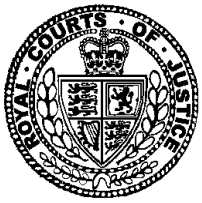

Neutral Citation Number: [2022] EWHC 2115 (Ch)

Case No: PT-2019-001074

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

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

Date: 12 August 2022

**Before**: Deputy Master McQuail

**Between:**

| | |
|---|---|
| **Salter Property Investments Limited** | **Claimant** |
| **- and -** | |
| **(1) PCL Planning Limited**<br>**(2) Charles Banner QC** | **Defendants** |

- - - - - - - - - - - - - - - - - - - - -

**Mr William Flenley QC** (instructed by Simmons & Simmons LLP) for the Claimant,
**Mr Christopher Greenwood** (instructed by DAC Beachcroft LLP) for the First Defendant,
**Mr Paul Mitchell QC** (instructed by Womble Bond Dickinson (UK) LLP) for the Second Defendant

Hearing date: 28 July 2022

# Approved Judgment



I direct that this approved judgment, sent to the parties by email at 10am on 12 August 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

**Deputy Master McQuail:**

1. This is a professional negligence claim in which a property development company, Salter Property Investments Limited (**Salter**), sues a firm of planning consultants, PCL Planning Limited (**PCL**), and a planning barrister, Mr Charles Banner QC (**Mr Banner**). The trial is listed for 8 days starting on 10 October 2022.

2. Salter seeks to re-amend its Amended Particulars of Claim (**APoC**). So far as the proposed amendments relate to particulars of loss the amendments have been agreed by both defendants, on the basis that Salter pay their costs of and occasioned by the amendments. There is a further minor amendment to paragraph 23(i)(d) which is not opposed.

3. Salter's application to amend its allegations of negligence against Mr Banner, as set out at paragraph 23(i) of the proposed Re-Amended Particulars of Claim (**RAPoC**) is not agreed by Mr Banner. An application for the court's permission to amend was issued, and served on Mr Banner's solicitors, on 30 May 2022. Late on 21 July 2022 Mr Banner's solicitors served a witness statement of Ms Helen Creech in opposition to the application. The ground of opposition is, in summary, that the amended case has no real prospect of success at trial. PCL does not oppose this amendment.

**Background**

4. In 2013 Salter owned an office building called Exminster House at Exminster in Devon. It wished to turn Exminster House into residential accommodation.

5. The Town and Country Planning (General Permitted Development) Order 1995 (SI 1995/418) (**GPDO**) permits certain types of development without the need for an application for planning permission. It was amended by the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013 (SI 2013/1101) to include a Class J in Part 3 of Schedule 2 to the GPDO. Class J permits a change of use of buildings from use class B1(a) (offices) to residential dwellings, subject to certain exceptions and conditions. The exception at para J.1(f) provides that such development of an office building is not permitted where the building in question is a listed building.

6. Section 1 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (**the Act**) directs the Secretary of State to maintain a list of buildings of special architectural or historic interest (**listed buildings**).

7. Section 1(5) of the Act provides as follows:

> "In this Act, 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act:-
>
> (a) any object or structure fixed to the building;
>
> (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948,
>
> shall, subject to subsection (5A)(a), be treated as part of the building".

8. A person who wishes to undertake a development pursuant to the rights granted by Class J must apply to the local planning authority for a determination as to whether prior approval is required in respect of various matters collateral to the development.

9. In December 2013 Salter applied to the local planning authority, Teignbridge District Council (**the Council**), to determine whether prior approval was required in relation to its

intended development of Exminster House. The Council's response of 3 January 2014 indicated that it considered Exminster House was within the J.1(f) exception because it was within the curtilage of the former Exe Vale Hospital. The response explained that Exe Vale Hospital had been listed in 1985 when it still operated as a hospital and that at that time Exminster House was in the same ownership and was used in conjunction with it as accommodation for nurses.

10. Salter instructed PCL to advise how to respond to the Council's position. PCL instructed Mr Banner to advise.

11. The key issue from Salter's perspective was whether the Exminster House building did or did not fall within the curtilage of the listed Exe Vale Hospital building for the purposes of the GPDO (**the Curtilage Question**).

12. Mr Banner advised in an Opinion dated 28 March 2014 that the factors relevant to the Curtilage Question included whether Exminster House and the former hospital were in the same ownership, and whether they were functionally connected.

13. The relevant part of Salter's currently pleaded case against Mr Banner is that he was negligent in that he did not advise in that Opinion or in an email of 9 June 2014 that, in applying the tests of (a) common ownership and (b) use and functional connection, it was necessary to look at the position as it stood at the date of the prior approval application in 2013, and not just as it had stood at the date of listing. By the date of the application, the position had changed significantly from that which had pertained at the date of listing: the Exminster House and Exe

Vale Hospital buildings were in separate ownership, there was no functional relationship between them, and a housing estate had been built between them.

14. Mr Banner denies this allegation of negligence.

15. Salter claims from Mr Banner compensation to put it in the position it says it would have been in if he had given non-negligent advice in March 2014.

16. By March 2015 Salter had terminated PCL's and Mr Banner's instructions and instructed a new planning consultant and planning barrister. The new barrister, Mr Christopher Lockhart-Mummery QC, advised that to answer the Curtilage Question it was necessary to consider the ownership and use and functional connection of the Exminster House and the Exe Vale Hospital buildings as those matters stood at the date of the prior approval application, and not merely as they had stood at the date of listing. His opinion was that were "strong/very strong" prospects of establishing that the circumstances relevant to the Curtilage Question were those at the present day, albeit in the context of the earlier history.

17. In July 2015 Salter made a further prior approval application on the basis of Mr Lockhart-Mummery's advice. It was rejected but it generated a right of appeal to the Planning Inspectorate. The appeal was successful, and Salter went on to convert Exminster House into residential accommodation.

**Present Pleading and Proposed Amendment**

18. Paragraph 23(i) of the APOC already alleges that Mr Banner acted negligently in that he failed to advise that the factors relevant to the Curtilage Question included both (a) the current

ownership of the buildings and (b) the current position as to the use of, and functional relationship between, the buildings at the date of the application to the Council.

19. The paragraph goes on to plead that Mr Banner's solicitors had stated at paragraph 4.6 of their letter of 16 September 2020 that he accepted those were relevant factors.

20. Mr Banner's witness statement for trial was served on 9 May 2022. At paragraph 36 Mr Banner stated that the admission in para 4.6 of the letter of response was "misleading" and that, when he read the draft letter of response, he must have "missed the significance of" the words in para 4.6 upon which Salter relied in the APOC.

21. Salter says that this withdrawal of Mr Banner's admission makes a fundamental difference to the defence which it thought it was meeting and, as a consequence, it seeks to re-amend the APOC. The proposed amendment seeks to add to the plea that Mr Banner acted negligently in his failure to advise that the ownership, use and function of the buildings as at the date of the proposed application were relevant factors to the Curtilage Question, an alternative plea that Mr Banner acted negligently in failing to advise that there was a significant possibility that (a) the current ownership and (b) current use and functional relationship of the buildings as at the date of the application were relevant factors to the Curtilage Question.

22. Apparently independently, the alternative plea is foreshadowed in the witness statement dated 9 May 2022 of Mr Peter Salter, who will be the main witness at trial for Salter. He says in paragraph 20:

> "I can confirm that had Mr Banner advised that it was the case or a significant chance that it was the case that a relevant factor in answering the curtilage question was the ownership of Exminster House and the use of the former Exminster Hospital and Exminster house at the date of the application, I would have asked Mr Seaton to obtain

> a fresh heritage report that complemented Mr Banners advice and submitted the fresh heritage report to the Council as part of our application."

23. Ms Creech's witness statement of 21 July 2022 makes clear that it is accepted on behalf of Mr Banner that the time at which relevant factors are to be taken into account in answering the Curtilage Question will be determined at trial. The witness statement goes on to explain that the objection to the proposed amendment is that it expands Salter's case to one which there is no real prospect of establishing.

24. Ms Creech exhibits various materials to her statement:

(i) a copy of Planning Practice Guidance, in force between September 1994 and March 2010;

(ii) Welsh Office Circular 61/96, in force until May 2017;

(iiii) Technical Advice Note 24, which replaced Welsh Office Circular 61/96 in May 2017;

(iv) Paragraph 1.004.3 of *The Encyclopaedia of Planning Law and Practice* as it stood in March 2014.

She explains that it will be contended by reference to those materials that Salter has no real prospect of succeeding on its proposed amended case.

25. Ms Creech then states at paragraphs 12 and 13 that Mr Banner is not asking the court to determine the Curtilage Question now and accepts that it is a matter for trial, and that it will involve "looking very closely at a number of authorities to discern what the law is". She goes on "the current application involves looking at the evidence and deciding whether [Salter] has any real prospect of demonstrating at trial [its proposed amended case]".

## Law on Amendments

26. CPR 17.2(2) provides that following service of a statement of case, it may only be amended with the written consent of the other parties or with the permission of the Court. CPR 17.3 confers upon the Court a broad discretionary power to grant permission to amend. The overriding objective is of central importance to the exercise of that power as is clear from *Pearce v East and North Hertfordshire NHS Trust* [2020] 1504 (QB), at paragraph 10 and the commentary to CPR 17.3 in the White Book 2022.

27. It is agreed by the parties that, in cases where it is proposed to amend a statement of claim so as to add a new claim, it is necessary to show that the amendment has a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction. This is analogous with the test for summary judgment.

28. Mr Mitchell relied on *Elite Property Holdings Ltd v Barclays Bank* [2019] EWCA Civ 204 at paragraph 41 in support of his submission that a claim may not be said to carry conviction where it may be said with confidence that:

(i) the factual basis for the claim is fanciful because it is entirely without substance; and/ or

(ii) the claimant does not have evidence to support at least a prima facie case that the allegations are correct; and/ or

(iii) the pleading contains insufficient facts in support of the case to permit the Court to draw such inferences as are necessary to establish the cause of action.

29. He went on to submit that for permission to be granted to amend

(i) the draft amended pleading must be coherent and properly particularised having regard to the elements of the cause of action relied upon (*Elite Property Holdings* at paragraph 42); and

(ii) the claimant must satisfy the Court that it has evidence which at least establishes a prima facie case that the new allegations will be made out (*Elite Property Holdings* at paragraph 41 and *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, at paragraph 18).

30. Mr Mitchell submitted that where a barrister is being accused of failing to advise regarding the law, the relevant evidence required to show negligence is that which shows the state of the law at the date he should have advised: *Chinnock v Veale Wasbrough* [2015] EWCA Civ 441, [2015] PNLR 25, at [50], with which proposition Mr Flenley agreed.

31. Mr Mitchell says therefore that as Salter's proposed new case is that no reasonably competent senior junior planning barrister could have failed to advise that there was at least a "significant possibility" that the answer to the Curtilage Question depended on factors at the date of application it is for Salter to show some evidence of the state of law as at March 2014, that gives it a real prospect of making out its new case.

32. Mr Flenley says that where an amendment merely provides further particulars, based on factual material, in support of an existing pleaded point, there should be no assessment of whether the amended particulars have a real prospect of success, this being a matter for trial (White Book, note 17.3.16). He referred me to paragraph 19 of the judgment HHJ Eyre QC, as he then was, sitting as a deputy High Court Judge in the case of *Scott v Singh* [2020] EWHC 1714 (Comm), in the following terms:

> "The new case set out in the proposed pleading must have a real prospect of success (see the commentary in the White Book at 17.3.16 and Mrs. Justice Carr's summary of the position in Quah Su-Ling v Goldman Sachs [2015] EWHC 759 (Comm) at [36]). The approach to be taken is to consider those prospects in the same way as for summary judgment namely whether there is a real as opposed to a fanciful prospect of the claim or defence being raised succeeding. It would clearly be pointless to allow an amendment if the claim or defence being raised would be defeated by a summary judgment application. However, at the stage of considering a proposed amendment that test imposes a comparatively low burden and the question is whether it is clear that the new claim or defence has no prospect of success. The court is not to engage in a mini-trial when considering a summary judgment application and even less is it to do so when considering whether or not to permit an amendment. Mr. Bergin says that this requirement only applies when the amendment in question is raising a new claim or defence. He contended that it did not apply if the amendment was in reality further particularisation or amplification of an existing claim. Mr. Pipe did not concede this but in my judgement Mr. Bergin is right. The requirement that the claim or defence proposed by way of amendment has a real prospect of success arises from the need to avoid the futility of allowing a claim or defence to be made by way amendment which is liable to be struck out or to be defeated by a summary judgment application. The same consideration does not apply if the line of claim or defence is in the original pleading and will remain in issue even if the amendment is not allowed…"

33. Mr Flenley says that the proposed amendment to the effect that Mr Banner ought to have advised of the significant possibility that the ownership, use and function of the buildings as at the date of the application was a relevant factor to the Curtilage Question, is a narrower version of the existing case.

34. He also says that Mr Banner should not be permitted to achieve, by attacking the amendment, what he has not done by an application for summary judgment on the presently pleaded case and refers me to *Sofer v Swiss Independent Trustees SA* [2021] EWHC 2196 (Ch), per HHJ Matthews QC sitting as a Deputy High Court Judge, at paragraph 32.

**The Curtilage Question and Advice on the Law**

35. Mr Flenley submits that a senior junior planning barrister should have had regard to the relevant case law and not simply to the materials to which Ms Creech refers in answering the Curtilage Question.

36. Mr Mitchell's own skeleton argument devotes 36 paragraphs to an analysis of the Curtilage Question referring to both the material exhibited by Ms Creech and a number of authorities.

37. Both Mr Flenley and Mr Mitchell took me to a number of these authorities in the course of argument and addressed me on the question of statutory construction by reference to the words of section 1(5) of the Act, the logic of the possible constructions and the case-law.

38. Counsel also referred to *Barker v Baxendale-Walker Solicitors* [2017] EWCA Civ 2056. There the Court of Appeal found that the defendant solicitors were negligent notwithstanding that it was accepted that their interpretation of section 28(4) of the Inheritance Tax Act 1984 was not one which no reasonably competent solicitor with the defendants' expertise could have reached. The defendant solicitors were held to have been under a duty to warn that there was a significant risk that HMRC would take a different view of section 28(4), a duty which they had breached. It is very clear from the judgment of Asplin LJ at paragraph 61(i) that this type of question is a highly fact-sensitive one. Mr Mitchell submitted that that type of issue does not arise here because the construction question was not obviously difficult.

**Analysis**

**Does the proposed Amendment advance a New Claim?**

39. The present paragraph 23(i) claim against Mr Banner is that he did not advise that the law was that factors to be taken into account in determining the Curtilage Question were to be considered at the date of the prior approval application. If it cannot be established by Salter that a barrister of Mr Banner's standing should have considered the appropriate time to take

the factors into account was anything later than the date of listing, that presently pleaded case will fail. However, one step on the road to establishing the presently pleaded claim is that Mr Banner should have reached a conclusion that there was at least a possibility that the date of the prior approval application was relevant.

40. Accordingly I agree with Mr Flenley that the amended case is effectively a particular of the presently pleaded case and it is not a new claim.

41. I do not therefore consider that there is a need for the proposed amendment to reach the real prospect of success threshold for the reasons explained in *Scott v Singh* and would therefore permit it to be made without consideration of that question.

**Is there a real prospect of success?**

42. Even if I am wrong and the amended case amounts to a new claim, it is inextricably linked to the existing case pleaded in paragraph 23(i) and also involves close consideration of the legal Curtilage Question.

43. The proposed amended case in paragraph 23(i) is equally coherent as the present case in paragraph 23(i) which has not been challenged by an application for summary judgment. I do not therefore reject it on the coherence limb of the test advanced by Mr Mitchell.

44. The parties are agreed that the Curtilage Question must be decided by the trial Judge. That, in my judgment, is sufficient to demonstrate that there is evidence to support the proposed amended claim. The preview I have had of that legal argument only goes to support conclusions that (i) it is matter on which there is evidence and (ii) I should not pre-empt the

trial Judge's decision in the context of this amendment application when the trial Judge will be able to decide the question with the benefit of all the evidence and detailed legal argument.

45. I am not persuaded that the content of Mr Banner's trial witness statement stating that the impression given by the content of Mr Banner's solicitors' letter of response was misleading has any bearing on the proposed amendment. However, given the content of the letter of response, it seems more than fanciful that Salter can establish that at the time Mr Banner wrote his Opinion he had in mind that the position as to the ownership and functional use of the two buildings at the date of the application was a relevant factor. It must therefore be arguable, if he had that in mind, that he should have dealt with the matter in his Opinion.

46. In addition, Mr Lockhart-Mummery QC's strong advice in early 2015 was that the position as at the date of the application was relevant to the Curtilage Question. The Planning Inspectorate accepted that and decided in favour of Salter on that basis in February 2016.

47. Finally, I conclude, bearing in mind the judgment of Asplin LJ in *Barker v Baxendale-Walker,* that I should not determine whether on the facts of this case Mr Banner's duty would have included advising on the risk or possibility that an alternative statutory interpretation was correct, as that decision can only be made by reference to all the evidence and not on a summary basis.

48. Accordingly, if I am wrong that the amendment is not a new claim, the matters to which I have referred above are in my judgment sufficient material that there is a real prospect of success for the amended claim.

## Conclusion

49. I will therefore give permission for the proposed amendments to paragraph 23(i) as contained in the draft RAPOC.

50. This judgment will be handed down remotely and without attendance on Friday 12 August 2022. If there are consequential matters that cannot be agreed a hearing will need to be fixed to deal with them.