Neutral Citation Number: [2021] EWHC 901 (QB)

Case No: 3939/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 14 April 2021

Before:

Margaret Obi
(sitting as a Deputy High Court Judge)

- -

Between:

Kingsley Napley LLP — **Claimant**

- and -

Mr Steven Harris — **Defendants**

Danriss Group Holdings Limited

- -

Mr Scott Allen and Ms Melody Ihuoma (instructed by **Reynolds Porter Chamberlain**) for the **Claimant**

Mr David Halpern QC and Mr William Harman (instructed by **Mayfair Rise**) for the **Defendant**

Hearing dates: 18-22 January 2021, 25-26 January 2021, and 29 January 2021

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PUBLIC JUDGMENT

Circulated on 8 April 2021

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Margaret Obi:

I. Introduction

1. This is the public version of my judgment. On 18 January 2021 (Day 1), I determined that parts of this hearing would be conducted in private (see: [2021] EWHC 137).

2. The claimant, Kingsley Napley LLP ('KN'), is a well-known and highly regarded firm of solicitors. KN was retained by the defendants - Mr Steven Harris ('Mr Harris') and Danriss Group Holdings Limited ('Danriss') in relation to seven matters between February and June 2017. Danriss is a private limited company owned and controlled by Mr Harris. These proceedings arise out of KN's claim against Mr Harris and Danriss, issued on 4 May 2018, for non-payment of professional fees. In response to the fee claim Mr Harris submitted a counterclaim raising allegations of professional negligence in relation to three of the retainers known as 'The Matrimonial Matter', 'The Possession Matter' and the 'The IWG Matter' respectively. This public judgment relates to the trial of the IWG Matter only.

3. The IWG counterclaim can be summarised as follows.

4. KN drafted a standstill agreement ('the Standstill Agreement') which lacked clarity with regard to the parties to that agreement. Mr Harris alleges that this meant that he was obliged to accept a less beneficial settlement from his former firm of solicitors Ingram Winter Green (IWG) than he would otherwise have achieved.

II. Key Legal Principles

5. KN admitted that it was a breach of duty for the agreement to name IWG LLP as the counterparty without further enquiry but denied that any loss was caused as a result of that breach. Therefore, this claim falls to be determined on a loss of a chance basis.

Loss of a Chance Doctrine

6. In accordance with the well-known Court of Appeal decision in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, as affirmed recently by the Supreme Court in *Perry v Raleys Solicitors* [2020] AC 352, the court is required to undertake a two stage causation enquiry:

    i. The court must determine, on the balance of probabilities, whether the claimant would have taken the steps he alleges he would have taken, if non-negligent advice had been given. Where the outcome depends on what a third party would have

done, it is up to the claimant to satisfy the court that there is a real chance that the third party would have taken the steps which the claimant states they would have taken. The position remains the same even if the third party gives evidence [see *Moda International Brands Ltd v (1) Gateley LLP (2) Gateley Plc* [2019] EWHC 1326 (QB)].

ii. If the claimant overcomes the first hurdle, the court must determine whether there would have been a real and substantial chance (i.e. a chance which was more than merely negligible) of the claimant being better off as he alleges if he had acted differently. In practice this means that an evaluation will be carried out where the value of the chance is between about 10% and 90% (10% or less is treated as nil; 90% or more is treated as being 100%).

7. If there is a real and substantial chance of the claimant being better off, the court must quantify the degree of likelihood as a percentage. The damages (i.e. the difference between the claimant's actual financial position and the financial position which he would have been in, had the professional taken the necessary steps) is then discounted by that percentage. For example, if the court takes the view that there was a 50% chance of the claimant being £1m better off, it will award damages of £500,000. If the court takes the view that there was no realistic prospect of the claimant being better off, it awards him nothing. There is no burden of proof on the claimant to satisfy the court as to the percentage.

8. In cases where the negligence has deprived the claimant of his ability to pursue a claim, and questions of what would have happened in that putative claim are wholly theoretical, the benefit of any doubt about the 'what-if scenario' (referred to as the counterfactual) is generally to be given to the claimant. The classic statements to this effect can be found in *Mount v Barker Austin* [1998] PNLR 493 at 497G (per Moore-Bick LJ) and 510 – 511C (per Simon Brown LJ and approved in *Perry v Raleys*). At 510C Simon Brown LJ stated:

> "*1. The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counterclaim) he has lost something of value i.e. that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success. …*
>
> *2. The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.*

> *3. If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.*

> *4. If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure…"If and when the court decides that the plaintiff's chances in the original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure."*

9. The above principle only applies to 'lost litigation' cases, in which the claimant has been deprived of his ability to adduce relevant evidence and bring a claim. It does not apply to situations where relevant evidence and arguments were actually advanced and responded to by the litigation counterparty; and it does not apply to legal issues which the court can determine. An example arises from the *Mount v Barker Austin* case itself, in which the court determined that the underlying case was completely hopeless, on the basis that the claimant's construction of the key document in the case was unsustainable as a matter of law.

10. Making every possible allowance in favour of the claimant is illustrated by the observations of Lord Sumption in *One-Step (Support) Ltd v Morris-Garner* [2019] PNLR 649 [§at 38]:

> *"Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, para 26-015, "[w]here it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence". In so far as the defendant may have destroyed or wrongfully prevented or impeded the claimant from adducing relevant evidence, the court can make presumptions in favour of the claimant. The point is illustrated by the case of Armory v Delamirie (1721) 1 Str 505, where a chimney sweep's boy found a jewel and took it to the defendant's shop to find out what it was. The defendant returned only the empty socket, and was held liable to pay damages to the boy. Experts gave evidence about the value of the jewel which the socket could have accommodated, and Pratt CJ directed the jury "that, unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did."*

11. In *Perry v Raleys* Lord Briggs emphasised that where a question of causation could be fairly investigated and tried by a court hearing a loss of a chance case, then the issue should be investigated and tried (§19, 24 and 37).

III. General Approach to Evidence

12. Many of the documents are contemporaneous or near-contemporaneous which assisted the witnesses in recalling events. Mindful of the observation of Lord Pearce in *Onassis v. Vergottis* [1968] 1 Lloyds Rep. 403 [at §431] that there is a sliding scale as to the credibility of witnesses, it is against these documents that the reliability of the witnesses' evidence in general had to be measured. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [at §16-20], Leggatt J (as he then was) observed that it is well-known human memory is unreliable, especially when it comes to recalling past beliefs. At [§18], he concluded:

> *"… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and*

> *working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

13. Although the court might well give more weight to contemporaneous written evidence, that does not mean that oral evidence can be disregarded: see *Martin v. Kogan* [2019] EWCA Civ 1645 at [§88-89]. This is especially important in a case, such as this, where the court has to consider evidence as to what the witnesses would have done in a hypothetical situation.

14. The issue of hindsight must also be addressed. Inevitably there is the risk of overdissection and over-analysis, both of which would be borne out of greater time to reflect and the court's knowledge of all that has happened both before and since.

IV. Background to The IWG Matter

15. The background circumstances cover a long period between 2005 and 2018 and is set out in full below.

The fee dispute with TPB – 2005 to 2006

16. Mr Harris and Mrs Harris purchased Clifton Hill in 2004. In May of that year they retained a firm of architects, TP Bennett ('TPB'), in relation to redevelopment work at the property. TPB took the view that its design services under the retainer were complete by 19 May 2005, save for ongoing fortnightly inspections. Mr Harris disputed this. He did not accept that the work was complete and questioned the level of fees; he took the view that he had overpaid. There was then a breakdown in the relationship.

17. On 22 July 2005 TPB wrote to Mr Harris stating that: (i) the working relationship appeared to have deteriorated to the point where there was no way forward; (ii) no more work would be done by TPB; and (iii) payment was due for the work that had been completed. This letter subsequently formed the basis of a professional negligence claim.

18. TPB exercised a lien over its papers until 1 November 2005 when Mr Harris paid the disputed sum into escrow. The fee dispute was settled at adjudication. The Adjudicator decided that Mr Harris was liable to pay some, but not all, of the fees claimed by TPB. Taking into account what Mr Harris had already paid, the Adjudicator ordered Mr Harris to pay a further £6,186.38 (which he did). However, this did not deal with the potential professional negligence claim against TPB.

The claim against TPB: IWG's retainer -2006 to 2011

19. Mr Harris instructed IWG to advise him with regards to a potential negligence claim against TPB. Initially IWG advised against the claim, but over time they became more optimistic. On 18 May 2007, Mr Harris was advised by Mr David Ingram and Mr Divyat Popat of IWG that he had a "*good claim worth pursuing*" against TPB for breach of contract. A Letter of Claim was sent to TPB on 24 August 2007. The claim was for a sum of £195,943 comprising £50,000 for work carried out by subsequent architects effectively re-doing work for which TPB had been paid, £97,186.61 for delays caused by TPB resulting in Mr Harris having to pay rent, legal fees, and ancillary items. On the same day (24 August 2007) IWG advised Mr Harris during a telephone discussion to make a Part 36 offer of £110,000 on the basis that would give him genuine protection on costs and interest. The claim was rejected in a robust letter of response by Fishburns acting on behalf of TPB.

20. On 16 March 2009, an expert report ('the draft expert report') was prepared on the instructions of IWG by a Mr Murray Armes of Probyn Miers. The draft expert report was the third of three drafts (Mr Harris had been dissatisfied with the previous drafts). Mr Armes concluded that TPB had unilaterally attempted to *"change the method of procurement or its terms of appointment"* and *"although the project could have been progressed with the planning drawings alone, this was not likely to achieve the results required by Mr Harris and anticipated in TBD's drawings. Neither was it likely to have provided a reliable tender price. ...therefore…the project could not have been progressed without the information which TDB withheld prior to payment of its fees."*

21. Mr Armes in his expert report under the heading "consequential losses" stated:

    i. That it was "*likely*" that additional architect's fees were incurred as a result of TPB's breach, but he could not quantify them;

    ii. That any additional costs in having services provided by a replacement project manager would be caused by TPB's breach;

    iii. That he was unable to form a view on additional QS fees; and

    iv. That TPB caused 23-25 weeks of delay, which fed into the claim for additional rent and council tax payments on an alternative property.

22. Mr Harris met with IWG on 2 March 2010. During that meeting Mr Popat expressed some doubts about the delay claim.

23. There was then a further hiatus. No substantial further action was taken by IWG and at some point in 2011 the limitation period expired. IWG did not advise Mr Harris that the claim against TPB would become statute-barred under section 5 of the Limitation Act 1980 unless it was brought within six years of the alleged breach of contract.

24. On 2 July 2012 Mr Harris emailed IWG to ask what was happening with the claim. The reply from IWG the next day (3 July 2012) stated: "*You were going to send me £5k to cover counsel's fees so I can get on with it*." Mr Harris replied: "*Am I time limited in anyway on this? How long do I have to liven this up again?*" He was subsequently

informed by IWG that he would need to obtain separate advice. Mr Harris subsequently instructed Howard Kennedy LLP ('Howard Kennedy').

The claim against IWG: Howard Kennedy's retainer – 2012 to 2014

25. The papers were transferred from IWG to Howard Kennedy on 6 August 2012. In early 2013 Mr Harris instructed Howard Kennedy in relation to a negligence claim against IWG.

26. Written advice was obtained from Mr David Johnson of counsel on 20 May 2013. He concluded that "*on the documentation available Mr Harris has a strong argument that TP Bennett at the very least declared an intention to curtail the services provided prematurely*" and that its conduct was "*likely to have amounted to a repudiation"*. Mr Johnson noted that the calculation of quantum was likely to be complex, that a detailed investigation would be required to investigate possible mitigation and remoteness arguments, and damages would be assessed and reduced on a loss of a chance basis.

27. On 4 July 2013, Howard Kennedy advised Mr Harris that the delay claim in respect of the lien exercised by TPB (i.e. the only significant delay claim Mr Armes had said might be sustainable) would be very difficult.

28. On 23 July 2013, Mr Johnson provided a further Advice in relation to the claim against IWG. He advised that the claim against IWG had "*good prospects of success in relation to a potential claim in negligence*". He further advised that the heads of claim which held the greatest prospect of success were for additional costs payable to follow-on design professionals in respect of costs exceeding the amount in TPB's retainer, together with the delay-related expenditure incurred beyond the period of securing the project papers. These amounted to approximately £150,000. Mr Johnson also advised that (i) there are issues relating to whether Mr Harris would have ever issued proceedings against TPB, (ii) the delay claim based on the period for which TPB withheld documents under their lien would not succeed and a claim against IWG in that respect was time-barred in any event; (iii) there was evidence on the file that the development stalled during the relevant period for other reasons in any event; (iv) it was impossible to reach a view on the material available about how much of the additional expert fees claim was a good one; (v) that the Mind's Eye (lighting consultants) fees claim was a bad one; (vi) the claims in respect of professional fees in respect of the adjudication were likely to fail; and (v) credit would have to be given for any element of betterment, and a discount would be applied for loss of chance.

29. On 2 July 2013 IWG LLP was incorporated. IWG LLP took over the practice of IWG.

30. On 25 July 2013, in a long email, Mr Johnson advised in response to a query from Howard Kennedy that Mr Harris could not properly have pursued any claim against TPB that was not supported by expert evidence and even if it were not improper to make such a claim it would be bound to fail. Mr Johnson also advised that it was *"very difficult to advise on the likely quantum of recovery."*

31. On 9 December 2013 Howard Kennedy sent a Letter of Claim to IWG LLP alleging negligence in failing to advise Mr Harris of the limitation period for suing TPB. Damages were claimed in the total sum of £173,536.40; comprising £50,146 for follow on professional fees, £97,186.61 for twelve months of delay, £14,427.13 in respect of wasted professional fees expended on the abortive proceedings against TPB, plus £7,050 said to have been wasted in respect of the structural engineer, and £4,726 paid to Mind's Eye.

32. Clyde & Co Claims LLP ('Clyde') responded on behalf of IWG and its insurer on 24 April 2014. Clyde named its insured as "Ingram Winter Green"; it did not raise any issue with regard to the assertion that IWG LLP was the firm that had been retained by Mr Harris. Clyde defended every aspect of the claim in robust terms. It was pointed out that Mr Armes' report had not supported a large part of the claim, including the claim for the structural engineers' fees, the Mind's Eye fees, and much of the delay claim. Reference was also made at length to the delay claim. Clyde stated that the delay claim was without merit as the project had never been finished for a variety of reasons (including Mr Harris's divorce, and him falling out with and having claims brought against him by two builders, groundwork contractors, a project manager, and an adjudicator) and Mr Harris had never lived in Clifton Hill, and so Mr Harris could not prove that TPB holding onto its papers for five months had caused him not to move into the property for any period.

33. In 2015 Mr Harris was diagnosed with cancer, and progress on the IWG claim ceased. However, by early 2017 Mr Harris revived the matter.

April – May 2017: the claim against IWG – KN's retainer

34. On 27 February 2017, Mr Harris informed Ms Jane Keir of KN that he intended to transfer conduct of the IWG matter to KN. On 21 April 2017 KN received 15 files relating to the matter from Howard Kennedy. This comprised the bulk of the papers, but Howard Kennedy also held electronic files which were transferred to KN on 15 May 2017 and a further file appears to have been received on or around 17 May 2017.

35. On 5 May 2017 Ms Sian Akerman, a solicitor working under the KN partner - Richard Foss, emailed Mr Harris. She stated that it appeared that "*the limitation period for issuing a claim against IWG expires on or around June 2017"*. She advised that protective proceedings should be issued *"immediately"* and that KN would need £25,000 plus VAT on account of costs before beginning work. Following a suggestion by Mr Harris it was agreed that an attempt would be made to agree a standstill agreement with IWG. A draft standstill agreement was subsequently drafted naming Ingram Winter Green LLP ("IWG LLP") as the proposed defendant.

36. On 22 May 2017, the Standstill Agreement was signed by KN on behalf of Mr Harris and Clyde on behalf of IWG, suspending the limitation period initially for three months. The counterparty was named as "Ingram Winter Green LLP … ("Ingram Winter Green")" and the background recital defined the *"Dispute"* as *"…any claim arising out of or connected with a claim by Mr Harris in respect of advice he received from Ingram Winter Green in respect of the loss of opportunity to issue against [TPB] …as set out in the detailed letter from Howard Kennedy…".*

37. KN then had no further involvement with the IWG matter. KN terminated their retainer with Mr Harris on 13 July 2017.

June 2017 – June 2018: the conclusion of the claim against IWG - direct access counsel and Mayfair Rise retainer

38. Mr Harris and Clyde agreed a series of extensions to the Standstill Agreement; it was extended on six occasions.

39. Mr Harris remained on good terms with IWG and continued to retain them as solicitors in a number of other matters. The nature of their relationship meant that Mr Harris had direct access to Mr Ingram of IWG. On 9 November 2017, Mr Harris emailed Mr Ingram on a 'without prejudice' basis stating that he would accept £110,000 plus interest and costs. Mr Ingram responded stating that he would discuss Mr Harris's proposal with his insurers, but he was *"pretty sure the figure sought will be way out of reach"*. On 7 December 2017, Clyde made a Part 36 offer to settle for £50,000.

40. Mr Harris acted in person for a period of time. He sought advice from Mr David Johnson, who had previously advised him via Howard Kennedy and who now advised him on a direct-access basis, on the merits of accepting the counteroffer. Mr Johnson provided advice in an email dated 13 February 2018. Mr Johnson advised that he would expect IWG to defend the delay claim strenuously, given that the project was never completed. Mr Johnson also advised on the Standstill Agreement and upon limitation. He did not identify or draw attention to any problem with the Standstill Agreement. On 28 February 2018, Mr Johnson assisted Mr Harris in drafting a Part 36 offer, dated 2 March 2018, in which the sum of £95,000 was sought. The sum was amended by Mr Harris to £110,000 inclusive of interest and was sent to Clyde on 2 March 2018. Mr Harris's letter set out his reasons for rejecting Clyde's lower offer. On 14 March 2018, Mr Harris emailed Clyde with details of his costs, which amounted to £27,616.86.

41. There was a meeting between Mr Harris and Mr Ingram of IWG, after which Mr Ingram clarified in an email, dated 11 April 2018, that the offer he had made at that meeting of £75,000 was inclusive of costs. He concluded by stating: *"Let me know. I have pulled out the stops here."*

42. That same day (11 April 2018) Mr Harris emailed Mr Johnson with an account of what he had been told by Mr Ingram about the insurers' position on the various heads of loss claimed. He expressed the view that he could not see why he was not entitled to be paid the sum £88,533 plus interest and costs. Mr Johnson replied on 12 April 2018, in the following terms:

> *"…the offer that we put forward was not my assessment of your worst case should the matter proceed to trial. Not only would the litigation risk factors that we discussed previously make it*

> *impossible to form such a view anyway, the particular nature of this claim is one that makes assessment of the likely quantum particularly difficult. The claim is a difficult one to advise on, partially because it involves the assessment of the merits of two separate sets of proceedings: (1) the claim against the architect, and (2) the claim against IWG. It is also a fairly uncommon type of claim, and there is a lack of precedent as to how the Court will approach such claims. There is every chance that the Court could award nothing, on the basis that either (1) it considered IWG was not liable in negligence, or (2) on the balance of probabilities you would not have commenced proceedings against TPB had you been advised accordingly. Equally, it could very easily form the view that the quantum of the claim was less than that claimed, or indeed put forward in our offer. It should be recalled that if you were to be awarded less than £50,000 you would be liable for the entirety of IWG's costs in full (i.e. on what is called the indemnity basis…*
>
> *Based on the above, I would encourage you to give the offer consideration, just as I advised in relation to the previous one. I suspect at this stage there are two options (1) to make a further counter-offer, or (2) to commence proceedings. I suspect that arguing about the individual points is now unlikely to yield any further movement: we have set out our basis and they have set out theirs. Realistically any further movement will, in my assessment, likely require us to commence proceedings."*

43. Mr Harris then sent an email to Mr Ingram on 12 April 2018 confirming that he had been advised that an offer of £75,000 inclusive of costs was not much of an advance on the Part 36 offer of £50,000. He made a request that Mr Ingram ask his insurers to increase their offer. Unfortunately, Mr Harris also inadvertently sent to Mr Ingram his email to Mr Johnson of 11 April 2018 and Mr Johnson's response of 12 April 2018 in which Mr Harris was encouraged to consider the offer of £75,000.

44. Mr Harris, realising his error, asked Mr Johnson, and his solicitor Ms Sally Marsden from Mayfair Rise (who had by then been instructed to act), for advice.

45. On 12 April 2018, Mr Johnson, having commented that the error was "*not an ideal situation at all",* advised Mr Harris to send an email to all the recipients of the email chain requesting its immediate deletion as privileged documents had been attached. He went on to suggest that there were two ways of looking at the error. First, Mr Harris had been very open that he was taking counsel's advice and working to identify an appropriate settlement. The email chain sets out some of the weaknesses but does not comment on any of the heads of claim and weaknesses that IWG would not already know about. He then stated:

> *"The second way of looking at it is that they are likely to be more bullish in circumstances where your email below mine refers to*

> *a potential settlement sum of £88k. I cannot see that they are likely to offer an amount in excess of this. If I were them in receipt of this I would not increase my offer beyond the £75k. I think, therefore, that this sharpens the need to make the decision floated in my previous email: are you going to accept the offer or are you going to commence proceedings? I think, realistically, those are going to be the only two feasible options at this stage."*

46. The following day (13 April 2018) Mr Harris sent a very long email to Mr Johnson, proposing a wholesale reformulation of his claim valued at £148,170. Mr Johnson replied that same day. He stated that he was confused by the email sent by Mr Harris and did not understand whether he was being asked to draft a response to IWG. He went on to state that if Mr Harris was not minded to accept the IWG's offer *"…further correspondence in this regard is unlikely to yield any further result and I would suggest you consider whether it is sensible at this stage to incur the cost of doing so."*

47. Ms Marsden advised Mr Harris in an email dated 13 April 2018. She stated:

> *"This is not a good use of your time or money you need to settle. How long did that email take and where are the Dodge questions? To issue proceedings will cost you 5% of the claim so on £146k claim nearly 7.5k. Pick the phone up and settle."*

48. Mr Harris responded on 16 April 2018 by suggesting a without prejudice meeting with Clyde and a further extension to the Standstill Agreement. However, before that could happen, Clyde sent an email to Mr Harris on 24 April 2018 putting him on notice that they had become aware of the possibility that the limitation period had expired before the Standstill Agreement was entered into. Clyde stated that they were going to take counsel's advice on the point and pending that advice, all offers were withdrawn but they agreed to extend the Standstill Agreement whilst each side considered its position.

49. On 17 May 2018, Clyde sent a further email to Mr Harris on a without prejudice basis. The first paragraph of the letter states as follows:

> *"We have now received advice from Counsel regarding limitation on your claim against our Insured. … [W]hat has become plain is that the Standstill Agreement was not entered into with the party against whom you assert your claim lies. That is something that you may wish to address with your former lawyers. That apart, even if you are able to surpass that problem…"*

50. Clyde went on to contend that the claim was statute barred because time had expired before 19 May 2005 (i.e. time had expired before the Standstill Agreement was entered into), and

reiterated the various other main difficulties with the claim against TPB including the absence of any evidence that any follow-on professional costs were duplicative of work done by TPB, and that there was no chance of the delay claim succeeding because the property was never completed or habitable at any stage in more than 12 years before it was sold by Mr Harris in 2018. However, Clyde concluded by reinstating the Part 36 offer of £50,000 and a *"generous"* alternative costs-inclusive offer of £75,000 was made *"in view of the longstanding good working relationship"* between IWG and Mr Harris.

51. Mr Harris attended a telephone conference with Mr Johnson and Ms Marsden on 30 May 2018. The opening line of the attendance note states *"[Ms Marsden] explained [Mr Harris does] not want to call it a day just yet."* It would appear from the attendance note that Mr Johnson stated that his *"biggest concern"* was that Mr Harris might not get over the hurdle of proving he would ever have issued proceedings against TPB (in which case his claim would fail in its entirety). Mr Johnson suggested that Clyde appeared *"nervous"* about the argument they had raised about the Standstill Agreement. Ms Marsden stated that normally the rights and responsibilities of a partnership are transferred to the LLP when a solicitor's practice changes its status in that way.

52. On 5 June 2018 Mr Johnson advised Mr Harris that while there were ways that the point raised about the Standstill Agreement could *"potentially be overcome"*, it was a point which added to the difficulty and complexity of the claim. He advised Mr Harris to accept the costs inclusive offer of £75,000 as it had the advantage of short-circuiting later arguments about costs.

53. Mr Harris had a telephone call with Mr Ingram and succeeded in persuading him to increase the offer slightly to £77,500, which Mr Harris accepted.

54. The Settlement Agreement between Mr Harris, IWG and IWG LLP was signed on 5 June 2018.

V. Witness Evidence

Mr Harris

55. Mr Harris, in his first witness statement, stated that the discussion with Mr Popat from IWG on 24 August 2007 with regard to making a Part 36 offer of £110,000 took place following receipt of Mr Armes's first draft report. However, during his oral evidence, he accepted that he was mistaken about the sequence of events; that advice took place before expert opinion evidence had been obtained. However, he maintained that a claim in excess of £110,000 was supported by the draft expert report, even if Mr Popat did not expressly refer back to that figure.

56. During cross examination Mr Harris was directed to an email from Mr Popat, sent on 12 October 2011, requesting £4,000 plus VAT to cover counsel's fees if Mr Harris wanted to progress the case. Mr Harris initially indicated that due to cash flow problems he would not have wanted to incur that expense. However, later in cross examination he stated that he

"would have found the cash" to issue proceedings against TPB; he *"wouldn't have not… issued through want of money"*. He stated that one option he may have employed was to use his credit cards.

57. Mr Harris acknowledged that during Howard Kennedy's retainer Mr Johnson advised him that causation and loss raised a number of issues. Mr Harris stated that these issues would be discussed in conference and a plan would be agreed to address them. He described the claim against IWG as a *"work in progress"* and later referred to his belief that it would get stronger once his legal team finally reviewed the boxes of papers relating to the original development project. Mr Harris also acknowledged that, in relation to Howard Kennedy's email advising him that he had a real and substantial claim against TPB, there would have been more work to do to make good a claim against IWG for £173,536.

58. As to his decision to keep pushing for £110,000 plus interest and costs in early March 2018, Mr Harris stated that he wanted to be *"consistent"* and was hoping to avoid proceedings, but he was conscious that he was negotiating with the insurers and with Mr Ingram, *"who want[ed] shot of it"* as much as he did. Mr Harris was adamant that there was a *"very good chance"* that IWG would have accepted that offer because it was in line with the offer Mr Popat had advised him to make. It was put to Mr Harris that Mr Ingram indicated in March 2018 that £75,000 was IWG's best and final offer. In response, Mr Harris observed that Mr Ingram was negotiating and *"…is not exactly a pussy cat"*.

59. Mr Harris gave evidence that in respect of the *"you need to settle"* email from Ms Marsden on 13 April 2018, this advice reflected the fact that he was unwell at that time and had other things going on, rather than the merits of his claim against IWG. During re-examination, Mr Harris explained that, despite the health concerns and the 'other things', he decided not to settle. However, he decided not to pursue the claim following receipt of advice from Mr Johnson on 5 June 2018 that the standstill issue had raised another hurdle, further risk and would result in additional costs. Mr Harris acknowledged that there were issues with his claim even before the standstill point arose, but he stated that he would have *"bottomed out all the stuff"*, issued the claim and would have been paid out.

Mr Foss

60. Mr Foss is an experienced litigator. During cross examination, he accepted that: (i) it appeared that the contract between Mr Harris and TPB had not been terminated as at 8 June 2005; (ii) IWG made no reference to when the limitation period might expire in 2010 or 2011; and (iii) the limitation period had already expired when Mr Popat asked for money on account to progress proceedings against TPB in October 2011.

61. Mr Foss accepted that KN should have made a search of the LLP register and that had they done so they would have discovered that IWG LLP was incorporated after the events which gave rise to Mr Harris's claim. Mr Foss also accepted that it "*wouldn't have been straightforward*" to argue that the Standstill Agreement had the effect of stopping time on Mr Harris's claim against IWG.

VI. Issues and Analysis

Mr Harris's Pleaded Case

62. The allegation of breach of duty is that KN failed to ensure that the Standstill Agreement was entered into with the correct party. The essence of the claim is encapsulated in the following particulars:

    i. The Standstill Agreement was made with IWG LLP.

    ii. IWG LLP was formed on 2 July 2013. Before that date IWG had been an unlimited partnership and therefore the Standstill Agreement should have been made with or included the partners of IWG as parties.

    iii. KN failed to take any or adequate steps to identify the correct persons or entities with whom the Standstill Agreement should be made to ensure that the Standstill Agreement was effective to prevent time running in respect of the whole period covered by the IWG claim.

63. Mr Harris alleged that the breach of duty caused him to suffer loss and damage because it weakened his negotiating position and deprived him of the opportunity to settle the IWG claim on better terms.

Causation

64. KN admitted that it was a breach of duty for the agreement to name IWG LLP as the counterparty without further enquiry but denied that any loss was caused as a result of that breach.

65. The issues to be determined are as follows:

    i. Would Mr Harris have issued a claim against TPB in time if he had been advised of the limitation period?

    ii. Who is the appropriate third party and what would that third party have done? iii.

        Has KN demonstrated that the lost litigation was of no value?

    iv. Did Mr Harris lose something of value which had a real and substantial rather than a merely negligible prospect of success?

    v. What were the realistic prospects of success?

Would Mr Harris have issued a claim against TPB in time if he had been advised of the limitation period?

66. Despite initial reservations IWG advised Mr Harris in May 2007 that he had a *"good claim worth pursuing".* Although this preliminary assessment was made before the draft expert

report had been obtained it is a strong indicator that Mr Harris had a worthwhile claim; it certainly was not assessed to be a claim of no (or little) value. In 2013 Mr Johnson also advised Mr Harris that the claim had *"good prospects of success"* and identified the heads of claim with the greatest prospects. He also identified a number of difficulties and advised further preparatory work would be required. He made it clear that there would almost certainly be a reduction to any claim on a loss of a chance basis, but he remained of the view that the claim had merit. Mr Johnson was much less optimistic in 2018. This was primarily because he was concerned that Mr Harris may have had difficulty persuading a court that he would have sued TPB and in addition there was the unusual double loss of a chance (IWG and TPB) feature which he felt complicated matters. Nonetheless, he assisted Mr Harris in drafting a counter-offer and expressed a willingness to assist him in commencing proceedings, if necessary. Therefore, the claim had value and was worth pursuing.

67. The pre-issue stage proceeded at a pedestrian pace. Only part of the delay related to Mr Harris's health; the remaining periods of inactivity appear to be because Mr Harris's attention was focussed on other things, not least running his business and the matrimonial proceedings. However, I am satisfied Mr Harris, having been advised that his claim was worth pursuing, would have pursued it. In an email, to Howard Kennedy sent on 4 July 2013, Mr Harris stated, *"I don't capitulate on any case I believe I have realistic chance of success on and usually will punt and don't have my bluff called."* Further, Mr Foss described Mr Harris as litigious. These are both accurate descriptions of Mr Harris's attitude to litigation. It is apparent from the documentary evidence that Mr Harris is someone who frequently seeks advice on issues outside his competence. However, by his own admission, he is not someone who necessarily follows advice before he has understood it for himself or made his own assessment of the merits of a particular course of action. There are several examples of Mr Harris refusing to follow the advice he had been given. During the relevant period, Mr Harris demonstrated a determination to negotiate a settlement; he did not want the matter to go to court and I am satisfied that the matter would not have gone to trial. However, if during IWG's retainer he was faced with a stark choice between abandoning the claim and issuing proceedings before the limitation period expired in 2011 (in the event that that TPB (or their insurers) could not be persuaded to enter into a standstill agreement), he would have opted for the latter, in order to prolong the opportunity to negotiate a settlement.

68. Mr Harris also had the means to pursue a claim. Periodically, he had cash flow problems, but I accept his evidence that he would have found the money to pursue the claim rather than abandon it.

Who is the appropriate third party and what would that third party have done?

69. In a case such as this, where the defendant's negligence has deprived the claimant of the opportunity to bring litigation, there are two possible third parties: (i) the court that would have decided the case; or (ii) the counterparty to the litigation, who is likely to have been willing to settle the claim at an appropriate figure. If the third party is treated as being the court hearing the 'lost litigation', the court in the current negligence proceedings will have to consider what the court might have decided in proceedings against IWG. Had that claim

proceeded to trial, the court in that case would have considered what the court would have done in proceedings against TPB, if the claim against TPB had been issued before it became statute-barred. Theoretically this could lead to a double discount, which would have to be avoided to prevent any injustice to Mr Harris. The alternative way of assessing damages is to treat IWG (and its insurer) and TPB (and its insurer) as the relevant third parties and to assess the lost chance by reference to the prospects and amount of settlement of the hypothetical claim. In adopting this approach, a further discount should not be made for the risk of not reaching a settlement, as the settlement value already reflects the risks of litigation and the parties' view of the prospects of success at trial: see ***Hanbury v. Hugh James Solicitors*** [2019] PNLR 25 at [19-22] and [60-62].

70. I accept the submission of Mr Halpern QC that in the present case IWG and TPB should be treated as the relevant third parties. I am satisfied that this would be fair because IWG's own advice to Mr Harris was that he had a good claim and therefore it would have been very difficult for IWG to have asserted that his claim against TPB would fail. As mentioned above, IWG recognised that there were difficulties in proving quantum, but that does not mean that quantum had no (or little) value.

71. Most professional negligence actions settle before trial. Insurers and the insured individual will take a commercial view and will not wish to risk the costs of litigation. In this case, IWG had the added incentive to settle because of an ongoing business relationship with Mr Harris. In these circumstances, I am satisfied that this case would have settled.

Has KN demonstrated that the 'lost litigation' was of no value?

72. It was not submitted on behalf of KN that the 'lost litigation' had no value. It was submitted that Mr Harris would not have issued a claim against IWG, but even if he had, he would not have achieved a result, either by settlement or by going to trial, that was better than the settlement he managed to achieve.

Did Mr Harris lose something of value which had a real and substantial rather than a merely negligible prospect of success?

73. Appropriate allowances should be made in Mr Harris's favour in assessing the realistic prospects of success. The underlying events took place more than 15 years ago. Therefore, it was unsurprising that Mr Harris's grasp of some of the detail was less than it may otherwise have been. That said, he was assisted by the contemporaneous documents which provided a good picture of the key events that occurred between 2006 and 2018. However, as acknowledged by Mr Halpern QC the court cannot presume evidence in favour of Mr Harris which is inconsistent with the contemporaneous documentation.

74. Mr Halpern QC submitted that the real "game-changer" occurred when Clyde noticed that the Standstill Agreement was in the wrong name and sought the advice of counsel. Had it not been for KN's negligence, Mr Harris would have been in a strong a position to settle the case for £110,000.

75. I do not accept Mr Halpern QC's submission. Mr Harris appears to have convinced himself otherwise, but the 'game' was already up by the time the parties to the Standstill Agreement became an issue. The advice to make a Part 36 offer of £110,000 was just that – an offer and crucially it was before expert evidence had been obtained. Following receipt of the draft expert report doubts were raised about the delay claim in respect of the lien. This was the only significant delay claim that the expert had said might be sustainable and by 2013 Mr Harris had been given advice that this part of the claim would not succeed. In reality the delay claim had no realistic prospect of success. Mr Harris did not move into Clifton Hill because the development was never completed. Therefore, it would have been impossible to show that any period in which he did not live there was caused by TPB. This was a significant part of the claim and without it the value of the claim was significantly less than it might otherwise have been. Further, Mr Harris instructed alternative architects when the relationship with TPB broke down. The development started again for a while, but in a much more ambitious form; the build cost doubled from £500,000 to £1m under the new scheme. There was no easy way of assessing how much of the additional professional costs of £50,000 duplicated TPB's work. However, making all due allowance in Mr Harris's favour, even if the entirety of the £50,000 professional fees claim was recoverable, in addition to the £14,000 of fees in respect of the adjudication which IWG accepted were recoverable, the total claim was worth £64,000 before any loss of a chance reduction was applied. Mr Harris stated that the problems would have been resolved. In my judgment that is, at best, wishful thinking and is not based on the reality of the situation. Mr Harris was well aware of the difficulties with the delay claim and that is one of the reasons why this case would never have gone to trial; the best that could be achieved was a reasonable offer which Mr Harris hoped to accomplish by leveraging his relationship with Mr Ingram. Clyde was also well aware of the difficulties with the delay claim and there was no prospect of an increase to what was already, a generous offer.

76. Mr Harris had been advised in clear terms by his own solicitor, and by his own counsel before the issue with the Standstill Agreement had been raised that he should settle the case by reference to the offers that had already been made. I do not accept that the advice from his solicitor had nothing to do with the merits of the underlying claim; it was a reasonable and rational assessment of Mr Harris's prospects of obtaining a better result. It was apparent beyond any reasonable doubt that IWG was not prepared to offer any larger sum to Mr Harris, and it was not in his best interests to pursue the matter any further. In the circumstances, Mr Harris had negotiated the best deal that was available. This was the situation before the anomaly in the Standstill Agreement was raised in May 2018.

77. In accepting the costs inclusive offer rather than the costs exclusive offer Mr Harris relied on advice from counsel. That advice was reasonable and rational based on the legal costs that were identified at that time.

78. On the basis of the contemporaneous evidence, no loss was caused to Mr Harris by reason of any ambiguity in the drafting of the Standstill Agreement. The claim was worth pursuing, but to borrow an analogy based on the *Armory v Delamirie* case, Mr Harris's claim is for a jewel that is bigger than the socket. There was no chance of a better settlement. Therefore, the claim must fail.

What were the realistic prospects of success?

79. For the reasons stated above, there was no realistic prospect of Mr Harris achieving a better result than the result he achieved.

VII. Conclusion

80. I am grateful to all counsel for their helpful written submissions and to leading counsel for their oral submissions. I am also grateful to all of the representatives for the hard work which has evidently gone into the preparation of this case for trial.

81. The parties should seek to agree terms of an order that reflects my conclusion and deals with any other consequential matters including costs.