to the Insurer shall be forfeited.

9. Third Parties

Any person who is not a party to this agreement has no right by statute or otherwise to enforce any term of this Policy

..

12. Communications

(a) All communications and notices to the Insurer shall be deemed to have been duly given if sent by first class post to the Insurer's address or the address of [the Funder] as set out herein.

(b) All communications and notices to the Insured or the Legal Representative shall be deemed to have been duly given if sent by first class post or facsimile to the last known address of the Legal Representative.

..

Termination

..

2. In cases where the Insurer is informed (or should have been informed) of any material development the Insurer may at its absolute discretion withdraw the benefit of this Policy and will have no liability to make any payment under this Policy from the date upon which the Insurer was notified or should have been notified of such material development. The Insurer shall provide the Insured with a written notification that the benefit under this Policy has been withdrawn

5.10 On 28 February 2012, Malicorp began proceedings ("the Enforcement Proceedings") to enforce the Award in the Commercial Court in London (No

2012 Folio 284). Balsara acted for Malicorp in the Enforcement Proceedings under a conditional fee agreement.

5.11 On 29 February 2012 Flaux J made an order ("Flaux J's Order") giving permission under the Arbitration Act 1996 s 101 to Malicorp to enforce the Award in the same manner as a judgment, subject to the right of Egypt to apply within 10 weeks of being served with the order to set that order aside.

5.12 In about July 2012 Mr Karmakar left Balsara and joined Saunders. Shortly thereafter, Malicorp transferred its instructions in connection with the Enforcement Proceedings to Saunders, who filed a Notice of Change of Solicitors on 2 August 2012.

5.13 On 15 October 2012, Egypt applied to set aside Flaux J's Order.

5.14 On 16 October 2012, Saunders sent a retainer letter to Malicorp ("the Retainer Letter") which set out the basis on which Saunders would act for Malicorp in connection with the Enforcement Proceedings.

5.14.1 Paragraph 1 of that letter, headed "Our Client", stated:

Our client will be the party to whom this letter is addressed. We will not be responsible for providing services to any other party. We will be seeking instructions from you and, as per your instructions, from Mr Paul Towey (whilst acting on your instructions given as the Director of Malicorp and on your behalf) in the conduct of this matter but if you want us to seek instructions from you alone or anybody else on your behalf then please let us have your written instructions identifying that individual and authorising us to seek his instructions with regard to this matter.

5.14.2 Paragraph 2 of that letter indicated that Mr Karmakar would "have ultimate responsibility for your work" and would "be primarily responsible for providing services to you in this matter".

5.14.3 Paragraph 3 of that letter, headed "The services we are retained to provide" stated (inter-alia):

It is always difficult to estimate the exact range of charges and costs that you may be required to meet in pursuing a claim against any party (see below). As we have taken over the conduct of this matter from [Balsara] and as we are continuing to act under [the Balsara Funding Agreement] our entitlement to receive further costs from you for work done in this matter will continue to be determined by the terms as agreed in that funding agreement.

5.14.4 Paragraph 4 of that letter, headed "Charges and expenses - Third Party Funding and Partial Conditional Fee Agreement" set out the terms of the conditional fee agreement between Malicorp and Saunders.

5.15 On 20 December 2012, Malicorp, Saunders and the Funder entered into the Saunders Funding Agreement, the material terms of which are set out later in this judgment.

5.16 It is Mr Hall's case that, at about this time, Gable (acting through the Funder) issued a further Policy Endorsement noting that Balsara had been replaced by Saunders as Legal Representative for the purposes of the ATE Policy. Mr Hall has, however, been unable to produce any copy of that further Policy Endorsement and the Solicitors do not accept (even for the purposes of this application) that any such endorsement was issued.

5.17 On about 11 January 2013, Saunders obtained a copy in English of a judgment handed down on 5 December 2012 by the Cairo Court of Appeal ("the Cairo Court of Appeal Judgment"). The Cairo Court of Appeal Judgment held that, as a matter of Egyptian law, the Award was void and of no effect on the basis that it had been delivered by only two of the three appointed arbitrators.

5.18 According to Mr Hall:

5.18.1 On 17 January 2013, Mr Karmakar advised the Funder that the Cairo Court of Appeal judgment appeared, at first glance, to reduce Malicorp's prospects of succeeding in the Enforcement Proceedings. However, on 20 February 2013, Mr Karmakar informed the Funder that Malicorp's Egyptian counsel had "a bullish view" on the prospects of a successful appeal to the Court of Cassation against the Cairo Court of Appeal Judgment. On that basis, Mr Karmakar advised the Funder that it was his view that Malicorp's prospects of succeeding in the Enforcement Proceedings had not changed.

5.18.2 On 31 May 2013, Mr Charles Hollander QC and Mr Gerard Rothschild from Brick Court Chambers gave advice in a telephone consultation with Mr Karmakar, to the effect that Malicorp's prospects of success in the Enforcement Proceedings were not good. Mr Karmakar did not inform the Funder (or Gable) of this advice.

5.19 On 26 July 2013, Saunders and Malicorp jointly submitted a further "ATE Insurance and Litigation Funding Proposal Form" ("the Second Proposal Form") to the Funder. This sought additional funding of £471,040. The Second Proposal Form was signed by Mr Towey on behalf of Malicorp and by Mr Karmakar on behalf of Saunders.

5.19.1 Under the heading "Please state your views as to the prospects of success", the box labelled "65%" was marked with a cross

5.19.2 Under the heading "What do you consider to be the weaknesses in your case?", Malicorp and Saunders stated:

An application to enforce the award in France was refused. Subsequently the award was recently declared a nullity by the Cairo Court of Appeal. This latest decision of the Cairo Court of Appeal has been challenged on appeal to the Court of Cassation in Egypt. We have received the signed opinion from Doctor Hassam Issa, Professor of Commercial Law in Ein Shama University in Egypt confirming that the Cairo Court of Appeal's decision is wrong and it was his belief that Court of Cassation will cancel the lower court's ruling

5.20 According to Mr Hall, Mr Rothschild thereafter gave further pessimistic advice to Mr Karmakar, which Mr Karmakar did not pass on to the Funder (or to Gable):

5.20.1 On 1 October 2013, when Mr Rothschild advised Mr Karmakar that the Cairo Court of Appeal Judgment was "damaging" to Malicorp's prospects of success;

5.20.2 On 9 October 2013, when he advised in writing that, in relation to 3 of the five grounds relied upon by Egypt, success was heavily dependent on obtaining convincing evidence of Egyptian law;

5.20.3 On 20 May 2014, when he advised that the best likely result would be a stay of enforcement pending the judgment of the Court of Cassation - something which might take 8-10 years;

5.20.4 On 24 and 25 June 2014, when he advised that Malicorp's overall prospects of success in the Enforcement Proceedings were no higher than 50% and that a stay was the most likely outcome of the application.

5.21 According to the Solicitors, the Funder "failed or refused" to provide any funding for the Enforcement Proceedings after about 28 February 2014.

5.22 Egypt's application to set aside Flaux J's Order came on for hearing before Walker J on 16 September 2014. Malicorp had not put in any evidence of Egyptian Law, nor had it instructed counsel. Mr Karmakar applied for an adjournment, but his application was unsuccessful.

5.23 On 19 February 2015, Walker J granted Egypt's application. That effectively ended the Enforcement Proceedings. Walker J's judgment ([2015] EWHC 361 (Comm)) is reported at [2015] 1 Lloyd's Rep 423.

5.24 Thereafter, Malicorp sought an indemnity from Gable under the ATE Policy. Saunders made its files available to Plexus Law, the solicitors for Gable, who reviewed them. On 18 March 2016, Plexus Law wrote on behalf of Gable to Malicorp ("the Plexus Letter"). The Plexus Letter alleged (inter alia) that there had been breaches by "Malicorp/Saunders" of Conditions 1(b) and 4(b) of the ATE Policy in that:

> **.. Counsel's negative views were routinely ignored or withheld from [the Funder] .. As you know, Malicorp specifically instructed [Saunders] <u>not</u> to keep [the Funder] informed of developments, as it informed [Saunders] that Malicorp would keep [the Funder] advised ..**

In consequence:

> **.. After careful consideration, and subject to consideration of any comments you may wish to make, we consider that Malicorp is not entitled to an indemnity under the [ATE Policy] ..**

5.25 On 21 October 2016, Saunders replied ("the Saunders Letter") on behalf of Malicorp to the Plexus Letter. The Saunders Letter contained a lengthy attempt to answer the allegations made in the Plexus Letter, including detailed arguments about the changing and provisional nature of the advice received from counsel. Materially for present purposes, the Saunders Letter also:

5.25.1 Asserted that:

> **It is Malicorp's position that the [ATE Policy] did not contain any specific provision requiring the Insured or its lawyers to notify the Insurer about any discovery of any fact or advice which materially or adversely affects the Insured's prospects of success in the proceedings. It required him to advise on material developments in the legal proceedings .. and any negative advice from counsel .. is**

> **not a material development in the legal proceedings under this Policy ..**

5.25.2 Argued that the Enforcement Proceedings had failed only because of lack of funding support, and that Malicorp had every confidence in the merits of the claim, but was deprived of the wherewithal to pursue it; and

5.25.3 Argued that the matters complained of in the Plexus Letter had caused no prejudice to Gable, and so did not entitle Gable to avoid the ATE Policy.

5.26 On 1 March 2017, the Funder went into Administration. On 1 August 2017 that Administration was converted into a Creditors' Voluntary Liquidation. On 4 January 2019 the Funder, acting by its Liquidators, assigned its claims against Malicorp and/or the Solicitors in relation to the Saunders Funding Agreement to Mr Hall.

5.27 The Claim Form in the present action was issued on 13 March 2019 in the Manchester Circuit Commercial Court. Particulars of Claim followed on 10 July 2019. The action was transferred to the London Circuit Commercial Court by the order dated 7 August 2019 of HH Judge Pearce. The Solicitors served their Defence on 27 September 2019 and issued this application at the same time.

The Saunders Funding Agreement

6. The Saunders Funding Agreement seems to me to have been drafted to complement the ATE Policy. Clauses 3 to 5 set out the agreement of the Funder to provide the "Total Funding Amount", which was to be released at Saunders' request in accordance with a Drawdown Schedule to fund the Enforcement Proceedings.

7. Clause 6 of the Saunders Funding Agreement contemplated two situations.

7.1 In the first, the Enforcement Proceedings are successful. In that event, Malicorp irrevocably instructs Saunders to receive the proceeds of the Enforcement Proceedings and, from those proceeds, to pay the Funder back any sums paid out plus the Success Fee payable in that event to the Funder. In clause 6.3 Saunders expressly:

> **.. acknowledges its obligations under this clause 6 and undertakes to the Funder to comply with its instructions and that it will notify the Opponent's solicitor or legal counsel that it is authorised to receive all Litigation Proceeds ..**

7.2 In the second, either the Enforcement Proceedings are not successful or the amount recovered is less than the amount required to repay the Total Funding Amount. In that event, Malicorp undertakes to repay to the Funder the total amount of the funding received from it within 5 business days of receiving payment from Gable.

8. Clause 9 of the Saunders Funding Agreement is headed "Control of the Legal Proceedings" and provides as follows:

> **9.1 Although the Funder will, under the provisions of this Agreement, be responsible for the funding of the Legal Proceedings, [Malicorp] will instruct [Saunders] and have control of the Legal Proceedings, and the Funder will not have control of the Legal Proceedings.**
>
> **9.2 Obligations of [Malicorp]**
>
> **9.2.1 [Malicorp] shall:**
>
> **..**
>
> **9.2.1.2 Instruct [Saunders] to provide the Funder with any documents or information relating to the Legal Proceedings as may be reasonably requested by the Funder;**
>
> **9.2.1.3 Instruct [Saunders] to provide the Funder, insofar as is reasonably practicable and proportionate, with copies of draft pleadings, witness statements and significant correspondence, prior to the issue of the Legal Proceedings;**
>
> **9.2.1.4 Through instructions to [Saunders] and/or on its own account, keep the Funder promptly informed of any significant developments in the Legal Proceedings (including any settlement discussions, any offers received and any information, evidence or advice coming to the attention of [Malicorp] or [Saunders] which may be material either to the prospects of success of the claim or of enforcing any judgment or reward); and**
>
> **9.2.1.5 Authorise [Saunders], without waving privilege, to provide all information requested by the Funder in respect of the Litigation.**
>
> **9.2.2 Comply with the terms of the [ATE Policy] (including as to payment of any premium as and when due) and any duty owed to [Gable] and to supply to the Funder a copy of any correspondence from [Gable] threatening to or withdrawing cover.**
>
> **…**

> **9.3 The parties agree not to do or permit to be done anything likely to deprive each other of any benefit for which the other has entered into this Agreement.**
>
> **9.4 [Malicorp] agrees that if the Funder requires any advice, given by [Saunders] to [Malicorp] in respect of the Legal Proceedings, to be confirmed by Counsel, [Malicorp] will instruct [Saunders] to instruct Counsel to provide an opinion to [Malicorp] on such advice and to provide a copy of such opinion to the Funder. The Funder agrees to bear the costs of such opinion.**

9. Clause 11 of the Saunders Funding Agreement, headed "Monitoring the Legal Proceedings" provides:

> **Notwithstanding clause 9 of this Agreement, [Malicorp] undertakes to the Funder that it has instructed, and will continue to instruct, [Saunders] to provide the Funder with monthly reports on the Legal Proceedings [in substantially the form set out at Schedule 5].**

However, the copies of the Saunders Funding Agreement that have so far been disclosed do not include any Schedule 5. Nor does the evidence which has been filed for this application suggest that any such monthly reports were in fact produced.

10. Clause 13 of the Saunders Funding Agreement is headed "ATE Insurance", and provides as follows:

> **13.1 If [Malicorp] has not already done so, on entering into this Agreement, [Malicorp] will assign to the Funder the benefit of the [ATE Policy] and will ensure that the Funder's Interest in the [ATE Policy] is duly noted by [Gable], so that any payment in accordance with the terms and conditions of the [ATE Policy] is made by [Gable] to the Funder, in order that the legal liability of [Malicorp] in respect of the funding paid by the Funder to [Malicorp] may be repaid.**
>
> **13.2 [Malicorp] undertakes to the Funder that it will, and it will procure that its officers, employees and agents will, comply with, and will instruct [Saunders] to ensure that they are fully aware of, all the terms and conditions of the [ATE Policy] so that the making of any payment under the insurance is not prejudiced by a failure on the part of [Malicorp] (or [Saunders]) to comply. In particular, [Malicorp] and [Saunders] will keep the Funder, and where applicable [Gable], fully informed of developments during the course of the Legal Proceedings and provide the Funder and where applicable [Gable], with all necessary information pursuant to the terms and conditions of the insurance ..**

> **13.3 [Malicorp] irrevocably undertakes to the Funder to claim under the [ATE Policy] whenever it is able to do so under the terms and conditions of such insurance.**

11. Clause 15 of the Saunders Funding Agreement contains a number of undertakings and warranties given by Malicorp to the Funder. Clauses 15.3 and 15.4 provide that:

> **15.3 [Malicorp] warrants to the Funder that it is not (and each of its officers, employees or agents are not) aware of any information in its possession which is, or might reasonably be expected to be, materially relevant either to the outcome of the Legal Proceedings or to the recoverability by [Malicorp] from the Opponent of the Litigation Proceeds ("Relevant Information") and which has not been disclosed to the Funder. At the same time, [Malicorp] warrants to the Funder that, other than as has been disclosed to the Funder before this Agreement has been entered into, there has been no material change to the Relevant Information provided to the Funder during the due diligence process.**
>
> **15.4 The warranties set out in clause 15.2 and 15.3 of this Agreement shall be deemed to be repeated, throughout the duration of the Agreement, on each day funds are advanced to [Malicorp] by the Funder. If, after the date of this Agreement, [Malicorp] (including its officers, employees or agents) becomes aware of any Relevant Information, [Malicorp] shall instruct [Saunders] immediately to inform the Funder of such information**

12. Clause 18 of the Saunders Funding Agreement contains provisions entitling the Funder to refuse further funding on giving 21 Business Days written notice where:

> **18.2.1 The Funder is no longer satisfied with the merits of [Malicorp]'s claim in the Legal Proceedings;**
>
> **18.2.2 The claim is no longer viable to fund; or**
>
> **18.2.3 The Funder considers that there has been a material breach of this Agreement by [Malicorp] or [Saunders] ..**

The correct approach to this application

13. Before I turn to consider the various arguments that have been advanced on this application, it is convenient to mention the proper approach to an application of this kind.

14. It was common ground that the relevant principles by which the court should be guided are those summarised in the judgments of Lewison J (as he then was) in *JD*

Weatherspoon Plc v Van de Berg & Co Ltd[1] at paragraph [4] and in *Easy Air Ltd (t/a Openair) v Opal Telecom Ltd*[2] at paragraph [15]. The first six of those principles are stated in materially identical terms in both judgments:

> **The correct approach on applications** [under CPR Part 24] **by defendants is .. as follows:**
>
> **i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success ..**
>
> **ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ..**
>
> **iii) In reaching its conclusion the court must not conduct a "mini-trial" ..**
>
> **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 ..**
>
> **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 ..**
>
> **vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without a 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**

15. For the Solicitors, Mr Shapiro QC emphasised paragraph (vii) of the summary in the *Easy Air* case:

> **vii) 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. .. If it is possible to show by evidence that**

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1 [2007] EWHC 1044 (Ch), [2007] PNLR 28.

2 [2009] EWHC 339 (Ch); approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24], per Etherton LJ, and in *Global Asset Capital Inc and another v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [27], per Hamblen LJ.

> **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**

He argued that the matters in issue in this case ultimately turn on a short point of construction of the Saunders Funding Agreement, which is highly unlikely to be affected by any evidence that is not already before the court. On that basis, Mr Shapiro urged me to "grasp the nettle" and to decide the case summarily.

16. By contrast, Mr Mitchell QC on behalf of Mr Hall laid stress on the different paragraph (vii) of the summary given in the *JD Weatherspoon* case, where Lewison J observed that:

> **vii) The court should be especially cautious of striking out a claim in an area of developing jurisprudence, because in such areas decisions on novel points of law should be decided on real rather than assumed facts**

In Mr Mitchell's submission, the nature of the relationship between litigation funders and the solicitors retained by those whom they fund is a modern one on which there is little authority. This is a developing issue of considerable relevance in the new landscape conduct of litigation. Accordingly, a decision regarding the scope of that relationship should not be made on a summary basis now, but only after all of the evidence raised by the pleadings is examined at trial.

17. In my judgment, there is no tension whatsoever between these different concluding paragraphs in Lewison J's formulations of the correct approach, both of which are amply supported by authority. The issue of whether a case can properly be disposed of without a trial is one of proper case management and procedural justice. In cases where the relevant law is in a state of incremental development or of uncertainty, a court will for sound practical reasons usually be reluctant to come to any final conclusion on the basis of assumed rather than actual facts. As Mummery LJ observed in *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Co 100 Ltd*[3] (a case cited by Lewison J):

> **.. there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment .. than in trying the case in its entirety .. The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions**

[3] [2006] EWCA Civ 661, [2007] FSR 3 at [5]-[6].

> **and of having more time in which to digest and reflect on the materials.**
>
> **The outcome of a summary judgment application is more unpredictable than a trial. The result of the application can be influenced more than that of the trial by the degree of professional skill with which it is presented to the court and by the instinctive reaction of the tribunal to the pressured circumstances in which such applications are often made ..**

18. However, where a point of law or construction which is not fact-sensitive (or where the court can be confident that it is seized of all the relevant facts) is both short and likely to be determinative of the whole (or at least of a substantial part) of the case, the overriding objective under CPR 1.1(1) of dealing with cases justly and at proportionate cost will usually favour summary determination.

19. Applying those principles, I now turn to consider the Solicitors' arguments that the Particulars of Claim disclose no reasonable grounds for the claims advanced on behalf of Mr Hall and/or that Mr Hall's case has no realistic prospects of success on any of the causes of action which have been pleaded on his behalf and that there is no other compelling reason why the case should be disposed of at a trial.

Breach of the Saunders Funding Agreement

The pleaded case

20. I begin with Mr Hall's case (pleaded in paragraph 63 of the Particulars of Claim) that the "instances of non-reporting" which I have summarised in sub-paragraphs 5.18 to 5.20 above "all amounted to breaches of the Saunders Funding Agreement".

21. Paragraphs 39 to 41 of the Particulars of Claim appear under the heading "Reporting obligations imposed on Saunders". Paragraphs 39 and 40 quote from clauses 9.2.1.4 and 9.3 of the Saunders Funding Agreement[4]. Paragraph 41 then pleads that:

> **41. The Claimant will say at trial that:**
>
> **(a) On its proper construction having regard to the terms of the agreement as a whole and to the terms of the [ATE Policy], Clause 9.2.1.4 recorded an instruction from Malicorp to Saunders to keep [the Funder] promptly informed of any significant developments which might be material to the prospects of success of the [Enforcement Proceedings]; alternatively,**
>
> **(b) On its proper construction, having regard to the terms of the agreement as a whole and to the terms of the [ATE Policy], clause 9.2.1.4 imposed an obligation upon Saunders to inform [the Funder]**

[4] Set out in paragraph 8 above.

> **promptly of any significant developments which were material to the prospects of success of the [Enforcement Proceedings] ..**

The submissions on behalf of the Solicitors

22. On behalf of the Solicitors, Mr Shapiro drew my attention to the fact that clause 9.2.1.4 is concerned only with the obligations of the "Litigant", i.e. Malicorp. Clause 9.2 as a whole is headed "Obligations of the Litigant" and clause 9.2.1 is prefaced with the words "The Litigant shall". At no point does clause 9.2 say "the *Solicitor* shall". It therefore does not expressly impose any obligations on Saunders: and (in Mr Shapiro's submission) there is no basis for implying any such obligations. Moreover, Malicorp's obligation under clause 9.2.1.4 to "keep the Funder promptly informed" may be performed in two ways: either "through instructions to the Solicitor", and/or "on its own account" - i.e. directly, without the intervention of Saunders. It follows, Mr Shapiro argued, that - contrary to the allegation in paragraph 41(b) of the Particulars of Claim - clause 9.2.1.4 does not itself impose any obligations to the Funder on Saunders. As stated in the Retainer Letter[5], Saunders' only client was Malicorp.

23. As to the allegation in paragraph 41(a) of the Particulars of Claim that clause 9.2.1.4 records a present and continuing instruction from Malicorp to Saunders, Mr Shapiro submitted that the existence of any such instruction would make redundant Malicorp's undertaking in clause 15.4[6] "to instruct [Saunders] immediately to inform the Funder" in the event that, after the date of the Saunders Funding Agreement, Malicorp becomes aware of any relevant information. In Mr Shapiro's submission, that is consistent with the fact that clause 9.1[7] expressly states that it is Malicorp that will "instruct [Saunders] and have control of the Legal Proceedings". Mr Shapiro also invited me to contrast the terms of clause 9.2.1.4 with Malicorp's express agreement in clause 6.1 to "irrevocably instruct" Saunders to deal with any receipts from the Enforcement Proceedings, and Saunders' express acknowledgement of those instructions in clause 6.3. Clause 9.2.1.4 contains no similar express agreement and no similar express acknowledgement.

24. With regard to the suggestion that the terms of the ATE Policy should influence the interpretation of clause 9.2.1.4, Mr Shapiro pointed out that neither the Funder nor Saunders were parties to the ATE policy, which was a contract between Gable and Malicorp. In Mr Shapiro's submission, the terms of the tri-partite contractual relationship between the Funder, Malicorp and Saunders are fully set out in the Saunders Funding Agreement and nowhere else.

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5 The relevant parts of which are set out in paragraph 5.14 above.
6 Set out in paragraph 11 above.
7 Set out in paragraph 8 above.

25. In Mr Shapiro's submission, the pleading in paragraphs 41(a) and (b) of the Particulars of Claim involves an attempt, by reference to the commercial context, to read into the plain words of clause 9.1.2.4 obligations that are simply not there. As to paragraph 9.3, "the parties" referred to there (as is apparent from the wording) are simply Malicorp and the Funder. In any event, clause 9.3 is purely prohibitory. It imposes no positive obligations, but only requires the parties to refrain from acting in a particular way.

26. In support of his submissions, Mr Shapiro drew my attention to the observations in paragraphs [15] to [22] of the judgment of Lord Neuberger of Abbotsbury PSC in *Arnold v Britton*[8] and in paragraphs [8] to [14] in the judgment of Lord Hodge JSC in *Wood v Capita Insurance Services Ltd*[9]. Mr Shapiro also referred me to the recent helpful summary of the principles of contractual interpretation given by HHJ Pelling QC in *TAQA Bratani Limited v Rockrose UKCS8 LLC*[10].

> **(i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions ..**
>
> **(ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made ..**
>
> **(iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision ..**
>
> **(iv) Where the parties have used unambiguous language, the court must apply it ..**
>
> **(v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language**

8 [2015] UKSC 36, [2015] AC 1619.
9 [2017] UKSC 24, [2017] AC 1173.
10 [2020] EWHC 58 (Comm) at [26]

> **they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used ..**
>
> **(vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other .. but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made ..**
>
> **(vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears .. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent.**
>
> **(viii)A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain ..**

27. Mr Shapiro also drew my attention to the principles applicable to the implication of terms, which were comprehensively set out by the Supreme Court in *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Limited*[11]. These, again, were recently and helpfully summarised by HHJ Pelling QC in *TAQA Bratani Limited v Rockrose UKCS8 LLC*[12], as follows:

> **(i) Terms are to be implied only if to do so is necessary in order to give the contract business efficacy or was so obvious that it goes without saying;**
>
> **(ii) It is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court considered that the parties would have agreed if it had been suggested to them;**
>
> **(iii) Construing the words that the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract;**
>
> **(iv) Construing the words used and implying additional words are different processes governed by different rules;**

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11 [2015] UKSC 72, [2016] AC 742. See also *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531.

12 Fn 10 above at [27]

> **(v) In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered because it is only after the construction exercise has been undertaken that the necessity question and the allied question whether the terms sought to be implied contradict the express terms of the contract concerned can be answered.**
>
> **The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion ..**
>
> **.. No term may be implied into a contract if it would be inconsistent with an express term ..**
>
> **Finally, particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties.**

28. In Mr Shapiro's submission, the circumstances of the present case do not come close to meeting these requirements, particularly the stringent requirement of necessity. Given the extent of the reporting obligations expressly imposed upon Malicorp, there is no necessity for any overlapping reporting obligations to be imposed upon Saunders. The Saunders Funding Agreement does not lack commercial or practical coherence without them.

The submissions on behalf of Mr Hall

29. On behalf of Mr Hall, Mr Mitchell took issue with Mr Shapiro's dismissal of the terms of the ATE Policy as irrelevant to the proper interpretation of the Saunders Funding Agreement. In Mr Mitchell's submission, the Saunders Funding Agreement and the ATE Policy administered by the Funder formed part of a suite of transaction documents that were intended to work together. He also submitted that, for the purposes of this application, I should assume that Mr Karmakar - and through Mr Karmakar, Saunders - were (contrary to Mr Karmakar's evidence) aware of the terms of the ATE Policy. In Mr Mitchell's submission, the fact that clause 4 of the ATE Policy[13] expressly imposed reporting obligations not only on Malicorp but also on Saunders was a highly material circumstance. The benefit of the ATE Policy had been assigned by Malicorp to the Funder "in order that the legal liability of [Malicorp] in respect of the funding paid by the Funder to [Malicorp] may be repaid"[14]. In the event that the Enforcement Proceedings were unsuccessful in producing the necessary funds, the ATE Policy was to be the Funder's primary source of repayment. Any breach by Saunders (or Malicorp) of the reporting

[13] Set out in paragraph 5.9 above.
[14] See clause 13.1 of the Saunders Funding Agreement, set out in paragraph 10 above.

obligations under clause 4 of the ATE Policy might entitle Gable to refuse cover and so destroy the commercial basis of the funding scheme. It followed, Mr Mitchell argued, that Mr Karmakar and Saunders would have known that the Funder would be relying upon Saunders to report to the Funder, on behalf of Gable, any material developments affecting the Enforcement Proceedings.

30. In Mr Mitchell's submission, these facts form a vital part of the factual background to the Saunders Funding Agreement and against which its provisions should be interpreted. In that connection, Mr Mitchell drew my attention (like Mr Shapiro) to passages in the judgment of Lord Neuberger of Abbotsbury PSC in *Arnold v Britton*[15] and also to the observations of Lord Mance JSC in *Re Sigma Finance Corp*[16] on the danger of focusing too narrowly on a critical phrase and of failing to set it in its commercial context and in the landscape of the instrument as a whole[17].

31. Against that background, Mr Mitchell submitted in support of the construction pleaded in paragraph 41(a) of the Particulars of Claim - that clause 9.2.1.4 recorded an instruction by Malicorp to Saunders - as follows:

31.1 In the event that adverse advice was received from counsel about the merits of the claim:

31.1.1 That advice would, in the first instance be received by Saunders;

31.1.2 As Saunders would have known:

31.1.2. Malicorp would be under a duty under clause 9.1.2.4 of the Saunders Funding Agreement either itself to report that advice to the Funder or to instruct Saunders to do so;

31.1.2. Both Malicorp and Saunders would be under a duty under clause 4(b) of the ATE Policy to report that advice to the Funder on behalf of Gable;

31.1.3 Under clause 9.3 of the Saunders Funding Agreement, Malicorp and Saunders had both agreed "not to do or permit to be done anything likely to deprive [the Funder] of any benefit for which [the Funder] has entered into this Agreement".

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15 Fn 8 above.

16 [2009] UKSC 2, [2010] 1 All ER 571 at [9].

17 See also to similar effect per Lord Collins JSC at [37], cited with approval in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29, [2016] 2 All ER (Comm) 851 at [31] per Lord Neuberger of Abbotsbury PSC.

31.2 Accordingly:

31.2.1 Saunders could not permit Malicorp not to report that adverse advice to the Funder; and

31.2.2 Malicorp could not prevent Saunders from reporting that adverse advice.

31.3 The correct construction of Clause 9.1.2.4 in its proper context is therefore that it contains an instruction by Malicorp to Saunders to report developments material to the prospects of success. Malicorp could pre-empt the need for Saunders to carry out that instruction by itself reporting material developments directly to the Funder; but it could only rescind that instruction by making such a direct report.

32. In support of the construction pleaded in paragraph 41(b) of the Particulars of Claim - that clause 9.2.1.4 imposed a direct obligation on Saunders - Mr Mitchell similarly submitted that:

32.1 One of the benefits for which the Funder had entered into the Saunders Funding Agreement (as referred to in clause 9.3) was to ensure that Malicorp and Saunders did all that was necessary to comply with the terms of the ATE Policy and so to preserve the rights under the ATE Policy which had been assigned to the Funder and on which the Funder was relying as a source of repayment.

32.2 Saunders knew that non-disclosure of material information to the Funder on behalf of Gable would be prejudicial to the Funder's assigned rights under the ATE Policy.

32.3 Accordingly, in order to comply with its obligation not to permit Malicorp to fail to disclose material information, Saunders was obliged to disclose such information itself.

An alternative case

33. In oral argument, Mr Mitchell outlined an alternative way of putting his client's case. The second sentence of clause 13.2 of the Saunders Funding Agreement[18] provides that:

> **In particular, [Malicorp] and [Saunders] will keep the Funder, and where applicable [Gable], fully informed of developments during the**

[18] Clause 13 is set out more fully in paragraph 10 above.

> **course of the Legal Proceedings and provide the Funder and where applicable [Gable], with all necessary information pursuant to the terms and conditions of the insurance**

This provision, Mr Mitchell submitted, contains an express obligation on Saunders to keep the Funder fully informed, which Saunders breached by failing to pass on the adverse advice received from counsel. Although the section of the Particulars of Claim headed "Reporting obligations imposed on Saunders" contains no reference to clause 13.2, that clause is set out in full earlier in the Particulars of Claim at paragraph 34 (albeit with the introductory words "By Clause 13.2, *Malicorp*[19] undertook to [the Funder] that .."). The allegation in paragraph 63 is simply of "breaches of the Saunders Funding Agreement", without reference to any specific provisions of that agreement. In Mr Mitchell's submission, this alternative basis for his client's case is therefore sufficiently pleaded in the Particulars of Claim, at least for the purposes of surviving an application to strike out or for summary judgment.

34. For the Solicitors, Mr Shapiro did not object to Mr Mitchell raising this alternative argument at the hearing, even though it had not been presaged in Mr Mitchell's Skeleton Argument. He did, however, submit that this alternative way of putting Mr Hall's case stood no better chance of success than that based on clauses 9.1.2.4 and 9.3. In Mr Shapiro's submission, it is plain from the wording of clause 13 as a whole that it is concerned exclusively with imposing obligations on Malicorp, not on Saunders. Clauses 13.1 and 13.3 do not mention Saunders. Clause 13.1 says that Malicorp "will assign to the Funder .. and will ensure ..". Clause 13.3 says that Malicorp "irrevocably undertakes". Clause 13.2 is of a piece with the clauses on either side of it. Its opening words are that Malicorp "undertakes to the Funder that it will .. comply with, and will instruct [Saunders] to ensure that ..". The second sentence, now relied on by Mr Hall, is simply a particular of the undertaking given by Malicorp in the first sentence. That, in Mr Shapiro's submission, is shown by the context and by the opening words of the second sentence, "In particular ..". When the second sentence of clause 13.2 says that Saunders "will keep the Funders .. fully informed", it is simply referring to Saunders doing so in accordance with the instructions which Malicorp undertook in the first sentence of that clause to give.

Analysis and conclusions

35. The issue of the correct interpretations to be given to clauses 9.2.1.4, 9.3 and 13.2 of the Saunders Funding Agreement is, at heart, a short point (or series of points) of law. I am satisfied that I have available to me all of the facts relevant to the interpretation of those clauses, and that it would therefore be in accordance with the overriding objective for me to determine those issues summarily.

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[19] Emphasis added.

36. As to those facts, I accept Mr Mitchell's submission that, for the purposes of this application, I must assume that Mr Karmakar - and through Mr Karmakar, Saunders - were aware of the terms of the ATE Policy. In those circumstances, I also accept his submission that the terms of the ATE Policy form part of the admissible background known to both parties by reference to which the terms of the Saunders Funding Agreement fall to be interpreted. Indeed, it seems to me to be plain that these two agreements were intended by the Funder to be complementary to each other as integral parts of the commercial arrangements for funding the Enforcement Proceedings.

37. Furthermore, it seems to me that for the purposes of this application I should also assume (without deciding) in Mr Hall's favour that, although the ATE Policy is in form simply a bilateral contract of insurance between Malicorp and Gable, it is arguable that the "responsibilities" undertaken by Balsara in clause 4 of the ATE Policy would have been enforceable against them by Gable - perhaps under some wider contract constituted by Balsara's signature to the Proposal Form[20] and their acceptance of the benefit of the funding provided to Malicorp under the commercial arrangements constituted by the ATE Policy and the Balsara Funding Agreement[21]. I am further prepared to assume in Mr Hall's favour for the purposes of this application that it is arguable that those obligations would similarly have been enforceable by Gable against Saunders, after Saunders took over the conduct of the Enforcement Proceedings[22].

38. However, the present action involves no claim by Gable. It is brought by Mr Hall as assignee of the rights of the Funder. The issues which I have to determine are therefore concerned exclusively with the nature and extent of the contractual duties (if any) owed by Saunders to the Funder. The duties owed by Saunders to Gable may form part of the relevant background to those issues. But it does not follow from the fact that Saunders may have owed a duty to Gable that it owes a like duty to the Funder under the terms of the Saunders Funding Agreement.

39. Mr Hall's presently pleaded case is founded upon clause 9.2.1.4 of the Saunders Funding Agreement. The first way that that case is put on his behalf in paragraph 41(a) of the Particulars of Claim is that clause 9.2.1.4 amounts to a continuing instruction given by Malicorp to Saunders.

40. In my judgment, clause 9.2.1.4 – whether read on its own or in conjunction with clause 9.3 - does not amount to an instruction by Malicorp to Saunders. Even when set in their commercial context and in the landscape of the instrument as a whole, that is simply not what the words of clause 9.2.1.4 say. The opening words of that

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20 See paragraph 5.5 above.
21 See paragraph 5.7 above.
22 See paragraph 5.16 above.

clause - "through instructions to the Solicitor" - indicate that those instructions are to be given separately by Malicorp, not that they are already given by the very words of this clause. Moreover, as Mr Shapiro submitted, the existence of any such continuing instruction in clause 9.2.1.4 would make Malicorp's undertaking in clause 15.4 redundant.

41. There is a further, and perhaps more fundamental, objection to Mr Hall's reliance upon the interpretation of clause 9.2.1.4 which is pleaded in paragraph 41(a). Even if, contrary to my view, clause 9.2.1.4 did amount to an instruction by Malicorp to Saunders, any breach of that instruction would be actionable by Malicorp (as Saunders' client and the person who gave the instruction) rather than by the Funder.

42. The second way in which Mr Hall's case is put in paragraph 41(b) of the Particulars of Claim is that that clause itself (at least when read with clause 9.3) imposes a contractual reporting obligation on Saunders. In my judgment clause 9.2.1.4 - whether read on its own or in conjunction with clause 9.3 - does not impose any such free-standing obligation on Saunders to the Funder. Again, even when set in their commercial context and in the landscape of the instrument as a whole, that is simply not what the words of clause 9.2.1.4 say. As Mr Shapiro submitted, at no point does clause 9.2 say "the Solicitors shall". It therefore does not expressly impose any obligations on Saunders: and there is no basis for implying any such obligations, since the Saunders Funding Agreement does not lack commercial or practical coherence without them. The reporting obligations imposed on Malicorp already provide protection to the Funder. It might perhaps have been a better bargain for the Funder if it had also imposed such obligations on Saunders: but "necessity is not established by showing that the contract would be improved by the addition"[23] of the suggested implied term. Both when interpreting a contract and also when considering the implication of terms, the task of the court "is to identify what the parties have agreed, not what the court thinks that they should have agreed"[24].

43. Turning to clause 9.3, it seems to me that Mr Mitchell's submissions as to the effect of that clause seek to put on that very general provision a weight which it cannot bear. Clause 9.3 imposes a prohibition. It requires the parties "not to do or permit to be done" particular things. In that respect, it seems to me to be akin to the term which is often (when it is not express) implied into commercial contracts, to the effect that the parties "shall do nothing of their own motion" to prevent performance[25]. I do not accept Mr Shapiro's argument that "the parties" referred to in clause 9.3 exclude Saunders. There is, however, nothing in the wording of clause 9.3 to support Mr Mitchell's ingenious argument that, by virtue of clause 9.3,

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23 *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531 at [7], per Lord Hughes JSC.

24 *Arnold v Britton* (fn 8 above) at [20] per Lord Neuberger of Abbotsbury PSC.

25 See H G Beale and others, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) at [14-024].

Saunders could not permit Malicorp not to report the adverse advice received to the Funder and was therefore itself obliged to report that advice.

44. In my judgment, the first step in that argument mis-states the true legal position, and the second step does not follow from the first. I accept Mr Shapiro's argument that clause 9.3 is concerned, not with prohibiting omissions, but with prohibiting positive acts. Omitting to do something - in this case failing to pass on pessimistic advice - will therefore not fall within the scope of 9.3. Since Malicorp's omission (although possibly a breach of clause 9.2.1.4) is not itself something that comes within the scope of clause 9.3, there can be no obligation on Saunders under clause 9.3 not to permit that omission.

45. In any event, even if that were wrong, an obligation on Party A (here Saunders) not to "permit" the non-performance of an obligation by Party B (here Malicorp) will not usually impose a positive obligation on Party A to perform that obligation instead of Party B. There are two reasons for this. First of all, the ordinary and natural meaning of an obligation not to "permit" a breach does not readily translate into a positive duty to perform the obligation oneself. Secondly, it seems to me that Mr Mitchell's argument wrongly conflates the power to prevent a breach with the power to remedy that breach. An obligation not to "permit" can normally only be broken where the obligee has the power to prevent the prohibited act[26]. In the present case, Saunders had no such power. Unless Party A, in performing Party B's obligation, is acting with the authority of Party B and as its agent for the purpose, Party B will still not itself have performed the obligation and so will remain in breach of contract. The obligation may have been performed, but Party B has not performed it. In the present case, Saunders could not have performed Malicorp's obligation to instruct Saunders. Nor could Saunders validly have performed Malicorp's obligation itself to act, unless Saunders was authorised (ie instructed) to do so by Malicorp. In either case, for the contractual obligation under clause 9.1.2.4 to be performed, Saunders would have needed instructions from Malicorp, which it did not receive. Saunders could therefore have remedied (or at least mitigated the loss resulting from) Malicorp's breach, but could not have prevented it.

46. It follows, in my judgment, that the suggested interpretations of clause 9.2.1.4 and clause 9.3 which are presently pleaded in paragraphs 41(a) and 41(b) of the Particulars of Claim are incorrect, and that those clauses provide no proper basis for the breach of contract claims made against Saunders by Mr Hall.

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[26] See eg *Tophams Ltd v Earl of Sefton* (No 2) [1967] AC 50 at 83, per Lord Wilberforce: "One can, of course, say something as to what is involved in to " permit ": clearly knowledge of what is to be permitted is an essential though not necessarily a sufficient ingredient. *Clearly, too, the word presupposes the possibility of control over the actions of the other person concerned*" (emphasis added).

47. As for Mr Mitchell's alternative argument based on clause 13.2, it seems to me that that also misinterprets the relevant provision. As Mr Shapiro submitted, clause 13 as a whole is concerned exclusively with imposing obligations on Malicorp, not on Saunders. Clauses 13.1 and 13.3 do not mention Saunders: and clause 13.2 is of a piece with the clauses on either side of it. Its opening words are that Malicorp "undertakes to the Funder that it will .. comply with, and will instruct [Saunders] to ensure that ..". The second sentence, now relied on by Mr Mitchell, is – as its opening words "In particular" make clear – simply a particular of the undertaking given by Malicorp in the first sentence.

48. In my judgment, clause 13.2 therefore also provides no proper basis for the breach of contract claims made against Saunders by Mr Hall

Breach of duty of care/breach of fiduciary duty

49. In the light of those conclusions, I can deal much more shortly with Mr Hall's case (pleaded in paragraph 63 of the Particulars of Claim) that the "instances of non-reporting" which I have summarised in sub-paragraphs 5.18 to 5.20 above "all amounted to .. breaches of duty of care, alternatively breaches of fiduciary duty on the part of Saunders".

50. Mr Mitchell realistically conceded that, unless he could establish that the Saunders Funding Agreement imposed a contractual duty to report on Saunders, no such positive obligation could arise either as an aspect of a duty of care at common law or as a fiduciary duty in equity.

51. In my judgment, Mr Mitchell was right to make that concession. In circumstances where the parties are in a contractual relationship, it is the terms of that contract which will normally define their duties each to the other. As Lord Bridge said in *Scally v Southern Health and Social Services Board*[27]:

> **.. If a duty of the kind in question was not inherent in the contractual relationship, I do not see how it could possibly be derived from the tort of negligence ..**

52. The fact that Saunders and the Funder were in a contractual relationship in the present case means that I do not have to consider the difficult question of whether

[27] [1992] 1 AC 294 at 303. See also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107-108, per Lord Scarman ("Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract"), as explained by Lord Goff in *Henderson v Merrett Syndicates Ltd (No.1)* [1995] 2 AC 145 at 186.

any (and, if so, what) duties might have been owed by Saunders to the Funder at common law in the absence of any such contract[28].

53. For the sake of completeness, I should however mention Mr Mitchell's further argument that the arrangements between Malicorp, the Funder and Saunders were such that that, in the event that Saunders appreciated that Malicorp was refusing to pass on to the Funder relevant information or to instruct Saunders to do so, Saunders was under a fiduciary duty both to cease to act for Malicorp and to report to the Funder that it had done so.

54. In support of this submission, Mr Mitchell relied upon the familiar cases of *Bristol & West Building Society v Mothew*[29] and *Hilton v Barker Booth & Eastwood*[30]. Those were both cases in which the solicitors concerned owed conflicting fiduciary duties to different clients. In the present case only Malicorp was Saunders' client. Mr Mitchell, however, submitted that the relationship between Saunders and the Funder was also a fiduciary one, on the basis that the Funder was placing "trust" in Saunders to perform its obligations under the Saunders Funding Agreement. In Mr Mitchell's submission, clause 9.3 of the Saunders Funding Agreement showed that the Funder was contractually entitled to place its trust in Saunders to ensure that Malicorp would not breach its obligation.

55. I have already held that clause 9.3 imposed no such contractual obligation on Saunders. However, even if I had accepted that it did, the obligation created by that clause would in my judgment have been a purely contractual one. It is notoriously difficult to identify with precision the kind of circumstances that justify the imposition of fiduciary duties[31]. It is clear that it is possible for fiduciary duties to arise even in a commercial setting. It is, however, also clear that it is not enough that one party simply "trusts" or is relying on the other party to perform an obligation to turn a contractual obligation into a fiduciary one. Something more than that is required to attract the intervention of equity. As Lord Mustill observed, when delivering the judgment of the Privy Council in *In re Goldcorp Exchange*[32]:

> **.. No doubt the fact that one person is placed in a particular position vis-a-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations of a different character from**

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28 For the tests that may be used in deciding whether a defendant sued as causing pure economic loss to a claimant owed a duty of care in tort, see eg *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181 at [4], and the discussion in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 at [58] to [67].

29 [1998] Ch 1

30 [2005] UKHL 8, [2005] 1 WLR 567.

31 See eg John McGee (ed), *Snell's Equity* (34th edn, Sweet & Maxwell 2019) at [7-005].

32 [1995] 1 AC 74 at 98.

> **those deriving from the contract itself .. Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences far exceeding those foreseen by Atkin LJ in *In re Wait* [1927] 1 Ch 606. It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies.**

56. In the present case, it is inherently unlikely that sensible commercial parties would have set up (or that a responsible solicitor would have agreed to) an arrangement in which conflicting fiduciary duties of the kind argued for by Mr Mitchell were likely to arise. Reflecting that, the terms of the Saunders Funding Agreement seem to me to have been drafted on the assumption that it is Malicorp alone that is the client of Saunders and to whom Saunders will therefore owe fiduciary duties. So, for example, clause 9.1 says in terms that it is Malicorp and not the Funder that will instruct Saunders. That relationship is reflected in many other clauses, such as clause 4.2 ("[Malicorp] will procure that the Solicitor immediately inform the Funder"), clause 6.1 ("[Malicorp] shall irrevocably instruct the Solicitor"), and clause 13.2 ("[Malicorp] .. will instruct the Solicitor to ensure"). This distinction between the fiduciary relationship of solicitor and client as between Saunders and Malicorp, and the purely contractual relationship between Saunders and the Funder is one that seems to me to be built into the structure of the Saunders Funding Agreement.

57. It follows that, even if I were wrong about the proper interpretation of clause 9.3, I would have held that there was no proper basis in law for this aspect of Mr Hall's case, to the extent that it relies upon a breach of fiduciary duty owed by Saunders to the Funder.

The claim in deceit against Mr Karmakar personally

58. Paragraph 64 of the Particulars of Claim pleads that:

> **The breaches of duty pleaded against Saunders above with the result of deliberate decisions on the part of Mr Karmakar to withhold material information from [the Funder]**

Paragraph 67 of the Particulars of Claim, under the heading "Loss and damage" then pleads that:

> **.. alternatively as a result of the deceit pleaded above against Mr Karmakar, [the Funder] sustains the following losses ..**

59. Mr Mitchell explained this allegation a little further in his Skeleton Argument at [34]:

> **The claim is that Mr Karmakar, knowing he was under an obligation to make reports to [the Funder] on behalf of Saunders, did not make such reports and [the Funder] suffered loss as a result. That is a perfectly proper claim: *JD Wetherspoon v Van Dr Berg*[33] at [17] ..**

60. The *JD Wetherspoon* case was one in which the first defendant (of which the other defendants were employees) had been retained by the claimant to locate suitable properties for the claimant to buy or lease as pubs. The claimant alleged that, in breach of its fiduciary duty as the claimant's agent, the first defendant had (inter alia) interposed companies owned or controlled by it into the chain of transactions, so as to make secret profits. The application before Lewison J was an application by the defendants to strike out the claim as disclosing no cause of action and/or because it was statute barred.

61. Lewison J refused the defendants' application, holding that, on the pleaded facts, it was arguable that all the defendants (including those who were simply employees) owed fiduciary duties to the claimant, and that (to quote the headnote) "a fiduciary who in breach of duty wrongfully withheld information from a beneficiary might be liable in tort for deceit". The passage in the judgment of Lewison J to which Mr Mitchell referred me includes the following observations:

> **.. JD Wetherspoon's real complaint is not that it was told lies at the time of the relevant transactions, but that the defendants kept silent about what was really going on. As a general rule mere silence, however morally wrong, will not support an action for deceit .. However, there are exceptions to that general rule. One such exception is (or at least may be) where the person against whom the claim is made has a duty of disclosure and fraudulently fails to do so: *Conlon v Simms* ..**

62. Mr Shapiro, on behalf of Mr Karmakar, took issue with this aspect of Mr Hall's claim on two grounds. First, he argued that the *JD Wetherspoon* case was either confined to cases of knowing breach of fiduciary duty or did not accurately state the law. In Mr Shapiro's submission, a mere omission to speak, even if dishonest, is incapable in law of giving rise to an action in the tort of deceit.

63. In that connection, Mr Shapiro drew my attention to the passage in *Chitty*[34] where this issue is discussed, and which criticises the observations in *Conlon v Simms* upon which Lewison J relied:

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33 Fn 1 above.
34 Fn 25 above at [7-159].

> **.. A breach of the duty to disclose will give rise to the right to rescind the contract but, it is submitted, not to a right to damages even if the other party kept quiet "fraudulently" in the sense of intended deliberately to mislead the claimant. In *Conlon v Simms*[35] it was said that:**
>
> > **" .. where the breach of the duty of disclosure is fraudulent, a party to whom the duty is owed who suffers loss by reason of the breach may recover damages for that loss in the tort of deceit .. Non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose."**
>
> **This, with respect, is very doubtful, and cannot be supported on the ground given. It is well established that breach of the duty of disclosure in insurance does not of itself give rise to an action for damages. A negligent failure to speak may give rise to liability in damages but only if there is a "voluntary assumption of responsibility". If silence when there is a duty to disclose amounted to an implied representation that there was nothing to disclose, that would make even a non-fraudulent non-disclosure into a positive misrepresentation for which damages could be recovered under Misrepresentation Act 1967 s.2(1), unless the non-disclosing party could show that he had reasonable grounds for believing that there was nothing to disclose, whereas it has been held that if the non-disclosure is negligent, it does not give rise to liability in damages under Misrepresentation Act 1967 s.2(1) or, without more, at common law.**
>
> **It is almost certain that without a voluntary assumption of responsibility there is no liability in damages for merely keeping silent, and it is submitted that this is so even if there was an intention to deceive.**

64. As a decision of the Court of Appeal, *Conlon v Simms* is, of course, binding on me, at least to the extent of its *ratio decidendi*. The numerous authorities cited in *Chitty* show that this is an area of developing jurisprudence. Like Lewison J in the *JD Wetherspoon* case, I should therefore have been reluctant to decide this issue of law summarily against the claimant.

65. Fortunately, for the purposes of the present application, I do not need to consider this issue further. The foundation of this aspect of the claim pleaded on behalf of Mr Hall is the existence of a duty to disclose: and, as I have already held, there was no such duty. In those circumstances, as Mr Mitchell again realistically conceded, this aspect of Mr Hall's claim is also bound to fail.

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[35] [2006] EWCA Civ 1749, [2008] 1 WLR 484 at [130], per Jonathan Parker LJ, with whom Moore-Bick and Ward LJJ agreed.

66. It is also unnecessary for me to consider the issue of whether Mr Karmakar's signature on behalf of Balsara to the Balsara Proposal Form amounted to some sort of implied continuing representation on behalf of Mr Karmakar personally. Although the possibility of a claim on this basis was mentioned in argument at the hearing before me, no claim on that basis has been pleaded on behalf of Mr Hall. I am also, therefore, not required to consider the difficult issue mentioned but not decided by the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland plc*[36] as to whether that sort of implied representation can ever ground an action in the tort of deceit.

67. Mr Shapiro's second objection to this claim was that the pleading of it in the Particulars of Claim was wholly inadequate. In Mr Shapiro's submission, paragraph 64 does not even attempt to plead on what basis the instances of non-reporting were intended to induce the Funder to act in a particular way, or any case on inducement. The allegation of dishonesty is not spelled out properly and relies on inference. Moreover, the facts alleged are equally consistent with negligence.

68. In my judgment, Mr Shapiro's second objection to this claim is also made out. The law rightly requires a claimant such as Mr Hall making a claim in the tort of deceit (which is an allegation of fraud) to plead its case with great particularity and precision, and not to make allegations which are not supported by credible evidence[37]. As Rix LJ stated in *AIC Ltd v ITS Testing Services (UK) Ltd (The "Kriti Palm")*[38]:

> **The elements of the tort of deceit are well known. In essence they require: (1) a representation, which is (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on.**

Each of those elements of this aspect of Mr Hall's claim ought therefore to have been distinctly pleaded with the required particularity and precision (making due allowance for the asymmetry of information resulting from the fact that Mr Hall has not yet had the benefit of disclosure[39]) in Mr Hall's Particulars of Claim**.**

69. The averments in the Particulars of Claim which I have set out in paragraph 58 above do not do adequately address any of these elements. First of all, they do not identify the implied representation alleged to have been made by the non-disclosure that is complained of. A claim in the tort of deceit is not a claim for breach of duty. As stated by Rix LJ, an essential element of a claim in deceit is the making of a

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36 Fn 28 above at [158].

37 See eg *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1 at [184] to [186] per Lord Millett

38 [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667 at [251]. See also to similar effect *Hayward v Zurich Insurance Co plc* [2016] UKSC 48, [2018] 2 All ER (Comm) 755 at [58], per Lord Toulson.

39 See eg *Ventra Investments Ltd v Bank of Scotland Plc* [2019] EWHC 2058 (Comm) at [22] to [25] and at [36] to [41].

representation. In the case of a claim based, not on an express representation, but on an alleged breach of a duty to disclose, what needs to be alleged is that the failure to make disclosure amounted in all the circumstances to an implied representation – perhaps (though not inevitably) to the effect that that the undisclosed facts do not exist[40]. In the present case, the Particulars of Claim plead a breach of a duty to disclose: but they do not go on to plead that that breach of duty amounted in the circumstances to any particular implied representation[41].

70. In consequence, the Particulars of Claim do not say specifically in what respect that implied representation was false. In consequence, the allegation of dishonesty is not directed towards the particular representation alleged to have been made or to Mr Karmakar's knowledge of the falsity of that particular representation.

71. Other normal elements of a claim in deceit are that the representation alleged to have been made was both intended to be relied on and was in fact relied on. The Particulars of Claim contain no averment either that Mr Karmakar intended any particular implied representation to be made and relied on by the Funder or that the Funder in fact relied on any such implied representation. Had there been a proper and systematic pleading of this aspect of the claim, it would have highlighted some of the difficulties which Mr Hall would have had to surmount in order to bring this serious allegation home against Mr Karmakar personally.

72. It follows that I would have struck out the present pleading of this aspect of Mr Hall's claim, even if I had not already held that it was bound for other reasons to fail.

The personal claim on behalf of Mr Hall

73. The title of the action asserts that Mr Hall claims "in his own right and as assignee of" the Funder. In fact, it is common ground that no personal claim has been pleaded, and that none is made. Mr Hall sues simply as assignee of the Funder.

74. Had it been necessary, I would therefore have struck out the words "in his own right and" from the title of the action. However, the addition of those words has caused no prejudice to the Solicitors. Their presence in the title of the action would not of itself have justified an application to strike out.

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40 "Non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose": *Conlon v Simms* (fn 35 above). Cf *Deutsche Bank AG and others v Unitech Global Limited, Unitech Limited* 2013] EWHC 2793 (Comm), [2014] 2 All ER (Comm) 268 at [54] to [56], per Teare J (affmd without discussion of this point [2016] EWCA Civ 119, [2016] 1 WLR 3598).

41 I am here concerned only with what needs to be pleaded in order to assert such a claim. For the argument that a claim on this basis is, in any event, unsustainable in law, even if adequately pleaded, see paragraph 63 above.

Other reason for a trial

75. Mr Mitchell stressed that his client had not yet had the benefit of disclosure of Saunders' files. He relied on that circumstance as explaining the brevity and generality of the particulars given of the allegation that the non-disclosure complained of resulted from a deliberate decision by Mr Karmakar.

76. Disclosure would, of course, enable Mr Hall and his advisers to be better informed about what happened during the Enforcement Proceedings. However, the determinative issues in this case are short points of contractual interpretation, which I have decided on the basis of facts which have either been agreed or which I have assumed in favour of Mr Hall. As indicated in paragraph 35 above, I am satisfied that I have available to me in that way all the facts relevant to the interpretation of those clauses. It is not enough simply to argue that the case should be allowed to go to trial because something may turn up. I therefore conclude for the purposes of CPR Pt 24 that there is no compelling reason why this case should be disposed of at a trial rather than summarily.

Conclusion

77. For the reasons set out above, I therefore conclude that the Particulars of Claim as presently pleaded disclose no reasonable grounds for the claims advanced on behalf of Mr Hall. I also conclude that Mr Hall's case has no realistic prospects of success on any of the causes of action which have been pleaded on his behalf and that there is no other compelling reason why the case should be disposed of at a trial.

78. Accordingly, the Solicitors' application succeeds.

79. I invite the parties to seek to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential issues. In the event that agreement cannot be reached, I will give directions for any points of disagreement to be resolved on the basis of written submissions. Pursuant to CPR PD 52A 4.1(a), I adjourn all applications for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination. In the circumstances, there is no need for the parties to attend the formal handing down of this judgment.