Neutral Citation Number: [2019] EWHC 3035 (Ch)

Case No: BL-2019-000451

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

Rolls Building, Fetter Lane
London EC4A 1NL

Date: 18/11/2019

Before:

CHIEF MASTER MARSH

- -

Between:

(1) Mrs Veline Hoie Maggistro-Contenta

(2) Mrs Veline Hoie Maggistro-Contenta

(as Personal Representative of the late Giacomino Maggistra-Contenta) **Claimants**

- and –

(1) Mr James Patrick O'Shea

(2) Jury O'Shea LLP **Defendants**

Geraint Jones QC (instructed by **Direct Access**) for the **Claimant**
Jamie Smith QC and Mark Cullen (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing date: 2 October 2019

- -

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.

.....

CHIEF MASTER MARSH

Chief Master Marsh:

1. This claim was issued on 1 March 2019 and is based on allegations by the claimants that the first defendant (Mr O'Shea) and the second defendant ("the LLP") were negligent in dealing with the financial affairs of Giacomino Maggistro-Contenta after his death. The LLP is a firm of solicitors and Mr O'Shea is a partner. Although two claimants are named in the claim form, they are, in fact, the same person. She has been named twice on the basis that she is a party in her own right and as her late husband's personal representative. I will refer to her as the claimant.

2. This judgment deals with two applications. On 12 July 2019 the claimant made an application seeking an order extending time for service of the particulars of claim. Subsequently, an application was issued by the defendants on 26 July 2019 seeking two separate strands of relief. First, a declaration that the court has no jurisdiction to try the claim due to late service of the particulars of claim. Secondly, an order that the claim form be struck out for non-compliance with CPR 7.4(2), CPR 7.8(1), paragraph 6.2 of PD7A, CPR 16.2(1)(a) and 16.2(2). The first limb of this application assumed a far greater importance than the second and it will not be necessary to set out the CPR rules that are relied on in full.

3. It is common ground that:

    (1) The claim form was issued on 1 March 2019, amended on 4 March 2019, re-amended on 26 June 2019 and re-re-amended on 27 June 2019. Because these amendments were made before the claim form was served, permission was not needed.

    (2) The claim form was sent to the defendants' solicitors, Kennedys LLP, by first class post on 27 June 2019 and was deemed served on 1 July 2019 which was the last day for service permitted by CPR 7.5(1).

    (3) CPR 7.4(2) required the particulars of claim to be served by the same date, 1 July 2019.

    (4) The defendants acknowledged service of the claim on 12 July 2019 on a conditional basis indicating an intention to dispute the court's jurisdiction.

    (5) The claimant issued her application on 12 July 2019. It was served on 18 July 2019.

    (6) On the same date as serving the application notice, particulars of claim were sent to Kennedys by post and were therefore deemed to be served on 22 July 2019.

    (7) Although the claimant's application does not expressly seek relief from sanctions, the application must be considered against the CPR 3.9 relief from sanctions framework.

    (8) The timing of the issue and service of the claim do not give rise to limitation issues because the events that are complained about took place in 2014.

Therefore, the primary limitation period in contract and in tort of 6 years does not expire until 2020.

Background facts

4. The claimant's husband, Giacomino, died on 6 April 2013 leaving a will which gave his entire estate to her although the will did not appoint an executor. He had fallen ill in January 2013 and, according to his son Tindaro, he was in a coma from that point until his death.

5. Giacomino was a businessman living in London. There are several features of his business activities that bear being highlighted:

   (1) He was assisted and advised in his business dealings and investments by Giuseppe Messuti ("Mr Messuti") who operated through G&M World Invest & Associates Ltd a company that was based at an address in London.

   (2) His business dealings were international in nature and assets were held, at least in part, through offshore structures.

   (3) He had business dealings with Prince Bahar of Brunei. At the time of his death, or in its immediate aftermath, a dispute arose concerning the extent Giacomino's interest in assets that were jointly owned by them.

   (4) He instructed the LLP to deal with legal issues arising from his personal and business affairs and Mr Messuti was known by Mr O'Shea and the LLP as Giacomino's financial adviser and as having an involvement with his financial affairs.

   (5) The claimant held a power of attorney for him dated 12 October 2012.

6. At the date of Giacomino's death he owned, or had an interest in, three principal assets:

   (1) A property at 21 Harley Street London W1 registered in his sole name. 21 Harley Street was the family home in London. It was subject to a charge in favour of Bank of Singapore securing borrowing of about £6.25 million.

   (2) He had an indirect interest with Prince Bahar through an offshore structure in a property in Sicily called Villa San Pancrazio.

   (3) He had an indirect interest with Prince Bahar in a property at 5 Cavendish Square London W1. The property was registered in the name of Nautilus Property Ltd and 50% of the shares in Nautilus were held by the Seaview Trust in which Giacomino and the claimant were beneficiaries.

7. Prior to Giacomino's death, the claimant retained Ms Natalie Moses to assist her in dealing with her husband's affairs. She signed a letter on 2 April 2013 addressed 'to whom it may concern' as Giacomino's attorney giving notice of the appointment of Ms Moses and giving authority to deal with her in matters relating to Giacomino. A further letter was signed by the claimant on 21 October 2013 and provided to the LLP that gave authority to Ms Moses "to liaise with yourselves on my behalf".

8. After his death, the claimant engaged the services of the LLP. Formal relations between her and the LLP, and with Mr O'Shea, derived from:

(1) A written retainer between the claimant and the LLP dated 23 April 2013. The scope of work was defined as "… advising you in your capacity as Successive Life tenant of the Seaview Trust, together with related activities." Under the heading "Instructions from Third Parties" the letter recorded that the LLP was authorised to take instructions from Tindaro.

(2) On the same day a further retainer was entered into between the claimant and the LLP relating to Giacomino's estate "together with related activities". In this retainer under the "Instructions from Third Parties" section it records that the claimant had asked the LLP "… to take instructions from Mr Giuseppe Messuti … and your son Tindaro …". At the hearing it was submitted by Mr Jones, who appeared for the claimant, that this provision only authorised the LLP to take instructions from Mr Messuti and Tindaro acting together. It is unnecessary to decide this point but to my mind the meaning is clear. In the context of the family's extensive dealings with Mr Messuti, and for practical reasons given the need for instructions to be given by email, instructions could be provided to the LLP either by the claimant or Mr Messuti or Tindaro.

(3) On 1 May 2013, the claimant, who is described in the document as Giacomino's only personal representative, executed a deed appointing Mr O'Shea as her attorney under section 25(5) of the Trustee Act 1925. It is not entirely clear to what trust that power related but nothing turns on it.

(4) On 19 July 2013, the claimant appointed Mr O'Shea as her attorney for the purposes of obtaining a grant of letters of administration with will annexed. In the usual way, the grant was intended to be limited for the claimant's use and benefit and until further representation was granted.

(5) On 25 February 2014 the claimant entered into an additional retainer with the LLP in relation to the sale of 21 Harley Street together with related activities. The scope of work went on to say: "The sale of the Property ties in with the grant of letters of administration with will annexed that we are currently assisting you with. We will also be dealing with the release of the charge over the Property in favour of Bank of Singapore Limited."

9. In each case the retainer is subject to the LLP's terms and conditions. They include an exclusion of liability in excess of £3 million and provided that:

> "11.2 The commercial implications of the matters on which you have asked us to advise are a matter for you to assess at all times, unless the contrary is agreed by us in writing.
>
> 11.3 If we are engaged in transactional work, the decision as to whether to complete a transaction remains a commercial decision solely for you. Neither our work nor our advice constitutes a recommendation as to whether or not you should complete or discontinue the transaction."

10. The LLP obtained specialist assistance from another law firm, New Quadrant Partners, in relation to the application for the grant of letters of administration. Save that there was an additional file of papers created by a separate law firm, nothing turns on the division of work in relation to the grant.

11. The essence of the complaint against the defendants concerns two issues. First, the price at which 21 Harley Street was sold and the parties to whom the proceeds of sale were sent and, secondly, the terms of settlement agreed with Prince Bahar. So far as both claims are concerned, it is significant that the grant of letters of administration to Mr O'Shea was obtained on 15 April 2014 which post-dates the exchange of contracts for the sale of 21 Harley Street and the date of the settlement deed with Prince Bahar. It will be necessary to examine the claims that are alleged in detail.

12. In order to clear away points that do not assist the claimant I observe:

    (1) No complaint can be made by the claimant about the defendants having declined to accept service of documents by electronic means. A party is entitled to adopt that approach and in consequence the other party must adapt the way in which procedural steps are handled.

    (2) The requirement in CPR 7.4(2) that particulars of claim must be served no later than the latest time for service of the claim form has been described as a trap for the unwary claimant[1], and in one sense it is. However, it is a provision of the CPR of which the claimants' advisers are expected to be wary. The point has been made many times a legal adviser who leaves service of the claim form until the end of the period for service courts disaster. Furthermore, CPR 7.4(2) is not a provision that is in any sense by design a trap. On the contrary, its purpose is clear. A defendant is entitled to know by the expiry of the period for service, by having received the claim form and particulars of claim, the full extent of the claim that is being pursued by the claimant. If there are genuine difficulties in effecting service or the claimant is unable to formulate the claim in detail due to a delay in receiving papers from the defendant, an application to extend time for service can be made. In this case, there were no difficulties with service. The claimant says the defendants supplied papers late in the day (a point that requires some further examination) but no application to extend time was made.

The claim form

13. The first iteration of the claim form named the claimant as the sole claimant and the LLP as the sole defendant and contained an endorsement providing brief details of the claim based on a breach of common law and contractual duties, breach of fiduciary duty and breach of an unspecified statutory duty. The value of the claim was put at £14 million. It is unnecessary to go through each subsequent version in detail. It suffices to record that:

    (1) Version (2) was sealed on 4 March 2019. It added Mr O'Shea as the second defendant and contained a more extended summary of the claim in

[1] The editors of the White Book described it in this way: see also the remarks made by Edwards-Stuart J in *Venulam Property Investments Ltd v Space Architecture Ltd* [2013] EWHC 1242 at [27].

the "brief details of claim" section of the claim form. The claim was now valued at £18 million.

(2) Version (3) was sealed on 26 June 2019. The claimant was now named as first and second claimant; as second claimant she is a party in her capacity as personal representative of her late husband Giacomino. This was of course quite unnecessary. In this version the defendants are now named in a different order with Mr O'Shea as the first defendant and the LLP as the second defendant. The brief details of claim were re-drafted, at least in part, to reflect the re-ordering of the defendants. The value of the claim is now put at "not less than £10 million".

(3) Version (4) was sealed on 27 June 2019. It makes no changes to the parties or the value of the claim. However, the brief details of claim were substantially redrafted and set out the claims made against Mr O'Shea and the LLP separately. Mr Jones candidly acknowledged that the brief details of claim could have been more felicitously drafted. Put colloquially, it not only contains everything but the kitchen sink and does so in a rather muddled and confusing way. The difficulties, in no small part, arise from the attempt to articulate personal claims against Mr O'Shea.

14. CPR 16.2(1)(a) requires the claimant to provide a "concise statement of the nature of the claim". It should not be a difficult requirement to meet. It will suffice for the claimant to identify in outline the cause, or causes, of action that are being pursued. Where there is more than one defendant, and the claims against each defendant are not the same, it is necessary to identify the additional claims and against which party they are pursued. All this can be done at a high level of abstraction and in simple terms.

15. The endorsement on the final version of the claim form is lengthy even though abbreviations are used:

> "Brief details of claim
>
> The Cs claim against D1 for damages for breach of contract and/or breach of duty of care that arose from the retainers that the Cs, or either of them, entered into with the Ds, or either of them, or with the late Giacomino Maggistro Contenta (GMC) before his death, since 2013; professional negligence from work carried out pursuant to said retainers or otherwise; Breach of Duty as Personal Representative of the Estate of the Late GMC, since the appointment of C1 on 15 April 2014; Breach of Fiduciary Duty in respect of the administration of the said Estate; Breach of Trust and maladministration in respect of the said Estate; Breach of Duties imposed by s.25 of the Administration of Estates Act 1925 in respect of the said Estate; Negligent misrepresentation made orally in late 2013/early 2014, at a meeting in Harley Street, to the Cs when the First Defendant Claimant [sic] stated that she must urgently sell her house because of the demands of the Bank of Singapore. Equitable Compensation, Including interest thereon on a compound basis under the equitable jurisdiction of the Court at 8% per annum with half yearly rests or under s.35A of the Senior Court Act 1981. Costs

> The C's claim against D2 is for damages for: Breaches of contract that arose from the retainers that C2 entered into with the Ds or either of them since 2013 or those relating to the late GMC before his death and the work they carried out for him. Prof Neg and/or breach of the duties of case [sic] that arose from the work carried out pursuant to the said retainers or other work or services that the D2 provided to the said Estate or to the C1 or to the late GMC before his death. Including interest under s.35A of the Senior Courts Act 1981, Costs".

The claim form and the particulars of claim

Claim form

16. The defendants make a number of complaints about the claim form. They say:

    (1) The brief details of claim are in places unintelligible and do not contain a concise statement of the nature of the claim in breach of CPR 16.2(1)(a).

    (2) The claim form did not say the particulars of claim were "to follow" in breach of paragraph 6.2 of PD7A.

    (3) The claim form was not accompanied by the response pack when it was served.

    (4) The claimant has been wrongly included twice.

17. Other than the first point, which warrants further examination, these are minor matters of form and would not normally justify the court striking out the claim.

18. The defendants complain that there is a lack of clarity about the basis for the claim because it is based on breaches of contract under retainers or a duty of care that arose under them that the claimants "or either of them" entered with the defendants "or either of them" or with Giacomino. On the face of it the retainers were made between the claimant and the LLP. It is far from clear how it could be the case that Mr O'Shea entered into retainers with the claimant and it is obviously unhelpful, and unnecessary, to treat the claimant as two persons when, in fact, she was merely acting in different capacities. Furthermore, although the complaints relate to events after Giacomino's death, it is suggested there may be claims arising from retainers that were entered into between him and the defendants.

19. More significantly, the claim form alleges claims against Mr O'Shea personally for breach of duty as personal representative, maladministration (presumably devastavit) and breach of the duties that are set out in section 25 of the Administration of Estates Act 1925. The court is left with the impression, that the claimant has done little to dispel, that Mr O'Shea is a defendant so as to bring pressure to bear on him and for practical reasons in light of the limitation on liability of £3 million in the written retainers (that reflects the limit of professional indemnity insurance). There is no suggestion that the LLP is not entitled to be indemnified under its indemnity cover for the acts and/or omissions of Mr O'Shea acting as a solicitor and member of the LLP regardless of his appointment as the claimant's attorney for the purpose of obtaining a grant on her behalf.

20. It is, however, understandable that the claimant wishes to ensure that the causes of action that are notified in the claim form are comprehensive but the 'kitchen sink' style of drafting is unhelpful. It has led the claimant to include, for example, a claim against Mr O'Shea for negligent misrepresentation, a puzzling claim that is rightly not pursued in the particulars of claim.

21. The unhappy drafting of the claim form illustrates with great clarity why the particulars of claim must be served within the period for service. A defendant receiving a claim form, whether it is drafted as the claim form is in this case or more helpfully, is entitled to know precisely what claim is being made. Unfortunately, there are aspects of the particulars of claim that also suffer from poor drafting.

Particulars of claim

21 Harley Street

22. On 7 March 2014 (nearly a year after Giacomino's death) the claimant entered into a contract as seller to sell 21 Harley Street to Basil Al-Hizami and Samer Al-Hizami ("the Al-Hizamis") for a sale price of £11.8 million. Completion of the sale was due on the later of 60 days from the date of the contract or the claimant obtaining a grant of probate. Clause 21 of the contract provided that the claimant was to provide at least 10 days before the date for completion a certified copy of the grant and, in the event that she was unable to do so, she would be deemed to unwilling, unready or unable to complete the sale.

23. Completion of the sale took place on 9 May 2014. After discharging the sum due to Bank of Singapore, and the costs of sale, the net sum of £5,333,244.45 was available to be paid to or on behalf of the claimant. The claimant makes two complaints. First, that 21 Harley Street was not sold at its full value and, secondly, that the net proceeds of sale were remitted to Mr Messuti without the claimant's authority to do so. It is said that Mr Messuti used the proceeds of sale to pay the debts of two companies registered in the Cayman Islands, ACE Limited and ACE 2 Limited and/or were speculatively invested by him. In any event, the claimant says that the proceeds of sale were not accounted for to her personally.

24. The claimant alleges that Mr O'Shea was under a duty to the estate and claimant as administrator and that he, as administrator, retained the LLP to act in relation to the administration of the estate. This is a somewhat unreal way of analysing the legal relationship. There were express retainers agreed between the claimant and the LLP and Mr O'Shea's role as administrator is clearly part of the services provided by the LLP. He was, after all, acting as the claimant's attorney as a matter of convenience for her so that she did not need to obtain a grant of probate in her own name. Nevertheless, it is possible to see that duties may have arisen in connection with the performance of the role of administrator, particularly if it can be said he failed to act in accordance with the claimant's instructions or is guilty of devastavit. Mr Jones acknowledged during the hearing that as the particulars of claim are currently drafted, the claimant is unable to show that Mr O'Shea owed duties as an administrator before the date of his appointment. Mr Jones said he would wish to amend the claim to include a claim based upon Mr O'Shea acting as a "quasi-administrator" in the period before his appointment. It is far from clear how Mr O'Shea could be said to owe

personal duties in that period during which the LLP was providing services pursuant to a retainer and the notion of a quasi-administrator is not a familiar one.

25. The essence of the claim in respect of 21 Harley Street can be found in paragraphs 13 and 17 of the particulars of claim:

> "13. The First Defendant did not market 21 Harley Street for sale by any reputable firm of estate agents nor did the First Defendant obtain any professional valuation advice relating thereto. Instead:
>
> a. On 20 February 2014 a Mr Sonnenthal, represented by Mr Derek Silver of Ashfords, solicitors, made a written offer to purchase 21 Harley Street, for £14m, with an undertaking to exchange contracts within 6 weeks.
>
> b. In the preceding week the said Messuti had contacted the Claimant to inform her that he had procured an offer of £11.8m for 21 Harley Street. The Claimant refused to accept the same.
>
> c. The First Defendant then copied the Claimant into an email on 21 February 2014 sent to Natalie Moses (the Claimant's then Personal Assistant) wherein he stated that *"The best way forward is 1) a signed letter of intent, and 2) proof [of] funds, and I would like to see the Knight Frank brochures referred to"*.
>
> d. On 21 February 2019 [sic] Natalie Moses asked the First Defendant *"Please ignore the Knight Frank part … The offer is £13 million. They are waiting contract. So if we can move quickly"*.
>
> e. On the same date the First/Second Defendants wrote to Mr Sonnenthal's solicitor, Ashfords, asking for a Letter of Intent and for confirmation that their client wished to purchase at £13m and for confirmation of funds.
>
> f. On 22 February 2014 the said Messuti met with the Claimant in Norway and attempted to persuade her to accept an offer of £11.8m procured by him for 21 Harley Street. The Claimant, knowing of the offer of £13m from Mr Sonnenthal, refused to accept Messuti's proposal, notwithstanding that Messuti told her that the Sonnenthal offer was /is "*not happening*".
>
> g. On 24 February 2014 Mr Sonnenthal was informed that the house had been removed from the market. The Claimant does not know why the First Defendant decided to withdraw the house from the market (if he in fact did so). He had not consulted the Claimant in respect of the house being removed from the market nor was she consulted in respect thereof.
>
> h. On the same date, 24 February 2014, a File Note on the First/Second Defendant's file indicates the First Defendant had authorised Messuti:
>
> i. To accept an offer of £11.8m for 21 Harley Street, and
>
> ii. To receive a 1% commission upon sale.

i. The Claimant now knows that Messuti, for his own financial gain, informed the First and Second Defendants that the proposed sale to Mr Sonnentahl would not proceed.

j. In circumstance where the Claimant had been informed that the sale to Mr Sonnenthal could/would not go ahead, she then agreed that the First Defendant could accept the offer made via Messuti, being then unaware that:

i. In fact, Mr Sonnenthal remained willing and able to proceed to purchase at £13m.

ii. The First Defendant was awaiting the confirmation requested from Mr Sonnenthal.

k. The First Defendant exchanged contracts with the purchaser, Mr Al-Hazimi, on 07 March 2014 in the sum of £11.8m."

26. All these events took place before Mr O'Shea was appointed administrator. And the contract of sale was signed in the name of the LLP as agent for the claimant. The particulars of claim are not accurate where it is said that Mr O'Shea exchanged contracts with the purchaser. There is no indication that Mr O'Shea did anything in his personal capacity outside the scope of the services supplied by the LLP through him as a member/partner and, secondly, it is clear that the claimant herself was the contracting party and contracts were exchanged in her name.

27. Paragraph 17 of the particulars of claim pleads the claimant's case against both defendants:

"In breach of the duties owed by the First and/or Second Defendant to the estate and to the Claimant personally, the First and Second Defendants were in breach of duty and/or negligent in that:

a. The First Defendant failed to take all reasonable care to obtain the best price reasonably possible for the said asset.

b. The First Defendant failed to obtain a professional valuation in respect of the said asset so as to inform itself [sic] of the likely proper open market value.

c. The First Defendant failed to market the property on the open market.

d. The First Defendant failed to await confirmation of Mr Sonnenthal's offer and availability of funds before agreeing to accept a lower offer which involved (i) a lower price by £1.2m, and (ii) a requirement to pay £118,000 to the said Messuti. Notwithstanding that the First Defendant was not retained to provide commercial/financial advice, a reasonably careful personal representative would have awaited confirmation of Mr Sonnenthal's availability of funds and only then chosen between the offer of £13m and that of £11.8m, given the failures set out at (a), (b) and (c) above.

e. The First Defendant treated the said asset as owned by the Claimant, and labouring under that mistake, failed to discharge his duties as personal representative in and about the said sale. Instead the First Defendant

purported to act solely upon the instructions of the Claimant and brought no independent judgment to bear, as he ought to have done *qua* personal representative.

f. Accepted the word of the said Messuti to the effect that the sale to the said Mr Sonnenthal would not proceed because his offer was withdrawn.

g. Failed to ascertain form solicitors then retained to act for Mr Sonnenthal, Ashford's [sic], whether or not their client's offer was withdrawn or whether the sale to him would proceed. The Claimant avers that if this elementary enquiry had been made, the said Messuti's deception (motivated by profit for himself) would have been discovered.

h. Failed to take the Claimant's instructions upon whether the sale to Mr Sonnenthal was to proceed.

i. The First and Second Defendants paid the net proceeds of sale to ACE Ltd and/or ACE 2 Ltd.

j. The First and Second Defendants have failed to account to the Claimant (the sole beneficiary) in respect of the said funds.

k. The First and Second Defendants paid away the said net proceeds of sale to parties other than the Claimant (sole beneficiary of the estate) without the Claimant's authority to do so. Insofar as the First and/or Second Defendants avers that they (or either of them) acted in accordance with instructions given by the said Messuti, each Defendant know or ought reasonably to have known that Messuti had no actual, implied or ostensible authority to give any such instructions whether on behalf of the estate and/or the Claimant.

l. The First and/or Second Defendants know or ought reasonably to have known that if the net proceeds of sale were paid away to ACE Ltd and/or ACE 2 Ltd and those companies (or either of them) were indebted to their respective bankers, the said fund would be or might be lost to the Claimant (especially in circumstances where the Claimant had no personal liability in respect of any of such company indebtedness). The First and/or Second Defendants made no inquiries concerning the extent to which, if any, the said companies were indebted to their respective bankers.

m. The First and/or Second Defendants knew or ought reasonably to have known that if the net proceeds of sale were paid away to ACE Ltd and/or ACE 2 Ltd, there was a substantial risk that the funds could be used for purposes other than purposes beneficial to the Claimant personally, as happened.

n. They failed to identify the said risks and/or to advise the Claimant thereof.

o. They failed to obtain informed consent from the Claimant for the said funds to be paid away to the said companies."

Cavendish Square and the Deed of Settlement

28. On 21 March 2014 a deed was executed that settled disputes with Prince Bahar. The disputes included the beneficial shares in which 5 Cavendish Square was held and the parties' rights to Villa Pancrazio. The claimant says that the value of 5 Cavendish Square at around the date of her husband's death was about £20m and that following the settlement Prince Bahar sold it for £18.5m. She says that:

    (1) She retained the LLP "in and about representing her to dispute" Prince Bahar's claims and to prosecute counterclaims. The date and nature of the retainer is not identified.

    (2) In respect of the disputes "correspondence, discussions and negotiations took place in which the First Defendant, in his capacity as a partner in the Second Defendant, acted for an on behalf of the Claimant."

    (3) The value obtained by her in the settlement, £500,000 plus Villa San Pancrazio, was inadequate.

    (4) She entered into the deed without being properly informed "as to its fairness and/or the desirability of entering into the same by reason of being negligently advised to enter into same by the First /Second Defendants".

    (5) The first and second defendants failed to obtain valuations for the principal assets that were the subject of the negotiation and by a letter dated 27 March 2013 (sic) gave a written acknowledgement of a debt that was prima facie statute barred.

    (6) The first and second defendants "caused or permitted the Claimant to enter into a manifestly disadvantageous Deed of Settlement given the obvious imbalance between the value of 5 Cavendish Square (about £18m) and Villa San Pancrazio (about Euros 2m)."

The Law

29. It is common ground that the claimant's application must be considered on the basis of the court's general discretion to extend time limits under CPR 3.1(2)(a) and against the framework in CPR 3.9 relating to relief form sanctions. The three-stage approach that is derived from *Mitchell* and *Denton* is well known.

30. The only area of controversy between the parties is whether the court should have any regard to the merits of the claim. Mr Smith, who appeared with Mr Cullen for the defendants, relies on the view expressed by Lord Neuberger in *Global Torch Ltd v Apex Global Management Ltd and others (No2)* [2014] 1 WLR 4495 at [29] to [31]:

    "29. In my view, the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues of the sort which were the subject matter of the decisions of Vos, Norris and Mann JJ in these proceedings. The one possible exception could be where a party has a case whose strength would entitle him to summary judgment. Both the general rule and the exception appeared to be common ground between the parties, although Mr Fenwick seemed to be inclined at one stage to suggest that the

> exception might be a little wider. In my view, the general rule is justifiable on both principled and practical grounds.
>
> 30. A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature or the enforcement of those directions and decisions. While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospects of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms.
>
> 31. In principle, where a person has a strong enough case to obtain summary judgment, he is not normally susceptible to the argument that he must face a trial. And, in practical terms, the risk involved in considering the ultimate merits would be much reduced: the merits would be relevant in relatively few cases, and, in those cases, unless the court could be quickly persuaded that the outcome was clear, it would refuse to consider the merits. Accordingly, there is force in the argument that a party who has a strong enough case to obtain summary judgment should, as an exception to the general rule, be entitled to rely on that fact in relation to case management decisions." [my emphasis]

31. The case management decisions to which Lord Neuberger referred were summarised in paragraphs [3] to [8] of his judgment. The decision of Vos J directed that the parties were to personally sign the statement of truth on the disclosure statement. Norris J made an unless order and Mann J refused to vary the order of Vos J on the basis that there had been a change of circumstances. Later, Mann J handed down a judgment refusing relief from sanctions. By an accident of timing, the judgment of Mann J dealing with relief from sanctions was handed down on 29 November 2013 following a hearing on 11 and 12 November 2013. The Court of Appeal handed down its judgment in *Mitchell* on 27 November 2013. Unsurprisingly, Mann J's judgment does not refer to *Mitchell* and the decision long pre-dates the review of the grant of relief from sanctions the following year in *Denton*.

32. The question of whether the merits are relevant in an application for relief from sanctions was touched on in the last paragraph of the judgment of Arden LJ (with whom McFarlane and McCombe LJJ agreed) in the Court of Appeal. She said:

> "Mr Fenwick submits that Mann J did not take into account the merits of the defence. He cites *CIBC Mellon Trust Co v Stolzenberg* [2004] EWCA Civ 827 at [30] where I approved a dictum of Etherton J (as he then was) that when granting relief from sanctions the court could and should take into account the merits of the case. However, that does not mean that the merits should be taken into account in every case, especially where, as here, the strength of the case depends on disputed facts."

33. I have emphasised two passages in paragraph 30 of Lord Neuberger's judgment in *Global Torch v Apex Management* because the appeal to the Supreme Court was based principally on the whether the case management decisions I have summarised were correctly made and not on whether the decision to refuse relief from sanctions should have been granted. Although both Lord Neuberger and Lord Clarke refer to *Mitchell* and *Denton*, they do so only in passing to make clear that nothing in their judgments seeks to undermine those decisions. It seems to me that Lord Neuberger's remarks, and those of Arden LJ, are therefore not directly focussed on whether the court, when looking at all the circumstances of the case under CPR 3.9(1), should or may consider the merits.

34. There are, of course, case management decisions made under the CPR where the rules require the court to consider the merits. [2] And there are applications that conventionally involve some assessment being made of the merits such as security for costs[3] and applications seeking permission to amend[4]. There are strong practical reasons in prohibiting a review of the merits unless it is required by the CPR, it is conventional to do so or the circumstances are exceptional. It is clear, however, that if the merits are such that a party has no real prospect of success it would be most odd to ignore this fact.

35. The practical difficulty created by considering the merits to the Part 24 standard, other than the hearing of an application under that rule, is that the court cannot usually determine the prospects of success without considering not just the statement(s) of case but also evidence from the parties. There is a fair degree of chicken and egg involved. Without the evidence the court cannot consider the merits even if they point firmly one way or the other; with the evidence the hearing will be lengthened. This suggests strongly that the merits must be clear from a brief (or at least relatively brief) review of the case. And a party wishing to raise the merits must give adequate notice to the other party of the submission that will be made. If this is not done the court is unlikely to entertain it.

36. In this case, there are two discreet points that are relevant to the application. First, the merits are flagged by the unsatisfactory nature of the details of claim on the claim form which signal that all may not be well with the claim. Secondly, Mr Jones volunteered that the particulars of claim will need amendment, without a draft amendment having been provided. I consider that these factors taken singly or together amount to an invitation to review the merits. The claimant is applying for an extension of time, albeit one that requires the court to have regard to the approach adopted when considering relief. A decision by the court to refuse an extension has the effect of preventing the claimant from pursuing this claim. It seems to me that it would be highly artificial when considering, at this very early stage of the claim, whether the claimant's application should be granted, and thus the claim may proceed despite the failure to comply with an important provision of the CPR, to ignore the merits if the claim if there are, or are not, real prospects of success. If the claim is so weak that it would be likely to fall at the Part 24 hurdle, there is really no purpose in

[2] Examples are CPR 6.37(1)(b) and 13.3(1)(a).
[3] CPR 25.12(1) although the court should only consider the merits in detail on an application for security for costs if there is a high probability of success or failure: *Keary Developments v Tarmac Construction Ltd* [1995[3 All ER 534 at 540 D-E.
[4] CPR 17.1(2).

granting the extension. It is also hard to believe that the court would be right to grant the extension if the claim appeared to have a high probability of failure, although it could not be said the prospects of success were fanciful.

37. In the course of his submissions, Mr Jones also referred me the decision of the Court of Appeal in *Hannigan v Hannigan* [2000] 2 FCR 650 CA. In that case which was decided shortly after the CPR came into force, the claimant's solicitor failed to comply with a substantial number of procedural requirements including issuing the claim using the wrong form, failing to verify the statement of case with a statement of truth and incorrectly naming the first defendant. There were also errors of form in the claimant's witness statement. However, the substance of the claim was set out adequately. Perhaps unsurprisingly, the Court of Appeal allowed an appeal against an order striking out the claim and at [37] Brooke LJ remarked that "… the old turf wars between solicitors over technicalities were being superseded by a new climate in which the emphasis was the achievement of justice …". I do not find the decision in that case to be of assistance in light of (a) the nature of the failings in that case, (b) the change to CPR 1.1(2) and CPR 3.9 in 2013 and (c) the development of the jurisprudence in relation to relief form sanctions in *Mitchell* and *Denton*.

The evidence

38. The evidence has been produced in three tranches:

    (1) Ms Kane[5] and the claimant produced witness statements dated 21 July 2019.

    (2) Mr O'Shea made a statement dated 3 September 2019 and Michelle Johnston[6] made a statement dated 4 September 2019. Mr O'Shea's statement contains a lengthy section headed: "The lack of real prospects of the claim now made".

    (3) Ms Kane and the claimant made further statements dated 19 September 2019 and Tindaro made a statement dated 18 September 2019.

    (4) Mr O'Shea made a further statement dated 25 September 2019. It adds little to the debate and I have not had regard to it.

39. The claimant explains in her first statement that she discovered in 2017 through her banker that "large sums of money from my inheritance had not been properly accounted for". She first approached Giambrone Law and later they introduced her to Ms Kane. Her subsequent brief account of the the issuing of the claim and the instruction of counsel at Devereux Chambers to work with Ms Kane is somewhat garbled and incomplete. However, at the end of her statement she makes two points. First that if the application is refused, she will issue a new claim. Secondly, she promises that, in future, court rules will be obeyed.

40. It is right to mention in addition that she says in paragraph 6:

[5] Ms Kane is a direct access barrister with extended rights who has been conducting the claim since 2 November 2018.
[6] Ms Johnston is a solicitor with Kennedys law LLP which acts for the defendants.

> "The last 10 days of June, and up to the beginning of July, I became extremely sick, as I am a survivor of Acquired Immune Deficiency Syndrome".

41. However, the claimant has not provided medical evidence to support this evidence and neither she nor Ms Kane say how it was material in relation to the service of the particulars of claim. A conference with counsel was held on 24 June 2019 although it is not said whether the claimant attended. Ms Kane records that counsel (not Mr Jones) was instructed to re-draft the claim form with the particulars of claim "to follow in 14 days". In circumstances that are far from clear, the barrister who had been instructed at the conference ceased to act on 9 July 2019 and Mr Jones was instructed the following day.

42. There is a suggestion that there was a breakdown in the relationship between Ms Kane and Kennedys in early July 2019. However, this appears to me to amount to no more than Kennedys awaiting events and doing nothing that prejudiced their clients' interests. It is not material to the claimant's application.

43. Mr O'Shea's summary of his case about the merits of the claim is considered later in this judgment. He makes two additional points that are relevant. First, the case he has to meet has changed and expanded on several occasions since Giambrone first wrote on 12 June 2018 and he expresses concern that Ms Kane's letter of claim dated 1 January 2019 suggested he was involved in a conspiracy to deprive the claimant of her assets, an allegation that has not been pursued. Secondly, the LLP has limited professional indemnity cover and the claim against him imperils his and his family's financial position.

44. The claimant's second statement makes some surprising assertions. She says:

    (1) She never had a one-to-one meeting with Mr O'Shea and never went to his office. However, she is not saying that she has never met him. Her meetings with him were at her home. She asserts, however, that if she had met Mr O'Shea away from her son and Mr Messuti the position would have been different.

    (2) She did not aware how much money she was supposed to have inherited until she saw the New Quadrant probate files. I find that assertion hard to accept at face value unless she is saying she did not know full details of what the estate comprised. She was certainly aware of the key assets.

    (3) That during the period in which her husband was in a coma: "The 2 men controlling my affairs were Mr Messuti and the Defendants." She does not say Mr O'Shea (or the LLP) was controlling her affairs after his death.

    (4) That in the period during which her husband was in a coma the amounts held by ACE Ltd and ACE 2 Ltd at Bank of Singapore reduced by payments totalling nearly $1 million. There is however no part of her claim against the defendants relating to this period.

    (5) In the later period, after his death and up to the sale of 21 Harley Street the bank holding in cash was reduced by $12.5 million. It is not suggested that the

defendants had any direct involvement with the accounts other than to transfer monies into the account.

(6) There is an issue concerning whether the defendants could take instructions from Ms Moses. It seems to me that all the authority says is that the claimant's instructions could be relayed via Ms Moses, not that Ms Moses herself could give instructions. In some circumstances the scope of authority could be an issue for a trial but the email traffic is such that there is no real issue to be determined.

(7) Mr Messuti did not have authority to give instructions to the defendants on financial matters and particularly about where funds were to be remitted. However, the email traffic shows that the claimant was aware Mr O'Shea would be told by Mr Messuti to which accounts the money he held should be paid.

(8) A diligent solicitor ought to have valued Villa San Pancrazio before entering the deal with Prince Bahar. This assertion is plainly wrong in law.

45. Tindaro's statement does not assist the claimant's case. He says, for example that Mr O'Shea "… was always the puppet of [Mr Messuti], and he didn't care about us but I now know that all he cared about was getting a nice piece of the pie." He goes on to say in a similar vein that Mr Messuti manipulated the circumstances to his advantage "with James O'Shea in the background rubber-stamping all the legal documents."

The three-stage test

(1) The seriousness and significance of the breach

46. For the reasons I have already given, it is important that a defendant is able to know the case that has to be met by the time the period for service expires. There is no special rule that applies in the case of claims for professional negligence. It is however possible to highlight two points. First, the defendants are right to point out that the claimant's case as it was put forward in correspondence was not consistent. The allegation made in the letter of claim dated 1 January 2019 that Mr O'Shea may have worked in collusion with or in a conspiracy with Mr Messuti was a serious allegation that was not withdrawn when challenged. Instead, Ms Kane stated that her client was not alleging fraud. It is all the more important in such circumstances that the defendant knows exactly what is alleged in a timely fashion. Secondly, the claim form was not a model of drafting clarity but included claims under a welter of retainers. Again, the defendants, with an eye to the extent of their insurance cover would wish to know how the claim was put.

47. Even without these additional factors, a delay of 21 days was both serious and significant. Ms Kane accepts that the breach was serious.

(2) Why the default occurred?

48. Ms Kane has made a witness statement candidly admitting that the default was the result of an error by her. She believed that the particulars of claim had to be served within 14 days of service of the claim form. She goes on to explain how the error

came about. Before dealing with the chronology of events Ms Kane says she has gone through a period of tremendous disruption in her personal life. She underwent major gender surgery giving rise to both physical and psychological trauma as well as the necessary realignment demanded by her new life. However, the evidence she provides is general in nature and it does not provide much assistance to the claimant's application. She does not say that the period of disruption in her life is a good reason for the default.

49. On 24 June 2019 counsel was instructed at a conference to redraft the claim form and to draft particulars of claim within 14 days. On 9 July 2019 counsel was alerted that an extension of 14 days was needed. Ms Kane says; "As a result, Counsel became guarded, and claimed conflict of interest, and ceased to act." Mr Jones was instructed the following day. The reason for the change of counsel is not spelled out and the summary provided by Ms Kane is not easy to follow.

50. Evidence is provided about the time that was taken to obtain the LLP's papers. Ms Kane came to be instructed because the London office of Giambrone Law which had acted for the claimant ceased to be regulated by the SRA. Ms Kane made an application in the Queen's Bench Division for pre-action disclosure and obtained an order on 22 November 2018 requiring the LLP to preserve the "conveyancing files" for the sale of 21 Harley Street and 5 Cavendish Square. The application was resolved by the LLP agreeing to pass over the files and a substantial quantity of files were provided on 4 December 2018. This led to the letter of claim being sent on 1 January 2019. However, further files were disclosed at the beginning of May 2019 relating to the LLP's retainer with ACE Ltd and were disclosed voluntarily. On the same date, Kennedys provided a further four lever arch files containing general correspondence saying that they believed the contents had already been disclosed. Finally, the New Quadrant Partners probate was passed over later on in May.

51. The vast bulk of the documents were in the claimant's possession in December 2018 and they sufficed for Ms Kane to write a lengthy letter of claim. The ACE Ltd documents will have added little and the correspondence disclosed in early May 2019 largely duplicated that which had already been provided. I accept that the additional documents had to be reviewed but there is nothing in the evidence to suggest that there was difficulty in finalising the particulars of claim due to the arrival of the later tranches of documents or that the conduct of the defendants was a contributory factor to the late service of the particulars of claim.

52. Mr Jones submitted that the defendants' solicitors were guilty of playing "litigation games" and that the claimant's ability to serve the particulars of claim was impeded by the defendant's failure to comply with the order for disclosure made in the Queen's Bench Division. I do not consider that these submissions are sustainable. Ms Kane acknowledges that had she known of the requirement to serve the particulars of claim with the claim form she could and would have done so. The defendants were not playing a litigation game. They were acting in a manner than is permitted by the CPR and professional obligations.

3. All the circumstances of the case

53. The two factors that are set out in CPR 3.9(1)(a) and (b) are of particular importance and should be given particular weight.

54. The failure to serve the particulars of claim with the claim form has undoubtedly affected the conduct of the litigation and has resulted in additional cost. It is right to observe, however, that the disruption and additional expense are not major because the claim is in its infancy.

55. The second limb of CPR 3.9(1) applies with rather more force. As I have already explained, the provision requiring a party to serve the particulars of claim with the claim is an important one. If it is a 'trap for the unwary', it is not one that is hidden or illogical. It is important that a defendant knows the case it has to meet. In this connection, there are two factors that have a bearing on the relative importance of CPR 7.4(2) as it applies to this case.

    (1) The LLP had professional indemnity cover of only £3 million whereas the claim had been variously valued at figures between £10 and £18 million. The choice of purchasing cover over the compulsory minimum sum is a for the law firm concerned. Whether it was wise not to do so when dealing with transactions with a value well in excess of the minimum cover is not a matter for the court.

    (2) The claimant joined Mr O'Shea as a defendant and has sought to craft a claim against him with somewhat unpromising material. It is clear that the limitation on liability of £3 million in the LLP's terms and conditions had not escaped the attention of the claimant's legal advisers.

56. Therefore, the LLP was facing a claim well above the limit of its cover and Mr O'Shea was facing a very large claim without any cover to fall back on. Even without Mr O'Shea's witness statement explaining the effect of the claim on him the worry caused by not knowing whether the claim was being pursued and appeared to have merit would have been obvious.

57. The court is required to consider whether the effect of a refusal to grant an extension of time is proportionate to the breach. The application seeking an extension was issued promptly and there is no history of a failure to comply with rules and orders. The claimant might wish to point to the need for the application made in the Queen's Bench Division for delivery up of the LLP's files as a factor that balances her default. However, even if it were right to bring such a counterbalance into play, which I doubt, the circumstances in which the application was made, and its necessity, are contentious. The defendants say the documents would have been produced without it and it is notable that the only order made by the court was for preservation, not delivery up.

58. The claimant says that the effect of refusing to grant an extension of time is merely to delay the progress of her claim. It is not subject to limitation and she will be free to issue a new claim although she will have to pay a new court fee. It seems to me in light of her position, the invitation to consider the merits ought not to be resisted, particularly bearing in mind Mr Jones' acceptance that the claim requires amendment to include a claim against Mr O'Shea in his capacity as 'quasi-administrator' (whatever that may mean). If the court comes to the view that this claim lacks merit, the claimant's ability to issue a new claim is one that militates in favour of refusing the extension, not against it. The claimant would then have an opportunity to consider

whether a more focussed claim can be crafted, or whether the reality is that the claimant's claim lies against Mr Messuti, not these defendants.

59. On 23 April 2013 the LLP was engaged to advise the claimant on the administration of the estate and to deal with the dispute with Prince Bahar. Mr O'Shea was appointed as the claimant's attorney on 1 May 2013 and on 19 July 2013, the latter power being granted to enable Mr O'Shea to obtain a grant of letters of administration. There was a further retainer in respect of 21 Harley Street made on 25 February 2014. No case is made that he was liable for breach of duty as the claimant's attorney.

60. Contracts were exchanged for the sale of 21 Harley Street on 7 March 2014 and the settlement with Prince Bahar was concluded two weeks later on 21 March 2014. These events all took place before letters of administration were granted to Mr O'Shea. It is right of course that the sale of 21 Harley Street was completed after the date of his appointment but this does not assist the claimant because Mr O'Shea when appointed as administrator was bound to complete the sale that the claimant, who was entitled to a grant as sole beneficiary of the estate and for whom he acted as attorney, had agreed.

61. The claimant has obvious difficulty with her claim against Mr O'Shea because of the timing of his appointment as administrator of Giacomino's estate. It is clear that the claimant has no real prospects of success as against Mr O'Shea. There is no legal basis for a claim against Mr O'Shea "qua administrator", as it is pleaded, for his acts or omissions before the date of his appointment. There was no executor named in the will and so the principle that a 'will speaks from death' has no application. There was no-one who had title to take any step on behalf of the estate before the grant. And Mr O'Shea cannot be said to have been a de facto administrator (otherwise an administrator de son tort) because he did not take control of the assets. Any duties that exist flow from the appointment itself. Steps taken before his appointment were as a partner in the LLP. The written retainers between the parties point firmly against Mr O'Shea having acted for the claimant in a personal capacity up to the date of his appointment.

62. The position of the LLP is equally unpromising. Curiously, the claimant ignores the retainers she signed with the LLP. At paragraph 9 of the claim she says Mr O'Shea "qua administrator" retained the LLP to act in connection with the administration of the estate and therefore the LLP owed a duty to the claimant. There are two difficulties with this aspect of the pleading. First, Mr O'Shea could not have retained the LLP to act for him as administrator before he was appointed. Secondly, even ignoring the first point, the alleged retainer does not make any sense. Mr O'Shea was appointed as the claimant's attorney and took the grant on that basis. He would have done so in the normal way as part of the services provided by the LLP to the claimant, services that were already the subject of a written retainer between the LLP and the claimant.

63. The two complaints in relation to 21 Harley Street are threefold:

    (1) Mr O'Shea as administrator should have marketed the property or taken steps to get a better price for it, if necessary, rejecting the claimant's instructions to sell it; and that he should have taken steps to pursue an offer made by Mr Sonnenthal.

(2) Mr O'Shea and the LLP wrongly accepted instructions from Mr Messuti that the Sonnenthal offer would not proceed and failed to take instructions on the offer and whether it was still in the table.

(3) The proceeds of sale were incorrectly distributed.

64. It is unnecessary to consider any of these allegations as they relate to Mr O'Shea for the reasons already given. At the hearing, Mr Smith took me through the relevant contemporaneous documents at some speed. He rightly recognised that if he was unable to demonstrate that the claimant had no real prospect of success against the LLP in a brief review of the documents he would be in danger of inviting the court to conduct a mini-trial and fall outside the exception to the general rule about considering the merits.

65. The chronology of the key events relating to the sale of 21 Harley Street are as follows:

(1) On 8 November 2013 Mr O'Shea was sent a valuation of the property by Savills prepared for Bank of Singapore. The valuation is dated 9 October 2013 and it valued the property at £12.75 million. Mr O'Shea had been provided shortly before with an authority signed by the claimant "giving authority to Natalie Moses to liaise with yourselves on my behalf". This authority clearly permitted the LLP and Mr O'Shea to use Ms Moses as a conduit for communications between them and the claimant. It did not purport to clothe Ms Moses with authority to make decisions and to give instructions herself. She was merely held out as someone who could relay the claimant's instructions.

(2) On 20 February 2014 Mr O'Shea and Ms Moser spoke on the telephone and this was followed by an email from Ms Moser that introduced Mr Sonnenthal as a purchaser. Although the offer was stated to be £14 million it was corrected to £13 million. Mr O'Shea made contact with Mr Derrick of Ashfords on Friday 21 February 2014 asking for a letter of intent to confirm the offer and proof that the funds were available. He confirmed the step he had taken to both Ms Moser and the claimant on Monday 24 February 2014.

(3) On the same day, Mr Messuti sent Mr O'Shea a document signed by the claimant giving authority to Mr Messuti to act on her behalf on the sale of 21 Harley Street at £11.8 million with a commission of 1% payable to Mr Messuti. As part of the email chain provided to Mr O'Shea, he would have been able to see that Tindaro sent the authorisation to Mr Messuti. Tindaro stated in his email that the authorisation had been signed by the claimant.

(4) On 26 February 2014 Mr O'Shea sent a new retainer to the claimant. The email states it follows a conversation between them. He asked her for "clear instructions on how you wish the sale to progress and who you would like me to engage with". He then referred to Professional Conduct Rules dealing with a sale where more than one contract is issued.

(5) The claimant sent a text message to Mr O'Shea at 02.18 on 27 February 2014 saying: "Please go a head with the offer for £11.800.000. As they're waiting … Do not want to loose that deal!!! Thank you". [sic]

(6) Later that day Mr O'Shea sent an email to the claimant, Mr Messuti and Tindaro saying he had sent papers to the solicitors for the Al-Hizami's. Tindaro replied, copying in the other parties, to thank Mr O'Shea for his email.

(7) Mr O'Shea was then in contact with the claimant on 3, 4 and 5 March about the transaction. On 5 March 2014 he sent her the draft contract and asked for authority to sign it on behalf of her and family members who were in occupation. That authority was given by the claimant the same day.

(8) Contracts were exchanged on 7 March 2014. It was signed by the LLP on behalf of the claimant.

66. It is clear that Mr O'Shea, and therefore the LLP, took steps that were expressly authorised by the claimant. The solicitors acting for Mr Sonnenthal were asked to verify his offer but failed to respond. Furthermore, the claimant made an express choice to pursue the offer by the Al-Hizami's. The allegation in paragraph 13(1) that Mr Messuti informed Mr O'Shea that the offer made by Mr Sonnenthal would not proceed is not borne out by the documents. The claimant was aware there were two offers and made a choice between the two. There was no reason for Mr O'Shea to question his instructions and, in any event, the claimant had ample opportunity to have second thoughts before exchange took place.

67. Later, on 26 March 2014, after exchange of contracts, Mr O'Shea received an email from someone named Oliver Dodd who was relaying an offer to buy the property for £12.3 million. Mr O'Shea forwarded the offer to the claimant the same day and asked the claimant to ring him. On 28 March 2014 Mr O'Shea confirmed to Mr Dodd that the claimant did not wish to proceed with the offer. This suggests strongly that had the Sonnenthals responded to Mr O'Shea's request for verification of their offer, he would have passed it to the claimant for her to consider.

68. Mr O'Shea is also criticised for the way in which the proceeds of sale were dealt with. The chronology is as follows:

(1) On 8 May 2014 Mr O'Shea sent an email to the claimant that was copied to Tindaro and Mr Messuti. It provided a completion statement for the sale that was due to complete the following day. Mr O'Shea said that the completion statement showed "the balance of funds to be transferred to you". He goes on to say he has copied in Mr Messuti "… so he knows to expect funds and can confirm the account details for onwards transmission of the completion monies." The completion statement includes a request: "Please provide account details of where funds are to be transmitted". Mr Jones relies on Mr O'Shea saying the funds would be transferred "to you" and submits it limited Mr O'Shea's ability to send the funds to anyone other than the claimant. It seems to me this a highly artificial construction of ordinary language and there is no reason why Mr O'Shea should be taken to have limited what the claimant might have chosen to do. As a matter of normal usage "to you"

includes "or any person you nominate" particularly where the claimant was the sole director and shareholder of the two ACE companies.

(2) In fact, the sale did not complete until 15 May 2014. Mr O'Shea sent an email to the claimant that day, copied to Tindaro and Mr Messuti and said: "I will transmit the balance of funds less my firm's outstanding invoices to your nominated account and I have copied [Mr Messuti] into this email, so that he can confirm safe receipt of funds to you. If you have any queries in the meantime, please do not hesitate to contact me."

(3) Mr O'Shea asked Mr Messuti in an email sent the same day to tell him where the completions monies should be sent.

(4) On 16 May 2014 Mr Messuti gave instructions to send £3,626,604.87 to the account of ACE Ltd at Bank of Singapore and £1,750,000 to ACE 2 Ltd at Bank Julius Baer & Co Ltd in Zurich.

69. The complaint against the defendants about the completion funds relating to 21 Harley Street is an odd one. It is not that they were sent to a person or entity which had no association with the claimant. On the contrary, the instruction received by Mr O'Shea was unremarkable given the claimant's complete control of the companies and Mr Messuti's extensive involvement with the family's finances. Furthermore, the claimant was made aware of the defendant's request for Mr Messuti to provide Mr O'Shea with the bank details for the transfer. Had this been of concern to her she would have said so.

70. The claimant's case concerning Cavendish Square is based on the premise that the outcome of negotiations with Prince Bahar agreed by the claimant was unsatisfactory. She points to the value of 5 Cavendish Square which was valued at between £18 and £20 million and complains that she received only £500,000 plus Villa San Pancrazio, the latter being of rather more limited value than was expected.

71. I accept Mr Smith's submission that this element of the claim is poorly particularised and, of course, the claim against Mr O'Shea suffers from the difficulty that the settlement long predates his appointment as administrator. Paragraph 25 of the particulars of claim asserts that a retainer was entered into between the claimant and the LLP for the LLP to dispute the Prince's claims and to pursue counterclaims. However, it is not said whether the retainer was written or oral or when and how it came into being and the claimant has not given evidence about it in her statement. There was, however, a written retainer dated 23 April 2013 relating to the Seaview Trust of which the claimant was the life tenant.

72. Furthermore, paragraph 26 of the particulars of claim refers in the most general terms to "correspondence, discussions and negotiations" having taken place concerning the disputes in which Mr O'Shea "in his capacity as a partner in the Second Defendant, acted for and on behalf of the Claimant." This falls some way short of pleading a basis upon which Mr O'Shea could be personally liable for his work as a partner in the LLP.

73. Paragraph 29 of the particulars of claim sets out the claimant's case in 8 sub-paragraphs. It is alleged that:

a. The defendants "failed to ascertain reliable valuations for the principal assets that were the subject matter of the negotiations". It is not said there was a failure to advise of the need to obtain valuations and as to the most valuable asset that was in dispute, 5 Cavendish Square, there was no issue about its value. As to Villa San Pancrazio, the claimant does not allege that she provided the defendants with information about its condition or any reasons why she was not in a position to form a view about its value.

b. By a letter dated 27 March 2013 the defendants provided an acknowledgement of an alleged debt of €3,098,470 despite the debt being statute barred. The point was "pounced upon" by Prince Bahar's lawyers. In fact, all Mr O'Shea did was to refer to what was set out in agreed, historic documents.

c. The defendants failed to advise that absent reliable valuation evidence the principal assets should be sold at the best reasonable price available. It seems to me that this allegation does not take the claimant's case very far when the settlement involved the division of assets and avoided a sale and subsequent division of the proceeds of sale.

d. The defendants "caused and permitted" the claimant to enter into a manifestly disadvantageous deed of settlement given the imbalance of value between 5 Cavendish Square and Villa San Pancrazio. This allegation is misconceived. In the course of a commercial negotiation, terms were put to the claimant for her to consider. She decided to accept them.

e. The defendants failed to use the reluctance of the Prince Bahar to "go public". This was not a point the defendants were instructed to take and, in any event, it was but one factor of unknown weight in a negotiation with many elements.

f. The defendants failed to take detailed instructions about what indebtedness Giacomino, the claimant and the companies had to Prince Bahar. It is not said how the defendants are said to be at fault.

g. The defendants failed to take detailed instructions about Prince Bahar's indebtedness to the claimant and her husband's estate. The same comment can be made as f. above.

h. This is a repeat of earlier allegations.

74. Finally, the claimant alleges that the defendants were accounting parties "at least in respect of the £500,000 due to her under the Deed of Settlement". In a similar way to the transfer of the proceeds of 21 Harley Street, following the sale of 5 Cavendish Square, Mr O'Shea was in a position to remit £500,000 to the claimant. On 17 December 2014 her sent an email to her, copied to Mr Messuti, asking for instructions about where the funds were to be sent. On 19 December 2014 Ms Moses (the claimant's PA) sent an email giving instructions to transfer the finds to ACE 2 Ltd at Bank Julius Baer. It was the same account to which funds had been sent earlier. Not only was the claimant the sole director of and shareholder in the company but it was the same account to which funds had been remitted 6 months previously without complaint.

Conclusions

75. The starting point is that the court is asked to exercise its discretion to extend time. If that decision were to be taken in isolation, and without regard to the factors in CPR 3.9 and the merits of the claim, it is likely the extension would be granted even though the court is asked to approve an extension of time after the period expired. The application was made promptly and the period of the extension is not a long one. If the claimant's case had real prospects of success at a trial, there would to my mind be a good basis granting the extension.

76. I am satisfied, however, that the circumstances that arise on the claimant's application are such that it is right to have regard to the merits of the claim as it is pleaded. The merits of the claim against Mr O'Shea, or rather the lack of merit, are clear without the need for a review of the documents. The chronology of events speaks for itself. To my mind, when considering all the circumstances of the case and whether to grant the extension of time, it is strictly unnecessary to review the merits of the claim against the LLP. In my judgment it is not appropriate for this claim to be permitted to proceed with the claim against Mr O'Shea in its current form. It would not be right to have regard to the possibility that it might be improved by amendment without the claimant having provided any real indication of what the amended claim might look like.

77. I had some initial concerns about the exercise that has been undertaken in respect of the claim against the LLP. However, it seems to me that the application made by the claimant, made at the very outset of the claim, provides a proper framework for the merits to be reviewed. Importantly, the claimant was put on notice in the clearest terms that the defendants intended to invite the court to review the merits and the claimant was given an ample opportunity to provide all the evidence she wished to rely on. As with the hearing of a Part 24 application, the court is entitled to assume that the respondent has put forwarded its best case. The evidence the claimant and Tindaro produced lacks a focus on the issues as they are pleaded and ignores facts that are inconvenient. For example, the claimant ignores the retainers she signed with the LLP and the express instructions she gave to Mr O'Shea. Tindaro's statement makes a number of wild allegations that are unrelated to the claim and unhelpfully to his mother's case says he could not be bothered to read many of the emails from Prince Bahar's lawyers.

78. The review of the events that I have summarised earlier in this judgment shows that the claimant gave instructions to Mr O'Shea to sell 21 Harley Street. Her real complaint lies not against Mr O'Shea and the LLP but against Mr Messuti and the way the finances of ACE Ltd and ACE 2 Ltd were operated by him on her behalf. So far as the settlement with Prince Bahar is concerned, her disappointment with its terms have been informed by hindsight. Her claim as it is drafted seeks to impose duties on the LLP that are far outside the normal terms of a solicitor's retainer.

79. The defaults that are relied on by the defendants in their application merely bolster the position they have taken on the claimant's application. They are not sufficient to warrant making an order striking out the claim.

80. I will dismiss the claimant's application and grant a declaration that the court has no jurisdiction to try the claim.