

High Court Approved Judgment

Crest Nicholson Operations Ltd and Crest Nicholson (South West) Ltd v Grafik Architects Ltd and NHBC Building Control Services Ltd



Neutral Citation Number (2021) EWHC
2948 (TCC)

Case No: HT-2019-BHM-000005

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN
BIRMINGHAM TECHNOLOGY AND
CONSTRUCTION COURT (QBD)

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 10/11/2021

Before :

HER HONOUR JUDGE SARAH
WATSON

Between:

CREST NICHOLSON OPERATIONS
LIMITED

CREST NICHOLSON (SOUTH WEST) LIMITED

- and -

GRAFIK ARCHITECTS LIMITED

NHBC BUILDING CONTROL SERVICES LIMITED

First Claimant

Second
Claimant

First
Defendant

Second
Defendant

Mr Andrew Singer QC (instructed by Gateley Plc) for the Claimant
Mr Samuel Townend QC and Mr Tom Coulson (instructed by in house counsel) for the
Second Defendant

Hearing date: 30 September 2021

JUDGMENT

INTRODUCTION

1. This is an application to strike out a claim pursuant to Civil Procedure Rule 3.4(2) on the basis that it discloses no reasonable grounds for bringing the claim and/or because it is an abuse of process.
2. The Claimants, Crest Nicholson Operations Limited and Crest Nicholson (South West) Limited (together referred to as “Crest”) were developers of a residential apartment building at The Quays, Portishead. The First Defendant is the architect who designed the development. It is not party to the application. The Second Defendant is NHBC Building Control Services Limited (“BCS”). Crest engaged BCS to carry out the services of an Approved Inspector for the development.
3. The claim concerns defects in the external wall systems of the development, which Crest claims constitute breaches of the fire safety requirements in Part B of the Building Regulations which were current at the time of the design and construction of the development. The building is over 18 metres in height. In particular, Crest alleges that there are defects as a result of the incorporation of combustible phenolic insulation and non-compliant Parklex cladding and also that the design and installation of the cavity and fire barriers was defective. Crest refers to those defects as the “Cladding Defects”. In addition, Crest alleges that there were defects in the render system because expanded polystyrene (“EPS”) was used in the render system below 18 metres, despite the fact that EPS is not of limited combustibility, as defined in the relevant Building Regulations. In addition, Crest alleges that the design and installation of cavity and fire barriers was defective. Crest refers to those defects as the “Render Defects”. The Render Defects are the main defects about which Crest complains.
4. In late December 2019, BCS’s parent company, NHBC, which provided the warranty for the development, accepted claims from owners on the basis that the development does not comply with Building Regulations. NHBC has a right to reclaim its costs from Crest. Crest’s claim is to recover significant losses in meeting the remedial costs. It

seeks to recover those costs from the First Defendant and from BCS. Its claim against BCS is for breach of contractual and tortious duty for failing to identify, and notify Crest of, the defects. There is also a claim for a contribution against BCS on the ground that it is liable to the building owners for the same loss as that for which Crest is liable. However, Crest has recently confirmed that the contribution claim will not be pursued against BCS and concedes that its Particulars of Claim should be amended accordingly.

5. The history of the litigation is as follows.

- a. On 19 February 2019, Crest issued a protective claim for limitation reasons. It had not complied with the pre-action protocol before doing so.
- b. On 18 June 2019, the first of several consent orders was approved, extending time for service of the Claim Form to enable the pre-action protocol to be followed.
- c. On 5 July 2019, Crest served a protocol-compliant letter of claim on BCS.
- d. On 6 September 2019, BCS responded to the claim. In that letter, it noted that it appeared that there had been no expert input into the claim.
- e. On 26 November 2019, Crest's solicitors wrote to BCS stating that they had since instructed Mr Easton as their expert. In that letter, they asked for information that Mr Easton had requested for the purposes of preparing a report on the question of whether BCS was in breach of its duties as Approved Inspector. They also indicated that his provisional view was that BCS's performance was poor.
- f. On 20 December 2019, NHBC accepted policyholders' claims on the basis that the development did not comply with Building Regulations.
- g. On 27 March 2020, Crest's solicitors chased for an answer to the questions raised by Mr Easton.
- h. On 1 May 2020, BCS responded, saying that it would not respond to the questions raised.
- i. On 20 May 2021, Crest served its Particulars of Claim.

- j. On 22 July 2021, BCS issued this application. Unusually, it did not make any formal or informal request for further information before doing so. Nor did it notify Crest of its intention to make the application.
6. There are two grounds on which BCS argues the claim should be struck out, being that the Particulars of Claim do not sufficiently particularise the alleged breaches of duty to enable BCS to understand the case it has to meet and that the claim is not supported by expert evidence. It argues that, as a result, the claim discloses no reasonable ground for bringing the claim and should be struck out. BCS had also sought to strike out the claim for a contribution on the basis that it had no liability to Crest's successors in title as a matter of law. That part of the application is no longer relevant because Crest has confirmed it no longer pursues that part of the claim.

FIRST GROUND: LACK OF PARTICULARITY

The law

7. The parties have both referred me to the case of *Pantelli Associates Ltd v Corporate City Developments Ltd* [2011] PNLR 198. In that case, in response to a claim for payment, the Defendant made allegations of professional negligence against a quantity surveyor. The allegations of negligence are set out in paragraph 9 of the judgment of Coulson J. They consisted of no more than a list of the duties and an assertion that the Claimant had failed in the performance of those duties. There were no allegations setting out the factual basis of the claim.
8. Mr Townend relies on the following passage from the judgment:

“11 CPR r 16.4(1)(a) requires that the particulars of claim must include “a concise statement of the facts on which the claimant relies”. Thus, where the particulars of claim contain an allegation of breach of contract and/or negligence, it must be pleaded in such a way as to allow the defendant to know the case that it has to meet. The pleading needs to set out clearly what it is that the defendant failed to do that it should have done, and/or what the defendant did that it should not have done, what would have happened but for those acts or omissions, and the loss that eventuated. Those are “the facts” relied on in

support of the allegation, and are required in order that proper witness statements (and if necessary an expert's report) can be obtained by both sides which addressed the specific allegations made.

“12 It is plain that, on any view, the amendments contained in paragraph 16 of the amended defence and counterclaim do not begin to meet the test in r16.4(1)(a). It is impossible for anyone to work out from those generalised and generic allegations what particular matters were being alleged against Pantelli. It would be impossible for a solicitor to take a witness statement from those involved in providing the services in question that could hope to meet these points, because no details have been provided for a prospective witness to accept or dispute. Accordingly, para 16 is not a proper pleading of a case of professional negligence.”

9. At paragraph 16, the Judge said that it was: “...*simply not good enough to turn a positive contractual obligation into an allegation of professional negligence by adding the words “failing to” to the obligation*”.

10. Mr Townend also refers me to the case of *Heron's Court v Heronslea and Others* [2018] EWHC 3309 (TCC), in which Waksman J considered the issue of the particularity of the Claimant's pleadings in a case against BCS for breach of its duties as Approved Inspector. The Judge's comments are *obiter dicta* because he decided that BCS were under no duty, as a matter of law. However, he considered whether, had he decided differently, he would have struck the claim out as an abuse of process for lack of particularity. From the judgment, it appears that numerous breaches of the Building Regulations had been identified and the Claimant had initially relied on the doctrine of *res ipsa loquitur* in support of its allegation that the Defendant was in breach of duty as it had given approval to a development that breached the Building Regulations in so many respects. The Claimant then provided more information as to the basis of its claim in the form of an expert's report. It appears from paragraph 62 of the judgment that the report identified the applicable building standards and building control performance standards and gave examples of why the defects would breach the professional obligations of an Approved Inspector. It appears that it identified the fact

that periodic inspections on site at key stages should have identified some of the defects and the expert was unable to understand how they were not observed by the Defendant.

Waksman J indicated that he would have ordered proper particulars to be provided, possibly accompanied by an unless order, but would not have struck the claim out as an abuse of process. Mr Townend relies on this case as supportive of BCS argument that the particulars in the case before me are inadequate, while acknowledging the remarks are *obiter dicta*.

This case

11. BCS makes no complaint of lack of particularity as to the alleged defects. They are comprehensively set out in the Particulars of Claim and are further supported by the report of an expert commissioned by the owners of the development, which report had been served on Crest.
12. This is not a claim based on a contract to supervise work or ensure compliance. There is no allegation that BCS was obliged to ensure that the development complied in all respects with Building Regulations. This is a claim based on breach of duty of an Approved Inspector. Both parties acknowledge that those duties are limited. Crest accepts that it is not sufficient for it simply to set out breaches of the Building Regulations. It must also identify the duties of an Approved Inspector, breaches of those duties and its case as to the consequences of that breach. Crest argues that it has done so sufficiently for BCS to understand the case it has to meet. In the alternative, Crest argues that, if there are deficiencies in the pleading, they are not sufficiently serious as to justify striking out the claim. It argues that the appropriate course would have been for BCS to seek further particulars of the claim rather than to apply to strike it out.
13. The Particulars of Claim are detailed and extensive. A significant part of them relates to the claim against the First Defendant. However, those allegations form part of the allegations against the Second Defendant, since the allegation is that it failed to identify defects in the First Defendant's design.
14. As far as the allegations against BCS are concerned, the following paragraphs are of particular importance:

- a. Paragraphs 27 and 28 set out the alleged defects in the Render System and the Cladding System respectively, in general terms.
- b. Paragraph 29 identifies by number and date 6 drawings prepared by the First Defendant which Crest alleges contain the design of the Render System. Paragraph 30 identifies by number and date 12 drawings prepared by the First Defendant which Crest alleges contain the design of the Cladding System.
- c. Paragraph 39 and the following paragraphs set out in detail the legal relationship between Crest and BCS, including BCS's contractual duties.
- d. Paragraph 44 contains an allegation that BCS owed a duty of care in tort to carry out its services with reasonable skill and care.
- e. Paragraphs 45 to 64 inclusive set out the allegations as to the Render Defects and why Crest alleges the Render System did not comply with Building Regulations.
- f. Paragraphs 65 to 80 inclusive set out allegations as to the Cladding Defects.
- g. The specific allegations relating to BCS, as opposed to the First Defendant, begin at paragraph 112.

“112. Crest will rely on NHBC-BCS's letter to CNO dated 23 April 2013, at appendix 11. NHBC-BCS wrote to Crest and enclosed a Technical Report which not only set out conditions to be met for satisfying compliance with BR2000 (the “Surveying Conditions”), but also conditions to be met to satisfy the NHBC Requirements (the “Warranty Conditions”). Crest will rely on this and all other such correspondence in support of its contention that NHBC-BCS owed contractual/tortious duties of care to Crest to exercise reasonable skill and care in carrying out their services as Approved Inspector so as to ensure that the Development complied with the Surveying Conditions and the Warranty Conditions.

113. Included as a matter of construction/interpretation in its obligation to comply with its Ts and Cs set out at paragraph 41 above, alternatively implied in its contractual obligations as a matter of business necessity,

NHBC-BCS was obliged to properly perform the duties set out in the Building Control Performance Standards (2006 ed) (“the Standards” and see Appendix 9 attached). In brief the Standards require that a competent Building Inspector has enough resources, should be sufficiently experienced and qualified, should consult their client, make an assessment of the plans and record the same, advise their client, undertake site inspections and advise of any contraventions of Warranty Conditions and any remedial measures.

114. The design change set out at paragraph 46 above was known to NHBC-BCS when made and Crest understands was approved by NHBCBCS (pending disclosure Crest cannot provide more particulars of knowledge/approval). In any event if the design change was not known to or approved by NHBC-BCS, when undertaking its site inspections between July 2012 and February 2014, NHBC-BCS should have identified the design change and considered the appropriateness of the same. In addition, the change should have been identified and considered during plan assessments by NHBC-BCS.”

15. The key allegations of breach of duty as Approved Inspector are in para 115, and in particular the bold sections below:

*“115. In providing its services to Crest, NHBC-BCS has caused and/or contributed to the Render Defects and the Cladding Defects as set out in paragraphs 45 to 111 above, in breach of clause 1.2 of the T&Cs and/or the Standards and/or negligently. Further, and in particular, NHBC-BCS failed to comply with clause 1.2 and/or the Standards in the respects identified at paragraph 113 above and generally in relation to the Render Defects and the Cladding Defects. **NHBC-BCS employed staff who were not sufficiently qualified and/or did not understand the detail of the Development either in the plan stage or on inspection. Plans were not adequately assessed or properly signed off. The site inspections failed to note and/or warn and/or make remedial recommendations for any/all of the Render Defects and the Cladding Defects identified at paragraphs 45-111 above. A competent inspector would***

have noted and warned about all the Render Defects and the Cladding Defects which were clearly observable to a competent inspector and made appropriate recommendations. Had that happened the Render Defects and the Cladding Defects would not have existed or would have been remedied at no cost to Crest.” (Emphasis added).

Employment of staff who were not sufficiently qualified and/or did not understand the detail of the Development either in the plan stage or on inspection

16. The first allegation of breach of duty is that BCS employed staff who are not sufficiently qualified and/or did not understand the detail of the development either in the plan stage or on inspection. Mr Townend argues that the allegation that BCS employed staff who were not sufficiently qualified should not have been made, because Crest cannot particularise the allegation. He points to the letter of 26 November 2019 in which Crest’s solicitors asked questions about the qualifications and experience of BCS’s staff as evidence of this. Mr Singer argues that the allegation is a composite allegation that either the staff were insufficiently qualified or they did not understand the detail, or both, and that it is made in the light of the approval of the development that breached Building Regulations. He argues that the allegations are properly made in the absence of answers to the questions raised in the letter of 26 November 2019, which may have enabled Crest to plead its case more precisely.
17. In that letter, Crest’s solicitors explained that they were seeking information requested by their expert. They asked for a copy of the revalidation application for BCS as an Approved Inspector, details of the qualification and training of visiting inspectors, the qualifications of the people carrying out the plan check, whether the inspectors had attended any courses or had specialist knowledge of facade materials and whether they had researched the materials to ascertain the installation requirements. BCS correctly observes that some of those requests are not expressed as requests for documents but are requests for information. However, they could easily be reformulated as requests for documents and that was not the reason given for refusing to answer the questions at the time they were asked. The reason given at the time was that BCS was not prepared

to answer the questions until Crest served its expert report and addressed issues as to the exclusions contained in BCS's terms and conditions. It is clear that Crest was seeking the information by way of advance disclosure that would enable it to seek the advice of its expert, with a view to producing focused Particulars of Claim with the benefit of expert advice, albeit that some of the requests were framed as requests for information rather than documents.

18. In circumstances where Crest has asked for advance disclosure of documents which BCS has refused to provide, I do not consider Crest should be criticised for including in the Particulars of Claim a composite allegation that either the staff were insufficiently qualified or they did not understand the detail of the development. Nor do I consider that BCS should have any difficulty understanding the case it has to meet in this regard.

Plans not adequately assessed or properly signed off

19. Mr Townend argues that the pleadings are inadequate in that they do not identify the plans referred to, what is said to have been wrong with the plans, i.e. what deficiencies or problems it is said should have been identified. He argues they do not identify what was "inadequate" about their assessment or sign off and what acts or omissions amounted to a failure to exercise the reasonable skill and care of an ordinary Approved Inspector. He argues that BCS does not understand the case it has to meet.
20. In relation to the allegation of breach that is said by Crest to be the main allegation, being breaches of duty in failing to identify and warn Crest of the use of EPS in the render system, I do not consider the criticism of the pleading to be justified. Paragraph 46 of the Particulars of Claim reads as follows:

"The Render Drawings were changed by Grafik on 21 February 2013, so that EPS would be used below a height of 18 metres in the Render System. This change is identified by the following amendment to Drawing 12100PG - 1355 C2 on 21 February 2013:

"C2 18m Line added, references, Insulation hatch changed to suit clients change to EPS Insulation below 18m"

21. That paragraph clearly identifies the precise drawing and the precise aspects of that drawing that Crest alleges BCS should have noticed would constitute a breach of the Building Regulations.

22. Paragraph 114 of the Particulars of Claim reads as follows:

“The design change set out at paragraph 46 above was known to NHBC-BCS when made and Crest understands was approved by NHBC-BCS (pending disclosure Crest cannot provide more particulars of knowledge/approval). In any event if the design change was not known to or approved by NHBC-BCS, when undertaking its site inspections between July 2012 and February 2014, NHBC-BCS should have identified the design change and considered the appropriateness of the same. In addition, the change should have been identified and considered during plan assessments by NHBC-BCS.”

23. I do not consider BCS is in any real difficulty in understanding the case it has to meet in relation to allegation that the plans were not adequately assessed or signed off. Crest has pleaded that it believes BCS expressly approved the plan which showed the use of EPS in the development. It has identified the specific features of the plan that it alleges BCS ought to have noted. It has pleaded that, even if not expressly approved, BCS should have identified the change during its plan assessments. BCS is able to plead its Defence and, in my judgment, its solicitors would be able to take witness statements dealing with this allegation without more information.

24. With regard to the allegations as to other defects, including that BCS ought to have identified in its plan assessments or during its inspections the defective design and installation of cavity and fire barriers that form part of the render system and the allegations that it should have identified the Cladding Defects, those allegations have been dealt with succinctly in the Particulars of Claim. Crest has identified in paragraphs 29 and 30 the drawings making up the design of the Cladding System and the Render System. Unlike the position in relation to the use of EPS, Crest has not specifically identified precisely which of those drawings contain the information that BCS should have noted, or precisely what it should have noted, that meant the design was defective. The drawings are not in the bundle. I do not know whether, if those drawings are reviewed, Crest’s position ought to be obvious or whether it is not clear to BCS why

Crest alleges that, in assessing them, BCS ought to have identified the alleged defects. In relation to the EPS defect, it seems likely that, even if the Particulars of Claim had only referred to the drawing number, given the words on that drawing that are cited in the Particulars of Claim (which state that EPS is to be used), identifying the drawing may well have been sufficient to enable BCS to know the case it had to meet in relation to the inclusion of EPS in the design. I do not know if the same is true of the other alleged defects. However, I do note that, unlike the position in relation to the EPS, Crest has not explained in detail what it was in the plans that BCS ought to have noticed.

Failure to note and/or warn and/or make remedial recommendations in respect of defects that clearly observable to a competent inspector

25. In relation to all the alleged defects, including the EPS defect, the allegation is general as to breach of duty on inspection. It is that site inspections failed to note and/or warn and/or make remedial recommendations. Mr Townsend argues that that is not sufficient to enable BCS to understand the case against it. Crest has not identified at which inspection(s) the defects were clearly observable, whether by reference to date, if that is known, or by reference to the stage of the work at which it alleges BCS would have been required to make an inspection when the defects would have been observable. Therefore, BCS may not have the information it requires to prepare witness statements or an expert's report.

Do the Particulars of Claim fail to disclose reasonable grounds for bringing the claim or are they otherwise an abuse of process so they should be struck out?

26. Whilst I accept that the Particulars of Claim may require some further particulars in order to ensure that BCS is in a position to deal with some of the allegations fully in its evidence, the facts of this case are very different from those in *Pantelli*. In *Pantelli*, there were mere assertions of breaches of duty with no explanation of the factual basis of the claim. In this case, Crest has pleaded:

- a. allegations as to the duty, including the facts giving rise to that duty;
- b. allegations of breach of duty, albeit that they are succinct, being:

i. failure to engage suitably qualified staff and/or failure of those staff to understand the detail of the development; ii. failure properly to assess the design plans specifically identified in the

Particulars of Claim;

iii. failure to note and/or warn and/or make remedial recommendations in respect of defects BCS ought to have identified as part of its inspections which Crest alleges would have been noted by a competent Approved Inspector;

c. detailed allegations as to the defects it alleges BCS should have identified when it assessed the plans and when it made inspections;

d. an allegation that, had BCS identified the defects and warned Crest, the defects would not have existed or would have been remedied without cost to Crest.

27. In addition, this claim is made at a time when there are many similar claims for defects in buildings which have been identified as failing to meet the fire safety requirements of the Building Regulations following the tragic fire at Grenfell Tower. Many of those claims include allegations of defects resulting from inclusion in facades of materials that are not of limited combustibility and allegations of defects in fire barriers. Whilst that does not absolve Crest from the need to explain its case, BCS's ability to understand the case it has to meet has to be viewed in the context of the very high level of awareness in the construction industry of the issues surrounding the problems that have been identified in many buildings with facade systems that do not meet the fire safety requirements of the Building Regulations.

28. The allegations against BCS, whilst succinct, clearly include much of the pleaded case against the First Defendant and also clearly set out all the elements of the cause of action pursued. The Particulars of Claim do not fail to disclose any reasonable ground for bringing the claim.

29. However, there is some force in BCS's argument that the allegations are not sufficiently detailed to form an agenda for trial or for taking detailed witness statements and, possibly, obtaining an expert's report. In my view, it would be possible for BCS's solicitors to take witness statements dealing with witnesses' qualifications and

expertise, the process they undertook, their understanding of the designs, whether they noted the defects either as part of the plan assessment or during inspections and, if not, why not. However, with the exception of the allegations in relation to the use of EPS, the Particulars of Claim do require more detail as to precisely what it is alleged it should have noticed in the plans or on site during inspection in relation to cavities and fire barriers, and at what stage, so that witness statements and experts' reports are suitably focused and the issues for trial are clear.

30. What I find surprising in this case is that BCS has, without warning, issued an application to strike out the entire claim without first seeking clarification of the Particulars of Claim or even warning Crest of its intention to make the application. It is unusual for the court to strike out a claim entirely without first giving the Claimant an opportunity to clarify its case. Whilst it may do so in a case which is clearly without any legal or factual basis, in a case where the complaint is lack of particularity, the usual course is for the Defendant first to request further information, whether informally or through a Part 18 request. If a Part 18 request is not answered, an application to court is made. Depending on the circumstances, in the first instance, the court will often not grant an unless order. Commonly, only if the Claimant fails adequately to answer the Part 18 request will the court make an unless order, to ensure compliance with the court's order. If the Claimant fails to comply with an unless order, the claim will be struck out.
31. In addition, Crest makes the point that BCS has not engaged in the spirit of the overriding objective and the pre-action protocol because it has refused to answer requests for documents and information. BCS has not argued that any of the information Crest sought in its letter of 26 November 2019 is not information that it will be obliged to provide in disclosure. Whilst some of the requests were put as requests for information rather than for documents, that is largely a matter of form. The requests for information could easily have been recast as requests for documents had BCS made no objection to the request on the basis that it was not a request for documents. BCS refused to deal with the requests until Crest served its expert report. The court does expect cooperation and exchange of information to narrow issues before proceedings are issued. In this case, due to limitation concerns, the Claim Form was issued before the request was made, but the parties agreed extensions of time for service

to complete the pre-action protocol process. However, on 1 May 2020, BCS responded to the request for information in the following terms:

“NHBC-BCS will not be responding to the questions raised or providing the documentation requested at paragraphs 4.1 to 4.12 (inclusive) of your letter dated 26 November 2019. It is not down to NHBC-BCS to assist your client with instructing its expert to produce a report that it intends to rely on when suing NHBC-BCS. Any suggestion to the contrary is quite remarkable.

NHBC-BCS is not prepared to engage in any further inter-partes correspondence until such time as you (1) persuade it that the exclusions in the applicable NHBC-BCS terms concerning compliance with Building Regulations do not apply or (2) provide an expert report in support of an NHBC-BCS Approved Inspector having acted negligently.”

32. By responding in that way, BCS refused to provide information that Crest had explained its expert needed in order to consider the issue of breaches of duty and provide a report. BCS put a precondition on cooperating requiring Crest to serve the report for which Crest had indicated its expert needed the information requested. Had BCS answered the request for documentation and information, Crest would have been in a better position to particularise its case. For example, it may have been able either to particularise its allegation that BCS's staff were insufficiently qualified or it may have been persuaded that it was not lack of qualification that caused BCS to fail to identify the defects so that the allegation may not have been made.
33. BCS has chosen both not to engage in the exchange of information before the case was pleaded that may have assisted Crest produce a more focussed pleading and also to make an application to strike out the claim in its entirety on the basis it discloses no reasonable grounds for bringing the claim. That is an unattractive position.
34. In short, in my judgment, this is not a case that is suitable for striking out on the ground it discloses no reasonable ground for bringing the claim. The Particulars of Claim clearly disclose a cause of action, albeit that they are, at least in respect of some of the alleged defects, pleaded succinctly. Whilst further particulars are required, BCS has, through its refusal to engage in the exchange of information with a view to narrowing issues, contributed to Crest's difficulties in pleading its case in detail at this stage.

Further, the appropriate course in the first instance was to seek particulars.

SECOND GROUND: LACK OF EXPERT EVIDENCE

35. The second ground on which BCS seeks to strike out the claim as disclosing no reasonable grounds for bringing the claim is a lack of expert evidence supporting the claim. At the time the application was made, the solicitor for BCS, who had not been involved in the detail of the case in the earlier stages, mistakenly believed that Crest had not obtained any expert evidence. The second witness statement of the solicitor corrected the error and stated that, when the application was made, she did not have in mind the letter of 26 November 2019 from Crest's solicitors in which they had identified Mr Easton as their clients' expert on the issue of breach of duty of an Approved Inspector and asked questions to assist Mr Easton in his consideration of the case. She conceded in her second witness statement that it may be the case that Crest's case was supported by expert evidence. Despite the fact that it is conceded that the application was originally made in the mistaken belief that Crest had not obtained expert advice on the claim, BCS maintains its position that the claim should be struck out for lack of support by an expert.

The law

36. BCS argues that, subject to limited exceptions, an allegation akin to professional negligence can only be put forward in a statement of case on the basis that it is supported by an appropriate expert. It relies on the case of *Pantelli* and, in particular, on the following passage:

"...it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view?"

37. Mr Townend concedes that the decision in *Pantelli* does not lay down an immutable rule of practice and that, where there is as an explanation as to why the expert evidence

has not been obtained, the court can consider those reasons in deciding on the appropriate order. They include circumstances where there has been insufficient time for the party to obtain expert evidence. Where there has been sufficient time, the court is more likely to strike out the claim.

38. Both parties refer me to the decision of Akenhead J in the case of *ACD (Landscape Architects) Ltd v Overall* [2012] PNLR 407. Akenhead J provided the following guidance in that case:

“17 (a) They [the comments in Pantelli] are not expressed to and do not lay down an immutable rule of practice that in no circumstances no pleading can be put forward which pleads professional negligence unless and until the party pleading has secured supporting expert evidence ...

(b) There is under the CPR a requirement that the pleading should be supported by a statement of truth (CPR Part 22 generally) ... One can envisage circumstances in which a defendant or claimant may legitimately or at least not dishonestly plead that the facts stated in his or her pleading are true even where they involve allegations of professional negligence against the other party and where no expert evidence has yet been retained. Obviously there must be sufficient for the maker of the statement to make it ...

(e) Matters may however be different in circumstances in which a party relying on professional negligence allegations makes it clear that it does not need expert evidence, gives the clear impression that it has no intention of securing expert evidence or as in the Pantelli case that party without good reason has proceeded for a long time during the litigation without securing such evidence. The other party in those circumstances can then take steps in an extreme case by way of a striking out application or by other more cost-effective means to bring this to the attention of the court. It is open to the court to strike out allegations of professional negligence which in its judgment would have to be supported by expert evidence to stand any realistic prospect of success in circumstances in which the party making such

allegations makes it clear that it has no intention of obtaining such evidence. Another fairer course open to the court having established that the party making the allegations would need such evidence would be to give that party a reasonable opportunity to obtain such evidence.

Obviously, that may depend on the stage at which the point arises and, for instance, that may be inappropriate at a very late stage in the proceedings or even during a trial.”

This case

39. BCS argues that the claim is not supported by expert evidence. It refers to the letter of 26 November 2019 in which Crest's solicitors stated as follows:

“In order for Mr Easton to fully and better consider NHBC-BCS’s AI service for the Development, we have compiled the below request for further information. Absent replies to these requests, Mr Easton will be restricted to finalising his views based on the information in our clients’ possession. On that basis he has expressed the provisional view that NHBC-BCS’s performance was poor.”

40. There followed the list of questions to which I have already referred, and which BCS declined to answer.

41. It is correct that Crest has not served its expert report. It has not waived privilege in its communications with Mr Easton. It has indicated Mr Easton considered BCS’s performance to be poor. Mr Townend and submits that saying BCS’s performance is poor is not indicative of Mr Easton supporting the allegation of breach of duty. Mr Singer submits that the expression is shorthand for BCS’s performance being in breach of duty. Whilst there may be a difference between performance being poor and in breach of duty, and I accept that no report has been served, it is clear that, before the Particulars of Claim were drafted, Crest had the benefit of expert advice. It appears likely that that advice was of a provisional nature, as it is clear from the correspondence that Mr Easton sought further information that would inform his opinion, which information has not been provided by BCS.

42. The Particulars of Claim have been verified by a statement of truth from Crest's Senior Projects Director, presumably taking into the expert advice obtained.
43. Crest has not indicated it does not need expert evidence or that it does not intend to serve it in due course. It has made clear it has expert advice and intends to serve expert evidence.
44. In short, this is not the extreme case which Akenhead J suggested in *ACD* would justify striking out the claim or even, as he put it, "*other more cost effective means to bring this to the attention of the court*" so that the court could pursue the "*fairer course*" of giving the Claimant a reasonable opportunity to obtain that evidence. It is clear that Crest has obtained expert advice and intends to serve an expert report in due course.
45. I do not consider this is a case that it is appropriate for striking out application on the ground that it is unsupported by expert evidence.

Conclusion

46. In my judgment, the claim should not be struck out as disclosing no reasonable ground for bringing the claim.
47. The Particulars of Claim would benefit from more detailed particulars on some issues. Whilst I consider the allegations in relation to the failure to identify and warn Crest that the plans included the use of EPS are sufficiently clear for BCS to understand the case it has to meet without further particulars, the allegations in relation to the other defects are not as clearly particularised and should be clarified. However, even as they stand, the Particulars of Claim clearly disclose a cause of action and reasonable grounds for bringing the claim.
48. In my view the appropriate course would have been for BCS to make a Part 18 request for further information rather than to apply to strike out the claim. If that request was not adequately answered, BCS should have made an application to court for an order that the request be answered. Whilst the question of whether an unless order would have been appropriate would have been considered in the light of the response to the request, at this stage, it is not clear why an unless order would have been appropriate. BCS had not made any request for information.
49. The application to strike out the claim is dismissed.

50. BCS's application did not seek in the alternative an order for further particulars. I have considered whether the appropriate course is for me simply to leave BCS to formulate a Part 18 request and serve it on Crest. However, given that I have already considered the need for further particularisation in the context of the application to strike, subject to further submissions, I consider the more proportionate course would be for an order to be made now. I therefore invite BCS to draft an order identifying the further particulars it requires and to seek to agree the terms of that order with Crest in advance of the handing down hearing. If the parties are unable to agree the terms of the order, or if either party considers that is not the appropriate course, I will hear submissions when this judgment has been handed down.

51. Finally, Crest has argued that any order for it to particularise its claim should require BCS to give disclosure of the documents requested on 26 November 2019 before the further particulars are served. However, Crest has not made an application for preaction or early disclosure and the merits of that course were not fully explored during the hearing, the focus of which was the application to strike out. Whilst disclosure at this stage would be likely to reduce the risk of the need for further amendments later, I do not know what additional costs might be incurred if BCS were obliged to give some disclosure at this stage, compared with the costs that might be saved as a result of the reduced likelihood of Crest needing to amend its Particulars of Claim after disclosure. I invite the parties to discuss and agree the appropriate course. If they are unable to agree, I will hear submissions when this judgment has been handed down.