



Neutral Citation Number: [2021] EWHC 2400 (Comm)

Case No: CL-2018-000578

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 24/09/2021

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

(1) SPIRE PROPERTY DEVELOPMENT LLP

(2) HORTENSIA PROPERTY DEVELOPMENT LLP

Claimants

- and -

WITHERS LLP

Defendants

**Mr Nigel Tozzi QC, Mr Tony Singla and Mr Jonathan Scott (instructed by CMS Cameron
McKenna Olswang LLP) for the Claimant**
**Mr Patrick Lawrence QC, Mr Carl Troman and Mr Diarmuid Laffan (instructed by Clyde & Co
LLP) for the Defendant**

Hearing dates: 19-22, 25-28 January 2021 and 2 February 2021

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.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the trial of a claim by the claimants for damages for breach of a contract of retainer or breach of an alleged duty of care in relation to the development of two high value properties in Central London. The properties share a common boundary. One is known in these proceedings as “*the King’s Chapel*” and is located at 459A Fulham Road, London SW10 9UZ. The other is known in these proceedings as “*the King’s Library*” and is a former school. The King’s Chapel was purchased by the first defendant (“SPD”) on 6 November 2012 at a price of £7.8m. The King’s Library was purchased by the second claimant (“HPD”) on 23 November 2012 at a price of £34m. I refer to the King’s Chapel and the King’s Library hereafter collectively as “*the properties*”. I refer to SPD and HPD hereafter collectively as “*the claimants*”.
2. The claimants are each special purpose vehicles set up specifically for the acquisition and development of the properties. Each was ultimately controlled by three entities, being (1) Prime London Residential Development Fund (“Fund”), managed by Savills Investment Management (“SIM”); Pryvest Limited, whose interest in the developments is also managed by SIM; and Tenhurst Limited (“Tenhurst”), a property development company, a subsidiary of which was also appointed by the claimants as the development manager for the redevelopment of each of the properties. The defendant (“Withers”) is a full service law firm which at all material times held itself out as having expertise in real property matters. It is common ground that the claimants retained Withers in 2012 to act on behalf of the claimants in relation to the acquisition of the properties, and that at all material times the partner who acted for the claimants was Ms Emma Copestake assisted by Ms Hannah Robinson.
3. Following their acquisition of the properties, the claimants discovered that each of them had buried beneath the ground three high voltage cables (“HVCs”) belonging to UK Power Networks (“UKPN”) running along Cable Route 379. The claimants allege that Withers were negligent in failing to identify and alert them as to the existence of the HVCs prior to exchange of contracts for the purchase of the properties. The primary issue that arises in relation to breach is whether Withers ought to have carried out a specialist search, which it is common ground would have revealed the existence and track of the HVCs. Once the existence of the cables had been discovered, the claimants sought advice concerning the HVCs from Withers (the nature and extent of the advice sought is in dispute) and it is alleged that in breach of duty, Withers failed to advise the claimants correctly as to their rights and the remedies available to them against UKPN. In summary, the claimants were entitled either to have the HVCs moved by UKPN at UKPN’s expense or to the payment by UKPN of compensation. Withers did not advise that this was so and in consequence, the claimants allege, the development schemes for each property was varied resulting in costs that would otherwise have been avoided and developments that were less valuable than would otherwise have been the case.
4. Many of the individuals involved in this case are those involved in Prime London Residential Development Jersey Master Holdings Limited v. Withers LLP (“the Prime Case”). That judgment was written before this one (even though this one was heard by me immediately before the trial of the Prime Case). I adopted this course because there

may have been credibility issues that arose there that may have impacted on the assessment of credibility of some of the witnesses in this case. Given the detailed description in that case of the various individuals and their respective roles, I have not considered it necessary to repeat the exercise in this judgment. The principles that I have applied in arriving at the factual findings set out below are those that I set out in paragraph 7 of my judgment in the Prime Case. Before turning to the facts of this case I should mention that I offered to hand down the judgment in the Prime Case in June 2021, before the judgment in this claim but both parties considered it desirable that they should both be handed down together.

The relevant Background Facts

5. I need not take up time in describing how Withers came to be retained other than to say that it was the result of a long standing professional relationship between Ms Copestake and Mr D’Arcy Clark, who as I explain in detail in the Prime Case judgment was the person with day to day management and control of the Fund. It is common ground that Withers was retained by SPD no later than 25 September 2012 and by HPD no later than 18 October 2012. By section A2 of the SPD retainer letter, Withers by Ms Copestake agreed to:

“...Carry out the following searches:

2.1 Local Authority

2.2 Environmental;

2.3 Chancel Check

2.4 Planning

2.5 Water Authority

2.6 Other searches appropriate to the location of the property.”

The letter set out the assumptions made by Withers at section 13 of the letter. They included:

“13.2 That you have received advice in relation to the planning, listed building and building control history of the Property, including the consents for the change of use and redevelopment of the Property into a single residential dwelling, and that no planning/listed building advice is to be given as part of this engagement.

...

13.4 That the Seller supplies a full sales pack and only additional enquiries arising from the papers supplied in the sales pack will be prepared by us.

13.5 That you will arrange a survey and valuation of the Property and that any matters arising from your survey and valuation report will not be addressed as part of this engagement.”

The HPD retainer letter was in similar terms save that the paragraph numbers are different. It is not in dispute that at all material times Withers knew that the properties were being acquired for redevelopment.

6. Withers prepared reports on title for each of the properties. The King’s Chapel report commented at paragraph 3 that the report was based “... *on our review of the title documents and search results ...*”, at paragraph 4 that Withers had not inspected the property and were unable to advise on its physical condition and at paragraph 13.1 that Withers had not been sent any survey report. The report concluded that Withers saw “... *no reason why you should not proceed with this transaction ...*” subject to three qualifications including one concerning any adverse comments received from SPD’s surveyor. The report concerning King’s Library was in similar terms. Neither report mentioned the HVCs or that a search for high voltage cables passing across the sites could have been but had not been carried out. Withers did not suggest prior to delivering the reports on title that such a search could be carried out but would not be unless instructions to do so were received from the claimants. It did not explain what such a search would reveal if carried out. Having received the reports, SPD instructed Withers to exchange contracts for the purchase of King’s Chapel on 9 October 2012 and HPD instructed Withers to exchange contracts for the purchase of King’s Library on 25 October 2012. The purchases were completed on 6 and 23 November 2012 respectively.
7. The claimants intended that King’s Library be converted into luxury flats (those material to this dispute being flats 3 and 4) and King’s Chapel into 3 houses being St Mark’s House, St John’s House and a newly built house to be called King’s Lodge. In order to carry those schemes into effect, a geo physical examination of the sites was carried out by Sinclair Johnson & Partners Limited and on 11 September 2013, the presence of the HVCs was discovered. Mr Mussan, the technical director of Sinclair Johnson & Partners Limited reported these findings initially by email of that date in these terms:

“Please note the presence of the HV cable running across the site, and in the location of the proposed new basement. We have instigated a below ground services desktop search (from Groundwise) and will forward the findings once received.”

The Groundwise report referred to by Mr Mussan provided a ground plan showing the track of the cable as running across the north east corner of the King’s Chapel site (and so through where King’s Lodge was to be constructed) and along the whole of the south west side of the King’s library site. As was accepted in Withers’ opening submissions, none of this is in dispute. Although the claimants allege that Withers was negligent in failing to ascertain and advise concerning the presence of the HVCs, they do not allege that they would not have proceeded had they been advised as they allege they should have been. As Mr D’Arcy Clark made clear at paragraphs 91-92 of his witness statement, (a) the claimant would have wished to proceed but would have sought to negotiate a reduced price but (b) “...*I have been asked whether we would still have*

gone ahead with the purchases in the absence of any reduction in the price; I believe that we would.”

8. In January 2014, the claimants acting by Mr Joy contacted Withers concerning the HVCs. This resulted in Ms Robinson responding initially by email having reviewed the reports on title that Withers had provided. She commented:

“... 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.”

Whilst this was accurate it was immaterial because (as is now common ground) the sub-stations and ancillary cables were nothing to do with the HVCs that traversed the sites. I should add that Withers rely on the fact that the presence of the sub stations did not put off the claimants from proceeding as demonstrating that even if advised of the presence of the HVCs, they would have proceeded with the purchase. In my judgment this is a misplaced criticism not least because cables from the sub stations did not traverse the properties as did the HVCs and the cables in connection with the sub stations were not HVCs. In a subsequent email, Ms Robinson said of the HVCs shown on the plan she had been sent by Mr Joy:

“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. ... 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.”

9. On 28 January 2014, Mr Joy emailed Ms Robinson seeking further clarification of the position. Specifically he asked

“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 then owners? It would seem impossible that the owners of the sites were not aware of such a large cable being laid on their property.

...

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.”

Ms Robinson’s response followed by email on 3 February 2014. In so far as is material for present purposes, Ms Robinson’s response was:

“... 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 for inspection, maintenance and replacement. A wayleave can either be agreed or can arise where the owner or 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 land owner 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....”

As is obvious from this extract and in any event I find that Ms Robinson failed to give any advice concerning the rights that either claimant might have against UKPN and specifically on whether either was in a position to insist on UKPN either moving the cables or paying compensation. She did not qualify the advice she gave in any way. She did not suggest that further research was required in order to ascertain what remedies might be available to the claimants. She did not suggest that a further formal retainer or a fee agreement was required before such advice could be given. She did not suggest that advice from specialist counsel was required. The claimants’ case as set out by Mr Joy in his witness statement is that the claimants were not aware of the rights that it had or may have had against UKPN, did not believe it had any rights as a result of the exchange of emails that I have referred to and proceeded thereafter

“ ... on the basis that the costs of resolving the problem (e.g. the cost of diverting the HVCs) would need to be met by Spire and Hortensia rather than UKPN, and that those costs and accompanying delays would have to be factored into our current development programmes and costings, and we approached our subsequent discussions and negotiations with UKPN on that basis.”

In summary and in the result the estimated cost of diverting the cables was financially prohibitive and in consequence a revised scheme was adopted which involved reducing the size of flats 3 and 4 in King’s Library and abandoning the construction of King’s Lodge and proceeding with a 2 house development on the King’s Chapel site instead.

10. On these facts, the claimants advance two claims. The first (which I refer to for convenience as the “*2012 Claim*”) is based on what the claimants allege was the negligent failure of Withers to identify and report on the presence of the HVCs, which the claimants alleged caused them to suffer loss by being deprived of the chance of negotiating a reduction in the purchase prices of the properties and/or by incurring

expenditure that would not have been incurred had the claimants learned of the presence of the HVCs in October 2012 rather than September 2013.

11. The second claim, which I call for convenience the “*2014 Claim*”, is based on an allegation that Withers negligently failed to advise the claimants correctly as to their position as against UKPN by failing to advise that either UKPN could have been compelled to move the HVCs or pay compensation unless it could establish a lawful authority for laying the cables that that not been discharged. The claimants allege this allegedly negligent omission caused them losses in the form of either (i) additional expenditure on alterations to both parts of the development and a reduction in value of the completed properties resulting from alterations made necessary by reason of the presence of the cables on the basis that UKPN could have been required to remove the HVCs at its own expense or (ii) what is alleged to be the statutory compensation that could have been but was not recovered from UKPN had UKPN opted to seek a statutory wayleave in respect of the HVCs rather than divert them. Before either of these remedies could be available it would have been necessary for the claimants to request UKPN to divert the cables in accordance with the statutory machinery contained in the Electricity Act 1989.

The 2012 Claim - Liability

12. It is common ground that Withers owed Spire and Hortensia a duty to exercise reasonable care and skill in acting for and advising them, both as an implied term of its retainers and in tort. As Mr Tozzi QC summarised this part of the claimants’ case in paragraph 33 of his written opening submissions:

“The issue for the Court to determine is therefore whether a reasonably careful and skilful conveyancer, advising and acting on the acquisition of properties like the King’s Properties in 2012, would have conducted a UKPN search; or, to take the express language of the retainer, whether such a search would have been appropriate to the location of those Properties. There is in practice no meaningful difference between those formulations: on either view, the question is essentially what searches a reasonably careful conveyancer would have done, in 2012, in the circumstances of this case.”

By the time when he came to close the claimants’ case this issue had broadened to whether Withers had been obliged to conduct a UKPN search or alternatively to draw to the attention of Spire and Hortensia the fact that such a search had not been or would not be conducted and seek their instructions as to whether to conduct one. Mr Lawrence QC submits on behalf of the defendants that this latter formulation is not open to the claimants since the alternative form of this allegation (and the causal consequences that follow) have not been pleaded.

13. Unsurprisingly the focus of attention has been on the scope of the requirement to carry out “... *other searches appropriate to the location of the Property*” since as is common ground, a UKPN search (which it is common ground is the only search that would have revealed the presence of the HVCs) was not one of the searches that was expressly identified in the retainer as one that would be carried out and generally solicitors are

not obliged to undertake investigations that are not expressly or impliedly requested by clients – see Orientfield Holdings v Bird & Bird [2015] PNLR 33 at paragraph 28. Importantly, Mr Lawrence accepted in his submissions (correctly I would add) that the searches that were appropriate for these purposes would be those that in the particular circumstances of this case would be considered appropriate by a solicitor acting in accordance with what a responsible or competent or well informed or respectable body of conveyancing solicitors would consider appropriate – see Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582 at 586-587; Saif Ali v Sydney Mitchell & Co [1980] AC 198, Maynard v West Midlands Regional Health Authority [1984] 1 WLR 634, Nye Saunders & Partners (a firm) v Bristow (1987) 37 BLR 97 at 103 and Williams v. Michael Hyde [2000] Lloyds Rep PN 823. Precisely similar considerations apply to what warnings or advice should have been given concerning what searches (other than those expressly identified in the retainer letter) had not been conducted but might be considered appropriate.

14. Aside from evidence from Ms Copestake, the parties each adduced expert evidence from very experienced conveyancing solicitors. The role of such evidence in a case such as this is constrained. As Oliver J (as he then was) warned in Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (A Firm) [1979] Ch 384 at 402:

“Clearly, if there is some practice in a profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court ...”

That said, I consider expert evidence concerning what searches should be carried out according to the practice at the material time is evidence that is likely to assist in arriving at the correct outcome – see by way of example G. & K. Ladenbau (U.K.) Ltd v. Crawley & de Reya [1978] 1 All E.R. 682, where Mocatta J. heard expert evidence from conveyancers where the issue was negligence in failing to search the commons register.

15. I turn first to Ms Copestake’s evidence because that establishes the context in which Withers’ acts and omissions must be viewed. It was accepted by Ms Copestake that what was appropriate for the purposes of the provision within the retainer letter referred to above would depend on the location of the property and what it was intended by the purchasers to be used for – see T4/177/4-18. In this context, Ms Copestake accepted that at all material times she knew that the properties were being purchased for redevelopment – see T4/178/11-15. She also accepted that she realised at the time that it was possible that redevelopment would involve subterranean works and it would have been straightforward to have asked the client whether it needed the relevant search to be carried out – see T4/179/18-25. This was all the more the case in the context of the transactions with which this litigation is concerned because Ms Copestake accepted what in any event is obvious namely that the claimants would have wanted to know if there was an entirely separate, extra-high-voltage cable that ran across the land that they

were planning to purchase – see T4/180/10-14. She added that with any development, a developer would need to know what was underneath the surface of the land that was being developed – see T4/180/15-181/9. She also accepted that she knew that both the properties were located in a densely populated part of London where it would not be surprising to find sub terranean utility infrastructure – see T4/181/10-15. She accepted that the presence of sub-terranean power cables would not be either novel or unusual – see T4/182/5-8. Ms Copestake accepted that because the vendor of King’s Chapel was a receiver, Withers was going to have to do a lot of the “*leg work*” that might otherwise have been the responsibility of the vendor – see T4/186/6-11.

16. In the course of her evidence Ms Copestake had explained that Withers’ practice was to commission all necessary searches from an organisation that she referred to as “*TM Group*”. She accepted that a power cable search could be made using that service provider and that the cost of such a search would have been trivial in the context of the purchase by the claimants of the properties – see T4/186/8-15.
17. Ultimately Ms Copestake’s evidence was that it is to be taken as read that a central London site is “... *likely to be littered with cables, whether they are active or not, pipes, goodness knows what else, ... in my experience that clients in central London who are carrying out development will be carrying out those sort of surveys.*” However, she did not accept that the only way to discover the condition of the sub surface of the site was by carrying out a UKPN cable search and that developers could be expected to carry out a geophysical survey of the whole of the site that the developer was acquiring. In relation to this particular site and these particular purchasers, Ms Copestake accepted however that she did not know whether the claimants had commissioned an appropriate geo-physical examination of the subsurface of the sites but added:

“... I was working with Savills and with John Hunter. John Hunter is an extremely experienced developer who has worked in central London. I have worked with Brian D'Arcy Clark. They are both very, very experienced individuals and I think in truthfulness, if I had started turning around and saying, you know, "Are you doing this and have you done your survey" I would have been slapped down -- you know, in a nice way, but would have been told not to – you know, you treat your clients, I think, with respect and they were both very experienced men.”

18. In her witness statement, Ms Copestake had said that power cable searches are not carried out as a matter of routine, are in any event not a reliable way of locating power cables and would not have been carried out (notwithstanding her acceptance of the points set out above) unless the search was one that had been expressly requested. Notwithstanding this, Ms Copestake accepted that (a) she didn’t know if anyone had procured either a power cable search or a geophysical survey of the site on behalf of the claimant; (b) she had no reason to suppose that anyone had done so and (c) she did not record at any time prior to exchange or otherwise that she was proceeding on the assumption that this activity had been undertaken by or on behalf of the claimants by someone other than Withers. It was in this context that this exchange between Mr Tozzi and Ms Copestake was relevant:

“... Ms Copestake ... if you are making an assumption that a client is doing something [you need] to make sure with the client that that is a legitimate and correct assumption; would you not agree with that?”

A. Yes, I would.”

Ms Copestake also accepted that had a search been carried out, it would have revealed the cables and that had that happened she would have drawn the presence of the cables to the attention of her clients – see T5/16/6 to 17/2.

19. The claimants question whether in fact Withers proceeded on the basis of the assumptions identified by Ms Copestake in the course of her evidence. There are some reasons for thinking that may not be so – Ms Robinson did not say that Withers had assumed that the claimants would carry out a geophysical examination of the sub surface of the site when responding to Mr Joy when the problem first became apparent, nor did she say that the decision not to carry out a power cable search was one that Withers had taken deliberately. In my judgment this submission derives very considerable support from Ms Copestake’s evidence as to how the relevant searches would have been procured within Withers. Her evidence was that the searches in fact procured were procured by a conveyancing secretary at Withers called Ms Griffin. As I have explained already, the searches ordered by Withers were procured from TM Group. Ms Copestake’s description of how this process took place was:

“If it would help to explain, the way that the Withers TM system was set up is that Withers had set out templates, so there would have been the searches which Withers had decided were relevant to different types of transactions, residential, commercial, et cetera. So that -- so TM would automatically have pulled up that template. And underneath when you put in a property address it can pull up search alerts. So this is TM, as I understand it, its database will pick up anything that TM believes should be alerted. So, for example, if one is buying a property in Cornwall it is likely to alert that a specific radon search should be carried out. If you are buying in an area that has historic coal mining activity, these search alerts will pop up. And it was usual practice for the fee earner to check the screen to check whether there were any search alerts or whatever else and also to look at the cost of the searches before giving sort of final approval to go ahead.”

However, in relation to the searches carried out in this case, Ms Copestake’s evidence was:

“Q. Right. Now, apart from the specific searches that we have seen in respect of Transport for London, Crossrail and HS2, the rest of the searches were what you would describe as your usual searches, is that fair?”

A. That is correct, yes.

Q. Yes. And would you accept this, Ms Copestake, that, to use a vernacular phrase, this was effectively a bog standard transaction or was treated as a bog standard transaction for the purchase of residential property in central London?

A. It was, yes, a residential purchase, yes.”

There is no evidence from Ms Copestake as to what would have been the result so far as searches are concerned if this had not been the approach. Indeed, in her following answer, she accepted that there was no particular guidance within Withers as to how the search process was to be approached for particular types of transaction. These factors considered in this paragraph lead me to reject the suggestion that a power line search was omitted as a conscious decision.

20. I reject the notion that it was not mentioned to Mr D’Arcy Clark or Mr Hunter because to do so would have shown disrespect. All that would have been required was a very short letter, email or phone call saying that having regard to their experience as seasoned property professionals and developers and in the interest of keeping costs under control, a power line search would not be carried out unless they or one of them asked for it to be carried out. No one could reasonably or rationally have thought that was showing disrespect. On the contrary it would be showing and would be understood by any rational client as showing care for a client’s affairs. I consider it probable that a power line search was simply not considered, probably because Ms Copestake was asked to authorise an entirely usual set of searches appropriate for the purchase of a residential property in Central London.
21. Before reaching any final conclusions it is necessary that I consider the expert evidence. The experts were respectively Mr Fitton who was appointed by the claimants and Mr Mapstone, who was appointed by the defendants. The experts were agreed that it was usual conveyancing practice in 2012 and now to use search agents such as TM Group to carry out the searches that are relevant. They were also agreed that one of the purposes of carrying out a utility search (including in this context a powerline search) was to identify the presence of plant and equipment that may cause problems for development. In my judgment this provides further support for the proposition that what searches were appropriate depend on the purpose for which property is being purchased. As I have explained it is not disputed that at all material times Withers knew the properties were being purchased by the claimants for redevelopment. Such searches are a means and in some cases the only means by which a solicitor can alert a client to the presence of equipment crossing the land being purchased – see paragraph 8 of joint report. Conveyancers use professional judgment as to which searches are relevant, having regard to location and nature of and the client 's intention in relation to the land and buildings to be acquired – see paragraph 9 of the joint report. The experts are agreed that in almost all circumstances where a purchaser intends to develop a property, a combined utilities search including a UKPN search will now (in 2020) be undertaken.
22. The experts disagreed as to whether this was the practice in 2012 and as to the purposes for which such a search might be carried out. Mr Fitton was of the view that a UKPN search was appropriate in all development circumstances in 2012 and prior to that. Mr Mapstone considered that that it was not standard practice to carry out UKPN searches prior to 2015 but since then it has become the practice to carry out a combined utilities

search which will include a UKPN search. Mr Fitton considered that the purposes of such searches included alerting clients as to what equipment may cross their land and affect development, whereas Mr Mapstone considered the main purpose was to establish whether the relevant site was or could be connected to the relevant utility. Whilst I accept that may be a purpose, I do not accept it is the only purpose of such searches and that the purposes of such searches for development clients at least will include that identified by Mr Fitton.

23. In his report, Mr Fitton's evidence was that in 2012, it was routine to undertake the widest range of searches possible including electrical supply lines owned or operated by UKPN. His view is that this would only not be so "... *where either the seller had provided a full up to date set of such searches or the client had instructed the conveyancer not to undertake them.*" He identified as a reason for undertaking such searches on behalf of a client intending to redevelop the property being purchased that

"there may be infrastructure or equipment in place (such as pipes or cables) which constitutes an impediment to development, including by making an intended development (or aspects of it) more expensive or time-consuming than it otherwise would be, possibly prohibitively so or indeed preventing development entirely. Such infrastructure may be there for utilities which benefit other land and/or for the benefit of the general utilities infrastructure. The cost and time of negotiating agreements with the utilities provider to develop on, under or above such infrastructure and/or to divert such infrastructure can be a time consuming, uncertain and costly process."

and that:

"Fourthly, electricity infrastructure is often installed or kept in place pursuant to a 'wayleave'. A wayleave is not a property right, but a personal right (in the nature of a licence) conferred on the utility company. 4 A wayleave may be granted by a landowner voluntarily on terms agreed with the utility company (a "voluntary wayleave"). Alternatively, in the case of electric lines in particular, a wayleave may be granted to an electricity company pursuant to paragraph 6 of Schedule 4 to the Electricity Act 1989, if the Secretary of State considers it to be "necessary or expedient" for the electricity company to install and keep installed an electric line on the land (a "necessary wayleave"). 5 Wayleaves (whether 'voluntary' or 'necessary') are not recorded against title (unless they are drafted to take effect as easements, as to which see below). This means that any wayleave that exists over land will not appear on the certificate of title to that land, and, therefore, that inspecting the certificate of title will not reveal to the conveyancer the existence of any utility infrastructure that has been laid on the land pursuant to a wayleave."

Mr Fitton added at paragraph 18 of his report that:

“As set out above, in my view it is good practice, and routine, to undertake the widest possible range of searches prior to acquisition in every conveyancing transaction. However, to the extent that that is not a given conveyancer's usual practice, the conveyancer should, at the very least, turn their mind to any relevant factors that indicate that a particular search is required and should conduct searches accordingly. The fact that the purchaser intends to redevelop the land is a clear indicator that utility searches (including searches for electric lines and infrastructure) should be conducted; and this is reflected in the guidance referred to in the preceding paragraphs.”

He qualified this very wide language in the course of his cross examination at T5/135/3-8, where he said that

“What that paragraph doesn't reference is the client's intentions, so what I had in mind there is one undertaking a range of searches which is relevant where you are acting for someone who is going to redevelop a site that you are acquiring.”

He added that if contrary to his view of what should have happened, Withers had decided not to carry out a power line search then it should have informed its client of that fact.

24. In the course of his cross examination it was suggested to him that there were a range of appropriate or respectable responses available to a conveyancing solicitor in 2012. The first was that it was a matter for the developer to obtain searches relevant to what was located in the ground of a development site being acquired by a client. As to this, Mr Fitton did not deny that assertion. Instead he said that he had never been instructed by a developer client not to carry out such searches – see T5/122/14-25. That was not an answer to the question that had been asked. When it was put to him again, he said that he had nothing to add to the answers he had given previously – see T5/ 123/11-12. When it was put to him for a third time, Mr Fitton's answer was that his firm and many others known to him undertake power line searches as a matter of routine when acting for a client acquiring a site for development. This again was not an answer to the question that Mr Lawrence was putting. Mr Lawrence returned to this theme at the end of Mr Fitton's cross examination, when the following exchange took place:

“Q: ... The third possible response, which one could refer to in this case as the Withers or Mapstone 2012 response, is to take the view that a sophisticated developer client can be expected to decide for itself whether it wants the type of information that is yielded by the type of search that we are discussing and only to carry out that search if expressly asked to do so. Now, I suggest to you that in 2012 there was a body of reasonable opinion within the profession which held that that was a proper response to this type of transaction.

A. Yes, that could be a proper response. But again, to give context to that, a competent conveyancer should identify what

risks are not being investigated as a consequence of not doing those searches.”

This was the fourth time this point has been put to Mr Fitton. On the first three occasions he apparently avoided answering the question. In relation to the fourth, it was unclear to me what Mr Fitton intended by the second sentence of his answer, given that only a few lines earlier, Mr Lawrence had suggested that one reasonable response would have been not to carry out the search but to ask the client whether he wanted such a search carried out and he had accepted that would have been a proper response, albeit that the solicitor should warn the client of the risks run by not having the search carried out. Mr Tozzi seemed to be of the same view because he re-examined on the issue in these terms:

“Q: ... I think what is being suggested is there is not any conversation at all, there is just an assumption by the conveyancing solicitor that the client can be expected to decide for itself and so nothing is said and the solicitor doesn't do the search. Now, if that was the proposition, is that something which there was a reasonable body of opinion that would support that as being a proper response?

A. In my opinion, that would not be a proper response. I had not understood the question that way, but that would not be a proper response.”

He added that he had never come across the view that a developer client should be left to carry out such enquiries without any indication by the solicitors that they would not be carrying out such enquiries – see T5/142/1-10. With some hesitation I accept that in the heat of cross examination Mr Fitton may have missed the point of the question that he was asked.

25. Mr Mapstone’s evidence on this critical issue was to contrary effect. Whilst he accepts that Mr Fitton’s evidence reflects what a respectable body of conveyancing solicitors would do in 2020 (that is either carry out a utilities search or inform the client that one would not be undertaken without express instructions and, perhaps, warning the client of the possible consequences that would follow from not carrying out such a search) he does not accept that was the position in 2012. It is necessary to consider what has changed in the intervening period to bring about the alleged change of practice. Mr Mapstone’s position was that (a) it was not possible to obtain a combined utilities search until 2015 and that the unwieldy format of individual utility search reports prior to that meant they were not easily procured or usable by solicitors prior to combined utility reports becoming available and (b) it was not usual in 2012 for stand -alone UKPN searches to be carried out (other than if specifically instructed) for sites in central London being acquired for redevelopment by experienced clients because of the ubiquity of power cables.
26. In the course of his oral evidence, Mr Mapstone was asked about what had changed in the period between 2012 and 2020 (when it is common ground the practice was what was described by Mr Fitton as is agreed between the experts and apparent from

practitioner information sources such as Practical Law and LexisNexis) in this exchange with Mr Tozzi:

“Q. No. But again, can I just put the proposition to you that there is nothing that has happened in the last eight years to make this sort of search more appropriate now than it would have been in 2012, has there?”

A. I don't think so. But it has never been the case that one size fits all. ... It depends on the circumstances and, in my opinion, the nature of the client.”

Withers carried out a UKPN search in February 2014 in the context of a refinancing transaction for the claimants and another was carried out in 2020. Mr Mapstone accepted that there was no material difference between the information contained in each – see T5/180/17-T5/181/10. This inevitable concession resulted in the following exchange between Mr Mapstone and Mr Tozzi:

“Q. Mr Mapstone, can I suggest to when we looked at the two UKPN responses that we have just had that there is no real difference in terms of their understandability or usability, is there?”

A. I -- before I wrote my report I took the trouble to check with Landmark and they told me how the search had changed in 2015 and become, as they put it, more accessible and more reader-friendly.

Q. Well, I'm sure they are going to tell you how good their product is, but we have just looked, haven't we, at the UKPN response --

A. No, we have looked at one or two pages of it, with respect.

Q. Yes. Well, I'm sorry, but people pay firms like Withers large sums of money presumably to understand conveyancing documents and it is not rocket science, with the greatest respect, to understand those two drawings and see the EHV cable running across them?

A. No, on those two drawings, correct.”

As Mr Mapstone accepted in the end in the following exchange, there was no material difference between what was available in 2020 and February 2014 and that there is no reason to suppose that what was available in February 2014 was materially any different from what was available in 2012:

“Q. So the point I'm making is this: there is not really -- I mean, Landmark have packaged it together and it is all very slick and so on, but there is no real difference, is there, Mr Mapstone, in

the actual quality or information that is being provided in 2015 under the Landmark banner to that which was available in 2012?

A. I don't have a 2012 one in front of me. I have only seen the 2015 one and the one that we did.

Q. Yes. Sorry --

A. I tried to get a 2012 one in order to do my report and it was not possible.

Q. Yes. Forgive me, just to get the dates right, the earlier one we looked at was actually February 2014?

A. It was for the refinancing.

Q. Yes, exactly.

A. Yes.

Q. And the date on it is February 2014, Mr Mapstone. And do you have any reason to believe that what would have been provided in October 2012 would have been materially different to what Withers actually obtained in February 2014?

A. No, not particularly, other than it might be in more accessible format. ... No, I don't think it would be -- I don't know, but I don't think it would be that different."

27. Mr Tozzi returned to the question of what changed between 2012 and 2020 that resulted in the change in practice which Mr Mapstone contended occurred. The real difficulty was that Mr Mapstone had no convincing basis for such a change in practice as the following exchange shows:

"Q. So what has happened in terms of the practice of the profession to cause this change, Mr Mapstone?

A. Because people have evolved and they have learnt and they have been brought up to date by articles and seminars and directives."

It is unclear what Mr Mapstone meant by "directives". There is no material change that has been demonstrated by reference to any of the professional practice guides and no other directives have been identified. References to seminars and articles misses the point in the absence of a material change of circumstances that justified or caused a change in practice. There is no evidence that what was being taught in seminars and articles changed materially at any point between 2012 and 2020.

28. Overall, I found Mr Mapstone to be argumentative and evasive in relation to this part of his evidence as is apparent from his evidence in particular at T6/ 6-8. One example will suffice. When Mr Tozzi suggested that the change in the format of the reports was not such as to justify a change in practice, Mr Mapstone replied at T6/7/23-24, "... *But,*

sir, I'm not entirely sure how relevant that is, bearing in mind that one wasn't carried out." This was plainly an inappropriate answer from a witness in the circumstances and suggests that in reality there was no good answer to the question that was being put. Thereafter he steadfastly refused to accept that there was no material difference between the information that was available and the format in which it was presented in 2014 and what had been available in 2012, not on the basis that he had any evidence to give based on his own recollection of the position in 2012, but on the basis that he had not seen a report from 2012 and on that basis did not know the answer to the question. This was entirely unsatisfactory evidence on a critical issue going to the heart of his assertion that there had been a change in practice between 2012 and 2015-2020. In summary I reject his evidence on this issue and conclude that there was no material change between what was available in 2012 and what was available in 2015 or in the format in which it was presented. Further I conclude that there was no such change between 2012 and 2014. As Mr Tozzi submitted and as I accept, there is no substantive difference between what Withers obtained when carrying out a power line search in 2014 and what was obtained in 2020.

29. That being so, I reject Mr Mapstone's evidence that there was a change in practice after 2012, whether driven by a change in the availability of information or the format in which the available information was presented or otherwise. As Mr Mapstone accepted, the facility to obtain a Power Line search was available to solicitors in 2012 – see T6/10/1-2. As he also accepted, the problem for a developer posed by the presence of cable in the sub surface of a development site was the same in 2012 as it is now – see T6/19/12-15 – and that a utility provider would be concerned about any development on or surrounding HVCs in 2012 as it would be in 2014, 2015 or 2020 - see T6/201-19 – and the risk of a wayleave (which it is common ground is not registerable) not being disclosed by a vendor and not showing up on a title search was the same in 2012 as it was in 2014, 2015 and 2020 see T6/21/15-20.
30. Mr Mapstone conceded in any event that in relation to a new developer client, a reasonably competent solicitor in 2012 would wish to satisfy themselves that the relevant searches were to be carried out by other professionals within the developer's team of construction professionals by express enquiry because (as is self-evident) there would otherwise be a risk of a misunderstanding as to who was doing what – see T6/14/4-6. In my judgment this is obvious and in my judgment is a further reason for me rejecting Ms Copestake's evidence that she would not have wanted to approach Mr D'Arcy Clark for fear of being thought disrespectful. It is also why I have accepted Mr Fitton's evidence in re-examination referred to at the end of paragraph 24 above.
31. In any event, the claimants were new clients for Withers. It is not suggested that Withers had worked with Tenhurst prior to being instructed in relation to the acquisition of the properties and it was Tenhurst who as Withers knew had been appointed by the claimants to carry out the redevelopment. In those circumstances, on Mr Mapstone's own evidence a reasonably competent solicitor would have made the enquiries to which he referred in this part of his oral evidence and there is no evidence whether from Mr Mapstone or anyone else that a respectable body of conveyancing solicitors in 2012 would not have adopted that course.
32. I reject the notion that there was a reasonable or respectable body of conveyancing solicitors who would have proceeded as Ms Copestake proceeded. As I have found

already, the decision not to carry out a power line search was not a conscious decision taken by reference to the sophistication or experience of the clients. In any event, Tenhurst was not a developer that Ms Copestake had worked with before – see T4/99/5-7. She had no direct experience of Tenhurst’s methods of working – see T4/99/16 - 18. She had no reason at all to think that a power line search would be carried out by or on behalf of the claimants whether by Tenhurst or otherwise. Then as in 2015 or 2020, the presence of HVCs would or might impede redevelopment in circumstances where the wayleave by which the right to run HVCs across the site would or might not appear on the register of title for the property. The professional literature currently available makes clear that a conveyancer should search for power cables where a property is being acquired for redevelopment. As I have explained, there is no basis for concluding that the practice has altered nor any reason for such a change.

33. In my judgment the practice as described was on the balance of probabilities the same in 2012 as it is currently and that practice is either to carry out a powerline search for a purchaser client acquiring a site for redevelopment or to ask whether such a search is required. To adopt any other course is to create the obvious risk of the issue not being addressed and there has not been shown to be a respectable body of conveyancing solicitors who would have consciously run such a risk in 2012 any more than in 2015 or 2020 or now. In any event, there is no evidence that Ms Copestake proceeded on the basis of an assumption that the claimants would carry out such a search. The retainer letter referred to a survey to be arranged by the claimants but that says nothing about what the survey would cover and there was nothing in the circumstances that either led or could reasonably have led Ms Copestake to think that it would include searches for sub surface power cables, as Ms Copestake accepted – see T4/145/3 – any more than would an environmental report, again as Ms Copestake accepted – see T4/111/16.
34. Her evidence is that she did not ask the question because to do so would have been disrespectful to very experienced property professionals. However, that is evidence that I have rejected for the reasons set out above and in any event is all the more an untenable position to adopt when it is remembered that the claimants were not themselves to carry out the development but had appointed Tenhurst to carry out the exercise. Ms Copestake had not acted for either claimant before or for Tenhurst and so had no idea what if any searches might be carried out by any of them. I reject the submission that the position was altered by the Development Management Agreement dated 5 November 2012 between SPD and Tenhurst, not on the basis that the agreement was concluded after Withers had been retained, but because it was not made until after exchange and so Withers could not reasonably rely on an obligation imposed on Tenhurst to identify the location of sub surface cables because that obligation could not and did not take effect until after exchange and thus at a point when it would have been too late - see Mr Fitton’s evidence at T5/143/3-6 - and because the investigations that would be carried out pursuant to the very generally expressed obligation would follow on from matters that raised pre contract as a result of legal searches. Finally, if and to the extent that it is suggested carrying out a power line search would be futile because it would be incomprehensible to a conveyancing solicitor, I reject that point for two reasons. First, I simply don’t accept that the drawing would be incomprehensible to a conveyancing solicitor. The plan provided to Withers when they carried out a power cable search for the properties in 2014 is entirely clear but in any event, it would be for the solicitor to pass the result of the search to their developer client. It is not suggested that such a client would not understand what was shown on the plan or its implications

or possible implications for redevelopment. Ms Copestake agreed with both of these points in her oral evidence – see T5/16/16 (clarity of the plan) and T5/16/23-17/2 (duty to pass on the plan).

35. In summary therefore, for the reasons set out above, I conclude that Withers were under a duty to carry out a UKPN power line search or at least to inform the claimants that one would not be carried out in the absence of express instructions and enquire of the claimants whether such a search was required. It is common ground that if such a duty was owed then it has been breached.
36. I turn now to the pleading point alluded to earlier. Mr Lawrence does not complain about the failure to plead the breach as such but complains about a failure to plead the causal consequences of the alleged breach. As Mr Lawrence put it in his oral submissions:

“What should have been in these pleadings is a clear and defined allegation that the claimants, at a defined time, would have reacted to Withers saying, "Do you want this search done?", by saying, "Yes, we want it". That would have brought that issue into focus and this is not ...”

He added that:

“I wanted my Lord to appreciate this, I'm really focusing on the causation angle here, because I fully accept that if my Lord decides that case B is the correct analysis of the negligence issue, then there has been no prejudice as a result of this gap in the pleadings. The problems I identify relate much more to causation.”

The thrust of Mr Lawrence’s submission was this:

“I say [there is] a compelling argument, that the claimants would not have required Withers to undertake this search for the commercial reasons that I have identified. I say the causation plea has not yet been made and I say that if it were made, it would be met by those arguments and I say that in the absence of it having been made at the right time, it has not been sufficiently explored, properly explored, fully explored, with such witnesses as the claimants have chosen to call.”

37. This was not the way in which the pleading point had been described in correspondence between counsel – see T9/122/18-19. In my judgment the breach issue is sufficiently pleaded by Paragraph 36(2) of the Re-amended particulars of Claim because that sub paragraph is sufficiently generally expressed to encompass the point. No possible prejudice could result from this because it has not at any stage been suggested by or on behalf of Withers that Ms Copestake sought instructions as to whether a power line search should be carried out or informing the claimants that it had not been. Indeed, her point (which in any event I have rejected) was that to ask would be disrespectful. In fact the question was not asked or the warning given because the point was not considered as I have found.

38. The causation point is mistaken. Mr D’Arcy Clark had addressed this issue in his witness statement – see paragraphs 52-53 of his initial statement and critically paragraph 9 of his supplemental statement - and was not challenged on what he had said. The issue was also a live one on the expert evidence. If the point was going to be that the allegation of breach by failing to ask or warn was not pleaded that might have been a justified approach but it is not where the complaint is that no prejudice has been caused by the failure to plead breach then it is very difficult to make good an assertion of prejudice by reference to a failure to plead causation at least where the issue has been addressed in the evidence and has not been challenged. If it was going to be suggested that Mr D’Arcy Clark was wrong in what he had said because the claimants would have been willing to exchange at risk because of the commercial pressures on the Fund then that could have been put, particularly as the same point featured at a later stage. If and to the extent the point is persisted with, I will give permission for the amendment identified in paragraph 22 of the claimants’ closing submissions since no possible prejudice could result from the amendment proposed given the nature of the point and the evidence forthcoming during the trial on the issue.

The 2012 Claim - Causation and Loss

The purchase Price Claim - Introduction

39. The claimants allege that had Withers acted in accordance with their duty the claimants would have been informed of the existence of the HVCs traversing the properties and had they been so informed then (a) SPD would either have been able to purchase King’s Chapel for £1m less than the price actually agreed or there was a real and substantial chance that it would have been able to do so and paid £7.8M and (b) HPD would either have been able to purchase King’s Library for £2m less than the actual price agreed and paid £34m or there was a real and substantial chance that it would have been able to do so – see paragraphs 37, 38 and 42(1) of the re-amended Particulars of Claim. Although this part of the claim is pleaded on the basis that either the properties would have been purchased for the lower sums pleaded or there was a real and substantial chance they would have been, the claim was advanced at trial exclusively on the loss of a chance basis – see paragraph 52 of the claimants’ written opening submissions and paragraph 35 of the claimants’ closing submissions.

The Legal Principles

40. The principles that apply to such a claim are now well established and are not in dispute between the parties. It is for the claimants to prove on the balance of probabilities what it would have done upon receipt of competent advice but “...*To the extent that the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation...*”- see Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352 *per* Lord Briggs JSC at paragraph 20, Gregg v Scott [2005] 2 AC 176 and Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602, which like this case was concerned with the loss of a negotiating opportunity. It is thus on the facts of this case for the claimants to prove on the balance of probability that they would have sought to negotiate a lower purchase price for each of the properties and then that if they had done so there was a real and not a mere speculative chance that they would have succeeded in negotiating a lower price for each of the properties. The evaluation of whether the claimants have lost a real as opposed to a speculative chance necessarily

involves two elements – being (a) what reduction in price might have been sought in the circumstances and (b) the chance of the vendor agreeing to that lower price.

Price Renegotiation

41. The first question is whether the claimants have proved on the balance of probabilities they would have sought to negotiate down the price to be paid for each of the properties. In relation to this issue the claimants' case is that had they been supplied with a power line search, they would have sought a price reduction on each Property. Withers' case is that the claimants “... would not, in fact, have jeopardised their purchases by trying to ‘gazunder’ the sellers days before exchange ...” and “... would have perceived, correctly, that any attempt to ‘chip’ the sellers would not succeed, and might rebound disastrously. It would not have happened”. Its case is that the claimants have failed to prove the first part of this element of their claim because:

- i) The HVCs would have been seen as something that could be worked around;
- ii) The agreed prices were each perceived to be advantageous;
- iii) The risk of jeopardising the transactions would by some margin have outweighed the (vanishingly) remote chance of chipping a small amount off the purchase price;
- iv) Both Savills and Tenhurst badly wanted the deals to go through.

42. There does not appear to be any real dispute but in any event I find that Ms Copestake would have informed the claimants about the HVCs had she learned of their presence as a result of carrying out a power line search. As I have found earlier, the report that would have been obtained in 2012 would have been in similar format to that which Withers obtained in 2014. That would have been passed to the claimants (and probably by Ms Copestake to Mr D’Arcy Clark) very quickly after it was received. Again, as I found earlier, it shows plainly the presence of HVCs crossing the sites. This is consistent with what happened with the results of the searches actually carried out – see the attendance note of 21 September 2012. This shows that consideration was given by Mr D’Arcy Clark to the impact of the search results on the viability of the proposed development scheme.

43. The claimants' case as to what they would have done had they been shown the power line search depends on the evidence of Mr Joy and Mr D’Arcy Clark. King’s Chapel was being sold by a receiver. Mr Joy was the main person concerned with the King’s Chapel acquisition – see T2/20/14. In relation to King’s Chapel, Mr Joy’s evidence was:

“we would have informed the receivers of the existence of the HVCs and explained that the HVCs undermined the value of the site because their existence prevented the consented scheme being built. In my experience, a site with an unbuildable planning consent would generally be worth considerably less than one with a consent that could be implemented. I believe the value of the King’s Chapel site would also have been

undermined as, had a revised planning consent been sought, there was a risk in us losing the right to build a subterranean extension (something which we considered to be extremely valuable). I believe I would have gone back to the receivers, after a discussion with Mr D'Arcy Clark, and argued for at least £1,000,000 off the purchase price of the King's Chapel. I believe we could have achieved this as, had the existence of the HVCs become public knowledge, then the site would have been much harder to sell. The receivers would also have been fixed with that knowledge which they would likely have had to disclose to another buyer. If the receivers had refused to accept a price reduction, I believe we and SIM would have had to review whether we still wanted to proceed. Our (Tenhurst's) view may not have been the same as SIM's. The existing planning consent was, in my view, underpinning the whole transaction, and we would have needed to consider quite carefully whether any alternative project could still take advantage of that consent, and whether it remained financially attractive."

In relation to King's Library (the seller of which was the William Pears group) the primary point of contact for the vendor was Mr Hunter - see Mr Joy's evidence at T2/20/14-15. Mr Hunter did not give evidence at either trial. Mr Joy's written evidence in relation to King's Library was:

"While I recall William Pears being relatively difficult to negotiate with, I believe the existence of the HVCs would not have helped the marketing of their scheme and that we would have been able to argue that they compromised our plans for the King's Library. I believe we and/or SIM would have asked the vendor i.e. William Pears for a reduction on the purchase price in the region of £1,000,000 to £2,000,000. Had the vendor accepted a sensible price reduction, I believe we would have proceeded with reduced basements at the outset, which would have saved us considerable time and cost. I am not sure whether we (Tenhurst) would have been prepared to proceed with the purchase without some sensible price reduction, as in my experience the very purpose of due diligence is that, in circumstances where something serious arises, you negotiate on price or do not proceed with the transaction."

Mr D'Arcy Clark's written evidence was that the Fund:

"would have sought price reductions in the purchase prices of both properties. I believe we would have advised the vendor of each property of the existence of the HVCs, in order to seek to leverage that information to obtain a price reduction; as part of that leverage I think we would have made the point that the vendor would be obliged to inform other prospective purchasers about the HVCs if asked. Naturally, we would have sought to obtain the largest price reduction we could, but I cannot now say

whether or to what extent this would have been successful. The most I can say is that it was a lost opportunity, which we would have undoubtedly sought to exploit. I do not know how desperate the vendors were to sell, although the fact that King's Chapel was being sold by receivers may be relevant."

However, Mr D'Arcy Clark also stated that

"I have been asked whether we would still have gone ahead with the purchases in the absence of any reduction in the price; I believe that we would."

44. This suggests strongly that the first and second of the points relied on by Withers has some force since such an approach would only be commercially rational if the HVCs were seen as something that could be worked around and the agreed prices were each perceived to be advantageous. However that does not lead to the conclusion that the claimants would not have attempted to negotiate a reduced price. As Mr Joy said in the course of his cross examination on these issues, "...*obviously we wanted to pay, you know, the lowest price we possibly could*". However, this part of Mr D'Arcy Clark's evidence suggests that any approach to the vendors would have been speculative and any reduction marginal.

King's Chapel Claim

45. Turning first to King's Chapel, Mr D'Arcy Clark was cross examined on the basis that the claimants would not have sought to re-negotiate the price. His answer was:

"No, that is wrong. If the cables and the existence of the cables had been made known to us, it would have been very clear to us that the planning consent already on that site frankly was a planning consent that couldn't be put into practice, in which case it did not enjoy the value that even we were putting on it at that stage. I would have had to have gone back to the transaction approval committee to explain that the planning consent which it had, and which we were hoping to improve on, was in fact a planning consent which couldn't be utilised. I would not have got approval to have gone ahead with the deal unless I could have shown that even with the cables there, it was worth pursuing. So the answer is that much more in the case of the chapel than the library, there is a good reason to think that one had a bargaining position which would have yielded well. We were negotiating against the receiver. The receiver, frankly, all he wants to do is to get shot of the problem and if we had told him, because we had found out because we had been informed, that there was a cable which ran through his site and which rendered the planning consent which he had frankly invalid, he would have had to declare that to any other purchaser as well and had the same problems again. So I think the chances are much more likely that we would have got a chipped price on the chapel and I think it is an avenue which we definitely would have pursued."

So far as that is concerned, Mr D’Arcy Clark’s assumptions concerning the wishes of the receiver (there being no evidence that what he says accurately reflects the views of this receiver in relation to this property) are overstated and simplistic. Once a receiver has decided to sell an asset, the receiver owes a duty of care to the mortgagor to obtain the best price that the circumstances permitted – see Cuckmere Brick Company Limited v. Mutual Finance Limited [1971] 2 WLR 1207 *per* Salmon LJ (as he then was) at 1218-1219G, Cross LJ (as he then was) at 1224G- 1225E and Cairns LJ at 1229A-F and Standard Chartered Bank Limited v. Walker [1982] 1 WLR 1410 *per* Lord Denning MR at 1415E-1416B. That means inevitably that the receiver would not accept an unrealistically low offer simply in order that the land be sold. Thus, whilst I accept that the receiver would be willing to agree a reduction if it could be shown that the effect of the HVCs was to reduce the true value of the land for all the reasons identified by Mr D’Arcy Clark, it is entirely unreal to suppose that the receiver would agree a reduction other than to a level that reflected the market value of the land affected by the HVCs.

46. There is no valuation evidence as to what the effect of the HVCs on value was at the date of sale. The valuation evidence that is available is concerned with the position on 31 July 2014 and in 2016. As to that there is no evidence as to the residual valuation of the King’s Library site in 2014 much less 2012. Mr Hewetson’s evidence is that the residual value of the King’s Chapel site on 31 July 2014 on the basis of the three house scheme and with no knowledge of the presence of the HVCs was £12m and on his worst case analysis with the revised scheme and knowledge of the HVCs was £10.239m. SPD purchased that property in 2012 for price of £7.8m. There is no evidence as to price inflation between 2012 and 31 July 2014. It is dangerous to read too much into this given the paucity of information and that neither party made submissions by reference to this material for these purposes. However, it is worth noting that even if there was a 10% year on year growth in property values in each of the two years prior to 31 July 2014, that would devalue the £12m 2014 valuation to about £9.32m and the £10.239m figure to about £8.4m. Each of these devalued sums was well above the agreed purchase figure.
47. This extrapolation is consistent with the only evidence available, which is an assertion by Mr Joy in an email to potential funders that the asking price had been £13.5m and the agreed subject to contract price was £7.8m – see the email from Mr Joy to Messrs Chilver and Morrison of 5 September 2012. This margin is described in the same email as meaning the Chapel development was “... *one that has a lot of headroom for added value*”.
48. Whilst I fully accept that if it could be shown that the true market price for King’s Chapel was lower than the agreed STC price by reason of the presence and location of the HVCs then there would be a strong chance that a lower price could have been negotiated, in my judgment it is highly unlikely that a materially lower price could have been negotiated if that could not be shown. However there is no direct or expert evidence to that effect and no evidence from which it can safely be inferred that was so and some in the form of the emails referred to above from which the contrary conclusion can be inferred.
49. In arriving at this conclusion, I accept Mr Joy’s point that if the HVCs had been identified, the vendors would have had to disclose their presence if the sale to SPD had

fallen through but that does not assist on the point I am now considering because it begs the question as to the true market value of the land on the basis that the presence and location of the HVCs were known. I accept too that it is probable that the receiver would have wanted to complete a sale quickly. However, that does not mean that he would be willing to do so at any price. I accept that the presence and location of the HVCs would have made implementing the planning permission that had been granted for the site difficult or impossible but that again is not the point for two reasons. First, that point takes no account of what if any liability UKPN would have either to compensate the land owner or move the cables and it takes no account either of what actually matters, which is the impact on true value of the presence and location of the cables. That issue involves comparing the agreed STC price with the true value of the site with knowledge of the presence and location of the HVCs and the implications for redevelopment of the King's Chapel property. If there was no difference then it is fanciful to suppose that the receiver would have agreed a material reduction given the duties he owed to the mortgagor and any guarantors of the mortgagor.

50. Returning to the test that I have to apply, it was for the claimants to prove that if they had been advised of the availability of power cable searches the claimants would have authorised Withers to conduct such a search. As explained above I am satisfied that the claimants would have authorised such a search. I am satisfied that had such a search been carried out (either by Withers in the ordinary course or following the receipt of express instructions to do so) they would have supplied a copy of the result to the claimants very soon after it had been received and certainly well before exchange of contracts. I do not accept that a conveyancing solicitor of reasonable competence could not have interpreted the results sufficiently to see the presence of the cables and there is no real doubt that the claimants and their planning and development advisors could have done. On the balance of probability I conclude that the claimants when informed of the result of the UKPN search would have wished to negotiate a reduction in price (because the claimants wanted to acquire the site but at the lowest price that could be achieved). However, the seasoned property professionals representing the claimants (in particular Mr D'Arcy Clark, Mr Joy and Mr John Hunter) would have realised that to have any credibility that would need to have been supported by credible material that the presence and location of the cables showed the site was worth less than the previously agreed STC price. There is no evidence to that effect. I infer that had such material been available, that would have been shown to be so by evidence adduced in this case.
51. Given (i) the duties owed by a receiver to a mortgagor and any sureties, (ii) the absence of any evidence as to the difference between the STC price negotiated in fact and the true value of the land with the known presence and location of the HVCs and (iii) the evidence that the claimants would have proceeded with the purchases in the absence of any reduction in the price, I conclude that the claimants have failed to show that they had a real or substantial as opposed to a speculative chance that they would have been successful in negotiating a further reduction in the STC price of King's Chapel even if they had decided to attempt to do so. Although the claimants rely on the fact that there was no competing bidder for the chapel, there is no evidence of it being marketed at the STC price that the claimants had agreed to pay for it, which as I have said was a substantial reduction from the original asking price. In those circumstances, I reject the claimants' claim that they should recover £800,000 under this head.

King's Library Claim

52. I now turn to King's Library. There is no valuation evidence as to the value of the King's Library property on the date when contracts for its sale and purchase were exchanged on the assumption that the location of the HVCs and its implications for the development of the property were known. There is no evidence of the residual value of the site in 2014 in order to provide a back check. The only evidence available as to the STC price negotiated by the claimants (£34m) is that it was "... quite a full price ..." – see Mr Joy's oral evidence at T3/57/12-13 – and Mr D'Arcy Clark's evidence (T3/136/5-7) was "... it is fair but not necessarily good, as you are implying, or cheap. I think it is about right". However neither of these witnesses was giving expert valuation evidence and their evidence on this issue is self-serving and uncorroborated though it could have been. Both parties adduced expert valuation evidence as I have said and the valuers could have been asked to provide such evidence.
53. The context of the negotiation leading to the STC offer by HPD to purchase King's Library was that put to Mr D'Arcy Clark in cross examination:

"Q: ... The position in relation to King's Library was that you were dealing with a notoriously or famously shrewd and hard-nosed and very substantial property group, the Pears Group; correct?"

A. Correct.

Q. They had entered into an exclusivity agreement in return for £25,000, which you had paid. But that had expired, correct?"

A. Correct.

Q. They had insisted throughout on the importance of the potential purchaser being good for the money; correct?"

A. Correct."

Mr D'Arcy Clark also accepted that the Fund should make and be seen to be making investments in appropriate London development sites and that the King's sites were at the top of the Fund's list of sites it was seeking to invest in – see T3/138/9-23. It was suggested to Mr D'Arcy Clark that had the claimants approached the vendors (referred to variously as the "*Pears Group*" or "*WPG*") with the suggestion that the STC price be reduced to take account of the presence and location of the HVCs, the vendors would have (and the claimants knew that the vendors would have) rejected the approach and withdrawn from the sale. Mr D'Arcy Clark's response was:

"A. Not necessarily. It is a possibility, certainly. But as we have just discussed, the exclusivity period had run out and yet we were still doing the deal with them. They were clearly interested in doing the deal with us. The school deals we were held up to us as their alternative route would have yielded a sum of money if they were able to capitalise the tenancy of one of those schools at a much later date. By doing a deal with us, they would have

got their money and made a substantial profit very quickly. So I don't think that you are entirely right in saying they would have told us to get lost, necessarily. They may well have said, "We are still making a lot of money, we now know about these cables which we will have to declare to anybody else, if we sell it to anybody else, in which case, why don't we just do the deal and get on?"

That answer must be read in the context of some internal communications passing from Mr D'Arcy Clark and others within Savills immediately prior to the exchange of contracts. Exchange was due on 25 October 2012 at 3pm. At 12.01, Mr D'Arcy Clark sent an internal email in the following terms:

"The deadline for exchange of contracts on the above is 3.00pm today. Rest assured that WPG, the ultimate owners, will pull that contract if we are just 1 second late. They have a reputation for so doing and a reputation to protect. I have called in all the favours that I can - as has John Hunter - in getting the exclusivity period extended as we have. For our reputation's sake we need to be seen to be as good as our word. I would therefore strongly advise that we exchange well before that deadline. This will demonstrate that we did so as soon as we were in position and not because we had to be forced to do so."

Whilst the context in which that email was sent was different from that which would have applied in the counterfactual situation under consideration, what it does show was Mr D'Arcy Clark's perception as to the manner in which the vendors could be relied on to behave.

54. The inference to be drawn from this material is that the vendors were very astute and experienced and would not be amenable to a speculative approach to reduce the price after a STC agreement had been reached. That said, had the vendor been persuaded that the effect of the presence and location of the HVCs was to reduce the value of the library site, it is highly unlikely that a shrewd and experienced operator such as the vendor would simply reject the approach out of hand and move to the next alternative. The alternative to a sale to the claimants was a long lease to a school as far as was known to the claimants. Mr Joy's evidence was that this would have a capital value assuming a 5% yield factor of £32m. In order to obtain such a capital value, it would be necessary for the vendors to enter into the lease whilst at the same time or thereafter attempting to sell on the property subject to the tenancy at a price that reflects that yield. There is no independent evidence that addresses any of this but on the face of it, there is at least a £2m difference between what the claimants were willing to pay for the Library site and the capital value of the alternative transaction. In fact the difference would be greater once account is taken of the risk that a sale on the basis of a 5% yield figure might not result and may not result for some months.
55. In those circumstances, I find that the claimants would not have wished to jeopardise the purchase of the Library site and would have been aware that an opportunistic attempt to reduce the STC price that had been agreed with the vendor was likely to result in both rejection of the approach and a real chance that the transaction would

break down. That is not something that the claimants or its backers wanted for all the reasons put to Mr D’Arcy Clark with which he agreed. Mr D’Arcy Clark’s evidence was that the STC price that had been agreed by HPD with the vendor of the library site was a fair market price. That must be read with Mr D’Arcy Clark’s evidence was that the claimants would have proceeded even if a price reduction could not have been negotiated. It follows from these conclusions that it is probable that HPD would have approached the vendor for a reduction in price only if it was confident that it could show that the presence of the HVCs had a material adverse effect on the value of the site. However given the alternative offer for the site, it was likely that any suggestion of a reduction below the fair market value of the alternative offer would be rejected out of hand.

56. It was for the claimants to prove on the balance of probability that had they been advised as they should have been, they (or HPD) would have attempted to negotiate a reduced price. I am not satisfied that they have discharged that burden because (a) the claimants were satisfied that the price that had been negotiated with the vendor of the library was a fair price in the circumstances, (b) they were aware that the vendors were difficult to deal with and were likely to withdraw from the transaction if faced with an unprincipled and opportunistic attempt to reduce the price; and (c) there is no evidence that the value of the library site would have been less than the STC price agreed. Plainly it was open to the claimants to adduce evidence as to the effect of the power lines on the value of the site but have not done so. Given the surrounding contextual matters relating to the acquisition of the site and the propensities of the vendor that is a fatal omission. Even if this is wrong, and I should have concluded that the claimants would have approached the vendor without material demonstrating that there was a material difference in the fair market value of the site between what had been agreed STC and its value with the existence and location of the cables being known, the claimants have failed to show there was a real or substantial as opposed to a speculative chance that they would have been successful in negotiating a reduction in price for the same reasons. In those circumstances, I reject the claimants’ claim that they are entitled to damages totalling £1.2m under this head.

Wasted Expenditure

57. This part of the losses alleged to have been caused by the 2012 breach in summary is pleaded as being:
- i) Wasted expenditure resulting from the need to alter the redevelopment following discovery of the HVCs – see Paragraph 42(1A) of the Reamended Particulars of Claim;
 - ii) Additional financing costs alleged to have been caused by discovering the cables in late 2013 rather than 2012 - see Paragraph 42(1B) of the Reamended Particulars of Claim; and
 - iii) Increased procurement costs caused by costs being greater in 2014 than they would have been in 2012 – see Paragraph 42(1C) of the Reamended Particulars of Claim.

The wasted expenditure claim follows from the change of the Chapel part of the scheme from a three house development including King’s Lodge to a two house development

with one (St Mark's House) being extended over most of the area that would have been occupied by King's Lodge but with a smaller basement. King's Library was always intended to be developed into flats. The redesign alleged to have been caused by the presence and location of the cables was to reduce the size and appeal of the master bedrooms in both flats 3 and 4 and in each case to construct the flats so that the cable passed close to the bed head of each master bed although obviously separated by the external structure of the flats.

58. Withers made one overarching causation submission concerning this claim, which in essence was that it was not reasonably foreseeable that experienced property developers would incur expenditure without first informing themselves of the underground conditions and since that is not what the claimants did, the losses must lie where they fall – see paragraph 171 of Withers' opening submissions. As I mentioned earlier, Withers sought to rely on the content of the DMA between SPD and HPD respectively and Tenhurst as negating liability for breach of contract or duty. I have rejected that argument for the reasons set out earlier. Whilst I accept that each of the DMAs imposed an obligation on the part of Tenhurst to "... *procure the carrying out of all necessary investigations to identify the location of sewers ducts pipes wires conduits or other service media under the Site ...*" the issue I am now concerned with - foreseeability – is concerned with what was foreseeable at the date of the breach of duty, when as I have said, the DMAs had not been entered into though I accept they were in the course of negotiation. It was reasonably foreseeable at the date of breach that the claimants would not undertake investigations that Withers should have either carried out or warned them they were not carrying out or would not do so immediately. It was thus reasonably foreseeable that costs would be incurred prior to a detailed on site investigation.
59. The evidence relevant to this part of the claim is that of Mr Cheema on behalf of the claimant and Mr Jones on behalf of the defendant. There is no dispute as to the method adopted by Mr Cheema for quantifying this element of the loss. This involves starting with the sum of all professional fees incurred by SPD to the end of July 2014, when the claimants decided to abandon the three house development of the Chapel site. It is common ground that the total fees incurred over that period is £989,050.37. This sum includes the Development Management fees paid to Tenhurst. The total of those fees is not in dispute.
60. It was not disputed that during the relevant period, a substantial amount of work was done by Tenhurst by reference to the three house plan. Mr Cheema's evidence on this issue was that the discovery and impact of the HVCs on the development scheme would have increased Tenhurst's fees, as it did with other providers of professional services on the project. This conclusion was based on paragraphs 16, 17, 35, 50, 59, 60 and 61 of Mr Plummer's statement and paragraphs 44 and 56 of Mr Joy's statement of 29 July 2020. None of these paragraphs were challenged in cross examination and I accept that evidence. Mr Jones did not dispute that (a) Tenhurst would have spent time during the relevant period working on the ultimately abortive 3 house scheme and (b) that work was wasted – see T7/127/2, 129/25, culminating with this exchange between Mr Singla and Mr Jones:

“Q: ... Tenhurst would have been heavily involved in the work on the three-unit scheme; do you accept that?”

A. Yes, I accept that.

Q. And its role was to be closely involved in managing both the planning and design stages and liaising with the other consultants, correct?

A. Correct, yes.

Q. And we have agreed that insofar as they did that, in respect of the three-unit scheme, all of that time and all of that work was wasted, correct?

A. That's correct, yes. ...

Q. subject to your point about the monthly basis on which they were paid, you would accept that Tenhurst's fees were abortive like the other consultants', correct?

A. Subject to that point, yes, I accept it.”

Withers’ sole basis for resisting the recovery of an apportioned part of the sum paid to Tenhurst was that as a matter of contract, the sums paid to Tenhurst were fixed fees payable to Tenhurst irrespective of what services it provided over the period when they were due.

61. The fees payable under the appointments are set out in Appendix 4 of Tenhurst’s appointment. Paragraph 1 provided for the payment of a fee (in SPD’s case) of £17,039 per month and (in HPD’s case) of £41,816.67 per month, in each case payable on the first day of each month during the period “ ... *from and including the first day of month following completion of the Site purchase pursuant to the Site Purchase Contract until the day before the second anniversary of such day ...*”. As a matter of construction, these sums were payable to Tenhurst irrespective of what work they were doing.
62. Mr Cheema was cross examined on this point at some length at T6/75/4-9, where he agreed with this analysis. However he declined to accept that this meant that no loss had been suffered. His evidence was that the work in fact done extended to 70 months rather than 24 because of wasted work in the period between 2012 and 2014. Mr Lawrence’s point in cross examination was that it did not matter what was done in that period, the fees were still payable and that if any claim was to be made it should have been by reference to work done after 2014. Mr Cheema said at T6/78/18-23 that he did not agree with this point because ultimately Tenhurst’s final account was much larger than was anticipated by the schedule to the appointments.
63. I accept Mr Cheema’s evidence the overall sums paid to Tenhurst were increased as a result of abortive time spent on the three unit scheme, which resulted in productive work being displaced. If in a period in which a consultant is to receive a fixed monthly fee, the time of the consultant is taken up with work that is wasted by reason of a breach of duty on the part of the defendant and in consequence other work has to be done or the same work performed again at additional cost, then the fact that the work was being paid for by monthly fixed fee or by the hour of work actually done is not to the point. The work and therefore the cost of performing the work is wasted to the extent that

either it need not have been done, or was valueless by reason of the breach of duty concerned and/or because it displaces the carrying out of work that would have been of value and could have been done within the initial 2 year period. Subject to the work paid for in the initial period being correctly apportioned between what was of value and what was wasted there is no objection in principle why this should not be recovered. Mr Jones (the defendant's quantum expert) accepted that point in the course of his cross examination – see T7/133/9-13, having notably first tried to avoid the question and its impact – see lines 1-8.

64. Mr Cheema's method of apportionment was to calculate the fees wasted by reference to the reduction in the floor area of the original scheme following redesign into a two house scheme. This approach is open to the objection that it is hypothetical or formulaic rather than focusing on particular items of work proved to have been wasted as a result of the breach of duty in respect of which damages is claimed. However that is not a point taken by Withers and the methodology was accepted by Mr Jones as correct in principle – see T7/117/6-10. The experts are agreed that this methodology means that the whole of the floor area of what would have been King's Lodge must be deducted from the original floor area of the three house scheme and that none of the floor area of St John's House should be deducted because it was unaffected by the redesign. The difference between Mr Jones and Mr Cheema concerned the effect of changes in the internal layout within St Mark's House. His position had been that changes to the internal layout as a result of a planning application in December 2015 was not caused by the discovery of the HVCs and that the changes that are relevant were confined to the external changes made in a planning application made in September 2015.
65. This is an issue of primary fact where the relevant evidence was given by Mr Plummer. His evidence was that these changes were caused by the discovery of the HVCs. He was challenged on that in cross examination but he rejected that challenge in these terms:

“A. No, I disagree. The obtaining of planning permission is quite often a sequential process. We wanted to safeguard and mitigate works on site and the route that we took was the perceived, not smoothest, but the best route for us to get planning permission, certainly on the St Mark's Extension, as you see there on the screen, the lower part. We were more interested in getting that approval to enable us to carry on, on site with the works, long-term works that we had intended. We knew that the external physical extent of the building there would enable us to give us the layouts internally that we required, but the house internally, to be such a substantial dwelling as one house would be with this extension, required the internal reconfiguration, which was the subject of the latter planning application.”

When Mr Jones was asked to comment on this he first attempted to avoid the question (see T7/122/5-23), which led to this exchange between Mr Singla and Mr Jones:

“Q. Mr Jones, that is a 17-line answer to my question, which was: you are not seriously challenging Mr Plummer's evidence on this, are you?

A. It is not for me to challenge Mr Plummer's evidence. But I'm just simply addressing to the court what other evidence is available of the changes at that time.

Q. You are not challenging Mr Plummer's evidence, yes or no?

A. No, it is not for me to challenge Mr Plummer's evidence.”

This was an ultimately correct concession although it did no credit to Mr Jones that he did not make that concession sooner in relation to an issue of primary fact. That evidence is unchallenged and I accept it. It provides the answer to the point made by Withers that if internal changes to St Mark’s House really had related to the HVCs then they would have been sought earlier than 23 December 2015. This being so, I prefer Mr Cheema’s analysis as to the correct proportion to be adopted as a means of calculating the proportion of the work done by the professional team over the relevant period that was wasted. I accept therefore that Spire is entitled to recover wasted expenditure in the sum of £436,300.90.

66. HPD’s claim for wasted expenditure is advanced on the same calculated basis – that is by ascertaining the percentage reduction in floor area of the revised scheme when compared to the original scheme and that using that as a means of calculating the notionally wasted costs that are claimed as damages. The relevant gross sums, reduction in floor area and therefore the proportion of recoverable fees are all agreed. The sole issue is that concerning Tenhurst, which is the same point as that already considered. I have already resolved that issue and need not consider it further. It follows that HPD is entitled to recover £25,752.85.

Additional Financing Costs

67. As pleaded, the claimants allege that “... *as a result of not being told about the cables in 2012, and only finding out about them in late 2013, Spire incurred additional financing costs caused by the consequential delay.*” The total sum claimed is £774,648. As opened, this claim was described as being “... *the sum total of senior debt interest and fees incurred in relation to the Spire Senior Facility entered into between Spire and Barclays, over the period September 2014 to September 2016 ...* ” and to be recoverable as damages because “ *[d]uring that period, the development was effectively ‘on hold’ due to the late discovery of the HVCs: Spire had decided that removing the HVCs in order to pursue the original three-house scheme was not financially viable, and was awaiting revised planning permission for the two-house scheme which was granted on 2 December*”. By the time closing submissions came to be made, the claimants submission was that “[t]here was a serious limit to what Spire could do in relation to the revised scheme before planning permission was obtained, notwithstanding the other matters to which Withers point in an attempt to muddy the water. Withers characterise this claim as “... *completely hopeless, contradicted by the evidence and must fail.*”
68. I accept (indeed it is not in dispute) that Withers was aware that the Fund and the developments were to be funded in part by borrowing – see Mr D’Arcy Clark’s email to Ms Copestake of 30 July 2012, where he summarised the finances in these terms:

“The overall development costs will be in the region of £70m and the GDV, once finished, £100-110m. The equity requirement will be £30-35m and senior debt terms have been provisionally offered by Lloyds.

There will be a requirement for mezzanine debt as well (£8m or so) until such time as the full planning consent is granted.”

69. I accept that in those circumstances, it was reasonably foreseeable that if the project was delayed additional financing costs would be incurred. What I do not accept however is that from this it follows that “... *the sum total of senior debt interest and fees incurred in relation to the Spire Senior Facility entered into between Spire and Barclays, over the period September 2014 to September 2016 ...*” becomes recoverable as damages. That is not what Mr D’Arcy Clark says were the losses caused by the delay. His evidence as set out in his statement is that the losses consisted of

“... considerable additional financing costs in the form of additional interest due under the extended and increased Spire Development Facility. In addition, Spire incurred additional non-utilisation fees (being monthly charges applied on the undrawn amounts of this facility) as well as additional bank monitoring surveyor fees”

The claim as it was put when it was opened was not supported by any witness and was repudiated comprehensively by Mr Plummer in the course of his cross examination when he explained that it was incorrect to conclude that no work at all was taking place. He unequivocally agreed with the proposition that

“Throughout the period between September 2014 and September 2016, so a two-year period from September 2014, throughout that period all concerned with these projects -- Mr Brooks, yourself, Mr Joy, et cetera -- were doing their level best to move the developments forward in every way possible ...”

Ultimately there was this exchange between Mr Lawrence and Mr Plummer:

“Q. ... it would be completely and fundamentally wrong, would it not, to say that the two developments were effectively on hold between September 2014 and September 2016; fundamentally wrong?”

A. I agree, yes.”

70. Unsurprisingly, it was submitted on behalf of the claimants in the course of the closing submissions that none of this led to the conclusion that the project was not delayed at all. I agree. In consequence, it was submitted that if additional finance costs for the whole period claimed should not be awarded, then “...*that should result in is a modest reduction in the relevant period, not a wholesale dismissal of the claim.*” Again in principle and subject to the omission of the word “*modest*”, I agree. However, this is not simply a case of identifying some earlier date than September 2016 and then prorating the sum recoverable by reference to the financial charges identified by the

claimants in their supplemental note concerning the finance charges in fact paid over the period. That would only be so if the proposition that "... *the development was effectively 'on hold' due to the late discovery of the HVCs ...*" was correct but for a shorter period than the period between September 2014 to September 2016. However, that is not what is pleaded and is not the effect of the evidence. Whilst that was the implication of paragraph 14 of Mr Plummer's second statement, where he said the Chapel project had been delayed for 15 months from 29 June 2014 to 24 September 2015 and the Library project for 3 months from 20 April to 23 July 2015, he made clear that was not what he meant in the course of his oral evidence, as this (unfortunately rather long) extract shows:

"Q. One should not understand that evidence, namely, "This delayed the King's Chapel by 15 months from June 2014 to September 2015", as meaning that no real progress could be made in relation to the King's chapel --

A. Correct.

Q. -- during those 15 months?

A. No, we were carrying on with St John's. St John's was not affected by the cable. It was only the revised -- the area outside St Mark's which was originally the lodge and became St Mark's Extension was the area where the cable affected, and until we had planning permission for the revised scheme in that area, then that part of the site was delayed. But we were carrying on in St John's, correct.

Q. Well, indeed. There was no, as I understand it, no appreciable delay in relation to St John's. But it goes further than that, doesn't it? The shell and core works had to be carried out first of all before the fit-out works could be carried out, and the shell and core works were carried out between -- broadly between, I say, summer 2014 and early 2015; you have corrected me and you have suggested that in fact they continued until sometime in 2016.

A. Yes.

Q. But whatever the precise chronology, the shell and core works were being carried out during the period of delay that you have identified between June 2014 and September 2015?

A. Certainly within St John's we would have been doing shell and core works and probably within the physical constraint of St Mark's. But we wouldn't have been able to undertake the works outside of the envelope of St Mark's that were affected by the St Mark's Extension planning application, planning permission.

...

Q. Summer 2014 to say, February 2015 or thereabouts. During that period I suggest to you, and this can be demonstrated by the documents if I can have a little time to find them, I suggest to you that McGee were carrying out and apparently completing the shell and core works in relation to the entirety of the chapel, St Mark's and St John's?

A. Within the structure of the chapel. But -- and they were possibly undertaking some of the works outside that was common to the original three-house scheme and the two-house scheme. We could not have completed the St Mark's extension until we had the relevant approval for the St Mark's Extension element.

Q. Yes, it may be that progress could not be made with the St Mark's Extension to some extent. That may well be. But it sounds as if we agree that McGee were carrying out phase one of the development works, namely the shell and core works, on the entirety of the chapel between mid-2014 and early 2015; you say it went later as well, yes; that's correct, isn't it?

A. Yes.

Q. So why is it that you think it is appropriate to say in paragraph 14 of your witness statement that delays connected to the HVCs, because that is what this is implicitly all about, delayed the King's Chapel by 15 months from June 2014 to September 2015, in circumstances where we have just agreed that for at least a large part of that period, necessary shell and core works were being carried out by contractors across the entirety of the chapel? I simply don't understand your evidence in paragraph 14.

A. Okay, my evidence there I think relates more to the planning delays rather than the physical delays. I'm talking about the dates of the planning permissions where we were delayed obtaining planning permission for the eventual scheme we constructed rather than the physical works on site.

Q. Thank you. So if we take that part of the sentence which reads: "This delayed the King's Chapel by 15 months (from 29 June 2014 ... to 24 September 2015..." If we take that part of your evidence, the position that you wish to convey in this part of your witness statement is simply the fact that planning consent for the two-unit scheme was not granted until September 2015; in reality you are saying no more than that?

A. Correct."

This was consistent with Mr D'Arcy Clark's evidence (T3/147-8) that there were multiple causes of delay during this period.

71. In my judgment if a claim was to be advanced in respect of increased finance charges it was necessary to carry out a much more sophisticated analysis than has been carried out by the claimants. It would have involved taking the actual length of time to complete the project and then carrying out a critical path analysis in order to demonstrate what part of the overrun was attributable to the discovery of the presence and location of the HVCs. This is highly skilled work carried out routinely by delay experts. Such evidence could have been but has not been adduced in this case. As things stand the suggestion that “... *the development was effectively ‘on hold’ due to the late discovery of the HVCs ...*” for the period between September 2014 to September 2016 fails as a matter of evidence because it was not on hold and was not delayed by the discovery of the HVCs for the period claimed. As Mr Lawrence put it in his oral closing submissions, “... *the claimants have failed to adduce any evidence that proves that the HVCs caused delay at any point of time and of any given length.*” As he also submitted, that “... *is not the way in which a claim for three-quarters of a million pounds should be formulated in substantial commercial litigation brought by commercial parties with very experienced advisers. It shouldn't be done in that way ...*”
72. In the absence of evidence that demonstrates the period of critical delay attributable to the late discovery of the HVCs, it would be entirely wrong to attempt to arrive at some hypothetical loss figure by calculating the finance costs for a period between date X and date Y then awarding by way of damages a percentage of the total sum resulting. That would not be compensating for loss shown on the balance of probability to have been caused by the breach alleged. This is the point where in my judgment the submission at paragraph 62 of the claimants’ closing submissions breaks down – it is not for Withers to say or admit what period of critical delay occurred, it is for the claimants to prove it. It is not good enough for the claimants to say that the project was delayed in the circumstances without proving the period of delay that was caused by the discovery of the HVCs and it is not a solution to invite the court to make a “... *modest reduction ...*” to the period claimed when it has not been proved that the project was on hold during even some lesser period than that contended for.
73. Before leaving this part of the claim, I should record that some reliance was placed by the claimant on the evidence of Mr Wenlock. That does not assist for at least the following reasons. First, Mr Plummer was called by the claimants as a witness in support of its claim and it is not open to the claimants simply to repudiate evidence because it turns out to be unsupportive; secondly Mr Wenlock himself acknowledged that St Johns House was unaffected by the HVCs – see paragraph 47 of his statement – and his evidence in that paragraph that in “... *order to mitigate some of the disruption and delays caused by the HVCs, our phase one and phase two contractors worked on different parts of the development at different times – we effectively split the site and worked on St John’s House first ...*” merely emphasises the point I have made, which is that if a claim for finance charges based on delay was to be advanced a critical path analysis of the delay actually caused to the project overall was required. The same point can be made of his reference to the acceleration of part of the works (see paragraph 54 of his statement) and his evidence at paragraph 56 that piling work was being carried out notwithstanding a delay in obtaining revised planning and listed building consent. It might have been possible to conclude that all the critical delay that occurred was attributable to the discovery of the HVCs if the evidence had been that this was the only cause of delay to the project but that is not the effect of the evidence.

74. In those circumstances, this part of the claim fails.

Increased Procurement Costs

75. The claimants' pleaded case in relation to this head of loss (quantified in the Re-amended Particulars of Claim in the sum of £226,708.24) is that:

“as a result of the costs of development being greater in 2014 than in 2012. Spire's procurement costs in 2014 were greater than they would have been in 2012 when they would have been incurred had Spire been correctly advised in 2012:”

In their opening submissions, this part of the claim was said to be an:

“estimate is based on the total final account payable to Dawnus, the Phase 2 fit-out contractor for the Chapel. Mr Cheema calculates Spire's loss as 2.2% of that total final sum, by reference to the 2.2% increase in Spons' Tender Price index between 2015 and 2016: simply put, Dawnus' final account was 2.2% more than it would have been had commencement of the Phase 2 works not been delayed.”

There is an obvious evidential problem based on these formulations: the pleaded case is concerned exclusively with a period between 2012 and 2014 whereas the evidence on which the claimants rely is concerned exclusively with the period between 2015 and 2016. Mr Tozzi submits that this a pleading point of no merit, because the case as advanced in the evidence is the case that the parties have engaged with. I agree with this approach. Since the claim was pleaded in the Re-amended Particulars of Claim, there has been a further downward adjustment in the sum claimed. Originally this claim had been advanced by reference to the whole of the Chapel development but at trial the claim in respect of St John's House was not maintained and a claim was maintained only in respect of St Mark's House. The sum claimed is £128090.16 and has been calculated by taking 56.5% of the original sum claimed using the floor area of St Marks House and extension as a proportion of the total floor area of the Chapel development.

76. Aside from the pleading point, the substantive point made on behalf of Withers is that the claim must fail essentially for the same reasons that the finance charges claim has failed - because it is based upon the premise that the discovery of the presence and location of the HVCs delayed the start of the Phase 2 works at the Chapel over the period relied on by the claimants being between May 2015 and April 2016. The only issue that matters in relation to this point concerns the replacement of the phase 2 contractor, when an entity called Stoneforce was replaced by another entity called Dawnus. Mr Plummer's evidence was that Stoneforce were retained in April 2015 to carry out the Phase 2 works – see T4/28/18-23. His evidence was that they were terminated in the summer of 2015 and as to why:

“A. Non-performance. It was clear that Stoneforce didn't have the -- they were not progressing with the design elements of the scheme, they didn't have everything geared up and it could be seen at an early stage that it would have been pointless carrying on with Stoneforce.

Q. They were simply and evidently not up to the job?

A. Correct.

Q. So that contract was terminated and a second fit-out contractor was appointed and that was Dawnus, yes?

A. Correct, yes.

Q. From what I have read, it looks to me as if Dawnus started their work in around October 2015; is that about right?

A. Yes, that would have been about right, yes.”

Mr Plummer also accepted what is self-evident – that the delay caused by the inadequate performance of Stoneforce and the need to replace it with Dawnus had nothing to do with the discovery of the presence and location of the HVCs. This evidence suggests that nothing material was achieved by Stoneforce between April 2015 and its termination and replacement with Dawnus in October 2015 – a period of 6 months of the 12 month period by reference to which the cost increase claim is advanced where no material progress was or could have been made as a result of non-performance by Stoneforce. The delay caused by this issue did not end in October 2015, because as Mr Plummer said in his evidence in re-examination:

“A. Well, it was mentioned earlier that when Stoneforce -- I think, well, it was -- there was clearly -- I think we got rid of them in June, from what was mentioned earlier, and Dawnus came on board. We then had the period where we would have had to procure the works through the Dawnus, so they would have had to become familiar with the packages and then gear up, so there would have naturally been a delay whilst they familiarised themselves (inaudible).”

The impact of this was not something that Mr Plummer could assess other than some delay would have resulted as this exchange between Mr Tozzi and Mr Plummer shows:

“By April 2016 when the phase two works started, was that start date delayed, to your knowledge, by the earlier dismissal of Stoneforce in June 2015?

A. I would have to check against the programme, but I presume it was delayed a bit, yes.”

Although the claimants rely heavily in their closing submissions on the evidence of Mr Wenlock on this issue set out in paragraphs 64-65 of his statement, Mr Wenlock has made no attempt at all to address the impact on progress in the identified period of the hiatus caused by the replacement of Stoneforce with Dawnus. Given that there is no attempt to analyse the effect of the various causes of delay over the critical period it is impossible on this evidence to find what part of the delay was attributable to the breach of contract and duty by Withers and what part to other independent causes. It is simply wrong to say as do the claimants that the dismissal of Stoneforce is immaterial because

if that had been a cause of delay Dawnus would have started work immediately on appointment. That is wrong for the reasons identified by Mr Plummer in his evidence quoted above. First, the reason for terminating Stoneforce was lack of progress and secondly, once Dawnus was appointed, there would be further delay because it “ ... *would have had to become familiar with the packages and then gear up, so there would have naturally been a delay whilst they familiarised themselves ...*”

77. In the result, the wasted expenditure claims succeed but the lost chance of price reduction claim and the additional financing costs and increased procurement costs claims fail.

The 2014 Claim – Liability

78. The key liability issue between the parties is 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 Electricity Act 1989 (“EA”).
79. As is common ground, there are two routes by which a utility company can obtain the right to lay a cable over land. First, the owner or occupier of land can consent to an electricity company laying a cable over its land. Where this occurs the right thereby created is known as a voluntary wayleave, which does not create a proprietary interest but only a personal right that does not bind a subsequent occupier of the land. Had a voluntary wayleave been granted by one of the claimants’ predecessors in title to UKPN, or one of its predecessors, prior to the acquisition of the sites by the claimants then it would have expired (at the latest) when the claimants acquired the sites. No advice was given to the claimants by Withers concerning either the need to require UKPN to produce any wayleave it relied on or as to the effect of the acquisition by the claimants on any voluntary wayleave granted prior to that.
80. The alternative route by which a utility company can obtain the right to lay a cable over land is to obtain a statutory wayleave granted by the Secretary of State pursuant to paragraph 6 of Schedule 4 to the Electricity Act 1989. Such wayleaves are granted for fixed periods, usually of 15 years. Had such a wayleave been granted, it is probable that it would have expired long before the claimants acquired the sites. The evidence available suggests that the HVCs were first laid no later than 20 May 1988 because it is shown on a London Electricity Board drawing that was revised on that date. A statutory wayleave granted on or before that date would probably have expired on or about May 2003, unless renewed.
81. Assuming that any statutory wayleave had expired then the claimants would have been entitled to serve notice on UKPN in 2014 pursuant to paragraph 8 of Schedule 4 to the 1989 Act requiring it to remove the HVCs. UKPN would then have had either (a) to remove the cables at its expense or (b) apply for a new statutory wayleave. In the latter event, the claimants would have been entitled to recover compensation from UKPN under paragraph 7 of Schedule 4 to the Electricity Act 1989 being the sum representing the difference between the open market value of the land unencumbered by such a wayleave and its value when encumbered – see Arnold White Estates Ltd v National Grid [2014] EWCA Civ 216, [2014] CH 385 and Welford v EDF Energy Networks (LPN) Plc [2007] EWCA Civ 293, [2007] 2 P&CR 15. No advice to the effect set out above was provided by Withers to the claimants, nor did it advise of the need to require

UKPN to produce any wayleave it relied on before or as part of the process of negotiating with UKPN.

82. I have set out the relevant part of the email exchanges between Ms Robinson and Mr Joy on which the claimants rely earlier in this judgment. The claimants case is that Withers assumed responsibility towards the claimants to advise them correctly as to their rights by tendering advice that Ms Robinson knew or ought reasonably to have known the claimants would rely on and therefore came under a duty to carry out the task carefully, which required advice as to the remedies available to the claimants. Withers submit this claim to be hopeless because:

- i) Withers was not retained in relation to dealings between UKPN and the claimants; and
- ii) Mr Joy did not ask for or receive any advice on the remedies available to the claimants against UKPN.

In my judgment these points are mistaken. The first is essentially immaterial for reasons I develop below and the second is wrong on a proper analysis of the email exchange between Mr Joy and Ms Robinson, the relevant part of which I set out earlier in this judgment, again for reasons that I develop below.

83. The email of 28 January 2014 from Mr Joy to Ms Robinson on proper construction contains a request for advice concerning UKPN's rights of access and how the claimants might get the HVCs moved otherwise than at their expense – see in particular paragraph 2 and the unnumbered paragraph that follows paragraph 3. As set out earlier, the advice that was given in response to this request was given by Ms Robinson by her email to Mr Joy of 3 February 2014. By paragraph 2 of that email, Ms Robinson purported to give advice concerning rights of access under the Electricity Act 1989. As I have found and as is common ground, Ms Robinson did not give any advice concerning the rights that the claimants had or might have against UKPN.

84. That Withers was not contractually retained to provide advice concerning its relationship with UKPN is immaterial because, by providing an unqualified substantive answer to Mr Joy's request, Withers assumed a duty of care in relation to the content of its advice – see White v Jones [1995] 2 AC 207 *per* Lord Browne-Wilkinson, at pp 273g–274g, where he summarised the law as being that if “ ... *responsibility for the task is assumed by the defendant he thereby creates a special relationship between himself and the plaintiff in relation to which the law (not the defendant) attaches a duty to carry out carefully the task so assumed ...* ”. The specific fact situations identified as engaging this principle included “ ... *where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice.*”. That Withers did not charge for this advice is also immaterial – see Inventors Friend Ltd v Leathes Prior (A Firm) [2011] PNLR 20 at paragraph 76.

85. Mr Joy's email clearly sought advice and equally clearly Ms Robinson understood that to be so because Ms Robinson's email in response set out advice. That advice was sought in connection with the removal of the cables. It is not disputed but in any event I find that Ms Robinson knew or ought to have known that Mr Joy would rely on the advice that she provided in response to his request. There was no other point in her

responding and she did not qualify her response in a way that indicated that the recipient should not rely on what was said because it was provisional or partial or was not intended to be advice that should be acted on. There was nothing that otherwise suggested it ought reasonably not be relied on. In fact Mr Joy did rely on it as being advice that there was no solution available to the claimants. As Mr Joy put it in his oral evidence:

“Had Withers known that we had certain rights in relation to -- that we would have had certain rights in relation to this situation if there hadn't been a wayleave, I can't understand why they didn't tell us. Because had any solicitor known that, why would they have withheld that information? I just don't understand it. So in response to my points, to come back with this information, I do not see how I was supposed to take any other conclusion, having tried on more than one occasion to get further information from Ms Robinson, to then have this quoted back at me, I do not see what other conclusion I could sensibly have drawn. I don't know how else to put it, really.”

As he added a little later in this section of his cross examination:

“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.”

In my judgment given the contents of the emails to which I have referred that was a reasonable conclusion for him to have reached and I accept his evidence on this issue.

86. In those circumstances, I conclude that Withers was in breach of duty by failing to advise that the position was as set out in paragraph 70 above or by identifying further information that would be required – whether there was a current wayleave that applied to the HVCs - or why such information would be relevant. The basis on which Ms Robinson proceeded was plainly negligent. She did not at any stage read the Act that she was purporting to give advice about. Her advice was derived from sources that were not even recognised textbooks but commercially available practice notes. As she said in the course of her cross examination:

“Q. Now, when you answered question 2, you referred specifically to the Electricity Act 1989. Did you look at that Act, Ms Robinson?

A. No, I didn't. I have a vague recollection of looking on PLC, the precedent information website, to assist with the response to that enquiry.”

Having been taken to her 3 February email, the following exchange took place:

“Q: ... So pausing there, what you were doing there was paraphrasing, do you agree, what some of those provisions that we have just looked at in paragraph 6 of schedule 4 to the Act, do you agree?

A. I didn't look at the Act so -- I have a vague recollection of looking on the PLC note and I would have taken it from there.

Q. Just help us with this, Ms Robinson. If you are going to advise someone about rights under an Act, a specific Act, don't you think you ought to actually look at the Act itself?

A. I was just answering a question about how could these wires be there without us knowing. It wasn't a detailed -- it wasn't a sort of lengthy, detailed piece of work. It was answering a question about why something hadn't come up during the conveyancing process.

...

Q. Well, the question he raised was about statutory rights and you are purporting to advise on those statutory rights, aren't you? How can you do that without looking at the relevant statute?

A. I looked at PLC and that is where I got the information from to expand. I think he had asked -- sorry, I can't see the previous email now, but I think he just wanted a bit more information on the comment I had made in the previous email."

It is inconceivable that Ms Robinson would not have realised the implications of what is set out in Schedule 4 of the Act for her clients had she taken the trouble to read the provision as plainly she ought to have done. Whilst it might have been appropriate to start her legal research by consulting the PLC website, it was not appropriate to stop there and write to Mr Joy in the terms that she did. Plainly she should either have read the Schedule and the caselaw associated with it or said that the task of providing comprehensive advice was something that ought to be referred to specialist environmental or planning law counsel or that for her to undertake the task would require a separate retainer and would require separate payment. She did none of these things. Instead she sent Mr Joy the 3 February email which reasonably and actually misled him in the way I have described.

The 2014 Claim – Causation

87. The claimants allege and I accept that had the claimants known their rights to be as summarised in paragraph 70 above, they would have approached UKPN, demanded sight of any statutory wayleave on which UKPN claimed to rely. Had that demand been made it would have become apparent that there was no such wayleave available to UKPN and the claimants would then have demanded that UKPN remove the cables at its expense.
88. Once that demand had been made, UKPN would have had one of the two alternatives available to it identified earlier. Contrary to the claimants' submissions, there was no realistic prospect of UKPN agreeing to remove or divert the cables at its expense. The HVCs were not redundant but were in use. The cost, disruption and inconvenience by removing or diverting the cables would simply be too great when it could with ease apply to the Secretary of State for a statutory wayleave and pay the claimants

compensation calculated in the manner described earlier. The estimates from UKPN for diversion in the context of a suggestion that the claimants would meet that cost ranged from £921,000 to £2 million – see the email from Mr Gale of Hoare Lea dated 22 July 2014. Of these the option apparently most favoured was option 2, the estimated cost of which was £.1m. It was described by Mr Gale in his email of 22 July 2014 as being “... *the most economical and viable solution in terms of cost and programme ...*” This was so from the claimant’s perspective. Whether UKPN would have shared this view had it been required to divert the cables is unknown. Those figures are likely to be under estimates given that the estimate was qualified by UKPN on the basis that “... *a proper feasibility was not done to arrive at these figures and this may have significant impact on the price. You should note also that UK Power Networks' formal estimate may vary considerably from the budget estimate. If you place reliance upon the budget estimate for budgeting or other planning purposes, you do so at your own risk*”. The time estimates arrived at by the claimant’s advisors for the time required for the set up then execution of the work totalled approximately a year.

89. No evidence has been adduced by the claimants either from UKPN or from the specialist consultants they engaged in relation to this issue (Hoare Lea). No explanation has been offered as to why either Mr Johnson or for that matter Mr Gale has not been called to give evidence and it has not been suggested that Mr Johnson was not available to give evidence. It was for the claimant to establish that there was a realistic as opposed to a fanciful prospect of UKPN agreeing to divert the HVCs at its cost but there is no evidence available relating to this issue and so the claim is one that is based on assertion. That is not a basis on which a court can be satisfied that there was more than a fanciful prospect. The best point that could be made is that the sums that the claimants would have sought by way of compensation would have equalled or exceeded the cost of one or more of the options referred to earlier. However that is not an argument that the claimants advanced and would in any event be flawed because no evidence has been adduced as to the probable cost of diverting the cables and removing the consequentially redundant ones located on the properties.
90. This part of the claimants’ submissions also ignores their own evidence, which makes clear that diversion would have delayed completion significantly and thus would have added to the costs incurred and eroded the profits that would otherwise have been made by the claimants from the development of the sites. It is highly likely therefore that the claimants would have carried out a careful assessment of the likely compensation recoverable from UKPN and the reduced profits resulting from the revised scheme against the profit forgone (if any) resulting from the delay caused by diversion and removal of the cables. No attempt has been made to adduce evidence going to any of these issues. The absence of this evidence taken together with the absence of any evidence either from UKPN itself or from consultants familiar with the issues that would arise (such as Hoare Lea) and the convenience for UKPN of seeking a statutory wayleave over the partially uncertain cost and inconvenience of diverting the cables leads me to conclude that the chance of UKPN removing or of the claimants encouraging UKPN removing the cables is a speculative one at best. Whilst it is true to say that at one stage the claimants were considering removing the cables, this does not affect my evaluation because they decided relatively quickly that this was not a feasible option because of the cost but also because of the delay implicit in such an exercise.

91. The claimants' reliance on the fact that UKPN did make proposals for the removal of the HVCs as demonstrating that UKPN would have agreed to move the HVCs is mistaken because that proposal was premised on the claimants meeting the cost of that exercise and thus is immaterial to the question I am now considering.
92. I reject therefore the claimants' submission that I should assess damages on the basis that there was a 75% chance that UKPN would apply for a new wayleave and a 25% chance that it would have removed the cables. There was no more than a speculative chance that UKPN would have agreed to remove the cables rather than seeking another wayleave.

The 2014 Claim – Loss

93. The claimants case on loss and damage was advanced on the basis that it was entitled to recover 25% of the losses that would have been suffered had UKPN decided to remove the HVCs and 75% of the losses that it is alleged would have been suffered on the basis that UKPN would have decided to seek a new wayleave and pay compensation. Given my conclusion that there was no realistic prospect of UKPN agreeing to remove or divert the cables at its expense, the claimants seek 100% of the losses that they allege they would have suffered had UKPN decided to seek a new wayleave and pay compensation. In principle this approach is correct since on the relevant counterfactual there is no basis on which UKPN could have avoided both removing the cables and applying for a statutory wayleave and paying compensation. However, it still needs to be approached on a loss of a chance basis since the outcome depends on an evaluation of what UKPN would agree to pay or the Land Tribunal award by way of compensation.
94. The loss claimed on this basis consists of the difference between the open market value of the King's Properties with the HVCs in place and the open market value that they would have had without the HVCs in place. The total sum claimed by the claimants are:
- i) £1,764,000 for the grant of a new wayleave over the Chapel in 2014; consisting of (i) £670,000 resulting from changes to layout caused by the continued presence of the HVCs and (ii) £1,094,000 due to stigma caused by the presence and proximity of the cables; and
 - ii) £1,825,000 for the grant of a new wayleave over the Library in 2014 consisting of (i) £678,000 resulting from changes to layout caused by the continued presence of the HVCs and (ii) £1,146,000 due to stigma caused by the presence and proximity of the cables,

in each case on the basis that this is what UKPN would have agreed or in default of agreement would have been directed to pay by the Land tribunal.

95. Before turning to the detail concerning the quantum of this part of the claim, there is what Withers characterise as a causation issue, which it submits defeats this claim. It is convenient to address that issue at this stage.
96. Withers assert that the claimants:

“have not, even now, lost their alleged rights to require UKPN to enter into a wayleave and obtain compensation from UKPN, in circumstances where there is no easement and no wayleave (whether pursuant to statute or contract) in respect of Cable Route 379 which Spire and Hortensia have alleged, particularised or disclosed. As such, Spire and Hortensia can, even now, give UKPN notice to remove the HVCs pursuant to paragraph 8(2) of schedule 4, EA1989 and, thereby, obtain compensation if and when UKPN applies for a necessary wayleave pursuant to paragraph 6 of that schedule.

- see paragraph 39(c)(i) of the amended Defence. The consequence of this is alleged to be that the opportunity to seek compensation has not been lost and the claimants have not therefore been caused the loss alleged.

97. I reject that submission. Since the date when the correct advice should have been given, the redevelopment of the sites has been completed and the properties constructed on the King’s Chapel site have been completed. Mr D’Arcy Clark’s evidence on this point is that it is:

“... wholly unreal to suggest that Spire and Hortensia could now serve a notice on UKPN to remove the HVCs. If there was a dispute with UKPN, the existence of this dispute would need to be disclosed to potential buyers. It would jeopardise and delay the marketing of the properties for sale and depress their values, particularly those properties which are directly affected by the HVCs - e.g. Flats 3 and 4 of the King's Library. Moreover, if UKPN were to respond to the notice by electing to remove the HVCs rather than pay compensation, the impact on the marketing and sale of the properties would be exacerbated, because of the substantial works that would then have to take place at the properties in order to effect the removal of the cables.”

Mr D’Arcy Clark added that:

“The position as at the date of this witness statement is materially the same as it was in mid-2018 when Spire and Hortensia first became aware shortly before the King's Proceedings were issued that Withers had failed to advise them properly regarding their rights in relation to the HVCs. By then, Spire and Hortensia had already spent four years re-designing the King's Properties to accommodate the HVCs, had started marketing the properties in the King's Library for sale and expected to commence marketing the King's Chapel properties for sale the following year. By that time, serving a notice to remove the HVCs on UKPN would have represented the same serious risk to Spire and Hortensia's commercial interests as it does now.”

Mr D’Arcy Clark was challenged on this point in cross examination but maintained the point that the suggestion that the claimants should now serve notice on UKPN was absurd – see T3/152/9. For the reasons I have given earlier, I do not consider there is any realistic prospect of UKPN seeking to remove or divert the cables but the remaining points made by Mr D’Arcy Clark in this part of his evidence are ones that are almost self-evident and I accept them. In addition there is the point made in the course of Mr Tozzi’s oral closing submissions concerning timing. Withers’ submission depends on the assessment in 2021 being the same as it would have been in 2014 and that is not correct. As I have said the assessment is of the difference between the open market value of the land unencumbered by a wayleave and its value when encumbered. Thus in 2021, the assessment would be by reference to the respective values in 2021 not 2014. As Mr Tozzi submitted and I accept:

“... At 2014 of course these were properties that were still in the process of a development being underway. Now those developments have taken place, steps have been taken to protect the properties from the HVCs and so on, so that the whole ... would be a completely different case and if my learned friends wanted to advance an argument that the compensation -- that any compensation payable by UKPN now would be identical to that which could have been recovered in 2014, then there is an evidential burden on them to do that. One can't simply assume that in 2020 the level of compensation would be same where actually the work has been carried out and where in fact steps have been taken to address the problems caused by having the HVCs running across the properties.”

98. This point is not in truth a causation point at all but is at best a mitigation point. As Mr Tozzi submits and I accept, the duty to mitigate is a duty to take reasonable steps and is not an obligation to take steps which a reasonable person would not ordinarily take in the course of his business – see British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co [1912] A.C. 673 per Viscount Haldane at 689. It is difficult to see how taking a step that a claimant judges to have become inopportune does not come within the scope of this qualification – see Orientfield Holdings Limited v. Bird & Bird LLP [2015] EWHC 1963 (Ch); [2015] P.N.L.R. 33 at paragraph 68, upheld on appeal - see [2017] EWCA Civ 348; [2017] P.N.L.R 31, where at paragraph 23 it is recorded that permission on this point had been sought and refused. Serving a notice after completion of the development at a time when the claimants were attempting to sell the houses and flats they had constructed on the sites is obviously adverse to the interests of the claimants given the likely effect of the uncertainty on those considering purchasing.
99. The quantification of the sums recoverable under this head is an issue that depends exclusively on the valuation evidence. As to that, in summary, the expert valuer appointed by the claimants (Mr Hewetson) assesses the losses in the sums summarised above whereas the expert valuer appointed by Withers (Mr Forgham) maintains that the presence of the HVCs cause a devaluation of the King’s Chapel site of £50,000 and of the King’s Library site of £70,000. The main reason for this difference in summary is that Mr Hewetson considers that a substantial devaluation should be applied because of the proximity of the HVCs to reflect negative buyer sentiment whereas Mr Forgham

disagrees. In addition the valuers disagree as to whether the reduction in sellable or lettable area has the greater impact on value for which Mr Hewetson contends.

100. It is common ground that compensation for the grant of a new wayleave in 2014 would have been assessed as being the difference between the open market value of the properties with the HVCs in place and the open market value they would have had if they could be sold without the HVCs in place.
101. Mr Hewetson's opinion of the site value of the three-house scheme on the King's Chapel site as at 31 July 2014 without the HVCs was £12,000,000 whereas his opinion of the site value of the two house scheme without the cables was £11,300,000, in each case after rounding down. This leads to the loss figure of £670,000 resulting from changes of lay out. However, Mr Hewetson's opinion was that the site value of the two house scheme was adversely affected by the presence of the HVCs on St Mark's House and that led to a further reduction of £1,094,000.
102. In respect of the King's Library site, Mr Hewetson's valuations changed between his first and second reports. His opinion was that the discovery of the HVCs forced a significant redesign of flats 3 and 4 within the development. He explained the reduction in his calculation of loss by reference to an additional drawing that demonstrated that the flats as designed originally would have been slightly smaller than the assumption made in his first report and entirely properly he took that into account when revising his valuation evidence. Originally, Mr Hewetson's opinion of the site value as at 31 July 2014 of flats 3 and 4 as originally designed, as a proportion of the site value of the whole, was £3,250,000 whereas that value as they had to be redesigned, but ignoring the effect of the HVCs was £2,540,000. However the adjustments referred to in Mr Hewetson's supplementary report led him to reduce this difference from £710,000 to £678,000. His final diminution assessment is explained by his opinion as to the effect of the presence of the HVCs on the marketability and sale value of flats 3 and 4 as part of the overall redevelopment scheme.
103. The major difference between the expert valuers turns upon Mr Hewetson's evidence that the presence of the cables make the properties less attractive to potential buyers. Mr Forgham also maintains that the two property scheme is not materially less valuable because the two unit scheme has more privacy and better pedestrian and vehicle access.
104. Withers submit that I ought to accept Mr Forgham's evidence in relation to the blight issue in essence because there is no evidence to support Mr Hewetson's conclusions on this point and because all the surrounding evidence relevant to the issue suggests that the point is without substance. First both experts are agreed that objectively the HVCs are safe and pose no risk to residents. Mr Forgham's evidence on this issue was:

“Gross development value – presence of the HVCs

2.2.3.29. Unlike Mr Hewetson, I would not make any adjustment for the proximity of the HVCs. As part of the development, the cables will be protected and will comply with statutory safety clearances. UKPN, who own the cables, have a legal obligation to operate them safely and any electromagnetic interference is very quickly dissipated underground unlike the case with overhead cables.

2.2.3.30. I understand that the properties were constructed so as to eliminate any conceivable risk from the HVCs and this supports my conclusion that they are not relevant to the pricing of the Two Dwelling Scheme.

2.2.3.31. I understand from contacts at UKPN that the HVCs are in the west carriageway of Hortensia Road and then zig zags north in Ifield Road, Fawcett Street, Oakfield Street, Cathcart Road, Holywood Road, Tregunter Road and beyond. To the south it is in Westfield Park, Barnaby Street, Lots Road to Harbour Drive. There is another nearby HV cable route to the east in Langton Street, Gertrude St, Camera Place and Park Walk. Therefore it is close to numerous properties in this locality. I also understand that there are hundreds of HVCs in London.

2.2.3.32. HVCs, like fibre optic cabling for broadband (which has also been the subject of speculation over EMIs (electromagnetic interference)) and gas mains, are all part of London's urban subterranean fabric.

2.2.3.33. From my experience of the sale and valuation of properties, I am not aware of the proximity of an electricity cable adversely affecting the sale of a property or its value, nor am I aware of any evidence to suggest that the presence of the HVCs in the vicinity of the Chapel would have an impact on its marketability and sales values."

As he added, in his supplemental report at paragraph 2.4.3, "... *there are hundreds of underground HVCs in London close to thousands of properties. From my experience of the sale and valuation of residential properties, I am not aware of the proximity of an underground HVC adversely affecting the sale of a property or its value.*" In this context, it is worth remembering that Ms Copestake is a very experienced London conveyancing solicitor and her evidence referred to earlier that both the properties were located in a densely populated part of London where it would not be surprising to find subterranean utility infrastructure – see T4/181/10-15 – and that the presence of subterranean power cables would not be either novel or unusual – see T4/182/5-8. Mr Hewetson accepts that the HCs are safe and that there is no measurable harm arising from the presence of the HVCs. His evidence is that the issue is one of "*buyer sentiment*".

105. In my judgment Mr Forgham's evidence on this issue is to be preferred for the following reasons. Firstly, as Mr Forgham rightly says, there are hundreds of these sorts of cables close to thousands of properties throughout central London. Had it been the case that the presence or proximity of such cables to residential properties had a discernible effect of the saleability or value of such properties, there would by now have been a substantial body of evidence to support such a conclusion. There is no such evidence. This led to the following exchange in cross examination of Mr Hewetson:

“May I suggest to you, Mr Hewetson, that there is no comparable evidence at all which assists in relation to the estimation of any appropriate reduction for this factor. There simply are no comparables, is that right?”

A. Certainly, yes. That I'm aware of, anyway.”

A little later in his cross examination there was the following exchange:

“Q. There is no comparable evidence which relates to downwards adjustments of values and prices --

A. Yes.

Q. -- on account of the presence of HVCs, correct?

A. Yes, that's right, yes.

Q. You have never encountered in 40 years in practice any transaction or instance involving somebody paying less or threatening to pay less because they claim to be worried about the proximity of an HVC?

A. No, most of the time nobody knows about them.

Q. You have never encountered that phenomenon, ever, before this case?

A. No, I haven't.”

In relation to the presence elsewhere in London of HVCs, there was this exchange with Mr Hewetson in the course of his cross examination:

“32:16 Q. It is plainly, I suggest, highly relevant to your and Mr Forgham's consideration of this problem, therefore, to know that HVCs of this type are all over the place in London. That is relevant, if I may say so, because that emphasises the significance of the absence of any comparable evidence?

A. Yes.”

All this led ultimately to the following exchange with Mr Hewetson:

“MR LAWRENCE: In a sense, Mr Hewetson, what you are positing is a notional prospective purchaser who is wholly irrationally concerned about a risk that does not exist; correct?

A. That's right.”

However he then sought to qualify that answer by saying:

“ ... it will be marketed without any reference to the existence of the HVC, but when you have done your deal with your purchaser and then say, "By the way, there is an HVC passing behind the wall there", and they are going to go away and start to look these things up for themselves and form all sorts of irrational, possibly irrational fears about either the science or indeed that some of these HVCs are beginning to degrade and so who knows what happens in the future if they need to be replaced. So you know, people are not entirely irrational, but I might put it this way, in a sense I might accept it, but my wife might not.”

In summary, Mr Hewetson accepted that (a) there was no rational basis for considering any risk was posed by the HVCs; (b) anyone who considered there was such a risk would be acting irrationally; (c) he had never encountered a case of someone seeking a reduction in price because of the proximity of HVCs; (d) there were no comparables that demonstrated what reduction might hypothetically be sought by reference to such an objection; and (e) in consequence whilst Mr Hewetson considered some potential purchasers might object on that basis, the impact it would have on the value to be attributed to a property was incapable of objective assessment.

106. I take fully into account in favour of the claimants that Mr Hewetson is an experienced property professional with many years of experience in the valuation of residential property in Central London who I am satisfied was expressing his genuine professional opinion as to the impact of the cables on the value of the redeveloped properties. I also take into account in favour of the claimants that the redevelopment resulted in very high value residential properties for which the market is relatively small and those in that market will have high expectations and demands. However, I also take into account the views of Mr Symonds and Mr D’Arcy Clark as set out in their contemporaneous emails. In relation to the provision of EMF screening being provided for the HVCs, Mr Symonds said “*I think it would bother me. I think I would want to know that belt and braces had been thrown at it!*” Mr D’Arcy Clark he responded to the same email by saying:

“I agree: proceed as planned with the screening. I have no doubt that one is subjected to far worse on the tube, on a plane on the mobile even but we must be able to show - if asked - that not only were we aware of the issue but that we have taken expensive and time consuming measures to ensure levels are and will remain well below any known acceptable level.”

107. On balance these emails do not support the view that there would be an adverse market reaction to the presence of the cables. Rather, it was a recognition by each that if the properties were to achieve full market value then the claimants had to be in a position to show those interested in purchasing that all steps that could be taken and that in consequence no risk was posed by the presence of the cables. This point, coupled with the points made above concerning the number of HVCs throughout central London, the very close proximity of pavements and roads to the frontage of many high value London properties which contain HVCs, the absence of any evidence of any property in London being discounted, much less discounted by the sort of margins identified by Mr Hewetson, by reason of the presence or proximity of HVCs and the accepted

irrationality of any objection based on the presence or proximity of such cables all lead me to conclude that there is no more than a speculative chance that either UKPN or the Land Tribunal would agree or assess compensation by reference to the point I am considering.

108. I would have been prepared to accept that there may be a price depressing marginal effect caused by the right of entities such as UKPN to enter the grounds of the houses and flats at the properties in order to gain access to and carry out works on its cables and/or the impact the cable's presence might have on future onward sales by a purchaser but that was not the basis on which this head of claim was advanced, as Mr Hewetson accepted in answer to a question from me – see T8/76/4.
109. In my judgment therefore, this element of the claim fails on the basis that it has not been proved and is not one that on the evidence available I can evaluate as real or substantial as opposed to being speculative. It was submitted by the claimants that even if I took the view that there might be some price impact falling short of what Mr Hewetson had suggested, I should still proceed to assess a sum as due by way of damages on the basis that the claimants had lost the chance of UKPN or a Lands Tribunal taking a different view. It was not submitted by Withers that this is wrong in principle. However, for the reasons I have identified, I consider that there is no more than a speculative chance that the Land Tribunal would come to a different conclusion.
110. I should make it clear I do not accept that my conclusions on this issue should lead to the further conclusion that Mr Hewetson's evidence is fundamentally unreliable and should lead to the conclusion that his evidence should be rejected wherever it differs from that of Mr Forgham. That is far too muscular an approach to give to evidence given by an honest and experienced professional attempting to grapple with a difficult issue.
111. That leaves the devaluation of the sites resulting from changes to layout caused by the continued presence of the HVCs. As to that, I prefer the approach adopted by Mr Hewetson for the following reasons. First, his approach of valuing the properties on the King's Chapel site is to be preferred because he has valued each as a whole rather than attempting to value the square footage above ground and that which is below ground, which is Mr Forgham's approach. Mr Forgham's approach fails to treat each property as a whole and so significantly undervalues the below ground elements of the properties and thus the value of the properties as a whole.
112. Secondly, it is counter intuitive to suggest that there is no material difference between the value of two substantial houses and three, even if the size of the two houses has been expended and even if there has been some marginal improvement so far as access is concerned for the two properties that were built over the three that had been planned.
113. Thirdly, as Mr Tozzi convincingly demonstrates even if Mr Forgham's square footage approach is adopted that still results in a substantially lower value for the two over the three house development scheme. It is only by adding back 5% to reflect that in the two house scheme each house would each have their own entrances, with additional outside space that this outcome is avoided. No attempt was made to explain where the 5% figure came from. However, this altered in cross examination – see T8/117 *passim*. Mr Tozzi asked which of the comparables that Mr Forgham had referred to were relevant to the

5% uplift. He identified two in his oral evidence (for the first time) but neither was a strong comparable on which to base such a significant opinion, particularly when they had not been identified in the report as being specifically relevant to this conclusion. In particular, neither had basement areas – see T8/117/11; the Little Boltons required a number of adjustments and by implication it was accepted that it was in a superior location – see T8/117/13-21 – and the other relied on was an 8 bedroom house and thus not really comparable at all – see T8/118/4-5. The beneficial changes to the properties in the two house scheme were limited in effect – they each had car parking under the three house scheme but got qualitatively better car parking under the two property scheme – see T8/119/1-3 – and the change to pedestrian access was at best an improvement over what had been provided under the three property scheme rather than the provision of something new – see T8/119/24-120/9. Although privacy was said to be a significant factor justifying the uplift, the improvement was partial because both houses continued to be overlooked from the road and one from a neighbouring property.

114. Fourthly, in relation to his approach to the basement, Mr Forgham valued the basement at the same rate as under the three house scheme even though (a) under the three house scheme the lower stories of each house were semi basement not basement and (b) the basement plant room has been valued as though it was habitable. Finally, Mr Forgham has proceeded on the basis that both the two properties in the revised scheme were similar whereas they are not, whereas Mr Hewetson accepted that overall one of the house was better than the other – see his oral evidence at T8/62/5-25. All this leads me to prefer the evidence of Mr Hewetson over that of Mr Forgham on this issue.
115. In relation to Flats 3 and 4 at King’s Library, I prefer the approach of Mr Hewetson for the reasons set out by Mr Tozzi in paragraph 140 of his closing written submissions. In particular, I accept that the three changes referred to in paragraph 140(2) will have adversely affected value. I do not accept that these have no impact as suggested by Mr Forgham at T8/144/10-20. In my judgment it is precisely factors such as these (the loss of a dressing room from a master bedroom suite, the loss of a bath from a master suite bathroom and a sub optimal room shape) that would affect the value of flats 3 and 4. Mr Forgham’s evidence to contrary effect was unconvincing and implausible.
116. In the result, the claimants are entitled in principle to recover damages on the basis of losses of (i) £670,000 resulting from changes to layout to the King’s Chapel site and (ii) £678,000 resulting from changes to layout to the King’s Library site caused in each case by the continued presence of the HVCs. However, as I said at the outset this assessment proceeds as a loss of a chance assessment. It follows that I must assess the chances of the claimant recovering these sums. My conclusion on the material referred to is that there is a substantial chance that the claimants would recover the whole of these sums and a no more than speculative chance that the defendant would succeed in its case as to the assessment of these sums. However, no submissions were made by either party as to what the outcome ought to be if I reached that conclusion so at the hand down hearing I will invite short submissions as to how I should approach this part of the assessment given these conclusions.
117. Subject to paragraph 116 above, I invite the parties to arrive at the correct sums recoverable by each party applying the conclusions arrived at above. If I have made errors of calculation, I invite the parties to let me have agreed corrections so that those can be incorporated into the judgment prior to hand down.