Neutral Citation Number: [2025] EWHC 481 (Ch)

Case No: CH-2024-000117

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

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

Date: 04/03/2025

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

JENIFER EVANS — **Appellant**

- and -

HUGHES FOWLER CARRUTHERS LTD — **Respondent**

- -
- -

Patrick Lawrence KC (instructed by **Hugh James**) for the **Appellant**
Roger Stewart KC and Usman Roohani (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing date: 16 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Tuesday 4 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Adam Johnson:

The Issue and the Outcome

1. This appeal arises out of a claim brought in September 2021 by a firm of solicitors ("*HFC*") for payment of roughly £90,000 in outstanding fees. Their former client Ms Evans, the Appellant, responded with a counterclaim. HHJ Evans-Gordon ("*the Judge*") summarily dismissed the counterclaim under CPR Part 24, and by this appeal Ms Evans seeks to reinstate it.

2. The appeal has two main points.

3. The first concerns the circumstances in which a solicitor comes under a duty to advise about his own negligence. Ms Evans maintains that in mid-2012, HFC came under a duty to advise her about their own negligence in handling proceedings which had resulted in a mistrial in April 2012. She says that that duty was a continuing duty until 2018, when any potential claim against the solicitors became time-barred. HFC deny that any such duty arose. The Judge agreed with HFC on that issue. Ms Evans seeks to overturn that finding.

4. The second main point is about the scope of a defendant's ability to rely on equitable set-off. Here, the Judge held that Ms Evans was not able to raise by way of equitable set-off in proceedings started in 2021, any cross-claim based on HFC's negligence in carrying out work in 2011 and 2012. Ms Evans seeks to overturn that decision also.

5. For the reasons which appear below, I have come to the conclusion that Ms Evans' appeal must be allowed and her counterclaim reinstated.

Background

6. The appeal arises on unusual facts.

7. In 2011 Ms Evans was involved in divorce proceedings before Mostyn J. She was represented by HFC, who instructed Leading Counsel, Mr Charles Howard QC.

8. At the same time, HFC and Mr Howard QC were also acting for Lady Mostyn, in her divorce proceedings against Mostyn J.

9. What eventually happened is that after a trial of Ms Evans' proceedings before Mostyn J, and after Mostyn J had circulated a draft Judgment but before it was handed down, certain events occurred which gave rise to a possible ground of challenge to Mostyn J's judgment. That was in April 2012. According to the pleadings, the issue was that Mostyn J had sent emails to Lady Mostyn, in which he had made disparaging comments about HFC and Mr Howard QC. There was potential for an allegation of bias by the Judge which might vitiate his Judgment. Ms Evans had to decide what to do about it. But there was a serious issue for HFC and Mr Howard QC in advising her: they had access to the emails via their client Lady Mostyn, and on the face of it were under a duty to provide them to their other client Ms Evans, because they were relevant to her position. But at the same time HFC and Mr Howard QC were bound by a duty of confidence to Lady Mostyn, and so could not disclose the emails to Ms Evans. They were in an obvious position of conflict.

10. HFC and Mr Howard QC properly flagged the issue. There was a meeting on 17 April 2012, a note of which has been produced, at which Ms Evans was given advice. This was followed up with a letter from HFC dated the same day. It was agreed that neither Mr Howard QC nor HFC could continue to act and that Ms Evans would need to look elsewhere for assistance in challenging Mostyn J's Judgment. A way forward was identified. Another firm of solicitors was appointed, namely Farrer & Co. LLP, and new Leading Counsel, Mr Richard Gordon QC. A challenge was made to Mostyn J's Judgment, and it was later set aside by the President of the Family Division in a judgment handed down in June 2012.

11. The President's ruling had the effect of allowing HFC and Mr Howard QC to step back into the picture, as long as they did not breach any ongoing duty of confidence owed to Lady Mostyn. Thus they were able to continue acting for Ms Evans, but with some limitations.

12. HFC and Ms Evans agreed to a revised retainer letter, dated 25 June 2012. The terms and conditions contained what was described as a "*Special Term*" at paragraph 12. I should set out some extracts:

> *"This retainer has been entered into after much discussion between the parties. There are the following additional terms:*
>
> *(a) Jenifer Evans has agreed to provide instructions to ensure that the funds owed as at today's date which are over £500,000 will be met as soon as possible;*
>
> *...*
>
> *(d) Jenifer Evans will not request any documentation/information from Hughes Fowler Carruthers arising from or in connection with their involvement in the divorce proceedings between Sir Nicholas Mostyn and Lady Mostyn while we represent her;*
>
> *(e) Jenifer Evans agrees that Hughes Fowler Carruthers can play no part in any steps by Jenifer Evans to recover the wasted costs of the trial;*
>
> *(f) Jenifer Evans will not instruct Hughes Fowler Carruthers to take any steps against Sir Nicholas Mostyn."*

13. There then had to be a further trial before Moylan J. He handed down Judgment in May 2013. HFC carried on working for Ms Evans after Moylan J's Judgment, in dealing with consequential matters. The ongoing matters were protracted and in fact continued until 2018. Between May 2013 and March 2018, invoices totalling some £400,000 were raised by HFC and were paid by Ms Evans.

14. There was then a further, and final phase of activity. It is this which prompted the present claim, and Ms Evans' counterclaim.

15. One matter arising from the financial terms imposed by Moylan J concerned the sale of a US business in which Ms Evans and her former partner had interests. In early

2018, Ms Evans became concerned that the terms on which the business was to be merged with another would prejudice her position. Between March and December 2018, therefore, HFC acted in making applications to vary the financial orders made by Moylan J.

16. The issue was eventually resolved, but Ms Evans then challenged HFC's claim for further fees arising from this later phase of work. On 28 September 2021, HFC issued a claim for unpaid invoices totalling roughly £91,000 (including interest). It was at that point that Ms Evans counterclaimed, saying that she had a substantial claim for damages for negligence, arising from HFC's handling of the proceedings before Mostyn J in 2011 and 2012, and the circumstances which had given rise for the need for two trials instead of one. Ms Evans claims as damages her costs of about £500,000 which she says were wasted on the first trial. It is that claim which HFC persuaded the Judge should be summarily dismissed, and which Ms Evans says should be reinstated on appeal.

What are the allegations of negligence?

17. The case on negligence is set out in Ms Evans' Amended Defence and Counterclaim. For present purposes, the important facts are as follows.

18. It was Mostyn J himself who first raised the point about HFC acting for Lady Mostyn. That was at a procedural hearing on 11 February 2011. He granted a brief adjournment to allow Ms Evans to be given advice and to give instructions. According to her pleaded case, Ms Evans' position is that she decided not to raise any objection at that stage, having been advised that she might be seen as being difficult.

19. It appears though that there was an ongoing concern about the fact that HFC were acting for other clients in proceedings before Mostyn J. Thus, a few months later, in July 2011, a special arrangement was entered into in order to deal with it, with the approval of the President of the Family Division. Pursuant to that arrangement, in any of HFC's cases pending before Mostyn J, HFC were to inform their client that they acted for Lady Mostyn and give the client the right to object, and if the client objected for any reason, then steps would be taken without further question to transfer the case to be heard by another Judge.

20. As to this, however, Ms Evans' case is that she was not told about the special arrangement, and was not given the option of having her case automatically moved to another Judge. She says she only came to find out about it later, after the damage was done.

21. Those are the basic facts. Against that background, the allegations of breach of duty by HFC fall into two broad categories.

22. The first ("*Category 1*") is about the adequacy of the information provided to Ms Evans in 2011 and 2012. This point is itself put in different ways. One is that Ms Evans was not sufficiently advised of the risks of continuing with her action before Mostyn J (her counsel Mr Lawrence KC said there was an accident waiting to happen). More straightforwardly perhaps, Ms Evans relies on the fact that she was never informed of the terms of the special arrangement, and of her right to have her

case automatically assigned to a different Judge. She says that if she had been told about it, she would have exercised that right.

23. The other group of allegations ("*Category 2*") is rather less about what Ms Evans was told initially, and instead about the advice she was given later on, after the problem arising from the Mostyn J emails had crystallised, and (on her case) she was left with substantial wasted costs. Here, Ms Evans' point is that she was not told that one thing she might do was to bring a claim against HFC themselves, for having failed to advise her about the risks, and for having failed to tell her about the special arrangement. Her point is that HFC had a duty to tell her that was a possible option, which they failed to do. She says the duty persisted until 2018, when her ability to make a claim against HFC based on their negligence became time-barred.

The Judgment Below

24. The proceedings below involved a slightly wider set of issues than I am concerned with, but it is important to see the entirety of the Judge's reasoning. The Judge was concerned with three points, not two.

Limitation: knowledge under s.14A Limitation Act 1980

25. HFC's position before the Judge assumed that Ms Evans' allegations of negligence were made out in respect of the Category 1 breaches. But HFC said those claims were time-barred. That was because Ms Evans' cause of action arising from the negligence accrued no later than the Spring of 2012: by then the damage had been done because the wasted expenditure had been incurred. On that basis, the relevant 6 year limitation period expired no later than 2018. Thus, it had already expired by the time HFC brought their claim on 28 September 2021 (it is agreed that for limitation purposes, that date should also be treated as the date on which Ms Evans brought her counterclaim: see Hassan Khan v. Al-Rawas [2017] 1 WLR 2301).

26. Ms Evans responded by relying on s.14A Limitation Act 1980: she said that the limitation period did not start to run until well after 2012, because it was only later that she came to have the knowledge required for bringing an action against HFC.

27. This was the first main point in the case before the Judge.

28. The Judge emphatically rejected Ms Evans' argument in her Judgment at [14]-[16]. She said it was clear that by the end of May or beginning of June 2012, Ms Evans knew all she needed to know about the potential for bringing a claim for damages. At [16] the Judge effectively said the point was obvious, because the allegedly negligent omissions by HFC were not hidden: they were there for all to see. The Judge put the matter as follows (my emphasis):

> *"This is not a case where the omission is a failure to operate on a patient properly or a failure to advise on a technical point which would not be within the knowledge of a lay person. Such an omission may be something which would require specialist advice before it could fairly be said to be within the defendant's knowledge. The relevant omissions were to advise the defendant of the risk that Mostyn J may be biased against*

> *her advisers, to advise her of the 2011 arrangement and to advise her to have her case moved to another judge. These omissions were all obvious to the defendant by July 2012 at the latest. On her case, at that time, she had actual knowledge that the claimant had not advised her to have her case moved to another judge even though that course of action was available. It was not necessary that she know that such a failure was negligent. She had all the knowledge required to understand that something had gone wrong in the claimant's handling of her case and she knew that she had suffered loss in consequence. In my judgment, that was sufficient to place the onus on her to seek separate advice ... ."*

29. Ms Evans does not seek to appeal this aspect of the Judge's reasoning. She does however seek to appeal her reasoning on the second and third main points the Judge dealt with.

Duty to Advise?

30. The second main point was the question whether HFC failed in their alleged duty to advise about their own negligence – what I have called breach of the *Category 2* duty.

31. On this point, the Judge's assessment of the relevant legal test was at [17] of her Judgment: she said that in order for a solicitor to come under a duty to advise of past negligence, what was needed was actual or constructive knowledge of that negligence.

32. From there, her reasoning was to say, first, that there was no allegation in the pleading of actual or constructive knowledge by HFC (see at [17] and [18]); and second, that in any event there was no proper basis for such an allegation. She put the latter point as follows at [18]: "*In any event, it appears more than unlikely that the negligence was so obvious that any reasonably competent lawyer would have been aware of it in light of the evidence.*"

33. By "*more than unlikely*" the Judge must have meant it was extremely unlikely or even impossible that a competent solicitor in the position of HFC would have had actual or constructive knowledge of their own earlier negligence. In reaching that conclusion, the Judge was especially influenced (see again at [18]) by the fact that at the time, in mid-2012, a number of other parties had been involved in the relevant events, whom one might have expected to raise concerns if there really had been potential for a claim in negligence. One party was Farrer & Co., who took over Ms Evans' case before the President of the Family Division; another was Mr Howard QC, who had advised about the conflict of interest arising from the Mostyn J emails; and another was the Solicitors Regulation Authority, which HFC had consulted and which in the Judge's view, would not have "*overlooked negligence as obvious as Mr Lawrence is compelled to submit*".

34. Finally (again at [18]), the Judge thought it significant that Ms Evans acknowledged in her Amended Defence and Counterclaim that she had been told "*she had to go elsewhere for advice about the matters relevant to Mostyn J and that she did so*".

Equitable set-off

35. The third point dealt with by the Judge was Ms Evans' ability to rely on her cross-claim for negligence, even if otherwise time-barred, by way of equitable set-off against HFC's claim for their unpaid fees.

36. The Judge considered that Ms Evans could not rely on any equitable set-off. Her primary reason was because she did not think there was a sufficiently close connection between HFC's claim for unpaid fees incurred in 2018 and the potential cross-claim against it for negligence in 2011 and 2012: the unpaid fees were for work HFC had done in seeking to vary the financial orders imposed by Moylan J, but the alleged negligence related to the "*initial financial remedy proceedings*" before Mostyn J, which the Judge thought constituted a different transaction which in any event had been overtaken by the later retrial in front of Moylan J (see at [27]). The Judge's interpretation of the law (see at [26]) was that in order for equitable set-off to be available, the claim and counterclaim "*must involve the same transaction or transactions or subject matter, such as building work, a business where the counterclaim involves property used by the subject business, a lease, contract or goods*". On the facts, the exercise of seeking variations in 2018, and the original proceedings before Mostyn J, were "*in reality, quite separate transactions*", and thus equitable set-off was not available (see at [27]).

37. The Judge had another point, in case she was wrong about the first. At [29] she said:

> *"Even if I am wrong on the issue of connection, in my view it would not be manifestly unfair to discount the counterclaim in negligence for the reasons given by Mr Stewart. All the facts were known to the defendant in 2012. In this knowledge she entered into an agreement with the claimant, whether amended or new makes no odds, that she would, and did, pay the outstanding fees and not raise the issue of the Mostyn J affair. If she had not done so, the claimant would not have continued to act. I cannot see any manifest injustice to the defendant in those circumstances."*

38. As I read it, what the Judge was effectively saying here was that by entering into the revised retainer agreement in June 2012 including the "*Special Term*", Ms Evans had agreed to draw a line under the "*Mostyn J affair*", and there was no injustice in holding her to that and thus preventing her from relying on it to excuse payment of fees for work done six years later.

The Grounds of Appeal

39. Ms Evans seeks to appeal the Judge's findings under the second and third headings above – on duty to advise and on equitable set-off.

40. Ms Evans relied on 10 Grounds of Appeal. To a large extent these were overlapping. The main points argued were:

    i. The Judge's conclusion on whether a duty to advise had arisen relied impermissibly on assumptions about what certain third parties (Farrer & Co., Mr

Howard QC and the SRA) had or had not done, when such matters had not been properly investigated. The Judge had thus relied on speculation rather than reliable inference. The question whether any duty to advise in fact arose is one which requires a factual inquiry which cannot be circumvented in that way. Thus, there was no proper basis for dismissing the counterclaim summarily.

ii. The Judge misdirected herself on the test for equitable set-off, and took too rigid an approach in thinking that for equitable set-off to apply, the claim and the cross-claim must arise out of the same transaction. Further and in any event, the Judge was wrong to conclude there was an insufficient connection between the claim and the cross-claim, because they both arise out of the same divorce proceedings.

Was the Judge correct about the duty to advise?

The Relevant Test

41. The application before the Judge was HFC's application for summary judgment. The question to be addressed by the Judge was therefore only whether the intended claim for failure to advise had a real prospect of success.

42. In practice, this meant the Judge asking whether there was a real prospect of Ms Evans showing that a duty to advise had arisen.

43. Before me, and before the Judge, the parties were essentially agreed on the legal test to be applied in determining that question. Such a duty will only arise in a "*relatively exceptional case*" (per Neuberger J in Gold v. Mincoff Science & Gold [2001] 1 Lloyd's Rep PN 423, at [98]). In Ezekiel v. Lehrer [2002] EWCA Civ. 16, [2002] Lloyd's Rep PN 260 the Court of Appeal, although considering an appeal under s.32 Limitation Act 1980, concluded that a duty could arise only if the solicitor knew, *or ought to have known*, that he was guilty of an earlier breach of duty. Although in a later case Asplin J assumed (*obiter*) that actual knowledge was required (Mathiesen v. Clintons [2013] EWHC 3056 (Ch) at [182]), more recently in Cutlers Holdings Limited v. Shepherd & Wedderburn [2023] EWHC 720 (Ch), Bacon J formulated the principle as follows at [259]: "*The duty will ... arise where the solicitor knows or ought to know that there is a significant risk that their earlier advice was negligent*." The Judge stated the law on more or less that basis in her Judgment at [13(vii)] ("*Such a duty will only arise if the solicitor knows or ought to know of their earlier negligence ...*"), although this formulation did not mention the language of "*significant risk*". For my part and in agreement with Bacon J I think that is important, because it makes clear that a fanciful or spurious risk of earlier negligence is not enough to trigger the duty: there must be a significant risk that the earlier conduct was negligent.

44. In my opinion, therefore, the overall question for the Judge was whether there was a real prospect of Ms Evans showing that HFC knew or ought to have known there was a significant risk that their earlier conduct was negligent.

Why I consider the Judge was wrong

45. To be fair to the Judge, I think she asked herself more or less the right question (subject to the point about "*significant risk*"), but respectfully I think she came to a

wrong answer about it. In short, I think Mr Lawrence KC is correct that the Judge placed too much stress on the idea that the alleged breach of duty by HFC cannot have been obvious because no-one else flagged it at the time. In my view, the Judge was wrong to treat that point as determinative.

46. Although a Judge on a summary judgment application is entitled to take a common sense view of the evidence and to reject a claim if it carries no real degree of conviction (Maranello Rosso Limited v. Lohomij BV [2021] EWHC 2452 (Ch) at [18]-[20]), as I see it the Judge's reasoning was too fragile to support the conclusion that there was not even a *real prospect* of Ms Evans showing at trial that HFC *ought to have known* there was a significant risk their earlier conduct had been negligent. To put it directly, I think she was wrong in the sense that she did not have legitimate and proper grounds for reaching the decision she did (to use the language of Sales LJ in Smech Properties Ltd v. Runnymede BC [2016] EWCA Civ. 42, at [27]).

47. By the relevant stage of her Judgment the Judge had already concluded, in the passage quoted at [28] above, that HFC's omissions were all obvious; and indeed so obvious as to place the onus on Ms Evans to seek separate advice about recovering her losses. The idea that the possibility of a claim should have been obvious to Ms Evans, a lay person, seems to me inconsistent with the idea that HFC, a firm of solicitors, cannot reasonably have been expected to know about it themselves. If HFC did know as much as Ms Evans, then arguably they *were* under a duty to advise, and could not escape it by saying that Ms Evans was equally aware of the facts giving her cause for complaint. As Bacon J held in the Cutlers Holdings case at [255], the duty arises "*irrespective of whether or not the client is aware of the facts which might establish prior negligence by the solicitor*".

48. In concluding that HFC did *not* know enough to become subject to any duty, the Judge relied on the apparent failure of Farrer & Co., Mr Howard QC and the SRA to say anything at the time. That is a notable feature of the chronology as presently understood, but this was an application for summary determination, and in my view the necessary detail has not yet been revealed which would make the Judge's conclusion a safe one. When the facts are looked into, the failures may well be explicable, on a basis which fits with the idea that HFC *did* owe their own duty to advise. For example, the advice Farrer & Co might be expected to have given will depend on such matters as the scope of their retainer and on what they were asked to advise about; likewise, the advice Mr Howard QC might be expected to have given will depend on such matters as what he was asked to do and what he understood or assumed Ms Evans had been told already; and similarly for the SRA. In any event, the principal focus for all of them at the time was not on what claims Ms Evans might have to recoup her losses, but instead on managing the conflict of interest which prevented HFC and Mr Howard QC from disclosing the detail of the emails sent to Lady Mostyn. So I do not think the inference drawn by the Judge was a safe one at such an early stage of the proceedings, especially in light of her earlier findings. I think Mr Lawrence KC was correct to say that it involved too much speculation about what might have happened, before the necessary background had been fully investigated. That was the wrong approach on an application for summary judgment.

HFC's Submissions

49. A large part of what divided the parties' submissions was the fact that they were looking at the same assumed facts in very different ways. For HFC, a main thrust of the argument made by Mr Stewart KC was that because everything was out in the open by 2012, and Ms Evans was able to help herself, there was no basis for saying that HFC were under any continuing duty to advise her about their own potential negligence thereafter, from 2015 onwards (he focused on this period because any breaches of duty from 2015 would be in time for the purposes of legal proceedings started in September 2021). In making that point, however, Mr Stewart KC seemed to be positing the kind of case where the solicitor's original negligence was not apparent at the time, and where a duty to advise about it only arises at a later point if some trigger event occurs which puts the solicitor on notice that there is a problem. Thus, in his Skeleton at para. 48, he said, "*There could be no basis for such a duty to arise, afresh, from September 2015, when all relevant facts had already been the subject of the President's judgment of May 2012.*"

50. This was shooting at the wrong target, however, because it was not addressing the case actually advanced by Ms Evans. This is not put on the basis that some form of trigger event occurred after September 2015, but instead on the basis that what the Judge thought was apparent to Ms Evans in 2012 should also have been apparent to HFC, and they should have advised her about it then. I think that is clear from the Amended Defence and Counterclaim, for example at [30(h)], where the core assertion made is that:

> *"Between April 2012 (when the existence of Mostyn J's derogatory emails came to light) and the termination of its retainer in around December 2018, [HFC] failed to inform Ms Evans that she had a cause of action against it arising out of its negligent failures set out above; and/or that she should take independent legal advice in relation to the fact that she had incurred substantial wasted costs as a result of the recusal of Mostyn J and the setting aside of the Mostyn judgment; and/or that any claim in that respect might well become time-barred in 2018."*

51. In my opinion the way Ms Evans puts her case here is a legitimate way of looking at things. The idea that a solicitor may owe a duty to advise about his own negligence is not confined to cases where the negligence is in some way latent, and where the question is whether something which happens later was enough to prompt the original advice or conduct to be reconsidered. I see no principled reason why the duty should not also apply to cases where the potential problem is known about to begin with. That is the case squarely made by Ms Evans in her pleading. She says she was not properly advised in 2012 that she might have a claim against HFC, given their negligence in the immediately preceding period, during 2011 and the early part of 2012.

52. Several points flow from this.

Was any duty to advise discharged?

53. First, there is the question whether any duty which arose was in fact discharged. This was in issue in the proceedings below, and the Judge appeared to say that it was, in

light of Ms Evans accepting in her Amended Defence and Counterclaim that she was told "*she had to go elsewhere for advice about the matters relevant to Mostyn J*" (see above at [34]). In submissions on the appeal, Mr Stewart KC also emphasised the terms of the June 2012 revised retainer, which among other things provided at (e): "*Jenifer Evans agrees that Hughes Fowler Carruthers can play no part in any steps by Jenifer Evans to recover the wasted costs of the trial."*

54. In my opinion, however, the Judge was wrong to reach the conclusion she did. The concession at paragraph 14 of the Amended Defence and Counterclaim is made in the context of Ms Evans describing the outcome of the discussions which took place on 17 April 2012 (see above at [10]), when she was told that neither Mr Howard QC nor HFC could act for her in seeking to set aside the judgment of Mostyn J. She was certainly told to look elsewhere in connection with that issue, but it is not clear that she was also sufficiently advised of the potential for a claim against HFC themselves.

55. The revised retainer letter came later, after Mostyn J's judgment had been set aside. The context was thus different, and by that stage *did* involve consideration of what steps Ms Evans might take to recover the wasted costs she had expended (one can see that from paragraph (e) of the "*Special Term*", quoted at [12] above). All the same, however, I think that at present there is still too much ambiguity as to what advice was given. The "*Special Term*" told Ms Evans she would have to look elsewhere, but it did not say that one of the things she should look elsewhere for was advice on bringing a claim against HFC. Its apparent focus was to resolve the conflict which arose because HFC still had access to emails which it could not show to Ms Evans, not to resolve the conflict which arose because HFC could not advise on a possible claim against themselves. In my opinion, when a solicitor has a conflict of the latter type (an *own-interest* conflict), he needs to be more explicit. It is not enough to say he cannot act; he should say clearly why not and tell the client, *there is a possible claim against me and I cannot advise you about it*. That view is consistent with the SRA Code of Conduct 2011, some extracts of which are set out in Bacon J's Judgment in the Cutlers Holdings case, including Outcome 1.6 which provided that a solicitor must "*inform current clients if you discover any act or omission which could give rise to a claim by them against you*" (emphasis added). On the face of it that did not happen here, because the "*Special Term"* conveyed the impression there was another reason for HFC's inability to act, namely the problem posed by the Mostyn J emails. So I think there is an open question about whether any duty was sufficiently discharged and a real prospect of Ms Evans showing that it was not. The facts need to be looked at in more detail. I think the Judge was wrong to dismiss Ms Evans' counterclaim summarily on this ground.

Is Ms Evans' case adequately pleaded?

56. The second point to make is about the Judge's observation (see at [17]) that there was no sufficient pleading by Ms Evans of a duty on HFC based on actual or constructive knowledge of any negligence. I do not think even the Judge regarded this point as determinative, because she went on to deal with the substance of the allegation as I have explained above. In any event, I agree with Mr Lawrence KC's submission that the pleading was sufficient and that the Judge was looking at things too narrowly. The allegation made at para. 30(h) of the Amended Defence and Counterclaim (see out above at [50]) is that HFC was in breach of duty by failing to inform Ms Evans that she had a cause of action against it arising out of its earlier negligence. It is

implicit in that allegation that, at the least, HFC *ought* to have known there was a significant risk that its earlier conduct was negligent. That must be so: HFC could not be under a duty to inform Ms Evans about matters they themselves could not be expected to know about. In submissions Mr Lawrence KC confirmed that the case advanced is one of constructive rather than actual knowledge. The pleading can easily be amended to make that clear.

Continuing Duty?

57. The third and final point is whether any duty to advise was a continuing duty which persisted after September 2015, and so was extant during the six year period relevant for limitation purposes between September 2015 and September 2021, when HFC's claim was commenced. The short answer to this point is that although it was the subject of submissions before me, the Judge made no relevant finding about it. Her reasoning, as I have explained above, was limited to saying that no duty arose; or if it did, then it was discharged. She said nothing about the substance of the duty and its lifespan, if it arose and was not discharged. Neither was the point raised independently by way of Respondent's Notice, as an additional way of justifying the result the Judge came to (see CPR, rule 52.13). That being so, it seems to me that this issue is not technically within the scope of the appeal and that I should therefore be cautious about expressing any definitive view about it. I will however say that in my opinion, there is a logic in arguing (as Ms Evans does) that if HFC came under a duty to advise her about a possible claim in mid-2012, then that duty persisted for such period of time as Ms Evans was able to do something about it – i.e., there is logic in saying that the duty persisted during the six year limitation period for bringing any such claim, which expired in mid-2018.

Was the Judge correct about equitable set-off?

The Legal test for Equitable Set-off

58. A good starting point is to ask what legal test applies to determine the availability of equitable set-off. When is a defendant entitled to say to a claimant, "*You cannot press your claim against me, without taking account of my cross-claim against you"*?

59. In Federal Commerce Limited v. Molena Alpha ("*The Nanfri*") [1978] QB 927, Lord Denning MR said at p. 974: " *... it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it*" (my emphasis).

60. In a later decision of the House of Lords, Bank of Boston Connecticut v. European Grain and Shipping [1989] 1 AC 1056 at 1102, Lord Brandon approved the criterion that the cross-claim should be one:

> *" ... flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim."*

61. Neither formulation makes it a precondition that the claim and cross-claim should have arisen out of the same contract or transaction. The test is not so mechanical. A cross-claim arising out of a different contract or transaction can qualify, providing it

has a sufficiently close connection with the claim. That requires an evaluation of the degree of connection between the two.

62. How should that be assessed?

63. In The Nanfri, Lord Denning MR signalled that a key question to ask is whether there is a risk of injustice, if the claim is allowed to be enforced without the cross-claim being taken into account as well. In the passage quoted at [59] above, Lord Denning MR went on to say (again, my emphasis):

> *" ... And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim".*

64. In BIM Kemi v. Blackburn Chemicals Limited [2001] EWCA Civ. 457, the Court of Appeal was concerned with whether there was any difference between the formulations used by Lord Denning MR and by Lord Brandon. The Court thought not, and endorsed the view expressed in Dole Dried Fruit & Nut Co v. Trustin Kerwood [1990] 2 Lloyd's Rep. 309, that they are really the same test expressed in different language. Potter LJ though commented (at [27]) that insofar as there was any difference between the formulations:

> *" ... the court has been content for the outcome to be governed by the notion of fairness involved in the proposition that it must be 'manifestly unjust' to allow one to be enforced without regard to the other".*

65. As I see it, the notion of inseparable connection is thus largely (if not entirely) coterminous with the notion of manifest injustice. If there is an inseparable connection between the claim and the cross-claim, then it will be manifestly unjust to permit the one to be enforced without taking account of the other. Likewise, a situation of apparently manifest injustice is likely to indicate just the degree of connection which requires equitable set-off to apply.

The Judge's Reasoning

66. The end-point of the Judge's primary line of analysis (Judgment at [27]) was her conclusion that the claim and the cross-claim arose out of "*quite separate transactions*" – i.e., on the one hand the work undertaken by HFC in 2011 and 2012 before Mostyn J, and on the other, the much later work in 2018 applying to vary the orders made in 2013 by Moylan J. Mr Lawrence KC criticised this reasoning as taking too mechanical an approach, because it assumes it is a precondition to equitable set-off that the claim and the cross-claim must arise out of the same transaction or contract, and that is wrong in law (see [61] above).

67. I am not persuaded by this argument. On careful consideration, I do not think that the Judge's approach *was* mechanical in the way Mr Lawrence KC suggests, even on her primary line of analysis, and certainly not if one looks at her Judgment as a whole. Although she expressed her primary conclusion in terms of there being "*quite separate transactions*", suggesting a somewhat hard-edged approach, it seems to me

from other parts of her Judgment that in fact the Judge had in mind both (i) the broader question whether the two streams of work were sufficiently "*closely connected*", even if they did arise out of separate transactions, and relatedly (ii) whether there would be manifest injustice in allowing a claim for payment in respect of one to be pursued without bringing into account a cross-claim for damages in respect of the other. I think the first of these points is in fact apparent from the same paragraph of the Judgment (paragraph [27]), where the Judge expressly states that the "*negligence alleged does not have a close connection with the ... variation application*"; and that there is "*little or no connection*" between the two (my emphasis). The second point is apparent from the Judge's further conclusion at [29] (quoted at [37] above), expressed by her as an alternative but really in my view just another way of looking at the same issue, that there would be no injustice in allowing HFC's claim to proceed in isolation.

68. Looking at her reasoning in the round, therefore, in my opinion the Judge was asking the right questions. Nonetheless, I agree with Mr Lawrence KC that she came to the wrong answer in concluding Ms Evans had no arguable case on equitable set-off.

69. For HFC, Mr Stewart KC argued that if she applied the right legal test, then the Judge's overall conclusion was an exercise in evaluative decision-making, which this Court on appeal should not interfere with save on limited grounds. For Ms Evans, Mr Lawrence KC argued that the Judge's evaluation proceeded on the basis of an artificial assumption that there had been a break in HFC's retainer in mid-2012. Mr Lawrence KC said that was not so when one looks at the substance of it, and more importantly the Judge's reasoning failed to make any proper allowance for the fact that Ms Evans had a potential claim against HFC which she had not been told about.

70. On this part of the case I again agree with Mr Lawrence KC. I do not think the Judge's conclusion can stand in light of the view I have taken that HFC arguably did owe a duty to advise on their own negligence.

71. The Judge's reasoning did not make any allowance for that argument, and indeed assumed that no such duty was owed. I think one can see that from [29] of the Judgment. There the Judge said there was no manifest injustice in preventing Ms Evans from relying on HFC's 2011-2012 negligence, in response to the claim made in respect of work done in 2018, because *"[a]ll the relevant facts were known to Ms Evans in 2012*"; and knowing of them, she had entered into the June 2012 revised retainer in which she agreed she would pay the then outstanding fees and not raise further "*the issue of the Mostyn J affair*" (the full text of the Judge's reasoning is set out above at [28]). In other words, the Judge's approach was to say that the revised retainer of June 2012 had drawn a line under the unfortunate events of 2011 and 2012, and the parties had agreed to a fresh start.

72. The problem is that if HFC *were* under a duty to advise and did not discharge that duty, then Ms Evans did *not* know all the relevant facts in 2012: she did not know from HFC that she had a potential claim against them, and therefore no definitive line *was* drawn under the unfortunate events of 2011 and 2012. Moreover, on Ms Evans' case, HFC's failure persisted into 2018, when the further work on varying Moylan J's order was being undertaken.

73. That being so, I think Ms Evans *does* have a properly arguable case on equitable set-off. It is closely linked to the case on breach of duty. She is entitled to say that it would be manifestly unjust to allow HFC to recover their fees for the further work they did in 2018 as part of the same divorce proceedings, without giving credit for the value of the claim against it which (on this hypothesis) arose out of the same overall course of conduct and became statute barred in 2018 only because of HFC's failure to advise her about it. To put it the other way around, Ms Evans is entitled to argue there is an inseparable connection between the two because they arise out of the same overall course of dealings between solicitor and client, which was not cleanly severed at the point of the 2012 revised retainer, because that retainer did not deal sufficiently with all the consequences of HFC's prior conduct.

Conclusion and Disposal

74. For the reasons given above I would allow the appeal. I should be grateful for the assistance of the parties in producing an appropriate form of Order, and would invite them to any agree any necessary consequential matters.