Neutral Citation Number: [2022] EWHC 165 (QB)

Case No: QB-2019-003628

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2022

Before:

DAN SQUIRES QC
(Sitting as a Deputy High Court Judge)

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Between:

(1) Mervyn Lambert Plant Limited **(2) Mervyn Lambert**	**Claimants**
- and -	
Knights Solicitors (a firm)	**Defendant**

- -
- -

John Bryant (instructed by Gotelee Solicitors) for the **Claimants**
Richard O'Brien (instructed by Kennedys) for the **Defendant**

Hearing dates: 25 to 29 October 2021

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Approved Judgment

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

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DAN SQUIRES QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 28th January 2022.

Dan Squires QC:

Introduction

1. This is a professional negligence claim brought by the Claimants against the Defendant, a firm of solicitors, in tort and for breach of contract.

2. The Second Claimant, Mr Lambert, is a successful businessman who resides in Diss in Norfolk. He is the director and controlling shareholder of the First Claimant, a plant hire company, also based in Diss. The Claimants instructed the Defendant, a firm of solicitors with expertise in planning law, between September 2016 and August 2017 in relation to a proposed development at a site in Bressingham Norfolk, not far from where Mr Lambert lived. Mr Lambert opposed the development, and after planning permission was granted by South Norfolk Council ("SNC") on 2 March 2017, he brought a judicial review claim seeking to challenge it. The claim was unsuccessful. Permission to bring the judicial review was refused on the papers on 13 June 2017 and following an oral hearing on 2 August 2017. The Claimants pleaded a number of allegations of negligence and breach of contract in relation to the advice they received from the Defendant in relation to the challenge. The key allegation was that the judicial review of SNC was "doomed from the outset", and that had the Claimants been properly advised, and in particular had they had been told of counsel's views on the case, they would never have pursued the claim. The Claimants seek to recover the majority of the fees they paid the Defendant during the period it was instructed.

The issues before the court

3. It is common ground that the First Claimant was a client of, and was owed contractual and tortious duties of care by, the Defendant from 21 September 2016 to 14 March 2017. It is also common ground that Mr Lambert then became a client of, and was owed contractual and tortious duties of care by, the Defendant from 14 March 2017 until sometime in August 2017.

4. The Claimants raise a number of allegations of negligence and breach of contract in relation to advice received from, or action taken, by the Defendant, and I have grouped the allegations into six headings in the judgment below. The Defendant denies any negligence or breach of contract. In the alternative, and if that is rejected, the Defendant disputes causation. It argues that, even if it breached any duty owed to the Claimants in the advice it gave, the outcome would have been the same. The Defendant argues that even if different advice had been given to them, the Claimants would still have instructed the Defendant to pursue the judicial review and to carry out other work, including lobbying SNC. According to the Defendant, the Claimants therefore suffered no loss. That is disputed by the Claimants who contend that if they had been properly advised of the prospects of the litigation they would have ceased to instruct the Defendant.

5. In addition to the question of causation, there is a further dispute as to whether the First Claimant could recover damages at all. The Defendant asserts that, as the fees incurred by the First Claimant were treated as a director's loan to Mr Lambert, which he has now repaid, the First Claimant suffered no loss. That is disputed by the Claimants. The parties agreed, however, that I should not determine that issue, or indeed, any issue relating to quantum and loss, at this stage. It was agreed I should confine my

determination to whether the Defendant was negligent or in breach of contract in any of the ways alleged, and, if so to determine whether that caused any loss. The parties considered that once they had those findings they would be best placed to determine how to proceed with any further issues concerning recoverable quantum. I consider that to be a sensible use of the court's and parties' resources, and agreed to proceed on that basis.

6. My judgment is structured as follows. It deals with: (1) the legal framework governing the claim; (2) an overview of the factual background; (3) the allegations of negligence and breach of contract and my findings on them; (4) issues of causation. I wish to thank the parties and their legal teams. The case on both sides was clearly put and well argued, and while the case undoubtedly raised strong feelings for the parties, the litigation was conducted in a cooperative manner and the witnesses sought to give their evidence in an open and helpful way.

Legal framework

7. The Claimants instructed the Defendant as a firm of solicitors specialising in planning law. It is not disputed the Defendant thereby owed the Claimants a duty in tort to act with the skill and care to be expected of a reasonably competent solicitor specialising in that field.

8. It is not disputed the Defendant also owed the Claimants contractual duties (from 21 September 2016 to 14 March 2017 to the First Claimant and 14 March 2017 until sometime in August 2017 to Mr Lambert). The express obligations, contained in the letters of retainer and relied on by the Claimants, were not disputed by the Defendant. They were: an obligation to review the matters on which the Defendant had been instructed "on … a regular basis"; an obligation to "advise … of any circumstances or risks of which [the Defendant] are aware or consider to be reasonably foreseeable that could affect the outcome of [the Claimants' case]"; an obligation to "update" the Claimants "with progress on your matter regularly"; and an obligation to "update [the Claimants] on whether the likely outcomes still justify the likely costs and risks associated with [the Claimants'] matter whenever there is a material change of circumstances."

9. The Claimants also pleaded that when Mr Lambert first spoke to Mr Knight, Senior Partner of the Defendant and the solicitor with conduct of the case, on 16 September 2016, Mr Knight said "he himself would not undertake an application for judicial review unless there was a high chance of success". The Claimants pleaded that they relied on that representation and/or that it became a term of the agreement between the Claimants and the Defendant that the Defendant would not advise the Claimants to pursue a judicial review unless it had a "high chance of success". The Defendant denied the statement was made, and disputed that, if it was, it could reasonably have been relied on or that it formed a term of the contract between the parties. As set out below, I do not accept that Mr Knight stated he would not undertake an application for judicial review unless there was a "high chance of success". In any event, whether or not such a statement formed a term of the contract between the parties, or was relied upon to enter the contract, was not one of the agreed issues for trial and was not pursued in argument by Mr Bryant for the Claimants (as distinct from the general allegation the Defendant failed to advise the Claimants on the prospects of success of any judicial review application which is dealt with below). I therefore do not deal with it further.

10. As set out above, the key dispute between the parties is whether accurate advice as to the prospects of the Claimants successfully judicially reviewing SNC was provided by the Defendant between September 2016 and August 2017. In tort, it was accepted that an aspect of a solicitor's duty owed to a client involved in litigation is to take reasonable steps to ensure the prospects of success of the litigation are accurately conveyed. It was also not disputed that the various contractual terms imposed similar obligations on the Defendant.

11. It is difficult, in my view, to see any significant differences in the duties imposed on the Defendant depending on whether they arise in contract or tort. The express contractual obligations were to update the Claimants on the progress of their case and whether the likely outcome justified the likely costs and risk, and to advise on any circumstances that could affect the outcome of the case. It is difficult to see how those obligations, when applied to ongoing or potential litigation, differ from the tortious duties owed by solicitors. Any reasonable solicitor involved in litigation would be expected to seek to ensure that their clients were properly advised of the progress of their case and of the prospects of success of any litigation in which they are involved, and of any material changes to those prospects. A solicitor that failed to do so is likely to have breached a tortious duty of care owed to their clients irrespective of any express contractual terms, and I do not consider that it makes a substantive difference that these general duties to advise and update were reflected in this case in express contractual terms.

12. What is required to establish a breach of duty in this case is also similar whether the duties are framed in tort or in contract. It was accepted by both parties that the tortious duty imposed on the Defendant was to act with the skill and care to be expected of a reasonably competent solicitor specialising in planning law. The Claimants accepted that they have the burden of proof in that regard, and had to establish that any alleged error was one no "reasonably competent member of the relevant profession would have made" (see *Duffield v Metamorph Law Ltd* [2021] EWHC 2795 (QB) at §89, citing Lord Hobhouse in *Arthur J S Hall & Co. v Simons* [2002] 1 AC 615 at 737G; endorsed in *Moy v Pettman Smith (a firm)* [2005] UKHL 7 at §25). The contractual duty on the Defendant in the present case was in essence the same. The obligations to update the Claimants on the progress of their case and whether the likely outcome justified the likely costs and risk, and to advise on any circumstances that could affect the outcome of the case, were not framed as a requirement to provide advice at stipulated intervals or in some particular form. The obligations were general in nature, and, in my view, imposed a duty similar to the tortious duty of care, namely to exercise the level of care to be expected of a reasonably competent solicitor advising a client on the prospects of their case.

13. A solicitor's duty to properly advise their client involved in litigation can be breached in two ways relevant to the present case. Firstly, it could be breached if the solicitor's assessment of the prospects of success of the litigation was one that no reasonably competent solicitor specialising in the relevant area of law could have made. Second, the duty could be breached if the solicitor conveyed the assessment of the prospects, or information relevant to the assessment, in a manner in which no reasonably competent solicitor would have done.

14. As to the solicitor's assessment of prospects of success, the following principles apply:

i) First, the fact that a litigant ultimately fails in their claim does not mean that any earlier views of the solicitor expressing confidence in the prospects of the claim were necessarily negligent. A reasonably competent solicitor can reach a conclusion that a claim has reasonable prospects of success, if it ultimately fails. That can also occur, as in the present case, even if ultimately a court refuses permission for the case to proceed. The fact that a solicitor may have believed a court would reach a particular conclusion, and was subsequently proven wrong, does not mean, of itself, the solicitor's views were ones no reasonably competent solicitor could have held.

ii) Second, it was not the Claimants' case (and certainly was not put to Mr Knight) that where he expressed particular views about the prospects of the litigation, they were not genuinely his views. It was not, for example, said that Mr Knight gave deliberately bullish or encouraging advice, knowing it was inaccurate, or not caring whether it was inaccurate, in order to persuade the Claimants to pursue a claim Mr Knight knew to be weak. In those circumstances, in order to succeed, the Claimants would need to show that Mr Knight's genuinely held views of the prospects of the litigation were ones that no reasonably competent solicitor would have shared.

iii) Third, it is not sufficient to establish a solicitor's opinion on the merits of a case was negligent that other lawyers might have reached a different view. As the courts have held "the mere fact that one professional man might suffer from an excessive caution does not mean that another man, exercising his judgment to the best of his skill and ability and taking perhaps a somewhat more optimistic view, is guilty of a departure from the appropriate standard of professional care and skill" (see *Leigh v Unsworth* (1972) 230 EG 501 (endorsed in *Hart v Large* [2020] EWHC 985 (TCC) at §§125-126)). The Claimants accepted in closing that "[two] lawyers may hold differing opinions with neither [being] unreasonable." That is true for different views held by different solicitors. It is also true of different views held by counsel and a solicitor. The fact that a barrister instructed in a case may have more cautious views does not mean it is necessarily negligent for a solicitor to be more optimistic. There may be cases where a solicitor with little or no experience in an area instructs a specialist barrister, and any divergence from the views of the barrister on the merits of the case would, in itself, be negligent. There is, however, no rule to that effect. In other cases a solicitor may have considerable experience in a particular area and may reach a different view on the merits from counsel instructed without falling below the appropriate standard of care. Provided the solicitor passes on to the client the views of the barrister, and explains why their views differ, it does not follow that reaching, and communicating, a different conclusion from the barrister will, in and of itself, be negligent. The question, as in other aspects of alleged professional negligence, will be whether the views reached by the solicitor are ones no reasonably competent solicitor would hold taking all relevant circumstances into account. The latter will include the views of experienced counsel, but they are not necessarily determinative of whether the solicitor was negligent.

15. As set out above, the duty to advise properly can be breached in a second way. If a solicitor reached a view on the prospects of the success of litigation which were within

a range that was reasonable for a competent solicitor to hold, but nevertheless failed to convey those views, or other relevant information, in an adequate manner, that too could be negligent. In particular, and the issue that arises in the present case, is whether a solicitor could be negligent in failing adequately to convey the views of counsel instructed in a case.

16. I consider the following principles apply in relation to that issue:

i) First, I accept, and it was not disputed by the Defendant, that the views of counsel of the prospects of a claim were relevant matters for a client engaged in litigation, and that it could be a tortious or contractual breach of duty for a solicitor to fail to pass them on. If a solicitor was expressing confident views in the prospects of success of the litigation (even if those views were not negligently held), while failing to pass on the views of counsel that were more pessimistic, that could very well constitute negligence or breach of contract. It is likely to be of real importance to a client, seeking to decide how and whether to proceed with litigation, to know the views of counsel, and a reasonably competent solicitor would be expected to pass them on. There is, however, no particular or distinct legal test for assessing whether there has been a breach of duty in that regard, and the issue is to be approached as in any other claim of solicitor's negligence. The question is whether, in failing to pass on counsel's views, or in the manner those views were conveyed, the solicitor acted in a way no reasonably competent solicitor would have done. It was not suggested by the Claimants that there is some rule, derived either in tort or from the contract in the present case, pursuant to which *any* failure to pass on counsel's advice is *per se* a breach of duty, or that that such advice must be passed on in some particular form. The question remains whether no reasonably competent solicitor would have acted as the Defendant did in the way in which advice was passed on to a client.

ii) Second, there is no rule of law that solicitors must provide counsel's views in writing rather than to convey them orally to a client. HHJ Richard Seymour QC held in *Harwood v Taylor Vinters (a firm)* [2003] EWHC 471 (Ch) at §84 "There are, no doubt, many circumstances in which it is desirable for a solicitor to give advice in writing. It will often be convenient to give advice in writing so that a client may have an opportunity to reflect upon the advice… However, there are also many advantages in communicating advice verbally." HHJ Richard Seymour QC continued: "The only hard and fast rule, as it seems to me, is that a solicitor should give whatever advice a reasonably competent solicitor would in the particular circumstances of the case, and give it clearly and so that the client appears to understand it" (ibid). I agree, and consider the observations apply equally to the passing on of counsel's advice as to the solicitor's own advice. There may well be advantages in passing on counsel's advice in writing, but no rule that is always required. Again, ultimately the question will be whether in deciding what is communicated to a client, when it is communicated, and the manner of communication, the solicitor failed to act in a way to be expected of a reasonably competent solicitor. In that regard the nature of the advice may be important. If counsel is providing a formal written advice for a client, it may well be that any reasonably competent solicitor would pass it on in writing. If, on the other hand, counsel merely expresses views about some

aspect of the case in passing to a solicitor in an email dealing with other matters, it may be sufficient to convey those view orally. Again, all will depend on the facts, and on whether no reasonably competent solicitor would have acted as the particular defendant did.

Factual overview

17. The background to the present case concerns planning applications made by Openfield Agricultural Limited ("Openfield"). Openfield is an agricultural company that owned and operated a grain storage facility at Harvest House, Bressingham, Norfolk. Openfield made a planning application seeking permission to demolish existing buildings and construct 17 storage silos and a number of other buildings on the site at Harvest House. The application was made initially on 13 October 2015 and a further application made on 17 June 2016.

18. On 14 September 2016 a meeting was held by SNC's Development Management Committee ("the DMC"). As discussed further below, the precise nature of the decision, if any, made on that day is not clear, but it appears that some form of resolution in favour of granting planning permission was reached. Mr Lambert was present at the meeting. He was concerned about the proposed development, and on 16 September 2016 he contacted the Defendant and spoke to Mr Knight about challenging it. As set out further below, it was clear from the evidence that Mr Lambert felt strongly about the development.

19. Following the initial conversation, Mr Lambert decided to instruct the Defendant. At the time it was considered appropriate for the First Claimant to be the Defendant's client. The First Claimant signed the Defendant's letter of retainer and on 21 September 2016 became a client of the Defendant.

20. On 6 October 2016 the Defendant instructed Mr Fookes, a counsel with considerable experience in planning matters, to draft a letter before claim to challenge the 14 September 2016 decision.

21. On 12 October 2016 a further meeting was convened of the DMC to consider the planning application, but it was decided to defer any further decision until after a site visit.

22. On 17 October 2016 the letter before claim was sent to SNC on behalf of Mr Porter, a local resident. The case was being funded by the First Claimant, but Mr Porter was at the time the proposed claimant in any judicial review. It was not suggested that the reason for that was relevant to the present claim or that it impacted on the duties owed by the Defendant to the Claimants.

23. On 19 October 2016 counsel was instructed to draft a judicial review application. There followed discussion between counsel and the Defendant, and correspondence between the Defendant and SNC, which culminated in SNC giving an assurance on 24 October 2016 that it would not take a limitation point if proceedings were not issued within six weeks of 14 September 2016. On that basis, counsel advised that it was not necessary to issue a judicial review claim at that stage.

24. There then followed a site visit to Harvest House on 1 November 2016, followed by a meeting of the DMC on 9 November 2016 at which a decision was taken, in principle, to grant planning permission but subject to conditions that were to be determined. There followed a further site visit on 15 February 2017, and, eventually, on 1 March 2017, the DMC met and decided to grant planning permission to Openfield's proposed development at Harvest House with conditions. The notice of the decision was issued on 2 March 2017. Mr Lambert continued to oppose the development, and did not consider the conditions met his concerns about the impact of the development on local residents. He instructed the Defendant to proceed with a judicial review of SNC's decision.

25. On 14 March 2017 Mr Lambert became the Defendant's client in place of the First Claimant.

26. On 17 March 2017 a letter before claim was sent by the Defendant to SNC, on behalf of Mr Lambert, challenging the 2 March 2017 decision. SNC replied on 3 April 2017 maintaining its decision.

27. On 12 April 2017, a judicial review claim was issued on Mr Lambert's behalf.

28. On 3 June 2017 Lang J refused permission to bring the judicial review on the papers. The application was renewed, and on 2 August 2017 permission was refused at an oral hearing.

Issues in dispute: allegations of negligence and breach of contract

The witnesses and the evidence before me

29. The Claimants made a number of allegations of negligence and breach of contract which the Defendant disputed. In support of their respective cases the parties placed before me a large body of documentary evidence including, in particular, a significant number of contemporaneous emails sent between the parties and other individuals. I have carefully read through the documents to which I was referred. I also heard from four witnesses: Mr Lambert, Mr Knight, Mr Wallace and Mr Manser. I make some observations about the witnesses.

30. Mr Wallace was the First Claimant's accountant and gave evidence for the Claimants. Mr Manser was a Trainee Legal Executive with the Defendant at the material time. He had some dealings with the Claimants' case in particular in relation to billing, and he gave evidence for the Defendant. The evidence of Mr Manser and Mr Wallace was of limited relevance to the issues the parties ultimately asked me to determine, they were subject to very little if any cross-examination, and little or no weight was placed on their evidence in the parties' closing submissions. I say no more about them.

31. The evidence of Mr Lambert and Mr Knight was, by contrast, central. Mr Knight was the owner and Senior Partner of the Defendant, and was personally responsible for the conduct of the case for the Claimants. Both Mr Lambert and Mr Knight gave detailed evidence of what had happened in 2016-2017 and were cross-examined extensively. As will become clear, a number of the Claimants' allegations turn on what precisely Mr Lambert was told about the prospects of success of any litigation by Mr Knight, and in

particular whether at various points in time he was told of counsel's views. In that regard there are clear differences in the evidence of Mr Lambert and Mr Knight.

32. The Claimants invited me to prefer the evidence of Mr Lambert, and the Defendant invited me to prefer that of Mr Knight. Each party submitted that the other party's witness gave less consistent or less reliable answers, but neither party invited me to find the other's witness was being deliberately dishonest. Instead, both questioned the recollection of the other side's witness and invited me to prefer, as more plausible, the evidence of their witness. Mr O'Brien, for the Defendant, argued that Mr Lambert repeatedly failed to answer questions, or talked over those asking them, and that that went to his reliability. Mr Bryant, for the Claimants, submitted that while Mr Lambert's answers may have sometimes not been "succinct" he was not seeking to be "evasive" and that he had a good grasp of the details of the case. Mr Bryant also suggested Mr Knight would have had other cases at the time, but that for Mr Lambert the challenge to the planning application would have been the focus of his attention, and that his recollection of events should therefore be regarded as more reliable.

33. I ultimately did not find that the manner in which the parties gave their evidence, or the fact Mr Knight may have had other ongoing cases, assisted me. Having heard Mr Lambert and Mr Knight give evidence, I found that both, generally speaking, did their best to give an accurate account of events as far as they were able to recollect them. With the passage of time, and in the context of the acrimonious end of their relationship and the subsequent litigation, it seems likely that both Mr Knight and Mr Lambert may have come to believe with greater certainty that their recollection of events was the correct one, but I did not find that either was attempting to mislead the court. As I explain below, on the key factual disputes which turned on the witnesses' respective recollections of events, I have preferred Mr Knight's evidence. That was not, however, because I found Mr Lambert to be a dishonest witness. He no doubt felt strongly about how he believed he had been treated, but I did not consider he was doing other than seeking, as far as he could, to recall what had occurred. It is, however, quite possible for events, and in particular the contents of conversations that happened five years ago, to be remembered differently by different individuals without either being dishonest, and ultimately my task is to determine, as best I can, what is the most plausible account. I sought to do so from the way the events were recalled by the witnesses, the contemporaneous documents and the surrounding circumstances. My conclusions in that regard are set out below.

Allegations of breach of contract and negligence

34. The Claimants' pleaded case contained a number of allegations of negligence and breach of contract that were not ultimately pursued. I say no more about them. The Defendant had also pleaded that if there had been negligence or a breach of contract, the Claimants contributed to their own losses by negligently refusing to follow professional advice. This too was not pursued, though the Defendant maintained that the Claimants' conduct was relevant to causation. In terms of the allegations of negligence and breach of contract that were pursued, I have grouped the issues the parties have asked me to determine into six categories that are broadly chronological. I set out in relation to each issue the nature of the dispute between the parties, the relevant evidence and my findings.

First allegation: treatment of SNC's "decision" of 14 September 2016

Issue in dispute

35. The first issue in dispute is whether the Defendant negligently advised the Claimants that SNC's decision of 14 September 2016 was susceptible to judicial review, and whether the Defendant negligently failed to appreciate that there was no point preparing an application for judicial review until SNC had made a decision susceptible to it.

36. The issue arose as follows. Mr Knight was initially contacted by Mr Lambert on 16 September 2016 and they discussed a potential challenge to a decision apparently made at the DNC meeting of 14 September 2016. On 21 September 2016, after the First Claimant formally instructed the Defendant, it is accepted by the Defendant that it advised the Claimants that work should commence to prepare for a challenge to the 14 September decision. Work was then undertaken up to 25 October 2016 preparing for a potential judicial review.

37. It was common ground before me that a resolution by a council to approve planning permission is, itself, amenable to judicial review (see *R v London Borough of Hammersmith and Fulham ex p Burkett* [2002] UKHL 23; [2002] 1 WLR 1593). It was also common ground that judicial review proceedings of any such decision needed to be issued within six weeks (see Civil Procedure Rules 54.5(5)). If a decision susceptible to judicial review had been taken on 14 September 2016, proceedings would thus have needed to be commenced by 26 October 2016 or risk being out of time. It was the Claimants' case that the Defendant was negligent in not appreciating until 25 October 2016 that no decision susceptible to judicial review had been taken by SNC on 14 September 2016, and that there was therefore no point in preparing a judicial review application at that stage. The Defendant's case is that it was not sufficiently clear until 25 October 2016 precisely what had been determined on 14 September 2016, or how SNC would respond if proceedings were not issued within six weeks, and that it was not negligent to ensure the Claimants' position was protected by preparing a judicial review claim, in particular as the Defendant was following counsel's advice in doing so.

Relevant evidence

38. The dispute before me turns on what was determined by SNC on 14 September 2016, and when the nature of that decision, and the risks of not challenging it, should have been appreciated by the Defendant. The Claimants' case is that the Defendant should have appreciated, at the latest by 19 October 2016, that no decision susceptible to challenge was taken on 14 September 2016. They rely on an email of 18 October 2016 from Mr Raine, a Senior Planning Officer at SNC, to the Defendant in response to an email asking for the "decision" of 14 September to be "rescinded". Mr Raine's email stated that SNC "did not issue the decision following the previous month's committee meeting resolution and as such there is no decision to 'rescind.'" It is the Claimants' case that, at the latest by the following day, 19 October 2016, the Defendant should have appreciated that there was no decision to challenge and stopped preparing for a judicial review claim.

39. The Defendant's case was that it was not clear up to, and indeed beyond, 25 October 2016 precisely what, if anything, had been determined by SNC on 14 September 2016.

The Defendant noted that emails were sent to SNC on 21 and 22 September 2016 which referred to "the planning permission" granted on 14 September 2016, and that they were not queried by SNC. The Defendant also noted an email from Mr Falk, a local resident and retired planning consultant and architect with considerable experience of planning matters, to Mr Raine of 4 October 2016 which stated that "It is known that a Planning Committee decision has been recorded but not ratified by a decision notice".

40. The Defendant recognised that Mr Raine's email of 18 October 2016 stated that SNC "did not issue the [planning] decision" on 14 September 2016. They were concerned, however, there was a risk that a resolution to approve planning permission had, in fact, been made on 14 September 2016 and remained extant, and that the limitation period for a judicial review might thus expire on 26 October 2016. Mr Knight therefore continued to correspond with SNC about the matter. On 20 October 2016 at 16:18 Ms Linley, a solicitor representing SNC, wrote to the Defendant and stated "there was a resolution in September to approve the application [for planning permission] but this has not been implemented as the Council was made aware very shortly after the committee date that there was a possible problem with the site notice … the matter than went to Council's next committee in October but the members resolved to have a site visit before any other discussion took place. It is proposed the matter will be referred to the November committee". The email concluded "please confirm that in those circumstances you do not need me to prepare a reply to your [pre-action] letter dated 17 October as there is no decision to [judicially review]". Mr Knight considered that was probably sufficient to protect the Claimants' position, but remained concerned a court might nevertheless conclude that a resolution to approve planning permission had, in fact, been taken on 14 September 2016 and remained extant, albeit not implemented, and that it might be said that time to challenge it would come to an end on 26 October 2016. Mr Knight therefore sought advice from Mr Fookes, the counsel instructed in the case.

41. On 21 October 2016 at 10:39, Mr Knight wrote to Mr Fookes. Mr Knight attached the emails from Mr Raine of 18 October 2016 and Ms Linley's email of 20 October 2016. He told Mr Fookes: "I am reasonably satisfied with SNC's position on the limitation issue although it does not go quite as far as I should have liked". He stated that he had discussed the matter with Mr Lambert "and he wants me to get your positive advice before I accept this". The email asked Mr Fookes "to confirm that I can safely agree to Jane Linley's proposal [not to require a response to the pre-action letter] as I am inclined to do". Mr Fookes replied on 21 October 2016 at 11:32. He did not advise ceasing work on the judicial review. Instead he stated that he would advise replying to Ms Linley to make clear that reliance was being placed on the email and precisely what the implications of that would be. Mr Fookes suggested the following wording:

> "Thank you for confirming that the South Norfolk Council has not yet taken the step of granting planning permission on application 2016/1447 and that the application is yet to be determined, possibly in November 2016 but that no date has yet been finalised. On that assurance, we are happy to agree that there is no need for you to reply to our pre-action protocol letter and to accept your view that there is, as yet, "(no) need (for you) to prepare a reply to your letter dated 17 October as there is no decision to JR". We will rely upon your email as an assurance

> that your Council will take no procedural or limitation point on delay against our clients should any grounds for a claim for judicial review arise from your actual decision on this application."

42. Mr Knight wrote to Ms Linley in those terms on 21 October 2016 at 12:15. Ms Linley replied at 16:05. She stated: "South Norfolk have not granted planning permission and the earliest it would be able to do is after its November committee meeting, given that it decided at its October meeting to carry about a site visit". The email continued "I will take instructions on whether or not South Norfolk would take any procedural or limitation points on delay should your client eventually choose to JR its decision, once a decision is made. However, I will advise South Norfolk not to take any point…"

43. Mr Knight forwarded Ms Linley's email to Mr Fookes and asked "whether we can safely accept the email below" and stop preparing to issue a judicial review claim, Mr Fookes replied on Friday 21 October 2016 at 17:18 that "We do need [Ms Linley] to confirm that they will take no point on delay if we do not go ahead now." On Saturday 22 October Mr Fookes sent a further email to Mr Knight which stated "The reason we need to protect ourselves if we do not get agreement from the Council not to take any delay point is that the time provision may still apply to our [Environmental Impact Assessment ("EIA")] screening challenge…", and he referred to a court decision on the timing of such challenges. On Monday 24 October 2016 at 11:25 Mr Knight emailed Mr Lambert and stated "I have not had an unequivocal response from the Council and so Robert Fookes of Counsel and I have agreed that we ought to make ready your protective Judicial Review proceedings bearing in mind that if we receive unequivocal assurances in the meantime we can simply pull the plug on the [judicial review ("JR")] at any time up to its actual commencement but if we hope for unequivocal assurances but do not get them we may be stranded from a JR perspective." On 24 October 2016 at 15:07, Mr Knight emailed Ms Linley and stated "I am afraid that the equivocal response to my email last Friday 21 October 2016 has caused the residents for whom I act and their Counsel to feel obliged to issue the Judicial Review on a protective basis because in the absence of an unequivocal confirmation that the Council will not take any delay point, the residents for whom I act cannot risk their interests being fatally jeopardised."

44. Ms Linley responded on 24 October 2016 at 16:24. She stated "I am … authorised to say that should proceedings be issued … the Council will not seek to defend them on the basis that they are out of time because the proceedings are issued more than six weeks from 14 September 2016." Mr Knight responded on 25 October 2016 at 9:36 and stated he was taking her email as a "belated unequivocal response to my request for confirmation that no delay point will be taken by the Council to remove the need to issue a protective JR in respect of the events of 14 September 2016". He noted that he had "copied this email to my clients, their Counsel and three interested parties and as soon as I have instructions and advice I shall reply definitively." Mr Fookes confirmed that he was satisfied with Ms Linley's email of 24 October 2016, and that, on the basis of it, he considered it was not necessary to issue judicial review proceedings protectively. Mr Fookes' views were forwarded to Mr Lambert at 11:28 on 25 October 2016. Mr Lambert agreed at 12:21 that "there is no need to go for judicial review at this time". Work then ceased on preparation for issuing a judicial review claim.

Findings

45. I do not consider the Defendant was negligent in considering that SNC's decision of 14 September 2016 might be susceptible to judicial review and preparing to issue protective judicial review proceedings up to and until 25 October 2016.

46. It may be that other solicitors would have been less cautious, but I do not consider that the approach the Defendant took was outside the standards to be expected of a reasonably competent solicitor specialising in planning law. The precise nature of the 14 September 2016 decision was not so clear that no reasonably competent solicitor would have acted as the Defendant did. Indeed, Ms Linley's email of 20 October 2016 suggested that there had been a resolution to grant planning permission, which is a decision susceptible for judicial review, albeit that the decision had not been "implemented". In circumstances in which the consequences of a failure to comply with an applicable limitation period could have been that any decision of 14 September 2016 would not be amenable to challenge, I do not consider the Defendant's cautious approach was negligent. That applies in particular to the potential EIA challenge, which, at least in the view of counsel, might have been time barred if a challenge was not brought at the time.

47. Furthermore, the Defendant acted in reliance on express advice from specialist planning counsel. It was not disputed that a solicitor is entitled to rely upon the advice of counsel properly instructed (see *Locke v Camberwell District Health Authority* [2002] Lloyd's Rep. P.N. 23, 29). That is subject to the caveat that the solicitor "must not do so blindly but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it" (ibid). In the present case the Defendant forwarded Mr Fookes the relevant correspondence with SNC and followed Mr Fookes' advice that it was advisable to proceed with preparing to issue a judicial review claim unless and until SNC provided an "unequivocal confirmation" that it would not take any delay point. The Defendant followed that advice and there was no suggestion it was "obviously or glaringly wrong". Nor is there any basis for suggesting the Defendant negligently delayed in seeking the "unequivocal confirmation" that counsel considered was necessary. To the contrary, as the chronology of emails set out above indicate, there was no delay in acting on counsel's advice or in corresponding with SNC and their legal advisers, with emails being sent by return or at the latest the following working day. It was at 16:24 on 24 October 2016 that Ms Linley provided the unequivocal assurance counsel had said was required. It was only then counsel advised it was unnecessary to issue judicial review proceedings protectively and work on preparing the judicial review ceased shortly thereafter. I do not consider that the Claimants have established that proceeding in that way was negligent.

Second allegation: treatment of counsel's advice of 10 October 2016

Issue in dispute

48. Mr Fookes was instructed on 6 October 2016 to produce a letter before claim, and on 10 October 2016 he sent a draft to Mr Knight. Mr Fookes' covering email referred to difficulties with any potential challenge which are set out below. The covering email was not in any formal sense an "advice" for a client. It contained brief observations

about the case from Mr Fookes to Mr Knight. The Claimants described it as an "advice", however, and I refer to it as such below.

49. The Claimants claim they were not told the contents of the 10 October 2016 advice, and that that failure was negligent and/or a breach of contract. The Defendant did not dispute that it may well have been in breach of duty if it failed properly to advise a client on the prospects of success of litigation, including by taking reasonable steps to ensure the client was aware of any negative advice from counsel, and Mr Knight expressly accepted in cross-examination that the Defendant was "obliged" to pass on Mr Fookes' advice as to the merits of the litigation. The Claimants' case was that that did not occur, and it was said in closing that the "main breach relied on [in the claim was] the failure to pass on counsel's advice", and, in that regard, the "most important" of those failures was the failure to convey the contents of Mr Fookes' 10 October 2016 email. As set out below, the Claimants also submit, in the alternative, that if the contents of the advice were passed on, they were not passed on properly, but their primary contention was that they simply were not told of Mr Fookes' views at the time.

50. The Defendant did not expressly concede that if Mr Fookes' advice of 10 October 2016 was not passed to the Claimants, it would have been in breach of its contractual or tortious obligations, but the contrary was not argued with any vigour. Instead, the Defendant's case was that, while Mr Fookes' email was not forwarded to the Claimants, its contents were adequately relayed orally to Mr Lambert by Mr Knight, and that doing so was not outside of the range of steps a reasonably competent solicitor could take.

Relevant evidence

51. As indicated, on 10 October 2016 Mr Fookes sent Mr Knight a draft letter before claim. The covering email made a number of comments about the potential claim. It stated: "the grounds are weak (there do not appear to be any landscape grounds in respect of the properties to the south)". Mr Fookes continued "although I have included an Environmental Assessment point – I need to warn you [of a number of legal difficulties]." Mr Fookes further noted that "as far as [a ground based on a lack of] consultation is concerned [one of the residents stated] that they did receive a letter of consultation on 6 July 2016 … but did not take in the details." Mr Fookes also stated: "I could not find any suggested legal grounds in the papers," and at the end of the email he wrote "Please let me know if you can think of any better legal grounds of challenge".

52. Mr Knight accepted that he did not forward Mr Fookes' email, but he stated in his witness statement that he "adequately relayed Mr Fookes' advice in [his] various exchanges with Mr Lambert". In cross-examination Mr Knight stated that he informed Mr Lambert of Mr Fookes' views, as set out in the 10 October email, on 12 October 2016 when Mr Knight and Mr Lambert were in the car on their way to the meeting of the SNC planning committee at South Norfolk House. Mr Knight was pressed on his recollection of events in cross-examination. He stated:

> "We took Mr Lambert's girlfriend to Diss railway station and we didn't discuss the application or anything about it at all until we had dropped her off and she climbed up some stairs and got on the train and then we got in the car… Mr Lambert started off by coming up with various anecdotes, including somebody who had owed him some money who he forced to pay, and this is while

> we were driving thorough Diss, and then I said: "Look, I need to talk to you about the -- I need to talk to you about the planning application and what we're going to do now and, you know, I need to tell you that Robert Fookes is pretty uncertain about the merits of this. We need to do lot more work on it. I think he's being overcautious, but..." And that would have been the way the conversation went and I can remember having that and [Mr Lambert's response] was just; "No, we've got to win it, you know, I don't do failure, we're going to … push ahead…" And actually, you know, having been driven round the development site and seen the effect it would have had on the area, I could understand where he was coming from."

53. It was put to Mr Knight that Mr Lambert's evidence was that he was not told of Mr Fookes' views. Mr Knight denied that. He stated he was "certain that I told [Mr Lambert] in the car between Diss Railway Station and South Norfolk House" of Mr Fookes' advice. It was put to Mr Knight that those details were not included in his witness statement. Mr Knight accepted that, but stated that he had recalled the details during the week of the hearing when going through the documents in the case. Mr Knight stated in cross-examination that he specifically passed on Mr Fookes' views that "the grounds are weak" and generally that he conveyed Mr Fookes' advice. Mr Knight further stated in cross-examination that when he did so he said words to the effect of "I've worked with Robert [Fookes] for a number of years. He's always pessimistic. He is always cautious. In my experience he's often overcautious. This is at a relatively early stage."

54. Mr Lambert's evidence was that he had not been told of Mr Fookes' views at the time, and that, had he been, he would have ceased then and there to instruct the Defendant.

Findings

55. The allegation regarding the 10 October 2016 advice turned largely on a narrow dispute of fact, namely whether Mr Knight passed on Mr Fookes' advice (with the caveats he explained) or whether he did not. The Claimants invited me to prefer Mr Lambert's evidence. The Defendant invited me to prefer that of Mr Knight. The parties' general submissions on the reliability of the two witnesses are set out above. Mr Bryant also submitted that any weight that could be given to Mr Knight's account was undermined by the fact that the details of the circumstances in which he passed on the advice to Mr Lambert were only recalled shortly before Mr Knight gave evidence. Mr Bryant made clear he was not suggesting Mr Knight was lying, but submitted that reliance should not be placed on an account given for the first time at such a late stage in the proceedings, and he invited me find that the contents of Mr Fookes' advice were not, in fact, relayed to Mr Lambert as Mr Knight claimed.

56. In circumstances in which it is not said either witness was lying and where I did not find either witness, in some general sense, to be inherently more credible or reliable than the other, it is inevitably not straightforward to decide what occurred in a conversation more than five years ago. Ultimately, however, I have preferred Mr Knight's evidence and concluded it is more likely than not that Mr Fookes' advice of

10 October 2016 was conveyed to Mr Lambert in the terms Mr Knight described. I thusconclude that Mr Knight most likely did pass on the substance of Mr Fookes' views about the case, including the fact that Mr Fookes thought the judicial review "weak" and could not at the time "find legal grounds … in the papers".

57. The reason I reach that conclusion is as follows:

i) I appreciate the concerns expressed on behalf of the Claimants that Mr Knight only recalled the details of the discussions with Mr Lambert on 12 October 2016 shortly before the trial, and that they were not referred to in his witness statement. It was not, however, suggested that Mr Knight's account of the conversation on 12 October 2016 was a late concoction, and I accept he recalled the details when preparing for trial as he suggested. I also consider that the level of detail about the day in question, which Mr Knight was able to recall, to be significant. The detailed surrounding circumstances Mr Knight described, and other matters he recalls being discussed on 12 October 2016, were not challenged, and the fact Mr Knight was able to recall them in such detail suggests he had a good memory of the conversation in question. Mr Knight's evidence was that he was "certain" he conveyed Mr Fookes' advice during the course of the conversation. I consider it is likely that he was correctly recalling having done so.

ii) Mr Knight's account is also supported by the surrounding circumstances. I consider it very likely that on 12 October 2016 Mr Lambert and Mr Knight would have discussed the merits of a challenge to any decision by SNC to grant planning permission, given that they were attending a meeting where that was being discussed. Mr Fookes had recently been asked to work on the letter before claim and had provided it two days earlier. In that context I consider it likely Mr Fookes' views would have been discussed, and likely that Mr Knight would have passed on the concerns Mr Fookes had expressed on 10 October 2016.

iii) Mr Knight's account is also supported by an email he sent two days later, on 14 October 2016, to Mr Rackham. Mr Rackham was a friend of Mr Lambert's and client of the Defendant, who was also concerned about the development. The email was copied to Mr Lambert. It stated "Mervyn [Lambert] and I think that we have got a fight on our hands here… Judicial Review proceedings are notoriously complex and unpredictable and so while we shall do everything we can to make a successful outcome possible it would be hubristic to suggest that it is likely." Mr Lambert did not suggest he had not seen the email. There is no evidence that Mr Lambert sought to correct the statement that he and Mr Knight thought they had a "fight on [their] hands" or to question the indication it would be "hubristic" to suggest a successful outcome was "likely". That supports the suggestion that Mr Lambert was aware of the potential difficulties with the case, and that is consistent with him having been told of Mr Fookes' concerns and discussed them with Mr Knight two days earlier.

iv) I also attach significant weight to an email sent on 22 October 2016 from Mr Fookes to Mr Knight, which was forwarded to Mr Lambert. Mr Fookes enclosed a bundle that would need to be filed if the claim was to be issued protectively. In the covering email Mr Fookes again made observations about the case. He referred to the timing of a potential EIA challenge but then stated "if in fact we

have [an EIA challenge]" (suggesting he considered that such a ground might not exist). He continued: "I am sure there are other points but I have not found them yet". Mr Lambert responded on 23 October 2016 to the email forwarding Mr Fookes' email to him, and so clearly received it. I agree with the Defendant's submission that the views expressed by Mr Fookes on 22 October were only a "small step on" from those he had expressed on 10 October. In the 10 October email Mr Fookes had stated he "could not find any suggested legal grounds of challenge". In the 22 October email he suggested there might be an EIA ground (though even that was doubted), and Mr Fookes stated he had "not found" any other points. It is true the 22 October was more optimistic about the possibility of finding grounds of challenge, but ultimately the substance was the same as the 10 October email, namely that Mr Fookes had not identified any good grounds of legal challenge at that stage. There was no suggestion Mr Lambert was surprised or concerned by the contents of the 22 October email. That supports Mr Knight's evidence that he had passed on the contents of the 10 October email, and that Mr Lambert was thus already aware of Mr Fookes' views.

v) Mr Lambert's receipt of the 22 October email also undermines his suggestion that if he had been told of Mr Fookes' inability to identify grounds of challenge on 10 October 2016 he would have immediately ceased to instruct the Defendant. He was informed of Mr Fookes' views to that effect in the 22 October 2016 email, and that did not lead to his raising concerns let alone ceasing to instruct the Defendant. Furthermore, if, in fact, the 10 October email was not passed on to Mr Lambert, as Mr Knight said it was, the receipt of the 22 October email would be of importance in relation to causation. If Mr Lambert did not cease to instruct the Defendant following the 22 October email, which indicated counsel had not been able to identify any substantive grounds of challenge, there is no reason to believe he would have done so following the 10 October email saying essentially the same thing.

vi) Finally, Mr Lambert's evidence was that he believed he had paid an initial £4,000 for counsel to advise on the papers and to draft a letter before claim. It was put to Mr Lambert in cross-examination that if he paid money for an advice from Mr Fookes, but had not received one, he would have asked for it. He stated "I didn't because I had no reason to believe that there's anything missing at that stage." That, however, is not consistent with Mr Lambert believing he had paid money for an advice he had not received. I consider that the more likely reason Mr Lambert did not ask Mr Knight for Mr Fookes' advice on the merits of the case in October 2016 was because Mr Fookes' views had, in fact, been relayed to him by Mr Knight during their discussions on 12 October 2016.

58. For these reasons I have concluded that counsel's views as set out in the 10 October 2016 were, in substance, passed to Mr Lambert. For the Claimants, Mr Bryant invited me to reach a different conclusion. He submitted in closing that at the "heart of the case" was Mr Knight's misapprehension that Mr Lambert wished to pursue the judicial review as part of a "wider strategy" to prevent the development at Harvest House by delaying it. That strategy could succeed even if the judicial review ultimately was not itself successful. Mr Bryant submitted that that was Mr Knight's "strategy" not that of Mr Lambert. He submitted that Mr Lambert was not wedded to bringing a judicial

review, and if Mr Lambert had been told of the difficulties counsel had identified with the judicial review in October 2016 he would not have proceeded. Given that Mr Lambert did proceed, Mr Bryant invited me to conclude that it followed he was not told of Mr Fookes' reservations about the case at the time.

59. Mr Knight denied in cross-examination that using a judicial review as part of a wider strategy to prevent the development was his plan and was not shared by Mr Lambert. He stated that the strategy was Mr Lambert's. He also said that, ultimately, the strategy was successful. Despite the planning permission being granted and the judicial review failing, the development never in fact occurred. While Mr Knight accepted he did not know for certain why the developer did not proceed with the development, he suggested it may well have been the result of the threats of legal action and wider campaigning efforts by Mr Lambert and others which delayed the development to such an extent as to render it unviable. Thus even if the judicial review failed in a legal sense it assisted to secure the wider goal of preventing the development.

60. Whether or not it was Mr Lambert's conscious "strategy" to use the judicial review as a means of delaying the development, it was clear he wished to stop it going ahead. It was Mr Lambert's pleaded case that he "opposed the proposed development" and he was quoted in a local newspaper on 17 August 2017, after permission to bring the judicial review was refused, as saying "the legal battle is not over. I am certain that [the application] will fail. Watch this space, I don't do failure. I have already spent a considerable amount of money and I'll have to spend some more to stop this." It was consistent with those sentiments that Mr Lambert would not have simply abandoned the judicial review if told at the outset that Mr Fookes had not, at that stage, found good grounds of judicial review, and, as I indicated, he did not cease to pursue the proceedings when sent Mr Fookes' email of 22 October 2016 containing similar information.

61. Furthermore, ceasing to instruct the Defendant and giving no further consideration to the prospect of judicial review would have been a peculiar response to being told the contents of the 10 October email. As set out below at paragraph 97, Mr Knight's advice at the time was that any decision that had been made on 14 September 2016 was likely to be flawed on procedural grounds because adequate notice to local residents had not been given. It appears that advice was correct as SNC did not seek to rely on any such decision. It would have been a peculiar approach for someone, clearly opposed to a proposed development and determined to stop it, on being told that the 14 September 2016 decision was procedurally flawed and likely to be made afresh, to decide he would not under any circumstances judicially review any *further* decision by SNC to grant planning permission if it were made because counsel could not, as of 10 October 2016, identify substantive grounds of challenge. It is more likely, as I have concluded occurred, that Mr Lambert, having been told of Mr Fookes' views and Mr Knight's caveats to them, decided to await any final decision from SNC on planning permission and see if there were, at that stage, grounds to challenge it. And as set out below, Mr Fookes was, in fact, able to find grounds of challenge to the 2 March 2017 decision when it was eventually made.

62. Mr Bryant also sought to argue that, even if Mr Knight did tell Mr Lambert of Mr Fookes' reservations expressed in the 10 October 2016 email, he was negligent in the way in which he communicated the information. With hindsight it may have been better for Mr Knight to have forwarded the 10 October email itself, but I do not consider it

fell outside the conduct of a reasonably competent solicitor to have passed on the advice in the way that Mr Knight did, orally and with the caveats Mr Knight added. I have concluded that Mr Knight passed on the substance of the advice, and as set out below, I do not consider that Mr Knight was negligent in holding, and expressing, more optimistic views on the merits than Mr Fookes, provided, as I have found, the latter's views were properly conveyed. Another solicitor may have acted differently, or passed on the advice in a different way, but I do not consider the evidence before me establishes no reasonably competent solicitor would have acted as Mr Knight did. On that basis I do not consider the Defendant was negligent in relation to Mr Fookes' 10 October 2016 email either in relation to whether its contents were communicated (which I consider they were), or the means by which the contents were conveyed.

Third allegation: advice contained in 27 February 2017 email

63. The Claimants allege that "negligently wrongful" advice was set out in an email from Mr Knight on 27 February 2017. I deal with that below at paragraphs 101-102 in the context of the general allegation of a failure to advise on the true prospects of success of a judicial review.

Fourth allegation: Defendant's comments on counsel's draft advice of 10 March 2017

Issue in dispute

64. On 1 March 2017 SNC granted planning permission in relation to Harvest House with conditions, and notice was given of the decision on 2 March 2017. On 10 March 2017 Mr Fookes sent a draft advice to Mr Knight. That was relayed to Mr Lambert on 13 March 2017 with a covering email.

65. The Claimants' pleaded case was that the Defendant had failed to pass on counsel's "true views" and that the "failure to pass counsel's views was negligent". An allegation that Mr Fookes' views, as expressed in his 10 March 2017 draft advice, were not passed to Mr Lambert cannot, in itself, be made out. The advice was sent to Mr Lambert and he did not dispute that he received it. In submission, the Claimants' case, instead, was that the covering email from Mr Knight, which attached the advice, placed an inappropriate "spin" on the advice and that that constituted a "negligent misrepresentation" of it.

Relevant evidence

66. On Friday 10 March 2017 Mr Fookes provided Mr Knight a document headed "advice". I set out below the contents of the document, but it is apparent that the "advice" was very much in draft form. The covering email from Mr Fookes described the "advice" as a "draft of my assessment of the issues so far", and in relation to some of the areas covered, such as "noise", it is clear that Mr Fookes was seeking further information before reaching even a preliminary view on the merits.

67. On Monday, 13 March 2017 Mr Knight forwarded the draft advice to Mr Lambert. In the covering email he wrote: "I attach Robert Fookes of Counsel's advice dated 10 March 2017 which on the face of it seems to be rather discouraging but which I think you and I need to interpret as an amber light for the JR challenge or challenges rather than a red or a green light." The email went on to state that the document should not be

shared "not least because it is very much a draft and one on which Robert Fookes and I are currently working". Mr Knight continued "Unless I hear from you to the contrary I shall assume that I am to tell Robert to get on with drafting the Claim Form etc. with you as the lead Claimant…" The email then explained that a conference was to be organised with Mr Fookes and Mr Vivian, a noise expert, to explain the noise issues to Mr Fookes. The Claimants' case is that the covering email, and in particular the statement that the advice was to be interpreted as an "amber light" rather than a "red light", negligently misrepresented Mr Fookes' advice.

Findings

68. The allegation in relation to the March 2017 draft advice is part of the wider allegation of a failure to pass on counsel's views and of failing to advise properly on the prospects of success of the judicial review. That is dealt with below. The allegation relating to the 10 March 2017 advice was, however, pleaded as a discrete issue and dealt with as such by the parties at the hearing. I will therefore set out my findings in relation to it separately, as well as dealing with it in the context of the more general allegation.

69. I take Mr Knight's description of Mr Fookes' 10 March 2017 advice as "an amber light … rather than a red or a green light" as indicating that, while Mr Fookes had doubts about the prospects of a judicial review, and that caution should therefore be taken before proceeding, he was not suggesting work on the judicial review should stop there and then as there was no proper basis for it to proceed. I do not consider that negligently misrepresented the advice.

70. As Mr Bryant accepted, Mr Knight's description of the advice was intended to be a "summary", and it was not suggested that Mr Knight did not genuinely consider that the advice was an "amber" rather than a "red light" for proceeding with the claim. I do not consider that interpretation, and the way it was described in the covering email, was outside of the range of advice a reasonably competent solicitor could give. That was, in particular, where the advice was itself forwarded, so Mr Lambert could check for himself whether the advice could fairly be described as "rather discouraging" but nevertheless as an "amber light", or whether counsel was advising that the claim should simply cease.

71. Mr Fookes' draft advice was discouraging about some of the potential grounds of challenge. For example, a ground based on "habitats regulations assessment" was "not consider[ed] arguable." A "visual impact ground" was also regarded as difficult, but counsel nevertheless posed some questions about it. A ground based on "harm to a listed building setting" was considered a "difficult matter to argue … but it might be sufficient to obtain permission." A potential EIA ground and an "existing use ground" were referred to and further information sought in relation to them. "Unlawful demolition" and "change of use" grounds were dealt with in negative terms and counsel advised "I am not at all sure that this argument will run." On a potential "noise" ground, further information was sought, and the advice on a potential "traffic" ground was generally negative. At the end of the advice, counsel asked "any other potential grounds?"

72. It is apparent that Mr Fookes thought a number of potential grounds could not be pursued, but in relation to others he had further questions and sought further assistance or information. As set out above, Mr Knight's evidence was that he had worked with Mr Fookes over a number of years and considered him to be generally "pessimistic"

and "often overcautious". It was not suggested that Mr Knight did not genuinely hold that view or that he was negligent in reaching it. Mr Knight stated in cross-examination that he did not interpret Mr Fookes' advice as being to stop work on the case "there and then", but to proceed with caution and see if better evidence could be found. He noted that he and Mr Lambert worked hard to improve the case following Mr Fookes' advice "and we subsequently managed to persuade Mr Fookes that actually we did have some arguable grounds and that there was a viable JR challenge to be made". Given Mr Knight's experience working with Mr Fookes and the contents of the latter's advice of 10 March 2017, I do not consider that Mr Knight regarding that advice as being an "amber light," was outside of the range of advice a reasonably competent solicitor could give.

73. It is notable, in that regard, that a number of the grounds on which counsel had further questions, such as the EIA ground and the "noise" ground, were, in fact, subsequently included in the Statement of Facts and Grounds issued with the judicial review application on 12 April 2017. The "noise" ground in particular was included in the light of information obtained after 10 March 2017 (see below at paragraph 75). A ground concerned with harm to a setting of a listed building, which counsel had considered "difficult" on 10 March 2017, was also included as were other grounds based on irrationality and breach of natural justice. As the Claimants accepted, the fact those grounds were pleaded by Mr Fookes must have meant he considered, at least by 12 April 2017, that they were properly arguable. Whilst that, of course, occurred after the email from Mr Knight describing the advice as an "amber light", it does suggest Mr Knight's assessment of the draft advice was reasonably accurate, namely that counsel's advice appeared "discouraging" but that a basis for pursuing the claim might be found if further information was obtained. That was ultimately what occurred, and I do not consider Mr Knight describing the advice in the terms he did in his 13 March 2017 email could be regarded as negligent.

Fifth allegation: continued reliance on traffic and noise issues

Issue in dispute

74. The fifth allegation, as pleaded by the Claimants, is that the Defendant negligently "persisted in seeking to rely on [noise and traffic matters] … despite counsel's views that neither … raised points of law". In essence, the allegation is that Mr Fookes did not consider that there were any "points of law" on noise or traffic (by which I take to mean that counsel did not consider that there were any properly arguable grounds concerning those matters), but that the Defendant insisted that they be pursued in the judicial review, and was negligent in doing so.

Relevant evidence

75. The relevant evidence is as follows:

    i) On 14 March 2017 Mr Fookes emailed Mr Knight and attached a draft pre-action protocol letter challenging SNC's decision of 2 March 2017. He stated in the covering email "it does not include noise or traffic as I do not have any grounds for legal challenge." Mr Knight responded on the same day attaching various documents and stated "I noted that you have a handful of questions for … [the noise expert] and I shall put these to him overnight and shall revert with his

answer once I have received them." Mr Fookes responded and repeated that he did "not have any noise or traffic point of law at the moment". That evening Mr Knight responded and stated "please let me know what else you need to be able to include noise and traffic."

ii) The following day, 15 March 2017, Mr Fookes responded attaching a further draft of the pre-action letter and stated "I have put in something about traffic and noise but we will need to review before making a claim". That evening, Mr Fookes sent another email having received further material. Mr Fookes did not consider some of the material raised "legal argument", but in relation to noise, Mr Fookes stated "if you wish to add anything from [the noise expert] to the pre-action protocol [letter] – feel free. As long as we have raised the issue we have a little latitude when we come to draft the actual JR application"

iii) On 17 March 2017 the pre-action letter was sent. It included grounds based on noise ("Failure to carry out the assessment of noise and impose appropriate conditions…") and a ground concerning access to the site.

iv) On 3 April 2017 SNC responded to the pre-action letter resisting the claim.

v) On 8 April 2017, after Mr Fookes had produced draft judicial review grounds, the noise expert, Mr Vivian, provided a draft witness statement with respect to noise. It was sent by Mr Knight to Mr Fookes that day and in the covering email Mr Knight wrote, "this needs further work but I think that it is actually quite helpful if you think there is any possibility of getting this evidence or something like it into our JR. Would you like me to work this up or is it inadmissible?" Mr Fookes responded and stated "at last" (which I assume meant that there was now "at last" the evidence he was seeking to enable the noise issue to be properly pursued). He attached draft judicial review grounds with amendments and advised that Mr Vivian's statement be submitted in the judicial review. Mr Fookes suggested some relatively minor changes to Mr Vivian's statement but wrote "apart from that I think [the noise statement] is very helpful."

76. The judicial review was issued on 12 April 2017 with a Statement of Facts and Grounds drafted by counsel. They included noise and access grounds. Following the refusal of permission on the papers, the renewal grounds dated 19 June 2017, signed by counsel, continued to pursue the noise ground (though not the access ground).

Findings

77. I do not accept the Defendant negligently insisted upon pursuing grounds relating to noise and traffic despite counsel's views that "neither … raised points of law".

78. As is clear from the evidence above, counsel's views were, initially, that he could not find grounds of challenge relating to noise and traffic, but on 15 March 2017 he agreed to include such grounds in the pre-action letter on the basis that the matter be "review[ed]" before any claim was made. Later that day Mr Fookes specifically suggested raising the issue in the pre-action letter as that would give "latitude when we come to draft the actual JR application" (by which I take to mean that provided the issue was raised in the pre-action letter it could then be pursued in any claim if evidence were obtained). Subsequently, on 8 April 2017, when the evidence from Mr Vivian was

provided, Mr Fookes appeared positively to encourage pursuit of the noise ground, describing Mr Vivian's statement as "very helpful" and noting that "at last" there was evidence to support the ground. Mr Fookes then included the noise ground, as well as an access ground, in the pleadings which he drafted.

79. There was no suggestion before me that Mr Fookes was not exercising independent judgment throughout or that he was somehow improperly pressured into pursuing grounds he considered had no legal basis or which were unarguable. It is true that initially Mr Fookes was concerned about whether noise or access could be properly pursued. He was, however, content for the grounds to be included in the letter before claim, and indeed positively supported their inclusion. Mr Fookes then himself included the noise and access grounds in the Statement of Facts and Grounds having received the evidence of Mr Vivian. Mr Fookes must therefore have concluded, as the Claimants accept, that the grounds were properly arguable and should be pleaded. In those circumstances, I do not consider that the Claimants have established that noise and access grounds were negligently pursued by the Defendant.

Sixth allegation: failure to advise the Claimants on the true prospects of success of a judicial review

Issue in dispute

80. The Claimants pleaded that "generally the Defendant failed to give either of the Claimants advice as to the true prospects of success of any application for judicial review." In the Claimants' opening skeleton argument, it was asserted that "Mr Knight gave bullish advice at the outset and continued to give encouraging advice even when counsel was advising that he could find no grounds for judicial review." The Claimants then listed a series of occasions on which "bullish" advice was said to have been given (directly and indirectly) to Mr Lambert. The Claimants had pleaded two specific occasions on which it was said that "negligently wrong" advice had been provided (on 16 September 2016 and 27 February 2017) but otherwise had not alleged that specific advice from Mr Knight was negligent. Following receipt of the Claimants' skeleton, the Defendant objected that the Claimants had not pleaded the great majority of the instances in which it was said incorrect advice had been provided. The Defendant contended that it therefore did not have a proper opportunity to respond, and argued that the Claimants should not be permitted to pursue allegations of negligent advice given by Mr Knight where they had not been specifically pleaded as such.

81. I heard submissions on the issue at the start of the trial. Following the submissions, the Defendant refined its position. It accepted the Claimants were entitled to pursue the allegation that "generally the Defendant failed to give either of the Claimants advice as to the true prospects of success of any application for judicial review". The Defendant also accepted the Claimants could put to Mr Knight individual instances of advice said to support that claim. The Defendant stated, however, that it would object if the Claimants sought to argue that advice given on some particular occasion was one that no reasonable solicitor would give. That was accepted by the Claimants. They invited me to find that, overall and taken as a whole, the Claimants were not told of the "true prospects" of success of their claim, but did not invite me to find some particular piece of advice was "negligently wrong" (other than those specifically pleaded as such).

82. The Claimants sought to pursue the allegation of a failure to advise in two ways. First, and as Mr Bryant put it in closing, the "main breach" relied on was the failure to pass on counsel's advice. In addition, as I have indicated, it was said that Mr Knight gave overly "bullish" advice rather than informing the Claimants of the "true prospects" of any judicial review.

83. I will consider the two ways the allegation were put in turn.

Failure to pass on counsel's advice: relevant evidence

84. The Claimants relied on a number of occasions on which, it was said, counsel's advice was not, and should have been, passed on to them:

i) The Claimants relied on the alleged failure to pass on counsel's advice of 10 October 2016. That is dealt with above at paragraph 48-62.

ii) On 19 October 2016 Mr Fookes wrote to Mr Knight. This was shortly after the letter before claim was sent on 17 October and at a time when there was a concern that proceedings might need to be issued by 26 October. It appears at that stage Mr Fookes may have believed that a substantive decision had been taken by SNC on 12 October 2016, rather than simply deciding to defer a decision pending a site visit as in fact occurred. Mr Fookes stated in the email "I will need to know what legal grounds there are to challenge. Most of the matters are planning objections which will have been re-considered on 12 October."

iii) On 22 December 2016 Mr Fookes wrote to Mr Knight and noted that "at present the only point of challenge that might arise would seem to be the question of the adequacy of the [EIA] Screening Opinion. However if successful that does no more than delay matters for further determination." The letter continued "I am still in the position I was in when I sent my email on [19 October 2016] to you as to any precise grounds of challenge available".

iv) Following SNC's grant of planning permission on 2 March 2017, and prior to the letter before claim being sent on 17 March 2017, Mr Fookes raised questions about various potential grounds of challenge. On 7 March 2017 he sent an email in relation to an "ecology" point and said "I am not optimistic that there is any legal point here but I may have missed something." On 9 March 2017 Mr Knight sent Mr Fookes an email from Mr Porter raising various issues about the development. Mr Fookes replied on the same day stating "none of those appear to raise points of law available on a JR." As set out above at paragraph 75(i)-(ii), on 14-15 March 2017 Mr Fookes sent Mr Knight emails in which he suggested that, at that stage, he did not consider there were "noise" or "traffic" points of law that could be raised.

v) On 10 March 2017 Mr Fookes produced a draft advice. It was sent by Mr Knight to Mr Lambert on 13 March 2017 and described by Mr Knight as an "amber" rather than "red" light. That is dealt with above at paragraphs 64-73.

vi) On 23 March 2017 Mr Fookes exchanged emails with Mr Knight about costs protection. He stated that he was not "confident" Mr Lambert would win on any of the grounds of challenge identified at that stage.

85. It was Mr Lambert's evidence that none of Mr Fookes' views, set out above, were passed on, save the draft advice of 10 March 2017, and, in relation to that, objection was taken to the "spin" put on the advice in the covering email from Mr Knight. Mr Knight's evidence was that the views of counsel were conveyed on each occasion they were given. His response to the allegation in relation to the 10 October 2016 advice is set out above. His response, when cross-examined on the advice in the 22 December 2016 email, was that "I don't believe I forwarded it to [Mr Lambert], but I think that I conveyed the general tenor of it to him in conversation … I would have dealt with it orally", and Mr Knight recalled where Mr Lambert would have been at the time. Mr Knight's response in relation to the 7 March 2017 advice was that he "believe[d]" he passed on the advice "by telephone" and recalled the particular discussion that took place, and he similarly believed that the "tenor" of the emails on 9, 14-15 March 2017 were conveyed. Mr Knight's evidence on the 23 March 2017 email was that "I am sure as I can be that I passed the advice on" to Mr Lambert and "I would have reported its contents to him … by telephone".

Failure to pass on counsel's advice: findings

86. My findings on counsel's advice of 10 October 2016 and 10 March 2017 are set out above at paragraph 48-62 and paragraphs 64-73 respectively. For the reasons I have given, I do not consider that the Defendant acted negligently or in breach of contract in relation to the passing on of that advice.

87. As to the other advice, the key question, again, is whether I prefer Mr Knight's evidence that the advice was passed on over Mr Lambert's evidence that it was not. Ultimately, I have concluded that it is more likely than not that Mr Knight's recollection was accurate, and that he did pass on Mr Fookes' views at the material time. As set out above, I have found that Mr Knight passed on Mr Fookes' advice of 10 October 2016 and 10 March 2017, as well as his advice of 22 October 2016. I consider it likely that Mr Knight would have similarly passed on Mr Fookes' views on the other occasions, and that it was provided in the way Mr Knight suggested in his evidence.

88. I reach that conclusion for the following reasons:

i) Mr Knight was able, at least in relation to some of the instances in which he recalled advice was passed on, to give relatively specific evidence as to the surrounding circumstances and the conversations which took place. His recollection of the surrounding circumstances was not challenged, and I consider it likely Mr Knight was accurately recalling not only the wider matters discussed, but that he passed on counsel's advice during the course of the conversations.

ii) Mr Knight and Mr Lambert were in regular contact discussing the case at the material time, and in March 2017 were gathering material to provide to Mr Fookes to enable him to draft a pre-action letter and then judicial review grounds. It seems likely that, during their conversations, Mr Knight would have discussed Mr Fookes' views on the strength or otherwise of the case.

iii) Mr Knight forwarded Mr Fookes' advice of 10 March 2017 in full. It seems unlikely that, having done so, Mr Knight would have then said nothing about other views expressed by Mr Fookes on particular points as and when they arose. Indeed, it seems likely that Mr Lambert would have expected those to be passed on. In particular after the 10 March 2017 advice, in which Mr Fookes had specifically indicated his views were preliminary and that he needed further information, it seems likely Mr Lambert would have expected, and received, any further views expressed by Mr Fookes as the latter's assessment developed.

89. It was submitted by the Claimants that even if Mr Knight had passed on the "tenor" of Mr Fookes' advice, that was not sufficient, and that Mr Knight was required to forward the particular emails from Mr Fookes. I do not accept that. To succeed with such a claim, Mr Lambert would need to show that no reasonably competent solicitor would have acted as Mr Knight did, or that it was a term of the contract between the Defendant and the Claimants that any expression by counsel of his views on the Claimants' case would be passed on in writing. I do not consider either are established. Mr Knight did pass on the formal "advice" produced by Mr Fookes on 10 March 2017 as well as the email of 22 October 2016. The other expressions of Mr Fookes' views were contained in emails to Mr Knight from Mr Fookes discussing aspects of the case, and in which, *inter alia*, Mr Fookes expressed concerns about some particular ground or about the strength of the case generally. Some solicitors may have chosen to forward every such email to their client. Others may not and I do not accept that no reasonably competent solicitor would have acted as Mr Knight did.

Giving of "bullish" / "encouraging" advice: relevant evidence / findings

90. As set out above, the "main breach" relied on by the Claimants was the alleged failure to pass on counsel's advice. It is not clear to what extent the Claimants were inviting me to find that, if, contrary to their primary case, counsel's advice was properly conveyed, it was nevertheless negligent and/or a breach of contract for Mr Knight, in addition, to express at various times his own more confident views about the prospects of the litigation. The Claimants' pleaded case was that "generally the Defendant failed to give either of the Claimants advice as to the true prospects of success of any application for judicial review." It is not clear whether the Claimants' case is that, even if counsel's views were properly passed on, the Defendant nevertheless failed to advise the Claimants on the "true prospects of success" because Mr Knight passed on his, sometimes different, views.

91. Insofar as that is the Claimants' case, as I have indicated, the Claimants pleaded two occasions on which the specific advice given by Mr Knight as to the prospects of success of the litigation were "negligently wrong". I deal with those below. Otherwise, the way in which the Claimants pursued the claim was to assert that, as a general matter, the Claimants were not given advice as to the true prospects of success of any judicial review. They rely on the failure to pass on counsel's advice, but also on various occasions on which Mr Knight was said to have given inappropriately "bullish" or "encouraging" advice. The latter was helpfully divided in Mr Bryant's submissions into different phases. I will do the same.

Phase 1: 14 September 2016 - 9 November 2016

92. The first phase was following SNC's meeting on 14 September 2016 at which planning permission was considered, and prior to SNC's subsequent reconsideration of the issue on 9 November 2016.

93. The period included the initial phone call between Mr Knight and Mr Lambert of 16 September 2016. In his witness statement, Mr Lambert stated that in the course of the phone call Mr Knight told him that "there were multiple grounds why a JR would succeed". That was specifically referred to in the Claimants' pleadings (though the date of the conversation was not at that stage identified) and the advice was said to be "negligently wrong".

94. As the Defendant pointed out, 16 September 2016 was before either Claimant was a client of the Defendant, so it is not clear what duties were then owed to them. In any event, Mr Knight denied making a statement in the terms asserted by Mr Lambert and I accept his evidence. On 20 September 2016 Mr Knight sent Mr Lambert an email, following up on the phone call, and stated "from what you have told me it seems to me that the case against the Council is strong." It seems likely that Mr Knight would have expressed himself on 16 September in similar terms, and, in any event, if there was any ambiguity as to what was said on the telephone, I would expect Mr Lambert to rely on what was said in the follow-up email summarising the phone call. I consider that the views Mr Knight expressed, namely that based on what he had been told the case appeared "strong", were open to a reasonably competent solicitor. Mr Knight's view remained throughout this period that a challenge to any decision of 14 September 2016 was likely to succeed. For the reasons set out below at paragraph 97, I do not consider that view to have been one no reasonably competent solicitor could have reached, and, indeed, it appears to have been correct. Once the procedural flaws in the 14 September decision were pointed out to SNC, it did not seek to rely upon the decision.

95. The Claimants also pleaded that during the phone call of 16 September 2016 Mr Knight said he would not undertake an application for judicial review "unless there was a high chance of success". In cross-examination Mr Knight said "I absolutely said no such thing", and in his witness statement he said "I would not and did not make such a statement". I accept Mr Knight's evidence. I do not consider it likely an experienced solicitor would have said, in an initial phone call with a potential client, and at a stage at which it would be very difficult to gauge the prospects of success of a case, that he would only take on a judicial review if there was a "high chance of success".

96. Mr Bryant referred to other instances in the period from September to November 2016 where it was said that overly "bullish" or "encouraging" advice was given. He relied, for example, on Mr Knight writing to Mr Lambert on 21 September 2016 stating that "from what I have heard and seen to date, it looks to me to be the case that the permission granted by [SNC on 14 September] is precarious and is likely to be vulnerable to a judicial review challenge because it is basically flawed". The Claimants also relied on Mr Knight writing on 6 October 2016 that in a challenge to the 14 September 2016 decision "we expect to … win" and that "I am quite clear that the planning process has been managed abominably by [SNC]". Mr Bryant referred to other emails and phone conversations in that period which he said were to similar effect.

97. In cross-examination Mr Knight stated he did, indeed, expect any challenge to the 14 September 2016 decision to be successful, and that he considered the process had at that stage been poorly managed. He stated that "[eventually] SNC accepted that …

because they rescinded the 14 September decision". He stated in cross-examination "I thought [Mr Lambert] had a good case for [judicial review] and I thought that it was likely to be unanswerable in relation to the 14 September 2016 planning permission and so it proved." I do not consider that those views on the prospects of success were ones no reasonably competent solicitor might hold. In particular where, as I have found, Mr Knight passed on Mr Fookes' more cautious views in his 10 October 2016 email and explained why he did not share them, I do not consider Mr Knight was negligent. Indeed, it appears that Mr Knight's views of any decision made on 14 September 2016 were correct. SNC did not attempt to rely upon the 14 September decision and agreed to rescind it, or at least not rely on it, when the relevant procedural flaws were brought to its attention.

Phase 2: 9 November 2016 to 2 March 2017

98. The second phase relied on by Mr Bryant was between SNC's reconsideration of the planning application of 9 November 2016 and its decision to grant planning permission with conditions notified on 2 March 2017.

99. Mr Bryant referred to a number of emails sent by Mr Knight in this period to Mr Lambert, or to others copying in Mr Lambert. They included, for example, Mr Knight on 22 February 2017 referring to "planning issues" as "an important [judicial review] ground"; Mr Knight on 23 February 2017 expressing his view that SNC was "vulnerable on … divergence from planning policy"; and Mr Knight writing on 28 February 2017 suggesting that "the noise issues provide a very clear judicial review ground if planning permission is granted tomorrow or subsequently". Other emails to similar effect were relied upon.

100. In cross-examination, where Mr Bryant took Mr Knight to particular emails, Mr Knight confirmed that they reflected his views at the time. He explained, for example, that his views on the noise grounds were informed by what he had been told by the noise expert, and Mr Knight accepted that, overall, he was more positive about the prospects of the judicial review than Mr Fookes. As Mr Knight stated, however, Mr Lambert was aware of that having been told of Mr Fookes' views. It was not put to Mr Knight that his views were not genuinely held, and I do not consider the Claimants have established that no reasonable and experienced planning solicitor could have held the views that Mr Knight did. I did not have evidence before me that the judicial review had such poor merits that no competent solicitors would have held the views Mr Knight did, and the fact that other solicitors may have reached different conclusions, or that Mr Knight's views were more positive than Mr Fookes', does not establish he was negligent.

101. During this period, on 27 February 2017, an email was sent by Mr Knight to Mr Porter, copying in Mr Lambert. As set out above, Mr Porter was at that stage a possible claimant to a judicial review claim. The email stated: "the noise issues were an especially good area for us" and that "we have plenty of grounds for our JR challenge if it is necessary and noise is the most straightforward and very positive but by no means the best overall". This advice was specifically pleaded by the Claimants to be "negligently wrong".

102. I do not consider that the views in the 27 February 2017 email were ones no reasonably competent solicitor would have held or expressed. There were ultimately seven grounds pleaded by counsel when the case was issued on 12 April 2017. As indicated above, it

was not disputed that Mr Fookes must have considered each to be properly arguable. In those circumstances it is difficult to see how it could be said that Mr Knight believing that there were "plenty of grounds for our JR challenge" could be regarded as a view no reasonably competent solicitor could hold. As to the suggestion that noise issues were "especially good", again the evidence before me does not establish that no reasonably competent solicitor could have held that view. As set out above, Mr Fookes was initially sceptical about the noise ground, but after a statement was received from the noise expert, which he described as "very helpful", Mr Fookes considered that the noise ground was reasonable to pursue. The fact that Mr Knight may have been more confident as to its merits than counsel, or that permission was ultimately refused on the ground, does not suggest that Mr Knight's views were ones no reasonably competent solicitor could hold.

Phase 3: 2 March 2017 to 2 August 2017

103. The next time periods Mr Bryant relied on were between SNC's decision of 2 March 2017 and the issuing of proceedings on 12 April 2017, and the period after proceedings were issued until permission was refused on 2 August 2017.

104. Again Mr Bryant relied on a number of emails sent by Mr Knight to Mr Lambert (or copying in Mr Lambert). They included: an email of 13 March 2017 stating that "the failure to consult and final access proposals is a strong JR ground", and an email of 7 April 2017 describing Mr Fookes "as very cautious about the merits. I am less so". On 11 April 2017 Mr Knight wrote to another individual, copying in Mr Lambert, and stated "the first hurdle after issuing JR is to get permission. That ought to be a forgone conclusion but if we fall at the first hurdle we have the option of a full permission hearing." On 3 June 2017, following refusal of permission, Mr Knight wrote to Mr Lambert and stated "these things fluctuate … and during 2016 I achieved permission in cases which I thought were marginal whereas I thought permission was likely or very likely in your case".

105. The various emails were put to Mr Knight in cross-examination. He again confirmed that he did believe, at the time, that the claim would get permission on the papers, and that he was less cautious on the merits than Mr Fookes. Again, it was not suggested Mr Knight's views were not genuinely held, and, as I have concluded, in this period Mr Knight passed on the views expressed by Mr Fookes, including the advice produced in writing on 10 March 2017. As it transpired, and with the benefit of hindsight, Mr Fookes' more "cautious" assessment of the merits may have been more accurate than Mr Knight's. I do not, however, consider the Claimants have established the case was so obviously poor that any reasonably competent solicitor would have advised Mr Lambert not to proceed with the case, nor that no reasonably competent solicitor could have reached the same view on the merits as Mr Knight did. The fact that Mr Knight took a different view to Mr Fookes, that other solicitors may have reached a different view on some or all of the grounds, or that, as it transpired, permission was refused, do not establish negligence.

Overall advice given

106. The Claimants' case is that "generally" the Defendant failed to give the Claimants advice as to the "true prospects of success" of any application for judicial review. That requires considering the advice the Claimants received as a whole. It is not appropriate

to consider only whether some particular statement by Mr Knight, taken out of context and in isolation, may have been overly "bullish" or "encouraging". It is necessary to consider the advice presented to Mr Lambert in the round. In that regard two points are important. First, the Claimants were, as I have found, informed of counsel's views. The Claimants positively rely on those views as accurately indicating the prospects of the litigation. It is difficult, in those circumstances, for the Claimants to establish they were not told the "true prospects" of success even if they were also told of Mr Knight's more positive assessment. Second, it is also important to bear in mind what other advice Mr Knight himself gave to Mr Lambert during the relevant period.

107. Mr Knight's evidence on the latter was as follows:

> "I warned Mr Lambert during out first call, and repeatedly during the retainer, that the outcome of a JR was hard to predict. I do not consider that I could have given Mr Lambert any other impression than prospects of success were finely balanced…
>
> I do not accept the allegation that I generally failed to give Mr Lambert … the 'true prospects of success of any application for JR'. From the very outset of the retainer and repeatedly I was very clear that I could not provide definitive prospects of success in any JRs as, in my experience of such matters, the issues are finally balanced the applications are fact sensitive, bear general litigation risk and the outcome could depend on the particular sensitivities of the judge considering it. Mr Lambert was aware of that wider context. I thought that there were sufficient grounds to seek a JR in this case, though this is not the same as confirming prospects of success of the application."

108. It was not put to Mr Knight that the above evidence was untrue or that his recollection of warning repeatedly of the difficulty of predicting the outcome of the judicial review was mistaken. In those circumstances, even if on some particular occasions, Mr Knight may have been positive about some particular grounds of challenge or about permission being granted, that would need to be taken in the context of the general warnings he gave about the difficulty of predicting the outcome of the case, as well as the fact he passed on counsel's more cautious views. Even if I had found that some particular comment from Mr Knight was overly encouraging, I would not have concluded that, taken overall, the Claimants received advice about the prospects of the litigation that was outside the range any reasonably competent solicitor would have given.

Issues in dispute: Causation

109. It was the Claimants' case that, had they been told of counsel's advice of 10 October 2016, they would have ceased to instruct the Defendant shortly thereafter and expended no further legal fees. Alternatively, and if that argument was rejected, it was said that if they had been properly advised in March 2017, the Claimants would have then ceased to instruct the Defendant.

110. The Defendant invited me to find, if I concluded the advice on the merits of the judicial review had not been properly given, that the Claimants would nevertheless have proceeded with his judicial review. The Defendant argued that such was the strength of

Mr Lambert's opposition to the proposed development that he would have sought to pursue judicial review proceedings even if they did not have good prospects of success. The Defendant contended that Mr Lambert's goal was not narrowly focused on winning the judicial review proceedings, and that he had a wider strategy of seeking to persuade SNC to refuse or reconsider the planning application, or grant it on conditions, and, if possible, delay the development so it became unviable for the developer. That could be achieved, it was suggested, by pursuing a judicial review even if it was not ultimately successful.

111. Given my findings that the Defendant was not negligent or in breach of contract, the issue of causation does not require determination, and I do not consider it helpful to indicate my views on it. Indeed, it is not possible in any meaningful way to engage in a hypothetical exercise of determining whether the Claimants could show, if there was breach of duty, that it caused the losses they claimed. I would need to assume, for example, that Mr Lambert was not told the contents of the various advices from counsel, and decide whether I accept Mr Lambert's evidence as to how he would have reacted had the advice been provided. The difficulty with that exercise is that if I were to assume that counsel's advice was not passed on, I would then have to assume I had preferred Mr Lambert's evidence to Mr Knight's and discount my findings on the surrounding circumstances that had led me to conclude that the contents of the advice was, in fact, conveyed. That would require me to assume hypothetical facts not only about breach, but a large number of other issues. It is impossible to see how that hypothetical exercise could be meaningfully conducted or what value it would be to the parties. I therefore express no views on what I would have found in terms of causation if I had concluded the Defendant was in breach of contract or negligent in one or more of the ways alleged.

Conclusion

112. For the reasons set out above, I have concluded that the Defendant did not act negligently nor breach any term of its contract with either Claimant. The claim for damages therefore fails. That said, I am sure, with the benefit of hindsight, things could have been done differently and that advice and other information that was conveyed, on occasions, orally could have been provided in writing. That may have avoided this litigation. I do not however consider that no reasonably competently solicitor would have acted as the Defendant did, and do not find the Claimants have established a breach of any duties owed to them.