IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NOS: 2303023/2014 and 2301446/2015

BETWEEN:

DR C M DAY

Claimant

-and-

LEWISHAM & GREENWICH NHS TRUST

First Respondent

HEALTH EDUCATION ENGLAND

Second Respondent

Authorities Bundle for hearing on 5 and 6 December 2022

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1. *Ridehalgh v Horsefield* [1994] Ch. 205, pages 226 B-C, 231 E, 238 E

2. *Greenfield v Robinson* EAT/811/95

3. *Medcalf v Mardell* [2003] 1 AC 120, page 136 H

4. *Mitchells (A Firm) v Funkwerk Information Technologies York Ltd* UKEAT/0541/07/MAA, paras 21, 27

5. *Ratcliffe Duce and Gammer v L Binns (ta Parc Ferme)* UKEAT/0100/08/CEA, para 12

6. *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, paras 29, 30, 32

7. *Horizon v Vincent* [2010] ICR 491, paras 18 and 27

8. *Balls v Downham Market High School and College* UKEAT/0343/10/DM, para 6

9. *Glasgow City Council v Dahhan* UKEATS/0024/15/JW, para 21

10. *Hayward v Zurich* [2017] AC 142, paras 33, 34, 35, 36

11. *Ackerman v Thornhill* [2017] EWHC 99 (Ch), paras 63, 65, 79

12. *Day v Lewisham* [2017] ICR 917, paras 28 and 30

13. *TCO v Stuart* [2017] ICR 1175, para 25

14. *KL Law Ltd v Wincanton Group Ltd* UKEAT/0043/18/RN, paras 27, 33

15. *Banerjee v Royal Bank of Canada* [2021] ICR 359, paras 30-37

16. *Thames Trains v Adams* [2006] EWHC 3291, paras 1, 36, 40-43

17. Extracts from *Foskett on Compromise* 9th edition (2020), Chapters 2, 4 and 20

[COURT OF APPEAL]

RIDEHALGH v. HORSEFIELD AND ANOTHER

ALLEN v. UNIGATE DAIRIES LTD.

ROBERTS v. COVERITE (ASPHALTERS) LTD.

PHILEX PLC. v. GOLBAN (TRADING AS CAPITAL ESTATES)

WATSON v. WATSON

ANTONELLI AND OTHERS v. WADE GERY FARR (A FIRM)

1993 Dec. 14, 15, 16, 17, 20, 21;
1994 Jan. 26;
March 4

Sir Thomas Bingham M.R.,
Rose and Waite L.JJ.

Costs—Discretion of court—Wasted costs orders—Solicitors ordered to pay personally opposing party's costs—Similar order made against counsel in respect of conduct of proceedings in court—Whether conduct complained of "improper, unreasonable or negligent"—Whether immunity in respect of court proceedings—Whether orders rightly made—Supreme Court Act 1981 (c. 54), s. 51(6)(7) (as substituted by Courts and Legal Services Act 1990 (c. 41), s. 4)—Courts and Legal Services Act 1990, s. 62

At the conclusion of four actions, two of which had been begun in the High Court and two in the county court, application was made under section 51(6) of the Supreme Court Act 1981,[1] as substituted by section 4 of the Courts and Legal Services Act 1990,[2] for orders that the opposing parties' solicitors pay personally costs wasted in the litigation. The applications were resisted on the grounds that the solicitors' conduct had neither been "improper, unreasonable or negligent" within the meaning of section 51(7) of the Act of 1981, as substituted, nor in any event had caused costs to be wasted. In each case the judge made the order sought. In a fifth case application was made at the conclusion of the trial of an action begun in the High Court for such orders against the unsuccessful parties' legal representatives. Counsel resisted the application on the ground that the Act of 1990, and in particular section 62, had preserved the immunity enjoyed by an advocate in respect of the conduct of proceedings in court. The judge found that her failure to conduct the trial with proper expedition arose as a direct consequence of her having accepted the brief at short notice and had caused costs to be wasted. He accordingly made the order sought. On the determination of a sixth action on appeal from the county court the Court of Appeal invited the solicitors who had had conduct of the litigation at first instance to show cause why such orders should not be made against them.

On the appeals and on the solicitors' application to show cause:—

[1] Supreme Court Act 1981, s. 51(6)(7), as substituted: see post, p. 230E–F.
[2] Courts and Legal Services Act 1990, s. 62: see post, pp. 230H–231A.

Held, allowing the appeals and declining to make orders against the solicitors on their showing cause, (1) that on a true construction of section 51(7) the words "improper, unreasonable or negligent" bore their established meaning; that "improper" applied to conduct which amounted to any significant breach of a substantial duty imposed by a relevant code of professional conduct and included conduct so regarded by the consensus of professional opinion; that "unreasonable" described conduct which did not permit of a reasonable explanation; that "negligent" was to be understood in an untechnical way to denote a failure to act with the competence reasonably to be expected of ordinary members of the profession; that in any event orders should only be made under section 51(6) where and to the extent that the conduct so characterised had been established as directly causative of wasted costs (post, pp. 232C–233A, C–E, 237E–F).

(2) That section 62 of the Act of 1990, although preserving an advocate's immunity in relation to court proceedings, was to be read subject to sections 4, 111, and 112 of that Act so that an advocate whose conduct in court had been improper, unreasonable or negligent would be liable to a wasted costs order; but that having regard to the cab-rank principle imposed on barristers by paragraph 209 of their Code of Conduct and to the public policy consideration that representation should be afforded to the unpopular and unmeritorious, pursuit of a hopeless case was not of itself to be characterised as conduct falling within section 51(7) of the Act of 1981, as substituted; that, in considering counsel's conduct in court, the judge had failed to appreciate that she had been obliged by paragraph 209 of the code to accept the brief and could not, by virtue of paragraph 506, withdraw from the case at such short notice as would prejudice her clients despite the inadequacy of her instructions; that neither counsel's conduct nor that complained of in the other cases could be stigmatised as improper, unreasonable or negligent, nor as wasteful of costs; and that, accordingly, none of the orders should have been made (post, pp. 233F, 234B, 235D–E, G–236A, E–G, 244A–B, H–245A, 246H–247B, 249E–H, 254F–255A, 263H–264B, 268F–H, 269A–B, 270D–E).

The following cases are referred to in the judgment of the court:

Barrister (Wasted Costs Order) (No. 1 of 1991), In re A [1993] Q.B. 293; [1992] 3 W.L.R. 662; [1992] 3 All E.R. 429, C.A.

Company (No. 0012209 of 1991), In re A [1992] 1 W.L.R. 351; [1992] 2 All E.R. 797

Currie & Co. v. The Law Society [1977] Q.B. 990; [1976] 3 W.L.R. 785; [1976] 3 All E.R. 832

Davy-Chiesman v. Davy-Chiesman [1984] Fam. 48; [1984] 2 W.L.R. 291; [1984] 1 All E.R. 321, C.A.

Edwards v. Edwards [1958] P. 235; [1958] 2 W.L.R. 956; [1958] 2 All E.R. 179

Filmlab Systems International Ltd. v. Pennington, The Times, 9 July 1993, Aldous J.

Gofur v. Fozal, The Times, 9 July 1993; Court of Appeal (Civil Division) Transcript No. 680 of 1993, C.A.

Gupta v. Comer [1991] 1 Q.B. 629; [1991] 2 W.L.R. 494; [1991] 1 All E.R. 289, C.A.

Holden & Co. v. Crown Prosecution Service [1990] 2 Q.B. 261; [1990] 2 W.L.R. 1137; [1990] 1 All E.R. 368, C.A.

Jenkins v. Livesey (formerly Jenkins) [1985] A.C. 424; [1985] 2 W.L.R. 47; [1985] 1 All E.R. 106, H.L.(E.)

Locke v. Camberwell Health Authority [1991] 2 Med.L.R. 249, C.A.

Mauroux v. Soc. Com. Abel Pereira da Fonseca S.A.R.L. [1972] 1 W.L.R. 962; [1972] 2 All E.R. 1085

Myers v. Rothfield [1939] 1 K.B. 109; [1938] 3 All E.R. 498, C.A.; sub nom. *Myers v. Elman* [1940] A.C. 282; [1939] 4 All E.R. 484, H.L.(E.)

Orchard v. South Eastern Electricity Board [1987] Q.B. 565; [1987] 2 W.L.R. 102; [1987] 1 All E.R. 95, C.A.

Rondel v. Worsley [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.)

Saif Ali v. Sydney Mitchell & Co. [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.)

Sinclair-Jones v. Kay [1989] 1 W.L.R. 114; [1988] 2 All E.R. 611, C.A.

Symphony Group Plc. v. Hodgson [1994] Q.B. 179; [1993] 3 W.L.R. 830, C.A.

Thew (R. & T.) Ltd. v. Reeves (No. 2) (Note) [1982] Q.B. 1283; [1982] 3 W.L.R. 869; [1982] 3 All E.R. 1086, C.A.

Wilkinson v. Wilkinson [1963] P. 1; [1962] 3 W.L.R. 1; [1962] 1 All E.R. 922, C.A.

The following additional cases were cited in argument:

AB v. John Wyeth & Brother Ltd. (unreported), 12 November 1993, Ian Kennedy J.

Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] A.C. 965; [1986] 2 W.L.R. 1051; [1986] 2 All E.R. 409, H.L.(E.)

Al-Kandari v. J.R. Brown & Co. [1988] Q.B. 665; [1988] 2 W.L.R. 671; [1988] 1 All E.R. 833, C.A.

Bahai v. Rashidian [1985] 1 W.L.R. 1337; [1985] 3 All E.R. 385, C.A.

Blyth v. Birmingham Waterworks Co. (1856) 11 Exch. 781

Bolam v. Friern Hospital Management Committee [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118

Business Computers International Ltd. v. Registrar of Companies [1988] Ch. 229; [1987] 3 W.L.R. 1134; [1987] 3 All E.R. 465

Buttes Gas and Oil Co. v. Hammer (No. 3) [1981] Q.B. 223; [1980] 3 W.L.R. 668; [1980] 3 All E.R. 475, C.A.

Debtor (No. 88 of 1991), In re A [1993] Ch. 286; [1992] 3 W.L.R. 1026; [1992] 4 All E.R. 301

Gojkovic v. Gojkovic [1992] Fam. 40; [1991] 3 W.L.R. 621; [1992] 1 All E.R. 267, C.A.

Goldman v. Hesper [1988] 1 W.L.R. 1238; [1988] 3 All E.R. 97, C.A.

Great Atlantic Insurance Co. v. Home Insurance Co. [1981] 1 W.L.R. 529; [1981] 2 All E.R. 485, C.A.

Holden & Co. v. Crown Prosecution Service (No. 2) [1994] 1 A.C. 22; [1993] 2 W.L.R. 934; [1993] 2 All E.R. 769, H.L.(E.)

John v. Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274

Langley v. North West Water Authority [1991] 1 W.L.R. 697; [1991] 3 All E.R. 610, C.A.

Lillicrap v. Nalder & Son (a firm) [1993] 1 W.L.R. 94; [1993] 1 All E.R. 724, C.A.

Lye v. Marks & Spencer Plc., The Times, 15 February 1988, C.A.; Court of Appeal (Civil Division) Transcript No. 97 of 1988, C.A.

Mainwaring v. Goldtech Investments Ltd., The Times, 19 February 1991; Court of Appeal (Civil Division) Transcript No. 48 of 1991, C.A.

Manor Electronics Ltd. v. Dickson , The Times, 8 February 1990, Scott J.

Marubeni Corporation v. Alafouzos (unreported), 6 November 1986; Court of Appeal (Civil Division) Transcript No. 996 of 1986, C.A.

Pamplin v. Express Newspapers Ltd. [1985] 1 W.L.R. 689; [1985] 2 All E.R. 185

Rees v. Sinclair [1974] 1 N.Z.L.R. 180

Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Mirror Group Newspapers Ltd. (Note) [1992] 1 W.L.R. 412; [1992] 2 All E.R. 638, D.C.

Reg. v. Horsham District Council, Ex parte Wenman (unreported), 1 October 1993, Brooke J.

Saxton, decd., In re [1962] 1 W.L.R. 968; [1962] 3 All E.R. 92, C.A.

Singer (formerly Sharegin) v. Sharegin [1984] F.L.R. 114, C.A.

Solicitor (Wasted Costs Order), In re A, The Times, 16 April 1993; Court of Appeal (Civil Division) Transcript No. 439 of 1993, C.A.

Swedac Ltd. v. Magnet & Southern Plc. [1990] F.S.R. 89, C.A.

Trill v. Sacher (No. 2), The Times, 14 November 1992; Court of Appeal (Civil Division) Transcript No. 862 of 1992, C.A.

Ventouris v. Mountain [1991] 1 W.L.R. 607; [1991] 3 All E.R. 472, C.A.

The following cases, although not cited, were referred to in the skeleton arguments:

Abraham v. Jutson [1963] 1 W.L.R. 658; [1963] 2 All E.R. 402, C.A.

Brendon v. Spiro [1938] 1 K.B. 176; [1937] 2 All E.R. 496, C.A.

Davies (Joseph Owen) v. Eli Lilly & Co. [1987] 1 W.L.R. 1136; [1987] 3 All E.R. 94, C.A.

Din (Taj) v. Wandsworth London Borough Council (No. 2) (Practice Note) [1982] 1 W.L.R. 418; [1982] 1 All E.R. 1022, H.L.(E.)

Francis v. Francis and Dickerson [1956] P. 87; [1955] 3 W.L.R. 973; [1955] 3 All E.R. 836

Gran Gelato Ltd. v. Richcliff (Group) Ltd. [1992] Ch. 560; [1992] 2 W.L.R. 867; [1992] 1 All E.R. 865

Hudson v. Elmbridge Borough Council [1991] 1 W.L.R. 880; [1991] 4 All E.R. 55, C.A.

Iverson v. Iverson [1967] P. 134; [1966] 2 W.L.R. 1168; [1966] 1 All E.R. 258

Jones v. Curling (1884) 13 Q.B.D. 262, C.A.

Mann v. Goldstein [1968] 1 W.L.R. 1091; [1968] 2 All E.R. 769

Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571

Pepper v. Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42, H.L.(E.)

Reg. v. Legal Aid Board, Ex parte Hughes (1992) 24 H.L.R. 698, C.A.

Reg. v. Legal Aid Committee No. 1 (London) Legal Aid Area, Ex parte Rondel [1967] 2 Q.B. 482; [1967] 2 W.L.R. 1358; [1967] 2 All E.R. 419, D.C.

Reg. v. Secretary of State for the Home Department, Ex parte William Berko [1991] Imm.A.R. 127

Rolph v. Marston Valley Brick Co. Ltd. [1956] 2 Q.B. 18; [1956] 2 W.L.R. 929; [1956] 2 All E.R. 50

Taylor v. Pace Developments Ltd. [1991] B.C.C. 406, C.A.

Wilsher v. Essex Area Health Authority [1987] Q.B. 730; [1987] 2 W.L.R. 425; [1986] 3 All E.R. 801, C.A.

RIDEHALGH V. HORSEFIELD AND ANOTHER

APPLICATION

On 26 March 1992 in giving judgment on an appeal by the tenants, Neil Horsefield and Christine Isherwood, against an order made in

possession proceedings by Judge Holt, sitting at Blackpool County Court, in favour of the landlord, Bevan Ridehalgh, the Court of Appeal (Purchas and Mann L.JJ.) invited the solicitors who had represented the parties in the county court to show cause why orders for wasted costs should not be made against them. By a direction of the Court of Appeal (Sir Thomas Bingham M.R., Leggatt and Roch L.JJ.) made on 4 October 1993 the matter was ordered to be heard with appeals in *Allen v. Unigate Dairies Ltd.; Roberts v. Coverite (Asphalters) Ltd.; Philex Plc. v. Golban (trading as Capital Estates); Watson v. Watson* and *Antonelli v. Wade Gery Farr.*

The facts are stated in the judgment of the court.

Allen v. Unigate Dairies Ltd.

Appeal from Judge Lachs, sitting at Liverpool County Court.

On 29 March 1993 the plaintiff, Patrick Allen, consented to the dismissal of his action claiming damages for personal injury against the defendants, Unigate Dairies Ltd., in respect of deafness allegedly caused by his working conditions. On 10 May 1993, on the defendants' application that their costs be paid personally by the plaintiff's solicitors, the judge found that in failing to ascertain that the plaintiff's workplace was not dangerously noisy his solicitors had been unreasonable and negligent in their preparation of his case. The judge accordingly directed that they personally pay the defendants' costs from 1 November 1992.

By a notice of appeal dated 4 June 1993 the plaintiff's solicitors appealed on the grounds, inter alia, that the judge (1) gave no or insufficient weight to the fact that (a) they had relied on instructions taken from the plaintiff both to themselves and to their expert and had also relied on their expert; (b) the defendants' correspondence in no way alerted them to the error as to the proximity of the plaintiff to a dangerously noisy machine and (c) the defendants' expert had compounded that error; and (2) erred in the exercise of his discretion in concluding that the solicitors' errors were so clear or of such a quality as to justify making the wasted costs order.

The facts are stated in the judgment of the court.

Roberts v. Coverite (Asphalters) Ltd.

Appeal from Judge Tibber, sitting at Edmonton County Court.

By an order dated 15 March 1993 and made by consent the claim by the plaintiff, Ronald Roberts, against the defendants, Coverite (Asphalters) Ltd., in respect of work done, was settled on terms set out in a schedule to the order. On 14 April 1993, on the application of the defendants for an order that the plaintiff's solicitor pay personally their costs, the judge held that the solicitor had failed to serve on the defendants notice of issue of legal aid granted to the plaintiff so that, in failing to comply with regulation 51 of the Legal Aid (General) Regulations 1980 (S.I. 1980 No. 1894), he failed to conduct the proceedings competently. The judge further concluded that, if the defendants had been so notified, they would have settled the action at the outset and he accordingly granted the application.

By a notice of appeal dated 7 May 1993 the solicitor appealed on the grounds, inter alia, that the judge (1) erred in law (a) in holding that the solicitor was in breach of regulation 51 of the Regulations of 1980 since the solicitor had sent a copy of the notice to the county court for service on the defendants in conformity with general practice; and (b) in finding on an insufficient factual basis that on notification the defendants would have settled the action; and (2) in any event erred in the exercise of his discretion in making the order.

By a respondent's notice dated 1 June 1993 the defendants sought to contend that the judge's order be affirmed on the additional grounds that (1) the solicitor had no reason to suppose that the county court would serve the notice on the defendants, and (2) in failing to serve the notice the solicitor acted without regard to the Law Society's guidance on the duties imposed on solicitors by the regulations relating to legal aid and that, accordingly, the solicitor's failure to observe professional standards in that respect amounted to a failure to conduct the proceedings with reasonable competence.

The facts are stated in the judgment of the court.

PHILEX PLC. v. GOLBAN (TRADING AS CAPITAL ESTATES)

APPEAL from Knox J.

By a statutory demand served on the applicant, Philex Plc., by solicitors acting for the respondent, S. Golban (trading as Capital Estates), on 24 December 1992 the sum of £11,100 was claimed as allegedly due as commission in respect of the purchase of a specified property. By a letter dated 31 December 1992 the applicant denied liability and sought an undertaking by 4 January 1993 that no petition would be presented to the Companies Court based on its refusal to pay the sum claimed. The respondent's solicitors could not take instructions so as to obtain any such undertaking by that date. On 5 January the applicant issued an originating application for an injunction to restrain presentation of a petition based on the statutory demand and on 8 January the proceedings were served on the respondent's solicitors. On 14 January 1993 Lindsay J. granted the injunction ex parte and on 25 January, on the inter partes hearing, Ferris J. continued the injunction and directed the respondent to pay the applicant's costs of both applications on an indemnity basis. The judge adjourned a further application by the applicant for those costs to be paid personally by the respondent's solicitors. On 30 June 1993 Knox J. concluded that it had been unreasonable and improper of the solicitors to use proceedings which, by 11 January, amounted to an abuse of the process of the court as a vehicle to secure a compromise at one stage offered by the applicant. He accordingly granted the application and directed that the wasted costs incurred by the applicant after 13 January be paid by the respondent's solicitors, but that credit be given for such costs as would have been incurred in disposing of the application of 5 January by consent.

By a notice of appeal dated 5 August 1993 the solicitors appealed on the grounds, inter alia, that (1) the judge's conclusion could not be justified on the evidence; (2) the judge had failed to consider whether the applicant had incurred costs as a result of any improper, unreasonable or

A negligent conduct by the solicitors under section 51(7) of the Supreme Court Act 1981; and (3) the judge had failed to take sufficient account of difficulties faced by the solicitors in responding to the application, since they had not obtained any waiver from the respondent of communications which were protected by legal professional privilege.

By a notice to affirm served out of time with leave of the Court of Appeal the applicant sought to contend that the judge's order be affirmed B on the additional grounds that (1) the respondent's solicitors had acted negligently and/or unreasonably and/or improperly in failing to advise their client on 13 January (i) not to pursue the winding up proceedings and (ii) that to do so amounted to an abuse of process; (2) the solicitors acted unreasonably and improperly in continuing to act for their client while failing to secure his consent to an order barring further recourse to C the proceedings or an undertaking to similar effect, whether by threatening to come off the record or otherwise; (3) in the absence of such conduct by the solicitors a formal undertaking or consent to the injunction would have been obtained on 13 January so that the applicant would have incurred no costs after that date, save for such costs as would have been involved in obtaining a consent order disposing of the application of 5 January; and (4) the judge had exercised his discretion appropriately.

D The facts are stated in the judgment of the court.

Watson v. Watson

Appeal from Booth J.

By a consent order made in matrimonial proceedings for divorce between the petitioner, Frank Watson, and Brenda Watson, the E respondent, on 2 March 1992 and corrected by consent subsequently Judge Wilcox, sitting as a deputy judge of the High Court, directed, inter alia, that all capital provision for the wife be settled on trust and in the event of her death or remarriage would pass to the child of the marriage. By a summons dated 16 February 1993, following disagreement between the parties' legal advisers in respect of the proper construction of the F consent order, the wife sought the court's direction as to the appropriate form for the trust deed to give effect to that order. By her order dated 10 March 1993 Booth J. determined that the trust deed should make provision in the form proposed by the husband's solicitors. On 7 April 1993, on the husband's application, the judge concluded that the wife's solicitors, in particular by failing to respond to issues raised by a letter dated 16 October 1992 from the husband's solicitors, had unreasonably G failed to negotiate the terms of the trust deed so as to avoid the necessity of returning to court and that accordingly they should personally pay £1,500 of the husband's costs of the application of 10 March and of the hearing of 7 April 1993.

By a notice of appeal dated 5 May 1993 the solicitors appealed on the grounds, inter alia, that the judge had misdirected herself in law (1) in finding that the solicitors had caused wasted costs to be incurred within H the meaning of section 51(7) of the Supreme Court Act 1981, as substituted; (2) and/or in exercising her discretion in wrongly failing to accept that it was reasonable for the solicitors to have relied on the advice given by specialist trust counsel instructed in the matter and in failing to

recognise that it was impossible to negotiate the matter with the husband's solicitors and that application to the court was necessary, and that therefore costs were not unnecessarily incurred.

By a respondent's notice dated 25 May 1993 the husband sought to contend that the judge's order be affirmed on the additional ground that the wife's solicitors' principal argument in favour of the way in which the intended trust deed should be drawn, which occupied the hearing almost entirely, had no chance of success, so that it was unreasonable, within the meaning of section 51 of the Act of 1981, as substituted, to have permitted or instructed presentation of that argument.

The facts are stated in the judgment of the court.

ANTONELLI AND OTHERS v. WADE GERY FARR (A FIRM)

APPEAL from Turner J.

By a writ issued on 12 June 1990 the plaintiffs, Samuel Antonelli, Munny Ltd. and Great Properties Ltd., began proceedings against the defendants, Wade Gery Farr (a firm), who had acted as their solicitors in respect of the purchase of certain properties. On 1 April 1992 C. was asked to represent the plaintiffs at trial of the action to be heard on 6 April and estimated to last five days. She accepted instructions but no proper brief was ever delivered to her and such bundles as she received were insufficient for adequate preparation. The hearing took place over six days and on 22 May 1992, in a reserved judgment, the judge dismissed the plaintiffs' claim and adjourned the defendants' application that the plaintiffs' legal representatives personally pay costs unnecessarily incurred by them in the conduct of the action. The claim against the plaintiffs' solicitors was subsequently compromised and on 27 November 1992 the judge concluded that C. had unnecessarily prolonged the proceedings to the extent of one full day, her failure arising as the direct consequence of her improper and unreasonable acceptance of the brief at short notice since it was manifestly improbable that she could achieve an adequate grasp of the matters in issue within the time available to her. He accordingly directed that she pay personally to the defendants the costs of one full day of the trial to the extent that such costs were unrecovered from the plaintiffs or their solicitors.

By a notice of appeal dated 18 January 1993, amended with leave of the Court of Appeal, C. appealed on the grounds, inter alia, that, having correctly found that all the areas in which time had been unnecessarily expended were the direct result of the late delivery of an ill-prepared brief, the judge erred in law in holding that the consequent costs resulted from unreasonable and/or improper conduct on C.'s part. In particular the judge erred (i) in holding that in all the circumstances C.'s acceptance of the brief at short notice was unreasonable and likely to and did give rise to improper conduct by her; (ii) in failing to pay any sufficient regard to the principle expressed at paragraph 506(d) of the Code of Conduct of the Bar of England and Wales that a practising barrister must not return any brief or instructions or withdraw from a case so that his client might be unable to find other legal assistance in time to prevent his suffering prejudice; (iii) in apparently judging C., who had accepted the brief in order to reduce prejudice to her clients, by reference to some objective

A standard of competence without regard to the time she had had to prepare the matter and the inadequacy of the brief she had received; (iii) in holding that section 51 of the Supreme Court Act 1981, as substituted, had operated to diminish the full breadth of the public interest immunity of the Bar, affirmed in *Rondel v. Worsley* [1969] 1 A.C. 191; alternatively (iv) in the exercise of his discretion in making the order having regard to all the circumstances of the case. In particular the judge should not have
B allowed the defendants to initiate and/or pursue their application for wasted costs when it should have been apparent to him (a) that the necessary investigation and its costs were likely to be out of all proportion to the amount of wasted costs in issue and (b) that to adjudicate properly on the matter might involve matters which the plaintiffs could claim were covered by legal professional privilege.

C By a respondent's notice dated 7 December 1993 and served out of time with leave of the Court of Appeal the defendants sought to contend that the judge's order be affirmed on the additional ground that even if C. had not acted improperly or unreasonably in accepting the trial brief at short notice the grounds of criticism made by the judge of her conduct of the proceedings remained independently valid and did not arise as a result of late delivery of the brief.

D The facts are stated in the judgment of the court.

Duncan Matheson Q.C. and *Guy Mansfield* for the Law Society. There is concern that the increased frequency with which orders are now made against legal advisers for wasted costs under section 51(6) of the Supreme Court Act 1981, as substituted by section 4 of the Courts and Legal
E Services Act 1990, may adversely affect the client's relationship with his legal representatives and threaten the independence of advice. The principal grounds of concern are that (i) if misused wasted costs orders may affect the willingness of legal representatives fearlessly to represent their clients' interests, particularly where the work is publicly funded; (ii) such orders may drive a wedge between the lawyer and his client;
F (iii) they may impinge on legal professional privilege; and (iv) the costs on applications for such orders, particularly where the court acts of its own motion, will often be irrecoverable and there is likely to be an adverse effect on the level of insurance premiums and legal fees.

Historically the jurisdiction to make such orders was confined to solicitors and rested on the High Court's inherent jurisdiction over its officers. Its exercise had a strongly disciplinary flavour: see *Myers v.*
G *Elman* [1940] A.C. 282 and *R. & T. Thew v. Reeves (No. 2) (Note)* [1982] Q.B. 1283. Its existence was confirmed by section 50(2) of the Solicitors Act 1974, and, until 1986, was supplemented by rules of court (see R.S.C., Ord. 62, rr. 7 and 8) under which the same principles for its exercise were applied. Ord. 62, r. 11 in 1986 set a less stringent test in civil (but not criminal) cases: see *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114; *Langley v. North West Water Authority* [1991] 1 W.L.R. 697; *Gupta v. Comer* [1991]
H 1 Q.B. 629 and *Holden & Co. v. Crown Prosecution Service* [1990] 2 Q.B. 261.

Prior to the Courts and Legal Services Act 1990 barristers were not amenable to any such jurisdiction: see *Orchard v. South Eastern Electricity*

Board [1987] Q.B. 565 and *Reg. v. Horsham Justices, Ex parte Wenman* (unreported), 1 October 1993. The court cannot exercise the jurisdiction conferred over barristers in relation to conduct which took place before the Act came into force in October 1991: see *Gofur v. Fozal*, The Times, 9 July 1993; Court of Appeal (Civil Division) Transcript No. 680 of 1993.

Apart from the court's inherent jurisdiction over solicitors, the present wasted costs jurisdiction is not exercised under section 51(1) or (3) of the Supreme Court Act 1981 (see *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] A.C. 965 and *Holden & Co. v. Crown Prosecution Service (No. 2)* [1994] 1 A.C. 22) but solely under section 51(6) (7) and (13) of the Act of 1981, as substituted by section 4 of the Act of 1990. The statutory jurisdiction applies to all legal representatives at all levels. [Reference was made to section 19A of the Prosecution of Offences Act 1985, as inserted by section 111 of the Act of 1990, and section 145A of the Magistrates' Courts Act 1980, as inserted by section 112 of the Act of 1990.] R.S.C., Ord. 62, r. 11 does not provide a separate jurisdiction and, since the language of the amended section 51 is reminiscent of that rule, it may be that Parliament intended to support the interpretation given in *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114. Its intention is not, however, to lower the threshold of conduct which may attract the exercise of the jurisdiction. Other sanctions are available for unsatisfactory professional work, such as civil actions for negligence and professional disciplinary proceedings under the powers exercised by the General Council of the Bar over barristers and by the Law Society over solicitors.

The words "unreasonable" and "improper" in section 51(7)(*a*) of the Act of 1981 have long been used in the context of orders against solicitors and are therefore to be presumed to bear their traditional meaning: see *Myers v. Elman* [1940] A.C. 282, 288–289. They relate to misconduct in the proceedings: see *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293. The duty owed by the solicitor is founded on his duty to the court, not on a duty of care to parties for whom he does not act. To such a person he owes no duty of care (see *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565) although a wasted costs order will include the compensation of such persons for loss. [Reference was also made to *Al-Kandari v. J.R. Brown & Co.* [1988] Q.B. 665 and *Reg. v. Horsham District Council, Ex parte Wenman*, 1 October 1993.]

The word "negligent" in section 51(7)(*a*) is to be understood in its legal context. It connotes only such error as no reasonably well informed and competent member of the profession could make and does not include errors of judgment: see *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 218, 220 and *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582. To interpret the word more broadly would introduce a lower threshold: see *In re A Solicitor (Wasted Costs Order)*, The Times, 16 April 1993; Court of Appeal (Civil Division) Transcript No. 439 of 1993. Accordingly, on a wasted costs application, the court should ask (1) whether there has been an improper, unreasonable or negligent act or omission; (2) if so, whether a party as a result has incurred costs; (3) if so, whether the court should exercise its discretion to make an order in respect of all or part of those costs: see *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293; *Reg. v. Horsham District Council,*

Ex parte Wenman (unreported), 1 October 1993 and *The Supreme Court Practice 1993*, p. 1061, paragraph 62/11/1.

The jurisdiction is draconian and should not be exercised so as to erode or outflank the immunity from suit accorded advocates in respect of their conduct of proceedings or pre-trial preparations: see *Rondel v. Worsley* [1969] 1 A.C. 191; *Locke v. Camberwell Health Authority* [1991] 2 Med. L.R. 249 and *Reg. v. Horsham District Council, Ex parte Wenman*, 1 October 1993. The jurisdiction is ultimately disciplinary in character and is based on the need to ensure that litigation is conducted with due propriety and that costs are not wasted by the negligent misconduct of litigation. It does not create an obligation to an opposing party which conflicts with or derogates from the duty to one's own client. A legal representative is entitled to accept instructions to pursue litigation which has little prospect of success provided that to do so does not amount to an abuse of the court's process. His opponent's remedy lies in the rule that costs follow the event. That rule should not be eroded by giving an alternative remedy available through the wasted costs jurisdiction.

In practice wasted costs applications are mainly brought against legal representatives of legally aided litigants. In principle, they should not be treated differently from other legal representatives: see section 31(1) of the Legal Aid Act 1988 and *In re Saxton, decd.* [1962] 1 W.L.R. 968. [Reference was also made to *Symphony Group Plc. v. Hodgson* [1994] Q.B. 179 and *Lye v. Marks & Spencer Plc.*, The Times, 15 February 1988; Court of Appeal (Civil Division) Transcript No. 97 of 1988.] A party who believes that legal aid has been wrongly granted to his opponent can invite the Legal Aid Board to withdraw legal aid. There are further safeguards regarding the provision of legal aid: see Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339), rr. 66, 67, 68, 73, 78, 79 and 80. The test for determining whether legal aid should be granted (the legal merits test) is applied generously by the board and no onus is cast on the litigant or his advisers to satisfy that test. The threat of wasted costs applications must not be used to frighten legal representatives acting for legally-aided parties: see *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565, 577–578, 580.

The term "legal professional privilege" falsely suggests that it is the legal representative, not the client, who enjoys the privilege: see *Ventouris v. Mountain* [1991] 1 W.L.R. 607, 611. The doctrine is firmly rooted in public policy and is fundamental to the system of litigation and access to professional legal advice. Exceptions to the doctrine are strictly limited and are based on competing considerations of public policy. Legal representatives are accordingly under a duty of confidentiality to their clients and cannot give evidence of what has passed between them or between the client's other legal advisers: see *Orchard's* case [1987] Q.B. 565, 572. Privilege must prevail even where the responding lawyer to a wasted costs application cannot resist an order without reliance on the privileged communications between himself and his client or between himself and counsel. In such a case, where privilege is not waived, the court should give the legal adviser the benefit of the doubt and decline to grant the application.

Where privilege is not waived the legal adviser can put before the court the effect but not the substance of the advice given by counsel (see *Marubeni Corporation v. Alafouzos* (unreported), 6 November 1986; Court of Appeal (Civil Division) Transcript No. 996 of 1986) but the court will not know whether counsel was properly instructed. In general a solicitor is entitled to rely on the advice of counsel properly instructed, but he may not do so blindly and without exercising his own independent judgment: see *Locke v. Camberwell Health Authority* [1991] 2 Med. L.R. 249; *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48 and *Manor Electronics Ltd. v. Dickson*, The Times, 8 February 1990. In any event the responding lawyer should not advise his client on the question of waiver. Independent advice would be needed and the costs of litigation would be increased. In view of their inherent difficulties, wasted costs applications should not be determined at an interlocutory stage, but at the conclusion of the litigation: see *Filmlab Systems International Ltd. v. Pennington*, The Times, 9 July 1993 and *AB v. John Wyeth & Brother Ltd.* (unreported), 12 November 1993.

The question of privilege does not create difficulties where an order is sought in respect of a legal adviser's defaults of an administrative or practical kind but it does where allegations are made which require a full inquiry to ascertain whether the faults complained of lie with the adviser or his client. In the latter type of case costs can be incurred out of all proportion to the initial litigation and, where the application is triggered by the court itself, the court should be alive to the danger of extra costs and relitigation of issues determined in the proceedings. The court should also be wary of initiating a full inquiry into an adviser's conduct since, in the event of the adviser's dispelling the criticisms made against him, there may be no body to fund the expense to which he has been put.

The immunity from suit enjoyed by barristers and solicitors acting as advocates from actions for negligence in respect of proceedings in court and preparation of such proceedings would, prior to the Act of 1990, have applied to any application for costs made against them personally. Section 62 of the Act of 1990 preserves the traditional immunity but there are limited modifications to it in section 51(6)(7) and (13). [Reference was made to *Rondel v. Worsley* [1969] 1 A.C. 191.]

The court should be slow to exercise its discretion in favour of so draconian an order. Where there is doubt it should be resolved in the legal adviser's favour, and the court should always bear in mind the possibly serious professional repercussions for the lawyer himself: see *Mainwaring v. Goldtech Investments Ltd.*, The Times, 19 February 1991; Court of Appeal (Civil Division) Transcript No. 48 of 1991. [Reference was also made to *Trill v. Sacher (No. 2)*, The Times, 14 November 1992; Court of Appeal (Civil Division) Transcript No. 862 of 1992; *Holden & Co. v. Crown Prosecution Service (No. 2)* [1994] 1 A.C. 22; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Mirror Group Newspapers Ltd. (Note)* [1992] 1 W.L.R. 412 and *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293.] The legal representative will often require independent representation. Where the court of its own motion instigates the proceedings difficulties will arise in the drafting of the complaint and in adducing the material on which it is

based and in conducting the proceedings, which will necessarily be inquisitorial in form. Other problems will arise on the need for discovery, for oral evidence and cross examination. The jurisdiction should be exercised by way of a summary procedure in which the formal requirements necessary to a full investigation are inappropriate.

Rupert Jackson Q.C. and *David Hodge* for the General Council of the Bar. The words "unreasonable or improper" sound more in the context of professional ethics than standard-of care. They constitute the first category of conduct to be assessed in the exercise of the jurisdiction and refer only to serious breaches of professional conduct: see *Myers v. Elman* [1940] A.C. 282. They should be judged by reference to the Code of Professional Conduct published by the General Council of the Bar in relation to barristers and the Guide to the Professional Conduct of Solicitors published by the Law Society. The reasonableness or propriety of the conduct of the legal representative in question is to be judged by reference to his duties to the court and the interests of his own client, not from the standpoint of the opposing party.

"Negligent" is to be read as meaning "such as to render a legal representative liable in an action for negligence." In the context of the Courts and Legal Services Act 1990 the word is clearly used as a legal term of art and is not synonymous with "careless." The relevant standard of care is that derived from *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 218, namely, entailing an error which no reasonably well-informed and competent member of the profession would have made, and not an error of judgment on which professional opinions might reasonably have differed: see *Reg. v. Horsham District Council, Ex parte Wenman*, 1 October 1993. Although the remedy of a wasted costs order may involve the compensation of third parties for losses suffered, the duty which founds the jurisdiction is that owed by the legal representative to the court or to his own client, not any duty owed to the opposing party: see paragraph 203(a) of the Code of Conduct.

Section 62 of the Act of 1990 is based on the legislature's acceptance of the common law principle according immunity to barristers for part of their work: see *Rondel v. Worsley* [1969] 1 A.C. 191; *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198 and *Rees v. Sinclair* [1974] 1 N.Z.L.R. 180, 187. The section extends that immunity to all advocates and to actions for breach of contract and sections 4, 111 and 112 of the Act must be construed consistently with it.

The public policy grounds of the immunity are that (1) the administration of justice requires a barrister to be able to perform his duty to the court fearlessly and independently (see *Rondel's* case [1969] 1 A.C. 191, 227–228, 247, 251, 271–272, 282–283, 290 and *Saif Ali's* case [1980] A.C. 198, 219–220, 235); (2) actions against barristers would involve relitigating the original actions which would prolong litigation, create the risk of inconsistent decisions and bring the administration of justice into disrepute (see *Rondel's* case [1969] 1 A.C. 191, 230, 238–251 and *Saif Ali's* case [1980] A.C. 198, 222–223, 235–236); (3) the cab-rank rule (see paragraph 209 of the Code of Conduct) obliges a barrister to accept a client, however difficult, who seeks his services (see *Rondel's* case [1969] 1 A.C. 191, 227, 274–276, 281 and *Saif Ali's* case [1980] A.C. 198, 221,

236); and (4) a barrister's immunity in respect of his conduct of proceedings in court is part of the general immunity attaching to all participants in the proceedings (see *Rondel's* case [1969] 1 A.C. 191, 229, 251–253, 268–270, 273 and *Saif Ali's* case [1980] A.C. 198, 222, 229–230).

Those considerations protecting advocates from liability for negligence apply with equal, if not greater, force to liability for wasted costs. Sections 4, 111 and 112 must be read subject to section 62 so as not to found liability for wasted costs where the conduct complained of has taken place in court or forms part of the pre-trial advice. Alternatively, those sections must be read subject to section 62 in a more limited form, namely, that the immunity is only preserved in respect of "negligence" so that "improper" or "unreasonable" conduct at any time founds liability, but that "negligent" conduct only does so if it does not arise in court or in the pre-trial advice.

The principle of legal professional privilege may well disadvantage counsel responding to such an application. [Reference was made to *Lillicrap v. Nalder & Son* [1993] 1 W.L.R. 94.] In general it is undesirable for the lay client to be asked to waive privilege save where he is the applicant or where he asserts that but for his lawyer he would have pursued a different course.

Where counsel's conduct is in question the court must have well in mind the central importance of the cab-rank rule to professional conduct: see paragraph 209 of the Code of Conduct. Exceptions to that are contained in paragraphs 501, 502 and 503. Counsel must not accept work which in practical terms he cannot undertake, nor may he return a brief so as to prejudice the lay client in the conduct of his case even though his instructions may be inadequate and his brief delivered so late that he cannot fully prepare it: see paragraph 506.

A wasted costs order should only be made in clear and obvious cases. An application for such an order should not be allowed to proceed if it would involve, in effect, the trial of a complex professional negligence action.

Ian Burnett and *James Laughland* as amici curiae. The regime set out in section 51 of the Supreme Court Act 1981, as substituted, and in R.S.C., Ord. 62, r. 11 and now extending to all legal representatives at all levels, does not constitute a radical departure from that previously established by R.S.C., Ord. 62, r. 11 in respect of solicitors: see *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114. The difficulties raised under the new regime are essentially the same as were raised formerly, although the number of applications has increased. Equally the traditional caution with which the courts approached the exercise of the jurisdiction remains applicable.

Under R.S.C., Ord. 62, r. 11 the court may facilitate a wasted costs order by (i) making its own order (see rule 11(1)(*a*)); (ii) directing a taxing officer to inquire and report back (see rule 11(1)(*b*)); (iii) referring the matter to a taxing officer for his consideration and decision (see rule 28). [Reference was also made to regulation 109 of the Civil Legal Aid (General) Regulations 1989; section 37A of and Schedule 1A to the Solicitors Act 1974, as inserted respectively by section 93 of and Schedule 15 to the Courts and Legal Services Act 1990; regulation 18(2) of the

A Disciplinary Tribunals Regulations 1993; regulation 2(a) of the Professional Conduct Committee of the Bar Council and sections 41 and 42 of the Administration of Justice Act 1985, as substituted by section 33 of the Legal Aid Act 1988.] It is within the context of increased supervision by professional bodies over their members' conduct that section 51(7) of the Act of 1981, as substituted, is to be interpreted. Reference to the traditional meaning of the words is not a reliable guide to their B construction. The intention of Parliament is clearly to enable the court to exercise a discipline over costs in relation to all those appearing before it and those with conduct of the litigation. That clear intention must not be thwarted by a restrictive construction of section 51(7). "Improper" refers to conduct which is in breach of a professional obligation to the court; "unreasonable" relates to conduct which would be actionable (save for C immunities) in negligence at the suit of one's own client but which has resulted in wasted costs being incurred by the other side (to whom no actionable duty is owed: see *Orchard's* case [1987] Q.B. 565 and *Business Computers International Ltd. v. Registrar of Companies* [1988] Ch. 229); "negligent" is a term of art importing the concept of duty of care, breach and damage. The legal representative owes a duty of care to his client and a duty, of a non-tortious kind, to the court. A negligent act or omission D thus involves the relationship between the lawyer and his client and such wasted costs as flow from that. Alternatively "negligent" should be interpreted in accordance with *Blyth v. Birmingham Waterworks Co.* (1856) 11 Exch. 781, 784. Both "unreasonable" and "negligent" should be determined in accordance with the criteria for professional negligence.

The regime of the Act of 1990 in relation to wasted costs provides a E clear statutory exception to the immunity described in *Rondel v. Worsley* [1969] 1 A.C. 191. Parliament would have indicated any contrary intention. Accordingly conduct which would be immune from suit in negligence might attract an order under section 51(6). However, public policy considerations are relevant to the exercise of the court's discretion on such an application and the cautionary words of the old jurisdiction remain apposite: see *Symphony Group Plc. v. Hodgson* [1994] Q.B. 179.

F In general, although non-disclosure of material may hamper a lawyer's response to an application, the lay client ought not to be asked to waive privilege. However, the court must take account of other remedies a client may have against his own lawyers, and where the application is made by the client against his own lawyers privilege may properly be waived. That is analogous to the position on taxation where documents normally G protected from disclosure by privilege may be put before the taxing officer. [Reference was made to *Goldman v. Hesper* [1988] 1 W.L.R. 1238 and *Pamplin v. Express Newspapers Ltd.* [1985] 1 W.L.R. 689.]

The procedure appropriate to such applications will vary according to the circumstances. R.S.C., Ord. 62, r. 11 indicates procedures to be followed, and it is clear that the matter should be dealt with summarily, without formal pleadings, discovery and interrogatories: see *Bahai v.* H *Rashidian* [1985] 1 W.L.R. 1337. The applicant must identify precisely the conduct complained of and indicate the extent of the wasted costs. Where an applicant fails to show a prima facie case the court should in its discretion dismiss the application. Even if satisfied that there is a prima

facie case the court has a discretion to dismiss the application where it considers it appropriate to do so, if for example, the costs of the applicant would be disproportionate to the amount to be recovered, issues would be relitigated, and questions of privilege would arise. Where the responding lawyer is required to show cause why an order should not be made, the burden of proof does not shift away from the applicant. He must establish his case and even where the court is satisfied as to conduct and causation it must nevertheless consider again whether to exercise the discretion to make the order and to what extent. Complex disagreements between client and adviser are more suitably dealt with by professional disciplinary machinery. Complex allegations made against a legal representative by his opponent are better dealt with on taxation, and the circumstances when a trial judge is concerned to investigate a lawyer's conduct throughout a piece of litigation should be rare.

An unassisted party is entitled to expect that the legal representatives of an assisted party will conduct the litigation in accordance with the Legal Aid Act 1988 and the Civil Legal Aid (General) Regulations 1989. Where there is a failure to do so, it may be that an order for wasted costs is appropriate. The incidence of legal aid will make no difference to the exercise of the jurisdiction.

Benet Hytner Q.C. for the former solicitors in the first action. The submissions of the General Council of the Bar on the construction of "improper, unreasonable or negligent" and on the immunity from liability in respect of court proceedings are correct. The procedure on a wasted costs application should be summary. The jurisdiction is of a punitive character. The solicitors' error in any event cannot amount to conduct falling within section 51(7). No order should be made under section 51(6). If erroneous interpretations of difficult legislation are to be penalised in this way much work which does not command legal aid for counsel would not be taken on by "High Street" solicitors and the public would in many cases lose the services of solicitors.

F. Nance, for the tenants in the first action, addressed the court only on the factual merits of the case.

Hytner Q.C. replied.

Duncan Matheson Q.C. and *Guy Mansfield* for the solicitors in the second action, adopted the submissions of the Law Society.

Mansfield following. The judge, having found the solicitors negligent, wrongly ordered that there be no legal aid taxation of their costs after a specified date: see regulation 107 of the Civil Legal Aid (General) Regulations 1989. His proper course, had he concluded that they should be penalised in costs, was to order that on taxation wasted costs be disallowed or reduced after compliance with the appropriate procedure: see regulation 109(1) and section 51(6) of the Act of 1981, as substituted. He could also have sent a copy of his judgment to the taxing officer. The conduct complained of was insufficient to found jurisdiction. [Reference was made to *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 218, 220.]

The defendants in the second action did not appear and were not represented.

Duncan Matheson Q.C. and *Guy Mansfield*, for the solicitor in the third action, adopted the submissions of the Law Society.

A *Mansfield* following. It is doubtful whether the failure to serve the defendants directly with notice of the grant of legal aid was a breach of regulation 51 of the Legal Aid (General) Regulations 1980 (S.I. 1980 No. 1894). Paragraph (1) of the regulation must be read with paragraph (3). The latter paragraph reflects the position that, unlike that in the High Court, service of proceedings in the county court is effected by the court itself. The solicitor complied with the strict wording of paragraph (3).
B Alternatively, he acted in accordance with the practice of other solicitors in that area. Further, it is doubtful if any such breach caused costs to be wasted since it cannot be said with certainty that notice that the plaintiff was legally-aided would have induced the defendants to settle.

Geoffrey Weddell for the defendants in the third action. On a proper construction of regulation 51 of the Regulations of 1980 the plaintiff's
C solicitor was required to serve all parties with notice of the issue of legal aid: see *Mauroux v. Soc. Com. Abel Pereira da Fonseca S.A.R.L.* [1972] 1 W.L.R. 962, 969. His failure to do so prevented settlement and caused costs to be wasted so that the order made against him was appropriate.

Duncan Matheson Q.C. and *Guy Mansfield* for the solicitors in the fourth action. The Law Society's submissions on the law are correct. The solicitor's conduct should not be characterised as "improper" within
D the meaning of section 51(7) of the Act of 1981, as substituted, and the order was therefore wrongly made.

Timothy Otty for the applicant in the fourth action. The issue of a statutory demand, even if not to be characterised as the bringing of an action, is analogous to the issue of proceedings: see *In re A Debtor (No. 88 of 1991)* [1993] Ch. 286. In any event the demand is the wrong procedure
E where the debt is contested and amounts to an abuse of process. The solicitor's failure to give an undertaking in lieu of the injunction sought by the applicant to restrain presentation of a winding up petition based on the demand was improper. To maintain the demand without that undertaking was causative of additional costs. The solicitor in fact lent his assistance to the prosecution of proceedings which were an abuse of process: see *Orchard's* case [1987] Q.B. 565, 572. There was a causal link
F between the waste of costs and his conduct. The judge exercised his discretion properly and his order should stand.

Matheson Q.C. in reply. The judge accepted that the solicitor had acted honestly. The issue of a statutory demand in the circumstances is not to be stigmatised as constituting an abuse of process: see *In re A Company (No. 0012209)* [1992] 1 W.L.R. 351.

G *Duncan Matheson Q.C.* and *Guy Mansfield*, for the solicitors in the fifth action, adopted the submissions of the Law Society.

Mansfield following. On the facts the solicitor's conduct, judged on the approach adopted in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, was not such as to incur the imposition of a wasted costs order. He acted reasonably in consulting specialist counsel and was entitled to accept the advice given: see *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48; *Locke*
H *v. Camberwell Health Authority* [1991] 2 Med. L.R. 249 and *Manor Electronics Ltd. v. Dickson*, The Times, 8 February 1990. In any event his conduct was not causative of wasted costs and no order should have been made.

Martin Pointer for the husband in the fifth action. The use of the word "negligent" in section 51 of the Act of 1981, as substituted, is not new in the context of the wasted costs jurisdiction (see *Myers v. Elman* [1940] A.C. 282, 289, 290) and does not depend on a breach of duty to the legal representative's client: see *Mauroux v. Soc. Com. Abel Pereira da Fonseca S.A.R.L.* [1972] 1 W.L.R. 962; *Currie & Co. v. The Law Society* [1977] Q.B. 990 and *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48. The jurisdiction is rooted in the solicitor's duty to the court and the solicitor's general duty to promote the court's efficient administration of justice. Where his conduct is improper, unreasonable or negligent the solicitor fails in that duty and the jurisdiction can be exercised in favour of the party injured by that failure. It is doubtful whether he owes any duty to the opposing party: see *Orchard's* case [1987] Q.B. 565 and *In re A Solicitor (Wasted Costs Order)*, The Times, 16 April 1993. Since liability depends primarily on the lawyer's duty to the court, a definition wider than that given by the Law Society and the Bar Council is acceptable: see *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781. The traditional gross misconduct test cannot survive the decision in *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114. [Reference was also made to *Gupta v. Comer* [1991] 1 Q.B. 629.]

Although the existence or non-existence of legal aid does not modify the standards of professional conduct and competence which the court is entitled to expect it may have a material effect. The grant of a legal aid certificate may be abused: see *Edwards v. Edwards* [1958] P. 235 and *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48. Irrecoverability of the costs of the successful litigant against the assisted party may be a material, and important, consideration in the exercise of discretion. It may prompt the application and, if the judge is satisfied that conduct within the meaning of section 51(7) has occurred, he may be more inclined to accede to it. That would be a proper exercise of his discretion. Since the application to the court in respect of the trust deed was lawyer-driven and unnecessary, an order for wasted costs is appropriate. Prosecution of a hopeless case may appropriately attract an order: see *Edwards'* case [1958] P. 235; *Davy-Chiesman's* case [1984] Fam. 48 and *Orchard's* case [1987] Q.B. 565. In matrimonial cases the duty to negotiate requires lawyers to exhaust such a course before making applications to the court: see *Gojkovic v. Gojkovic* [1992] Fam. 40; *Singer (formerly Sharegin) v. Sharegin* [1984] F.L.R. 114.

The solicitor should not be allowed to plead reliance on counsel and then invoke privilege to defeat an application for wasted costs. [Reference was made to *Locke v. Camberwell Health Authority* [1991] 2 Med. L.R. 249.] He should not be permitted to hide behind counsel, unless his instructions and the advice he received are disclosed: see *Davy-Chiesman's* case [1984] Fam. 48, 63, 67, 68, 69. [Reference was also made to *Marubeni Corporation v. Alafouzos*, 6 November 1986; *Great Atlantic Insurance Co. v. Home Insurance Co.* [1981] 1 W.L.R. 529 and *Buttes Gas and Oil Co. v. Hammer (No. 3)* [1981] Q.B. 223.]

There is no statutory requirement that the procedure for a wasted costs application should be summary. The court must adopt whatever procedure is necessary to investigate whether the criteria are established. The

A escalation of costs will sometimes be an inevitable concomitant of such an application.

Mansfield in reply. An order cannot safely be made where privilege is not waived. While a solicitor cannot hide behind counsel, he cannot be blamed where counsel considers the instructions he has received are sufficient and gives advice on that basis: see *Swedac Ltd. v. Magnet & Southern Plc.* [1990] F.S.R. 89.

B *Rupert Jackson Q.C.* and *David Hodge* for counsel in the sixth action. The submissions of the General Council of the Bar are correct. The conduct complained of does not fall within section 51(7). Having regard to counsel's obligations under the Code of Conduct, and in particular the cab-rank rule (paragraph 209), she cannot be criticised for her late acceptance of the brief, nor for her consequent difficulty in preparing the C case for trial and presenting it. The judge should not have let the application for wasted costs proceed: it was not a clear and obvious case, nor was it appropriate for resolution by a summary procedure. On analysis the individual criticisms of counsel's conduct of the case are unjustified. In any event, all the complaints against her fall within the area of immunity from suit and do not attract the wasted costs jurisdiction.

Gregory Chambers for the defendants in the sixth action. The D submissions of the Law Society are correct in relation to the interpretation of section 51(7). The relationship of section 62 with sections 4, 111, 112 is not such as to oust the wasted costs jurisdiction. The application was properly made and the judge, having heard the trial, was able to judge the competence with which it was conducted. His exercise of discretion should not be disturbed.

E *Jackson Q.C.* in reply. The judge applied unduly high standards to counsel's conduct of the trial. He should have adopted the criteria set out in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198.

Burnett replied.

Hodge also replied.

Jackson Q.C. for the General Council of the Bar in reply. The effect of *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114 is that immediately before F the enactment of the Act of 1990 the words "unreasonably or improperly" in R.S.C., Ord. 62, r. 11 connoted misconduct of the type stigmatised in *Myers v. Elman* [1940] A.C. 282, and "failure to conduct proceedings with reasonable competence and expedition" connoted negligence. Parliament resolved the conflicting approaches of the Criminal and Civil Divisions of the Court of Appeal by adopting the approach of the Civil Division.

G Where inspection of the responding lawyers' documents would be required, the applicant's complaint is generally unsuitable for determination under the summary wasted costs jurisdiction.

It is sometimes the duty of counsel to represent the unmeritorious or to present a seemingly hopeless case (see *Rondel v. Worsley* [1969] 1 A.C. 191) and the threat of a wasted costs application should not be allowed to detract from those duties.

H *Matheson Q.C.* for the Law Society in reply. The wasted costs jurisdiction does not apply to advocacy. Alternatively, it only applies to conduct which is improper or unreasonable, and not conduct which is alleged to be negligent. A seemingly hopeless case may not in fact be so.

It is for the judge, not the advocate, to determine that. [Reference was made to *John v. Rees* [1970] Ch. 345.]

Cur. adv. vult.

26 January 1994. SIR THOMAS BINGHAM M.R. handed down the following judgment of the court. This is the judgment of the court. Different sections of the judgment have been written by different members. Each of us concurs fully in all sections.

There are six appeals before the court. All of them (save one, in which this issue has been compromised) raise the same question: in what circumstances should the court make a wasted costs order in favour of one party to litigation against the legal representative (counsel or solicitor) of the other? It is a question that this court should give such guidance as it can.

Two of the cases before us come on appeal from the county court. Three come on appeal from the High Court, one from each division. In all of these cases wasted costs orders were made and the legal representatives who were the subject of the orders appeal. In the remaining case, the issue first arose in this court: on allowing an appeal against the decision of a county court, the court invited the solicitors who had acted for the parties in the court below to show cause why they should not be ordered personally to pay the costs thrown away. The solicitors have appeared by counsel in this court in response to that invitation.

Since the question raised by these appeals is of general concern to their members, both the Law Society and the General Council of the Bar sought and were granted leave to make submissions to the court. Since the question is also of concern to the public, we offered the Attorney-General a similar opportunity of which he took advantage, and counsel were accordingly instructed to represent the wider public interest. All the parties to the six appeals were also represented, save for one party in the compromised appeal. We gratefully acknowledge the help we have had from all solicitors and counsel involved in mounting and presenting these cases.

Our legal system, developed over many centuries, rests on the principle that the interests of justice are on the whole best served if parties in dispute, each represented by solicitors and counsel, take cases incapable of compromise to court for decision by an independent and neutral judge, before whom their relationship is essentially antagonistic: each is determined to win, and prepares and presents his case so as to defeat his opponent and achieve a favourable result. By the clash of competing evidence and argument, it is believed, the judge is best enabled to decide what happened, to formulate the relevant principles of law and to apply those principles to the facts of the case before him as he has found them.

Experience has shown that certain safeguards are needed if this system is to function fairly and effectively in the interests of parties to litigation and of the public at large. None of these safeguards is entirely straightforward, and only some of them need to be mentioned here. (1) Parties must be free to unburden themselves to their legal advisers without fearing that what they say may provide ammunition for their

A opponent. To this end a cloak of confidence is thrown over communications between client and lawyer, usually removable only with the consent of the client. (2) The party who substantially loses the case is ordinarily obliged to pay the legal costs necessarily incurred by the winner. Thus hopeless claims and defences are discouraged, a willingness to compromise is induced and the winner keeps most of the fruits of victory. But the position is different where one or both parties to the case are legally-
B aided: section 17 of the Legal Aid Act 1988 and Part XIII of the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339) restrict the liability of legally-assisted parties to pay costs if they lose. And sometimes the losing party is impoverished and cannot pay. (3) The law imposes a duty on lawyers to exercise reasonable care and skill in conducting their clients' affairs. This is a duty owed to and enforceable by the client, to
C protect him against loss caused by his lawyer's default. But it is not an absolute duty. Considerations of public policy have been held to require, and statute now confirms, that in relation to proceedings in court and work closely related to proceedings in court advocates should be accorded immunity from claims for negligence by their clients: *Rondel v. Worsley* [1969] 1 A.C. 191; *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198;
D section 62 of the Courts and Legal Services Act 1990. (4) If solicitors or barristers fail to observe the standards of conduct required by the Law Society or the General Council of the Bar (as the case may be) they become liable to disciplinary proceedings at the suit of their professional body and to a range of penalties which include fines, suspension from practice and expulsion from their profession. Procedures have changed over the years. The role of the courts (in the case of solicitors) and the
E Inns of Court (in the case of barristers) has in large measure been assumed by the professional bodies themselves. But the sanctions remain, not to compensate those who have suffered loss but to compel observance of prescribed standards of professional conduct. Additional powers exist to order barristers, solicitors and those in receipt of legal aid to forgo fees or remuneration otherwise earned. (5) Solicitors and barristers may in certain
F circumstances be ordered to compensate a party to litigation other than the client for whom they act for costs incurred by that party as a result of acts done or omitted by the solicitors or barristers in their conduct of the litigation.

It is the scope and effect of this last safeguard, and its relation with the others briefly mentioned, which are in issue in these appeals. We shall hereafter refer to this jurisdiction, not quite accurately, as "the wasted
G costs jurisdiction" and to orders made under it as "wasted costs orders." These appeals are not concerned with the jurisdiction to order legal representatives to compensate their own client. The questions raised are by no means academic. Material has been placed before the court which shows that the number and value of wasted costs orders applied for, and the costs of litigating them, have risen sharply. We were told of one case
H in which the original hearing had lasted five days; the wasted costs application had (when we were told of it) lasted seven days; it was estimated to be about half-way through; at that stage one side had incurred costs of over £40,000. It almost appears that a new branch of

legal activity is emerging; calling to mind Dickens's searing observation in *Bleak House*:

> "The one great principle of English law is, to make business for itself. . . . Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it."

The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest, recently and clearly affirmed by Act of Parliament, is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers. The reconciliation of these public interests is our task in these appeals. Full weight must be given to the first of these public interests, but the wasted costs jurisdiction must not be emasculated.

The wasted costs jurisdiction

The wasted costs jurisdiction of the court as applied to solicitors is of long standing, but discussion of it can conveniently begin with the important and relatively recent case of *Myers v. Elman* [1940] A.C. 282. At the end of a five-day hearing before a jury the plaintiff obtained judgment for damages for fraudulent conspiracy against five defendants, with costs. Nothing could be recovered from any of the defendants. Nor, perhaps, was any recovery expected, for at the end of the trial the plaintiff's counsel applied for an order that the costs of the action should be paid by the solicitors who had acted for the defendants.

Notice was duly given to the solicitors and a further five-day hearing followed to decide whether the solicitors or any of them should make payment. In the case of one solicitor, Mr. Elman, the trial judge (Singleton J.) considered two complaints: that he had filed defences which he knew to be false; and that he had permitted the filing of an inadequate affidavit verifying his clients' list of documents. In considering these complaints the judge had before him a considerable correspondence between Mr. Elman and his clients which the plaintiff's advisers had (naturally) not seen before; the reports of the case do not disclose how it came about that the clients' privilege in that correspondence was waived.

Singleton J. rejected the complaint relating to the defences but upheld that based on the defective affidavit of documents. Nothing, held the judge, should be said which might prevent, or tend to prevent, either solicitor or counsel from doing his best for his client so long as the duty to the court was borne in mind, but if he were asked or required by the client to do something which was inconsistent with the duty to the court it was for him to point out that he could not do it and, if necessary, cease to act: see *Myers v. Rothfield* [1939] 1 K.B. 109, 115, 117. The judge ordered Mr . Elman to pay one-third of the taxed costs of the action and

two-thirds of the costs of the application. Mr. Elman appealed, and the Court of Appeal by a majority reversed the decision of the judge. It appeared that the work in question had been very largely delegated to a well-qualified managing clerk and the conduct complained of had been his, not Mr. Elman's. The majority held that to make a wasted costs order the court must find professional misconduct established against the solicitor, and such a finding could not be made where the solicitor was not personally at fault.

On further appeal to the House of Lords, Lord Russell of Killowen dissented on the facts but the House was unanimous in rejecting the Court of Appeal's majority view. While their Lordships used different language, and may to some extent have seen the issues somewhat differently, the case is authority for five fundamental propositions. (1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors. (2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not. (3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice. (4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross. (5) The jurisdiction is compensatory and not merely punitive.

When *Myers v. Elman* was decided, the court's wasted costs jurisdiction was not regulated by the Rules of the Supreme Court, although Ord. 65, r. 11 did provide for costs to be disallowed as between solicitor and client or paid by a solicitor to his client where such costs had been "improperly or without any reasonable cause incurred" or where "by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same." There was also provision in Ord. 65, r. 5 for a solicitor to pay costs to any or all parties if his failure to attend or deliver a document caused a delay in proceedings. But the rules reflected no general wasted costs jurisdiction. Following the decision the rules were not amended to regulate the court's inherent wasted costs jurisdiction, but the jurisdiction itself was preserved by section 50(2) of the Solicitors Act 1957. In 1960 a new rule (which later became Ord. 62, r. 8(1)) was introduced which did regulate, although not enlarge, this inherent jurisdiction. The new rule provided:

> "Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or any other misconduct or default, the court may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order—(*a*) disallowing the costs as between the solicitor and his client; and (*b*) directing the solicitor to repay to his client costs which

the client has been orderded to pay to other parties to the proceedings; or (*c*) directing the solicitor personally to indemnify such other parties against costs payable by them."

In paragraphs (*a*) and (*b*) the effect of the old rule was reproduced. In paragraph (*c*) the effect of *Myers v. Elman* [1940] A.C. 282 was recognised. It is plain that expressions such as "improperly," "without reasonable cause" and "misconduct" are to be understood in the sense given to them by their Lordships in that case.

Both before and after introduction of the new rule, contested applications for wasted costs orders against solicitors did come before the courts. *Edwards v. Edwards* [1958] P. 235, *Wilkinson v. Wilkinson* [1963] P. 1, *Mauroux v. Soc. Com. Abel Pereira da Fonseca S.A.R.L.* [1972] 1 W.L.R. 962, *Currie & Co. v. The Law Society* [1977] Q.B. 990 and *R. & T. Thew Ltd. v. Reeves (No. 2) (Note)* [1982] Q.B. 1283 are examples. But we believe such applications to have been infrequent. In the course of their practices the three members of this court were personally involved in only one such application.

During the 1980s the tempo quickened. In *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48 a legally-aided husband made an application for ancillary relief against his wife. The judge who heard the application dismissed it, observing that it was without any merit, should not have been made and most certainly should not have been pursued to the end. The wife obtained the usual costs order against the husband, not to be enforced without leave of the court. She then sought costs against the legal aid fund. The Law Society, as administrator of the legal aid fund, applied that the husband's solicitor personally pay the costs of both husband and wife. The judge rejected that application and the Law Society appealed. The judgment of the Court of Appeal is authority for two propositions. (1) Subject to any express provisions of the Legal Aid Act 1988 or regulations to the contrary, the inter-relationship of the lay client, solicitor and counsel and the incidents of that relationship, for instance relating to privilege, are no different when the client is legally aided from when he is not. (2) Although a solicitor is in general entitled to rely on the advice of counsel properly instructed, he is not entitled to follow such advice blindly but is in the ordinary way obliged to apply his own expert professional mind to the substance of the advice received. On the facts, the Court of Appeal held that the solicitor should have appreciated the obvious unsoundness of the advice given by counsel after a certain date, and should have communicated his view to the Law Society. The court therefore allowed the appeal in part. The court plainly regarded counsel as substantially responsible, but there was at the time no jurisdiction to make an order against a barrister.

In *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565 the plaintiff was again legally-aided with a nil contribution. His claim failed. The usual order, not to be enforced without leave, was made in the defendants' favour. An application was made against the plaintiff's solicitors personally and this was dismissed both by the trial judge and on appeal. In the course of his judgment on appeal, Sir John Donaldson M.R. made certain observations about the position of the Bar, but it would

A seem that these were obiter since no claim was or could have been made against counsel for the plaintiff. The case is notable first for Sir John Donaldson M.R.'s ruling on the exercise of the jurisdiction under Ord. 62, r. 8 as it then stood. He said, at p. 572:

> "That said, this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases. In the context of a
B complaint that litigation was initiated or continued in circumstances in which to do so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is mala fide or for an
C ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive."

Secondly, the decision reaffirms that a solicitor against whom a claim is made must have a full opportunity of rebutting the complaint, but recognises that he may be hampered in doing so by his duty of
D confidentiality to the client "from which he can only be released by his client or by overriding authority:" see p. 572G. Thirdly, the judgments highlight the extreme undesirability of claims for wasted costs orders being used as a means of browbeating, bludgeoning or threatening the other side during the progress of the case: see pp. 577G, 580E. Such a practice, it was pointed out, could gravely undermine the ability of a solicitor, particularly a solicitor working for a legally-aided client, to do so with the
E required objectivity and independence.

In 1986 the relevant Rules of the Supreme Court were amended. Ord. 62, r. 8 became Ord. 62, r. 11, but with some rewording. It now read:

> "11(1) Subject to the following provisions of this rule, where it appears to the court that costs have been incurred unreasonably or
F improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the court may (*a*) order—(i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or (ii) the solicitor personally
G to indemnify such other parties against costs payable by them; and (iii) the costs as between the solicitor and his client to be disallowed; or (*b*) direct a taxing officer to inquire into the matter and report to the court, and upon receiving such a report the court may make such order under sub-paragraph (*a*) as it thinks fit."

It is noteworthy that the reference to "misconduct" is omitted, as is the implication that any conduct must amount to misconduct if it is to found
H a wasted costs order. More importantly, reference to "reasonable competence" is introduced, suggesting the ordinary standard of negligence and not a higher standard requiring proof of gross neglect or serious dereliction of duty.

The Court of Appeal had occasion to construe the new rule in *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114. In his judgment, at p. 121A, May L.J. read the new rule as substantially different from the old, and, at p. 121F, as intended to widen the court's powers. It was no longer necessary to apply the test of gross misconduct laid down in the older authorities: see p. 122A. "The court regarded the new power as salutary, particularly as a means of penalising unreasonable delay:" see pp. 121H, 122A, C.

In *Holden & Co. v. Crown Prosecution Service* [1990] 2 Q.B. 261, the court's decision in *Sinclair-Jones v. Kay* was criticised and not followed, but the correctness of that judgment was affirmed in *Gupta v. Comer* [1991] 1 Q.B. 629, where Ord. 62, r. 11 as it then stood was again considered. Part of the court's reasoning in upholding the earlier decision cannot, it would seem, survive later authority, but there is no ground to question its conclusion that the new rule was intended to cut down limitations hitherto thought to restrict the court's jurisdiction to make wasted costs orders.

In his judgment in *Gupta v. Comer,* Lord Donaldson of Lymington M.R. referred, at p. 635, to legislative amendments to section 51 of the Supreme Court Act 1981 which would enable new rules to be made "imposing an even stricter standard than that which Ord. 62, r. 11 has been held to impose." This was a reference to what became the Courts and Legal Services Act 1990. Section 4 of that Act substituted a new section 51 in the Supreme Court Act 1981. Relevant for present purposes are the following subsections of the new section:

> "51(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—(*a*) the civil division of the Court of Appeal; (*b*) the High Court; and (*c*) any county court, shall be in the discretion of the court. . . . (6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court. (7) In subsection (6), 'wasted costs' means any costs incurred by a party—(*a*) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (*b*) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay. . . . (13) In this section 'legal or other representative,' in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf."

The new subsection (6) of section 51 was extended to civil proceedings in the Crown Court. Section 111 of the Act of 1990 made a similar amendment to the Prosecution of Offences Act 1985, applicable to criminal proceedings in the Court of Appeal, the Crown Court and the magistrates' court. Section 112 of the Act of 1990 amended the Magistrates' Courts Act 1980 to similar effect. We should also draw attention to section 62 of the Act of 1990, which was in these terms:

> "62(1) A person—(*a*) who is not a barrister; but (*b*) who lawfully provides any legal services in relation to any proceedings, shall have

A the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services. (2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an action for breach of any contract relating to the provision by him of the legal services in question."

B With effect from 1 October 1991 Ord. 62, r. 11 was amended to supplement the new section 51 of the Supreme Court Act 1981. It is enough to summarise the effect of the rule without reciting its full terms. Where the court makes a wasted costs order, it must specify in its order the costs which are to be paid. As under previous versions of the rule, the court may direct a taxing officer to inquire into the matter and report C back or it may refer the matter to a taxing officer. The court may not make an order under section 51(6) unless it has given the legal representative a reasonable opportunity to appear and show cause why an order should not be made, although this obligation is qualified where the progress of proceedings is obstructed by a legal representative's failure to attend or deliver a document or proceed. The court may direct the Official Solicitor to attend and take such part in any proceedings or inquiry under D the rule as the court may direct.

Some aspects of this new wasted costs regime must be considered in more detail below. It should, however, be noted that the jurisdiction is for the first time extended to barristers. There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable E conduct of litigation by their or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured.

Since the Act there have been two cases which deserve mention. The first is *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293. This arose out of an unhappy difference between counsel and a judge sitting in the Crown Court in a criminal case. It was held on appeal, in F our view quite rightly, that courts should apply a three-stage test when a wasted costs order is contemplated. (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so, did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs? (If so, the costs to be met must be specified and, in a criminal case, G the amount of the costs.) We have somewhat altered the wording of the court's ruling but not, we think, its effect.

The second case, *Symphony Group Plc. v. Hodgson* [1994] Q.B. 179, arose out of an application for costs against a non-party and not out of a wasted costs order. An observation of Balcombe L.J., at p. 194, is however pertinent in this context also:

H "The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who

are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339/89), and in particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations—see *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565—and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred."

"Improper, unreasonable or negligent"

A number of different submissions were made on the correct construction of these crucial words in the new section 51(7) of the Supreme Court Act 1981. In our view the meaning of these expressions is not open to serious doubt.

"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

The term "negligent" was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence." That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the

A applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.

We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal B representative causes the other side to incur unnecessary costs without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the C profession.

In adopting an untechnical approach to the meaning of negligence in this context, we would however wish firmly to discountenance any suggestion that an applicant for a wasted costs order under this head need prove anything less than he would have to prove in an action for negligence: "advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-D informed and competent would have given or done or omitted to do;" an error "such as no reasonably well-informed and competent member of that profession could have made:" see *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 218, 220, *per* Lord Diplock.

We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap E between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended.

Pursuing a hopeless case

F A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v. Worsley* [1969] 1 A.C. 191, 275:

> "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and G reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."

As is well known, barristers in independent practice are not permitted to H pick and choose their clients. Paragraph 209 of their Code of Conduct provides:

> "A barrister in independent practice must comply with the 'Cab-rank rule' and accordingly except only as otherwise provided in paragraphs

501 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person."

As is also well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not the lawyers to judge it.

It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.

Legal aid

Section 31(1) of the Legal Aid Act 1988 provides that receipt of legal aid shall not, save as expressly provided, affect the relationship between or rights of a legal representative and client or any privilege arising out of the relationship nor the rights or liabilities of other parties to the proceedings or the principles on which any discretion is exercised. (The protection given to a legally-assisted party in relation to payment of costs is, of course, an obvious express exception.) This important principle has been recognised in the authorities. It is incumbent on courts to which applications for wasted costs orders are made to bear prominently in mind the peculiar vulnerability of legal representatives acting for assisted persons, to which Balcombe L.J. adverted in *Symphony Group Plc. v. Hodgson* [1994] Q.B. 179 and which recent experience abundantly confirms. It would subvert the benevolent purposes of this legislation if such

representatives were subject to any unusual personal risk. They for their part must bear prominently in mind that their advice and their conduct should not be tempered by the knowledge that their client is not their paymaster and so not, in all probability, liable for the costs of the other side.

Immunity

In *Rondel v. Worsley* [1969] 1 A.C. 191 the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a case in court and the preliminary work in connection with it. A majority of the House held that this immunity extended to a solicitor while acting as an advocate. In *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198 a majority of the House further held that the immunity only covered pre-trial work intimately connected with the conduct of the case in court. These decisions were based on powerfully argued considerations of public policy, which included: the requirement that advocates should be free to conduct cases in court fearlessly, independently and without looking over their shoulders; the need for finality, so that cases are not endlessly relitigated with the risk of inconsistent decisions; the advocate's duty to the court and to the administration of justice; the barrister's duty to act for a client, however unsavoury; the general immunity accorded to those taking part in court proceedings; the unique role of the advocate; and the subjection of advocates to the discipline of their professional bodies.

We were reminded of these matters when considering submissions on the interaction of sections 4, 111 and 112 of the Courts and Legal Services Act 1990 and section 62 of the same Act. On one submission, section 62 must be read subject to the other sections. On that view, if an advocate's conduct in court is improper, unreasonable or negligent he is liable to a wasted costs order. On a second submission, sections 4, 111 and 112 must be read subject to section 62. On that view, a wasted costs order can only be based on improper, unreasonable or negligent conduct which does not take place in court and is not intimately connected with conduct of the case in court. On yet a third submission, sections 4, 111 and 112 should be read subject to section 62 but in a more limited sense: improper or unreasonable conduct would found an order whether in court or out of it, but negligent conduct would not found an order unless it fell outside the ambit of the recognised immunity for work at the trial and before it.

In our judgment (and subject to the important qualification noted below) the first of these submissions is correct, and for a number of reasons. (1) There is nothing in sections 4, 111 and 112 to suggest that they take effect subject to the provisions of section 62. (2) Part II of the Act of 1990, in which section 62 (but not the other sections) appears, is directed to widening the categories of those by whom legal services are provided. It was therefore natural to enact that those providing services also or formerly provided by lawyers should enjoy the same immunity as lawyers. To the same end, section 63 enacts that such persons should enjoy the same professional privilege as a solicitor. There is nothing in section 62 to suggest that it is intended to qualify the apparently unqualified effect of the other sections, to which (in the scheme of the

Act) it is in no way related. (3) Nothing in the Act warrants the drawing of any distinction between improper and unreasonable conduct on the one hand and negligent conduct on the other. Such a distinction is in any event unworkable if, as we have suggested, there is considerable overlap between these expressions. (4) If the conduct of cases in court, or work intimately connected with the conduct of cases in court, entitles a legal representative to immunity from the making of wasted costs orders, it is not obvious why sections 111 and 112 were applied to magistrates' courts, where no work would ordinarily be done which would not be covered by the immunity. (5) It was very odd draftsmanship to define a legal representative in section 51(13) as a person exercising a right of audience if it was intended that anyone exercising a right of audience should be immune from the liability imposed by section 51(6). (6) It would be anomalous to interpret an Act which extended the wasted costs jurisdiction over barristers for the first time as exempting them from liability in respect of their most characteristic activity, namely conducting cases in court and advising in relation to such cases. It would be scarcely less anomalous to interpret an Act making express reference to negligence for the first time as exempting advocates from liability for negligence. (7) It is one thing to say that an advocate shall be immune from claims in negligence by an aggrieved and unsuccessful client. It is quite another for the court to take steps to rectify, at the expense of the advocate, breaches by the advocate of the duty he owed to the court to further the ends of justice. (8) It is our belief, which we cannot substantiate, that part of the reason underlying the changes effected by the new section 51 was judicial concern at the wholly unacceptable manner in which a very small minority of barristers conducted cases in court.

We referred above to an important qualification. It is this. Although we are satisfied that the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct, it does not follow that we regard the public interest considerations on which the immunity is founded as being irrelevant or lacking weight in this context. Far from it. Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.

Privilege

Where an applicant seeks a wasted costs order against the lawyers on the other side, legal professional privilege may be relevant both as between the applicant and his lawyers and as between the respondent lawyers and

A their client. In either case it is the client's privilege, which he alone can waive.

The first of these situations can cause little difficulty. If the applicant's privileged communications are germane to an issue in the application, to show what he would or would not have done had the other side not acted in the manner complained of, he can waive his privilege; if he declines to do so adverse inferences can be drawn.

B The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find C themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent D lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order.

E *Causation*

As emphasised in *In re A Barrister (Wasted Costs Order) (No. 1 of 1991)* [1993] Q.B. 293 the court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential. Where the F conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the legal aid authorities, but it is not one for exercise of the wasted costs jurisdiction.

Reliance on counsel

G We endorse the guidance given on this subject in *Locke v. Camberwell Health Authority* [1991] 2 Med.L.R. 249. A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable is it likely to be for a solicitor to accept it and act on it.

H *Threats to apply for wasted costs orders*

We entirely agree with the view expressed by this court in *Orchard v. South Eastern Electricity Board* [1987] Q.B. 565 that the threat of proposed applications should not be used as a means of intimidation. On the other

hand, if one side considers that the conduct of the other is improper, unreasonable or negligent and likely to cause a waste of costs we do not consider it objectionable to alert the other side to that view; the other side can then consider its position and perhaps mend its ways. Drawing the distinction between unacceptable intimidation and acceptable notice must depend on the professional judgment of those involved.

The timing of the application

In *Filmlab Systems International Ltd. v. Pennington*, The Times, 9 July 1993, Aldous J. expressed the opinion that wasted costs orders should not, save in exceptional circumstances, be sought until after trial. He highlighted a number of dangers if applications were made at an interlocutory stage, among them the risk that a party's advisers might feel they could no longer act, so that the party would in effect be deprived of the advisers of his choice. It is impossible to lay down rules of universal application, and sometimes an interlocutory battle resolves the real dispute between the parties. But speaking generally we agree that in the ordinary way applications for wasted costs are best left until after the end of the trial.

The applicant

Under the rules, the court itself may initiate the inquiry whether a wasted costs order should be made. In straightforward cases (such as failure to appear, lateness, negligence leading to an otherwise avoidable adjournment, gross repetition or extreme slowness) there is no reason why it should not do so. But save in the most obvious case, courts should in our view be slow to initiate the inquiry. If they do so in cases where the inquiry becomes complex and time-consuming, difficult and embarrassing issues on costs can arise: if a wasted costs order is not made, the costs of the inquiry will have to be borne by someone and it will not be the court; even if an order is made, the costs ordered to be paid may be small compared with the costs of the inquiry. In such cases courts will usually be well advised to leave an aggrieved party to make the application if so advised; the costs will then, in the ordinary way, follow the event between the parties.

Procedure

The procedure to be followed in determining applications for wasted costs must be laid down by courts so as to meet the requirements of the individual case before them. The overriding requirements are that any procedure must be fair and that it must be as simple and summary as fairness permits. Fairness requires that any respondent lawyer should be very clearly told what he is said to have done wrong and what is claimed. But the requirement of simplicity and summariness means that elaborate pleadings should in general be avoided. No formal process of discovery will be appropriate. We cannot imagine circumstances in which the applicant should be permitted to interrogate the respondent lawyer, or vice versa. Hearings should be measured in hours, and not in days or weeks. Judges must not reject a weapon which Parliament has intended to

be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation.

"Show cause"

Although Ord. 62, r. 11(4) in its present form requires that in the ordinary way the court should not make a wasted costs order without giving the legal representative "a reasonable opportunity to appear and show cause why an order should not be made," this should not be understood to mean that the burden is on the legal representative to exculpate himself. A wasted costs order should not be made unless the applicant satisfies the court, or the court itself is satisfied, that an order should be made. The representative is not obliged to prove that it should not. But the rule clearly envisages that the representative will not be called on to reply unless an apparently strong prima facie case has been made against him and the language of the rule recognises a shift in the evidential burden.

Discretion

It was submitted, in our view correctly, that the jurisdiction to make a wasted costs order is dependent at two stages on the discretion of the court. The first is at the stage of initial application, when the court is invited to give the legal representative an opportunity to show cause. This is not something to be done automatically or without careful appraisal of the relevant circumstances. The costs of the inquiry as compared with the costs claimed will always be one relevant consideration. This is a discretion, like any other, to be exercised judicially, but judges may not infrequently decide that further proceedings are not likely to be justified. The second discretion arises at the final stage. Even if the court is satisfied that a legal representative has acted improperly, unreasonably or negligently and that such conduct has caused the other side to incur an identifiable sum of wasted costs, it is not bound to make an order, but in that situation it would of course have to give sustainable reasons for exercising its discretion against making an order.

Crime

Since the six cases before the court are all civil cases, our attention has naturally been directed towards the exercise of the wasted costs jurisdiction in the civil field. Attention has, however, been drawn in authorities such as *Holden & Co. v. Crown Prosecution Service* [1990] 2 Q.B. 261 and *Gupta v. Comer* [1991] 1 Q.B. 629 to the undesirability of any divergence in the practice of the civil and criminal courts in this field, and Parliament has acted so as substantially (but not completely) to assimilate the practice in the two. We therefore hope that this judgment may give guidance which will be of value to criminal courts as to civil, but we fully appreciate that the conduct of criminal cases will often raise different questions and depend on different circumstances. The relevant discretions are vested in, and only in, the court conducting the relevant hearing. Our purpose is to guide, but not restrict, the exercise of these discretions.

RIDEHALGH v. HORSEFIELD AND ISHERWOOD

Mr. Ridehalgh ("the landlord") owned a house in Blackpool. In the middle of July 1985 he let it for 12 months to Mr. Horsefield and Miss Isherwood ("the tenants"). When the 12 months came to an end the landlord re-let the house to the tenants for a further 12 months. When that 12 months came to an end he again re-let the house to the tenants, this time for two months. In October 1987 he let the house to them for a fourth time, again for 12 months. In October 1988 he let the house to the tenants for the fifth and last time, for 12 months expiring in October 1989.

When that letting came to an end the landlord consulted solicitors. They issued county court proceedings seeking possession and alleging various breaches of covenant. The tenants launched a cross-action claiming damages for breach of covenant. These actions were fully pleaded, and were eventually consolidated. The consolidated action remains alive and has not yet been heard. It was not alleged by the landlord in those actions that the tenants' original tenancy had been a protected shorthold tenancy. The landlord's solicitor had not been able to obtain a copy of the original tenancy agreement and was therefore unable to establish the nature of that tenancy.

Later he was able to obtain a copy of the original tenancy agreement from the rent officer (although not of the protected shorthold tenancy notice which the landlord instructed him had also been served). Under cover of a letter dated 4 July 1990 he accordingly served on the tenants a notice dated 5 July 1990 under Case 19 of Schedule 15 to the Rent Act 1977, which had been added to that Act by section 55(1) of the Housing Act 1980. The notice was expressed to expire on 5 October 1990.

On 17 January 1991 the landlord's solicitor issued proceedings claiming possession of the house under Case 19. He pleaded (as was necessary if he was to rely on that Case) that before the original agreement had been made in July 1985 the landlord had given the tenants written notice that the tenancy was to be a protected shorthold tenancy within the meaning of the Rent Act 1977 and the Housing Act 1980. In their defences the tenants advanced a number of pleas. Relevantly for present purposes, both tenants denied receipt of a protected shorthold tenancy notice.

In the spring of 1991 when this action was proceeding towards trial the solicitors for the landlord and the tenants independently consulted textbook authority. The landlord was a man of limited means. The tenants were legally aided. It is understandable, and it was the case, that neither solicitor undertook profound research and neither consulted counsel (which, indeed, the tenants' solicitor had no authority to do). The tenants' solicitor, however, concluded that the parties' respective cases stood or fell on whether or not (as the landlord contended and the tenants denied) a protected shorthold tenancy notice had been served before the original tenancy had been granted. His analysis was this. (1) If the notice had been duly served, the subsequent tenancies in 1986, 1987 and 1988 were protected tenancies vulnerable to a claim for possession under Case 19. (2) The periodic tenancy which arose on expiry of the last fixed term tenancy in October 1989 was accordingly an assured shorthold tenancy pursuant to section 34 of the Housing Act 1988. (3) The notice given

A under Case 19, although inappropriate in form, was effective to determine the assured shorthold tenancy pursuant to section 21(4) of the 1988 Act and to entitle the landlord to possession. (4) If, however, the notice had not been duly served, the tenants were statutory tenants and the landlord was not entitled to possession.

The tenants' solicitor accordingly telephoned the landlord's solicitor, in a commendable attempt to shorten the forthcoming hearing and avoid B unnecessary costs, and suggested that the hearing should be confined to the single, conclusive, factual issue whether the notice had been duly served or not. The landlord's solicitor agreed.

In truth this analysis, and the conclusion drawn from it, were fundamentally unsound. If the notice had been duly served, the original tenancy was indeed a protected shorthold tenancy. But the succeeding C tenancies in 1986, 1987 and 1988 were not protected shorthold tenancies but protected tenancies, by virtue of section 52(2) of the Housing Act 1980. It remained open to the landlord to seek possession under Case 19. When the last fixed term tenancy expired in October 1989 the tenants became statutory tenants under sections 2 and 3 of the Act of 1977. Section 34 of the Act of 1988 had no application because no new tenancy D had been granted after the section came into force in January 1989 and no tenancy had been entered into on or after that date. As statutory tenants the tenants were vulnerable to a claim by the landlord under Case 19. But that Case requires that proceedings for possession should be commenced not later than three months after the expiry of the Case 19 notice, and here the landlord's proceedings were commenced 12 days after the expiry of the three-month period.

E The landlord's solicitor appreciated (after commencement of proceedings) that they had been commenced more than three months after expiry of the Case 19 notice, but he did not regard that as a matter of any significance since the solicitors had agreed that that notice was properly to be regarded as a notice under section 21 of the Act of 1988, and section 21 contained no special time limit for bringing proceedings.

F The case came on for hearing before Judge Holt in the Blackpool County Court on 17 October 1991. The landlord's solicitor opened his case along the lines which the solicitors had agreed. The tenants' solicitor confirmed his agreement on the issue for the court to decide. The judge expressed some bewilderment about the legislation, but did not question the solicitors' agreed analysis even though section 34 was read in detail. G The landlord's solicitor acknowledged that his pleaded case was based on Case 19 and not section 21, but neither the tenants' solicitor nor the judge queried that and it was tacitly agreed that the claim should be treated as if made under section 21.

The factual issue whether the protected shorthold tenancy notice had been served or not was vigorously contested before the judge over two days. At the end of the hearing the judge gave an ex tempore judgment H which runs to nearly 30 pages of transcript. She found that the notice had been duly served, thus accepting the evidence of the landlord and rejecting the evidence of the tenants. She accordingly made a possession order in favour of the landlord.

The tenants then consulted new solicitors (whose conduct of the matter is open to no possible criticism) and gave notice of appeal. But the new solicitors were at a disadvantage because they did not have all the papers and did not know the basis of the judge's decision. The notice of appeal, as originally drafted by counsel (who had not of course appeared below), took the point that the Case 19 proceedings were out of time; neither he nor the tenants' new solicitors appreciated that judgment had in fact been given under section 21.

The landlord consulted counsel, who correctly advised that the case had proceeded on a wrong basis in the court below. In a skeleton argument and in a respondent's notice he sought to uphold the judge's order on the basis that the landlord was entitled to possession under Case 19. He sought to overcome the problem that the action had been commenced after expiry of the three-month time limit by contending that this was a directory provision, for the benefit of the tenant, which the tenants had waived.

The tenants' counsel had by this time learned of the basis on which judgment had been given below. He accordingly settled an amended notice of appeal and a skeleton argument in which he abandoned reliance on the Case 19 time point. Instead, he contended that the Case 19 notice which had been given was not an effective notice under section 21. But a few days later, when he had seen the landlord's skeleton argument and respondent's notice, he settled a supplemental skeleton argument. In this he revived his argument that, if this was a claim under Case 19, the proceedings were out of time. He met the waiver argument by contending that the time limitation went to jurisdiction and the parties could not confer jurisdiction on the court by consent.

The tenants' appeal against Judge Holt's decision was fixed for hearing on 10 or 11 March 1992. A week before, on 3 March, on the advice of counsel, the landlord's solicitor wrote to the tenants' new solicitors an open letter proposing terms on which the appeal could be compromised. This letter did not in terms concede that judgment had been given below on a false basis nor that the possession order could not stand, and it sought to maintain Judge Holt's costs order. The tenants had very little time to respond to the letter, and most of the costs of the appeal had by then been incurred anyway.

The Court of Appeal (Purchas and Mann L.JJ.) heard the tenants' appeal over two days. They held that the agreed basis upon which the case had been fought in the court below was fundamentally unsound for the reasons summarised above. In a reserved judgment handed down on 26 March 1992 Mann L.J. held that section 34 of the Act of 1988 (which he described as of "a complexity which does not admit of paraphrase") did not apply because no tenancy had been entered into after the commencement of the Act. In October 1989 the tenants became and therefore remained statutory tenants. They did not become assured shorthold tenants and accordingly section 21 of the Act of 1988 was of no materiality. But they were vulnerable to a claim properly made under Case 19. Unfortunately for the landlord, however, the proceedings under Case 19 had not been commenced within the three-month time limit. The court held that the time limit went to jurisdiction. It accordingly concluded that

A the judge's decision could not be supported either on the ground on which it had been given or on the ground argued by the landlord on appeal. It allowed the appeal with an expression of sympathy for the landlord

> "because if his summons had been issued 12 days earlier and his case had then been conducted on the correct basis, his claim for possession . . . would on the judge's findings seem to have been unanswerable."

B

When the Court of Appeal's judgment was handed down there was a discussion of costs. The court made no order in relation to costs save for legal aid taxation of the tenants' (new) solicitors' costs of the appeal. The court indicated that it was

> "minded to make an order and will make an order that the solicitors concerned in the court below shall be personally and severally and jointly liable to reimburse the legal aid fund on an indemnity basis for any costs incurred not already met by charges in favour of that fund on the legally assisted parties."

C

Purchas L.J. had indicated that the court was concerned to protect the legal aid fund so far as was proper. The solicitors were given time to show cause why an order should not be made against them.

D

After the Court of Appeal's decision, the landlord served a further notice seeking possession under Case 19. The tenants did not give up possession. After expiry of the notice (and within the statutory time limit) he issued further proceedings claiming possession under that Case. The tenants served a defence denying that the landlord had served a protected shorthold tenancy notice before the 1985 tenancy agreement had been made and denying that Judge Holt's judgment concluded that issue. At a hearing before Judge Proctor in October 1992 the tenants sought to re-litigate that issue, contending that it was not res judicata. The judge rejected the argument and made a possession order under Case 19. The tenants appealed against Judge Proctor's order. In July 1993 their appeal was dismissed.

E

F

The solicitors who acted for the landlord and the tenants in the action heard by Judge Holt appeared by counsel in this court and sought to show cause why the proposed wasted costs order should not be made against them. The landlord himself is to be indemnified by the Solicitors' Indemnity Fund in relation to all costs orders made against him in that action. At issue now are the costs incurred in the action by the Legal Aid Board.

G

It has never been suggested that either the landlord's or the tenants' solicitor acted improperly or unreasonably. The question was whether they had acted negligently. In his additional skeleton argument for the solicitors, Mr. Hytner did not dispute that the landlord's solicitor had been negligent in failing to bring Case 19 proceedings in time and that the tenants' solicitor had been negligent (though not, it was said, actionably so) in failing to take the point. But plainly this negligence, assuming it to be such, did not cause the action to proceed as it did in the county court: that was the result of the solicitors' agreement that if the protected shorthold tenancy notice had been served the landlord was entitled to

H

possession because section 34 converted the tenants' holding into an assured shorthold tenancy which the notice under Case 19 was effective to determine under section 34. It is now plain that the solicitor's agreement was based on a misunderstanding of the law. Were they negligent in failing to understand the law correctly?

Dismay that a straightforward dispute between landlord and tenant should have led to four county court actions (one still undecided), two appeals to this court and the passing of three years (so far) since the litigation began might well prompt an answer unfavourable to the solicitors. We can well understand why Purchase and Mann L.JJ. reacted as they did. But we do not in all the circumstances think it right to stigmatise the solicitors' error as negligent, for these reasons. (1) This legislation is very far from straightforward. Mann L.J. commented on the complexity of section 34. Judge Holt commented that she couldn't make head or tail of it. We sympathise with her. It is unfortunate that legislation directly affecting the lives of so many citizens should not be more readily intelligible. (2) The solicitors do not appear to have approached the case in a careless way. There is nothing to contradict their statements that the textbooks they consulted did not give a clear answer to their problem. They could not be expected to bring the expertise of specialist counsel to the case. Nor could they reasonably expect to be remunerated for prolonged research. We do not think their error was one which no reasonably competent solicitor in general practice could have made. (3) It is significant that a most experienced county court judge saw no reason to cavil at the basis upon which it had been agreed to conduct the case. Had the error been egregious, it is hard to think the judge would not have corrected it. (4) Counsel appearing for the tenants on appeal from Judge Holt did not regard the basis on which the case had been argued below as unsustainable. On the contrary, he argued (among other things) that the statutory tenancy which began in October 1989 was an assured shorthold tenancy by virtue of section 34 of the Act of 1988, which was the basis of the solicitors' agreement criticised by the Court of Appeal. We think it significant that experienced counsel did not discard the argument as obviously wrong.

After two days of argument by counsel, and having reserved judgment, this court was able to take a clear view of the legal point at issue. This view was directly contrary to the solicitors', and is plainly right. But it does not follow that the solicitors were negligent in forming the opinion they did. We do not think they were.

There is a further consideration. Had the landlord stuck to his Case 19 claim before Judge Holt, and had the tenants relied on the time point, the landlord would have failed. There might or might not have been an appeal. But it seems clear that the parties would at some stage have wished to litigate the issue whether the protected shorthold tenancy notice had been served before the first letting. This might have been decided on the first, or on a later, occasion. It seems likely, given the history of this litigation, that the tenants would have sought to appeal against an adverse finding on this issue whenever it was made. Thus although the solicitors'

A mistaken agreement to fight the case on the basis they did must have led to some waste of costs, it would be wrong to regard all the costs incurred before Judge Holt and in the Court of Appeal as wasted.

ALLEN v. UNIGATE DAIRIES LTD.

The plaintiff's solicitors appeal against the third part of a wasted costs
B order made at Liverpool County Court on 10 May 1993 by Judge Lachs. Their appeal against parts one and two of his order has been compromised by agreement between the parties.

The plaintiff who was legally aided claimed damages for noise-induced hearing loss said to have been caused by exposure to a decrater machine at his place of work. On the day of trial in March 1993, before opening, the claim was dismissed by consent it being then accepted that the
C plaintiff's workplace was not dangerously noisy. The judge held that the solicitors had been negligent in failing to discover this at an earlier stage and ordered, so far as is presently material, that there should be no legal aid taxation of their costs after 1 November 1992.

The case for the solicitors is that they had relied on the instructions of their client to themselves and to their expert, on the reports of their expert
D and on counsel and had acted as reasonably competent solicitors.

Before examining the relevant material, a preliminary point arises, under the legal aid regulations, as to the form of the judge's order.

It is apparent from regulation 107 of the Civil Legal Aid (General) Regulations 1989 that a judge has no power to forbid legal aid taxation. Regulation 107(1) states that costs "shall be taxed in accordance with any direction or order given" and regulation 107(3)(*b*) states that a final
E judgment decree or order "shall include a direction . . . that the costs . . . be taxed on the standard basis." By virtue of regulation 107(4) if such a direction is not given "the costs . . . shall be taxed on the standard basis." It follows that taxation of a legally assisted persons costs is mandatory and must take place after final judgment whether or not the judge orders it.

F However, a judge does have power, under section 51(6) of the Supreme Court Act 1981 and regulation 109(1), to order that, on taxation, wasted costs shall be disallowed or reduced after notice has been given by the taxing officer to the solicitor or counsel enabling him to be heard.

In the present case no criticism was made of counsel. But if no taxation took place he could not be paid by the Legal Aid Board.

Accordingly the appropriate procedure, in a legally-aided case, if a
G judge properly concludes that a wasted costs order is appropriate, is for him to order legal aid taxation, to send, if he wishes, a copy of his judgment to the taxing officer and to direct under section 51(6) that wasted solicitors costs after a particular date be disallowed and consideration be given to whether counsel's fees be disallowed or paid by the Legal Aid Board.

The central question in the present appeal is whether there was before
H the judge material justifying his conclusion that the plaintiff's solicitors had been negligent.

He reached this conclusion having regard to the following matters: (1) the "extremely skimpy statement" taken from the plaintiff in September

1988; (2) the plaintiff's advisers' failure to make appropriate inquiries about the plaintiff's place of work; (3) the fact that there was no dangerous level of noise at the plaintiff's place of work; (4) the lack of explanation as to why matters were not clear until the morning of the trial; (5) the failure to obtain counsel's opinion and a full report; (6) the failure to inquire as to the significance of a line on a plan, provided by the defendants, which depicted a wall; (7) the failure to recognise the confusion between "decrater" "recrater" and "flyer" which was apparent on sight of the defendants' expert's report; (8) the failure to take any steps properly to identify the plaintiff's place of work and the effect of noise there.

For the solicitors, Mr. Mansfield submitted that, on a true analysis of the evidence, there was no substance in any of these criticisms.

In addition to the skimpy statement, the schedule to the questionnaire annexed to the particulars of claim gave details about the plaintiff's place of work. The plaintiff's instructions to the solicitors and their expert described working in the back bay bottle reception area and used the words "flyer" and "decrater" when referring to the noisy machine. The plaintiff's expert had interviewed the plaintiff in July 1992 and marked the site plan provided by the defendants on his instructions: it was not then suggested that the line to which the judge referred denoted a wall. The plaintiff's expert referred to the bottle reception area as the back bay where the plaintiff worked, to the machine as a decrater, also known as "the flyer," and to the defendants' disclosed noise level tests as showing in 1986 dangerously excessive levels from the decrater, which the expert assumed was in the bottle reception area. The defendants' expert's report served in September 1992, far from suggesting any error in this approach, also referred to the decrating machine known as the flyer in the back bay. The plaintiff's expert, to whom the solicitors again referred in early 1993, did not suggest that an inspection of the site was necessary: in any event the layout had changed since the plaintiff worked there. There was nothing in the defence or the correspondence from the defendants' solicitors to alert the solicitors to the fact that, as was demonstrated on the morning of the trial, there was a destacker but no decrater in the back bay and there was a solid wall between the decrater and the plaintiff's place of work. At pre-trial conferences with two different counsel, neither had suggested that such a fundamental error had been made. It was not until 6 May 1993, a few days before the hearing on the costs application, that the defendants' solicitors conceded in an affidavit that their expert was wrong.

In the light of this material this experienced judge in our judgment fell into error. The solicitors acted throughout on the plaintiff's instructions and obtained appropriate legal and expert advice on which they were entitled to rely. With the benefit of hindsight it is clear that the plaintiff was unlikely to have been exposed to excessive noise if there was a wall between him and the decrater. But, in our judgment, there was nothing prior to the date of trial which ought reasonably to have put the solicitors on inquiry either as to the significance of the line on the plan or as to the possibility that the plaintiff was not exposed to noise from the decrater. It is, indeed, regrettable, having regard to the present climate favouring a cards-on-the-table approach to litigation, that the defendants' solicitors, if

they were aware of it, did not, in correspondence, expressly point out to the solicitors the error which they were making. Accordingly, the solicitors did not act improperly, unreasonably or negligently.

We are conscious that it is particularly necessary in relation to the many thousands of industrial deafness claims which are being pursued in Liverpool and elsewhere that firm judicial control should be exercised over the parties to such litigation and their legal advisors. We have no doubt that in an appropriate case a wasted costs order or direction that on legal aid taxation the taxing officer shall disallow or reduce costs, is a useful means for exercising such control. But in the present case, for the reasons given, this was not appropriate case for such an order. Accordingly, we set aside the judge's order disallowing legal aid taxation and to that extent this appeal is allowed.

ROBERTS v. COVERITE (ASPHALTERS) LTD.

The plaintiff's solicitor appeals against an order made by Judge Tibber at Edmonton County Court on 14 April 1993 that he should pay the defendants' costs of the action.

The plaintiff, legally aided with a nil contribution since September 1987, claimed the price of work done by proceedings instituted in the county court on 10 November 1988. The solicitor in accordance with the practice of London practitioners, sent to the court with the particulars of claim, notice of issue of legal aid and the original legal aid certificate. It was the court's practice to serve a copy of the notice of issue with the summons. The solicitor asked in his accompanying letter that one copy of the notice (which he sent in duplicate) be sealed and returned to him. The court did not serve a copy of the notice of issue on the defendant nor return a sealed copy to the solicitor and it was accepted that this was the court's fault. The solicitor assumed that the court had served the notice on the defendant, for the claim was served and a defence was filed.

Initially the claim was for a little over £3,000 plus interest. By amendment in September 1989 this became £4,677 and a claim was added on a dishonoured cheque in the sum of £531. No amended defence was served. In February 1990 the defendants admitted that a sum of £232 was due. In March 1990 the plaintiff sought summary judgment for that sum plus the amount of the cheque, that is, £763 but that application was adjourned and further particulars were twice supplied by the plaintiff. On 25 February 1992, the solicitor "reminded" the defendants' solicitors of the plaintiff's legal aid and expressed surprise that no offer had been made, drawing attention to the sum of £763 apparently due. On 26 February the defendants' solicitors replied acknowledging that £232 was due but saying that this would not of itself result in an order as to costs. They said they would amend to deny the claim on the cheque if necessary and stated that the failure to give notice of issue of the legal aid certificate would entitle them to an order against the solicitor personally for their costs to date. The solicitor did not reply. There were no further negotiations and no payment into court. There was no application to amend the defence. In September 1992 the solicitor filed a certificate of readiness with a time estimate of one and a half days and in October 1992 the case was set down for trial on 15 March 1993. On 17 February 1993

the defendants' solicitors wrote to the solicitor saying that five days would be necessary and seeking a rearranged date for trial. On 1 March the solicitor refused this request. On 3 March the defendants offered £2,500 including costs in settlement, referring again to the failure to notify the issue of legal aid and to the possibility of an order against the solicitor personally for costs under Ord. 62, r. 11. The solicitor replied that the plaintiff would accept £2,500 plus costs which he estimated at £4,500 plus VAT. On 11 March the defendants offered £5,000 inclusive of costs. On 15 March, at the door of the court the case settled for £2,500 plus costs on scale 1 without prejudice to the defendants' application for costs against the solicitor.

In November 1988 the relevant regulations were the Legal Aid (General) Regulations 1980. Regulation 51 provides:

> "(1) Whenever an assisted person becomes a party to proceedings, or a party to proceedings becomes an assisted person, his solicitor shall forthwith—(*a*) serve all other parties to the proceedings with notice of the issue of a certificate; and (*b*) if at any time thereafter any other person becomes a party to the proceedings, forthwith serve similar notice on that party. (2) Copies of the notices referred to in paragraph (1) shall form part of the papers for the use of the court in the proceedings. (3) Where an assisted person's solicitor—(*a*) commences any proceedings for the assisted person in the county court; or (*b*) . . . and at the same time files a copy of the notice to be served in accordance with paragraph (1), the registrar shall annex a copy of the notice to the originating process for service."

For the solicitor, Mr. Mansfield submitted that paragraph (1) to the regulation must be read with paragraph (3), so that where proceedings are commenced in the county court by someone who is already legally aided compliance with regulation 51(3) is a complete performance of the solicitor's obligation. On this basis the solicitor was not in breach of regulation 51. In any event, even if he was in breach of that obligation by not serving the notice personally and direct, he was acting in accordance with the practice of other solicitors in the London area. As the solicitor in due course received a defence, there was no reason for him to suspect that only part of the documents which should have been served had been served, save that a sealed notice of issue of the legal aid certificate was not returned to him, as he had asked. The judge, submitted Mr. Mansfield, placed too much weight on this and failed to give any weight to the fact that the court itself had failed to serve the notice. The solicitor's failure to realise that this had not been returned to him does not, submitted Mr. Mansfield, amount to culpable behaviour within *Saif Ali* because other solicitors had adopted the practice. In any event, submitted Mr. Mansfield, even if the solicitor's conduct was properly categorised as negligent, the judge failed to give any proper consideration to the question of causation. A wasted costs order can only be made if costs have been wasted by reason of the culpable conduct. Here, the costs were incurred by defending the claim. It was not sufficient for the judge to be satisfied that the defendants would have sought to settle at the outset if they had known that the plaintiff was legally aided; it also had to be established on

A the balance of probability that, with that knowledge, they would either have made an acceptable offer or paid into court a sufficient sum to win on costs at the end of the day. In February 1992 when the defendants' solicitors knew that the plaintiff was legally aided, no payment was made into court nor was any attempt at settlement made by the defendants' solicitors. It was not until one week before the hearing that they made their first offer of settlement and although, in February 1992, the B defendants' solicitors acknowledged that £252 was due, that sum was not paid into court.

For the defendants, Mr. Weddell submitted first that regulation 51(1)(*a*) imposes an absolute duty on a solicitor to serve a notice of issue of a legal aid certificate personally and that regulation 51(3) is, as the judge found, a belt and braces provision. He pointed out that (3) refers to "a copy of C the notice" whereas (1) refers to the notice. Regulation 8 which relates to service of notices under the Legal Aid Regulations refers only to notices not copies of notices.

In our judgment, so far as notification of issue of a legal aid certificate is concerned, there is no significant difference between a notice and a copy of a notice. The solicitor for the legally assisted person receives from the Law Society a legal aid certificate. He prepares a notice of its issue and he D must serve notice of its issue on the other party: whether he does so by a document properly described as an original or a copy is in our judgment entirely immaterial.

Mr. Weddell further submitted that the solicitor did not send the notice to the court for service but sent it for return to himself. This in our view overlooks the fact that, as is apparent from the accompanying letter, E he sent two copies of the notice only one of which was to be returned to him.

We are unable to accept Mr. Weddell's submission that the solicitor's conduct here amounted not to mere negligence but to recklessness. Clearly the solicitor was in error in failing to observe that the sealed copy of the notice had not been returned to him and in assuming that the court would have effected service of the notice. But we are wholly unpersuaded that F this amounted to improper, unreasonable or negligent conduct.

In any event, we are unable to accept Mr. Weddell's submissions on causation. He said that the judge, having accepted the evidence of the defendants' director, Mr. Speroni, and the defendants' solicitor, that advice to settle would have been followed, was entitled to conclude that settlement would have been made at an early stage. Mr. Weddell also G pointed out that settlement was ultimately achieved at a figure in the region of one third of the value of the claim including interest. But in our judgment the conclusion is inescapable that the judge did not properly address the question of causation. We accept Mr. Mansfield's submission that the history of events between February 1992 and March 1993 which we have earlier set out makes it impossible to conclude on the balance of probabilities that with knowledge that the plaintiff was legally aided in H November 1988 the defendants would have made either a successful payment into court or an acceptable offer earlier than they did.

Accordingly, we take the view that there was no proper basis here for the judge to make a wasted costs order against the solicitor. We add only

this. When a solicitor opts for the court to serve process he should expressly inform the court that he wishes notice of issue of legal aid to be served by the court.

In the light of this conclusion, it is unnecessary to determine the difficult question as to whether the judge had any jurisdiction to make the order he did, having regard to the fact that the act or omission relied on occurred prior to October 1991 when the Courts and Legal Services Act 1990 came into force, but complaint was not made until March 1993. This court held in *Gofur v. Fozal*, The Times, 9 July 1993; Court of Appeal (Civil Division) Transcript No. 680 of 1993, that the Act is not retrospective, so section 51(6) would not provide jurisdiction. Ord. 62, r. 11, under the old form of which the county court had jurisdiction (see *Sinclair-Jones v. Kay* [1989] 1 W.L.R. 114), was amended from 1 October 1991 to refer to section 51(6). But there are no transitional provisions in the Act or the rule. The answer depends on whether, on the proper construction of section 16 of the Interpretation Act 1978, there was, on 1 October 1991, an accrued right capable of enforcement by legal proceedings. Having regard to the view which we have formed on the merits of this matter, it is unnecessary for us to embark on answering that question.

This appeal will accordingly be allowed and the judge's order set aside.

Philex Plc. v. Golban

The appellants in *Philex Plc. v. Golban* (*trading as Capital Estates*) are solicitors against whose firm a wasted costs order was made in the Companies Court. Their client had claimed to be a creditor of the company, which was solvent. The debt was disputed. The client had nevertheless made use of the statutory demand procedure as a means of pressure to force payment. The company applied for and obtained an injunction to restrain the issue of a winding up petition, and an order for their costs of that application against the client on an indemnity basis. Having reason to doubt the solvency of the client, the company applied further that their costs should be made the subject of a wasted costs order against his solicitors. The judge made such an order, not upon the ground that the solicitors were open to any criticism for issuing the statutory demand in the first place, but because at a later stage (when the payment time allowed by the statutory demand had expired) they were parties to a negotiating offer which made unreasonable or improper use of the implied threat of a winding up petition as an inducement to the company to compromise the claim.

The facts, which are helpfully set out in the full and careful judgment of Knox J., were these. On or about 18 December 1992 the alleged debtor company Philex Plc. ("Philex") completed the purchase of a property in north west London ("the property") for a price in the region of £370,000. The alleged creditor Mr. S. Golban ("Mr. Golban") claimed to be entitled to an introduction fee or commission on the purchase, in respect of which he invoiced Philex as follows on 22 December 1992:

> "For introduction of the above property purchase from L. & S. Properties at purchase price £370,000 and completion to take place on 21 December 1992. Agreed commission of 3 per cent.: £11,100."

A The claim was promptly denied on behalf of Philex, whose finance director, Mr. Torbati, replied on 24 December: "We are in receipt of your invoice . . . which we do not understand. So far as we are aware we have no liabilities outstanding to yourselves." On that same day (24 December) the appellant firm (acting as solicitors for Mr. Golban through a partner to whom it will be convenient to refer as "the solicitor") served on Philex a statutory demand in the approved form 4.1. That form has indorsed B upon it in heavy black type the warning:

> "Remember! The company has only 21 days after the date of service on it of this document before the creditor may present a winding up petition."

It was signed by Mr. Golban, who designated the solicitor as the person C to whom any communications were to be addressed. The demand re-asserted the commission claim in the sum of £11,100 and alleged that Philex had refused to pay it. The letter from the solicitor's firm covering service of the statutory demand included a note that their offices would be closed from 1.30 p.m. that day (24 December) to 9.30 a.m. on Monday 4 January 1993.

D On Thursday 31 December 1992 Iliffes, solicitors acting for Philex, wrote to the solicitor's firm in response to the statutory demand. They disputed that Mr. Golban had at any time acted for or been engaged for any purpose by Philex, which did not deny that he had been concerned in discussions with it about the purchase but contended that the company had been given to understand that he was acting exclusively on behalf of the vendors. The letter continued:

E

> "Our client is a solvent company. The reason that our client refuses to pay your client the sum claimed or any other sum is that your client has no entitlement to be paid. The alleged debt is disputed by our client and your client's statutory demand is an abuse of the process of the Companies Court. Unless we receive your client's undertaking by 4 p.m. on Monday 4 January 1993"—which was the F first working day after the date of that letter and was also the day on which the solicitor's office was due to re-open—"that he will take no further steps in relation to the statutory demand and that he will not issue a winding up petition in respect of it our client will make an immediate application to the Companies Court to restrain your client from presenting a petition and will apply for its costs on the indemnity basis in accordance with the principles laid down in *In re* G *A Company . . .*"

A reference to Hoffmann J.'s reaffirmation in *In re A Company (No. 0012209 of 1991)* [1992] 1 W.L.R. 351, 354 of the principle that it is an abuse of the process of the Companies Court to present a winding up petition to secure payment of a debt concerning which there is a genuine dispute.

H The solicitor duly found that letter of 31 December waiting for him when he returned to his office on 4 January, and sent a copy of it (together with a copy of the law report of *In re A Company (No. 0012209 of 1991)* [1992] 1 W.L.R. 351) to his client Mr. Golban, whom he knew to be

abroad and not due to return until 5 or 6 January. He did not feel that he could give the required undertaking without instructions from his client. The 4 p.m. deadline allowed by Iliffes' letter of 31 December accordingly passed, and on 5 January Iliffes issued an originating application in the Companies Court returnable on 25 January and seeking an order for an injunction restraining Mr. Golban from presenting any petition to wind up Philex based upon the statutory demand. That application was served on the solicitor's firm the same day (5 January) under cover of a letter which stated that the affidavit in support would be served shortly.

This supporting affidavit was in fact served on the solicitor's firm on Friday 8 January. It was sworn by Mr. Torbati, who stated Philex's general case as follows. Mr. Golban had indeed introduced the property to Philex's managing director (Mr. Sabourian) and had acted as an intermediary to convey to the vendors certain offers that were initially made for it by Philex. Those offers did not, however, bear fruit. Philex thereafter entered into direct negotiations with the vendors which led eventually to an agreement for sale in which Mr. Golban had played no part. Mr. Torbati went on to describe Mr. Sabourian as having expressed the wish, nevertheless, to make some ex gratia payment to Mr. Golban for his introduction. He had suggested a figure of £2,000, which Mr. Golban had rejected as wholly inadequate.

The solicitor did not read this evidence on the Friday on which it was served, but considered it on Monday 11 January (having in the meantime sent a copy of it without comment to Mr. Golban). It should be noted that the judge had no criticism to make, down to that point, of the solicitor's conduct in any respect whatsoever.

On that same day (Monday 11 January) the solicitor wrote a letter to Iliffes which contained no more than a simple acknowledgment of receipt of the affidavit. His client's comments on that affidavit were received on 13 January: it may safely be assumed (although privilege has not been waived) that those comments dissented strongly from Mr. Torbati's version of events.

Thursday 14 January was the expiry date of the 21-day period allowed by the statutory demand. On that day the solicitor was telephoned by Mr. Evered of Iliffes, who asked him whether Mr. Golban was intending to resist the pending application for an injunction against presentation of a petition (due to be heard on 25 January), pointing out at the same time that it was now crystal clear that there was a genuine dispute about the claim and that Mr. Golban was at risk of having to pay costs on an indemnity basis if he invoked the winding up procedure. The solicitor replied that he had explained this to his client, who was nevertheless adamant that he was owed the money and wanted to go ahead. When Mr. Evered asked him whether he intended to issue a petition, because (if he did) Philex would apply immediately for an ex parte injunction to restrain its advertisement, the solicitor replied that he would have to take instructions and would get back to him on that point. After that conversation, the solicitor had to leave immediately to attend a court engagement, and when he returned to his office he found a fax copy of an ex parte injunction which had been obtained by Iliffes that day prohibiting

A the issue by Mr. Golban of any petition to wind up Philex until the conclusion of the hearing due to take place on 25 January.

On Friday 15 January at the latest (it was possible according to the finding of the judge that the relevant advice had been given two days earlier on 13 January) the solicitor advised Mr. Golban specifically that in the current state of the evidence a genuine dispute existed as to the subject matter of the statutory demand, and that it would be an abuse of the B process of the court to present any petition founded upon it. Mr. Golban accepted that advice, but at the same time gave the solicitor certain instructions, as to which there has, again, been no waiver of privilege, but it may safely be assumed from what followed that they included a request to see if something in the nature of a compromise could be salvaged from the existing situation. The solicitor accordingly that same day drafted a C letter to Iliffes to which reference will be made shortly, but did not post it that day because he wanted to have it approved by counsel to whom he submitted the draft for consideration over the weekend.

On Monday 18 January Iliffes faxed a letter to the solicitor seeking to substantiate a suggestion previously made that Mr. Golban had become the subject of bankruptcy proceedings, and giving him notice that:

D "unless terms can be agreed for the relief sought and payment of our client's costs prior to the hearing of the application on 25 January we shall seek that an order be made against your firm personally to pay our client's costs on the indemnity basis."

On 19 January the solicitor sent to Iliffes the letter which had been submitted in draft to counsel. It included the following passages:

E "It appears from your client's affidavit that he has offered payment of £2,000 to our client in satisfaction of the claim. Whilst our client wishes to reserve his rights to pursue the full claim he is nevertheless prepared to accept payment of £2,000 together with our reasonable costs if this can be agreed before 25 January. If not, our client intends to issue proceedings for the full amount of his claim and seeks your F confirmation that the sum of £2,000 will be paid into court in such proceedings. In spite of his reservations arising from the discrepancy between what you have stated on behalf of your client and what your client states in his affidavit our client accepts that the evidence contained in the affidavit establishes, prima facie, a dispute rendering inappropriate the continuation of the winding up procedure and confirms that he does not intend to present a winding up petition. We note your comments G regarding our position and the alleged bankruptcy of our client. He had, as you know, denied to us that he is bankrupt and in view of your persistence in asserting this we have made a search against our client which has disclosed that there are no subsisting entries. We are therefore unable to agree with your contention that we should be personally liable for costs and will certainly oppose any such application."

H The proposal in that letter for settlement of Mr. Golban's claim for £2,000 and his costs was rejected by Iliffes on 21 January. No agreement was reached as to how matters should proceed at the hearing on 25 January. The upshot was that counsel attended that hearing, on the instructions of

the solicitor on behalf of Mr. Golban, and offered no resistance to an order for an injunction in the terms prayed by the originating application. An order was made that Mr. Golban should pay Philex's costs of the application on an indemnity basis. An application intimated at that hearing for such costs to be paid by the solicitor's firm personally was adjourned to a later date, and was dealt with by Knox J. on 30 June 1993 when he made the wasted costs order now under appeal. This was an order that the solicitor's firm:

> "do pay the wasted costs incurred by [Philex] after 13 January 1993 to be taxed if not agreed but credit should be given for such costs as would have been incurred in disposing of the [application] by consent."

The judge's reasons for treating the costs incurred by Philex from and after 14 January 1993 as "wasted" for the purposes of section 51(6) and (7) were expressed in these terms:

> "I have come to the conclusion that it was unreasonable and indeed improper to use proceedings which by 11 January 1993 [the solicitor] should have realised and did realise amounted to an abuse of the process of the court as a vehicle to secure a compromise on the basis of the £2000 claim which at one stage was offered. [The solicitor] did indeed, on his own evidence, advise his client Mr. Golban not to proceed with the statutory demand on 15 January. He should, and indeed may, have done so, when Mr. Golban gave [the solicitor], on or about 13 January, his comments on Mr. Torbati's affidavit. The fact that Mr. Golban continued to believe in the merits of his case for commission is not any justification for not accepting that the winding up procedure was inappropriate and should not be followed."

This passage makes it clear that the conduct of the solicitor which the judge regarded as unreasonable or improper for the purposes of section 51(7) consisted of his adoption on Mr. Golban's behalf from and after 14 January 1993 of the tactic of threatening the use of a winding up petition, presented in abuse of the process of the court, as a bargaining counter to improve his client's prospects of persuading Philex to accept a compromise of the claim at the suggested figure of £2,000 plus costs.

The appellant firm submits that this finding of misconduct was not open to the judge on the evidence and can only have been founded on a misreading of the correspondence. It points out (1) that the relevant compromise was proposed in the letter of 19 January, in which it was quite clearly and unconditionally stated that Mr. Golban accepted that the evidence established a bona fide dispute making the continuance of the winding up procedure inappropriate, and confirmed that he did not intend to present a winding up petition. There was therefore no question of the solicitor using potentially abusive proceedings as "a vehicle to secure a compromise." (2) That the compromise proposal was in any event contained in a letter whose text had been approved by counsel on whose advice the solicitor was entitled to rely.

With every respect to the views of a judge with wide experience in this field of the law who had obviously given the case detailed and careful attention, these submissions are in our judgment well founded. We do not

A suggest that there could never be circumstances in which a solicitor who advised his client to make use of a threat of proceedings that would (if brought) amount to an abuse of the process might be found to have been guilty of improper or unreasonable conduct. It is simply that we are unable to find any evidential basis for the judge's conclusion that misconduct of that sort had occurred in the present case. The solicitor was, moreover, entitled to rely upon the fact that from 15 January B onwards he was acting on the advice of counsel, both generally in regard to the prosecution of Mr. Golban's claim to commission and specifically in regard to the compromise proposal, the terms of which (as proposed in the letter of 19 January) had been approved by counsel.

Mr. Otty, arguing in support of the notice to affirm which has been served in the appeal by Philex, suggested that there was an alternative C ground on which the judge could (and in his submission should) have based a wasted costs order. From 14 January onwards the solicitor had a client who was eligible in law (the 21 days of the statutory demand having expired) to present a winding up petition, and who, although willing to acknowledge that the debt demanded was a disputed debt, and willing even to accept that to present a petition would involve abuse of the court process, was nevertheless not prepared to take the crucial step of D instructing his solicitor to give a formal undertaking to the court that no petition would be presented. From that point, therefore, so Mr. Otty argued, it became the solicitor's duty to stop acting altogether, and to tell Mr. Golban that he must either take different advice or act in person. Had the solicitor ceased to act from 14 January onwards, the wasted costs would, it is asserted, have been saved.

E We are unable to accept that argument. The solicitor was not criticised by the judge for anything he did (or omitted to do) down to and including 13 January. It would involve setting an over-scrupulous standard for the solicitor, as well as running some risk of unfairness to the client, if the solicitor were to be expected to terminate his retainer abruptly on 14 January, with the hearing only 11 days away, solely upon the ground that the client, although willing to give appropriate assurances, was F unwilling to authorise the formal undertaking which would make any contest at that hearing unnecessary. Nor does it appear to us that the costs of a contested hearing on 25 January would necessarily have been saved by his ceasing to act. It is by no means unlikely that Mr. Golban, deprived of his solicitor, would have insisted upon maintaining his opposition and would have resisted the application thereafter as a litigant in person. The same objection applies to Mr. Otty's alternative submission G (to which it is unnecessary to refer in detail) that costs could have been avoided if advice that presentation of a petition would be abusive of the process had been given to Mr. Golban by the solicitor on 13 January instead of 15 January 1993.

For these reasons the appeal will be allowed and the wasted costs order discharged.

H

WATSON v. WATSON

The appeal in *Watson v. Watson* lies against a wasted costs order made in financial proceedings between former husband and wife. The wife, on legal advice, had persisted in maintaining a technical point of law which,

when litigated at a contested hearing, was found to be wholly without merit. The specific default on the part of her solicitor which gave rise to the order had been his failure to answer adequately a letter from the husband's solicitors in which his attention had been drawn to a point which the court was later to find wholly conclusive against the wife's objections. The judge considered that a full and proper answer to that letter would greatly have improved the prospects of the matter proceeding by consent, and would thus have saved the expense of a contested hearing to debate what turned out in the end to be an unarguable point. She therefore made a wasted costs order against the wife's solicitor in respect of part of the costs of the contested hearing at which the wife's objections had been overruled.

A brief reference needs first to be made to the legal background against which the proceedings had arisen. In the Family Division—unlike other areas of the law where parties sui juris can obtain an order by consent disposing of the action on terms which involve no consideration by the court of their fairness—the court retains a supervisory jurisdiction to approve proposed financial compromises between spouses on their merits: see *Jenkins v. Livesey (formerly Jenkins)* [1985] A.C. 424. Where a "clean break" compromise is to be effected on the basis of a payment of capital in extinguishment of future rights of maintenance, the terms for which the court's approval is sought may provide for the capital to be transferred to the maintained spouse outright, or for it to be settled on trust for that spouse for a life interest only, with remainder to the children of the family. If the capital is to be settled, the court will either approve a trust deed already tendered to it in draft, or else (if no draft has yet been agreed) approve the proposed trust provisions in principle, leaving the parties to agree the details between themselves. In the latter case, the court retains a residual jurisdiction to approve the terms of the trust deed in default of agreement between the parties.

In cases where the capital is to be settled, the best practice (as the judge observed in the present case) is undoubtedly to follow the course of having a draft trust deed ready for court approval at the time when the consent order is made: there can then be no scope for argument about trusts which are already defined at the point of compromise in a definitive instrument which itself forms part of the terms of settlement expressly approved by the court. There may however be circumstances in which that proves impracticable, and agreement has to be obtained in principle for trusts which are to be worked out in detail later. Though that is a sensible procedure, and may in some circumstances be the only possible one, it is a course fraught with risk of future dispute. Opposing views are liable to arise, for example, as to when the primary trusts declared on the face of the court order take effect: do they vest an immediate interest in the beneficiaries from the moment that the order is perfected, or do they remain inchoate until incorporated in the proposed trust deed?

It was the emergence of difficulties such as these which underlay the proceedings in the present case. Mr. and Mrs. Watsons' marriage had taken place in November 1974. Their only child Robert was born in April 1976. By July 1977 the parties had separated, and they never again lived together, despite attempts at reconciliation. The husband was a man of

some wealth. The wife suffered (and still suffers) from a drug dependency problem which was a principal cause of the failure of the marriage and was sufficiently acute to require Robert to be brought up by his father from the age of three. In July 1977 the parties had signed a deed of separation which contemplated arrangements under which the wife would become entitled to have properties purchased for her occupation during her life by trustees who would hold the reversion for Robert if he attained the age of 25, and subject to that upon such trusts as the husband should appoint.

Divorce proceedings were started by the husband in 1988 on the ground of their long term separation. In October of that year the wife claimed financial relief in the same proceedings. She was slow in pursuing her claim, and no hearing date was fixed before 2 March 1992 (one month before Robert's sixteenth birthday). On 21 February 1992 the husband's solicitors wrote to the wife's solicitors with proposals for a clean break settlement of all the wife's outstanding claims for maintenance from the husband (or his estate) upon terms that the wife's current home (a London flat) should be settled, together with a fund of £150,000, upon trust for her for life. It was proposed that "the ultimate beneficiary of the trust" should be Robert "who will be entitled, providing he has attained the age of 25 years, to the capital fund on the earlier of your client's remarriage or her death."

That proposal was not accepted, and the parties came to court prepared for a contested hearing on 2 March 1992. Their professional advisers began to talk. Door-of-the-court discussions, always by nature urgent, had in this case a particular immediacy because no one had been able to predict with any confidence that the wife would attend the hearing at all: she had nevertheless come to court on this occasion, and if the matter was to be compromised on her instructions it would be necessary to take advantage of her presence by concluding a firm agreement there and then.

The discussions bore fruit. A compromise was agreed, very much on the lines of the letter that had been written by the husband's solicitors, in that it provided for a fund of realty and investments to be settled on the wife for life. Because this had been expected to be a contested hearing, there was as yet no draft trust deed in being. Provision would therefore have to be made in the order for such a deed to be drawn up later. In the course of the negotiations the wife's advisers had pressed hard for the agreement of the husband to pay her future costs of approving the ultimate form of the trust deed. This was refused, and the wife submitted to a direction that each party should (in this as in all other respects) bear their own costs.

A draft order was written out in counsel's handwriting, and the parties then went before the judge (Judge Wilcox, sitting as a deputy High Court judge) where the nature and effect of the order were explained to him, and he approved it. That consent order of 2 March 1992 (perfected on 4 March) reads (so far as relevant):

> "By consent it is ordered (1) That the [husband] do as soon as is practicable effect two settlements upon and for the benefit of the [wife] as follows: (a) the flat at 8, Stafford Mansions, London, S.W.11

shall be held by trustees who shall hold the property upon terms that: (i) the [wife] may occupy the property during her lifetime and following her death the property shall pass to the child of the family Robert Watson absolutely and (ii) the trustees shall have power upon request being made to them by the [wife to invest in an alternative property] and (b) the sum of £150,000 shall be settled upon the trustees upon terms that the whole of the income arising therefrom shall be payable to the [wife] during her lifetime with reversion following her death to the child of the family Robert Watson absolutely: . . . (2) that both of the trusts described in the preceding paragraph shall be subject to the following additional terms: (a) the trusts shall be established in the Cayman Islands (b) the trustees shall be Ansbacher Ltd. or a similar trust company established there, at the nomination of the [husband] (c) the cost of establishing the two trusts shall be borne by the [husband], and (d) in the event that the [wife] dies before the child of the family Robert attains the age of 25 years, then his reversionary interests shall be accumulated (subject to a power in the trustees to advance capital in their discretion) until he shall attain the age of 25, whereupon he shall be entitled to the capital of both trusts absolutely."

The order further provided for payment by the husband to the wife of a lump sum of £2,500, and that each party should bear his or her own costs.

There had been one oversight in the drafting of the consent order, in that it omitted a provision (which had been common ground in the negotiations) that her life interest should subsist only until remarriage. The order was amended by consent under the slip rule on 6 April 1992 to make good this omission.

Later that month the husband's solicitors sent to the wife's solicitors a first draft, and in June a second draft, of a trust deed which contained two provisions that were to prove controversial. These were that Robert's reversionary interest should not be vested in him absolutely, but should be made contingent: (a) upon his attaining the age of 25 (we shall refer to this as "the age contingency"); and (b) upon his being alive at the date of the falling in of the prior income interest given to his mother—that is at the date of her death or remarriage (we shall refer to this as "the survivorship contingency") with an ultimate gift over to the husband in the event that Robert failed to fulfil either contingency.

The wife's solicitor referred the drafts to the wife's matrimonial counsel, who advised that they should be submitted to specialist trust counsel in the same chambers.

On 7 July 1992 the wife's solicitor wrote to the husband's solicitors objecting, on counsel's advice, both to the age contingency and to the survivorship contingency (and consequently to the gift over to the husband) upon the ground that they represented a cutting down of the interests provided for Robert under the original consent order—interests which (as they contended) were vested and indefeasible. In their reply of 16 July 1992 the husband's solicitors maintained a contrary view of the construction of the order, asserting that both contingencies were already implicit in its terms. This was referred by the wife's solicitor to

counsel, on whose advice he wrote to the husband's solicitors on 6 September asserting that the interests to be taken by Robert under clause 1 of the consent order were "immediately vested remainder interests" unaffected by the subsequent trust for accumulation of income up to the age of 25, and citing authority of some antiquity for that proposition.

The husband's solicitors then, for their part, consulted counsel, on whose advice they wrote to the wife's solicitor on 16 October 1992. In their first paragraph they stated that they were willing to delete the age contingency. In the remainder of the letter they concentrated upon the survivorship contingency. It was pointed out that if Robert was treated as taking an immediate and indefeasible reversionary interest, then in the unfortunate event that he should predecease his mother—dying either under the age of 18 or over that age unmarried and intestate—the reversion would pass to his next of kin under his intestacy. One of his next of kin would be the wife, whose life interest would become enlarged pro tanto into an interest in capital. The whole basis (it was pointed out) of the negotiations which had resulted in the wife being given an income interest only in the relevant trust property was that she ought not to be given access to any substantial sums of capital because of the risks to which capital would be subject in her hands as a result of her addiction.

The letter therefore proposed that the consent order should be further amended by introducing the words "if then living" into the relevant provisions of paragraph (1), so as to put it beyond doubt that Robert's interests were to be subject to the survivorship contingency. The relevant passages of the letter ended by saying:

> "If we cannot agree, it will be necessary to issue a summons before a High Court judge for directions to be given as to the appropriate instruction, implementation or amendment of the order of 2 March 1992. We understood . . . that you would be making an application. If we do not hear from you within 14 days with your confirmation that we have reached agreement on the outstanding issues, we shall issue a summons ourselves."

On 14 December 1992 the wife's solicitor replied:

> "We have had an opportunity of speaking with counsel concerning this matter who has advised that it must be brought back to court under the liberty to apply provision. We are accordingly obtaining a date as speedily as possible as our client has been substantially prejudiced by the inaccurate drawing up of the trust and your client does not seem prepared in any way to be of any assistance in the interim."

After the husband's solicitors had replied on 17 December refuting the suggestion of prejudice to the wife's interests and stating that they had hoped that the matter could have been dealt with by consent and "a substantive response" received to their letter of 16 October, the wife's solicitor responded on 23 December by saying:

> "Your hope that this matter could have been dealt with by consent has been prevented by your intransigence in respect of the question

of costs. We do not see why our client should have a further charge in respect of her costs hanging over her head by virtue of your mistake, not the first in this case in relation to this settlement. If your client is prepared to undertake our costs in relation to these matters, our counsel may take a different view in relation to the way that this matter can be dealt with. We take the view that we are entitled to an order for costs and returning the matter to court is the only way in which this can be dealt with."

The correspondence was brought to an end by the husband's solicitors who wrote on 6 January 1993:

"Our client is not prepared to pay your client's costs in relation to our unnecessarily extensive correspondence over this issue. You could have limited your client's costs by accepting long ago the proposals which we put forward. We are not prepared to engage in any further correspondence with you regarding this matter."

The wife's solicitor accordingly took out a summons claiming the court's approval of a form of trust deed which would give Robert an absolute and indefeasible interest in reversion. It was supported by an affidavit exhibiting the correspondence from which we have quoted. The summons came before Booth J. on 10 March 1993 and was dismissed by the judge, who made an order authorising the settlement to proceed in the form proposed by the husband's solicitors. The judge made it plain that she regarded the objections taken by the wife's advisers to any provision making Robert's reversionary interest contingent upon surviving his mother's death or remarriage as wholly without merit. Firstly it was quite wrong, she said, to subject a consent order negotiated outside the court door to the very strict rules of construction that would be appropriate to a most carefully drafted deed or other legal document. Secondly, on construing any consent order in matrimonial proceedings it was essential to look behind the words of the order to see what the parties desired to achieve, and the possibility of the wife becoming entitled to a capital interest in any circumstances lay wholly outside the contemplation of both parties at the time.

The wife was at all material times legally aided. After Booth J. had delivered judgment, Mr. Pointer, counsel for the husband, asked for a wasted costs order against the wife's solicitor in respect of the husband's costs of the application. He made no corresponding application against either of the counsel who had advised the wife. There was some discussion with the judge as to the basis on which a wasted costs order might be made. Mr. Pointer said that he relied firstly on the fact that the wife's solicitor had sought a form of trust deed which was unsupportable on any proper interpretation of the consent order, and secondly on his failure at any time "properly to address the substance" of the letter of 16 October 1992. The judge expressed some doubts about the first ground, but described herself as "appalled" by the lack of response to the letter of 16 October. She acceded however to the objection by the wife's counsel that a wasted costs order should not be made without giving the wife's solicitor a proper opportunity of answering the complaint on which it was founded, and she adjourned the application to be restored in the near

A future, with leave to the wife's solicitor to file an affidavit in the meantime if so advised. According to the note of the judge's remarks made by the husband's solicitor, counsel for the wife asked the judge at that point:

> "whether she could advise that the charges against those instructing her were for a contribution to the husband's costs because of the failure to [answer sensibly the letter of 16/10/92 and] negotiate upon
B the terms of the letter dated 16 October 1992. Booth J. confirmed this."

Pending the adjourned hearing of the application for a wasted costs order, the wife's solicitor swore an affidavit in which he expressed his understanding that Booth J. had accepted at the main hearing that her rejection of the substantive arguments raised on behalf of the wife was not
C a ground on which she would make a wasted costs order: he therefore concentrated on the criticism of his failure to answer specifically the points raised in the letter of 16 October. He confirmed that he had at all times acted, in connection with the approval of the terms of the draft deed, on the advice of matrimonial and trust counsel. He had referred the letter of 16 October to counsel and received advice which made it clear to him that there was no question of any agreement or compromise in relation to the
D construction of the trust deeds. He said:

> "The reason for rejecting any proposals in the letter of 16 October were the same as before and the same as advanced at the hearing namely that [the husband's solicitors] were introducing into the trust deed a contingency not provided for in the court order."

E He added that even if his answers to the 16 October letter were thought to have been inadequate, no costs had been wasted in consequence: the only answer he could have given was the one advised by his counsel—namely a repetition of the contention that the consent order had created vested rights in his client and her son to the removal of which he could not agree unless the court were so to direct.

F The hearing of the wasted costs order application took place on 7 April 1993. Mr. Pointer relied upon the two grounds he had already indicated at the main hearing, namely: (a) the intransigent pursuit by the wife's solicitor of a case that he knew, or ought reasonably to have known, was hopeless; and (b) the failure by the wife's solicitor to deal in specific detail with the terms of the letter of 16 October.

The judge expressed strong sympathy, in the course of her judgment,
G with ground (a), but in the end she refrained from basing any wasted costs order upon it. Her forbearance in this respect was in our opinion fully justified for the following reasons. (1) The practice of stating trusts in principle on the face of a consent order, the details of which are to be set out in a formal trust instrument for subsequent agreement and execution is one which (as we observed at the start of our judgment on this particular appeal) opens up hazardous territory in which there is wide
H scope for dispute and misunderstanding. The absence of any authority cited to us as to how the court acts in such circumstances suggests, moreover, that it is territory uncharted by any guidance as to principle. The wife's solicitor had every justification, therefore, for taking a strict

and cautious view of his client's rights (and those of Robert). The fact that the judge in the upshot was prepared to view the case robustly and to brush his scruples aside as pedantic does not mean that the solicitor was wrong to prepare himself for the possible doubts of a more cautious and less confident tribunal by insisting that his client's apparent vested rights should be defended at a contested hearing. (2) The wife's solicitor did not maintain his stance independently. He was at all material times advised by both matrimonial and trust counsel, neither of whom was sought to be made a respondent to the wasted costs order application. If the judge intended, by her references in the judgment to *Davy-Chiesman v. Davy-Chiesman* [1984] Fam. 48, to suggest that there were analogies between that case and this, we would respectfully disagree. Counsel's views may not in the end have prevailed before the judge, but they were cogent and clear, and it was entirely reasonable for the wife's solicitor to have acted on them. (3) The judge had already committed herself, by her remarks at the end of the main hearing, to absolving the wife's solicitor from liability to a wasted costs order on this ground.

We therefore hold, despite Mr. Pointer's able argument in support of the respondent's notice which has been served by the husband, that the judge was right not to base any wasted costs order on ground (a).

We turn to ground (b), on which the husband was successful. The judge repeated her earlier strictures on the failure of the wife's solicitor to deal more fully with the letter of 16 October. The fact that it had always been common ground between the parties that the wife would take no interest (vested or contingent) in the capital to be settled under the "clean break" agreement was (as she had held at the substantive hearing) the crucial factor in the case. It was nevertheless not a factor to which either side had previously referred in correspondence. When, therefore, the husband's solicitors raised it for the first time in their letter of 16 October, it became the duty of the wife's solicitor to take it up, bring a fresh mind to bear on it, and make use of it to give a new turn to the negotiations. Had he followed that course, there would have been an improved chance that common sense would have prevailed on both sides and a basis reached for an unopposed application to the court to have a draft trust deed incorporating the survivorship contingency formally approved. Those views were summarised by the judge in the following terms:

> "In my judgment the matter that was raised by [the husband's solicitors] was a matter of importance which had not been addressed before, as [the husband's solicitors] point out, by the court order, by the parties or indeed by their advisers. It was a matter which was relevant and should have been resolved. I accept the submission of Mr. Pointer that it was inadequate for [the wife's solicitor] on behalf of the wife once the matter was raised merely to say that the question should be placed before the court without more ado. It is a very different matter to place an application, if there had to be an application, before the court on a consent basis, which could have been done by one solicitor without representation by the other side but with a letter indicating consent, from the matter being raised in court where the issue is in conflict and where both parties have to be represented by counsel and solicitors, thereby incurring very

A substantial costs indeed. If this matter had been discussed in the way that the first matter in issue between the parties had been (that is, deferring Robert's interests until the age of 25), agreement might have been reached. If not, at least the husband and his advisers would have known the practical objections raised by the wife to their very sensible suggestion of how that matter should have been resolved. As it was, the wife's case was not clear until the hearing or shortly before B it. There is a responsibility upon all legal practitioners, to take every step possible to avoid a contested court hearing, thereby incurring additional costs. As I said during discussion of these matters following upon my judgment of 10 March, I was, and continue to be, appalled by the fact that that letter of 16 October 1992, was not answered and was not dealt with. That seems to me to be a very serious omission C which comes within the guidelines given in the criminal case of *Wasted Costs Order No. 1 of 1991*, The Times, 6 May 1992, and referred to in *The Supreme Court Practice 1993*, First Supplement. I think that that was an unreasonable omission. It amounted to a failure properly to negotiate a clearly relevant matter which could then have been dealt with without incurring the substantial costs that ultimately followed."

D

Those conclusions, reached by a judge with unrivalled experience in the field of matrimonial finance, are entitled to the fullest respect. Nevertheless the reasoning which they incorporate was in our judgment unsound in two respects.

First, the conduct of the wife's solicitor in regard to the 16 October E letter was not conduct which could in our judgment be properly described (whatever criticisms may be made of it in other respects) as unreasonable. The original agreed intention to ensure that the wife had no capital under the proposed settlement was not a surprise factor in the case: indeed the very fact that this intention had been fundamental to the negotiations which led up to the consent order provided the chief reason for the court's conclusion at the main hearing. The only effect, therefore, of the letter of F 16 October was to give this factor a specific emphasis which it had not so far received in correspondence. Such emphasis certainly required the wife's solicitor to give it renewed and serious consideration. It is difficult, however, to think of any way in which he could have done that more effectively than by taking the step (which he did) of passing the letter on to counsel for his further specific advice. Once counsel had advised that G his views were unchanged, that is, that the terms of the original consent order were nevertheless still to be regarded as creating an interest in capital which (although reversionary) was free of the survivorship or any other contingency and was immediately and immutably vested in Robert or his estate—the wife's solicitor was entitled to construe his duty to his client as leaving him with no alternative but to continue his opposition to any proposal that Robert's vested rights should be cut down by agreement. H This does not mean that he was entitled to escape criticism altogether. The judge had ample justification for finding the wife's solicitor's replies to the letter of 16 October too grudging, perfunctory, and generally unhelpful to be acceptable when judged according to the highest standards

of the profession. But those are not the standards which the court has to apply when considering whether a solicitor's conduct has been sufficiently unreasonable to merit the making of a wasted costs order against him. When the criterion which we have described in our statement of general principles as the acid test is applied to the conduct of the wife's solicitor in regard to the answering of the letter, we regard it as conduct which, although undeserving of praise, does nevertheless permit of a reasonable explanation.

Secondly, on the question of causation, the judge's remarks appear to us to go no further than to say that a fuller response to the letter would have improved the prospects of an uncontested hearing. They fall substantially short of any finding sufficient to establish that causal link (which we have described in our statements of principle as essential) between the conduct complained of and the costs alleged to have been wasted. Nor would there have been scope, in our judgment, for any such finding to have been made. It could not be assumed that if the factor introduced into the correspondence by the letter of 16 October had been specifically addressed, there would have been no need for a contested hearing. A specific response could only have proceeded, in the light of counsel's latest advice, on the lines of "We are sorry: we have carefully considered the factor you mention and taken advice about it, but we are advised that we have no option in our client's best interests but to persist in our objections." The matter would still have had to come back to court on a contested basis.

For these reasons the appeal in *Watson v. Watson* will be allowed and the wasted costs order made against the wife's solicitor will be discharged.

ANTONELLI AND OTHERS v. WADE GERY FARR (A FIRM)

In the summer of 1987 Mr. Antonelli, a property developer of somewhat unsavoury reputation, and two of his companies (we shall refer to them compendiously as "Mr. Antonelli") wished to buy a property called Ermine Court in Huntingdon. The property consisted of a number of flats, a shop and some space used for car parking. Mr. Antonelli wished to intensify the development of the site, in particular by building on the car parking space. His offer was accepted and he instructed the defendant, a local firm of solicitors, to handle the conveyancing of the transaction. Although Mr. Antonelli paid the vendor the balance of the purchase price in March 1988 the sale was not completed until July 1990.

By then Mr. Antonelli and the defendant solicitors had long fallen out. On 12 June 1990 he issued a writ against them, accompanied by a statement of claim settled by counsel. It had become plain that the property could not be developed, partly because the car parking bays had been let to the owners of the flats, and also that the date for serving a rent review notice on the shop had passed. A number of complaints were accordingly pleaded against the defendant solicitors, including failure to complete on time and failure to make proper inquiries, and a very large claim was made. The statement of claim was amended in September 1990 by different counsel.

The trial was fixed to begin on Monday, 6 April 1992. On 16 March 1992 a third member of the Bar, whom we shall call "C.," became involved

A on Mr. Antonelli's side. She was instructed to resist an application for security for costs. In the event the application was never heard but C. kept the pleadings in the action.

On Wednesday, 1 April 1992 C. was asked if she would represent Mr. Antonelli at the trial due to begin in five days' time. She said she would. On that day, and on the following days, she pressed for a conference to be arranged with her client, even going to the length of B telephoning the solicitor in charge of the case at his home. But no conference was, as we understand, arranged. On Friday, 3 April Mr. Antonelli, who had received legal aid up to but not including the trial, was refused legal aid for the trial. By Friday evening, with the case due to begin first thing on Monday, C. had received no brief and no witness statements. She had seen a copy of her expert's report, but this C had been taken away again and she had no copy. She had that day received a bundle of documents prepared by the other side; those acting for Mr. Antonelli had not prepared a bundle. Thus all C. had to prepare over the weekend for her opening of the case on Monday morning was the pleadings and the defendant solicitors' bundle of documents.

When C. arrived at court on Monday morning she received from Mr. Antonelli a copy of a bundle of documents which he had himself D prepared. Its contents differed from the defendant solicitors' bundle; many of the pages were illegible; and C. had no time to familiarise herself with it before the court sat. C. was expressly instructed by Mr. Antonelli not to seek an adjournment, because he was under financial pressure and wanted a result. But, appreciating that her claim for damages was quite inadequately particularised, C. did ask the trial judge (Turner J.) if he E would agree to determine liability first and then quantum if it arose. This course was resisted by the defendant solicitors and the judge did not agree. He did however direct the defendant solicitors to serve a request for further and better particulars at once and C. to reply to it by 10.30 a.m. the next day. This was done.

It is unnecessary to rehearse the full history of the trial. It became clear that the basis on which part of Mr. Antonelli's damages had been F claimed was still unsatisfactory. Further pleading was needed. At 10.30 a.m. on the morning of Wednesday, 8 April the judge accordingly indicated that he would dismiss the damages claim "unless full and proper particulars setting out precisely how the claims are made up are served by 10.30 on Monday morning." Counsel originally instructed for Mr. Antonelli and the defendant solicitors (neither of whom appeared at G the trial) had estimated the length of the trial at five and seven days respectively, and it seems clear that at this stage the hearing was expected to last until Monday, 13 April. C. was also seeking to re-amend her statement of claim to plead a new head of damage, as a result of answers given by Mr. Antonelli which made it hard to sustain the original basis of claim; the judge did not refuse leave finally, but he made clear that he would not grant leave unless the claim was more fully particularised.

H In a commendable endeavour to complete the case expeditiously, the judge announced on Wednesday 8 April that the court would sit at 10 o'clock on Thursday, Friday and Monday. With the same end no doubt in view, he indicated when the court sat on Thursday morning that

he would be assisted by counsel putting their submissions in writing. He added that he would not prevent oral submissions but would not encourage them. Counsel for the defendant solicitors agreed. C. did not demur. When the court adjourned on Thursday, it was expected that the evidence would be completed by mid-morning the next day. The judge indicated that when the evidence had finished he would adjourn until 2 o'clock before receiving submissions. Both parties agreed. The judge observed that on that basis "we will just about finish this case, the oral part of it, tomorrow."

As hoped, the oral evidence finished by about 11.30 on the morning of Friday, 10 April. Counsel for the defendant solicitors handed up to the judge a copy of his closing submissions in manuscript. He also gave C. a copy, but the copy was neither complete nor legible. C., who indicated some unfamiliarity with this procedure, said she was still working on her submissions. The judge handed down to the parties a note he had prepared entitled "Principal Issues of Fact," intended to indicate to counsel the areas in which he would welcome submissions. The first of these was directed to the development potential of the site. The judge then adjourned until 2 o'clock.

When the court sat again at 2 o'clock, C. had still not received a full and legible copy of the written submissions of counsel for the defendant solicitors. He then made relatively brief oral submissions. When he had finished C. handed up her own written submissions, to the extent she had completed them. She made some oral submissions. She then indicated that she wished to have the opportunity to make further submissions on Monday morning. At 3.17 p.m. on Friday afternoon the court adjourned until 10 o'clock on Monday.

On Monday, 13 April the hearing opened with discussion of the re-amendment C. was seeking to make to the statement of claim. The judge deferred ruling on this until liability had been determined. C. gave the judge her further written submissions prepared over the weekend, and addressed the court on the issues. At 11.15 a.m. the judge reserved judgment and adjourned.

On Friday, 22 May 1992 the judge gave his reserved judgment. In this he made various comments critical of the defendant solicitors' handling of the case, but dismissed the action. He rejected Mr. Antonelli's evidence and held that the defendant solicitors' defaults had not caused him damage. On behalf of the defendant solicitors an application for a wasted costs order was then made against Mr. Antonelli's solicitors and C., his counsel. The judge directed that the claim and the answer to it should be properly pleaded, and this was duly done.

The application came on for hearing by the same judge on 3 August 1992. After an hour's adjournment, the claim against the solicitors was compromised on the solicitors' undertaking to pay a sum equal to the excess payable by them under their policy of insurance. Those underwriting the defence of the defendant solicitors accepted this settlement because they were also underwriting the claim against Mr. Antonelli's solicitors and would, by continuing, have been claiming against themselves. But, as the judge later observed:

> "it is in the highest degree improbable that the sum offered and accepted is other than a small fraction of what was likely to have

A been the effect of an order (if any) made at the end of the current proceedings."

So the application went on against C. alone. At the end of a full day's hearing the judge again reserved judgment, which because of other commitments he was not able to deliver until 27 November 1992.

The defendant solicitors based their application against C. on six B grounds. Two of these the judge in his judgment rejected and no more need be said about them. Of the four grounds the judge upheld, counsel for the defendant solicitors has in this court found it impossible, having heard the argument for C., to maintain his reliance on one. This related to the rent review of the shop. We consider that this concession was rightly made, since the argument advanced by C. in the court below, C although unlikely to succeed, could not properly be abandoned without Mr. Antonelli's consent. There remain three grounds upon which the judge found against C. These were (1) C.'s failure to complete her written submissions on Friday, 10 April, obliging the court to sit again on Monday, 13 April; (2) C.'s pursuit of the claim relating to the development potential of Ermine Court; (3) C.'s unreasonable slowness in the conduct of the proceedings. We shall return to these three grounds below.

D But the judge also held against C. on a more fundamental, far-reaching ground. Earlier in his judgment he had referred to the following parts of paragraphs 501 and 601 of the Code of Conduct of the Bar of England and Wales:

> "501. A practising barrister must not accept any brief or instructions if to do so would cause him to be professionally E embarrassed: . . . (b) if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do; . . ."

> "601. A practising barrister (a) must in all his professional activities . . . act . . . with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or F waste of the court's time . . .; (b) must not undertake any task which: (i) he knows or ought to know he is not competent to handle; (ii) he does not have adequate time and opportunity to prepare for or perform; . . ."

Then, having dealt with the various complaints one by one, the judge said:

> "In summary then, a number of areas have been identified in G which, due to the conduct of counsel, the time of the court and thus of the defendants was expended unnecessarily. Before that can justify an award of costs being made against counsel personally on the application of the opposing party, I would have to be satisfied that the conduct giving rise to the complaint fell in one or more of the categories (a) negligent, (b) unreasonable or (c) improper. Having regard to the nature of the action and the volume of potentially H relevant evidence, both oral and documentary, for counsel to have accepted an 'unseen' brief at the time and in the circumstances already described, despite the submissions made to me this afternoon, was 'unreasonable' and was likely to and did give rise to 'improper'

conduct on her part. The unreasonableness stems from the manifest improbability of counsel being able to achieve an adequate grasp of the broad issues involved in the case, quite apart from the absolute necessity of having a full and adequate grasp of the details of the evidence. In my judgment, for counsel to have accepted such a 'brief' at such short notice was, on any showing, both improper as well as being unreasonable. All the matters identified above as being open to substantial criticism were the direct consequence of those faults."

In the result, the judge held that the several failures of C. which had been discussed in his judgment had unnecessarily prolonged the proceedings to the extent of at least one full court day. He accordingly ordered that the costs of one full day of the trial be paid by C. personally to the defendant solicitors to the extent that such costs were not recovered from the plaintiffs or their solicitors. The order made plain that the sums recovered from the plaintiffs' solicitors under the settlement of the wasted costs application against them were to be treated as discharging the order against C. to the extent that those sums exceeded the taxed costs of the preparation and delivery of trial bundles. The judge also ordered that the costs of the application for a costs order against C. be paid by her to the defendant solicitors save to the extent that such costs had been increased by the adjournment of one hour of the hearing of the application. In practical terms, the principal sum which C. (or, in truth, her insurer) is at risk of having to pay under the wasted costs order is about £1,100. The costs of the application for both sides (increased on C.'s side by changes of solicitor) are estimated to exceed £40,000.

Counsel for the defendant solicitors expressly abandoned on appeal the fundamental, far-reaching ground on which the judge had found against C., which indeed had not been advanced on their behalf before the judge. The extract from paragraph 501 of the Bar Code which the judge cited, presumably because he regarded it as relevant, is in truth irrelevant. The cited extract prohibits barristers accepting work which, because of other professional commitments, they are too busy to handle properly. That was not C.'s position and it was never suggested that it was. Paragraph 601 does, it is true, require barristers to show reasonable competence and avoid unnecessary expense and waste of court time, and also requires barristers not to undertake work beyond their competence or which they have inadequate time to prepare. But the judge omitted all reference to the cab-rank rule, paragraph 209 of the Bar Code, which we have cited above: ante, pp. 233H–234B. When C. was asked on Wednesday, 1 April to conduct this case on the following Monday she was not in our judgment entitled to refuse. She did not then know how inadequate her instructions would be (and she tried to procure reasonable instructions), but even if she had known she would not have been entitled to refuse. By Friday the inadequacy of her instructions was only too plain, but she would not even then have been entitled to refuse to act, unappetising though the prospect was. Paragraph 506 of the Bar Code provides:

"A practising barrister must not: . . . (d) except as provided in paragraph 504 return any brief or instructions or withdraw from a case in such a way or in such circumstances that his client may be

A unable to find other legal assistance in time to prevent prejudice being suffered by the client."

In short, C. could not properly let Mr. Antonelli down at the eleventh hour. There was no reason to think that anyone else would be better placed to conduct the case than she. She was professionally obliged to soldier on and do the best she could. The judge's failure to appreciate this B vitiates not only his fundamental criticism, but also the three specific criticisms, since he held these to be the direct consequence of C.'s improper and unreasonable conduct in accepting instructions at all at such short notice.

That conclusion enables us to deal briefly with the judge's three specific criticisms. But we must consider those criticisms, since the defendant C solicitors served (with leave) a respondent's notice contending that even if C. did not act improperly or unreasonably in accepting the trial brief at short notice the judge's specific grounds of criticism remained independently valid and were not the result of late delivery of the brief. (1) We do not share the judge's conclusion that C. is to be blamed for the court's sitting on Monday, 13 April. The judge's earlier order had plainly contemplated a sitting on that day. The timetable had altered, but the D order had never been varied or revoked. That apart, the judge (probably because he blamed C. for accepting the brief at all) made inadequate allowance for the difficulties under which C. laboured throughout, having during the hearing to settle further and better particulars, re-amend her statement of claim, familiarise herself with a new bundle, collect the evidence from her witnesses, try and make good the effect of damaging E answers by her witnesses in evidence and, as the week wore on, prepare to cross-examine the opposing witnesses during a lengthened hearing day. It is unnecessary to consider whether the judge had power to direct that closing submissions should be in writing, since neither counsel objected. But C. was fully entitled, indeed bound, to ensure that adoption of that procedure did not put her client in a worse position than if the conventional procedure had been followed. Before answering submissions F on behalf of the defendant solicitors she was entitled either to hear them or, if they were in writing, study them. When counsel for the defendant solicitors sat down on the afternoon of Friday, 10 April, she had not had the chance to study the written submissions. Nor, in fact, had she been able to complete her own written submissions. Had her submissions been oral she would not have completed them that afternoon. Justice plainly G demanded that the hearing be adjourned until Monday, 13 April. (2) We cannot, again, share the judge's view that C. acted unreasonably in pursuing the claim for loss of developmental potential. In his judgment the claim rested on the assertion of Mr. Antonelli and never had an outside chance of success. He noted that in C.'s closing submissions no substantive argument was advanced. It is certainly true that this was a most unpromising head of claim. But Mr. Antonelli was himself a property H developer. He was entitled to seek the court's ruling on the issue, with such little support as his expert gave him. The judge treated Mr. Antonelli's knowledge on this aspect as a principal issue of fact. In the absence of any waiver by Mr. Antonelli, we do not know what (if any) advice C.

gave on pursuit of this claim or what instructions he gave. We do not, however, think that this was one of those situations in which C. was entitled simply to decline to pursue the claim if her instructions were to do so. In our judgment she should not be held liable under this head. (3) In upholding the complaint that C.'s conduct of the proceedings had been unreasonably slow, the judge said:

> "Point (iii) is made good by a reading of the transcripts. On many occasions it was quite unclear to what issues either individual questions or sections of examination or cross-examination were directed. Moreover, there was a number of instances where questions were long, rambling and inchoate. There were no less than seven occasions upon which there were embarrassing pauses while counsel appeared not to know what the next question should be or topic to be investigated. Counsel's uncomprehending reply to this point merely serves to underline its validity."

The transcript certainly shows that the judge was on occasion tried by C.'s conduct of the proceedings; he was on occasion critical of her opponent also. But this is the sort of question on which very great weight must be given to the judgment of the trial judge. From his vantage point he can observe signs of unfamiliarity, lack of preparedness, laziness, incompetence and confusion with much greater perspicacity than an appellate court with only a transcript to work on. Very rarely could an appellate court be justified in interfering. But with some hesitation we feel we should do so here: first, because it might well be unfair to leave this criticism standing when the judge's fundamental criticism has been rebutted; and secondly, because (as indicated above) we think the judge made insufficient allowance for the great difficulties under which C. laboured in presenting this ill-prepared and anyway very difficult case.

We would set aside the judge's order, quash the order against C. personally and order that the defendant solicitors pay C. the costs of the application against her.

4 March 1994. On a further hearing the court, after argument, determined such issues of costs which could not be resolved by agreement.

No wasted costs order in the first action.
Appeals allowed in the second to sixth actions.

Solicitors: Barlow Lyde & Gilbert; Solicitor, General Council of the Bar; Treasury Solicitor; Weightman Rutherfords, Liverpool; Rawsthorn Edelstons, Preston; Barlow Lyde & Gilbert; Barlow Lyde & Gilbert; Colin Bishop & Co.; Barlow Lyde & Gilbert; Iliffes; Barlow Lyde & Gilbert; Penningtons; Richards Butler; Weightman Rutherfords, Liverpool.

D. E. C. P.

Mrs L Greenfield v Mr A Robinson Respondent

Positive/Neutral Judicial Consideration

Court
Employment Appeal Tribunal

Judgment Date
16 May 1996

Appeal No. EAT/811/95

Empolyment Appeal Tribunal

[1996] UKEAT 811_95_1605, 1996 WL 35023580

The Honourable Mr Justice Mummery (P) Mr J D Daly Miss C Holroyd

At the Tribunal On 16 May 1996

Representation

For the Appellant Ms Heather Williams (of Counsel) Messrs Freeth Cartwright Hunt & Dickins Solicitors Willoughby House 20 Low Pavement Nottingham NG1 7EA.
For the Respondent Mr Chris Quinn (of Counsel) Banners Solicitors 2 Marsden Street Saltergate Chesterfield S40 1JY.

Judgment

Mr Justice Mummery (President):

This is an appeal by Mrs L Greenfield against the decision of the Industrial Tribunal held at Sheffield on 23 May 1995.

The Tribunal unanimously decided that the Applicant, Mrs Greenfield, had signed and concluded a binding agreement under the auspices of the Advisory Conciliation and Arbitration Service and that that agreement was binding under s.134 and s.140 of the Employment Protection (Consolidation) Act 1978 .

The Tribunal concluded that they did not have jurisdiction to re-open the Applicant's complaint of unfair dismissal against the Respondent, Mr Robinson. The extended reasons for the decision were sent to the parties on 15 June 1995. Mrs Greenfield appealed. She served a notice of appeal in July 1995, setting out various grounds of alleged errors of law in the decision.

The case was listed for a preliminary hearing before the Tribunal constituted as today. At the preliminary hearing on 15 November Ms Williams appeared for Mrs Greenfield and persuaded the Tribunal that there was an arguable question of law. We therefore allowed the appeal to proceed to a full hearing. We took the unusual step of asking the Chairman to produce his notes of evidence in relation to one of the contentions made by Ms Williams that there was a perverse finding of fact by the Tribunal, namely a finding inconsistent with uncontradicted evidence given to the Tribunal by a witness, Mr Morris, who had acted as representative of Mrs Greenfield in the Industrial Tribunal.

This is the full hearing of the appeal. The Chairman has provided the relevant part of his notes of evidence. Counsel have helpfully summarized their legal arguments in the skeleton submissions.

There is a preliminary procedural matter. Mr Quinn, who appears for the Respondents on the appeal, pointed out that the only Respondent named in the proceedings before the Industrial Tribunal was Mr Robinson. Mrs Robinson was at all material times a partner in the business in which Mrs Greenfield had been employed. Mrs Robinson should have been named as a Respondent along with her husband. She had, in fact, completed the notice of appearance. She had been treated throughout as if she were the true Respondent. It was she who entered into the compromise agreement with Mrs Greenfield, that is the subject of the Industrial Tribunal proceedings and this appeal.

This application to join Mrs Robinson as a Respondent was not opposed by Ms Williams.

The main point on the appeal is whether and in what circumstances an agreement, evidenced by a signed COT3 agreement, is liable to set aside on the grounds of alleged misrepresentation.

The background to the case is this: Mrs Greenfield was employed as a kitchen assistant at the Parkhouse Hotel near Chesterfield. She presented an application on 24 November 1994 claiming unfair dismissal against the proprietors of the Hotel. She named Mr Robinson. She said that she had been employed at the hotel since 1 October 1992 and had been summarily dismissed in circumstances that were alleged to be unfair on 26 October 1994.

The response of the proprietors was that there was no unfair dismissal. They had dismissed Mrs Greenfield for misconduct.

The case never reached a full hearing because, in the circumstances described in the extended reasons, a settlement was reached. A COT3 agreement was signed in circumstances described in the decision as normal circumstances, involving an officer of ACAS, Mr Wyman, a conciliation officer. That was considered to be the end of the case.

An application was later made by Mrs Greenfield inviting the Tribunal to reopen her originating application. The case which she had brought was never formally dismissed. It had been adjourned, following the reaching of the agreement recorded in the COT3 form signed by the parties. Mrs Greenfield's application was to set aside that agreement on the basis that it was concluded under an actionable misrepresentation.

The first point to be decided was whether the Tribunal had jurisdiction to entertain that application. The Tribunal dealt with that point in this way: they heard the evidence, made findings of fact and came to conclusions which made it unnecessary for them to rule on the question of jurisdiction. They held that, in view of their findings of fact, they did not have to decide whether the Tribunal had power to set aside the agreement on the basis of misrepresentation. They found as a fact that the alleged misrepresentation had not been made and that there was no actionable misrepresentation on the basis of which an order could be made setting aside the agreement.

That was a sensible, practical way of dealing with the matter. If there is any doubt about the jurisdiction of a Tribunal to entertain this kind of application, we would remove that doubt now. The position, in our view, is that the conclusion reached in Vol. IV of Harvey on Industrial Relations and Employment Law, paragraph 713 to 735, is correct. On the basis of the

ruling by Mr Justice Popplewell in the case of *Hennessy v Craig Myle & Co Ltd [1985] ICR 879* at 885 B-E, a tribunal can investigate the circumstances in which it is alleged that an agreement, within the meaning of s.140 of the Employment Protection (Consolidatio , is liable to be avoided at common law or in equity. No doubt was cast on this statement when that same case went to the Court of Appeal: *[1986] ICR 461* . It is clear from the judgment of the Master of the Rolls, (Sir John Donaldson) with which the other two Members of the Court agreed, that they recognized that contracting-out agreements under s.140(2) can be avoided on grounds on which an agreement can be avoided at common law. See page 465 B-C. That particular case dealt with economic duress as a ground of avoidance. There is no reason why actionable misrepresentation at common law cannot also form the basis on which an Industrial Tribunal could set aside a contract falling within that section.

Ms Williams cited other cases qualifying or casting doubt on this jurisdiction of the Industrial Tribunal. In our view, the two main cases are distinguishable. We agree with the editor of Harvey that neither *Eden v Humphries and Glasgow Ltd [1981] ICR 183* nor *Larkfield of Chepstow Ltd v Milne [1988] ICR 1* at 6G-7F affect the correctness of the judgment of Mr Justice Popplewell in the Hennessy case. Neither case is authority for the proposition that an Industrial Tribunal (as opposed to the Employment Appeal Tribunal) has no jurisdiction to set aside an agreement disposing of proceedings over which it alone has jurisdiction.

In so far as the decisions are inconsistent with the proposition in Hennessy , we agree with the editors of Harvey that Hennessy is the more compelling authority.

On this appeal Mr Quinn did not seek to challenge the correctness of Ms Williams' propositions on jurisdiction.

We now come to the meat of the matter explained in the extended reasons. The Tribunal heard evidence only from Mr Morris on Mrs Greenfield's side. Mr Morris is from the North East Derbyshire Citizens Advice Bureau. He acted on Mrs Greenfield's behalf during the negotiations, as well as at the hearing in the Industrial Tribunal on 23 May.

Mrs Robinson also gave evidence. Mrs Greenfield was present at the hearing on 23 May, but she did not give evidence. On the basis of the evidence the Tribunal made these findings of fact. They referred to the application and to the fact that Mr Morris acted throughout for Mrs Greenfield. They then said this:

> "During February and March 1194 the ACAS conciliation service was involved in discussions between the two parties. Initially the respondent was unable to consider an offer of settlement because the respondent's business was in financial difficulties. Throughout this period the respondent was represented by Mrs Doreen Hollingsworth, a Legal Executive with the legal firm of Banners. Eventually Mr Morris and Mrs Greenfield were invited to see the respondent's accounts because the respondent wanted to make the point that the business was in difficulty. Mr Morris and Mrs Greenfield had declined to inspect the accounts because they accepted that the business was in financial difficulties but could not guarantee or be certain that the accounts would tell the full story of the respondent's financial position."

That was the background to the events of 9 March when the agreement was concluded. Both Mr Morris and Mrs Greenfield knew in February and early March about the financial difficulties of the Respondent. On 9 March 1995 there was a telephone call between Mr Morris and Mrs Hollingsworth:

> "Mrs Hollingsworth phoned Mr Morris to indicate that the respondent's business was in serious difficulty and that there was a risk that it may have to be put into bankruptcy the following day. Mrs Hollingsworth indicated that the respondent might be willing to settle the application for £250 on the basis of a personal loan and she suggested that otherwise there may be little or nothing available to Mrs Greenfield. Although Mrs Greenfield was not happy at this she decided to accept this and eventually the settlement was conducted through the offices of an ACAS conciliation officer Mr Wyman."

Mr Wyman visited both Mrs Greenfield and the solicitors acting for the Respondent. A COT3 form agreement was signed by Mrs Greenfield and by Mrs Robinson, acting on behalf of her husband. There was an agreed payment of £250 in full and final settlement.

The next day, 10 March, there was a meeting between Mr and Mrs Robinson and their accountant about the financial mess their business was in. The upshot of that meeting was that the landlords of the hotel and public house, Mansfield Brewery, were willing to provide Mr and Mrs Robinson with a loan by buying back some fixtures and fittings and postponing a debt which they owed.

> "As a result of this the Robinsons avoided bankruptcy or voluntary liquidation and otherwise they would have almost certainly gone out of business. It was the case that bankruptcy was discussed as a possibility at that meeting but because of Mansfield Brewery's offer bankruptcy was avoided as a consequence."

The Robinsons' business never became bankrupt. The Tribunal found it continued to be active, though it also continued to have financial difficulties. It was because the business continued as a going concern and was not subject to bankruptcy procedures that Mrs Greenfield made the application to re-open the COT3 agreement. Her case was that that was signed only on the basis of what she contended was a misrepresentation. The misrepresentation was that the Robinsons' business faced bankruptcy and that, if she did not settle for £250, it was unlikely she would receive any compensation at all.

The Tribunal referred to the submissions by Mr Morris and Mrs Robinson. The Tribunal assumed, without necessarily ruling, that they had jurisdiction to set aside this agreement on the basis of actionable misrepresentation. They then considered, on the evidence, whether there had been an actionable misrepresentation on which the agreement could be avoided. Their crucial findings are in paragraph 9 of the decision:

> "The tribunal finds on the evidence before it that there is nothing to support the contention that the COT3 agreement made by the respondent and the applicant was entered into or induced as a result of an actionable misrepresentation, whether innocent, negligent or fraudulent. The circumstances in which the COT3 agreement was made were quite normal circumstances which ACAS and tribunals frequently observe in such cases. It was clearly a genuine case where the respondent's business was in financial difficulties and this fact was made known to the applicant. She entered into the

> agreement knowing that there were financial difficulties and taking the chance that it would be better to settle for £250.00 now than risk getting nothing at some future time. The fact that subsequently, the following day, means were found to prevent the business going into voluntary liquidation or enforced bankruptcy did not affect the genuineness of the agreement the previous day or the circumstances in which that agreement was reached. Accordingly, the tribunal is unable to find on the facts before it that there was an actionable misrepresentation."

Ms Williams has given substantial help in disposing of this appeal. She has argued every point that could reasonably be argued. We will deal with each of her arguments in turn.

She identified three issues. She accepted that she has to succeed on all three in order to win this appeal. She also accepted that, if she succeeded in the appeal on the basis that there was some legal error in the decision, there were difficulties in this Tribunal deciding whether or not to set aside the COT3 agreement. The likelihood of a successful appeal would be that the matter would have to be remitted to another industrial tribunal to rehear the application to set aside the agreement in accordance with the directions on law in our judgment.

She also accepted that, even if that remitted industrial tribunal set aside the agreement, that would not be the end of the dispute. If the Industrial Tribunal, on the remitted hearing, concluded that the agreement ought to be set aside one inevitable consequence of that would be that Mrs Greenfield would have to hand back £250. She could not claim to be entitled to keep £250 paid under an agreement which she had successfully invalidated in the Industrial Tribunal application.

At the next stage there would have to be a hearing of the Industrial Tribunal claim for unfair dismissal, which the parties had thought they had conclusively settled on 9 March 1995. It was accepted by Ms Williams that the Industrial Tribunal might reject Mrs Greenfield's claim. Whether they did so or not would depend on all the evidence and argument at that hearing. If Mrs Greenfield's unfair dismissal claim were rejected, the ultimate result of a successful appeal would be that Mrs Greenfield was worse off than if the agreement had remained binding on her.

We spell all those matters out, because it is important to set this appeal in the context of what limited objective can be achieved at the hearing today if the appeal is successful.

We now examine the two issues which Ms Williams identified on the appeal. The first issue is whether there was a legal error in the Tribunal's findings of fact. Although findings of fact cannot normally be challenged in this Tribunal on an appeal, because appeals are confined to questions of law, there are limited circumstances in which a finding of fact may be made as a result of a legal error. For example, a finding of fact is made as a result of a legal error if the finding of fact is not supported by any evidence. It cannot then really be described as a finding of fact. If it is a conclusion which is contrary to uncontradicted evidence, it is perverse and unsupportable.

The second point is whether the evidence taken with the Industrial Tribunal's other findings, establishes that there was in this case an actionable misrepresentation. We have to enquire whether the Tribunal erred in law in saying that there was no actionable misrepresentation. The argument on that aspect of the case requires consideration of the elements of actionable representation, namely, whether the representation was false, whether it was a representation of fact or another kind of

representation which can be actionable and whether the Appellant had been induced by the representation to rely upon it and did, in fact, rely on it in entering into the agreement under attack.

The basis of the first submission rests on the comparison made by Ms Williams between what the Tribunal said they found as a fact and what is recorded in the Chairman's notes of evidence of Mr Morris's evidence in-chief. In-chief Mr Morris is recorded in the notes as giving this evidence:

> "I acted for Mrs Greenfield. Calls from ACAS (February/March). Respondent unable to consider [making] offer because of financial difficulties. Respondent represented by Doreen Hollingworth, a legal executive with Banners, solicitors. We were invited to see accounts. We declined. We accepted that the business may have been in difficulties. But was there money elsewhere?"

The crucial passage is in these three sentences:

> "9 March. Mrs Hollingworth phoned. Said that business was in serious problems and **would be** put into bankruptcy the next day. But would be willing to settle for £250 on basis of borrowing. Suggested there may be nothing otherwise."

He went on to deal with the circumstances which are already the subject of findings of fact and there is no dispute about that. Mrs Greenfield was not happy, but decided to accept. The matter was not signed up finally on the COT3 form until Mr Wyman of ACAS was involved and had a meeting with Mrs Greenfield and with the solicitors for the Robinsons. His evidence in-chief concluded:

> "We now understand no bankruptcy and business continuing."

There was cross examination by Mrs Robinson. The only recorded answer to her questioning was:

> "We had no guarantee that you did not have other accounts."

There is recorded under the heading "Tribunal questions":

> "We did not look at the accounts. Mrs Hollingworth had no idea whether there were any other accounts. Mrs Hollingworth said that business was approaching bankruptcy."

Ms Williams' argument was that Mr Morris gave clear evidence that Mrs Hollingsworth had said on the telephone on 9 March that the business would be put into bankruptcy the next day. Mr Morris was not cross-examined by Mrs Robinson on that part of his evidence. No alternative version of the conversation was put to him or given in evidence. Mrs Hollingsworth was not called to give evidence. Mrs Robinson gave no contrary evidence, because she was not a party to that conversation and there was no suggestion that there was any reason for treating Mr Morris otherwise than as a reliable and credible witness. There were no grounds for rejecting his testimony on this point. On this basis the submission was made that there was no evidence to support the Tribunal's finding of fact that Mrs Hollingsworth told Mr Morris in the telephone conversation that the Respondent's business was in serious difficulty and that there was a risk that it may have to be put into bankruptcy the following day. Ms Williams said what the Industrial Tribunal had done in paragraph 4 of the extended reasons was to place an interpretation on the evidence given by Mr Morris that was contradictory to, or was a watered-down version of, what he is recorded in the notes of evidence as having actually said. She submitted that the Tribunal's finding of fact about the terms of the representation was perverse and, therefore, legally erroneous, because no reasonable industrial tribunal, in the light of Mr Morris' uncontradicted evidence, could have made the finding they did in paragraph 4 of the decision.

We should therefore allow the appeal if the other ground was established namely that what was in fact said by Mr Morris, not what was attributed to him by the Tribunal, was an actionable representation.

The second point was that the representation was actionable and that the Tribunal had not correctly interpreted or applied the law relating to misrepresentation when they came to the conclusions quoted in paragraph 9 of the extended reasons. On this part of the case Ms Williams argued that there was a clear representation that there would be a bankruptcy the next day. That was a representation of fact or was a representation treated in the same way as representations of existing fact. On this aspect of the case, she referred us to the passages in Halsbury's Laws relating to misrepresentation. She drew to our attention passages relating to statements of intention. A statement of intention involves a representation as to the existence of an intention which is itself a present fact. The non-fulfilment of an intention may be evidence in the particular case that the intention never existed at all. Ms Williams referred particularly to paragraph 1007 and footnote 6 to that paragraph in Vol. 31 of Halsbury's Laws. She also referred to another passage under the heading "Forecasts", paragraph 1010, citing authorities for the proposition that a statement of expectation is a statement that the party does actually expect as stated and is therefore a representation. There are other authorities relating to statements of opinion, belief and information as constituting representations. If a person makes a statement of his opinion, belief or information, there is a representation that he has the opinion, belief or information when he makes it.

It is submitted that this is an actionable representation. The representation made by Mrs Hollingsworth must have been on the basis of what she knew, either directly or from what she was told by the Robinsons. She represented what their intentions, expectations, beliefs or information were at that time. The fact was that this representation was false because the very next day, instead of the business going into bankruptcy, it was rescued and there was money available which enabled it to continue. It has never gone into bankruptcy. Ms Williams contended that, on the proper understanding and application of the law, the Tribunal ought to have found that this representation was actionable, because it had induced Mrs Greenfield to enter into the settlement. It had been stated by Mrs Hollingsworth to Mr Morris. Mr Morris was known by Mrs Hollingsworth to be the person representing Mrs Greenfield throughout the case. A person who had made a false representation could not deny that it had had the effect of inducing a person to rely upon it. Ms Williams submitted that it did not matter that the inducement was made to Mr Morris, rather than to Mrs Greenfield direct. The fact was that on the very same day that the conversation

took place between Mrs Hollingsworth and Mr Morris an agreement was reached in the terms proposed in the conversation, i.e. £250 in full and final settlement and the whole matter was signed up later that day.

In brief, Ms Williams' submissions amounted to this, that the Tribunal erred in law because they made a finding of fact at variance with uncontradicted evidence. If they had applied the law correctly to the evidence given they would have found a definite representation that there would be bankruptcy the next day. That was an actionable misrepresentation because it related to facts, expectations or intentions existing at that time, which were untrue, as shown by what happened the following day. In those circumstances, as Mrs Greenfield had relief on these, and they were false, she could have the agreement set aside.

We are grateful for those clear and comprehensive submissions. We do not think it necessary to refer to the authorities, because the propositions about the law of misrepresentation are clear. They were not substantially in dispute between Ms Williams and Mr Quinn.

It is obviously important that, when cases are settled, they are settled on the basis that both sides are correctly informed of what they need to know and have not been misled by mis-statements of fact into thinking that the position is different than it really is. We have, however, reached the conclusion that there is no error of law in the Tribunal's decision.

As to the Chairman's notes of evidence, it is important to have this in mind, that the notes are not a transcript. The Chairman is not obliged to record all the evidence word for word. This evidence is recollection about a telephone conversation some months previously and of which there is no written record. The evidence given by Mr Morris on 23 May was about what had been said in some negotiations on the telephone on 9 March. Account can be taken by the Tribunal of the fact that it is unlikely that a person would remember, word for word, what is said. We bear this in mind when so much of Ms Williams' argument on this aspect of the case turns on the variation in language between the note of evidence (i.e. that the business would be put into bankruptcy the next day) and the finding of fact in paragraph 4 that there was a risk that it may have to be put into bankruptcy the following day.

The Tribunal, in making findings of fact, are carrying out a process of interpreting all the evidence before them, making assessments about the probabilities and then stating their findings of fact. They are not obliged to accept every word that is said by the witness as literally true. They must interpret that evidence in the context in which the events recounted have taken place. We do not think that it was a perverse interpretation of the evidence to state the finding of fact in the first sentence of paragraph 4 of the extended reasons. This was not a case where for the first time on 9 March 1995 Mr Morris became aware that there was a financial crisis in the affairs of Mr and Mrs Robinson. According to paragraph 3, this was known the previous month and, in fact, it operated as an inhibition to reaching a settlement. There were offers to make accounts available for inspection, but that had been declined. It is important also to bear in mind that the agreement reached was not made instantly on the conclusion of this conversation and the communication of its contents by Mr Morris to Mrs Greenfield.

The Tribunal were entitled to take into account, in interpreting the evidence, the circumstances in which the agreement was reached that day. It seems to have taken most of the day to involve those who were necessary to conclude the agreement: Mr Wyman and the solicitors for Mr and Mrs Robinson, as well as Mrs Greenfield and Mr Morris. The agreement by which Mrs Greenfield is said by the Respondents to be bound, was only made after the visit that Mr Wyman made to Mrs Greenfield and the solicitors and was signed up with all the usual formalities on the COT3 form.

In all those circumstances, we do not find that the Tribunal's conclusion about what was said in the telephone conversation is perverse. In our view, it was a finding of fact which they were entitled to make on the basis of all the evidence before them. It would be an unrealistic exercise in this Tribunal to find that there was perversity in the Tribunal's decision simply

because their wording of the finding of fact did not correspond word for word, or near word for word, with a note of part of the evidence which they had taken from Mr Morris.

Much of what we have said on that point provides the answer to the arguments on the alleged errors of law about actionable misrepresentations. In our view, this part of the appeal fails because there are findings of fact in which there is no error of law. If the Tribunal made a finding of fact on the representation, which they were entitled to, then they were entitled to come to the conclusions of fact which they did in paragraph 9. The crucial conclusion of fact there is that the agreement was entered into by Mrs Greenfield knowing that there were financial difficulties and taking the chance that it would be better to settle for £250 now rather than risk getting nothing at some future date. The Tribunal found in those circumstances that there was no evidence to support the contention that the agreement was induced by the actionable misrepresentation. The reason that Mrs Greenfield entered into it was not because of any specific representation that there would be bankruptcy the next day, but because of a fact which she had known for some time and which Mr Morris had known for some time, that the respondents were in financial difficulties and it was better to have something certain now than the prospect of something uncertain in the future.

In our view, there is no legal misdirection or error in the paragraph 9 of the decision rejecting the claim of actionable misrepresentation.

For all those reasons, we agree with Mr Quinn that the appeal fails. Mrs Greenfield cannot show that there was perversity in the findings of fact and cannot show that there was any actionable misrepresentation which induced her to settle the case. She settled the case in a manner which was binding upon her. The Tribunal were legally right in dismissing her application to set it aside.

The appeal is dismissed and legal aid taxation of the Appellant's and Respondent's costs.

House of Lords

Medcalf *v* Mardell and others

[2002] UKHL 27

2002 April 16, 17, 18; June 27

Lord Bingham of Cornhill, Lord Steyn, Lord Hoffmann, Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry

Costs — Wasted costs orders — Legal representatives — Application by claimant against defendants' counsel in respect of allegations of fraud in draft notice of appeal and skeleton argument — Defendants declining to waive privilege — Counsel unable to rely on privileged material in resisting application — Whether court entitled to infer that counsel had no "reasonably credible material" to establish prima facie case of fraud — Whether court entitled to make order — Supreme Court Act 1981 (c 54), s 51 (as substituted by Courts and Legal Services Act 1990 (c 41), s 4) — Code of Conduct of the Bar of England and Wales, 6th ed (1998), para 606

During the course of an appeal by the unsuccessful defendants to a High Court action leading and junior counsel who represented the defendants, acting on instructions, made serious allegations of fraud against the claimant in a draft amended notice of appeal, in a supplementary skeleton argument and at the hearing of the appeal. The Court of Appeal dismissed both the defendants' application to amend the notice of appeal and the substantive appeal. The claimant applied, pursuant to section 51 of the Supreme Court Act 1981[1], for a wasted costs order against the defendants' counsel on the ground that they had acted in contravention of paragraph 606 of the Code of Conduct of the Bar of England and Wales[2] in that they could not have had before them "reasonably credible material" which established a prima facie case of fraud. The claimant sought to recover the costs of investigating and rebutting the allegations. The defendants declined to waive privilege, and consequently counsel were unable to place before the court privileged and confidential material relating to their instructions so as to demonstrate that they had "reasonably credible material" which justified making the allegations. The Court of Appeal held that counsel's conduct had been improper in relation to seven of the allegations made, including an allegation that the claimant or his solicitors had fraudulently interfered with the official transcript of the trial, since counsel could not have had before them sufficient material for the purposes of paragraph 606 of the Code to justify those allegations, that their inability to reveal privileged or confidential material did not make the hearing unfair, and that, making every assumption favourable to counsel on points where the court did not have evidence before it, it was nevertheless just to exercise its discretion in favour of making the order to compensate the claimant for wasted costs caused by their misconduct.

On counsel's appeal—

Held, (1) that parties to litigation were entitled under section 51 of the 1981 Act to seek wasted costs orders not only against their own legal representatives but also against the legal representatives of the opposing party; that wasted costs orders could be made in relation to a barrister's conduct when exercising a right of audience in court as well as in relation to conduct which was immediately relevant to the exercise of that right, such as settling pleadings or preparing skeleton arguments; and that, therefore, the court had jurisdiction to hear the claimant's application for a wasted

[1] Supreme Court Act 1981, s 51, as substituted: see post, para 12.
[2] Code of Conduct of the Bar of England and Wales, para 606: see post, para 11.

costs order against the defendants' counsel in respect of the draft notice of appeal and skeleton argument (post, paras 18–20, 45, 46, 74, 75).

(2) That paragraph 606(c) of the Code of Conduct of the Bar did not require that counsel should, when making allegations of fraud in pleadings and other documents, have before him "reasonably credible material" in the form of evidence which was admissible in court to support the allegations; but that, at the preparatory stage, it was sufficient if the material before counsel was of such a character as to lead responsible counsel exercising an objective professional judgment to conclude that serious allegations could properly be based upon it (post, paras 22, 45, 46, 74, 75, 79).

(3) Allowing the appeal, that since wasted costs orders had a penal effect upon counsel against whom they were made, counsel were entitled to defend themselves against the making of the orders by placing before the court, without restriction, all material which was relevant to the issue as to whether they had before them at the time of settling the impugned documents "reasonably credible material" which established a prima facie case of fraud; that, when, due to legal professional privilege, counsel were unable to defend their conduct of a case by revealing their instructions and other relevant material, the court should not make the wasted costs orders unless, proceeding with extreme care, the court could say that it was satisfied that there was nothing that counsel could, if unconstrained, have said to resist the order, and that it was in all the circumstances fair to make the order; that in the absence of the full facts, due to the defendants' refusal to waive privilege, the court was not entitled to speculate and infer that there could not have been any material upon which counsel could have been justified in making the allegations of fraud, including, (Lord Hobhouse of Woodborough dissenting) the allegations of fraudulent interference with the court transcript; and that, accordingly, the benefit of the doubt had to accrue to counsel, and the wasted costs orders would be quashed (post, paras 23–28, 32, 40–46, 61–63, 65, 74, 75).

Ridehalgh v Horsefield [1994] Ch 205, CA approved.

Decision of the Court of Appeal [2001] Lloyd's Rep PN 146 reversed.

The following cases are referred to in the opinions of their Lordships:

Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associated Newspapers Ltd [1970] 2 QB 450; [1970] 3 WLR 101; [1970] 2 All ER 754, CA

Brown v Bennett (No 2) [2002] 1 WLR 713; [2002] 2 All ER 273

Byrne v Sefton Health Authority [2001] EWCA Civ 1904; [2002] 1 WLR 775, CA

Campbell v United Kingdom (1992) 15 EHRR 137

De Haes and Gijsels v Belgium (1997) 25 EHRR 1

Drums and Packaging Ltd v Freemans (unreported) 6 August 1999, Laurence QC

Foxley v United Kingdom (2000) 31 EHRR 637

General Mediterranean Holdings SA v Patel [2000] 1 WLR 272; [1999] 3 All ER 673

Hall (Arthur J S) & Co v Simons [2002] 1 AC 615; [2000] 3 WLR 543; [2000] 3 All ER 673, HL(E)

Harley v McDonald [2001] UKPC 18; [2001] 2 AC 678; [2001] 2 WLR 1749, PC

Kelly v London Transport Executive [1982] 1 WLR 1055; [1982] 2 All ER 842, CA

Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA

Lillicrap v Nalder & Son [1993] 1 WLR 94; [1993] 1 All ER 724, CA

Myers v Elman [1940] AC 282; [1939] 4 All ER 484, HL(E)

Oldfield v Keogh (1941) SR (NSW) 206

Orchard v South Eastern Electricity Board [1987] QB 565; [1987] 2 WLR 102; [1987] 1 All ER 95, CA

Parry-Jones v Law Society [1969] 1 Ch 1; [1968] 2 WLR 397; [1968] 1 All ER 177, CA

R v Derby Magistrates' Court, Ex p B [1996] AC 487; [1995] 3 WLR 681; [1995] 4 All ER 526, HL(E)

R v Inland Revenue Comrs, Ex p Taylor (No 2) [1989] 3 All ER 353, DC

Ridehalgh v Horsefield [1994] Ch 205; [1994] 3 WLR 462; [1994] 3 All ER 848, CA
Symphony Group plc v Hodgson [1994] QB 179; [1993] 3 WLR 830; [1993] 4 All ER 143, CA
Worsley v Tambrands Ltd (unreported) 8 November 2000

The following additional cases were cited in argument :

Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167, CA
B v United Kingdom (1984) 38 DR 213
Chief Constable of North Yorkshire v Audsley [2000] Lloyd's Rep PN 675
Dombo Beheer BV v The Netherlands (1993) 18 EHRR 213
R v Mills [1994] SCR 668
R v Ward (Judith) [1993] 1 WLR 619; [1993] 2 All ER 577, CA
Skone v Skone [1971] 1 WLR 812; [1971] 2 All ER 582, HL(E)

APPEAL from the Court of Appeal

This was an appeal, pursuant to leave granted by the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Hutton) on 15 May 2001, by two barristers, Bernard Richard Weatherill QC and Josephine Mary Hayes, who appeared for the defendants, Terence Mardell and the Terry Mardell Organisation Ltd, from a wasted costs order made by the Court of Appeal (Peter Gibson and Schiemann LJJ, Wilson J dissenting) on 24 November 2000 on the application of the claimant, Roger Keith Medcalf, following the Court of Appeal's dismissal of the defendants' appeal from a decision of Lloyd J on 29 June 1998.

The facts are stated in the opinion of Lord Bingham of Cornhill.

Nicholas Davidson QC and *Leigh Ann Mulcahy* for counsel. A party to litigation cannot obtain a wasted costs order against the legal representatives of the opposing party: section 51(6), (7) and (13) of the Supreme Court Act 1981, section 19A(3) of the Prosecution of the Offences Act 1985 and section 145A(3) of the Magistrates' Courts Act 1980 support that view.

The limiting of the jurisdiction in that way was a realistic policy choice. The wasted costs procedure was intended to be summary without giving rise to long and potentially expensive satellite litigation. [Reference was made to *Harley v McDonald* [2001] 2 AC 678; *Brown v Bennett (No 2)* [2002] 1 WLR 713 and *Chief Constable of North Yorkshire v Audsley* [2000] Lloyd's Rep 675].

The jurisdiction is not exercisable against a person who is not exercising rights of audience or a right to conduct litigation: see section 51(13). The allegations against counsel in the present case did not relate to the exercise of their rights of audience but to matters which which did not take place in court. [Reference was made to *Byrne v Sefton Health Authority* [2002] 1 WLR 775; *Worsley v Tambrands Ltd* (unreported) 8 November 2000 and *Orchard v South Eastern Electricity Board* [1987] QB 565.]

A claim for a wasted costs order against the legal representatives of the opposing party raises special difficulties for counsel defending the claim due to issues of client confidentiality. They cannot give evidence of conversations with their client or of material which was put before them and they are bound by rules of professional privilege. Unless the former client consents, there is no method available to get that material before the court, but without it they could be subject to a highly prejudicial order which has a penal effect. Those difficulties do not arise when the application is made against a party's own legal representatives.

A The key issue in the wasted costs hearing was whether counsel had before them reasonably credible material which as it stood established a prima facie case of fraud. That issue could not be determined without it first being established what that material was. Once they were instructed to make the allegations of fraud, they had a duty to promote their client's interests and to make the allegations if they had sufficient material to support them.

B By being prohibited from identifying that material counsel were, through no fault of their own, disabled from giving evidence on a key issue of fact. Proceedings against lawyers have penal consequences upon their career. It is unfair to try an individual on a charge and at the same time to deny the individual the right to adduce evidence in defence of the charge. No one was in a position to adjudicate fairly on what happened out of court, and counsel acted responsibly in court. The hearing took no more than the estimated C time despite the application to amend the notice of appeal. [Reference was made to *Ridehalgh v Horsefield* [1994] Ch 205; *R v Derby Magistrates' Court, Ex p B* [1996] AC 487; *R v Ward (Judith)* [1993 1 WLR 619; *Skone v Skone* [1971] 1 WLR 812 and *Arrow Nominees Inc v Blackledge* [2002] 2 BCLC 167 and to *R v Mills* [1999] SCR 668.]

The possibility that counsel had difficult clients with a difficult case must D not be ignored. One cannot tell whether counsel could have proved what they wanted to prove in the wasted costs proceedings but they were prevented from proving it due to the right to professional privilege exercised by their client. If the court is not going to be able to make the decision whether a defendant would be prejudiced by non-disclosure in a criminal trial that should be the end of the trial. So, too, in a claim for wasted costs against a lawyer.

E The case is about whether allegations in the draft amended notice of appeal breached paragraph 606 of the Code of Conduct of the Bar and the failure when the application got to court to drop the allegations. The allegations were extraordinary but it was right and proper to bring them to the court's attention. Counsel should not dismiss out of hand something which appears to be serious even if it later turns out to be wrong.

F It cannot be said that counsel were innocent of the charges made on the wasted costs order. But it can be said that it is not possible to say whether or not the charges were made out. Counsel are not in a position to put in material which would raise a doubt. If the court does not know what the material is there must be a doubt.

Mulcahy following. Apart from the common law right to a fair trial the Human Rights Convention buttresses the general case that the court adopted G an unfair method of proceeding. An analysis by reference to the Convention reveals the procedure to be unsatisfactory in ways which would not be recognised as a matter purely of pre Human Rights 1998 Act domestic law.

Article 6(2) and 6(3) of the Convention are applicable because the wasted costs jurisdiction is punitive and allegations of professional misconduct are quasi criminal in character. Article 6(2) adds another element to the case, H namely, the presumption of innocence. There was unfairness in this case in the operation of the burden of proof. The majority of the Court of Appeal approached the case on the basis that the claimant was entitled to the order unless counsel could show sufficient reasons why it should be denied. There was a violation of the presumption of innocence since there was a finding of

guilt in circumstances where counsel had not had the opportunity of exercising their rights of defence due to legal professional privilege. A

The law should be clear and foreseeable so that an individual can know in advance if his conduct will be a breach of it. The present case is at the criminal end of the civil hierarchy and there can be no punishment unless the offence is clearly defined and not extensively construed to the detriment of the accused. The court penalised counsel by adopting a novel interpretation of paragraph 606 of the Code of Conduct of the Bar. Counsel had a duty to their client to take properly arguable points, especially in the Court of Appeal when there was not necessarily any further appeal. B

The issue of impartiality raises the question as to who should be dealing with applications of the present kind, particularly when they relate to fact-finding and concern the way the case was conducted before as well as during the substantive hearing. In the present case leading counsel encountered judicial discouragement to his submissions and reacted appropriately by not persisting with the point. It is now said that he reacted so fast that he should not have been putting forward the point in the first place. It is natural for judges to bring into account their subjective impression of the merits of a point when considering whether it was proper to allege it at some earlier time. Legal representatives should not be denied the safeguard of a fresh tribunal in such a case. C D

Romie Tager QC and *Edward Rowntree* for the claimant. The argument on behalf of counsel on jurisdiction was based on a strained and overly academic reading of the 1981 Act and wholly ignores the indications given by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, the purpose of the amendments to section 51 and the clear intention of Parliament. E

As to the allegations made in the amended notice of appeal, there was a complete absence of any material upon which the allegations could be based. The allegations were not of stupidity or incompetence but of serious misconduct, deception, forgery and interference with the transcripts of court proceedings. Yet there was not shown to be a single alteration of significance in the transcripts. F

The way the allegations were put forward made it essential to incur costs in meeting them. In the absence of any evidence supporting the allegations it was improper for them to have been made in the first place, and it was unreasonable and negligent for counsel to have persisted with the allegations. G

Counsel gave the Court of Appeal no explanation at all for their conduct in adopting and advancing the allegations and relied on the ground that the court could not be satisfied that they acted improperly because it had not seen the privileged material. Paragraph 606(b) and (c) of the Code of Conduct of the Bar are relevant. If a barrister has before him at the pleading stage material which he knows will not or cannot be used at the hearing of the matter and without which there is no realistic prospect of the allegations succeeding, then irrespective of the position under paragraph 606(c), he would be prevented by paragraph 606(b) from making those allegations as the words "properly arguable" require the barrister to consider the available material in the context of what will be available to the court at the time at H

which submissions are made in relation to the allegations. In the context of the Code of Conduct "material" means the material in the bundles.

Even if the majority of the Court of Appeal were wrong in their conclusion that as a general rule the material in question must be that which is before the court, the conclusion that in the circumstances of the present case the propriety of the pleaded allegations had to be assessed in the light of the material put before the court is unimpeachable. The majority took the view that in relation to most of the allegations it was difficult to conceive what other material there was. Counsel's duty was to avoid wasted costs and to say to their client that there was no evidence to support his allegations.

There is no separate issue arising by virtue of the Human Rights Convention. The overriding objective of the Civil Procedure Rules encompasses all of the relevant Convention rights. [Reference was made to *B v United Kingdom* (1984) 38 DR 213 and *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213.]

Davidson QC replied.

Their Lordships took time for consideration.

27 June. **LORD BINGHAM OF CORNHILL**

1 My Lords, in this appeal two barristers (Mr Bernard Weatherill QC and Ms Josephine Hayes) challenge a wasted costs order made against them by the Court of Appeal. They do so on two grounds: first, that the court had no jurisdiction to make the order; and second, that such an order should not have been made when they were precluded by legal professional privilege from answering the complaints made against them. The appeal requires the House, for the first time, to consider the wasted costs order regime introduced by section 4 of the Courts and Legal Services Act 1990 and expressed in section 51(6), (7) and (13) of the Supreme Court Act 1981.

The proceedings

2 The proceedings in which the wasted costs order was made against the barristers concerned a snooker-based television quiz game, originally conceived by Mr Michael Kemp in about 1984 and developed in its early stages in 1987, first by Mr Kemp and Mr Roger Medcalf and then by these two with the addition of Mr Mardell, who had professional experience of developing and exploiting television game shows and was involved both personally and through his company, originally named Createl Ltd and then the Terry Mardell Organisation Ltd ("the TMO"). The plans for this new game show went through various different versions and were the subject of much discussion and refinement. Presentations were made on several occasions to the BBC, which was slow to respond. In the end, however, the BBC did respond. It bought the new game show and programmes were transmitted. They have proved to be a continuing success. But from about the end of 1987 Mr Medcalf was excluded from any part in the development and exploitation of the project, which were handled by Mr Mardell and his company and Mr Kemp.

3 In July 1993 Mr Medcalf issued proceedings against Mr Mardell, Mr Kemp, the BBC (which settled before the action came to trial and played

no further part) and the TMO. Mr Medcalf's claim at that stage was based on alleged infringement of copyright and breach of confidence. The action came on for trial before Lightman J in January 1997 but was aborted on the third day of trial to enable Mr Medcalf's advisers to re-plead his case so as to include an additional claim in partnership. A stringent order in costs was made against Mr Medcalf as a condition of the postponement. Mr Medcalf's case was then re-pleaded and a second trial took place before Lloyd J in May 1998. At this trial the judge preferred the evidence of Mr Medcalf to that of Mr Mardell and Mr Kemp. He found that there had been a partnership between the three men to be inferred from their conduct and that there had also been a breach of confidence. The defendants were ordered to provide an account of the profits of the partnership and to make an interim payment of £100,000 into court.

4 Mr Mardell and the TMO (but not Mr Kemp) at once appealed against the judge's decision and there was a second appeal against certain orders made by the judge in a later decision on the taking of the partnership accounts. No satisfactory account was provided in compliance with the judge's order and in July 1999 Mr Medcalf applied to strike out the defendants' third attempt to provide the account ordered. In response the defendants served witness statements making, for the first time, serious allegations of fraud against Mr Medcalf and his solicitors in connection with the conduct of the action before Lloyd J. It was alleged that Mr Medcalf or his solicitors had tampered with the transcripts of evidence given at the trial, that Mr Medcalf's solicitors had attempted to pervert the course of justice during without prejudice discussions with Mr Kemp and that Mr Medcalf's signature on his witness statement had been forged. No transcripts of evidence had been available to the judge when he had given judgment and Mr Medcalf in evidence had vouched the proof of his witness statement, but these points were relied on as impugning the credibility of Mr Medcalf, and the reliability of his evidence had been an important issue at the trial. The master referred the striking out application to Lloyd J, who was to have heard it on 26 November 1999 but who was in the event unable to hear it until 2 December 1999.

5 Neither of the appellant barristers had up to then represented Mr Mardell or the TMO. Ms Hayes was instructed shortly before 24 November. On 25 November she informed leading counsel for Mr Medcalf (Mr Romie Tager QC) of an application she intended to make (and shortly thereafter did make) to the judge, that he should direct the police to investigate the allegations made concerning the transcripts and the perversion of the course of justice and that Mr Medcalf's application to strike out the account should meanwhile be stayed. Mr Medcalf's solicitors intimated an intention to apply for a wasted costs order against the defendants' solicitors, although this was not pursued. In her skeleton argument for the hearing before Lloyd J on 2 December Ms Hayes included the allegations of misconduct already mentioned but with the addition of certain serious allegations of a similar character. An amended notice of appeal was drafted, although not formally served, including these and additional allegations of impropriety.

6 On 6 December 1999 Lloyd J rejected the defendants' application and refused permission to appeal. He went on to hear Mr Medcalf's application to strike out the defendants' third partnership account. Mr Weatherill,

A appeared before the judge with Ms Hayes on 8 December 1999 (having been instructed on that date or shortly before) when application was made that the judge should defer giving judgment on the striking out application pending receipt of evidence from the United States Department of Justice which might substantiate one of the allegations of fraud made against Mr Medcalf. This application was refused. On Mr Medcalf's application to strike out the judge refused to make the order sought, but held that the third account which the defendants had given did not comply with his order and that they should have a last opportunity to comply.

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7 There was intense interlocutory activity on the part of Mr Medcalf and the defendants over the next two months. Relevantly for present purposes, the defendants' appeal against the judge's substantive decision in favour of Mr Medcalf, coupled with an application by the defendants to amend their notice of appeal so as to include the allegations of impropriety against Mr Medcalf already referred to, were due to be heard by the Court of Appeal on 14 February 2000. At a hearing on 28 January 2000 Clarke LJ gave directions to ensure that that date would be effective: among other things he ordered that evidence in the defendants' possession relevant to matters raised in the draft amended notice of appeal be served that day, with an indication in writing of any further evidence the defendants might wish to put before the court, and that the defendants should by 4 February 2000 issue and serve an application to amend their notice of appeal and to introduce fresh evidence, serve and file a bundle comprising all witness statements and evidence intended to be relied on, and serve and file a draft amended notice of appeal and supporting skeleton arguments covering those of the existing grounds of appeal still advanced and identifying any which were abandoned.

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8 In response to that order of Clarke LJ, the defendants served certain reports and listed evidence which was not in their possession but which they hoped would follow. A draft amended notice of appeal dated 3 February 2000, bearing the names of both barristers, was served on the following day. Skeleton arguments dated 4 February 2000, including a supplementary skeleton argument in support of the application to amend the notice of appeal signed by both the barristers, were also served on 4 February. The supplementary skeleton argument advanced submissions in support of each of the new allegations of fraud, forgery and other impropriety. Two additional bundles of evidence were served on Mr Medcalf. In the course of Friday 4 February 2000, for reasons which have not been disclosed, instructions were withdrawn from the defendants' solicitors. The barristers ceased to be instructed and the solicitors came off the record on Monday 7 February. During the following week Mr Medcalf's advisers prepared and filed evidence to rebut the allegations of fraud and impropriety raised in the draft amended notice of appeal. This evidence was not served on the barristers, who were no longer acting, but they were again instructed at about midday on Friday 11 February and the evidence was then made available to them.

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9 At the hearing before the Court of Appeal (Peter Gibson and Schiemann LJJ and Wilson J) on Monday 14 February, Mr Weatherill and Ms Hayes, acting (as it is accepted that they did throughout) on instructions, opened the defendants' application to amend the notice of appeal and to adduce new evidence. The application to amend failed in respect of the

allegations of impropriety. In the course of argument Mr Weatherill abandoned some of the allegations in the face of judicial hostility. In relation to the remaining allegations, the Court of Appeal rejected the application to amend (although other parts of the application to amend were conceded or were successful). This application occupied about one and a half days of court time, although no oral answer on behalf of Mr Medcalf was called for. A further two and a half days were devoted to argument on the substantive appeal. On 2 March 2000, the Court of Appeal handed down a unanimous reserved judgment, giving its reasons for rejecting the application to amend in respect of the defendants' allegations of fraud and impropriety and dismissing the substantive appeal. Counsel for Mr Medcalf indicated that he would be seeking a wasted costs order against the barristers. This matter was adjourned to enable Mr Medcalf to state his case and to enable the barristers to respond. At a hearing on 2 July 2000, the Court of Appeal ordered that this application proceed to a second stage.

10 Before that application was resolved, Mr Medcalf compromised his action against Mr Mardell, Mr Kemp and the TMO. The terms of the compromise are not material, save to note that it expressly preserved and excluded Mr Medcalf's claim for wasted costs against the barristers. The principal basis upon which counsel for Mr Medcalf advanced the application for wasted costs against the barristers was that it had been improper of them as counsel for the defendants to have advanced allegations of fraud and other improprieties in the draft amended notice of appeal, in the supplementary skeleton argument and at the hearing of the appeal when, in contravention of paragraph 606 of the Code of Conduct of the Bar of England and Wales, they could not have had before them reasonably credible material establishing a prima facie case of fraud. Mr Medcalf sought to recover as wasted costs the costs said to have been incurred in investigating and rebutting the allegations made, both by way of written evidence and oral argument at the hearing.

Paragraph 606 of the Code of Conduct

11 Paragraph 606 of the Code of Conduct, headed "Drafting pleadings and other documents", at the relevant time provided:

> "A practising barrister must not devise facts which will assist in advancing his lay client's case and must not draft any originating process pleading affidavit witness statement or notice of appeal containing . . . (c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud . . . provided that nothing in this paragraph shall prevent a barrister drafting a pleading affidavit or witness statement containing specific facts matters or contentions included by the barrister subject to the lay client's confirmation as to their accuracy."

Section 51 of the Supreme Court Act 1981

12 So far as relevant to this appeal, section 51 of the Supreme Court Act 1981, as substituted by section 4 of the Courts and Legal Services Act 1990, provides:

A "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—(a) the civil division of the Court of Appeal; (b) the High Court; and (c) any county court, shall be in the discretion of the court . . .

"(3) The court shall have full power to determine by whom and to what extent the costs are to be paid . . ."

B "(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.

"(7) In subsection (6), 'wasted costs' means any costs incurred by a party—(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee

C of such a representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay . . ."

"(13) In this section 'legal or any other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf."

D Sections 111 and 112 of the 1990 Act make provision for wasted costs to be awarded in criminal proceedings and civil proceedings in the magistrates' court.

The wasted costs jurisdiction

13 In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal heard

E a composite group of six test appeals. Both the Bar and the Law Society were represented by leading counsel. At the invitation of the court, the Attorney General nominated two counsel to represent the general public interest. In a reserved judgment of the court, the Court of Appeal (Sir Thomas Bingham MR, Rose and Waite LJJ) reviewed at some length the history of the court's jurisdiction to order payment of costs by legal practitioners whose conduct had led to the incurring of unnecessary costs,

F made detailed reference to the rules and legislation governing the exercise of this jurisdiction, drew attention to certain obvious dangers to which the jurisdiction was subject and gave guidance on the future handling of such applications. Save that this judgment must now be read subject to the decision of the House in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, and subject to what is said in paragraph 23 below, I would endorse and need

G not repeat what the Court of Appeal said in *Ridehalgh v Horsefield*. It does however appear, from material laid before the House, that the clear warnings given in that case have not proved sufficient to deter parties from incurring large and disproportionate sums of costs in pursuing protracted claims for wasted costs, many of which have proved unsuccessful. The House is grateful for the perceptive commentary on the weaknesses of this jurisdiction made by Hugh Evans, "The Wasted Costs Jurisdiction" (2001)

H 64 MLR 51.

The decision under appeal

14 The decision of the Court of Appeal now under appeal is reported [2001] Lloyd's Rep PN 146. Opinion was divided. Peter Gibson and

Schiemann LJJ (for reasons given by Peter Gibson LJ on behalf of both) held that a wasted costs order should be made against the barristers. Wilson J dissented.

15 At p 152, para 25 of the majority judgment, Peter Gibson LJ recorded that there was no dispute as to the jurisdiction to make a wasted costs order nor as to the principles to be applied. Full reference was made to *Ridehalgh v Horsefield*. The crux of Mr Tager's case (for Mr Medcalf) was that the barristers had acted improperly, in breach of paragraph 606 of the Code of Conduct, in making allegations of fraud unsupported by any reasonably credible material establishing a prima facie case: see pp 153–154, para 35 of the judgment. The defence advanced by Mr Davidson on behalf of the barristers was summarised at p 154, para 39 of the judgment:

> "He says that the fundamental point was that this was a case in which it appeared that the court had been deceived at the trial and that it was right and in the public interest for advocates to bring that point forward for adjudication. His main line of defence, however, was based on the fact that, despite the best efforts of the solicitors acting for the barristers, the defendants have not responded to requests that they waive privilege so as to enable the barristers to refer to privileged material in defending the wasted costs claim. The barristers have put in evidence that they were fully aware of their duties under the Code of Conduct and believed that they complied with those duties. They say that they would like to put before the court full details of what material was available, their own consideration of it and their reasoning but are prevented by the law of privilege and confidentiality from doing so. They believe that if they could do so, no wasted costs order would be made. Mr Davidson submits that it is impossible for this court to know on what material the barristers acted, that it is unfair to the barristers, who are unable to give evidence on privileged and confidential matters, for us to draw inferences as to the available material or to exercise our discretion as to whether an order should be made. He and his junior, Miss Mulcahy, have drawn our attention to article 6 of the European Convention on Human Rights and to the cases decided thereunder. They submit that it would be a contravention of that article to decide this case in circumstances where the barristers cannot give evidence on material matters whereas Mr Medcalf is able to bring forward all the evidence in his possession on what they call 'the key issue of fact'."

16 The majority began by considering the allegations of fraud in the draft amended notice of appeal in order to assess whether there was a possibility that the barristers had had other material. This review was prefaced by certain preliminary observations. First, the majority emphasised the importance of paragraph 606, which gave litigating parties a measure of redress against potentially very damaging allegations for which (because of the law of absolute privilege) they could obtain no redress. Thus a barrister must be instructed to make the allegation in question, and should have reasonably credible material establishing a prima facie case before drafting such an allegation. The judgment continued, at p 154, para 40:

> "The material must be evidence which can be put before the court to make good the allegation. If there is material before counsel which

A cannot be used in court, the existence of that material cannot justify the actions of counsel in putting their names to the allegation."

Secondly, it was said that paragraph 606 applied not only to allegations of fraud but also to other allegations of dishonest or dishonourable conduct. Thirdly, the majority made plain that counsel must maintain his independence and not compromise his professional standards in order to please the client. In its review of ten allegations made by the defendants, the majority held that no reasonably credible material had been produced to the court to justify seven, while concluding that there was some evidence to support the remaining three. In considering whether, on the material put before the court, the conduct of the barristers had been shown to be improper, unreasonable or negligent, the majority commented on the peripheral character of these allegations in relation to the main issues in the action (p 157, para 54) and based its finding against the barristers primarily on the failure to produce evidence to the court to support the allegations made. At p 158, para 58 of its judgment the majority said:

> "Second, the barristers could not have allowed the draft amended notice of appeal to go out under their names to Mr Medcalf containing allegations of impropriety reliant on the expected contents of the witness statements without the barristers satisfying themselves of the existence of that evidence in a form to be put before the court. We emphasise that the duty under paragraph 606 is one personal to counsel and cannot be delegated to his solicitors. He has to satisfy himself that he has reasonable credible material *before him* which *as it stands* establishes a prima facie case of fraud when he drafts the notice of appeal."

At p 158, para 59 the majority held that the propriety of the pleading had to be assessed in the light of the material put before the court. It was not persuaded (p 158, para 60) that the inability of the barristers to reveal privileged or confidential material made the hearing of the application unfair or contrary to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While acknowledging the high professional standing of the barristers, the majority found no reasons why, in the exercise of the court's discretion, it should deny Mr Medcalf the order he sought (p 159, para 64).

17 In his dissenting judgment Wilson J compressed into six the seven allegations on which the majority had found against the barristers. He agreed that, at the hearing, no reasonably credible evidence had been placed before the court which prima facie established the validity of those six allegations made against Mr Medcalf (p 160, para 72). But in his opinion that was not the point. The point was whether the barristers had had such material before them. Wilson J first considered the barristers' position on 3–4 February when the draft amended notice of appeal had been finalised and the skeleton arguments delivered. He said, at p 161:

> "78. I harbour doubts whether on 3 and 4 February the barristers had before them the material which justified their making the six allegations. All six of them had figured in drafts of Ms Hayes dating back to early December 1999 so there had already been two months in which to collect the evidence to justify them. In the drafting of the jointly signed notice dated 3 February it is hard to discern selection, as opposed to blanket

repetition, of (to use Mr Weatherill's own description at the hearing) the gallimaufry of allegations which on instructions had been assembled in the drafts of Ms Hayes.

"79. But, in the complete absence of evidence as to what the barristers actually had before them on 3 and 4 February, I have insufficient confidence in the fertility of my imagination to come to a positive conclusion that they could not have had before them whatever paragraph 606 required.

"80. There is an initial question as to what paragraph 606 did require to be before them. The words refer to 'reasonably credible material which as it stands establishes a prima facie case of fraud'. In paragraph 58 above my Lords so construe those words as to require the barristers to have before them reasonably credible evidence, in a form to be put before the court, which establishes the prima facie case. My view is that the word 'material' goes wider than evidence in proper form; that the phrase 'as it stands' just means 'at face value'; and that to construe the word 'establishes' as something which can be achieved only by evidence admissible in court is, in this context, arguably to read too much into it. My own preference would be not to adopt any such paraphrase."

Wilson J raised a series of questions relating to the material which might have been before the barristers on 3–4 February and concluded, at p 162:

"84. Answers to such questions might well have enabled me to concur in the conclusion of my Lords. Or they might have had the reverse effect. Lacking the answers, I remain in doubt as to whether on 3 and 4 February the barristers were guilty of professional impropriety. It is doubt of which, pursuant to the same passage in *Ridehalgh v Horsefield*, they must have the benefit. It is better that in certain circumstances the wasted costs jurisdiction should be emasculated by the principle of legal professional privilege than vice versa."

Of the hearing on 14–15 February he said (at p 163, para 85) that "There was therefore an element of professional impropriety in articulation of these serious allegations at the hearing" in the absence of evidence to support them. In the exercise of his discretion, however, Wilson J would have declined to make an order against the barristers on this limited ground. In reaching this conclusion he was impressed by the extremely difficult circumstances in which both barristers, but particularly Mr Weatherill, had been called upon to act in this complex and highly contentious matter.

Jurisdiction

18 The barristers' argument on jurisdiction was first raised in the House. It was said, first, that section 51 conferred no right on a party to seek a wasted costs order against any legal representative other than his own. Thus the court had no power to make an order against the legal representative of any opposing party. This submission was based on the wording of section 51(13) quoted above, and in particular the words "on his behalf": it was argued that a party could only seek a wasted costs order against a person exercising a right of audience or a right to conduct litigation on his behalf or any employee of such a person.

A 19 There are in my opinion very compelling reasons why this construction cannot reflect the intention of Parliament. It is clear that in the exercise of its inherent jurisdiction the court could order a solicitor to compensate a party who was not the client of that solicitor, as it did in *Myers v Elman* [1940] AC 282. In *Orchard v South Eastern Electricity Board* [1987] QB 565, 571, 581, the Court of Appeal expressly dissented from the view, advanced obiter by Lord Denning MR in *Kelly v London Transport* B *Executive* [1982] 1 WLR 1055, 1065, that this jurisdiction could be exercised against counsel also. In the context of the 1990 Act, which among other things provided for a substantial extension of solicitors' rights of audience in the higher courts, this inequality of treatment as between advocates performing the same professional function was plainly indefensible, and the object of section 51(6) and (7) was to put barristers and C solicitors, for this purpose, effectively in the same position. Section 51 only applies in civil proceedings, but (as was accepted on behalf of the barristers) it is quite clear from section 111 of the 1990 Act (amending the Prosecution of Offences Act 1985) and section 112 of the 1990 Act (amending the Magistrates' Courts Act 1980) that in criminal proceedings in the Court of Appeal, the Crown Court or a magistrates' court and civil proceedings in a magistrates' court a wasted costs order may be made in favour of a party to D the proceedings against the legal representative of any other party. No reason has been advanced why Parliament should have wished to lay down a different rule governing barristers in civil proceedings in the High Court, and it is to my mind inconceivable in the context of the 1990 Act that Parliament should have wished to afford to barristers in civil proceedings (otherwise than in a magistrates' court) a ground of exemption not enjoyed by E solicitors. Against arguments of this weight, any submission based on the wording of subsection (13) would have to be irresistible. The barristers' argument is not. The subsection is intended to make plain that no liability can attach to any practitioner not involved in the litigation giving rise to the claim. I note without surprise that a similar conclusion was reached by Neuberger J in *Brown v Bennett (No 2)* [2002] 1 WLR 713.

F 20 The barristers' second argument on jurisdiction was also based on the language of subsection (13). It was to the effect that any order made against them could only relate to their conduct when exercising a right of audience in court. This was because they had no right to conduct litigation, as defined in sections 28 and 119(1) of the 1990 Act. Thus (it was said) they could not be liable in wasted costs for anything done when settling the draft amended notice of appeal or the skeleton arguments, the activities which G had in fact given rise to most of the wasted costs claimed against them. A similar argument was advanced to and rejected by Leveson J in *Worsley v Tambrands Ltd* (unreported) 8 November 2000 and also by Neuberger J in *Brown v Bennett (No 2)*. Both judges were right to reject it. Section 4 of the 1990 Act substituted a new section 51 in the 1981 Act. Once inserted that section was to be read as part of the 1981 Act. Its interpretation was to be H governed by its own terms and any other terms of the 1981 Act. I would question whether it would be permissible in principle to construe subsection (13) in the light of definitions imported into the 1990 Act for quite different purposes: see *Bennion, Statutory Interpretation*, 3rd ed (1997), p 213. The section was intended, as already stated, simply to make plain that no liability could attach to any practitioner not involved in the

litigation giving rise to the claim. For the reasons convincingly given by Leveson J it would stultify the section if a barrister were not potentially liable for conduct immediately relevant to the exercise of a right of audience but not involving advocacy in open court. If one might have thought subsection (13) to be unnecessary, the facts of *Byrne v Sefton Health Authority* [2002] 1 WLR 775 show that it was not.

The construction of paragraph 606 of the Code of Conduct

21 As is evident from the quotations from the judgments of the majority and the minority in the Court of Appeal set out in paragraphs 16 and 17 above, there was a difference of opinion on the interpretation of paragraph 606. The majority held that, when putting his signature to an allegation of fraud or dishonesty, counsel must have before him evidence in a form to be put before the court to make good the allegation. Wilson J held that counsel must have "material" but that it need not be evidence in admissible form.

22 Paragraph 606(c) lays down an important and salutary principle. The parties to contested actions are often at daggers drawn, and the litigious process serves to exacerbate the hostility between them. Such clients are only too ready to make allegations of the most damaging kind against each other. While counsel should never lend his name to such allegations unless instructed to do so, the receipt of instructions is not of itself enough. Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As the rule recognises, counsel could not properly judge it proper to make such an allegation unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation. At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn. I would however agree with Wilson J that at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it. I could not think, for example, that it would be professionally improper for counsel to plead allegations, however serious, based on the documented conclusions of a DTI inspector or a public inquiry, even though counsel had no access to the documents referred to and the findings in question were inadmissible hearsay. On this point I would accept the judgment of Wilson J.

Legal professional privilege

23 In *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal addressed the issue of legal professional privilege which may arise where an applicant seeks a wasted costs order against lawyers acting for an opposing party and said, at p 237:

> "The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit

A their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of the respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."

I do not for my part consider this passage to be inaccurate or misleading, and counsel did not criticise it. Read literally and applied with extreme care, it ought to offer appropriate protection to a practitioner against whom a wasted costs order is sought in these circumstances. But with the benefit of experience over the intervening years it seems clear that the passage should be strengthened by emphasising two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another. The point was well put by Mr George Laurence QC sitting as a deputy High Court judge in *Drums and Packaging Ltd v Freeman* (unreported) 6 August 1999 when he said, at para 43:

> "As it happens, privilege having been waived, the whole story has been told. I cannot help wondering whether I would have arrived at the same conclusion had privilege not been waived. It would not have been particularly easy, in that event, to make the necessary full allowance for the firm's inability to tell the whole story. On the facts known to D3 at the time it launched this application, D3 might very well have concluded that the firm would not be able to avoid a wasted costs order, even on the 'every allowance' basis recommended by Sir Thomas Bingham MR."

Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. The court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so. This reflects the old rule, applicable in civil and criminal proceedings alike, that a party should not be condemned without an adequate

opportunity to be heard. Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order.

24 It was not submitted to the House that a relaxation of the existing rules on legal professional privilege could or should be permitted in a case such as the present: the decision of the House in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 gave no encouragement to such a submission, and subordinate legislation introduced to modify that decision for purposes of the wasted costs jurisdiction was held to be ultra vires in *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272 and was revoked. No attempt has been made to modify the rule by primary legislation. The result no doubt is that in a context such as the present the scope for making wasted costs orders is very limited. This is not necessarily to be regretted. In *Ridehalgh v Horsefield* [1994] Ch 205, 238–239, the Court of Appeal considered that wasted costs hearings should be measured in hours and urged the courts to be astute to control what threatened to become a new and costly form of satellite litigation. In *Harley v McDonald* [2001] 2 AC 678, reviewing the exercise by the New Zealand courts of the inherent jurisdiction to order barristers and solicitors to pay costs unnecessarily incurred, the Judicial Committee of the Privy Council observed, at p 703, para 50:

> "As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed."

Save in the clearest case, applications against the lawyers acting for an opposing party are unlikely to be apt for summary determination, since any hearing to investigate the conduct of a complex action is itself likely to be expensive and time-consuming. The desirability of compensating litigating parties who have been put to unnecessary expense by the unjustified conduct of their opponents' lawyers is, without doubt, an important public interest, but it is, as the Court of Appeal pointed out in *Ridehalgh v Horsefield,* at p 226, only one of the public interests which have to be considered.

The present appeal

25 Proceeding from the undoubted fact (with which Wilson J agreed) that at the hearing on 14–15 February there was no reasonably credible admissible evidence before the court to substantiate the seven allegations held to be improperly made, the majority of the Court of Appeal concluded that the barristers could have had no such admissible evidence before them when signing the draft amended notice of appeal and the skeleton arguments. It would seem likely that they did not. But this was to apply too stringent a test. The question is whether, at that stage, the barristers had material of any kind before them which justified the making of the allegations. This is something which the court does not know and cannot be told. Hunch and suspicion are not enough. Like Wilson J, and for the reasons given in his persuasive judgment, I remain in doubt, and the barristers must have the benefit of that doubt. In a case of this complexity, I would moreover think it unfair and contrary to the appearance of justice to condemn them unheard. While the Strasbourg jurisprudence to which the House was referred fortifies that conclusion (see, for example, *De Haes and Gijsels v Belgium* (1997) 25 EHRR 1, 48, paras 80–81) I do not think it relies on any principle not recognised by the common law. Again like Wilson J, I would not think it right to base even a partial order on the barristers' failure to abandon the objectionable allegations at the outset of the proceedings on 14 February. They do not appear to have clung to these allegations with undue tenacity, and the matters relied on by Wilson J as influencing the exercise of discretion cannot be lightly discounted.

26 I am in full agreement with the reasons given by my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry. Save in relation to the transcript allegation, I am also in full agreement with the opinion of my noble and learned friend Lord Hobhouse of Woodborough: on that matter I differ from him because the transcript allegation, although weaker on its face than the other allegations, was not different in kind; and also because I share the view expressed by Lord Rodger in paragraph 76 below.

27 Despite the highly regrettable outcome for Mr Medcalf, whose successful proceedings have had severe financial consequences for him, I would allow the barristers' appeal, quash the wasted costs order made by the Court of Appeal and award the barristers the costs of and occasioned by the wasted costs application both in the Court of Appeal and before the House (such order not to be enforced without leave of the Court of Appeal in relation to any period when Mr Medcalf was legally-aided).

28 Well after the conclusion of argument, at a stage when the opinions of the committee were in final draft, material was received from the barristers suggesting that Mr Mardell and the TMO were or might be willing after all to waive their entitlement to legal professional privilege. The committee met informally (without reviewing this material in detail) to consider whether it should explore this material further or remit the matter to the Court of Appeal. It was unanimously resolved that the appeal should be decided on the basis upon which it had been argued both in the Court of Appeal and before the House. It would be inconsistent with the clear objectives of the wasted costs regime to permit this issue to be the subject of yet further litigation.

LORD STEYN

29 My Lords, I limit my remarks to the question whether the two barristers against whom wasted costs orders were made by a majority in the Court of Appeal had a fair opportunity to deploy their side of the case: *Medcalf v Mardell* [2001] Lloyd's Rep PN 146.

30 The legislation empowering the making of wasted costs orders did not expressly address the problem which arises where a barrister is prevented by legal professional privilege from explaining what instructions and material he received from his client: section 51 of the Supreme Court Act 1981. Subsequently, the decision of the House of Lords in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507D, ascribed to legal professional privilege an absolute character. It appears to pre-empt the creation of exceptions in the interests of justice. Doubts have been expressed about a perceived rigidity of the law: A A S Zuckerman, "Legal Professional Privilege—the Cost of Absolutism" (1996) 112 LQR 535; Colin Tapper, "Prosecution and Privilege" (1996) 1 E & P 5; Colin Passmore, "The Legal Professional Privilege" (1999) 3 E & P 71.

31 It was common ground before the House that in the wasted costs jurisdiction under section 51, the court had no power to relax the privilege so as to enable a barrister to defend himself against allegations of improper conduct. Where a client seeks a wasted costs order against his barrister, a waiver of privilege in relation to all relevant matters will be implied by law: *Lillicrap v Nalder & Son* [1993] 1 WLR 94; *Matthews & Malek, Disclosure,* 2nd ed (2000), p 297. Sometimes the jurisdiction will be invoked against a barrister by the opposite party in the proceedings. In that situation the barrister's client will usually have no incentive to waive privilege and will refuse to do so. Here lies the root of a systemic problem.

32 The jurisdiction provides compensation for an aggrieved litigant. It has, however, a penal effect on the practitioner against whom it is exercised: see *Myers v Elman* [1940] AC 282, 319; *Harley v McDonald* [2001] 2 AC 678, 703, para 49. In wasted costs proceedings a barrister is therefore entitled to defend himself by placing before the court, without restriction, all logically relevant material about his side of the story.

33 The wasted costs jurisdiction is available in respect of costs incurred by a party "as a result of any improper, unreasonable or negligent act or omission": section 51(7). An allegation of "improper" conduct is the most serious charge. The case against the barristers was throughout advanced and considered by the Court of Appeal on the basis that they had committed improper conduct.

34 The substance of the case against the barristers was that, contrary to paragraph 606 of the Code of Conduct, they made allegations of dishonesty against a litigant without having before them "reasonably credible material which as it stands establishes a prima facie case of [dishonesty]".

35 This particular professional duty sometimes poses difficult problems for practitioners. Making allegations of dishonesty without adequate grounds for doing so may be improper conduct. Not making allegation of dishonesty where it is proper to make such allegations may amount to dereliction of duty. The barrister must promote and protect fearlessly and by all proper and lawful means his lay clients interests: paragraph 203 of the Code of Conduct. Often the decision will depend on circumstantial

A evidence. It may sometimes be finely balanced. What the decision should be may be a difficult matter of judgment on which reasonable minds may differ.

36 In the case before the House evidence is that the barristers were aware of the need for caution.

37 By their signatures to documents submitted to the court they vouched for the fact that they had before them material justifying the making of allegations of dishonesty.

B **38** Improper conduct under section 51(7) does not require proof of bad faith. Nevertheless, it is a highly material circumstance that the Court of Appeal accepted that the barristers believed in good faith that they had material which justified the making of the allegations [2001] Lloyd's Rep PN 146, 158, para 60.

39 Furthermore, it is relevant that both barristers were acknowledged C to be competent and experienced practitioners. Their bona fide views that there were materials before them justifying the allegations they made are therefore entitled to some weight. But, despite their best endeavours they failed to obtain a waiver of privilege from their client, and they were therefore unable to explain the grounds for their beliefs.

40 In these circumstances the question is whether the barristers' beliefs that they had material which objectively justified the allegations D unquestionably fell outside the range of views which could reasonably be entertained. The burden of proof is on the party applying for the wasted costs order. In *Ridehalgh v Horsfield* [1994] Ch 205, 239C, Sir Thomas Bingham MR observed that the wasted cost jurisdiction "recognises a shift in the evidential burden". This observation was plainly not intended to have any application where barristers are prevented by professional privilege E from telling their side of the story.

41 The point narrows down to the question whether it has been proved that the materials on which the barristers in fact relied did not objectively justify their decision. The majority in the Court of Appeal (Peter Gibson and Schiemann LLJ), disagreeing with a strong dissenting judgment of Wilson J, answered this question in the affirmative. In doing so the Court of Appeal made a judgment, based on inference, as to the nature and contents of the F materials *before the barristers*. What exactly those materials included was and is unknown. Nevertheless, the majority in the Court of Appeal decided that even if the barristers had been permitted to tell their side of the story about the materials, which were before them, it would not have availed them in any way.

42 I cannot accept the view of the majority. The law reports are replete G with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried. Without knowing the barristers' side of the story, I am unwilling to speculate about the nature of the documents before them. In these circumstances it is unnecessary to examine the particulars of the allegations against the barristers which they had no opportunity to answer. Lawyers are also H entitled to procedural justice. Due process enhances the possibility of arriving at a just decision. Where due process cannot be observed it places in jeopardy the substantive justice of the outcome. In my view the analysis of Wilson J was realistic and correct.

43 It was impossible to determine the issue fairly. It follows that the wasted costs orders must be quashed.

44 This conclusion has relevance for other cases involving the wasted costs procedure where the privilege prevents barristers from explaining their conduct. I am in full agreement with the guidance given by my noble and learned friend, Lord Bingham of Cornhill, in paragraph 23 of his reasons.

45 For the reasons given by Lord Bingham of Cornhill and Lord Rodger of Earlsferry, as well as the reasons contained in this opinion, I would allow the appeals.

LORD HOFFMANN

46 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn. For the reasons they have given I too would also allow the appeals.

LORD HOBHOUSE OF WOODBOROUGH

47 My Lords, this appeal has raised for consideration the wasted costs jurisdiction of civil courts under section 51 of the Supreme Court Act 1981 as amended by the Courts and Legal Services Act 1990. The 1990 Act restructured the legal professions and the interrelation between the roles of solicitors and barristers. It recognised that advocacy functions could be carried out by both branches and extended the power to make orders for costs not only against solicitors exercising the right to conduct litigation on behalf of a party but also against any advocate exercising a right of audience: section 51(13). Section 51 is a provision dealing generally with the jurisdiction to make orders as to costs including a general power to determine by whom and to what extent costs of the proceedings are to be paid: section 51(3). The "wasted costs" jurisdiction is supplementary and subsection (6) empowers the court both to disallow costs which have been wasted by a legal representative as between the lawyer and his own client and to order that the legal representative meet the whole or part of any wasted costs.

48 The present appeal is concerned only with the problems arising from the second limb of this power. The order in the present case was an order made on the application of the claimant in the action, Mr Medcalf, against the two barristers who had acted as the advocates for the defendant, Mr Mardell, and his company on their unsuccessful appeal to the Court of Appeal from a judgment given by Lloyd J in favour of Mr Medcalf. The complaint against the barristers made by Mr Medcalf and substantially upheld by the majority of the Court of Appeal (Peter Gibson and Schiemann LJJ, Wilson J dissenting) was that the barristers had caused him, Mr Medcalf, to incur wasted costs which the barristers ought to be ordered to meet.

49 "Wasted costs" is a defined expression. Subsection (7) provides that it means:

> "any costs incurred by a party—(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

The phrase "legal or other representative" is that to which I have already referred; it is defined as covering those who, in relation to a party, are

A exercising either a right of audience or a right to conduct litigation on the party's behalf. The aspect of these provisions with which this appeal is concerned is therefore alleged improper, unreasonable or negligent conduct by someone exercising rights of audience (i e acting as an advocate) on behalf of one party which the opposing party says should lead the court to make an order that the advocate should bear part of the costs incurred by that
B opposing party.

50 At first sight, this power to make costs orders against such advocates seems sensible and straight forward. However this simplicity is deceptive as the subsequent history of the exercise of this jurisdiction has shown. These complications and pitfalls were discussed in the judgment of the Court of Appeal in the group of cases reported as *Ridehalgh v Horsefield* [1994] Ch 205 (a judgment to which my noble and learned friend, Lord Bingham of
C Cornhill was, as the then Master of the Rolls, a party) and principled and authoritative solutions provided. It is apparent from what your lordships have been told from the bar that, notwithstanding that judgment, many of the adverse consequences have persisted. The same message is given in the valuable article "The Wasted Costs Jurisdiction" by Mr Hugh Evans (2001) 64 MLR 51. In the present case the Court of Appeal, both the majority and
D the minority, were following the *Ridehalgh* judgment although this led them to different conclusions. For myself, I would wish to take this opportunity to endorse and reaffirm what was said in that judgment. But it is clearly necessary to emphasise again some of its features.

The constitutional aspect

E 51 The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in
F the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect to in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial
G system uses adversarial procedures.

52 It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England, the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional
H independence underwrite, in a manner too often taken for granted, this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case

is influenced not by his duty to his client but by concerns about his own self-interest.

53 Thus the advocate owes no duty to his client's opponent; inevitably, the proper discharge by the advocate of his duty to his own client will more often than not be disadvantageous to the interests of his client's opponent: *Orchard v South Eastern Electricity Board* [1987] QB 565, 571. At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party. Similarly, the advocate acting in good faith is entitled to protection from outside pressures for what he does as an advocate. Thus, what the advocate says in the course of the legal proceedings is privileged and he cannot be sued for defamation. For similar reasons the others involved in the proceedings (e g the judge, the witness) have a similar immunity.

54 The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice; the public interest, covering the litigants themselves as well, is now also expressed in CPR Pt 1. (See also paragraph 9 of the Practice Direction, Statements of Case supplementing CPR Pt 16.) The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles. These include the provisions relevant to barristers which preclude them from making allegations, whether orally or in writing, of fraud or criminal guilt unless he has a proper basis for so doing. Paragraph 606(c), which has already been quoted by my noble and learned friend, requires express instructions and reasonably credible material which as it stands establishes a prima facie case of fraud. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice.

55 The introduction of a wasted costs jurisdiction makes an inroad into this structure. It creates a risk of a conflict of interest for the advocate. It is intended and designed to affect the conduct of the advocate and to do so by penalising him economically. Ideally a conflict should not arise. The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court: *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. But the situation in which the advocate finds himself may not be so clear-cut. Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. Once an opposing party is entitled to apply for an order against the other party's legal representatives, the situation becomes much more unpredictable and hazardous for the

advocate. Adversarial perceptions are introduced. This is a feature of what happened in the present case. The factors which may motivate a hostile application by an opponent are liable to be very different from those which would properly motivate a court.

56 In my judgment, the jurisdiction must be approached with considerable caution and the relevant provisions of section 51 construed and applied so as not to impinge upon the constitutional position of the advocate and the contribution he is required to make on behalf of his client in the administration of civil justice. The judgment in *Ridehalgh v Horsefield* [1994] Ch 205 referred to most of the relevant points. First, from the point of view of the advocate the jurisdiction is penal. It involves making a finding of fault against the advocate and visiting upon him a financial sanction. Unlike the position between the advocate and his own client where the potential for liability will encourage the performance of the advocate's duty to his client (see *Arthur J S Hall & Co v Simons*) and the order would be truly compensatory, the jurisdiction to make orders at the instance of and in favour of the opposing party gives rise to wholly different considerations for the advocate. The risk of such an application can, at best, only provide a distraction in the proper representation of his own client and, at worst, may cause him to put his own interests above those of his client. The construction of the section and the application of the jurisdiction should accordingly be no wider than is clearly required by the statute. Secondly, the fault must, in the present context, relate clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom he owes no duty. Thirdly, the terms used in subsection (7) should receive an appropriately restrictive interpretation in relation to advocates. The judgment in *Ridehalgh v Horsefield* [1994] Ch 205, 232 spelt this out. The use of the first two terms, *improper* and *unreasonable*, call for no further explanation. The word *negligent* raises additional problems of interpretation which are not material to the present appeal since the respondents' allegation against the appellants is impropriety not negligence. But it would appear that the inclusion of the word *negligent* in substitution for "reasonable competence", is directed primarily to the jurisdiction as between a legal representative and his own client. It is possible to visualise situations where the negligence of an advocate might justify the making of a wasted costs order which included both parties, such as where an advocate fails to turn up on an adjourned hearing so that a hearing date is lost. The breach of the advocate's duty to the court will be clear and if the breach was not deliberate, the term *negligent* would best describe it. For a person exercising a right to conduct litigation (i e a litigation agent) it is less difficult to think of apt examples affecting the other side as was the situation in *Myers v Elman* [1940] AC 282. The use of the same language in subsection (7) in relation to both categories of legal representative does not mean that it will have the same breadth of application for both categories. Fourthly, it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is: *Ridehalgh v Horsefield* [1994] Ch 205, 233–234. So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard; to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that

there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process. However it is relevant to bear in mind that, if a party is raising issues or is taking steps which have no reasonable prospect of success or are scandalous or an abuse of process, both the aggrieved party and the court have powers to remedy the situation by invoking summary remedies—striking out—summary judgment—peremptory orders etc. The making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort.

Practical consequences

57 The practical consequences of the wider use of the jurisdiction, particularly where the client's opponent is the applicant, were also commented upon in *Ridehalgh v Horsefield*. The first and most striking is that it creates satellite litigation which too easily gets out of proportion to the litigation which has spawned it. The present case provides an educational but far from extreme illustration. The principal trial was not wholly straightforward, involving successive amendments of the pleadings, questions of legal analysis and bitterly contradictory oral evidence but the trial judge was able to deliver his judgment at the end of the trial without having to reserve it. He held in favour of the existence of a partnership and ordered an account of profits. After various contested interlocutory applications both to the judge and to the Court of Appeal, the Court of Appeal, in March 2000, unanimously dismissed Mr Mardell's appeal, dismissing also his application to amend the notice of appeal and adduce fresh evidence. A month later the main action was settled. The wasted costs application has occupied the following two years with a further full hearing in the Court of Appeal and an appeal to your Lordships' House. If the policy of the wasted costs jurisdiction is to reduce the costs of litigation and to save court time, it too often fails to achieve this objective (as is confirmed by the Modern Law Review article already referred to). The jurisdiction is discretionary and should be reserved for those cases where the unjustifiable conduct can be demonstrated without recourse to disproportionate procedures. (See also *Harley v McDonald* [2001] 2 AC 678.) The jurisdiction does not exist as an end in itself; it is distinct from the professional disciplinary structures. The procedures appropriate for wasted costs applications were discussed in *Ridehalgh v Horsefield* [1994] Ch 205, 238–239.

58 Once the power to initiate wasted costs procedures is extended to the opposite party in the litigation, that party is provided with a weapon which it is too much to expect he will not on occasions attempt to use to his own advantage in unacceptable ways. It must not be used as a threat to intimidate the lawyers on the other side: *Ridehalgh v Horsefield*, at p 237, citing *Orchard v South Eastern Electricity Board* [1987] QB 565. It should not be motivated simply by resentment at an inability to obtain an effective order for costs against an assisted or impecunious litigant: *Ridehalgh v Horsefield*, at p 231, citing *Symphony Group plc v Hodgson* [1994] QB 179. Nor should it be used as a means of continuing contentious litigation by other means or to obtain from a party's lawyers what cannot be obtained from the party himself. The legitimate interest of an applicant for a wasted costs order is financial, a reduction in the costs he has to bear, but the

A application must be merits based and clearly made out; it must not raise a suspicion of being itself abusive.

59 A further consequence of exercising the jurisdiction on the application of an opposite party is that it raises questions of the legal professional privilege of the lawyer's client. The client very probably will have no interest in waiving the privilege. Indeed the client may stand to gain if his opponent can look to the client's lawyer for an indemnity rather than B to the client himself. This situation creates a serious problem which may lead to the emasculation of the wasted costs jurisdiction as between the opposing party and the advocate. The appellants argue that in cases such as the present it should do so: fairness requires that the privileged material should be before the court; if it cannot be, the application for wasted costs should fail. They submit that this argument must be conclusive.

C

Legal professional privilege

60 As already observed by my noble and learned friend, Lord Steyn, the nature and extent of legal professional privilege has not been in question on this appeal nor has it been the subject of any argument. Its absolute and paramount character has been accepted by the respondents, citing *R v Derby* D *Magistrates' Court, Ex p B* [1996] AC 487 and *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272. However, the need of a lawyer to be able to ask a court to look at privileged material when a lawyer's conduct is in question may not be so intractable. The material in question may be confidential rather than absolutely privileged: *Parry-Jones v Law Society* [1969] 1 Ch 1. It may be possible to restrict the use which can be made of the disclosed material so as to reduce or remove the infringement of the client's E privilege: see per Glidewell LJ in *R v Inland Revenue Comrs, Ex p Taylor (No 2)* [1989] 3 All ER 353, 361. It may be that partially inquisitorial procedures can be adopted, as in the inter partes taxation of costs. It should be remembered that the subject matter of the wasted costs application is an alleged breach of the lawyer's duty *to the court* and it is not unique that a lawyer may have to refer to privileged material in the context of explaining F himself to the court and defining his relationship to the court as, for example, when a litigation agent is applying to come off the record or a barrister is ceasing to represent an assisted defendant during the course of a criminal trial. It may be that, as in the context of articles 6 and 8 of the European Convention on Human Rights, the privilege may not always be absolute and a balancing exercise may sometimes be necessary: *Campbell v United Kingdom* (1992) 15 EHRR 137 and *Foxley v United Kingdom* G (2000) 31 EHRR 637. But on the present appeal it must be taken that the material which the appellants say is relevant may not directly or indirectly be made available to the court with the result that it is open to the appellants to argue that the Court of Appeal must have acted unfairly in making a wasted costs order against them.

61 The point was specifically considered in *Ridehalgh v Horsefield* H [1994] Ch 205, 237:

> "The privilege is not theirs to waive . . . So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice

may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. *Where there is room for doubt, the respondent lawyers are entitled to the benefit of it.* It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order." (Emphasis supplied.)

The answer given therefore was not to treat the existence of privileged material as an absolute bar to any claim by an opposite party for a wasted costs order but to require the court to take into account the possibility of the existence of such material and to give the lawyers the benefit of every reasonably conceivable doubt that it might raise. So, all that the lawyer has to do is to raise a doubt in the mind of the court whether there might not be privileged material which could affect its decision whether or not to make a wasted costs order and, if so, in what terms and the court must give the lawyer the benefit of that doubt in reaching its decision, including the exercise of its statutory discretion. I see nothing unfair about this approach. Further, if the use of the jurisdiction on the application of an opposite party is kept within the proper bounds, the frequency with which the problem arises of taking into account the existence of possibly relevant but unseen privileged material should be much reduced.

62 The contrary submission of the appellants on this appeal treats the existence of privileged material as a kind of trump card which will always preclude the making of a wasted costs order on the application of an opposite party. They ask how can a court evaluate whether privileged material which, ex hypothesi, it has not seen would affect its decision without first seeing that material. But this argument does not reflect what was said in *Ridehalgh v Horsefield*. Once the lawyer is given the benefit of any doubt, any element of unfairness is removed. It must depend upon the circumstances of each particular case. For example, a lawyer who has to ask for an extension of time or an adjournment because, say, he has forgotten about a time-limit or has accidentally left his papers at home, would not be able to say that any privileged material could possibly excuse his incompetent mistake. To make a wasted costs order against him would not (absent some additional factor) be inappropriate or unfair. In other situations privileged material may have a possible relevance and therefore require assumptions favourable to the lawyer to be made. Thus, in the present case it is assumed that in all respects the appellant barristers were acting on the express instructions of their lay clients although a finding of fact to that effect could only be made after the consideration of privileged material. The assumption removes the unfairness which might otherwise, in this respect, exist.

63 Therefore, for myself, I would not qualify what was said in *Ridehalgh v Horsefield*. But I agree that it may be salutary to remind parties that each case must depend upon its own facts and that the power to make an order is discretionary and material which could affect the exercise of that discretion is also relevant. I agree with my noble and learned friend, Lord Bingham of Cornhill, that the court must be satisfied before it makes the

A wasted costs order that there is nothing that the lawyer could say, if unconstrained, to resist the order and that it is in all the circumstances fair to make the order.

The present case

64 The facts leading up to the making by the Court of Appeal of the
B wasted costs order against the barristers are fully set out in the Court of Appeal judgments and have been summarised in the opinion of my noble and learned friend. The difference between the majority and the minority in the Court of Appeal was not in the test to be applied. All agreed that the barristers should be given the benefit of any doubt: see Peter Gibson LJ, [2001] Lloyd's Rep PN 146, 153, 157. The difference lay in the outcome of applying the test. Thus Peter Gibson LJ said, at p 158, on behalf of himself
C and Schiemann LJ:

> "Try though we might, we have not found it possible to conceive of any circumstances in which the barristers in putting their names to the particular allegations of impropriety in the draft amended notice of appeal and supporting them in their skeleton and at the hearing had relevant privileged or confidential material which justified their conduct
D as compliant with [paragraph] 606 but had been withheld from the court."

On the other hand, Wilson J said, at p 162:

> "I remain in doubt whether on 3 and 4 February the barristers were guilty of professional impropriety. It is doubt of which, pursuant to the same passage in *Ridehalgh v Horsefield*, they must have the benefit. It is
E better that in certain circumstances the wasted costs jurisdiction should be emasculated by the principle of legal professional privilege than vice versa."

65 With the one exception of the transcripts allegation, I agree that the preferable view is that the wasted costs order should not have been made.
F The complaint made on behalf of Mr Medcalf was that an application had been made to the Court of Appeal to allow the amendment of the notice of appeal and for the admission of fresh evidence which included allegations which could not properly be made. The application for a wasted costs order was based upon the draft amended notice and the accompanying skeleton argument. These documents were effectively simultaneous although dated one day apart (3 and 4 February 2000) and they were signed by the
G barristers. It was a consequence of these documents that additional time was taken up on the first two days (14 and 15 February) at the hearing of the appeal but there was not any additional waste of time caused by counsel taking excessive time to argue Mr Mardell's case. All the relevant points upon which the applications to amend and admit fresh evidence were based were hopeless and were roundly rejected by the Court of Appeal both at the time and in their unanimous written judgment dismissing the appeal. With
H the one exception already mentioned, I would put these points into the category of arguing a hopeless case. How they would ever persuade the Court of Appeal to allow the appeal and reverse the judge's judgment escapes me. They related to peripheral matters and, although the credibility of Mr Medcalf was central to the judge's decision and the attempt to upset it

on appeal, they could not be thought sufficient, nor were they all novel. Speaking for myself, I would put these points into the category, not of impropriety, but of counsel discharging their duty to present even a hopeless case if instructed to do so, in which case no question of making a wasted costs order against them should have arisen. It must be remembered that the good faith of the barristers and their consciousness of the rules of their profession are not challenged nor is their statement that they acted upon their clients' express instructions. If it is considered that the barristers' inclusion of these points was improper, I would not arrive at that conclusion without feeling doubts which I would not wish to resolve without knowledge of the surrounding circumstances and the privileged material covering the relationship between the advocates and their client. I do not believe that in these circumstances it would be fair to exercise the discretion against the appellants.

The transcripts allegation

66 This allegation was included in ground 45 of the proposed amendments to the notice of appeal. It was in the following terms:

> "The first and fourth defendants have fresh evidence that since the trial there has been interference with the official transcript of the trial. The first and fourth defendants have caused a second set of transcripts to be prepared by different transcribers. The first set of transcripts contain alterations, deletions, interpolations, and false certifications tending to the detriment of the first and fourth defendants' already disclosed grounds of appeal and attempting to buttress the learned judge's judgment, obscure perjured testimony and prevent the discovery of additional substantive grounds of appeal. The said interference casts such fundamental doubt upon the integrity of the plaintiff and the process of the court in this case that a new trial should be ordered ex debito justitiae."

This is an allegation of serious fraud and conspiracy involving not only Mr Medcalf but also the official court transcribers and, presumably, the plaintiffs' solicitors. The accompanying skeleton argument in 12 paragraphs identified the evidential material relied on, going back to the previous summer.

67 There are three important features which are essential to the proper evaluation of the allegation made in the proposed ground 45. The appellants' argument failed to have any regard to them and the same could fairly be said of the dissenting judgment of Wilson J.

68 The first and most important is that the allegation was made as part of and was dependant upon a *Ladd v Marshall* [1954] 1 WLR 1489 application to admit fresh evidence in the Court of Appeal on appeal from a final judgment. The applicant has to identify and place before the Court of Appeal in documentary form the fresh evidence the subject of the application. The fresh evidence to support the relevant ground of appeal has thus to be fully disclosed. There is no room for the applicant to say that if you grant my application to adduce the fresh evidence then there is other evidence not adduced at the trial and not included in my application upon which I will also want to rely. The application is exhaustive of the opportunity to adduce fresh evidence in the Court of Appeal. In any event,

A the position was put beyond argument by an order of Clarke LJ on 28 January directing that any evidence to be relied on should be served by 4 February. The evidence placed before the Court of Appeal on behalf of Mr Mardell was the only evidence upon which Mr Mardell could rely in support of ground 45 and upon which the advocates could rely as justifying the allegation in ground 45 in compliance with paragraph 606 of the Code of Conduct.

B **69** There has been a discussion whether paragraph 606 is satisfied by an expectation of obtaining admissible evidence which has not yet been obtained. I do not wish to enter upon this discussion save to say that it is misconceived: the emphasis should be upon whether the existing material discloses a prima facie case, which is a concept well understood in many areas of procedural law, not least in the criminal law. The question which C the advocate must ask is: is there a prima facie case of the fraud which I am going to allege? It is important not in any way to devalue the important principle encapsulated in paragraph 606. But, in any event the "expectation" excuse cannot, and could not on any hypothesis, assist the appellants here. At the early stages of litigation, before the close of pleadings, some of the relevant evidence supporting an allegation may not yet have been put into a form which can actually be used at the trial; D discovery may yet have to take place but a party may know what documents will have to be produced on discovery. At the stage of trial, evidence which has not been given and the advocate cannot adduce cannot be relied upon to justify an allegation. After trial and judgment, the situation is even more clear cut. Only evidence already adduced in the action or for which leave to adduce is given by the Court of Appeal under *Ladd v Marshall* [1954] 1 WLR E 1489 can be relied upon as justification. This was the position here in relation to ground 45. Ground 45 and the accompanying skeleton argument made allegations which came within the scope of paragraph 606 and clearly should have been (and the barristers say it was) seen as engaging the professional responsibility of an advocate to the court. Since the allegations related to matters occurring after trial and judgment, the principle in *Ladd v* F *Marshall* was inevitably critical to the ability to sustain the allegation. A specific application to admit fresh evidence had to be made. The allegation had to be made on the evidence which Mr Mardell as the appellant was asking the Court of Appeal to admit. If that evidence did not disclose even a prima facie case against Mr Medcalf, it follows that a breach of paragraph 606 and the advocates' duty to the court occurred.

70 The second feature is partly a consequence of the first. It is not G possible to make a *Ladd v Marshall* application without waiving any privilege in the material which is the subject of the application. Ground 45 starts with the words "the . . . defendants have fresh evidence that since the trial there has been interference with the official transcripts of the trial". They cannot at the same time claim any privilege against disclosing what that evidence is. The suggestion that there was material capable of justifying the allegation which Mr Mardell could rely on without waiving any privilege H and disclosing the material to the opposite side and the court is patently unsustainable.

71 The third feature is peculiar to the present case. The allegation of fraudulent interference with the transcript had been unsuccessfully relied upon by junior counsel for Mr Mardell on previous occasions using the same

material. In particular, on 2 December, she applied to Lloyd J for an order that proceedings on the account should be stayed and the police should be directed to investigate the transcript question as an attempt to pervert the course of justice. The judge dismissed the applications and refused leave to appeal. The reaction of the Court of Appeal on the hearing of the substantive appeal should have come as no surprise to the barristers. It was entirely in line with what had been said by the judge earlier. There was no evidence whatever that Mr Medcalf or anyone acting for him had anything to do with the defective transcripts. The evidence disclosed regrettably familiar deficiencies in the system whereby mechanical recordings and transcripts are made in the Royal Courts of Justice in London. The primary tape is in the court-room where the trial is taking place and depends upon a court official each day keeping a log of the proceedings and switching the tape on and off at the right times. The tape recording should be of a reasonably good quality but the transcriber, who has no independent knowledge of the proceedings, is entirely dependant upon what the court officials have done. (The court officials may indeed have had to look after several courts at the same time.) What happened in the present case was that the court officials did not keep a complete log and did not always switch on or off the tape recorder at the times they should. Also, at times the voice on the tape was not clear. All this was confirmed by the investigations carried out and the statements and affidavits lodged. In the Royal Courts of Justice there is also a back-up multitrack tape which runs throughout the working day covering all courts. Inevitably its quality is not as good as the primary tape. A transcript is not made unless asked for. The transcript will normally be made by one of the Lord Chancellor's Department contractors from the daily court-room tapes if available. This was what was done initially in the present case. When the defects in the first transcript and, hence, in the tapes from the court room were discovered and the solicitors complained, the senior contractors were called in and a further complete transcript was made using both types of tape. This is the second transcript to which ground 45 refers and which those representing Mr Mardell consider to be satisfactory.

72 It was an unhappy incident but it was fully explored and explained in the evidence which was put before the Court of Appeal. In my judgment no competent and reasonably experienced advocate or litigator should have seen anything remotely sinister about it let alone treat it as evidence of a conspiracy to pervert the course of justice. As previously stated, there was nothing to implicate Mr Medcalf or any one acting for him in any wrong doing in this connection whatever. It disclosed no prima facie case against him. Yet the advocates put their signature to ground 45 and to the supporting skeleton argument.

73 In my judgment this was just the type of situation paragraph 606 was designed to prevent. Unjustifiable allegations of fraud have been made. Like Peter Gibson LJ and Schiemann LJ, I cannot conceive of any privileged material which could possibly make any difference to the culpability of making this irresponsible allegation or justify it. The allegation is on its face implausible and suggests an abandonment of the objectivity and sense of proportion which a court is entitled to require of an advocate. Further it was the duty of the advocate to put before the court on the *Ladd v Marshall* application the material which was said to justify the allegation. If the

material was not reasonably capable of justifying it, even on a prima facie basis, the allegation should not have been made.

74 Therefore I would for myself only allow the appeal in part. But your Lordships consider otherwise and would allow the appeal wholly. Since matters of discretion are involved and since I do not feel confident that, if the transcript allegation had stood alone, the Court of Appeal would still have thought that a wasted costs order was appropriate, or at least felt no doubt about it, I will with reluctance concur in the order proposed. Subject to what I have said in this opinion, I agree with what has been said by my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn; I also agree with what the former has said in paragraph 28 of his opinion.

LORD RODGER OF EARLSFERRY

75 My Lords, I have had the advantage of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, in draft. I agree with them and, for the reasons they give, I too would allow the appeal.

76 Like my noble and learned friend, Lord Hobhouse of Woodborough, I was much troubled by the allegation, in ground 45 of the proposed amendments to the notice of appeal, of fraudulent interference with the transcript. None the less, the appellants have not been able to tell their side of the story. A court making a wasted costs order under section 51 of the Supreme Court Act 1981 exercises a discretion. All kinds of mitigatory circumstances may be relevant to the exercise of that discretion. In my view, therefore, it was wrong for the Court of Appeal to make an order against the appellants in a situation where the full facts about the circumstances in which the appellants had been instructed and had prepared the relevant documents were not known and where the appellants were prevented from putting them before the court.

77 The majority of the Court of Appeal held that the appellants' conduct, in drafting the amended notice of appeal on 3 February 2000 and in preparing the skeleton arguments the following day, had been "improper" in terms of section 51(7)(a). That decision was based on the view that their conduct on those dates was governed by paragraph 606 of the Code of Conduct of the Bar of England and Wales, 6th ed (1998). Paragraph 606 provides that, before making any allegation of fraud, counsel should have before him "reasonably credible material which as it stands establishes a prima facie case of fraud". The majority held that, in terms of the rule, the "material" had to be "evidence which can be put before the court to make good the allegation": [2001] Lloyd's Rep PN 146, 154, para 40 per Peter Gibson LJ. Since it was clear from what happened subsequently that no such evidence had been available to counsel on 3 and 4 February, the majority held that counsel had breached the rule in paragraph 606.

78 The interpretation of the paragraph 606 that the majority adopted is, perhaps, not surprising since the rule of professional conduct was formerly understood to be to that effect. For instance, in *Associated Leisure Ltd (Phonographic Equipment Co Ltd) v Associate Newspapers Ltd* [1970] 2 QB 450, 456E–F Lord Denning MR indicated his understanding that the duty of counsel was not to put a charge of fraud on the record "unless he has clear and sufficient evidence to support it". The passage is cited in *Bullen & Leake & Jacob's Precedents of Pleadings*, 13th ed (1990), p 428. The same

approach is to be found in the extrajudicial remark of Lord Macmillan that, where a person's reputation is at stake, the pleader should not "trespass . . . a hair's breadth beyond what the facts as laid before him and duly vouched and tested will justify": "The Ethics of Advocacy" in *Law and Other Things* (1937), p 192, approved in *Oldfield v Keogh* (1941) 41 SR (NSW) 206, 211 per Jordan CJ.

79 But the current rule is that stated in paragraph 606. Wilson J held that the term "material" in paragraph 606 went wider than evidence in proper form: [2001] Lloyd's Rep (PN) 146, 161 para 80. The paragraph states a rule of professional conduct rather than a rule of law, but I agree with his interpretation of it. The current rule of conduct is slightly less strict than the rule as at one time understood. While, usually, the material before counsel will comprise evidence in an admissible form, something less can satisfy the requirements of the current rule, provided that it establishes a prima facie case of fraud. A report of an official inquiry, or accurate reports of evidence given in a civil or criminal trial, are examples that come to mind. A professional rule that permits counsel to draft pleadings on such a basis, before the actual evidence is to hand, achieves a sensible balance: it gives due protection to defendants, while not putting unnecessary obstacles in the way of claimants and their counsel raising proceedings promptly. So interpreting the rule, I am unable to infer from the circumstances that the appellants were necessarily in breach of it on 3 or 4 February 2000.

Appeal allowed with costs.

Solicitors: Clyde & Co; Gordon Dadds.

S H

Appeal No. UKEAT/0541/07/MAA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 19 February 2008
Judgment handed down on 8 April 2008

Before

HIS HONOUR JUDGE BURKE QC

MR P SMITH

MR S YEBOAH

MITCHELLS SOLICITORS - In a Matter of Costs Order — APPELLANT

FUNKWERK INFORMATION TECHNOLOGIES YORK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR P CHAPMAN (Solicitor) Messrs Mitchells Solicitors 2 Peckitt Street Clifford Street York YO1 9SF
For the Respondent	MS N TWINE (of Counsel) Instructed by: Messrs Raworths LLP Solicitors Eaton House 89 Station Road Harrogate N Yorkshire HG1 1HF

SUMMARY

PRACTICE AND PROCEDURE: Costs

After the Claimant's discrimination claim failed the Respondents sought an order for costs against her or a wasted costs order against her solicitors for pursuing a hopeless case *ab initio* after the third day when the hopelessness was manifest. The Tribunal rejected the application for costs against the Claimant but made a wasted costs order against the solicitors on the basis that they ought to have advised her after Day 3 and before the hearing resumed 6 weeks later that her case would fail. On the solicitors' appeal

Held:

(i) The Tribunal were not referred to the guidance in **Ridehalgh v Horsefield** (CA) and **Medcalf v Weatherill** (HL) or even to the summary in *Harvey*.

(ii) The Tribunal erred in principle in not applying that guidance and in

(a) failing to consider whether the pursuing of a hopeless case was not only very negligent but amounted to an abuse of the Court.

(b) failing to consider whether the solicitor between the 3rd and 4th days made any assessment of the merits, and if so what it was and how he reached it.

(c) failing to consider whether the solicitors' failure had caused the costs of the 4th and 5th days i.e. whether, if advised, the Claimant would have withdrawn

(iii) Therefore appeal allowed; the parties not seeking a remission, wasted costs application dismissed.

HIS HONOUR JUDGE BURKE QC

The Nature of the Appeal

1. In this appeal Mitchells Solicitors challenge a wasted costs order made by the Employment Tribunal sitting at Leeds, chaired by Employment Judge Hildebrand and sent to the parties with written reasons on 3 July 2007. Mr David Scott, a partner in Mitchells, had before that Tribunal represented the Claimant, Mrs Wright, who had brought claims against her employers, the Respondent, of sex discrimination and unfair dismissal. The trial of those claims took place over five days, the first three days on 3 to 5 October and the last two days on 21/22 November 2006. By their reserved judgment sent to the parties on 18 December 2006 the Tribunal dismissed all of those claims. The Respondent subsequently sought a wasted costs order against Mitchells and a costs order against Mrs Wright.

2. At a case management discussion for the purposes of those costs applications on 26 February 2007 the Tribunal made various orders for the substantive hearing of those costs applications.

3. On 3 July 2007 the Tribunal dismissed the costs application against Mrs Wright but ordered Mitchells to pay to the Respondent as wasted costs the sum of £3,325, £2,125 of which consisted of the Respondent's solicitors and counsel's fees for the two hearing days in November 2006 and £900 of which consisted of such costs for the day on which the wasted costs application itself was heard.

4. There is no challenge to the quantification of the wasted costs order if the Tribunal were correct in law to make it. Mitchells contend by this appeal that the Tribunal's making of that order was in error of law; the Respondent contends the opposite. Mitchells have before us

been represented by Mr Chapman, a senior partner. The Respondent has been represented by Miss Twine of Counsel, who has appeared for it at all stages. We are grateful to both of them for their helpful submissions.

5. Mrs Wright has not been represented on this appeal or even formally joined as a party to it. Mitchells continue to act for her; for reasons to which we will come she has nothing to gain by or lose as a result of this appeal.

The Facts

6. It is not necessary to consider the facts in great detail. Mrs Wright is a graduate in electrical engineering and was employed as such by the Respondent from 6 October 2003. Difficulties arose from an early stage of her employment; concerns over her competence were expressed within the Respondent and from a major client. In January 2006 Mrs Wright was informed that, in the absence of any alternative resolution, disciplinary proceedings (relating to capability and not misconduct, we should make clear) would be commenced. Mrs Wright alleged harassment and victimisation (but, at that stage, not on the grounds of sex discrimination) and presented a grievance. Before either a disciplinary hearing or a grievance hearing took place, she resigned on 14 February 2006. She claimed that she had been constructively dismissed; central to that claim was her case that the allegations relating to her capability were without substance and trumped up. She particularised five specific acts of sex discrimination.

7. The Tribunal rejected the sex discrimination claim on two bases; firstly, they found that all the five alleged discriminatory acts had occurred well before the period of three months prior to the presentation of the claim and were out of time. No suggestion had been made that it

was just and equitable to extend time. Secondly, they found in any event that the allegations were without substance and that there was no preferential or differential treatment.

8. As to the unfair dismissal claim, to which it seems at the stage of final submissions Mr Scott on behalf of Mrs Wright had added an unpleaded claim of direct discrimination, the Tribunal found that the central core of Mrs Wright's case was unsustainable in view of the voluminous documentation which evidenced the history of serious concerns about her competence going back to 2004, and that Mrs Wright resigned because she was not prepared to face imminent disciplinary action.

9. In their costs judgment, the subject of the present appeal, the Tribunal said that the allegation that the concerns about Mrs Wright's competence were trumped up was wholly unfounded and unsupported; and it is clear from their liability judgment that that was their conclusion, albeit not expressed in those words.

10. The Tribunal, constituted of course as before, heard the costs applications some six months or so after their reserved judgment on the merits of Mrs Wright's claims. They decided, first, at paragraph 6, that an order for costs should not be made against Mrs Wright in circumstances in which she had received advice throughout from her representative. They said in that paragraph:

> **"6. The Tribunal carefully considered the Respondent's submissions, but concluded that it would be inappropriate to exercise the discretion against the Claimant in circumstances where the Claimant received advice throughout from her representative. It was clear that the Claimant had not received advice regarding the weakness of the case, but merely that the outcome would depend on what the Tribunal believed. She was never advised that it might be sensible to withdraw from the case."**

and continued as follows at paragraphs 7 and 8:

> **"7. The advice on the merits of the claim which the Claimant had received was that in September, shortly before the Hearing, the Claimant was advised she stood between a 50 and**

55% chance of success. Earlier the Claimant had been informed in February 2006 that she stood a 55-60% chance of success. Even if the claim technically comes within the statutory definition of "misconceived" on the grounds that it had no reasonable prospect of success, the Tribunal was satisfied that this Claimant held a strong conviction that the claim stood a prospect of success in accordance with the advice which she received from her Solicitor. That advice seems to have had no detailed basis in the factual analysis of the respective allegations in the claim, and it is difficult to see how the Claimant could have been called upon to interrogate her Solicitor further regarding the basis on which he made that assessment of her prospects of success.

8. Accordingly, we did not find that the Claimant acted unreasonably in her conduct of the proceedings."

11. The Respondent, as is clear from paragraph 9 of the Tribunal's judgment, put its wasted costs application on the basis that Mrs Wright's claims never had any prospect of success; but it alternatively submitted that, after Mrs Wright had given evidence, it was clear that she could not win, that on four occasions it told Mr Scott that, if Mrs Wright withdrew, it would not pursue a costs application against her - with the implication, of course that if she did not it would pursue such an application - and that, nevertheless the claims proceeded to the end of evidence and submissions over the two days in November.

12. The Tribunal's reasons for making the wasted costs order against Mitchells are set out quite shortly at paragraphs 11 – 16 of their judgment. It is simpler and perhaps wiser to set them out than to attempt to summarise them. They are as follows:

"11. The Tribunal's analysis of the conduct of the case was that the Claimant's statement was rambling and unfocussed and far longer than it need have been if properly drafted. The effect of this was that the cross–examination of the Claimant and the preliminary reading took the first two days of the Hearing. One of the Respondent's witnesses was dealt with on the third day, and that concluded the Hearings of the 3rd, 4th and 5th October 2006. The Hearing resumed on 21st and 22nd November 2006, with the final witness being taken on 22 November 2006 and the submissions concluding at 4 pm on that day. The Tribunal deliberated on the final day, 23 November, and reached its conclusion.

12. Our analysis of the case was that although often discrimination cases turn on the way in which particular witnesses give evidence, the Claimant's evidence in this case had a strangely disengaged approach to the serious issues faced. It may be that the Claimant's representative should have been aware that the evidence would be given in this way in advance of the first set of Hearings because of the deficiencies in the preparation of the witness statement and the failure to focus the case on potentially successful claims of sex discrimination and the Claimant's unfair constructive dismissal case. The first set of Hearings was occupied with the Claimant's case and one Respondent's witness. Whatever could be said prior to the first set of hearings, it was certainly clear by the time the Claimant's evidence had been completed and Mr Davies had been heard for the Respondent that the Claimant's prospects of succeeding in this case were extremely limited. To have allowed the Claimant to proceed in those circumstances without making clear to the Claimant the fact that any realistic assessment of her chances put them well below the figures previously quoted

amounted to conduct on the part of the Claimant's representative leading this Tribunal with no alternative but to make a wasted costs order.

13. We appreciate the importance attached by the Appellate Courts to representation being available to allow Claimants to pursue claims in the field of discrimination. In addition, therefore, to any natural reluctance to make a wasted costs order, given the very serious finding on which such an Order must be based, there is in the context of a discrimination case an additional component imposing on us a duty to consider very carefully whether such an Order might discourage a representative such as Mr Scott from pursuing cases in discrimination when other representatives might not be available.

14. Having said that, we did not consider that it would be appropriate to make an Order against the Claimant's representative in respect of the costs incurred in the first three days of the Hearing. While it may be that Mr Scott acted improperly, unreasonably or negligently in allowing the case to proceed to Hearing, we accept that it would be reasonable for him to allow the Claimant to give her evidence in-chief and put forward her view of the facts and her case that it was sex discrimination which she experienced. However, once the Claimant had completed her evidence and Mr Davies had given his evidence, any competent advisor would have been obliged to point out to the Claimant the fact that after her case had been heard and her evidence had been challenged there was very little factual basis on which a Tribunal was likely to find a case of sex discrimination or constructive dismissal in her favour.

15. There is nothing to suggest that, despite a significant number of costs warnings on the part of the Respondent, Mr Scott gave the Claimant anything approaching a critical analysis of the strengths and weaknesses of her case after the first set of Hearings was concluded. It therefore follows that the Respondent in this case was put to the cost of the second set of Hearings without any true need for that work to be undertaken.

16. In those circumstances, we consider that a wasted costs order against the Claimant's representative is amply justified in this case. We computed the amount thereof on the basis that there were two brief refreshers at £650 and 12 hours of Solicitor's work, that is £1,125 - a total of £2,425. We also considered it right that the Claimant's representative should pay the costs of the Hearing today incurred by the Respondent in the sum of a further £650 refresher for Counsel and £250 Solicitor's costs - a total of £900."

13. Those reasons can be distilled into one simple conclusion, that by the end of the third day, when the hearings were adjourned to late November, Mr Scott as a competent solicitor should have told Mrs Wright that her case was now very likely to fail; he had not done so; as a result the costs of the two days in November were wasted. The nub is to be found in the last sentence of paragraph 14 and in paragraph 15.

Submissions

14. Mr Chapman's submissions, put we hope without disservice into summary form, were:

(1) The Court of Appeal in **Ridehalgh v Horsefield** [1994] 3 AER 848 gave guidance as to the correct approach to wasted costs applications, which guidance was adopted by

the House of Lords in **Medcalf v Weatherill** [2002] 3 WLR 172. In so far as relevant to this appeal that guidance was that:

i. The wasted costs jurisdiction should only be exercised with great caution and as a last resort.

ii. A wasted costs order should be made only if the court or tribunal is satisfied that the conduct of the impugned representative was properly to be characterised as improper, unreasonable or negligent; see, so far as Employment Tribunals are concerned, rule 48(3)(a) of Schedule 1 to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**.

iii. A legal representative, solicitor or counsel, should not be held to have acted improperly, unreasonably or negligently simply because he acts on behalf of a party who pursues a hopeless case.

iv. The Tribunal can only make a wasted costs order in such a case if it is shown (i) that the legal representative has presented a case which he regards as bound to fail; and (ii) that, in so doing, he has failed in his duty to the court and that the proceedings amount to an abuse of the process.

v. The Tribunal, must in deciding whether to make a wasted costs order, take into account that, unless the legal representative's lay client waives privilege, the cloak of confidence between client and legal representative is likely to prevent that representative from being able to explain why he has pursued his client's case as he has.

vi. It must be shown that the conduct of which complaint is made caused the applicant to incur unnecessary costs.

vii. The court or tribunal must exercise a discretion at two stages; it must first consider whether the merits and circumstances of the application render the application justified and proportionate; if it exercises its discretion in favour of the complaint proceeding at that first stage, the application will proceed to a hearing at which the court or tribunal has to exercise a further discretion if the central prerequisites for an order are made out, as to whether to make an order or not.

(2) The Tribunal failed to comply with that guidance and therefore erred in law in the following respects:

i. There had been no waiver of privilege. Any waiver was given only under unfair pressure from the Tribunal; the Tribunal had not borne in mind the guidance as to the difficulties of making a wasted costs order in those circumstances.

ii. The Tribunal had not found that Mr Scott had failed in his duty to the court or lent himself to an abuse of process.

iii. The Tribunal had not considered or made findings as to Mr Scott's assessment of the merits of Mrs Wright's case at the time when, as they held, he had failed to advise her as to those merits.

iv. The Tribunal had not made findings as to causation; had Mrs Wright been given advice as to the merits before the resumed hearings in November it was highly likely that she would have insisted on continuing, either with or without her solicitors.

v. The Tribunal had not exercised a discretion at either of the two stages set out in **Ridehalgh**; the first stage was omitted altogether; at the second stage the

Tribunal directed themselves at paragraph 12 of their Judgment that they had no alternative but to make a wasted costs order.

vi. The Tribunal failed to consider that there had been no or no sustained attempt to strike out the claims or seek payment of a preliminary deposit on the basis of an absence of merit.

15. Miss Twine on behalf of the Respondent did not seek to challenge the content or force of the guidance provided by **Ridehalgh** and **Medcalf**, nor indeed could she have done so. Her submissions, similarly summarised, were:

(1) There had been a full waiver of privilege; the guidance as to the correct approach where there had been no such waiver was of no relevance.

(2) Where there was more than the pursuing of a hopeless case, for example – as on the Tribunal's findings in the present case - where there had also been a failure to assess and advise as to that hopelessness, it was not necessary for the Tribunal to go further and find an abuse of the process; alternatively on the findings of fact there was such an abuse and the Tribunal should have be taken so to have found.

(3) The Tribunal's judgments demonstrated that they had found Mr Scott to have appreciated that the merits were, after the first three days of the hearing, greatly reduced, to the extent that the hearing should not have continued.

(4) It was implied from the Tribunal's findings, in particular at paragraph 6, that they had concluded that, had Mrs Wright been given appropriate advice, she would not have persisted; she or Mr Scott had been given costs warnings by the Respondent four times; she would not have risked continuing.

(5) As to the first of the two stages at which a discretion could have been exercised, there had been case management discussion, to which we have referred, at which the

Tribunal considered whether the application for a wasted costs order was out of time and, having decided that it was not, gave directions for the hearing of the application. No point that the Tribunal should have specifically considered whether the application was merited was raised by Mr Scott on that occasion; that hearing was conducted on the basis that, subject to the time point, there would be a full hearing of the application.

(6) There had been an application to strike out or for a deposit to be paid at the outset before Mrs Wright's claims were properly particularised. Thereafter it was not appropriate to make such an application. The wasted costs order in any event applied only to the last two days of the five day hearing.

Discussion and Conclusions

Mrs Wright

16. We should make it clear at the outset of our conclusions that the results of this appeal have no effect, one way or the other, on Mrs Wright's position. Although the Respondent sought a costs order against her and against her solicitors, they failed to obtain an order against her; and they have not sought to challenge the Tribunal's decision as to costs in her favour. If the wasted costs order were now to be set aside, the Respondent cannot revive its application for costs against Mrs Wright. That is why there has been no reason to involve her in this appeal.

Privilege

17. It emerged at an early stage of the hearing of this appeal that there was a dispute between Mr Chapman, who was not present at the Costs hearing, and Miss Twine, who was present but candidly accepted that her memory of it was limited, as to what happened before the Tribunal in

relation to privilege. Mr Chapman told us, on information from Mr Scott, that Mrs Wright gave evidence to the Tribunal; he said that, when she was asked by the Tribunal about the advice Mr Scott had given to her, Mr Scott objected on the grounds of privilege. The Tribunal made comments which had the effect of causing Mr Scott to go outside, talk to Mrs Wright and then return to the Tribunal, feeling under compulsion to advise Mrs Wright that questions about the advice she had received should be answered. Miss Twine's account was that Mrs Wright did not give evidence, but Mr Scott on her behalf, without giving evidence, told the Tribunal, as Mrs Wright's advocate, what had happened; when the issue of advice arose, Mr Scott asked for an adjournment and then returned to the Tribunal and indicated that Mrs Wright had waived her privilege. The waiver was entirely voluntary.

18. We can understand, on the one hand, that Mr Scott might well have felt under pressure to advise Mrs Wright to waive privilege, not necessarily at the hands of the Tribunal but from the situation that he and Mrs Wright were in. If she did not waive privilege she might have been at greater risk of a costs order against herself. On the other hand, the waiver of privilege, in the light of what is said by Lord Bingham in **Ridehalgh** at page 866 (c) to (e) and in **Medcalf** at paragraphs 23/4, involved risks to Mr Scott which would have been substantially smaller if privilege had been maintained. Where a costs order is sought against a litigant and a wasted costs order is sought against that litigant's legal representative – especially if both applications are heard together – there is inevitably a very real tension and a substantial difficulty for both targets as to how the litigant's entitlement to privilege should be appropriately handled. It is at least possible that Mr Scott's sense that he was under compulsion arose from that tension rather than from anything said or done by the Tribunal. It might well, with hindsight, have been wiser if, as **Ridehalgh** suggests should be considered in such a situation, Mrs Wright had been steered in the direction of independent advice and representation.

19. However, there are, on what we have been told by the parties, issues of fact between the recollections of Mr Scott, as given to Mr Chapman, and of Miss Twine; the Tribunal have not been asked for their recollection of what happened in relation to privilege or for their comments on the suggestion that, somehow, they obliged Mr Scott to allow questions to be asked the answer to which would otherwise be subject to privilege. These issues could only be resolved by seeking from the Tribunal answers to a series of carefully drafted questions; yet the delay and expense which that course would cause could hardly be proportionate.

20. In these circumstances we invited both parties, who – and we shall return to this later – were anxious that we should decide without any further delay or cost whether the wasted costs order made by the Tribunal should survive or fall, to put the issues as to privilege on one side and to proceed to reach decisions upon the other grounds of the appeal, reserving to ourselves and to the parties the right to return to the privilege issues if it became necessary to do so. For reasons which will appear, it will not be necessary to return to those issues.

The Authorities

21. The principal authorities in the wasted costs jurisdiction are **Ridehalgh** and **Medcalf**. In the former the Court of Appeal gave important general guidance as to the way in which that jurisdiction should be exercised and dealt with six appeals in actions of various types in which wasted costs orders had been made. It is common ground that the resolution of those six specific appeals is not of assistance for present purposes; as to the general guidance, we have already summarised above the propositions on which Mr Chapman based his argument; they were not disputed; and we will, therefore, not refer to the judgment of the Court of Appeal given by Lord Bingham in full detail. We will refer to some specific aspects of that guidance below. In **Medcalf** that guidance was adopted and, in some particular respects, particularly in

relation to privilege and to wasted costs applications where what is alleged against a legal representative is that he has pursued a hopeless case, enlarged.

22. This was, of course, as both parties accepted before us, a case in which the fall-back allegation against Mr Scott, which succeeded, was that he had failed to advise Mrs Wright of the true merits of her case during the break between the third and fourth days of the hearing and had continued to pursue her case when it was hopeless. We ought, therefore, to set out the guidance for such cases given in **Ridehalgh** at page 863:

> "*Pursuing a hopeless case*
>
> **A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v Worsely* [1967] 3 All ER 993 at 1029, [1969] 1 AC 191 at 275:**
>
> > **'It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, or representatives or advisers for the latter.'**
>
> **As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of the Code of Conduct of the Bar of England and Wales provides:**
>
> > **'A barrister in independent practice must comply with the "Cab-rank rule" and accordingly except only as otherwise provided in paragraphs 501, 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which he may have formed as to the character reputation cause conduct guilt or innocence of that person.'**
>
> **As is well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not for the lawyers to judge it.**
>
> **It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely**

easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

23. In Medcalf Lord Steyn said at paragraph 42:

> **"I cannot accept the view of the majority. The law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried."**

24. Hobhouse LJ said at paragraphs 51 to 53:

> **"51. The starting point must be a recognition of the role of the advocate in our system of justice. It is fundamental to a just and fair judicial system that there be available to a litigant (criminal or civil), in substantial cases, competent and independent legal representation. The duty of the advocate is with proper competence to represent his lay client and promote and protect fearlessly and by all proper and lawful means his lay client's best interests. This is a duty which the advocate owes to his client but it is also in the public interest that the duty should be performed. The judicial system exists to administer justice and it is integral to such a system that it provide within a society a means by which rights, obligations and liabilities can be recognised and given effect in accordance with the law and disputes be justly (and efficiently) resolved. The role of the independent professional advocate is central to achieving this outcome, particularly where the judicial system uses adversarial procedures.**
>
> **52. It follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively. In England the professional rule that a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.**
>
> **53. Thus the advocate owes no duty to his client's opponent; inevitably, the proper discharge by the advocate of his duty to his own client will more often than not be disadvantageous to the interests of his client's opponent. (*Orchard v S E Electricity Bd* [1987] QB 565, 571). At times, the proper discharge by the advocate of his duties to his client will be liable to bring him into conflict with the court. This does not alter the duty of the advocate. It may require more courage to represent a client in the face of a hostile court but the advocate must still be prepared to act fearlessly. It is part of the duty of an advocate, where necessary, appropriately to protect his client from the court as well as from the opposing party. Similarly, the advocate acting in good faith is entitled to protection from outside pressures for what he does as an advocate. Thus, what the advocate says in the course of the legal proceedings is privileged and he cannot be sued for defamation. For similar reasons the others involved in the proceedings (e.g. the judge, the witness) have a similar immunity."**

And then he continued at paragraph 56:

> **"56. In my judgment, the jurisdiction must be approached with considerable caution and the relevant provisions of s.51 construed and applied so as not to impinge upon the constitutional position of the advocate and the contribution he is required to make on behalf of his client in the administration of civil justice. The judgment in *Ridehalgh* referred to most of the relevant points.**

First, from the point of view of the advocate the jurisdiction is penal. It involves making a finding of fault against the advocate and visiting upon him a financial sanction. Unlike the position between the advocate and his own client where the potential for liability will encourage the performance of the advocate's duty to his client (see *Arthur Hall v Simons, sup*) and the order would be truly compensatory, the jurisdiction to make orders at the instance of and in favour of the opposing party gives rise to wholly different considerations for the advocate. The risk of such an application can, at best, only provide a distraction in the proper representation of his own client and, at worst, may cause him to put his own interests above those of his client. The construction of the section and the application of the jurisdiction should accordingly be no wider than is clearly required by the statute.

Secondly, the fault must, in the present context, relate clearly to a fault in relation to the advocate's duty to the court not in relation to the opposing party, to whom he owes no duty.

Thirdly, the terms used in subsection (7) should receive an appropriately restrictive interpretation in relation to advocates. The judgment in *Ridehalgh* spelled this out at p.232 of the report. The use of the first two terms, *improper* and *unreasonable*, call for no further explanation. The word *negligent* raises additional problems of interpretation which are not material to the present appeal since the respondents' allegation against the appellants is impropriety not negligence. But it would appear that the inclusion of the word *negligent* in substitution for "reasonable competence", is directed primarily to the jurisdiction as between a legal representative and his own client. It is possible to visualise situations where the negligence of an advocate might justify the making of a wasted costs order which included both parties, such as where an advocate fails to turn up on an adjourned hearing so that a hearing date is lost. The breach of the advocate's duty to the court will be clear and if the breach was not deliberate, the term *negligent* would best describe it. For a person exercising a right o conduct litigation (ie a litigation agent) it is less difficult to think of apt examples affecting the other side as was the situation in *Myers v Elman* [1940] AC 282. The use of the same language in subsection (7) in relation to both categories of legal representative does not mean that it will have the same breadth application for both categories.

Fourthly, it is the duty of the advocate to present his client's case even though he may think that it is hopeless and even though he may have advised his client that it is. (*Ridehalgh* pp 233-4). So it is not enough that the court considers that the advocate has been arguing a hopeless case. The litigant is entitled to be heard: to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principles to which I have referred. The position is different if the court concludes that there has been improper time-wasting by the advocate or the advocate has knowingly lent himself to an abuse of process. However, it is relevant to bear in mind that, if a party is raising issues or is taking steps which have no reasonable prospect of success or are scandalous or an abuse of process, both the aggrieved party and the court have powers to remedy the situation by invoking summary remedies – striking out – summary judgment – peremptory orders etc. The making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort."

25. We should refer to two further authorities. In **Persaud v Persaud** [2003] EWCA Civ 394 a wasted costs application against counsel was based on alleged failure on his part to give his clients accurate advice as to the prospects of success. In his judgment, with which Mummery LJ and Blackburne J agreed, Peter Gibson LJ said:

> **"22. It is clear from what was said in both *Ridehalgh* and Medcalf that it is necessary for a duty to the court to be breached by the legal representative if he is to be made liable for wasted costs. In *Ridehalgh* at page 232 H to page 233 A Sir Thomas Bingham said this:**

> **"Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court, it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of duty to his client."**
>
> **That guidance given in *Ridehalgh* was confirmed in *Medcalf*. Lord Hobhouse in that case at paragraph 26 referred approvingly to *Ridehalgh* and to the necessity for there to be a breach of the advocate's duty to the court. I need say no more on that first point."**

> **"24. To my mind the two cases of *Ridehalgh* and *Medcalf* must now be taken to state what the law is in this area, and earlier cases may heave to be reconsidered in the light of the authoritative guidance which we now have. In *Ridehalgh* a clear distinction is drawn between presenting a hopeless case. It is plain that that cannot of itself lead to a wasted costs order – and lending assistance to proceedings which amount to an abuse of process."**

26. Miss Twine referred us to **Highvogue Ltd v Morris** (EAT/0093/07) in which the EAT, presided over by Beatson J – in a decision made after the decision in the present case – upheld a wasted costs order against solicitors arising from their conduct of an Employment Tribunal claim. However, the order there was not based on negligent pursuance of a hopeless case; it was based not on negligence but on improper or unreasonable conduct. At paragraph 6 the EAT reminded itself of and followed the first two sentences in the passage in **Ridehalgh** which we have set out above.

27. It is to be noted that the judgment of the Tribunal in the present case makes no reference to **Ridehalgh** or to **Medcalf**. Whilst there is, at paragraph 13, a reference to authorities as to the need for claimants to be represented in discrimination cases, the Tribunal did not refer to any authority as to the approach which should be taken to an application for a wasted costs order. If, of course, the Tribunal had been fully aware of those principles the absence of any reference in their judgment to authority would be of no significance; but that, for reasons we shall explain, is not this case. Unhappily, in a jurisdiction which Tribunals are not regularly called upon to consider, the Tribunal in this case were not referred either by Mr Scott or by Miss Twine to **Ridehalgh**, **Medcalf** or any other authority on wasted cost orders; nor were they referred to the summary of the guidance in **Ridehalgh** set out in *Harvey on Industrial*

Relations and Employment Law Vol. 5 Section T, paragraph 077. We feel bound to express both surprise and regret that the Tribunal's attention was not drawn to at least one of those sources of essential assistance. Had they been given the assistance to which they were entitled this appeal might not have been necessary.

Abuse of the Process

28. The authorities are clear; before a wasted costs order can be made against a legal representative on the grounds that he has presented a hopeless case that representative must be shown not only to have acted improperly, unreasonably or negligently – and it is negligence which is relevant here and will usually be relevant in this class of case – but also to have lent assistance to proceedings which amount to an abuse of the court.

29. Miss Twine's submission that the Tribunal did not need to consider abuse of the court is based on the words in **Ridehalgh** at page 863G:

> **"Legal representatives will, of course, whether barrister or solicitor, advise clients of the presumed weakness of their case…"**

She argues that, if a legal representative does not give any advice at all or at a relevant point in the case when the merits have changed, then either there is no need to prove abuse of the court or the failure to give such advice is itself an abuse of the court.

30. While we are prepared hypothetically to accept that it may be open to a tribunal to regard a failure to give advice and "ploughing on regardless" as amounting to an abuse of the court – although we are not to be taken as deciding that that would be so – there is no suggestion in **Ridehalgh** or the other authorities that that must be so. The sentence on which Miss Twine relies is not, in our judgment, intended to limit the need for an abuse of the court to be established or to suggest that a failure to give advice as to the merits amounts to such an abuse

but to point out the dangers of assuming that a hopeless case is being pursued on the advice of lawyers or that lawyers can be expected or should be expected, in advising or considering the giving of advice, to turn themselves into judges. There will inevitably be cases in which the giving of advice as a trial proceeds, if not sought by the client, may be unwelcome or destabilising. Some clients may express a desire not to be advised about the merits as a trial develops. How often or at what intervals should such advice be given? The multiplicity of fact-situations which could arise is such that there cannot be a principle or rule that failure to give advice as to merits on the part of a legal representative as a trial proceeds must amount to a breach of that representative's duty to the court or to an abuse of the process of the court if the trial continues.

31. Therefore, if failure to give advice or continuing with proceedings without giving such advice can amount to a breach of a legal representative's duty to the Court or on an abuse of the process, the court or tribunal before which a wasted costs order is sought must decide on the facts of each case whether such a breach of duty and abuse is demonstrated.

32. However, the Tribunal did not in this case consider that question. The need for there to be more than negligence, before they came to consider the exercise of their discretion, does not appear to have been canvassed before them at all. Certainly there is no mention of it in their judgment. There is no reason to suppose that they would not have considered the principles set out in the authorities if they had before them any of the sources to which we have referred; but they did not have them. The absence of a finding that Mr Scott was in breach of his duty to the court or that his conduct of the case amounted to an abuse of the process is, in our judgment, fatal to the survival of the wasted costs order which the Tribunal made.

Mr Scott's state of mind

33. In our judgment if any assessment was to be made of negligence on the part of Mr Scott in failing to advise Mrs Wright between the end of the third day and the start of the fourth day of the hearing, it was essential for the Tribunal to consider and determine what was Mr Scott's state of mind in relation to the merits of Mrs Wright's claim at that stage. The Tribunal found that, in February 2006, Mr Scott advised Mrs Wright that her prospects of success were 55-60 per cent and that, shortly before the hearing, he advised her that those chances were 50-55 per cent (see paragraph 7 of their judgment); but nowhere did the Tribunal make any finding as to whether Mr Scott had reconsidered the prospects during the six-week gap, as to what his judgment was of the merits at that stage if he had done so and as to what the basis of any estimate which he made was. While the Tribunal, observing the progress of the hearing, formed their own view of the merits at that stage, as is clear from paragraph 12 of their judgment, for the Tribunal to have proceeded from their view to a conclusion that Mr Scott held or ought to have held the same view was, in our judgment, not justified. Mr Scott may have had wholly different and entirely genuine reasons for any assessment he made (if he did) at that stage.

34. The Tribunal did not consider his state of mind or assessment of the merits at that stage at all; we were told that Mr Scott did not say anything and was not asked any questions about these matters. He did not give evidence, as opposed to addressing the Tribunal as a representative; and Miss Twine did not ask to be allowed to cross-examine him. Therefore the Tribunal did not investigate or make any express findings in this factual area.

35. Miss Twine's argument that the Tribunal must be taken to have found that Mr Scott did not put his mind to the merits at that stage at all is, in our judgment, not supportable. There is nothing in the Tribunal's judgment which evidences such a finding. We have some sympathy

with Miss Twine's further point that the Respondent had no evidence to give on this issue; but the burden of proof lay on the Respondent; and the Respondent could have asked that Mr Scott give evidence and be cross-examined. It was, in our judgment, an error of law for the Tribunal to leap from their own view of the merits to the conclusion that Mr Scott was negligent in failing to advise Mrs Wright as to the merits again at that stage without any evidence or other material, if he did not do so, as to why he did not do so.

Causation

36. In **Ridehalgh** at page 861 (A)-(C) the Court of Appeal stated that a three-stage test is required when a wasted costs order is contemplated, namely: (1) Has the legal representative of whom complaint is made acted improperly, unreasonably or negligently? (2) If so did such conduct cause the applicant to incur unnecessary costs? (3) If so, is it in all the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

37. However, we suspect for the same reason as that which explained the absence of any reference to abuse of the process, there is no reference to causation in the Tribunal's judgment. They did not set causation out as an issue to be decided; nor did they expressly make any findings as to it.

38. Miss Twine submitted that the necessary finding is to be implied from paragraph 15 of the Tribunal's Judgment. The Tribunal there said that it followed from the absence of any provision of a critical analysis by Mr Scott to Mrs Wright after the first three days of the hearing, when the merits were seen by the Tribunal to be extremely low, that the Respondent had been put unnecessarily to the cost of the last two days of the Hearing. That reasoning necessarily included a finding, Miss Twine argued, that, had Mrs Wright been given appropriate

advice at that stage, she would have withdrawn. Such a finding would have represented the reality; Mrs Wright had every reason to withdraw, especially in the light of the costs warnings given to Mr Scott by the Respondent (only the first of which, given well before the hearing started, is known to have been passed on by Mr Scott to Mrs Wright).

39. In contrast Mr Chapman submitted that Mrs Wright would, in all probability, not have withdrawn if advised pessimistically as to her prospects of success at that stage. Mr Scott (or his firm to be more precise) was acting on a conditional fee basis; Mrs Wright was not at risk save in the event of a costs order against her which, in the Employment Tribunal, would have been rare (we do not know whether she was insured against such an order). She had given her evidence and was likely to have wanted to see her case pursued properly and effectively to the end. There was, of course, no suggestion that Mr Scott would withdraw; but Mrs Wright might, if he had given her unwelcome advice, have terminated his retainer and continued in person, with the risk of additional difficulties for the Tribunal and the Respondent and, possibly, added expense.

40. We cannot resolve these rival arguments as to what course Mrs Wright would or might have taken had Mr Scott given the advice which the Tribunal believed should have been given. She was not asked about what would have happened if Mr Scott had given her such advice; there was no specific evidence as to that and no finding; and the *a priori* arguments we have summarised demonstrate that there was not only one answer which could have been given, had the causation issue been investigated. That is why it is not possible to conclude that the Tribunal implicitly determined the causation issue in the Respondent's favour. The reality is that the Tribunal were not invited to and did not consider or determine that issue; and therein is to be found a further error of law.

The exercise of discretion

41. On this issue we prefer Miss Twine's submission. As to the first stage at which the discretion arose, Mr Scott raised no objection at the CMD to the giving by the Tribunal of directions for the substantive hearing of the wasted costs application. If he had wished to persuade the Tribunal that there was no real substance in the application and that they should not permit it to go forward to such a hearing, he had on that occasion the opportunity to do so. He did not take it then or at any other time. The hearing went ahead without any demur from Mr Scott; and it is too late now for it to be said on his behalf that the Tribunal should have set about a task at the CMD stage which neither party invited them to undertake.

42. As to the second stage we do not accept that the use by the Tribunal in paragraph 12 of the words:

> **"leading" [sic] "this Tribunal with no alternative but to make a wasted costs order…"**

should be read as an indication that the Tribunal did not exercise their discretion, having found that there was negligent conduct, in deciding to make the order which they made. The Tribunal's judgment must be read as a whole; in paragraph 13 the Tribunal referred to the importance of not discouraging legal representatives from representing claimants in discrimination cases, a policy point which could only have been relevant as part of the exercise of a discretion.. In paragraphs 14 and 15 the Tribunal balanced various considerations. In our judgment the Tribunal can be seen, when all the relevant paragraphs are considered together to have exercised their discretion in favour of making an order.

43. We should add that decision-makers often use expressions such as "we have no alternative but to" or "we are driven to". The use of such expressions should not be taken generally as an indication that the decision-maker has not considered both sides' cases fully and

fairly or has not exercised a discretion which had to be exercised. Such expressions are usually an indication that, despite such full and fair consideration, the merits of one side's position have been overwhelmingly persuasive.

Striking out etc.

44. We need say no more about this issue than that (1) the absence of an application to the Tribunal to strike out the claim (other than an application which was dropped when Mrs Wright's claim was properly particularised) or for payment of a deposit does not, in law or in practice, preclude a successful application for costs against an unsuccessful claimant or a wasted costs order against the representative of such a claimant. It is well known that such applications rarely succeed; and the true weaknesses in a claimant's case may often not appear until after disclosure and exchange of witness statements or until the substantive hearing has started and developed; and (2) on the basis of Mr Scott's pre-trial assessments of the prospects of Mrs Wright succeeding – which the Tribunal did not find to have been unreasonable or negligent, while expressing the view that they might have been (see paragraph 14) – Mrs Wright's case was properly conducted for the first three days of the hearing on any view. Had there been a successful strike-out application she would not have been able to progress her case as far as the point at which the Tribunal adjourned part-heard. Had there been an unsuccessful application for a strike-out, the position would have been no different, between the third and fourth days of the hearing, from that which prevailed. Whether the ordering of a deposit would have made any difference to Mrs Wright's decision to proceed or not, at any stage, it is not possible to tell.

45. In these circumstances we do not regard the fact that no application to strike-out or for a deposit was persisted in as in any way undermining the Tribunal's decision on the wasted costs application.

Conclusion

46. For the reasons we have set out above under the headings (1) Abuse of the Court (2) Mr Scott's State of Mind and (3) Causation the wasted costs order cannot stand; this appeal must be allowed and the wasted costs order must be set aside.

47. At one stage we were concerned that, in the absence of crucial findings by the Tribunal, we might have no alternative but to remit the wasted costs application to the Tribunal, either in full or on a limited basis. Although Mr Chapman urged us that any remission should be to a new Tribunal, only the original Tribunal could, in practical terms, deal properly with the application; and any remission would, in our judgment, have had to have been to the same Tribunal. However, as we said earlier, both Mr Chapman and Miss Twine, on behalf of their respective clients, urged us not to remit, for good reason. The amount at stake is relatively small; further expenditure of costs would be disproportionate; and, realistically, unless the Respondent can argue that there was a waiver of privilege before the Tribunal which would bind Mrs Wright at a rehearing, it is highly likely that privilege would not be waived at such a rehearing; and, on the basis of what was said on the effect of privilege in **Ridehalgh** and **Medcalf**, the Respondent's prospects of obtaining an order would be slight.

48. In our view it is very likely indeed that, had the Tribunal properly directed their attention to the Respondent's need to prove abuse of the Court and to the need to consider Mr Scott's state of mind, for the reasons we set out above they would not have made the wasted costs order on the material before them. Mr Scott has since made it clear, Mr Chapman tells us, that he believed at the end of the third day that Mrs Wright still had a 50/50 chance of success. He did not say that in evidence to the Tribunal; he was not asked; but in any event without that evidence to the contrary we feel able to conclude with confidence that, absent error of law, the Tribunal would, on the limited material before them, despite their natural and understandable

misgivings as to the merits of the claim, have felt unable to make the wasted costs order sought. There was no direct evidence as to causation; and the material to support a finding that continuing with the proceedings beyond the third day amounted to an abuse of the process was simply not present.

49. Accordingly we allow the appeal, set aside the wasted costs order and substitute a judgment that the wasted costs application be dismissed.

. Appeal No. UKEAT/0100/08/CEA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 23 April 2008

Before

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

(SITTING ALONE)

RATCLIFFE DUCE AND GAMMER APPELLANT

1) MRS L BINNS T/A PARC FERME
2) MR N McDONALD RESPONDENTS

Transcript of Proceedings

JUDGMENT

In a Matter of Costs

APPEARANCES

For the Appellant	MR C STIRLING (of Counsel) Instructed by: Ratcliffe Duce & Gammer LLP 49-51 London Street READING Berkshire RG1 4PS
For the First Respondent	No appearance or representation by or on behalf of the First Respondent.
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent.

SUMMARY

Practice and Procedure

Costs

Wasted costs order made against appellant firm of solicitors. Employment Tribunal applied the wrong principles and relied upon the wrong authorities. Had the right principles been adopted, the only possible conclusion was that no such order could be made. Appeal upheld.

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

1. This is an appeal against the decision of the Employment Tribunal, in which it made an award for wasted costs against the Claimant's solicitors, now the Appellants before me. It did so on the basis that the Claimant's continued pursuance of the complaint was unreasonable and misconceived and that the Appellants should have appreciated that.

2. The background, very briefly, was this. The Claimant's solicitors lodged unfair dismissal proceedings on his behalf. A preliminary issue was whether he had twelve months continuous employment. The Claimant alleged he had been employed from 1 September 2005 until 16 November 2006. Initially he was called a self-employed contractor and subsequently became an employee, but his case appears to have been that in reality he was an employee doing the same work throughout.

3. The Respondent in the ET3 initially accepted that the Claimant had provided services to them as an independent contractor between September 2005 and December 2005, but thereafter had been an employee. They later retracted this, however, and said that the Claimant had not been employed at all before December 2005 in any capacity. They provided some documentation to support this. On this premise the Claimant would not have the twelve months' continuity of employment necessary to pursue the unfair dismissal claim.

4. The Claimant was alleging that he had bank statements proving that he received payments from the Respondent over the period September to December 2005 but in the event they were never provided. He also said that he had a witness, whom he identified, who would confirm that he had worked for the Respondent during that period.

5. The solicitor did not attend the hearing at which the Tribunal concluded that there was no requisite continuity of employment. Having dismissed the claim, the Tribunal gave the Appellants notice as to why a wasted costs order should not be made against them "pursuant to rule 40(3)" of the Tribunal rules.

6. Various representations were made to the Tribunal by the Appellants as to why they had not acted unreasonably. There was a very detailed reply by the solicitors for the employers. In giving her reasons, the employment judge identified the question she had to ask herself as follows:

> **"The Tribunal have to decide whether, in all the circumstances of the case, the representative conducted the case unreasonably or whether the bringing or conducting of the complaint was misconceived. Unreasonable conduct is a precondition of the power to award costs. There need be no causal link between the costs incurred and the unreasonable behaviour."**

She was here applying the principles enunciated by the Court of Appeal in **McPherson v BNP Paribas** [2004] ICR 1398, to which she expressly referred.

7. The employment judge found that the complaint was misconceived. She summarised the errors of the Claimant's representatives as follows:

> **"…Firstly, no heed was taken with regard to the documents provided by the Respondent establishing when the Claimant went on the Respondent's payroll. Secondly, there was a failure by the Claimant's representative to heed the significance of the contract of employment signed by the Claimant stating a commencement date of 19 December 2005. Thirdly, there was a failure to heed the significance of the Claimant's failure to obtain the bank statements he stated proved his case. Fourthly, there was a failure also to appreciate that the Claimant's witness, Mr Rutherford, was not an employee at the same premises as the Claimant so that his evidence on the Claimant's alleged daily attendance was worthless. The Tribunal, therefore, find that the pursuance of the case after June 2007 was unreasonable since the case was obviously misconceived at that date."**

Accordingly she concluded that the wasted costs order should be made of the costs incurred from a particular date when she thought that the Appellants ought to have appreciated that the case had no prospect of success.

The grounds of appeal.

8. The Appellant advances a number of grounds on which the Employment Tribunal erred in law in this matter. I am not going to set them out in detail. Suffice it to say that the fundamental point from which most of the other complaints derive is that the Tribunal relied upon the wrong order. The Employment Judge purported to make an order under rule 40(3) of the **Tribunal Rules of Procedure** whereas a wasted costs order is made under rule 48.

9. The Tribunal did identify parts of rule 48 when setting out the statutory background, but there is no further reference to that rule. As I have said, the letter to the Claimant's solicitors, following the judgment of 19 September, required them to show cause why they should not pay wasted costs pursuant to rule 40(3). That is not the appropriate provision for such wasted costs. The employment judge simply assumed that wasted costs could be awarded against the representatives in precisely the same circumstances as they can be awarded against a party to the action.

10. That approach was wholly misconceived. There is a fundamental difference between the scope and application of the two sets of costs rules. Costs orders (or preparation time orders which, broadly, apply where the successful party is not represented) are made against the unsuccessful party in certain circumstances, including where the action is misconceived, which includes where the case had no reasonable prospect of success.

11. A wasted costs order is made under rule 48 personally against a legal representative (or other representative who is acting for profit). Rule 48(3) defines the circumstances where such an order can be made:

> **"Wasted costs means any costs incurred by a party –**
>
> > **(a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or**

(b) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect that party to pay."

12. This precisely mirrors the definition given in section 51 of the **Supreme Court Act 1981**. Accordingly, the authorities applicable to wasted costs in the civil law generally are equally applicable here. The two leading authorities analysing the scope of section 51 and the circumstances in which such orders can be made are **Ridehalgh v Horsefield** [1994] Ch 205 (CA) and **Medcalf v Mardell and others** [2002] UK HL 27; [2003] 1 AC 120 (HL). (A valuable compilation of the principles to be drawn from these cases is found in the recent judgment of the EAT (HH Judge Burke QC presiding) in **Mitchells Solicitors v Funkwerk Information Technologies York Ltd.** UKEAT/0541/07.)

13. There is no doubt when one examines this decision that the Tribunal did apply the wrong rule when considering whether wasted costs should be paid. That led it ineluctably to make further related errors. It meant that it applied the wrong test to determine whether the solicitors were liable to pay these costs, and it relied upon the **McPherson** case, which is not the appropriate authority. Where a wasted costs order is concerned, the question is not whether the party has acted unreasonably. The test is a more rigorous one, as the leading authorities referred to above make plain. They demonstrate that a wasted costs order should not be made merely because a claimant pursues a hopeless case and his representative does not dissuade him from so doing.

14. The employment judge did not have her attention drawn to these authorities, nor did any of the parties identify the error she had made in focusing upon the wrong rule. Nobody had their eye on the ball. As a consequence she also adopted the wrong procedure. She allowed the Respondent's solicitors to submit comments upon the Appellant's representations to her. That is

not an appropriate procedure to adopt when a wasted costs order is made. The Tribunal should give the representative a reasonable opportunity to make oral or written submissions as to why the order should not be made (rule 48(7)). But whilst the other party may apply for an order - although the issue can exceptionally be raised by the Tribunal at its own initiative - it does not thereafter comment on the submissions, and it will never be appropriate for the receiving party to cross examine the representative against whom the order is being considered.

15. I should add that there are various errors of fact which raise grounds of appeal, and in particular which documentation was received when by the Claimant's solicitors. The Respondents concede that the Tribunal did make certain errors about this, but submit that they do not materially affect the outcome.

16. I see no purpose in engaging in any detailed analysis of those matters. The approach of the Tribunal here was fundamentally misconceived from the beginning and it is clear that the order cannot stand.

Could a wasted costs order properly be made?

17. The only question then arising is whether the matter should be remitted for fresh consideration or whether I can safely conclude that a wasted costs order could not properly be made. I am wholly satisfied that no such order could properly be made. In summarising my reasons it is necessary to provide some brief discussion of the basic principles of this jurisdiction.

18. In **Ridehalgh** the court emphasised that courts should apply a three-stage test when determining whether a wasted costs order can be contemplated:-

(1) Has the legal representative of whom complaint is made acted improperly, unreasonably, or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) If so, is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

19. The notion that a wasted costs order can be made against a lawyer simply because his client is pursuing a hopeless case is entirely erroneous. Such conduct does not of itself demonstrate that their representative has acted improperly or unreasonably. Clients frequently insist on pursuing a case against the best advice of their lawyers. The reasons why costs should not be awarded in such circumstances were fully explained by Sir Thomas Bingham MR, as he was, in the **Ridehalgh** case (page 863) as follows:

> **"***Pursuing a hopeless case*
>
> **A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. As Lord Pearce observed in *Rondel v Worsely* [1967] 3 All ER 993 at 1029, [1969] 1 AC 191 at 275:**
>
> > **'It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, or representatives or advisers for the latter.'**
>
> **As is well known, barristers in independent practice are not permitted to pick and choose their clients. Paragraph 209 of the Code of Conduct of the Bar of England and Wales provides:**
>
> > **'A barrister in independent practice must comply with the "Cab-rank rule" and accordingly except only as otherwise provided in paragraphs 501, 502 and 503 he must in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of whether his client is paying privately or is legally aided or otherwise publicly funded: (a) accept any brief to appear before a court in which he professes to practise; (b) accept any instructions; (c) act for any person on whose behalf he is briefed or instructed; and do so irrespective of (i) the party on whose behalf he is briefed or instructed (ii) the nature of the case and (iii) any belief or opinion which**

he may have formed as to the character reputation cause conduct guilt or innocence of that person.'

As is well known, solicitors are not subject to an equivalent cab-rank rule, but many solicitors would and do respect the public policy underlying it by affording representation to the unpopular and the unmeritorious. Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insist that cases be litigated. It is rarely if ever safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers involved. They are there to present the case; it is (as Samuel Johnson unforgettably pointed out) for the judge and not for the lawyers to judge it.

It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

20. To similar effect was the following observation of Lord Hobhouse in the **Medcalf** case (p.143H):

"……It is the duty of the advocate to present his client's case even though he may think it is hopeless and even though he may have advised his client that it is (Ridehalgh pages 233-4). It is not enough that the court considers the advocate has been arguing a hopeless case. The litigant is entitled to be heard: to penalise the advocate for presenting his client's case to the court would be contrary to the constitutional principle to which I have referred. The position is different if the court concludes that there has been improper time wasting by the advocate or the advocate has knowingly lent himself to an abuse of process. However, it is relevant to bear in mind that if a party is raising issues or is taking steps which have no reasonable prospect of success or are scandalous or are an abuse of process, both the aggrieved party and the court have powers to remedy the situation by invoking summary remedies – striking out; summary judgment; peremptory orders, etc. The making of a wasted costs order should not be the primary remedy; by definition it only arises once the damage has been done. It is a last resort."

His Lordship also observed that the representative owes no duty to his opponent, and that the jurisdictional was penal and has to be approached with considerable caution.

21. The distinction therefore is between conduct which is an abuse of process and conduct falling short of that. In this case there was no attempt to determine whether there was an abuse of process, and there was no basis for supposing that there was. It has not been suggested that the case was being pursued for any improper purpose or anything of that nature.

22. Furthermore, a particular problem arises in circumstances where the privilege of the client is not waived. In those circumstances it will be a very exceptional case indeed where a court will be entitled to infer that a party is abusing the process of the court by pursuing a hopeless case. The reasons are again explained by the Master of the Rolls in **Ridehalgh (**p.237B):

> **"In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do so that and may be unwilling to waive if he does so the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. … Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order".**

23. In this case privilege has not been waived. There is absolutely no basis at all for concluding that there was an abuse of process. This is a case where the representative did not prevent a party pursuing what turned out to be a hopeless case, but even if it is fair to infer that the solicitor should have appreciated that it was hopeless - and it must be remembered that the claimant was maintaining that he had relevant evidence to support his case until the last minute - it does not follow that he could have influenced his client to drop the case in any event.

24. I should add that in addition since there was no evidence that the claimant would have withdrawn even if advised to do so, there was no basis for inferring that any costs had been

incurred as a consequence of any misconduct. Unlike the position where an ordinary costs order is made, where there is no need to fix the amount by reference to the additional costs actually resulting from unreasonable conduct (as the **McPherson** case makes clear), where a wasted costs order is made, the actual loss flowing from the misconduct must be calculated. If the claimant would have continued the action in any event, no costs are wasted.

Disposal

25. This appeal is bound to succeed. The employment judge acted on the wrong principles and the costs order must be set aside. Had the right principles been applied, there would have been no basis for making a wasted costs order. Accordingly the wasted costs application is dismissed.

Court of Appeal

Ezsias *v* North Glamorgan NHS Trust

[2007] EWCA Civ 330

2007 March 5; 7 Ward, Maurice Kay and Moore-Bick LJJ

Industrial relations — Employment tribunals — Striking out proceedings — Claim of unfair dismissal by reason of protected disclosures — Conflict of fact as to reason for dismissal — Tribunal finding claim bound to fail and striking out claim — Whether apparent bias by tribunal — Whether striking-out order appropriate — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861), Sch 1, rr 18, 20

The claimant employee, a surgeon, was summarily dismissed by the respondent trust. He made a claim of unfair dismissal, inter alia, by reason that he had made protected disclosures. The trust, contending that his case was without merit and that the dismissal resulted from the complete lack of confidence in him and from his responsibility for a breakdown of relationships in his department, applied to an employment tribunal for an order for payment of a deposit by the employee under rule 20 of the Employment Tribunals Rules of Procedure 2004[1]. Following a pre-hearing review, the chairman of the employment tribunal, in a document dated 20 July 2005 and headed "judgment", stated that the employee's claim had no reasonable prospect of success and ordered the application to be relisted for consideration of the employee's means and/or an application by the trust for a striking-out order. The chairman subsequently signed a certificate of correction deleting the word "judgment" from the 20 July document and struck out the employee's claim, stating that his claim of unfair dismissal was "bound to fail". The Employment Appeal Tribunal allowed an appeal by the employee, holding that the employment tribunal's decision was vitiated by apparent, though not actual, bias and that in any event the case was not an appropriate one for the use of the striking-out power under rule 18(7) of the 2004 Rules.

On appeal by the trust—

Held, dismissing the appeal, that, notwithstanding the removal of the label "judgment" from the pre-hearing review decision, it was plainly and unequivocally suffused with a concluded view that the employee's unfair dismissal claim had no prospects of success; that the view expressed was not provisional or preliminary and a fair-minded and informed observer would form the perception that there was a real possibility that the tribunal had prejudged the issues and reached a concluded view or had a closed mind; that, accordingly, the decision to strike out was, as the appeal tribunal found, vitiated by the appearance of bias; that, further, although employment tribunals should be alert to providing protection to respondents from claims that had little or no reasonable prospect of success, they had also to exercise appropriate caution before making an order that would prevent an employee from proceeding to trial in a case which involved serious and sensitive issues; and that where, as in the instant case, the particular nature and scope of the factual issues revealed diametrically opposed cases on the reason for dismissal, it was legally perverse for an employment tribunal to conclude that the claim should be struck out,

[1] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch 1, r 18(7): ". . . a chairman or tribunal may make a judgment or order: . . . (b) striking out . . . any claim . . . on the grounds that it . . . has no reasonable prospect of success . . ."

R 20(1): ". . . if a chairman considers that the contentions put forward by a party . . . have little reasonable prospect of success, the chairman may make an order . . . requiring the party to pay a deposit . . . not exceeding £500 as a condition of being permitted to continue to take part in the proceedings . . ."

particularly in discrimination and protected disclosure cases (post, paras 4, 18, 23, 24, 28–32, 35, 36).

Dicta of Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, para 103, HL(E) applied.

Per Maurice Kay LJ. Consideration should be given to the introduction of a more demanding criterion for a second appeal to the Court of Appeal where the order of the Employment Appeal Tribunal is an interlocutory and not a final order, such as that set out in CPR r 52.13(2) of whether a second appeal "would raise an important point of principle or practice" (post, para 34).

Decision of the Employment Appeal Tribunal affirmed.

The following cases are referred to in the judgment of Maurice Kay LJ:

Anyanwu v South Bank Student Union (Commission of Racial Equality intervening) [2001] UKHL 14; [2001] ICR 391; [2001] 1 WLR 638; [2001] 2 All ER 353, HL(E)

Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097; [2002] ICR 646, CA

Man (E D & F) Liquid Products Ltd v Patel [2003] EWCA Civ 472; The Times 18 April 2003, CA

Marler (E T) Ltd v Robertson [1974] ICR 72, NIRC

Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465, HL(E)

Southwark London Borough Council v Jiminez [2003] EWCA Civ 502; [2003] ICR 1176, CA

The following additional case was cited in argument:

Care First Partnership Ltd v Roffey [2001] ICR 87, CA

APPEAL from the Employment Appeal Tribunal

By a decision dated 9 September 2005 the chairman of an employment tribunal at Cardiff, on an interlocutory application by the respondent employer, North Glamorgan NHS Trust, ordered the striking-out of an unfair dismissal claim by the claimant, Mr Ezsias, on the ground that it had no reasonable prospect of success. On 25 July 2006 the Employment Appeal Tribunal (Elias J, President) allowed an appeal by the claimant on grounds that the tribunal order was vitiated by apparent bias and was not an appropriate use of the striking-out power in rule 18(7) of the Employment Tribunals Rules of Procedure 2004.

With permission given by Sir Henry Brooke, the trust appealed on grounds, inter alia, that the judge (1) erred in law in setting aside the employment tribunal's decision; (2) failed to pay any, or any sufficient, regard to the tribunal's conclusion that the claimant's claim had no reasonable prospect of success and/or was bound to fail; (3) ought to have held that the fair-minded and objective observer would not have concluded that there was a real risk that the decision to strike out the claim was affected by bias; (4) erred in directing himself that where the facts were in dispute it was only in the most extreme case that a tribunal could strike out a claim without hearing evidence in relation to disputed facts, thereby introducing an unwarranted limitation to the power to strike out; (5) erred in directing himself that once it was accepted that the claimant might be able to establish that he had made protected disclosures then it could not be unrealistic to say that they might be the reason for the dismissal; and (6) had he correctly directed himself in law, would have concluded that there was ample material

to justify the tribunal's conclusion that the claimant's claim had no reasonable prospect of success, and that there was no ground for interfering with that conclusion. A

The facts are set out in the judgment of Maurice Kay LJ.

Timothy Pitt-Payne for the employer.
The claimant in person. B

Cur adv vult

7 March. The following judgments were handed down.

MAURICE KAY LJ

1 Mr Ezsias is an oral and maxillofacial surgeon. He was employed by North Glamorgan NHS Trust from 1 July 1998 until he was summarily dismissed on 1 February 2005. Three days later he commenced proceedings in the employment tribunal. He claimed that his dismissal was automatically unfair pursuant to section 103A of the Employment Rights Act 1996 because the reason for it was that he had made protected disclosures; in other words, because he was in common parlance "a whistleblower". Moreover he claimed that it was unfair on conventional grounds pursuant to section 98 of the 1996 Act. The case for the trust is that the true reason for the dismissal was that Mr Ezsias was responsible for a breakdown of relationships in his department and within the trust such that the employment relationship could not continue and that it had been fairly terminated. C D

2 From the outset the trust contended that the proceedings in the employment tribunal were totally without merit and it sought the procedural protections available to a respondent employer in such circumstances. The protections available under the Employment Tribunals Rules of Procedure 2004 are: (1) In a case which a chairman at a pre-hearing review considers to have "little reasonable prospect of success", an order that the applicant pays a deposit not exceeding £500 as a condition of being permitted to continue to take part in the proceedings—rule 20. Or more seriously: (2) The striking out of all or any part of the claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success—rule 18(7). E F

3 Although I have described these protections in terms availing a respondent employer, in principle they may also avail an employee if he can show that the employer's case has little or no reasonable prospect of success. Experience shows that cases such as the one brought by Mr Ezsias in the employment tribunal can make substantial demands on management time and resources with only a limited prospect of recovering litigation costs from an unsuccessful employee after trial. The limitation is that the employment tribunal can only award costs against an employee or an employer who has brought or conducted the proceedings vexatiously, abusively, disruptively or otherwise unreasonably, or where the bringing or conducting of the proceedings has been misconceived—rules 40 and 44 of the 2004 Rules. In these circumstances it is not surprising that employers in particular frequently seek the protections available under rules 18 and 20. G H

4 The present case brings into focus the difficulties and tensions which can accompany their applications for summary justice. To state the obvious, an employment tribunal should be alert to provide protection in the face of

A an application that has little or no reasonable prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues.

5 On 7 July 2005 there was a pre-hearing review before the chair of the employment tribunal sitting alone. It had been sought by the trust. The sole issue of which Mr Ezsias had been given notice related to an application for a B deposit under rule 20. Before such an order can be made the employment tribunal must be satisfied that the person against whom it is sought has the ability to pay the sum in question—rule 20(2). Failure to pay the ordered sum within the specified time will result in the claim being struck out—rule 20(4). The outcome of the hearing on 7 July 2005 was the promulgation of a document dated 20 July 2005. Under the heading C "judgment of the employment tribunal" it stated:

> "In my opinion the contentions put forward by the [employee] have no reasonable prospect of success. The case will be relisted to consider the question of means and/or the [trust's] application for a striking out order."

D 6 This led Mr Ezsias to lodge an appeal with the Employment Appeal Tribunal, although at that time such an appeal would have been premature because the employment tribunal had not made a final order for a deposit and had made no order on the strike-out application save that it be relisted. On 15 August 2005 the employment tribunal gave notice of a hearing to take place on 9 September for consideration of Mr Ezsias's means and the trust's strike-out application. At the hearing on 9 September the chair, who knew E by then of Mr Ezsias's proposed appeal to the Employment Appeal Tribunal in relation to the earlier hearing, referred to the document of 20 July as containing a "clerical error" in that it should not have been described on its face as a judgment. She went on to say: "It is clear from the opinion and reasons that there was no finding of fact, no decision on a point of law, no order and no judgment."

F 7 On 14 September she signed a certificate of correction under rule 37(1) of the Rules deleting the word "judgment" from the document of 20 July. Also, having heard counsel for the trust and Mr Ezsias in person on 9 September, she struck out Mr Ezsias's entire application on the basis that it had no reasonable prospect of success. As a result the application for a deposit fell away. In due course Mr Ezsias brought a proper appeal before the Employment Appeal Tribunal. On 25 July 2006 the President, Elias J, G sitting alone allowed Mr Ezsias's appeal and held:

> "(1) The decision of the employment tribunal at the hearing on 9 September 2005 was vitiated by apparent but not actual bias on the part of the chair; and (2) in any event this was not an appropriate case for the use of the strike-out power under rule 18(7)."

H 8 There is now before this court an appeal by the trust brought with the permission of Sir Henry Brooke which seeks to challenge both parts of the judgment and order of Elias J. Before I turn to the two issues it is necessary to say a little more about the factual cases which the parties seek to advance. Mr Ezsias's case is that between 1999 and 2002 he made a number of complaints about his colleagues and about shortcomings in the way in which

the department was run. He alleged fraud on the part of two colleagues and dereliction of duties affecting patient care, incompetence, and inadequacy on the part of the same and other colleagues. He claimed that the safety and treatment of patients was being jeopardised. The case for the trust is that over a period of time relations between Mr Ezsias and certain colleagues had broken down and that it was this rather than any whistleblowing by Mr Ezsias that had resulted in his suspension in April 2003 and eventual dismissal after full inquiry in February 2005.

9 At the heart of the trust's case is a document dated February 2003. It is in the form of a letter addressed to the chief executive of the trust and it is in these terms:

> "All the senior members of the maxillofacial department within the three district general hospitals wish to register their grave concerns in regard to the lack of progress that has been made in resolving a large number of outstanding issues concerning Mr Ezsias. There is a complete lack of confidence in and a total breakdown of the relationships between this consultant and the senior staff within the department. This has significant effects on the service provision and the quality of care provided to patients within the hospitals. We all seek urgent confirmation that immediate progress will be made to redress these issues before a complete breakdown of the services results."

10 Nine people signed the document. They included the two colleagues in respect of whom Mr Ezsias had previously made allegations of fraud and others who were affected by his other allegations. Although the document is dated February 2003, Mr Ezsias asserts that it was not brought to his attention until after he was suspended two months later. He disputes the date of the document and challenges the good faith of some or all of the signatories.

11 I now return to the decision of the employment tribunal. The first document promulgated by the chair and dated 20 July 2005 requires more detailed citation. Following the initial summary, which I have already set out, under the heading of "public interest disclosure" the chair stated: "I am of the opinion that the claim not merely has 'little prospect of success' but that it has *no* reasonable prospect of success for the following reasons."

12 She then set out a number of reasons. Some of them raise points of law which, as I shall later state, fell away as matters for consideration on this appeal. Later, addressing the merits overall, she said:

> "The whistleblowing claim would have no reasonable prospect of success in my view in that the tribunal would go on to find that the principal reason for dismissal was not that the claimant had made a protected disclosure but that he was dismissed for 'some other substantial reason' within the meaning of section 98 of the 1996 Act, namely irretrievable breakdown of the relationship of trust and confidence. In the light of the letter from all the claimant's nine colleagues asserting irretrievable breakdown of trust and confidence, together with their statements to the effect that they could no longer work with him and that members of the department would resign if he returned from suspension, any reasonable tribunal would take the view that irretrievable breakdown

A in relationships with the consequent prospect of disappearance of the department was the principal reason for dismissal . . . I am therefore of the opinion that the claim based on public interest disclosure has no reasonable prospect of success. I would go further and say I have no doubt that it is bound to fail in that any reasonable tribunal will find that public interest disclosure was *not* the principal reason for dismissal."

B **13** Then, under the sub-heading "unfair dismissal", the chair went on to reach a similar conclusion in relation to the alternative claim. She said:

"In my view any reasonable tribunal having found that the reason for dismissal was irretrievable breakdown of the relationship of trust and confidence would find that the procedures applied . . . were such as a reasonable employer would have applied in the circumstances . . .
C A reasonable tribunal would find that in the light of the entire team's inability to work with the claimant and the consequent prospect of disappearance of the department, dismissal came within the band of responses a reasonable employer would have made to the situation . . . For the above reasons I am of the opinion that the complaint of unfair dismissal has no reasonable prospect of success. I will go further and say
D that it is bound to fail."

14 So far as the later hearing of 9 September was concerned, and the resulting strike-out, the reasoning of the employment tribunal is set out in a letter dated 29 September 2005, the relevant parts of which read as follows:

"The reasons were that the claim had no reasonable prospect of success
E because: (a) in the light of the letter from all your nine colleagues and the statements they made to the [trust] any reasonable tribunal would take the view that the principal reason for dismissal was not protected disclosure . . . but irretrievable breakdown in relationships with the consequent prospect of disappearance of the department; (b) any reasonable tribunal would find that the [trust] took reasonable
F procedures to try and resolve the situation through discussion without success and that in view of the entire team's inability to work with you and the prospective closing of the department, dismissal came within the band of reasonable responses to the situation and was fair within the meaning of section 98 of the 1996 Act."

15 It is now necessary to consider whether the employment tribunal
G committed any error of law in relation to the hearings of 7 July and 9 September 2005 or whether it was the Employment Appeal Tribunal which fell into legal error when it allowed Mr Ezsias's appeal.

Issue 1: was the decision to strike out vitiated by apparent bias?

16 I make it clear at once that Elias J did not find actual bias on the
H part of the employment tribunal. Indeed, he expressly rejected it. We are here concerned with apparent bias and in particular the question of pre-determination or pre-judgment of a case by a judicial decision maker. The test is well known and was expressed by Lord Hope of Craighead in *Porter v Magill* [2002] 2 AC 357, para 103, in these terms: "The question is whether the fair-minded and informed observer, having considered the

facts, would conclude that there was a real possibility that the tribunal was biased."

17 Addressing this in the particular context of alleged pre-determination by an employment tribunal Peter Gibson LJ made the following observation in *Southwark London Borough Council v Jiminez* [2003] ICR 1176, para 25: "the premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias." All this is common ground.

18 Even after the label "judgment" has been removed from the document of 20 July 2005, it is on its face plainly and unequivocally suffused with a concluded view as to Mr Ezsias's prospects of success. It begins with the expression of an opinion that Mr Ezsias's contentions "have no reasonable prospect of success". Although the only matter receiving immediate attention at the time was the application for a deposit which is governed by the weaker test of "little reasonable prospect of success", the chair proceeded to say of the whistleblowing claim that she was of the opinion that it had "*no* reasonable prospect of success". The word "no" was underlined for emphasis by the chair herself. Her final observation on this aspect of the case was as I have already set out above. As I have set out, she went on to express herself in similar terms in relation to what I would call the more conventional unfair dismissal claim. I shall say no more about that because it is common ground that for present purposes it stands or falls with the whistleblowing claim.

19 Mr Pitt-Payne on behalf of the trust concedes that this language gives rise to cause for concern when the application for a strike out had yet to be the subject of proper notice, submissions and determination. However, his submission is that such concern is now displaced by what the chair came to say on and after 9 September 2005. He refers first to the words used by the chair when explaining her intention to expunge the word "judgment" from the earlier document in which she observed: "there was no finding of fact, no decision on a point of law, no order and no judgment."

20 He then refers to the comments furnished by the chair to the appeal tribunal in accordance with its usual practice when an allegation of actual or apparent bias is made. In a document dated 6 July 2006 the chair described her words of 20 July 2005 as "an interim opinion on the deposit application to the effect that the case had not merely little but no reasonable prospect of success".

21 In that document the chair went on to say that on 9 September: "I explained to Mr Ezsias that it was merely a preliminary opinion not a judgment. That there was nothing at this stage to appeal against so there was no reason to postpone."

22 All this leads Mr Pitt-Payne to submit that, contrary to first appearances, what the chair had said in the document dated 20 July 2005 was no more than the expression of a provisional view. He then seeks to rely on *Southwark London Borough Council v Jimenez* [2003] ICR 1176 to support the proposition that a provisional view, even if expressed in trenchant terms, is not to be equated with pre-determination. That proposition is sound and is indeed illustrated by *Jimenez*. However, the crucial factor in that case was that the employment tribunal had expressly stated at the time of articulating its trenchant view of the evidence it had

A by then received that it was "its preliminary view". As Peter Gibson LJ said, at para 38:

> "The council's representatives could have been in no doubt that all the views which the chairman proceeded to give . . . were expressed to be preliminary views . . . I have some difficulty in understanding why a strongly expressed view cannot be a provisional view leaving it open to
B the party criticised to persuade the tribunal as to why that view was wrong and why the party's conduct was justified."

23 In my judgment the present case falls clearly on the other side of the line. What the chair said in the document of 20 July 2005 was not said at the time to be a provisional or preliminary view. On the contrary, it was clearly stated in concluded terms. What she later said to the Employment Appeal
C Tribunal by way of explanation was, in the view of Elias J, enough to acquit her of actual pre-determination but it did not and could not displace the perception which any fair-minded and informed observer would have formed, namely that there was a real possibility that she had a concluded view or a closed mind as regards Mr Ezsias's prospect of success. Elias J put it in this way, at para 52:

D
> "Any fair-minded and informed observer would, in my view, have considered that, to put it at its lowest, there was very little prospect that [Mr Ezsias] would be able to shift her from her view. I do not think that her comments at the second hearing would sufficiently have dispelled that impression."

24 I entirely agree. The legal error is not to be found in the judgment of
E Elias J on this issue but in the way in which the chair expressed herself in the document of 20 July 2005. Thereafter the position was irretrievable.

Issue 2: a reasonable prospect of success

25 It is only since 2001 that the Employment Tribunals Rules of Procedure have included "no reasonable prospect of success" as an express
F ground for striking out. Until then applications which had no prospect of success were struck out on the ground that they were "frivolous": *E T Maller Ltd v Robertson* [1974] ICR 72. In *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646 the distinction was drawn between "no prospect of success", and "no *reasonable* prospect of success". Ward LJ observed, at para 46, that the latter prescribes a lower standard as a basis for striking out.

G **26** Mr Pitt-Payne seeks to draw comfort from this lowering of the threshold. I accept his submission that what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. It seems to me that Elias J also proceeded on this basis—see para 56 of his judgment. Mr Pitt-Payne then submits that when Elias J observed that in the present case the facts are disputed he went on to place an unwarranted
H gloss on the "no reasonable prospect of success" test. He refers in particular to two passages in which Elias J said:

> "58. However, where the facts themselves are in issue, in my judgment it can only be in the most extreme case that the chairman can say that without any evidence being tested in cross-examination the disputed

facts would inevitably or almost inevitably be resolved against the claimant." A

And a little later:

"64. Mr Pitt-Payne submits that it must in principle be possible for a tribunal in a clear case to make a finding that a claimant has no chance of establishing the facts alleged. I would not discount the possibility that very exceptionally it might be. But it seems to me that at the very least if such a step is going to be taken then the primary factual basis on which a tribunal infers that the dismissal must have been for the reason advanced by the employer, and not the countervailing reason advanced by the employee, must itself be undisputed." B

27 I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success: see *E D &F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, [10], per Potter LJ—a commercial rather than an employment case. However, what is important is the particular nature and scope of the factual dispute in question. In the present case it is stark. Mr Ezsias is contending that others turned on him because he was a whistleblower. The trust says that he was impossible to work with and that he unreasonably jeopardised the proper functioning of the hospital. What was it that caused the chair of the employment tribunal to consider that that head-on conflict of fact could be resolved without a trial to the point of a conclusion that Mr Ezsias's case has no reasonable prospect of success? Although in the document of 20 July 2005 she purported to identify some legal points, these effectively fell away in the September reasoning and Mr Pitt-Payne does not seek to rely upon them. In the September reasoning she based her decision on "the letter from all your nine colleagues and the statements they made" concluding that "any reasonable tribunal" would on that basis decide that Mr Ezsias was dismissed not because he had made protective disclosures but because of an irretrievable breakdown of relationships for which he was responsible. C D E F

28 The question for this court is whether that reasoning on the part of the employment tribunal contains an error of law. I have no doubt that it does. Given the extent of the factual dispute, it was legally perverse to conclude as the employment tribunal did. In addition to the diametrically opposed cases on the reason for the dismissal, Mr Ezsias had put in issue the evidential significance of the letter of February 2003 by contending that (1) he did not accept its date because it was not shown to him until after he had been suspended in April; and, perhaps more importantly, (2) its signatories included the two colleagues in respect of whom he had previously made allegations of fraud and others whom he had criticised as regards their competence and professional standards. G

29 It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having H

A no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.

30 There is another aspect of this type of case that calls for comment. Whistleblowing cases have much in common with discrimination cases, B involving as they do an investigation into *why* an employer took a particular step, in this case dismissal.

31 The claimant will often run up against the same or similar difficulties to those facing a discrimination claimant. There is a similar but not the same public interest consideration. In *Anyanwu v South Bank Student Union (Commission of Racial Equality intervening)* [2001] ICR 391, para 24, C Lord Steyn said:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias D in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

Lord Hope of Craighead added, at para 37:

> "I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The E questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

F 32 In my judgment the same or a similar approach should generally inform whistleblowing cases, subject always of course to the kind of exceptional case to which I have referred. If she had had it in mind the chair of the employment tribunal would surely not have concluded as she did. She ought not to have done so in any event.

G *Conclusions*

33 It follows from what I have said that I would dismiss this appeal in relation to the two issues which it raises. The question as to whether this is a suitable case for ordering Mr Ezsias to pay a deposit under rule 20 remains open. There has been no final ruling on that application because it was overtaken by the striking out. If the trust wishes to pursue such an application (and I am not to be taken as encouraging it), it will have to make H it again in the employment tribunal differently constituted. Nothing I have said in that regard or anything else in this judgment should be taken as indicating any view of the ultimate merits of this case one way or the other.

34 Finally I add this observation: I regret that a second appeal from the Employment Appeal Tribunal to this court against an interlocutory order

refusing to strike out or upholding a decision refusing to strike out an application is available on satisfaction of the relatively low criterion of a real prospect of success in this court. As this case shows, a great deal of time and expense can be consumed by the prolongation of what turns out to be no more than a preliminary skirmish. In my view consideration should be given to the introduction of a more demanding criterion where the order of the Employment Appeal Tribunal is an interlocutory and not a final order. I have in mind the primary test for an appeal from the decision of the High Court where that decision was itself an appellate decision and the real prospect of success test gives way to consideration of whether a second appeal "would raise an important point of principle or practice"—see CPR r 52.13(2)(a). If that had been the test for permission to appeal to this court in the present case, I do not consider that it would have been satisfied. Nor would there have been any other compelling reason for the Court of Appeal to hear this appeal.

MOORE-BICK LJ

35 I agree that this appeal should be dismissed for the reasons given by Maurice Kay LJ.

WARD LJ

36 I also agree and so the appeal is dismissed.

Appeal dismissed.

Solicitors: Eversheds LLP, Cardiff.

H D

A

Employment Appeal Tribunal

Horizon Recruitment Ltd and another *v* Vincent

UKEAT/478/09

2009 Dec 2; 11 Silber J

B

Industrial relations — Employment tribunals — Compromise agreement — Agreement providing for payment to claimant — Claimant alleging employer knowing unable to make payment — Agreement satisfying statutory requirements — Whether employment tribunal jurisdiction to determine enforceability on ground induced by misrepresentation — Employment Rights Act 1996 (c 18), s 203

C

The claimant entered into a compromise agreement with the respondents, the company by whom she had been employed and the company to which she contended the employer's undertaking had been transferred, whereby it was agreed that she would be paid a sum of money by the employer in full and final settlement of her proceedings for unfair dismissal. A month later the employer went into liquidation, no payment having been made to the claimant. The claimant sought to set aside the compromise agreement on the ground that she had been misled into entering into the agreement as a result of misrepresentation, as the respondents must have known at the time that the employer was unable to comply with the payment provision. An employment judge held that, although the compromise agreement was valid in that it met all the requirements of section 203(3) of the Employment Rights Act 1996[1], the claimant had an arguable case that she had been induced to enter into the agreement by a material misrepresentation and the tribunal had jurisdiction to determine whether it was thereby unenforceable, notwithstanding section 203(2)(f).

D

E

On an appeal by the respondents—

Held, dismissing the appeal, that, while section 203(2) of the Employment Rights Act 1996 permitted parties to make a valid compromise agreement precluding a claimant from proceeding in the employment tribunal, the employment tribunal had to ensure that any purported agreement was valid, and that included consideration of whether it should be avoided at common law, on grounds of duress or misrepresentation, before deciding whether it satisfied section 203(3) (post, paras 16, 17, 26, 27).

F

Hennessey v Craigmyle & Co Ltd [1985] ICR 879, EAT and dicta of Mummery J in *Greenfield v Robinson* (unreported) 16 May 1996, EAT followed.

The following cases are referred to in the judgment:

Byrnell v British Telecommunications plc (unreported) 13 October 2004, EAT
Eden v Humphries & Glasgow Ltd [1981] ICR 183, EAT
Greenfield v Robinson (unreported) 16 May 1996, EAT
Hennessy v Craigmyle & Co Ltd [1985] ICR 879, EAT; [1986] ICR 461, CA
Larkfield of Chepstow Ltd v Milne [1988] ICR 1, EAT

G

No additional cases were cited in argument.

H

INTERLOCUTORY APPEAL from an employment judge sitting at Leeds

By a judgment on a pre-hearing review sent to the parties on 3 September 2009, the employment judge refused an application by the respondents, Horizon Recruitment Ltd and Industrious Ltd, to strike out a claim of

[1] Employment Rights Act 1996, s 203: see post, paras 7, 8.

constructive unfair dismissal by the claimant, Mrs Jane Vincent, and ordered a further hearing to determine whether a compromise agreement between the claimant and her employer was enforceable as satisfying the requirements of section 203 of the Employment Rights Act 1996, or unenforceable because of misrepresentation. The respondents appealed on the ground that the employment judge was wrong in holding that he had jurisdiction to consider the validity of a compromise agreement on the basis of misrepresentation.

The facts are stated in the judgment.

Edward Legard (instructed by *Gordons LPP, Leeds*) for Industrious Ltd.
The first respondent took no part in the appeal.
The claimant in person.

The court took time for consideration.

11 December 2009. The following judgment was handed down.

SILBER J

Introduction

1 Section 203(1) of the Employment Rights Act 1996 deems as void provisions which preclude a party from bringing proceedings before an employment tribunal, save in respect of agreements which satisfy certain specific requirements, which are set out in section 203(3). In the present case, it is common ground that the parties entered into a compromise agreement which met those requirements but the claimant employee contends that the compromise agreement is not enforceable because of misrepresentations made by the employers. The issue before the employment tribunal and before this appeal tribunal was whether the employment tribunal had jurisdiction to determine whether the alleged compromise agreement was unenforceable on grounds of misrepresentation notwithstanding that the compromise agreement complied with the section 203(3) requirements.

2 On 17 August 2009, Employment Judge Lee sitting in Leeds held that the employment tribunal had jurisdiction to determine this issue but the employers have appealed. Underhill J, the President of this appeal tribunal, ordered the full hearing in order that this issue should be resolved in the light of conflicting authorities to which I will refer shortly.

The facts

3 Mrs Jane Vincent, the claimant, was appointed as managing director of Horizon Recruitment Ltd ("Horizon") from January 2006 until her resignation on 31 December 2008. The claimant contends that there was a TUPE transfer between Horizon and Industrious Ltd ("Industrious") in early 2009. The case for the claimant is that in November 2008 she agreed to resign in return for a monetary settlement but both Horizon and Industrious reneged on this binding agreement. It is not suggested that any agreement made at that time complied with the requirements of section 203(3) of the Act.

4 On 23 March 2009, the claimant lodged her application form ET1 in the employment tribunal. On 17 June 2009, three separate agreements were made which were: (a) a deed of compromise under which (i) Horizon would

pay the claimant £30,000 by way of termination payment and £13,750 a covenant payment within seven days of the agreement (clauses 3 and 8) in full and final satisfaction of all claims by the claimant against Horizon and Industrious, and (ii) the claimant agreed upon execution of the agreement immediately and unconditionally to withdraw the proceedings before the employment tribunal; (b) a deed of settlement between the claimant, Horizon, Industrious and certain directors; and (c) a sale agreement made between the claimant and various directors.

5 On 22 July 2009, Horizon entered creditors' voluntary liquidation. It is common ground that neither of the payments provided for by the compromise agreement was paid. The case for the claimant is that when the compromise agreement was entered into either Horizon or Industrious or both of them must have known they were not going to be able to comply with the payment provisions in the compromise agreement. She contends that she was misled into entering the agreement as a result of misrepresentations on the part of one or both Horizon and Industrious. The claimant wishes to set aside the compromise agreement.

6 The issue before the employment tribunal was whether it had jurisdiction to consider a challenge to the validity of the compromise agreement on the basis of the misrepresentations or whether the claimant had to bring separate proceedings in the courts to set aside the compromise agreement.

The statutory provisions

7 Section 203(1) and (2) of the Employment Rights Act 1996, in so far as is material, provides:

> "(1) Any provision in an agreement . . . is void in so far as it purports . . . (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.
>
> "(2) Subsection (1) . . . (f) does not apply to any agreement to refrain from instituting or continuing . . . any proceedings . . . if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement."

8 The conditions specified in subsection (2) which had to be satisfied are set out in subsection (3) of the section and, as it is not disputed that they have been satisfied, the conditions can be summarised as broadly requiring that the agreement be in writing; that it relates to particular proceedings; that the employee has received advice from a relevant (and insured) independent advisor and that it carries a statement to that effect.

9 The case for Industrious is that the employment tribunal does not have jurisdiction to deal with any aspect of a compromise agreement which satisfies the requirements of section 203(3). Reliance is placed on previous cases which show that issues of enforcing a compromise agreement have to be dealt with by the courts and not by the employment tribunal. Thus section 19A(3) of the Employment Tribunals Act 1996 (inserted by section 142 of the Tribunals, Courts and Enforcement Act 2007) provides:

> "Any sum payable by a person under the terms of the compromise (a 'compromise sum') shall, subject to subsections (4) to (7), be recoverable—(a) in England and Wales, by execution issued from a

county court or otherwise as if the sum were payable under an order of that court . . ." A

The reasoning of the employment judge

10 The employment judge found that: (a) the compromise agreement was valid in that it met all the requirements of section 203(3); (b) although Industrious was not named as a party to the compromise agreement, the agreement if valid bound the claimant in respect of her claims against both Horizon and Industrious; and that (c) the claimant had an arguable case that in entering the compromise agreement she had been induced by and or relied on a material misrepresentation on the part of Horizon. B

11 None of those findings are in dispute on this appeal but what is challenged on the appeal is the finding of the employment judge that "this tribunal does have jurisdiction to determine whether there is an enforceable agreement" (para 10 of the determination). C

The submissions

12 Mr Edward Legard, counsel for Industrious (who has complied admirably with his duties to the court with an unrepresented opponent by referring me to all relevant cases even where they do not support his submissions), contends that the employment judge erred because the only task of the employment tribunal was to determine if the strict requirements of section 203(3) had been complied with and that any other issues relating to the enforceability of a compromise agreement had to be determined in the county court. He proceeds to contend that the employment tribunal is a creature of statute and that there is no provision which enables it to decide whether a compromise agreement is enforceable or impugnable on grounds of duress or of misrepresentation. In support of this contention he relies on authorities to which I now turn. D E

13 In *Eden v Humphries & Glasgow Ltd* [1981] ICR 183, which was the first case in which the validity of a compromise agreement was considered, Slynn J said, at pp 185–186: F

> "Now, as we understand the position in the High Court, from looking at *The Supreme Court Practice* (1979), vol 2, paras 2015 and 2016 under the heading 'Compromise', if an action is compromised then the compromise can only be set aside by a separate action and on certain limited grounds. The question is whether the appeal tribunal has jurisdiction to set aside an agreement which has been made, even if application is made on grounds which would justify the matter being set aside in the High Court. We have to remember that we are a body set up by statute with only the powers which the statute gives us. It does not seem to us that those powers do include jurisdiction to set aside an agreement which has been arrived at between the parties to compromise an appeal to this tribunal. Nor can the provisions of the notes which the employee relies on, to the effect that we can regulate our own procedure, possibly give us the jurisdiction which he suggests that those notes do give to us." G H

14 There are two major differences between the situation in the *Eden* case and the present case. First in *Eden*, unlike in the present case, the

A compromise related to an appeal to this appeal tribunal rather than to the employment tribunal. Second, the present case has to be considered in the light of section 203 and there was nothing similar in force at the time of *Eden*. So I do not consider that it helps me.

15 The next relevant case is the decision initially of the Employment Appeal Tribunal in *Hennessey v Craigmyle & Co Ltd* [1985] ICR 879 in B which Popplewell J, giving the judgment of this tribunal, had to consider whether an employment tribunal could determine whether a compromise agreement produced by a conciliation officer could be set aside by the employment tribunal on grounds of economic duress. He explained, at p 885 (with my emphasis added):

> "It was argued by the employers that because of the provisions of section 140(2) which specifically lay down the matters which can be C relied on as validating a contract, the doctrine of economic duress has no application to the Employment Protection (Consolidation) Act 1978. *It seems to us, however, that the word 'agreement' in section 140(1) is subject to all the qualification by which an agreement can be voided at common law.* It was never intended that the provisions of subsection (2) should be exclusive. Accordingly we reject the submission that if D economic duress is capable of rendering a contract voidable it has no application to employment law. But we believe that the circumstances in which it is likely to be successfully alleged will arise in employment law only in the most exceptional circumstances."

16 No doubt was cast on this statement when the case went to the Court of Appeal [1986] ICR 461. It is noteworthy that in giving his judgment the E Master of the Rolls (Sir John Donaldson), with whom the other two members of the court (Parker and Woolf LJJ) agreed, explained that they recognised that contracting-out provisions under section 140(2) (of the Employment Protection (Consolidation) Act 1978) can be avoided on the grounds on which an agreement can be avoided at common law and economic duress was an example of this. The Master of the Rolls accepted that the tribunal had jurisdiction to consider if an agreement can be avoided F when he said, at pp 468–469: "Whether economic duress of this order did or did not exist is entirely a question of fact for the tribunal of fact, in this case the industrial tribunal."

17 In my view, this dicta is powerful support for the approach of the employment judge, which was that an employment tribunal is entitled to consider whether a compromise agreement can be and should be avoided G before deciding if it constituted a valid agreement for the purposes of section 203 of the 1996 Act.

18 Then in *Larkfield of Chepstow Ltd v Milne* [1988] ICR 1 there was an attempt to have an agreement avoided on the ground that it was concluded under a mistake of fact. The parties had reached an agreement at the end of the hearing and the settlement was approved with the original application being stayed. An issue arose as to whether the settlement had H been made under a mistake of fact because, unknown to the parties when the members of the employment tribunal had retired, they had found in favour of the claimant. The claimant applied successfully to the employment tribunal for the lifting of the stay and the respondent appealed successfully as it was decided that there were no grounds for avoiding the agreement.

19 Having quoted the passage from *Eden v Humphries & Glasgow Ltd* [1981] ICR 183 to which I have just referred, Garland J giving the judgment of this appeal tribunal said [1988] ICR 1, 7:

> "We referred to *Hennessy v Craigmyle & Co Ltd* [1986] ICR 461 as authority for the proposition that a compromise complying with section 140 can be set aside in exceptional circumstances, but we would hesitate to regard this decision as authority for the proposition that there was jurisdiction to set aside at common law or in equity rather than on the ground that the conciliation officer had not conducted himself and the negotiations strictly in accordance with the relevant provisions of the Act of 1978."

20 There are two reasons why I do not consider that judgment helpful. First, the appeal tribunal in *Larkfield* was not referred to the judgment given by Popplewell J in *Hennessy v Craigmyle & Co Ltd* [1985] ICR 879 but instead only to the decision of the Court of Appeal in that case [1986] ICR 461, which did not deal specifically with the point which has to be resolved on this appeal. Second, Garland J (unlike me) was dealing with a submission from the employer appellant that "the appeal tribunal cannot review or revise a settlement properly entered into", while I am considering a submission that the employment tribunal cannot impugn a compromise agreement.

21 The next decision is that of this appeal tribunal in *Greenfield v Robinson* (unreported) 16 May 1996, in which the main point on the appeal was whether and in what circumstances an agreement evidenced by a signed COT3 agreement is liable to be set aside on grounds of alleged misrepresentation. The employment tribunal had to consider the question of jurisdiction but it made findings of fact which led it to conclude that it was unnecessary for it to rule on the question of jurisdiction. Mummery J explained (with my emphasis added):

> "That was a sensible, practical way of dealing with the matter. If there is any doubt about the jurisdiction of a tribunal to entertain this kind of application, we would remove that doubt now. The position, in our view, is that the conclusion reached in vol IV of *Harvey on Industrial Relations and Employment Law*, paras 713–735, is correct. On the basis of the ruling by Popplewell J in the case of *Hennessy v Craigmyle & Co Ltd* [1985] ICR 879, 885B–E, *a tribunal can investigate the circumstances in which it is alleged that an agreement, within the meaning of section 140 of the Employment Protection (Consolidation) Act 1978, is liable to be avoided at common law or in equity.* No doubt was cast on this statement when that same case went to the Court of Appeal: [1986] ICR 461. It is clear from the judgment of the Master of the Rolls (Sir John Donaldson), with which the other two members of the court agreed, that they recognised that contracting-out agreements under section 140(2) can be avoided on grounds on which an agreement can be avoided at common law: see p 465B–C. That particular case dealt with economic duress as a ground of avoidance. *There is no reason why actionable misrepresentation at common law cannot also form the basis on which an industrial tribunal could set aside a contract falling within that section.* Ms Williams cited other cases qualifying or casting doubt

A on this jurisdiction of the industrial tribunal. In our view, the two main cases are distinguishable. We agree with the editor of *Harvey* that neither *Eden v Humphries & Glasgow Ltd* [1981] ICR 183 nor *Larkfield of Chepstow Ltd v Milne* [1988] ICR 1, 6G–7F affect the correctness of the judgment of Popplewell J in the *Hennessy* case. Neither case is authority for the proposition that an industrial tribunal (as opposed to the Employment Appeal Tribunal) has no jurisdiction to set aside an B agreement disposing of proceedings over which it alone has jurisdiction. In so far as the decisions are inconsistent with the proposition in *Hennessy*, we agree with the editors of *Harvey* that *Hennessy* is the more compelling authority. On this appeal Mr Quinn did not seek to challenge the correctness of Ms Williams's propositions on jurisdiction."

C **22** I agree with Mr Legard that the submission on jurisdiction was not contested, but the views of Mummery J on matters of this sort have particular weight especially as they followed the same views expressed in *Hennessy* [1985] ICR 879.

23 Unfortunately the statements of Mummery J and Popplewell J were not referred to in the more recent case of *Byrnell v British Telecommunications plc* (unreported) 13 October 2004, in which Judge D Ansell in the judgment accepted a submission that the only jurisdiction of the employment tribunal in relation to the validity of compromise agreement was to ascertain whether it complied with relevant sections such as section 203 of the Employment Rights Act 1996, which as I have explained sets out a series of requirements.

24 Judge Ansell said of the employment tribunal, at para 9:

E "They clearly had no jurisdiction to entertain claims in relation to the termination agreement as a whole; their task was merely to satisfy themselves that the relevant provisions of that agreement that dealt with the compromise of employment claims satisfied the various statutory requirements in terms of form and legal advice."

25 I feel sure that, if Judge Ansell had been referred to the approach F advocated in *Hennessy v Craigmyle & Co Ltd* [1985] ICR 879 and in *Greenfield v Robinson* (unreported) 16 May 1996, he would have followed them.

Conclusions

26 My view of the authorities is that I should follow the approach G advocated in *Hennessy* and in *Greenfield* which deal directly with the point raised on this appeal, and I am encouraged that *Harvey on Industrial Relations and Employment Law* vol 5, para T–713, reaches a similar conclusion. For the reasons which I have sought to explain, the cases which take a different approach can be distinguished.

27 Indeed, if I had not been bound by authority, my conclusion would H have been the same. In my view, section 203(2) of the 1996 Act permits the parties to make valid compromise agreements but the word "agreement" must mean a valid agreement and the employment tribunal has to ensure that any purported compromise agreement is valid. There is nothing in the Act which precludes the employment tribunal from performing that task and the only reason of principle suggested by Mr Legard for taking a different

view is that such a task might be too complex for an employment tribunal. Compared with the tasks facing employment tribunals in, for example, discrimination cases, it is not demanding or onerous to decide if an agreement can be set aside for misrepresentation. Indeed the employment tribunals frequently have to resolve difficult and complex issues of contractual law such as when they are determining whether an employee has been unfairly dismissed.

28 For those reasons, this appeal must be dismissed.

Appeal dismissed.

J W

Employment Appeal Tribunal

Unison *v* Somerset County Council and others

UKEAT/43/09

2009 July 15 Bean J, Mr A Harris, Mr J R Rivers

Employment — Transfer of undertaking — Protection of employees — Provision in transfer agreement for future recruitment giving no preference to non-transferring employees of transferor — Union complaining of failure to consult — Whether non-transferring employees "affected employees" — Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), reg 13

The appellant union complained that the respondent councils had failed to consult and inform the union, in breach of regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006[1], in respect of a change agreed with the transferees, shortly before the transfer of the councils' resources directorates, concerning the transferees' future recruitment policy. The effect of the change was that the transferees would notify vacancies, not taken up by transferred and seconded employees, to other council employees simultaneously with an external advertisement. An employment tribunal, dismissing the complaint, found that, although the union had not had any real opportunity of considering the provision in its final form, there were "special circumstances" under regulation 13(9) which rendered it not reasonably practicable for the councils to consult the union.

On an appeal by the union and on the issue whether, as the provision in question could only concern council employees not working in the parts transferred, they were "affected employees" for the purposes of regulation 13—

[1] Transfer of Undertakings (Protection of Employment) Regulations 2006, reg 13(1)(6): see post, para 11.

Reg 13(9): "If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances."

Appeal No. UKEAT/0343/10/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 7 October 2010
Judgment handed down on 15 November 2010

Before

THE HONOURABLE LADY SMITH

(SITTING ALONE)

MR T A BALLS — APPELLANT

DOWNHAM MARKET HIGH SCHOOL & COLLEGE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES LADDIE (of Counsel) Instructed by: Messrs Lewis Silkin Solicitors 5 Chancery Lane Clifford's Inn London EC4A 1BL
For the Respondent	MR STEPHEN GOODFELLOW (of Counsel) Instructed by: Norfolk County Council Legal Services Martineau Lane Norwich NR 1 2DH

SUMMARY

UNFAIR DISMISSAL

Strike out. Whether claim had reasonable prospects of success. Whether failure to actively pursue a claim. Employment Tribunal failed to have regard to relevant law and reached conclusions both on the issue of reasonable prospects and whether Claimant had failed to actively pursue his claim which were manifestly not open to it.

Amendment. Circumstances in which it was appropriate to allow amendment of Notice of Appeal which had been drafted by the Claimant, by means of substitution of grounds drafted by counsel instructed under ELAAS scheme. Factors to be taken into account.

THE HONOURABLE LADY SMITH

Introduction

1. This is an appeal against the striking out of a claim by an Employment Tribunal sitting at Norwich, Employment Judge Laidler, sitting alone, dated 7 August 2009. I will carry on referring to parties as Claimant and Respondent.

2. Strike out was ordered on two grounds, namely that the claim had no reasonable prospects of success and that it had not been actively pursued.

3. Accordingly, rule 18(7) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** applied, the provisions of which confer a discretion on an Employment Tribunal to strike out a claim in various circumstances including where the claim has "no reasonable prospects of success" and where it "has not been actively pursued."

The power of strike out

4. To state the obvious, if a claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee claimant's perspective, his employer has "won" without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that strike out is often referred to as a draconian power. It is. There are, of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached.

5. I would refer to the discussion of the use of the power to strike out for failure to actively pursue a claim in the case of **Rolls Royce Plc v Riddle** [2008] IRLR 873, in particular at paragraph 18 – 19:

> **"Where a motion is made under this rule, the Tribunal requires, accordingly, to begin by asking itself whether the claimant has failed to actively pursue his claim. It would not usually be difficult to conclude that where a claimant has failed to appear at a full hearing of which he has been notified, that amounts to a failure to actively pursue his claim. Then, the Tribunal requires to ask itself whether, taking account of the whole circumstances, it ought to exercise its discretion so as to strike out the claim. The rule provides for a general discretion to strike out if the tribunal is satisfied that there has been a failure to actively pursue a claim.**
>
> **19. The rule is not drafted so as to fetter the discretion that is conferred by any particular considerations. However, as with all exercises of discretion, it will be important to take account of the whole facts and circumstances including the fact that strike out is the most serious of sanctions. That being so, as commented in *Harvey*, it is usually considered appropriate to take account of the principles laid down by the High Court in England prior to the introduction of the current Civil Procedure Rules. Those show an expectation that cases of failure to actively pursue a claim will fall into one of two categories. The first of these is where there has been 'intentional and contumelious' default by the claimant and the second is where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent: *Birkett* v *James [1977] 3 WLR 38.* The *Birkett* principles were applied in the Industrial Tribunal context in the case of *Executors of Evans* v *Metropolitan Police Authority [1992] IRLR 570."***

6. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects.

7. I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially.

Background

8. The following background is evident from the documents that were before the Employment Judge. The details are important, hence the extent to which I quote from correspondence.

9. The Respondent is a school and the Claimant was employed by it as a groundsman until 30 November 2006 when he was summarily dismissed for gross misconduct. His wife was the bursar, was dismissed at the same time and, in October 2008, she pleaded guilty to two counts of theft from the Respondent in the sums of £85,000 and £30,000. She was sentenced to a term of imprisonment of 18 months.

10. The police carried out investigations regarding the Claimant but he was not charged with any offence. The Respondent, in the form ET3 lodged by them in response to the Claimant's claim for unfair dismissal, allege that he, in common with his wife, had misappropriated money belonging to them. That is an inference that they seek to draw from the fact (which is not disputed) that two cheques for money not due to the Claimant were paid into his bank account

and sums paid by way of a fuel card belonging to the Respondent were used to fuel the Claimant's and his wife's private vehicles. It is not suggested that the Claimant paid the money into his bank account nor is it said that he used the fuel card. The allegation appears to be that these were matters that occurred in the context of the thefts committed by the Claimant's wife and the Respondent infers some responsibility on his part.

11. The Claimant presented a claim for unfair dismissal to the Employment Tribunal at Bury St Edmunds on 22 February 2007. In paragraph 10 of his claim form, under the heading "Other Information" he stated:

> **"I have submitted my claim within the specified time scale but feel that it is not prudent to pursue the matter further until after the 5th April 2007 when I will know whether the allegations made against me have been disproved. My solicitor involved attended the meeting with the police on 18.12.06 and quashed (*sic*) all their evidence, and there is no further meeting with my solicitor and police until 5th April 2007. My previous employer has been vindictive since an altercation in October 2006 when I stood up to his demands and since then things have escalated to the current situation. I disproved the allegations but he took no notice of them whatsoever and the appeal was timed extremely quickly to ensure he had tied everything up by the end of the school term and on the exact date when the police arrived to pursue this matter to ensure I was unable to even attend the appeal meeting. I do not wish to antagonize this situation until after my return to the police on 5.04.07 but need to submit my claim within the timescale laid down. Your co-operation at this time would be gratefully appreciated as I am under an extreme amount of stress, in addition to financial difficulty through loss of job and trying to regain new employment. At present my solicitor is unable to deal with the employment issue and has recommended others who we are contacting and I will let you know as soon as possible our nominated solicitor for our employment issues."**

12. He also presented a claim for unlawful deduction from wages, on 27 February 2007. In that claim he specified that he alleged he was owed payment for 330 extra hours worked (at £7.18 per hour) and holiday pay for 25.5 days (four hours per day at £7.18 per day). No form ET3 appears to have been lodged in respect of the claim for unlawful deduction from wages. At the appeal hearing before me, Mr Goodfellow stated that no such form could be traced and it was not suggested that any such ET3 was before the Employment Judge at the hearing on the application for strike out.

13. The Claimant's wife presented a timeous claim for unfair dismissal. The Respondent sought conjunction of the two claims. The Claimant objected. His objections were not successful and in April 2007, the claims were conjoined.

14. Between April and August 2007, the Claimant sought and obtained postponements of a case management discussion as he was still being investigated by the police, they had removed papers and his computer and he was trying to obtain legal representation. The problems he was experiencing in attending to the preparation of his case by reason of the fact that there was an ongoing criminal investigation against him was a regular theme in his applications for postponements.

15. On 4 September 2007, the proceedings were stayed pending the outcome of the ongoing criminal investigation against the Claimant.

16. Shortly before 28 May 2008, the criminal investigation that had been carried out in respect of the Claimant was discontinued. No criminal charges were ever brought against him; a letter from the Claimant to the Employment Tribunal dated 5 June 2008 states:

> **"Regarding my current situation the investigation has been dropped against me so therefore I have no case to answer."**

17. In a letter to the Employment Tribunal dated 2 May 2009, the Claimant, similarly, stated:

> **"…no criminal charges of any sort have been brought against me..."**

18. Although, in a letter from the Respondent to the Employment Tribunal dated 30 January 2009, they state: "The criminal charges against Mr Balls were dismissed in June last year", that is not correct. The position was, rather, as stated by the Claimant.

19. In October 2008, the Claimant's wife pleaded guilty to two charges of theft as above noted.

20. In his letter of 5 June 2008, the Claimant made it plain that he was keen to get his claim going again. Having explained that the investigation had been dropped, he stated:

> **"I presume that because of this fact my Tribunal Case no longer remains stayed! I would be appreciated (*sic*) if you would contact me back at your convenience to indicate the next phase that the Tribunal wishes to take in the Tribunal Proceedings...**
>
> **I am available at short notice…"**

21. As he received no reply from the Employment Tribunal to that letter he wrote again on 8 July 2008. He stated:

> **"I understand you have exchanged correspondence with the other party but this does not appear to be moving the matter forward.**
>
> **I am anxious that the end of term for the school is approaching which is obviously a ploy to delay the matter further.**
>
> **Please can you provide an update of details and timetable for resolving this issue? Also, please can you provide an answer in writing in your reply as to the reasons for the extended delay..."**

22. By letter dated 14 July 2008, the Employment Tribunal replied stating:

> **"These cases will remain stayed until the conclusion of the police investigation is known in the case of Mrs J Balls."**

23. By letter dated 28 July 2008, the Claimant expressed his dissatisfaction with that outcome. He stated:

"...I cannot see why my cases should not go ahead."

24. The Employment Tribunal wrote to the Claimant by letter dated 1 August 2008 giving further reasons why the Claimant's claims were to remain stayed. They stated:

> **"Very serious allegations were made against your wife by the Respondent and it is plain that Judge Mitchell gave much thought before, on 4 September 2007, deciding to consolidate both claims to be heard together. It is quite obvious that the Respondent took the view (but it is for the Employment Tribunal to decide) that your dismissal and that of your wife arose from the same facts and the same series of incidents that will be, of course, for the Employment Tribunal to decide in due course. If the proposed criminal charges against your wife come to Court then Judge Cole regards it as more appropriate for the Employment Tribunal claim to await the outcome of the criminal trial. This will also avoid any difficulties for witnesses who may give evidence to the criminal court."**

25. By letter dated 14 October 2008, the Claimant wrote to the Employment Tribunal and stated:

> **"In conjunction with the letter that I sent the Tribunal on the 28th July 2008 and to the Tribunals subsequent ruling I can confirm that the matter that has kept my case to remain stayed has now been resolved to enable my claim to continue."**

and he asked the Tribunal to respond within 7 days acknowledging that his claims should be continued without delay.

26. The Employment Tribunal replied by letter dated 20 October 2008. They stated:

> **"Your letter of 14 October 2008 is not clear. Mrs Balls has not contacted the Tribunal to withdraw her case. Why do you say "the matter that has kept my case stayed has now been resolved?""**

27. The Claimant did not respond until he received a further letter from the Employment Tribunal dated 19 January 2009 headed "**REQUEST FOR INFORMATION Employment Tribunal Rules of Procedure 2004"** directing him to write to them within 7 days to

> **"inform us of the current position in this case."**

and warning him:

> **"In default of a reply the claim will be struck out as not actively pursued."**

28. I pause to observe that there is no indication in the papers of the stay having been lifted at that stage. Rather, the impression is that the stay remained very much in place albeit that it would probably have to be accepted that it was impliedly lifted when the pre hearing review to consider the issue of strike out went ahead.

29. By letter dated 20 January 2009 to the Employment Tribunal from the Claimant and his wife, the Tribunal was clearly advised:

> **"…we will be continuing with our claims…"**

and

> **"In no way have or has any decision been made to cancel these claims."**

and there is reference to the claims being pursued through named solicitors who would be sending further paperwork in due course.

30. That did not, however, satisfy the Employment Tribunal and they wrote to the Claimant and his wife by letter dated 23 January 2009 stating:

> **"The claimant's letter does not provide an adequate explanation nor does it answer our letter dated 20 October (further copy enclosed). Unless this matter is explained satisfactorily there may need to be a pre – hearing review to consider whether the claims should be struck out."**

31. That letter was copied to the Respondent who replied in the letter of 30 January 2009 to which I have already referred. In addition to the comment quoted above, they provided details of the Claimant's wife's plea of guilty to theft and of her sentence. They also advised that, so

far as the Claimant's named solicitors were concerned, they had spoken on the telephone to someone at that firm who had told them that he had no "formal" instructions in relation to the Employment Tribunal claim.

32. They end their letter of 30 January as follows:

> **"In the circumstances I would respectfully request that the Tribunal list these matters of its own motion for a Pre- Hearing Review to consider whether these claims should be struck out on the basis that none of the claims have any reasonable prospect of success and or in the alternative that the claims should be struck out for a failure by both parties to actively and properly pursue the claims."**

33. That letter from the Respondent was copied to the Claimant under cover of a letter from the Employment Tribunal of 3 February 2009 in which the Claimant was advised that:

> **"Employment Judge Cole has commented that a pre-hearing review seems sensible, but your observations, if any, are invited within 7 days of the date of this letter."**

34. That was the background against which a pre-hearing review was fixed, on 13 February 2009, to consider whether the claim should be struck out. It is not clear whether it was fixed on the basis that the issue was being raised by the Tribunal of its own motion, as the Respondent had invited it to do, or, as would appear to have been the more appropriate course of action, on the basis that the strike out application was being made at the instance of the Respondent. Whilst, on one view, it may not matter, the difference could be important if any issue arises as to onus.

35. The Claimant was advised that the PHR would take place on 13 May 2009. He sent in written submissions by letter dated 2 May 2009. In that letter he stated:

> **"I will be unable to attend due to my current mental health and depression, which can be substantiated by a doctor's letter and certificate should this be required."**

36. His submissions criticised the Respondent for having delayed his claims. In addition to the statement that no criminal charges had been brought against him, to which I refer above, he plainly sought to make it clear that his position was that he was entirely innocent of the allegations made by the Respondent against him:

> **"...which they have admitted to their error."**

37. He refers to salary which he considers he is owed and adds:

> **"In addition, the letter from the Head at the School confirms I am owed salary for additional work undertaken for which he has treated me differently to other employees."**

and on the second page of his letter he explains:

> **"I have received a letter from the Head at the School admitting that I was treated unfairly and differently to other staff, and therefore, I have been discriminated against by the School and treated unfairly in comparison with other School and Council employees."**

38. The Employment Tribunal did not revert to him in connection with that letter. He was not asked to provide any medical certificate.

The PHR

39. The Claimant did not attend the PHR. The heading of the Employment Tribunal's judgment states:

> **"Representation**
>
> **Claimants: For Mr T Balls – written representations."**

The respondent was represented by counsel. In her judgment, the Employment Judge states:

> **"14. The Respondents have made representations at this hearing that the claims be struck out, with regard to Mrs Balls in the light of her conviction and with regard to Mr Balls, again in the light of the conviction, that his claim of unfair dismissal has no reasonable prospect of success, and, with regard to the wages claim, that it likewise has no reasonable prospect on the basis that the contract that the Claimant entered into was for 20 hours a week on a fixed wage, even though it was agreed between parties that the hours might vary."**

40. The Employment Judge does not refer to any submission being made by the Respondent's counsel that the Claimant had failed actively to pursue his claim.

The Employment Tribunal's judgment

41. The judgment is a short one. Brevity can, of course, be commendable but not if it is at the expense of the essentials or accuracy. Significant absences in this judgment are the lack of any reference to rule 18, to relevant authority as to its application, to relevant authority on the issue of failure in the active pursuit of litigation, to the issues raised in the Claimant's forms ET1 and the Respondent's sole ET3, to the correspondence between the Claimant and the Employment Tribunal to which I have referred above and to the submissions contained in the Claimant's letter of 2 May 2009. An obvious error is that the Employment Judge states, at paragraph 3:

> **"Criminal charges against Mr Balls were dismissed in June 2008."**

which, whilst that is of course the way that the Respondent put it in its letter of 30 January 2009, is not what the Claimant told the Employment Tribunal, as is evident from a reading of his letters, as above. It is an unfortunate error since it gives the impression that the Employment Judge has commenced her considerations with a more negative view of the Claimant than was justified and, further, gives the impression that she has been less than careful in her assessment of the material before her.

42. The Employment Judge found, at paragraph 15, that there were no reasonable prospects of the Claimant's wife succeeding in her claim, given her conviction – even if it were to be found that she was unfairly dismissed, there would be no award of compensation once a **Polkey** deduction was applied. She then deals with the Claimant's unfair dismissal claim at paragraphs 16 to 18 where she states:

> **"16. With regard to Mr Balls' unfair dismissal claim, I am likewise satisfied that the claim should be dismissed as having no reasonable prospects of success. Even though criminal charges have been dropped, the test in the Employment Tribunal is quite different and the employer does not have to show guilt or otherwise but satisfy the test in *British Home Stores* v *Burchell [1980] ICR 303* and satisfy the Tribunal that it acted fairly in all the circumstances. As stated in relation to Mrs Balls, even if there were any procedural failings, it is more likely than not that there would still be no award of compensation in the light of all the circumstances in the case. I am satisfied therefore that the claim should be dismissed as having no reasonable prospects of success.**
>
> **17. Further I am also satisfied it should be struck out on the basis that it has not been actively pursued. Mr Balls has been writing to the Tribunal since October 2008, stating that he was instructing solicitors who were proceeding with the claims but that has not in fact been the case. It also appears that those solicitors are not instructed and therefore the information given by him cannot be relied upon. A strike-out warning has been given and he has been well aware that that was being considered at this hearing.**
>
> **18. I have taken note of his letter of 2 May 2009 but that does not assist the tribunal. No medical evidence was provided as to why Mr Balls could not attend this hearing. Indeed he did not seek a postponement of it but asked that his letter be taken into account. The letter does not give the tribunal any details as to how the claim is to be pursued. It merely restates the Claimant's position that his dismissal was unfair."**

43. The Employment Judge then turns to the Claimant's claim for unpaid wages and states, at paragraph 19:

> **"I am also satisfied that that should be struck out as having no reasonable prospects of success. I am satisfied that the position as outlined by the Respondents is likely to be established at any full Hearing and that the Claimant has no reasonable prospects of demonstrating that monies in respect of wages are due to him. In the alternative, again this claim has not been actively pursued. No steps have been taken by the Claimant to pursue it and indeed it could have been pursued by him completely independently of the other claims. He has, however, chosen not to do so."**

Notice of Appeal

44. The Claimant lodged a Notice of Appeal which he had drafted. It referred to a number of matters including that the judgment was made in his absence due to ill health, that all his allegations that he was unfairly treated had been totally disregarded, that he had new evidence

from his GP regarding his illness, that under Article 6, he was entitled to a fair trial, that the Tribunal's decision amounted to punishing him for a crime he did not commit, that he was treated differently to other employees, and that the Employment Tribunal was biased. The Notice of Appeal was rejected on the sift, as he was advised by letter dated 5 February 2010.

45. At a hearing under rule 3(10) on 7 July 2010, the Claimant was represented by Mr James Laddie, of counsel, who appeared under the ELAAS scheme. It is a tribute to the quality and value of that scheme that he prepared and submitted to this Tribunal, for that hearing, a clear and cogent skeleton argument in support of the rule 3(10) application and, on the basis of it and his oral submissions, Underhill P was persuaded that there were in fact reasonable grounds of appeal. The case was allowed through to a full hearing. Paragraph 4 of the order for the full hearing provided:

> **"The Skeleton Argument of Mr James Laddie prepared for the Rule 3(10) application hearing is to stand in substitution as an Amended Notice of Appeal: the Respondents to have liberty to apply on paper within 14 days of the sealed date of this Order on notice to the other parties to vary or discharge the Order in this paragraph and/or for consequential directions as to the hearing or disposal of the appeal."**

46. Notice of application to discharge Underhill P's order was lodged within fourteen days, although their skeleton argument for the appeal hearing was amended only forty eight hours prior to the hearing to add an application to discharge paragraph 4.

47. I heard argument at the outset of the appeal hearing in respect of the Respondent's application to discharge paragraph 4 of the order. Although no timeous notice of the application had been given, Mr Laddie did not take issue in that regard. Mr Goodfellow's submission was that the amendment of the original Notice of Appeal came late in the day against a background of earlier delay by the Claimant who had indicated that he was instructing a solicitor. He very fairly accepted, however, that the Claimant did not in fact have legal

representation until Mr Laddie was instructed under the ELAAS scheme and that had not occurred until the day before the rule 3(10) hearing. He did not suggest that the Respondent was prejudiced by the amendment of the Notice of Appeal.

48. Mr Laddie submitted that the Respondent's application should be refused and I agreed that that was the appropriate course of action, noting that the Claimant's own draft had captured the essential elements of the case as set out in the skeleton. Further, I had no doubt, particularly since what was at issue was a decision to strike out the Claimant's claims and the Respondent was not pointing to any prejudice, that it was in accordance with the overriding objective that I refuse Mr Goodfellow's application. It also seemed to me that to do otherwise would not have been in accordance with the Claimant's Article 6 right to a fair trial.

The appeal

49. For the Claimant, Mr Laddie submitted that the Tribunal had erred in law both in finding that the Claimant's claims had no reasonable prospects of success and in finding that he had failed actively to pursue his claims.

50. Mr Goodfellow conceded that, given the absence of any form ET3 in relation to the wages claim, it could not be said that it had no reasonable prospects of success.

51. Mr Laddie submitted that the Employment Judge's reasoning failed to disclose any evidence that she had understood the correct legal test, that she had applied it or that she had properly understood the factual background. He referred to **English v Emery Reimbold & Strick Ltd** [2003] IRLR 710, recognising that it was not necessary for a judgment to spell out every aspect of the reasoning. This, however, was, he submitted one of the cases where it was not clear how or why the Claimant had lost and the **English** test was not met. There was no

indication of her applying the proper test to decide on the issue of reasonable prospects. There was no indication of her appreciating that the Claimant's claim was separate from his wife's, that he had worked in a different job which did not give him any access to school funds, on a different site, at a wholly different level of responsibility and had never been charged with any offence. As to her reference to **Burchell**, it was materially inaccurate. The case was not authority for an employer being required to satisfy the Tribunal that it acted fairly in all the circumstances. There was no indication of her being aware that the test was more demanding and sophisticated and that it was not enough to show genuine belief in the alleged misconduct. When it came to the wages claim, her approach was staggering. There was not a scrap of evidence before her to enable her to strike it out whereas there was a detailed claim in the Claimant's ET1. Astonishingly, she criticised the Claimant for having failed to pursue his wages claim separately yet that was exactly what he had done. Whilst he recognized that the Respondent no longer suggested that there were no reasonable prospects in respect of the Claimant's wages claim (although they had done so at the PHR), the Employment Judge's approach to that issue was symptomatic of her whole approach. Overall, the judgment "was a mess".

52. So far as delay was concerned, the Respondent's case was that there had been delay which could be categorised as being in the first of the **Birkett v James** categories, namely intentional and contumelious default. Mr Laddie went through the correspondence to which I have referred and submitted that contrary to what was found by the Employment Judge, far from deliberately delaying matters, the Claimant had been trying to get matters moving. On no view could he be accused of culpable delay. He had never failed to comply with an order of the Tribunal. It had never been suggested that he was guilty of an abuse of process.

53. Mr Laddie submitted that, overall, a serious injustice had occurred, the Tribunal's judgment should be quashed and the claims remitted to a fresh Employment Tribunal.

54. For the Respondent, Mr Goodfellow submitted that the Employment Judge's judgment, whilst not entirely clear in parts, gave sufficient explanation of her reasons for finding as she did. She was entitled to take account of the fact of the Claimant's wife plea of guilty to theft, of the fact that the sums misappropriated included sums of money that were paid into his bank account and the Claimant had not suggested that he was unaware of that happening. He also suggested that the Claimant had not dissociated himself from his wife's actions. The test that the Employment Judge had to apply was as explained by the Court of Appeal in the case of **ED&F Man Liquid Products Ltd v Patel** [2003] C.P Rep 51, founding on the reference to the need for the case to "carry some degree of conviction" (per Potter LJ at paragraph 6) and the Employment Judge was entitled to decide that it had not been met.

55. Regarding delay, Mr Goodfellow submitted that the correspondence showed that the Claimant was not being frank. It would, he submitted, have been apparent that the Claimant had been written to in October 2008 and had not responded. The Employment Judge was entitled to decide that he had failed to progress his claim.

Discussion and Decision

56. I have already alluded to criticisms that I consider fall to be made of this judgment and, having considered counsels' submissions, it seems to me that all of Mr Laddie's criticisms were well founded. The Employment Judge's approach is wholly flawed.

57. Dealing firstly with the facts, she was not entitled to proceed on the basis that the Claimant had been charged with an offence at any time or on the basis that he had not instructed

solicitors (putting matters at their highest, the Respondent's letter of 30 January 2009 indicated that the identified solicitor had not received "formal" instructions), nor on the basis that as from October 2008, he had been repeatedly stating that he was instructing solicitors, that being the impression she gives in paragraph 17 of her judgment (there was but a single letter from the Claimant to the Employment Tribunal after October 2008) or on the basis that he had not raised a separate wages claim or on the basis that he had not taken steps to pursue it.

58. Turning then to the Employment Judge's characterisation of matters, there is a strong sense of her approach being that the Claimant must be "tarred with the same brush" as his wife. That emerges from her reference to charges against the Claimant having been dropped, a matter which was of no apparent relevance, from her reference to being "likewise" satisfied that his claim had no reasonable prospects, and from her stating that as with his wife's case, even if there were procedural failings, it was likely that there would be no award of compensation. She gives no reason for that conclusion other than, by inference, his wife's guilt. It was in fact important that the Employment Judge ensure that the fact of conjunction of the claims did not cloud her vision so far as the Claimant's quite separate claims were concerned. He was entitled to have his claims considered on their own merits and the Employment Judge needed to be careful to avoid making any assumptions based on the fact of his wife having committed theft. Unfortunately, on any reading of her judgment, it can only be concluded that she failed to do so.

59. Further, if the Employment Judge had had regard to the history of the case she would have seen that the Claimant had opposed the joining of the claims and had been at pains to stress that he was innocent of any wrongdoing. She could and should also have observed the separate nature of the Claimant's and his wife's jobs and would have been alive to the risk of treating both persons' claims as one and the same when they simply were not.

60. Moving to the criticisms of the Claimant for causing delay, on any sensible reading of the correspondence it can only be concluded that it is not fair to criticise him in either the way that the Employment Judge did or as the Respondent did in its letter of 30 January 2009 yet that is what the Employment Judge appears to have done. The plain picture that emerges is that the Claimant did not want his claims to be stayed or joined with his wife's but had to accept that happening, that the Employment Tribunal were well aware that matters were awaiting the outcome of police investigations (that was the reason for the stay), that as soon as he was free of police investigations, he made it plain to them that he wanted to make progress and that thereafter, he was faced with a number of singularly unhelpful, apparently enigmatic letters from the Tribunal which he was then criticised for not dealing with. I cannot understand the difficulty that the Tribunal apparently had with understanding the meaning and import of the Claimant's letter of 14 October particularly since they were well aware of the background. Their response on 20 October was unnecessarily combative, as was their letter of 19 January 2009. As for asking a Claimant to tell them what the current position in the case was, that was and should have been obvious to them; the claims were stayed and the Claimant was asking to make progress with them. What more of an explanation did they require? Any ordinary citizen would, by this stage, have been entitled to feel enormously frustrated and it is not surprising that the letter from the Claimant and his wife of 20 January was in firm and plain terms and sought to make it clear that they were indeed going ahead with their claims. That that should have been followed with a letter telling the Claimant that his letter did not provide an adequate explanation and that he was at risk of having his claim struck out was quite wrong. What did the Tribunal want to have explained? How was the Claimant supposed to understand what precisely was their question? And why, when they had been wholly unclear in their responses to the Claimant, should he have been at risk of his claim being struck out? To say that these matters were mishandled by the Tribunal is an understatement. What, however, for present purposes is important is that the Employment Judge should have appreciated that that

was the background and on no view could it support the conclusion that the Claimant had not actively pursued his claim.

61. In all the circumstances, I have no difficulty in upholding this appeal.

Disposal

62. I will pronounce an order upholding the appeal and remitting the Claimant's claims to a freshly constituted Employment Tribunal to proceed. It would plainly be inappropriate that it be remitted to the same Tribunal, as was accepted by Mr Goodfellow.

Appeal No. UKEATS/0024/15/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 11 May 2016

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

GLASGOW CITY COUNCIL APPELLANT

MR BENSALEM DAHHAN RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr B Napier (One of Her Majesty's Counsel) Instructed by: Glasgow City Council Legal Services City Chambers George Square Glasgow G2 1DU
For the Respondent	Mr D Hay (Advocate) Instructed by: Bridge Litigation UK Carlton Building 63 Carlton Place Glasgow G5 9TW

SUMMARY

On appeal against the decision of the Employment Tribunal that it had jurisdiction to set aside a settlement agreement on the ground that the claimant lacked capacity to contract, it was argued that the position as set out by Silber J in **Industrious Ltd v Horizon Recruitment Ltd (in liquidation) and Vincent** did not extend to agreements where the alleged invalidity was due to capacity.

A distinction between agreements induced through error or misrepresentation and those purportedly entered into by a party who lacked capacity is artificial and unsound. The relevant legislation requires the Employment Tribunal to consider the validity of any purported settlement agreement. Only if it is valid both in form and in substance will the Tribunal's jurisdiction to determine the claim be ousted.

THE HONOURABLE LADY WISE

Introduction

1. In a judgment dated 18 February 2015 and promulgated the following day, employment judge Shona MacLean, sitting in Glasgow, made a determination that the Employment Tribunal has jurisdiction to set aside the settlement agreement between the parties dated 19 June 2014 on the ground that it was invalid because the claimant did not have capacity to contract at the time of signing. I shall refer to the parties as the claimant and respondent as they were in the Tribunal below. At the hearing before the employment judge and before me the claimant, Mr Dahhan, was represented by Mr David Hay, Advocate. The respondent, Glasgow City Council, was represented on both occasions by Mr Brian Napier, QC.

2. The issue in this appeal is apparently a novel one, namely whether the Employment Tribunal has power to set aside a purported settlement agreement on the basis that one of the signatories to the agreement lacked the capacity to enter into it. While there are a number of authorities, particularly in England, in relation to the power of the Employment Tribunal to set aside settlement agreements, none of those has related to contractual capacity as opposed to an absence of agreement through essential error or misrepresentation.

Background

3. The background is set out in the judgment of the employment tribunal but I will summarise it briefly here. On 17 July 2013 the claimant, who was employed as a teacher by the respondent, presented a claim against Glasgow City Council of direct discrimination, harassment and victimisation on grounds of the protected characteristic of race. The claims

were resisted and proceedings were sisted pending internal procedures. On 5 June 2014 after a Preliminary Hearing it was agreed that the proceedings would remain sisted only until 7 July 2014. On 20 June 2014 the Tribunal was advised that settlement had taken place and that the claimant accordingly wished to withdraw his claim. Accordingly, employment judge MacLean issued a judgment on 24 June 2014 dismissing the claims under Rule 52 of the 2013 Regulations, the claim having been withdrawn by the claimant. On 9 July 2014 the claimant wrote to the Tribunal advising that he had lacked capacity to instruct his solicitor and to make decisions at the time of the purported settlement. He wished to apply for reconsideration of the judgment of 24 June 2014 if and when the settlement agreement was set aside. The respondent objected to the claimant's application, that led to a preliminary hearing to consider the Tribunal's jurisdiction to set aside the settlement agreement. The judgement appealed against was issued following that preliminary hearing.

Argument for the Appellant and Respondent

4. Mr Napier, QC confirmed that it was accepted on both sides that the settlement agreement in question was an *ex facie* valid settlement agreement in terms of sections 144 and 147 of the Equality Act 2010. It was a contract to settle the dispute between the parties, the claimant having had the benefit of advice. Accordingly the settlement agreement was on the face of it binding, subject to the claimant's assertion now that he agreed to withdraw his claim at a time when he lacked capacity. The content of the agreement involved the claimant agreeing to give up all claims arising from his contract of employment with the respondent, whether under statute or at common law, subject to exceptions in respect of (a) actions to enforce the agreement itself; (b) personal injury claims not apparent at the time of signing; and (c) pension entitlement claims. It was noteworthy that the breadth of the agreement extended not only to claims for unfair dismissal and discrimination but also to claims that could be made

because of the employer's breach of implied duties of good faith within the employment context. The intention appeared to be to exclude all present and future claims arising from the employment relationship. That would include, for example, a claim brought against the respondent alleging breach of its duty of confidentiality. Thus there was potential exposure for the respondent to contract based claims that extended far beyond the matters that fell within the remit of the Employment Tribunal. The Employment Tribunal's jurisdiction is a statutory one. While there is contractual jurisdiction in respect of a breach of contract of employment, that contractual jurisdiction is limited to circumstances where a contract of employment has terminated. Other types of contractual claims arising from the employment relationship are specifically excluded by statute – section 3(3) Employment Tribunals Act 1996 ("ETA") and articles 3 and 5 of the Employment Tribunal Extension of Jurisdiction (Scotland) Order 1994.

5. Mr Napier submitted that there was a difference between the previous provision on settlement agreements in section 203 of the Employment Rights Act 1996 ("ERA 1996") and sections 144 and 147 of the Equality Act 2010. The issue about setting aside agreements on the basis of a lack of capacity to contract could only arise unto the 2010 Act. The 1996 Act required a settlement agreement to be in writing but did not specify a contract as such. It was possible to reach agreement with someone who is intoxicated or with a child but a contract could only be entered into by someone holding capacity to contract. The difference in the effect of a lack of capacity in Scots and English law was also noted although that was said not to be of the essence of the matter.

6. The development of the law in relation to the Employment Tribunal setting aside settlement agreements was said to be usefully summarised in Harvey on Industrial Relations and Employment Law, Division P1 at paras 704-725. The issue of jurisdiction to set aside such agreements had developed since the early case of **Eden v Humphries & Glasgow Ltd [1981**

ICR 183 in which the EAT had held that it had no power to set aside an agreement compromising an appeal and that the only way in which such an agreement could be set aside was by separate action. The current position is contained in the more recent decision of **Industrious Ltd v Horizon Recruitment Ltd (in liquidation)** and **Vincent [2010] IRL 204 EAT** in which Silber J, having reviewed the various authorities decided that there was nothing in the relevant legislation that precluded the Tribunal from performing the task of ensuring that any purported compromise agreement was valid. It was accepted on behalf of the respondent that, under the law as it now stands, the Tribunal has power, in certain circumstances, to set aside an agreement where there is an absence of consent of a party, because of misrepresentation, economic duress or mistake. That is the effect of the decision in **Industrious Ltd**. However, Mr Napier argued that the law had not and should not develop further than that. Save in so far as now accepted as exceptions, the jurisdiction of the Employment Tribunal was strictly limited to that given by statute. That was consistent with the decision in **Eden v Humphries & Glasgow Ltd** and also with *dictum* of Lord Johnson in **Secretary of State for Scotland v Mann and Another [2001] ICR 1005**. In the case of **Industrious Ltd**, Silber J had sought to explain the decision in **Eden v Humphries & Glasgow Ltd** partly on the basis that section 203 of the 1996 Act had not been in existence when the case was decided. However, as section 203 of the 1996 Act had no bearing on contractual capacity that was of no moment. What mattered was that the issue in **Eden** was that a party alleged medical reasons and a failure to understand the significance of the agreement in the set aside claim that was rejected beyond the powers of the EAT. In Mr Napier's submission, one should guard against extending such ability as the ET now had to set aside agreements to situations where it was being asked to make a finding on capacity. A capacity finding goes to status and potentially other areas of law. For example, it would be difficult for a court in a family matter to fail to take account of a finding of lack of capacity by the Employment Tribunal at the material time. Any argument that, because there is now jurisdiction to set aside agreements on

the basis of misrepresentation, jurisdiction could be extended to situations of lack of capacity would be flawed. The test was a different one. In **Dunhill v Burgin [2014] 1 WLR 933**, albeit in a different context, Lady Hale in the UK Supreme Court had emphasised the importance of upholding agreements validly entered into.

7. Mr Napier submitted further that it was important that the terms of the settlement agreement in this case went far beyond the matters in respect of which the Employment Tribunal has jurisdiction. The employment judge in this case acknowledges (at paragraph 45 of her judgment) that if the settlement agreement were to be set aside it would not be possible to restrict that consequence to areas in which it had jurisdiction. It was submitted that such a conclusion was correct but militated against accepting jurisdiction to set aside an agreement of this sort. It was noted that in **Greenfield v Robinson [1996] UKEAT 811** Mummery J rejected the proposition that the tribunal had no jurisdiction to set aside an agreement disposing of proceedings "... over which it alone has jurisdiction". Those views were specifically endorsed by Silber J in **Industrious**. Accordingly, one could distinguish a situation where an agreement related solely to matters over which the Tribunal had jurisdiction and were all encompassing agreement such as that involved in the present case. As a fall-back position, Mr Napier argued that even if there was the power argued for by the claimant in this case a possible restriction would be available of setting aside the agreement but only in so far as the matters over which the Employment Tribunal had jurisdiction were concerned. The fact that no other proceedings are contemplated between the parties to this dispute should not drive the decision on jurisdiction.

8. It was also argued that the employment judge had misunderstood the position by finding that the Tribunal had jurisdiction to consider the validity of the settlement agreement "under common law" (paragraph 47). As already submitted, the jurisdiction of the Employment

Tribunal is entirely dependent upon statute. The appeal should be allowed and an order substituted that the Employment Tribunal has no jurisdiction to set aside this contract.

Argument for the Claimant and Respondent

9. Mr Hay, advocate, suggested that the question to be addressed in this case was the source of the jurisdiction for the Employment Tribunal to consider the validity of an agreement. That source was initially section 203 of the Employment Rights Act 1996, which provision was headed "settlement agreements". From the coming into force of that provision, "settlement agreement" was treated as a term of art sufficient to embrace every aspect of validity. While it was accepted that the Employment Tribunal, as a creature of statute, has no inherent common law jurisdiction, it has jurisdiction conferred upon it to consider whether or not it should give effect to a settlement agreement through the wording of section 203 of the 1996 Act and now section 144 of the Equality Act 2010. That position was supported by decisions of the Court of Appeal and Employment Appeal Tribunal in England. In **Greenfield v Robinson 1996 UKEAT 811** the power to set aside an agreement was expressed by Mummery J in general terms. No distinction was made between the different classes of validity. No distinction could properly be drawn between an agreement under section 203 of the 1996 Act and a contract under sections 144 and 147 of the 2010 Act. The jurisdictional impact was the same. Further, while the effect of lack of capacity to contract differed as between Scotland and England that mattered little as the issue was jurisdiction to explore challenges to an agreement or contract compromising an action before the Tribunal.

10. It was submitted further that the task facing a tribunal under these provisions was conceptually similar to the defensive exception that was available in the sheriff court using the general plea of *ope exceptionis* at a time when reduction was an incompetent remedy in the

sheriff court and fell within the exclusive jurisdiction of the Court of Session. A party in sheriff court proceedings was entitled to plead invalidity (nullity) as a defence to an aspect of proceedings founded upon an unenforceable writing. In such proceedings the court would apply the common law of Scotland to the effectiveness or validity of the document in question. The situation was much the same here. While the expression used by the employment judge in relation to common law was to some extent inapposite, what mattered was the power of the Tribunal, emanating from statute, to address the validity or otherwise of a document put before it. Such an approach was entirely consistent with the line of reasoning adopted by Silber J in **Industrious Ltd v Horizon Recruitment Ltd (in liquidation) and Vincent**. In particular the word "agreement" in section 203 (or "contract" in section 144) must mean a valid agreement. The Employment Tribunal has to ensure that any purported settlement agreement is valid. It would be a curious and undesirable result if a document that was void in terms of the law of Scotland and thus a nullity would nonetheless require to be enforced by the Employment Tribunal here provided it complied with the statutory requirements of sections 144 and 147 of the 210 Act. Further, it would be unsatisfactory for the claimant to be able to argue lack of mental capacity to contract in the English Employment Tribunal without objection on the basis that such a contract would be considered voidable rather than void there, but be unable to do so in the Employment Tribunal in Scotland. There was no limitation or qualification to the categories of invalidity that could be considered by the Tribunal. There was no sound reason for so limiting the field of potential invalidities. There was no basis for the suggestion that any limitation should operate so as to permit the Tribunal to consider questions of voidable contracts but not contracts that were purportedly void. A voidable contract is valid until rescinded – McBride, The Law of Contract in Scotland 3rd edition paras 13-21 to 13-23. In contrast, a void contract is null *ab initio* – Gloag on Contract at page 531. It would seem strange for the Tribunal to require to give effect to a contract which is enforceable in law until rescinded by one of the parties but be unable to acknowledge that a void contract was a nullity.

It could be argued that greater judicial interference on the part of a tribunal was required to decline to give effect to an otherwise valid contract than to acknowledge that a contract never had the status of a binding obligation from the outset. The legal systems of both Scotland and England recognise the concepts of void and voidable contracts and it would be artificial to differentiate between the two in a way that would demand Scottish Tribunal to depart from the reasoning of **Industrious**. It was acknowledged that Underhill J had sounded a warning note as to the wariness of tribunals embarking down the road of trying to investigate a party's mental capacity to litigate in **Johnson v Edwardian International Hotels Ltd [2008] UKEAT 0588**, but that observation must be seen in the context of the ratio of the decision which was whether it was appropriate for an employment tribunal to investigate a party's capacity to litigate before it. No issue of the invalidity of written contracts arose in that case and the *dictum* in question was accordingly of limited assistance.

11. Turning to the respondent's argument that the Tribunal erred in its conclusion given that the terms of this particular settlement agreement included bases of action not justiciable in the Employment Tribunal, it was accepted that the conclusion of the Tribunal finding that such a settlement agreement was unenforceable for want of mental capacity would not result in a decree or other order formerly revoking the document. Such a conclusion could nonetheless found a plea of *res judicata* in another forum. Much would depend on whether the issue litigated and decided upon in the Employment Tribunal was the same as that litigated in subsequent proceedings in another forum in accordance with the requirements for a plea of *res judicata* – **Esso Petroleum v Law 1956 SC 33**. However, it was contended that such consequences did not give rise to any difficulties in the course proposed on behalf of the claimant. It was important to recognise that in appropriate circumstances the plea of *res judicata* would be available to either party involved in the litigation. The single action rule in Scots law would appear to exist in employment related proceedings – **British Airways v Boyce**

2001 SC 510.

12. Mr Hay contended that the respondent's approach was flawed in so far as it sought to distinguish capacity to contract from other matters such as error or misrepresentation that could lead to an agreement being set aside. The issue of capacity had to be judged in relation to the decision or activity in question and not globally – **Dunhill v Burgin 2014 1 WLR 933** at paragraph 13.

Discussion

13. It is instructive first to consider the relevant statutory provisions concerning settlement agreements in the context of disputes before the Employment Tribunal. The provision in force at the time of the relevant cases culminating in that of **Industrious Ltd v Horizon Recruitment Ltd** was section 203 ERA 1996. In so far as material, it provided that:

> "(1) Any provision in an agreement ... is void in so far as it purports;
>
> ...
>
> (b) to preclude a person from bringing any proceedings under this Act before an Employment Tribunal ...
>
> (2) Sub-section (1) does not apply to any agreement to refrain from instituting or continuing any proceedings ... if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement."

14. In broad terms the conditions referred to in sub-section (2) were that that agreement had to be in writing, relating to particular proceedings and following independent advice being given to the employee with the agreement carrying a statement to that effect.

15. The provision now in force, section 144 of the Equality Act 2010 provides, in so far as

material, as follows:

> "(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act ...
>
> (4) This section does not apply to a contract which settles a complaint within section 120 if the contract –
>
> (a) is made with the assistance of a conciliation officer, or
>
> (b) is a qualifying settlement agreement."

(The term "settlement agreement" was substituted by the (Enterprise and Regulatory Reform Act 2013) section 23(5)).

16. The term "qualifying settlement agreement" is defined in section 147 of the 2010 Act. In essence, again the contract requires to be in writing, relating to the particular complaint, signed following independent advice received by the employee with the contract stating in terms that such advice has been received.

17. What is immediately apparent is that the scheme of the provisions in both pieces of legislation is to impose a rule that a contract is either void or simply unenforceable unless certain specified conditions are satisfied. Only if those conditions are satisfied will the Employment Tribunal be released from the responsibility to determine a claim before it. The significance of that, in my view, is that, absent a qualifying settlement agreement being valid in both form and substance, the Employment Tribunal cannot dismiss the claim on the basis that it has settled.

18. It has to be acknowledged that both the Employment Tribunal and the Employment Appeal Tribunal are bodies created by statute and that their powers are therefore limited to those bestowed by the legislation. The decision in the case of **Eden v Humphries & Glasgow Ltd** was that in the absence of a specific statutory power to set aside an agreement

compromising an appeal before the Employment Tribunal, no such setting aside order could be made. Mr Napier argued that the explanation given by Silber J in **Industrious Ltd,** that **Eden v Humphries & Glasgow Ltd** had been decided before section 203 of the 1996 Act was enacted did not assist in determining the approach to be taken to contracts to which the Equality Act 2010 applies. However, standing the scheme of the provisions both in the 1996 Act and now in the 2010 Act, the distinction made by Silber J is in my view a valid one. Until such time as the Employment Tribunal was required to consider the terms of a settlement agreement and decide whether it was sufficient effectively to oust jurisdiction of an ongoing complaint on the basis of a compromise settlement, there was no statutory power to set aside such an agreement. The power to set aside such agreements arises from the statutory requirement upon the Tribunal to consider its validity. As Silber J put it in **Industrious Ltd**:

> "...s.203(2) of the ERA permits the parties to make valid compromise agreements but the word '*agreement'* must mean a valid agreement and the Employment Tribunal has to ensure that any purported compromise agreement is valid."

19. Both sides accepted in argument before me that following the cases of **Greenfield v Robinson** and **Industrious Ltd v Horizon Recruitment Ltd (in liquidation)** and **Vincent** the Employment Tribunal does have jurisdiction to set aside agreements at least in relation to matters over which it has jurisdiction. The real issue in this case is whether what the claimant seeks to do in this case is an extension of that power. If so, standing that the Employment Tribunal's powers are limited to those conferred by statute, is such an extension permissible?

20. In my view, the distinction proposed by Mr Napier in this case is artificial and unsound. Once it is accepted that the analysis of Silber J in **Industrious Ltd** is correct to the extent that the obligation on the Tribunal when presented with a proposed settlement agreement is to consider whether it is valid, there is no sound basis for drawing a distinction between invalidity

on the ground of, say, misrepresentation on the one hand and invalidity on the ground of lack of capacity to contract on the other. Both sides were agreed that the distinction between Scots and English law rendering contracts entered into through lack of capacity void in the former but voidable in the latter were not material to determination of this issue. It is of course the case that none of the decided cases have required to address the particular question of whether the Employment Tribunal has jurisdiction to set aside an agreement said to have been entered into where one party to the contract lacked legal capacity. However, I agree with the submission made by counsel for the respondent that it would be a strange, even illogical result if a Tribunal was required to decline to give effect to the contract entered into through misrepresentation that was otherwise valid but could not refuse to enforce a contract that was a nullity (at least in Scots law) from the outset.

21. It may be that the Employment Judge in this case misunderstood the position to some extent when she suggested that the power of the Tribunal to set aside the contract somehow emanated from the common law. The power, indeed the obligation, to consider the validity or otherwise of a qualifying settlement agreement emanates from the statute itself. It seems to me that that was the general principle articulated by Silber J in **Industrious Ltd v Horizon Recruitment Ltd**. Where a claim is made that one party to an otherwise *ex facie* valid agreement had no capacity to contract, the duty of the Employment Tribunal to examine that issue and refuse to acknowledge as enforceable the agreement, if on the evidence led a lack of capacity is proved, is all part of the exercise laid down first in the 1996 Act and now in the 2010 Act.

22. So far as the *res judicata* point is concerned, there are of course one or two aspects of the contract involved in the present case which go beyond the specific issues being litigated before the Employment Tribunal. But where a challenge is being made to the validity of the

contract itself, whether through misrepresentation or as in this case a lack of capacity, it is necessarily the whole contract that is challenged. I do not regard the *dictum* of Mummery J in **Greenfield v Robinson** as restricting the power to set aside such agreements to those parts of the contract that specifically relate to the enumerated claims before the Tribunal. Where the contract is said to be a nullity, its component parts will stand or fall together. It would then be open to either party, in appropriate circumstances, to take a *res judicata* point in any subsequent litigation which would have to be dealt with on its own merits.

23. For these reasons I consider that the Employment Judge was correct in the conclusion that she reached and did not err in law in deciding that the Tribunal had jurisdiction to consider and determine the issue of the validity or otherwise of this agreement. The appeal is dismissed.

Supreme Court

Zurich Insurance Co plc *v* Hayward

[2016] UKSC 48

2016 June 16;
July 27

Lord Neuberger of Abbotsbury PSC,
Baroness Hale of Richmond DPSC,
Lord Clarke of Stone-cum-Ebony,
Lord Reed, Lord Toulson JJSC

Contract — Rescission — Settlement of action — Employee claiming damages against employer for injury at work — Employer's insurers suspecting that employee exaggerating effect of his injury but entering into settlement agreement on basis of inability to prove their suspicions in court — Insurers subsequently receiving proof that employee exaggerated claim so that settlement excessive — Insurers bringing action for rescission of settlement agreement — Whether sufficient to prove materially false misrepresentation intended to induce and inducing representee to act to his detriment — Relevance of representee's belief as to truth of representation — Whether employee's material false representation inducing insurers to enter into settlement — Whether insurers estopped from retrieving amount overpaid under settlement agreement

The defendant was injured in an accident at work and claimed very substantial damages against his employer. The employer's insurers, despite suspecting that the defendant had exaggerated the extent of his injuries, were unable to find evidence sufficient to prove their suspicions in court. They reached an agreement with the defendant to pay him less than one third of the amount he had claimed, in full and final settlement of the claim, and a Tomlin order was made to that effect. The insurers, having subsequently received proof that the defendant had recovered from his injuries a year before the settlement had been reached, brought an action against him in deceit claiming, inter alia, to be entitled to rescind the settlement agreement and to repayment of the sums paid under it. The judge, having found that the defendant had exaggerated the effects of his injury, held that the insurers were entitled to rescind the settlement agreement. He proceeded to assess the quantum of damages due to the defendant in his claim against his employer at less than one ninth of the sum which he had received under the settlement agreement, and ordered the defendant to repay that sum less the amount of the damages assessed. The Court of Appeal allowed the defendant's appeal on the grounds, inter alia, that, although the defendant had misrepresented the extent of his injuries, the insurers had not relied on that misrepresentation when they had reached the settlement agreement.

On the insurers' appeal—

Held, allowing the appeal, that in a claim for deceit based upon alleged misrepresentation it had to be shown that the defendant had made a materially false misrepresentation which had been intended to induce, and had induced, the claimant to act to his detriment; that, although the claimant's state of mind might be relevant to the issue of inducement, it was not necessary as a matter of law for the claimant to prove that he had believed the misrepresentation to be true, and his reasonable belief as to whether the misrepresentation was true was not a necessary ingredient of the test of whether inducement had been proved; that, since a representee might settle a claim on the basis that he thought that the judge would believe the misrepresentation, the fact that the insurers had not wholly believed the defendant did not preclude them from having been induced to reach the settlement by the defendant's misrepresentations; that it was sufficient for the defrauded representee to establish that the fact of the misrepresentation had been a material cause of his entering into

A the settlement; and that, accordingly, since the questions whether the insurers had in fact been induced by the misrepresentation to enter into the settlement agreement and whether doing so had caused them loss were questions of fact which the judge had been entitled to decide in the insurers' favour, his order would be restored (post, paras 18, 23, 25–26, 32, 36, 37, 40, 44, 47–49, 50, 57, 58, 67, 70–72).

Redgrave v Hurd (1881) 20 Ch D 1, CA and *Smith v Chadwick* (1884) 9 App Cas 187, HL(E) considered.

B Decision of the Court of Appeal [2015] EWCA Civ 327; [2015] CP Rep 30 reversed.

The following cases are referred to in the judgments:

Arkwright v Newbold (1881) 17 Ch D 301, Fry J and CA
Australian Steel & Mining Corpn Pty Ltd v Corben [1974] 2 NSWLR 202
BP Exploration Operating Co Ltd v Chevron Shipping Co [2001] UKHL 50; [2003]
C 1 AC 197; [2001] 3 WLR 949; [2002] 1 All ER (Comm) 1; [2002] 1 Lloyd's Rep 77, HL(Sc)
Barton v Armstrong [1976] AC 104; [1975] 2 WLR 1050; [1975] 2 All ER 465, PC
Betjemann v Betjemann [1895] 2 Ch 474, CA
Briess v Woolley [1954] AC 333; [1954] 2 WLR 832; [1953] 1 All ER 909, HL(E)
Downs v Chappell [1997] 1 WLR 426; [1996] 3 All ER 344, CA
Edgington v Fitzmaurice (1885) 29 Ch D 459, Denman J and CA
D *Gipps v Gipps* [1978] 1 NSWLR 454
Gould v Vaggelas (1984) 157 CLR 215
HIH Casualty and General Insurance Ltd v Chase [2003] UKHL 6; [2003] 1 All ER (Comm) 349; [2003] 2 Lloyd's Rep 61, HL(E)
Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under Policy No 019057/08/01 [2007] EWCA Civ 57; [2007] 1 CLC 164, CA
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
E *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702; [1956] 2 WLR 502; [1956] 1 All ER 341, CA
Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501; [1994] 3 WLR 677; [1994] 3 All ER 581; [1994] 2 Lloyd's Rep 427, HL(E)
Redgrave v Hurd (1881) 20 Ch D 1, Fry J and CA
Ross River Ltd v Cambridge City Football Club Ltd [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004; [2008] 1 All ER (Comm) 1028
F *Sharland v Sharland* [2015] UKSC 60; [2016] AC 871; [2015] 3 WLR 1070; [2016] 1 All ER 671, SC(E)
Smith v Chadwick (1884) 9 App Cas 187, HL(E)
Smith v Kay (1859) 7 HL Cas 750, HL(E)
Sprecher Grier Halberstam LLP v Walsh [2008] EWCA Civ 1324; [2009] CP Rep 16, CA
Standard Chartered Bank Ltd v Pakistan National Shipping Corpn Ltd (Nos 2 and 4)
G [2002] UKHL 43; [2003] 1 AC 959; [2002] 3 WLR 1547; [2003] 1 All ER 173; [2002] 2 All ER (Comm) 931; [2003] 1 Lloyd's Rep 227; [2003] 1 BCLC 244, HL(E)
Strover v Harrington [1988] Ch 390; [1988] 2 WLR 572; [1988] 1 All ER 769
Summers v Fairclough Homes Ltd [2012] UKSC 26; [2012] 1 WLR 2004; [2012] 4 All ER 317, SC(E)
Toubia v Schwenke [2002] NSWCA 34; 54 NSWLR 46
H *Zurich Insurance Co plc v Hayward* [2011] EWCA Civ 641; [2011] CP Rep 39, CA

The following additional cases were cited in argument:

Arnison v Smith (1889) 41 Ch D 348, Kekewich J and CA
Attwood v Small (1838) 6 Cl & Fin 232, HL(E)

Binder v Alachouzos [1972] 2 QB 151; [1972] 2 WLR 947; [1972] 2 All ER 189; [1978] 1 Lloyd's Rep 524, CA
Law v Law [1905] 1 Ch 140, Kekewich J and CA

APPEAL from the Court of Appeal

By a claim form and particulars of claim issued in February 2009 the claimant insurers, Zurich Insurance Co plc, claimed damages in deceit against the defendant, Colin Hayward. By amendment the insurers claimed in the alternative to be entitled to rescind a settlement agreement which they had reached with the defendant on 3 October 2003, whereby the insurers had agreed to pay the defendant £134,973 in full and final settlement of a claim for damages for personal injuries sustained in an accident at his work place on 9 June 1998, and the repayment of the sums paid under it.

The defendant applied to strike out the claim or for summary judgment in his favour. On 17 March 2010 Deputy District Judge Bosman sitting in Cambridge County Court refused the application. The defendant appealed. On 19 July 2010 Judge Yelton, sitting in Cambridge County Court, allowed the appeal and granted the application. The insurers appealed. On 27 May 2011 the Court of Appeal (Maurice Kay, Smith and Moore-Bick LJJ) [2011] EWCA Civ 641; [2011] CP Rep 39 allowed the appeal and restored the district judge's decision.

Following trial of the claim in November 2012 Judge Maloney QC sitting in the Cambridge County Court allowed the claim and the settlement agreement was rescinded. On 6 September 2013 the judge assessed the quantum of damages due in the defendant's action against his employer at £14,720 and, in the insurer's action, ordered the defendant to repay the amount received under the settlement agreement, less £14,720.

By an appellant's notice the defendant appealed against the decision to allow the insurers' claim and the order for repayment. On 31 March 2015 the Court of Appeal (Underhill, King and Briggs LJJ) [2015] EWCA Civ 327; [2015] CP Rep 30 allowed the appeal and restored the settlement agreement.

On 28 July 2015 the Supreme Court (Lord Mance, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC) granted the insurers permission to appeal, pursuant to which they appealed.

The facts are stated in the judgment of Lord Clarke of Stone-cum-Ebony JSC.

Patrick Limb QC and *Jayne Adams QC* (instructed by *DAC Beachcroft Claims Ltd*) for the insurers.

The defendant claims that he was fraudulent but not a deceiver and that the insurers were at fault for failing to discover his dishonesty. However the tort of deceit does not necessarily require proof that the representee believed the dishonest representation. Whilst proof of knowledge on the part of the representee is a defence, nothing short of knowledge of the falsity will do since a representee who does not know a representation to be false has been deceived. It is sufficient that the misrepresentation influenced the representee to the extent that it was a material cause of entering into the settlement.

Inducement is concerned with causation and not with the representee's credulity. Although it may be inferred that a representee who believes a

misrepresentation has been induced to rely on it, an absence of belief does not mean there was no inducement because what is required for there to be inducement is a causal connection between the misrepresentation and the representee making a decision or undertaking a course of action on the basis of that misrepresentation. Inducement refers to the causative effect of the misrepresentation on the mind of the representee. The focus is on the causative effect of the misrepresentation in terms of what, in the light of the misrepresentation, the representee does or does not do, and not on whether he believed the misrepresentation. The misrepresentation was material if it was actively present in the mind of the representee when he made the settlement.

Had the insurers known the truth they would not have offered the defendant such a large amount in settlement. That amount was almost ten times the true value of the claim. The defendant's misrepresentations operated on the minds of the insurers and made them decide to make the offer which they made.

The onus of proof is on the defendant representor to prove actual knowledge of the true position, rather than on the representee bringing a claim for deceit to disprove knowledge. Mere suspicion does not suffice; knowledge, or at least blind-eye knowledge, of truth needs to be established.

It cannot be said that the insurers had knowledge of facts from which they ought to have realised that the defendant's representations were false, nor did the trial judge so find. Since the insurers did not have knowledge of facts from which they ought to have realised that the defendant's representations were false, they were deceived. As a result of the fraud the insurers were put in a position where they had no choice but to make a settlement.

The insurers' suspicions during the original personal injury action, as shown by their having put the defendant under surveillance, does not in law defeat a subsequent claim for deceit. There was fresh evidence which led to fresh allegations and showed the defendant to have been fraudulent. The fact that it subsequently turned out that the insurers' original concerns had been right is not a basis for saying that they were not deceived. There is a substantial difference between suspicion and knowledge. The Tomlin order does not mean that the current proceedings should be stopped.

[Reference was made to *Gould v Vaggelas* (1984) 157 CLR 215; *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *Australian Steel & Mining Corpn Pty Ltd v Corben* [1974] 2 NSWLR 202; *Attwood v Small* (1838) 6 Cl & Fin 232; *Redgrave v Hurd* (1881) 20 Ch D 1; *Gipps v Gipps* [1978] 1 NSWLR 454 and *Law v Law* [1905] 1 Ch 140.]

Guy Sims (instructed by *Hewitsons LLP*) for the defendant.

In a case where fraud is alleged the representee must have been deceived. Successful deception is an essential part of the tort. In order to set aside a compromise on the basis of fraudulent misrepresentation the representee must show that he was deceived and that he was induced into the settlement because he believed that the misrepresentations were true.

The insurers were aware that the defendant was not honest and are therefore in no worse a position than they were at the time of the misrepresentation. The insurers went a long way beyond mere suspicion that the representations made by the defendant were untrue. They not only did not believe those representations but actively disbelieved them,

considered them fraudulent, believed the correct position and analysed it. They decided to investigate the defendant's representations and having investigated they decided to settle, taking into account all the risks of doing so, because they did not know if the court would accept the true position was what they believed it to be. They were not surprised at the finding of fact eventually made since they had considered that to be the true position well before the compromise was made.

In the tort of deceit there is a requirement that the representee both believes and relies on the misrepresentations, so that there is a successful deception which was only later unmasked. Where the representee conducts investigations sufficient to uncover facts from which he ought to have realised that he was being deceived, he does not place the necessary reliance on the representations.

[Reference was made to *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *Arnison v Smith* (1889) 41 Ch D 348; *Sprecher Grier Halberstam LLP v Walsh* [2009] CP Rep 16; *Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under Policy No 019057/08/01* [2007] 1 CLC 164; *Gipps v Gipps* [1978] 1 NSWLR 454; *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003] 1 AC 197; *Toubia v Schwenke* (2002) 54 NSWLR 46 and *Binder v Alachouzos* [1972] 2 QB 151.]

Limb QC in reply.

Mistrust on the part of the insurers is not enough to defeat their claim. *Toubia v Schwenke* (2002) 54 NSWLR 46 does not assist the defendant's case.

The court took time for consideration.

27 July 2016. The following judgments were handed down.

LORD CLARKE OF STONE-CUM-EBONY JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, BARONESS HALE OF RICHMOND DPSC** and **LORD REED JSC** agreed)

Introduction

1 In April 2012 the Supreme Court considered a case called *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004, where the facts were strikingly similar to those here. In that case, as in this one, the claimant suffered an injury at work which was caused by the negligence or breach of duty of his employer. In each case the employer was either held liable (in the *Summers* case) or admitted liability (here) as to 80%, the claimant accepting that he was 20% to blame. In each case the claimant dishonestly exaggerated the extent of the consequences of the injury. In the *Summers* case the claimant originally claimed damages of over £800,000 but was awarded a total of just over £88,000 on the basis of the true facts, which came to light after undercover surveillance evidence showed that his account of the consequences of his injuries had been grossly and dishonestly exaggerated. In the instant case, the claimant, Mr Colin Hayward, claimed £419,316·59 (exclusive of promotion prospects but discounted for loss of ill health pension). He was ultimately awarded £14,720 after a trial before Judge Moloney QC ("the judge"). The reason for the reduction was again partly as a result of undercover

surveillance and other evidence that showed that Mr Hayward's claim had been grossly and dishonestly exaggerated.

2 In the *Summers* case the issue was what remedies were available to the employer and its insurers, whereas in the instant case the issue arises out of a settlement agreement reached between the parties on 3 October 2003, the accident having occurred on 9 June 1998. The agreement was made shortly before the issue of quantum was due to be tried and was incorporated in a Tomlin order. The employer's case was conducted on its behalf by its liability insurer, Zurich Insurance Co plc ("Zurich"), which is the appellant in this appeal. The employer (in practice Zurich) agreed to pay £134,973·11, inclusive of CRU of £22,473·11, in full and final settlement of Mr Hayward's claim.

3 The Tomlin order was in familiar terms as follows:

> "BY CONSENT
>
> "IT IS ORDERED THAT
>
> "All further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect."
>
> "THE SCHEDULE
>
> "The claimant accepts in settlement of his cause of action herein the sum of £134,973·11."
>
> "4. Upon payment by the defendant of the several sums and costs before mentioned, they be discharged from any further liability to the claimant in relation to the claim herein."

4 In 2005, Mr Hayward's neighbours, Mr and Mrs Cox, who had lived next door to him since June 2002, approached the employer to say that they believed that his claim to have suffered a serious back injury was dishonest. From their observation of his conduct and activities, they believed that he had recovered in full from his injury at least a year before the settlement. They were referred to Zurich and made full witness statements to that effect.

5 In February 2009 Zurich commenced the present proceedings against Mr Hayward claiming damages for deceit. Zurich pleaded that both written statements made by Mr Hayward or on his behalf, and his statements of case in the particulars of claim and the schedule(s) of loss as to the extent of his injury, as well as his accounts given to the medical experts, constituted fraudulent misrepresentations. Damages were claimed equivalent to the difference between the amount of the settlement and the damages that should have been awarded if he had told the truth. The claim was subsequently amended to claim in the alternative rescission of the settlement agreement and the repayment of the sums paid under it.

6 No point has been taken in reliance upon the fact that the action was brought in the name of Zurich rather than the employer. Mr Hayward applied to strike out the proceedings, or for summary judgment in his favour. He contended that the Tomlin order created an estoppel per rem judicatam and/or by record, alternatively that the action was an abuse of the process because the issue of fraud had been compromised by the settlement. Deputy District Judge Bosman refused to strike out the claim, although he directed Zurich to amend the claim to seek an order that the compromise be set aside rather than an order for damages. Although it was pleaded in the

original defence to Zurich's claim that Zurich must satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489, that contention was not ultimately pursued following the hearing before the deputy district judge. His decision was reversed on appeal by Judge Yelton.

7 Zurich appealed to the Court of Appeal (Maurice Kay, Smith and Moore-Bick LJJ) and the decision of the deputy district judge was unanimously restored [2011] CP Rep 39. It was held that the settlement gave rise to no estoppel of any kind and that the action was not an abuse of process. It was further held that the fact that Zurich had alleged deliberate exaggeration prior to the settlement did not preclude them from relying on it subsequently as a ground for rescission. In the result, the claim proceeded. I note in passing that Moore-Bick LJ said, at para 58:

> "If it is to succeed in its action Zurich will have to persuade the court that it was induced to agree to the settlement by fraud on the part of Mr Hayward, a task that may not prove easy, given the fact that it already knew enough to justify the service of a defence in the terms indicated earlier."

The trial

8 The trial came before the judge in the Cambridge County Court in November 2012. He heard evidence for Zurich from Zurich's solicitor (Ms Winterbottom) and its claims manager (Mr Birkenshaw), who were responsible for the conduct of the litigation, from Mr and Mrs Cox and from Mr Sharp, who was the orthopaedic expert instructed on behalf of Zurich. Mr Hayward gave evidence together with three members of his family and also called evidence from Mr Varley, who was the orthopaedic surgeon instructed on his behalf.

9 Mr Hayward denied any suggestion that his condition was anything other than genuine or that there was any element of exaggeration. He maintained throughout that he was a seriously disabled individual whose disability arose from the original accident and was such that, ever since, he had not been able to work or carry out normal activities of daily living without assistance. As with the first series of witness statements, Mr Hayward signed the appropriate statements of truth setting out in detail the extent of his disability and presented himself to the medical experts on that basis.

10 Following a four-day trial, the judge found that Mr Hayward had deliberately and dishonestly exaggerated the effects of his injury throughout the court process. Of Ms Winterbottom and Mr Birkenshaw, the judge said (at para 2.6 of his judgment quoted in full below) both that: "[neither] can be said to have believed the representations complained of to be true" and that

> "[they] may not themselves have believed the representations to be true; but they did believe that they would be put before the court as true, and that there was a real risk that the court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate".

The judge further found that, although Zurich was aware at the time of the settlement of the real possibility of fraud, Mr Hayward had continued his

A deliberate misrepresentations even after the disclosure of the 1999 video, and that those continuing misrepresentations influenced Zurich into agreeing a higher level of settlement than it would otherwise have done. The judge therefore set aside the compromise.

11 It followed that the issue of quantum in the original action remained to be tried. That issue was heard on 6 September 2013 and, having found B that Mr Hayward had made a full recovery from any continuing physical disability by October 1999, the judge thereafter handed down a judgment awarding Mr Hayward damages in the modest sum of £14,720, which was about 10% of the settlement figure. An order was made in the later action directing him to repay the sum paid under the settlement less that amount, namely £97,780, interest of £34,379.45 and £3,951 adjustment for CRU.

C *The appeal to the Court of Appeal*

12 Mr Hayward appealed to the Court of Appeal against the decision that the settlement should be set aside but did not appeal against the judge's assessment of quantum or (contingent on whether the settlement was set aside) against the order for re-payment. Moreover, the judge's findings of fact were not challenged. To my mind, as appears below, this is a critical D factor in this appeal.

13 The appeal was heard by Underhill, Briggs and King LJJ. They agreed that the appeal should be allowed [2015] CP Rep 30. Substantive judgments were given by Underhill and Briggs LJJ. Although King LJ agreed with both judgments, I do not read their reasoning as quite the same.

14 In his para 9 Underhill LJ set out para 2.5 of the judge's judgment, E where he said that the judge addressed the issue of reliance and dealt with the law. Para 2.5 is in these terms:

> "Lastly, of course, it is necessary that the employer/Zurich should *rely* on the representations and suffer loss as a result. Here an interesting (and apparently unresolved) question of principle arises. In the ordinary case, sale of goods for example, reliance by the purchaser is effectively F equivalent to his *belief in the truth* of the statement; if he believes the goods are as represented, he will be relying on the representation (and acting on it by his purchase) and if not, not. In the litigation context the position is different. In such a situation, the party to whom the representation is made is by no means likely to believe it to be true at the pretrials stage. At the very least, statements made in the course of G litigation will be viewed with healthy scepticism and weighed against the other material available. Often the other party will not be sure, even then, whether the statement is in fact true, and will mainly concern himself with how likely it is to be accepted by the court. Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie. But even then he and his advisers cannot choose to ignore it; they H must still take into account the risk that it will be believed by the judge at trial. This situation is quite different from a proposed purchase, where if in doubt one can simply walk away. For these reasons, it appears to me that the many dicta relied on by CH, to the effect that liability requires that the representation must be believed by the other party, are not

applicable to a case like the present. The formulation adopted by the editors of *Clerk & Lindsell*, 20th ed (2010), para 18-34 fits the case better; 'The claimant must have been *influenced* by the misrepresentation' (my emphasis)." A

15 After noting that "CH" was shorthand for Mr Hayward, Underhill LJ set out (also in his para 9), para 2.6 of the judge's judgment as follows: B

"I heard the evidence of Ms Winterbottom and Mr Birkinshaw respectively in 2003 Zurich's litigation solicitor and claims handler. Each was aware of the 1999 video and of the real possibility that this was a fraudulent claim. Each was frustrated by the reluctance of 'their' expert, Mr Sharp, to produce a clear supplemental report saying that he now believed CH to have been shamming and to have sustained far less harm than was being claimed. Neither can be said to have believed the representations complained of to be true. But, if the law is as stated at 2.5 above, this does not matter provided the representations *influenced* them in their decision how much to pay CH in settlement. I am in no doubt that they did. They may not themselves have believed the representations to be true; but they did believe that they would be put before the court as true, and that there was a real risk that the court would accept them in whole or part and consequently make a larger award than Zurich would otherwise have considered appropriate. Acting in reliance on *that* belief (which, whether or not CH was truthful or honest, was the belief he and his advisers must have wanted them to form on the basis of the statements) they made the payment into court which led to the Tomlin order settlement." C D E

Underhill LJ then set out the substance of the judge's ultimate conclusions from para 6.6 in these terms:

"although Zurich was aware at the time of the settlement of the real possibility of fraud here, CH had continued his deliberate misrepresentations even after the disclosure of the 1999 video, and those continuing misrepresentations did influence Zurich into agreeing a higher level of settlement than it would otherwise have made." F

The judge added:

"The conditions required for setting aside the settlement are therefore made out and I so order." G

16 Para 6.6 must be put in its context, which includes paras 6.4 and 6.5. Between paras 6.1 and 6.3 the judge explained why he accepted the evidence of Mr and Mrs Cox as credible. He then said, at paras 6.4–6.5:

"6.4. The choice before me is not the stark one between 'no pain at all' and 'complete disability'. What I have to decide is whether CH's actual level of pain and disability at the time of the representations was materially less than he was representing, and if so whether that misrepresentation was deliberate and dishonest. It is accepted that there was here an injury leading to a measure of pain and disability, at least up to 2002; and Mr Sharp and Mr Varley do not exclude some continuing H

pain (as opposed to disability) in the period after the settlement. That being so, the records of pain management and analgesic drug treatment which gave me concern are not irreconcilable with Zurich's case.

"6.5 There is no special standard of proof for fraud in civil proceedings; the normal test of balance of probability applies, though of course in assessing the probabilities one bears in mind that fraud is an unusual matter. In this case, the evidence, summarised above, that CH was not in fact suffering from the level of pain and disability that he claimed is so strong that it prevails over his innocent explanations. The probability is, and I so find, that CH was experiencing some pain both before and after the settlement, and did want it treated and managed; but at the same time, he also wanted the maximum compensation he could obtain, and to get it he was dishonestly willing to exaggerate his symptoms to the doctors, and to conceal his real level of ability from them and from the world, so as to give the false impression that he was not capable of heavy work when in fact he was. He must have been aware by the time of the 14 October 1999 surveillance video (at the latest) that his physical abilities were considerably greater than he thereafter represented to the doctors and his employers' representatives, and I find that his representations made after that date were knowingly false and misleading."

17 Underhill and Briggs LJJ allowed Mr Hayward's appeal for similar but not identical reasons. They did so essentially because of the state of mind of Zurich (and the employer) when the settlement was made. They rejected the conclusions of principle expressed in para 2.5 of the judge's judgment set out above. The parties to this appeal agreed that the appeal raised two issues. The first was this.

"In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation: a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?"

The second was this.

"Under what circumstances, if any, does the suspicion by the defendant of exaggeration for financial gain on the part of the claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?"

Discussion

Issue 1

18 Subject to one point, the ingredients of a claim for deceit based upon an alleged fraudulent misrepresentation are not in dispute. It must be shown that the defendant made a materially false representation which was intended to, and did, induce the representee to act to its detriment. To my mind it is not necessary, as a matter of law, to prove that the representee believed that the representation was true. In my opinion there is no clear

authority to the contrary. However, that is not to say that the representee's state of mind may not be relevant to the issue of inducement. Indeed, it may be very relevant. For example, if the representee does not believe that the representation is true, he may have serious difficulty in establishing that he was induced to enter into the contract or that he has suffered loss as a result. The judge makes this point clearly and accurately in the third sentence of para 2.5 of his admirable judgment.

19 He makes a further point in the same paragraph which is of importance in the context of this somewhat unusual case. It is this. A person in the position of the employer or its insurer may have suspicions as to whether the representation is true. It may even be strongly of the view that it is not true. However, the question in a case like this is not what view the employer or its insurer takes but what view the court may take in due course. This is just such a case, as the judge correctly perceived. As he put it, the employer and its advisers must take into account the possibility that Mr Hayward would be believed by the judge at the trial. That is because the views of the judge will determine the amount of damages awarded.

20 In any event this is not a case in which Zurich or the employer knew that Mr Hayward was deliberately exaggerating the seriousness and long term effects of his injuries. We now know that he was thoroughly dishonest from October 1999 and that he continued to make false claims in the witness box at the trial even when the evidence against him was overwhelming. Each case of course depends upon its own facts but it seems to me to be putting the case too high to say, as Briggs LJ does at para 30, that Zurich went so far as to plead that Mr Hayward was fraudulent and to support it by a statement of truth. He says, at para 31:

> "In my opinion the true principle is that the equitable remedy of rescission answers the affront to conscience occasioned by holding to a contract a party who has been influenced into making it by being misled or, worse still, defrauded by his counterparty. Thus, once he discovers the truth, he must elect whether to rescind or to proceed with the contract. It must follow that, if he already knows or perceives the truth by the time of the contract, he elects to proceed by entering into it, and cannot later seek rescission merely because he later obtains better evidence of that which he already believed, still less if he merely repents of it. This seems to me to be a fortiori the case where, as here, the misrepresentation consists of a disputed claim in litigation, and the contract settles that claim."

21 To my mind that is to put the position too high in favour of fraudsters in general and Mr Hayward in particular. It is true that in its defence dated 30 October 2001 the employer (no doubt through Zurich) stated that the facts stated in the defence were true. The relevant facts were pleaded in paras 6–7 as follows:

> "6. It is admitted that the claimant suffered an injury to his back as a result of the accident. The defendant relies on the medical reports of Mr Sharp dated 11 June 2000, 20 August 2000 and 26 November 2000. The view of the claimant's ongoing physical condition from Mr Bracegirdle relied on by the claimant is not accepted by the defendant. As a result of video surveillance obtained Mr Sharp formed the view that the claimant's disability was not as great as he had described and he was capable of

working full time even if not with heavy lifting. In view of the claimant's lack of candour in relation to his physical condition it is not possible to accept that his depressive state, as described, has been consistent, is continuing or will continue into the future.

"7. The claimant has exaggerated his difficulties in recovery and current physical condition for financial gain."

22 These pleas show that Zurich was suspicious of Mr Hayward but no very clear allegations were, or could be, made. However, it is not in dispute that Zurich did as much as it reasonably could to investigate the position before the settlement. The evidence was not as good from its point of view as it might have hoped but the fact is that Zurich did not know the extent of Mr Hayward's misrepresentations. The case was settled at a time when the only difference between the experts was the likely duration of future loss. The figure agreed was about half way between the respective opinions of the experts. It was not until the advent of Mr and Mrs Cox that Zurich realised the true position. Hence, as the judge expressly found, the amount of the settlement was very much greater than it would have been but for the fraudulent misrepresentations made by Mr Hayward. The small amount ultimately awarded by the judge, which is not challenged, shows the extent of the dishonest nature of the claim. I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud.

The authorities

23 I am not persuaded that the authorities lead to any other conclusion. As stated above, the ingredients of the tort of deceit are not in dispute subject to one question, which is whether a claimant alleging deceit must show that he believed the misrepresentation. In my opinion the answer is no.

24 There are many formulations of the relevant principles in the authorities. I take two examples. In *Briess v Woolley* [1954] AC 333, 353 Lord Tucker said:

"The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation—not having been corrected in the meantime—is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee the tortious act is complete provided that the representation is false at that date."

To like effect, Lord Mustill said in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd (No 2)* [1995] 1 AC 501, 542:

"In the general law it is beyond doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid, although the task of proof may be made more easy by a presumption of inducement."

25 The authorities show that questions of inducement and causation are questions of fact. I would accept the submissions made on behalf of Zurich in support of the proposition that belief is not required as an independent

ingredient of the tort. It may however be relevant as part of the court's consideration of the questions whether there was inducement and, if so, whether causation has been established.

26 In this regard I agree with the judge when he said at the end of para 2.5 that the statement in *Clerk & Lindsell on Torts*, 20th ed (2010) fits the case better. It simply said "The claimant must have been influenced by the misrepresentation". That is a sub-heading to para 18-34 in the 21st ed (2015). In para 18-35 the editors say that, although the claimant must show that he was induced to act as he did by the misrepresentation, it need not have been the sole cause. It is submitted on behalf of Mr Hayward that the claimant's mind must be at least partly influenced by the defendant's misstatements. In *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 Bowen LJ said:

> "The real question is, what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself could make no difference."

I see no conflict between the judge's approach and those conclusions.

27 Mr Hayward relies upon the references in the textbooks and, indeed, in cases like *Edgington v Fitzmaurice* to the requirement that the representation must have impacted upon the representee's mind. To my mind that simply means that the representee must have been induced to act as he did in reliance upon the representation.

28 In Zurich's written case its argument in support of the position that belief in the truth of the representation is not required is summarised as follows:

> "(i) Inducement is concerned with causation—not the representee's credulity. Although one may infer that a representee who believes a misrepresentation has been induced to rely on it, an absence of belief does not mean there was no inducement. This is because what is required for there to be inducement is a causal connection between the misrepresentation and the representee making a decision or undertaking a course of action on the basis of that representation. That does not require belief in the misrepresentation itself.
>
> "(ii) Just as belief in the misrepresentation is not required, so also belief in other inducing causes is irrelevant.
>
> "(iii) There is a '*presumption of inducement*', particularly where there is an intention to induce by means of fraud. If the defrauded representee first had to show he *believed* the misrepresentation, there would be little (or no) utility in having the presumption.
>
> "(iv) That presumption should not be rebutted merely because the representee is sceptical. Otherwise, the doubting representee would be placed in a worse position than the gullible or trusting one. Given that misgivings and suspicion might be more likely to arise where there is fraud, it would be perverse for the prospects of redress to be extinguished on account of those very doubts. Of all representees, it may be thought the defrauded representee (whether believing or not) should be the most deserving of protection.

A "(v) There is no duty upon the defrauded representee to exercise 'due diligence' to determine whether there are reasonable grounds to believe the representations made. Conversely, the fact that the representee does not in fact wholly credit the fraudster and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light.

B "(vi) Whereas proof that the representee had knowledge (or 'blind eye knowledge') of the falsity suffices, nothing short of that avails the misrepresentor."

29 As to sub-para (i), inducement, I would accept the submission on behalf of Zurich that materiality is evidence of inducement because what is C material tends to induce. As Hutley JA put it in the Court of Appeal of New South Wales, *Gipps v Gipps* [1978] 1 NSWLR 454, 460, "To state that a person is induced by a statement is to affirm a causal relation which is a question of fact, not of law". See also *Downs v Chappell* [1997] 1 WLR 426, per Hobhouse LJ at p 433. Moreover, albeit by reference to section 18(2) of the Marine Insurance Act 1905 (6 Edw 7, c 41), in the *Pan* D *Atlantic* case Lord Goff of Chieveley, accepted at p 517C and p 517E respectively that in gauging materiality it suffices if the misrepresentation (or non-disclosure) had "an impact on the mind" or an "influence on the judgment". In the same case Lord Mustill adopted references to inducement not being established where the misrepresentation (at p 545) "did not influence the judgment", (at p 546) "did not influence the mind" or (at p 551) E "had no effect on the decision".

30 In para 6.6 of his judgment (quoted at para 15 above) the judge held that the continuing representations influenced Zurich into agreeing to a higher level of settlement that it would otherwise have done. The judge was entitled to adopt the proposition in *Clerk & Lindsell* that "the claimant must have been influenced by the misrepresentation".

31 In para 28 of his judgment Briggs LJ said:

F

"In my judgment the authorities on rescission for misrepresentation speak with one voice. For a misstatement to be the basis for a claim to rescind a contract, the claimant must have given some credit to its truth, and been induced into making the contract by a perception that it was true rather than false. Where judges and text-book writers have used the word 'influenced' as the touchstone for reliance they have done so in G order to allow for belief in the truth of the misrepresentation to be a contributory rather than sole cause of the representee's entry into the contract: see for example *Clerk & Lindsell on Torts*, 21st ed, para 18-35. They have not thereby intended to allow in any case where the representee can show that he was influenced into making the contract by the mere making of a representation which he did not believe was true."

H 32 I would not accept this analysis. As I see it, the representee's reasonable belief as to whether the misrepresentation is true cannot be a necessary ingredient of the test, because the representee may well settle on the basis that, at any rate in a context such as the present, he thinks that the representation will be believed by the judge. But it is centrally relevant to the

question of inducement and causation. Logically, the representee is more likely to settle for a different reason other than the representation, if his reasonable belief is that it is false. One of the extraneous factors in this case, for example, was the fact that the insurers' expert Mr Sharp had failed to produce, in their view, a report which set out the extent of the misrepresentations with sufficient clarity—see para 15 above.

33 As to sub-para (ii), multiple causes, the text books strongly support the proposition that it is sufficient for the misrepresentation to be an inducing cause and that it is not necessary for it to be the sole cause: see eg *Chitty on Contracts*, 32nd ed (2015), vol 1, para 7-37. See also, for example, *Barton v Armstrong* [1976] AC 104, where Lord Cross, delivering the majority advice of the Privy Council in a case involving duress by threats of physical violence, invoked, as an appropriate analogy, the treatment of contributing causes in fraud cases. He said, at p 118:

> "If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief . . . If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision . . . for in this field the court does not allow an examination into the relative importance of contributing causes . . ."

Lord Hoffmann made much the same point in *Standard Chartered Bank Ltd v Pakistan National Shipping Corpn Ltd (Nos 2 and 4)* [2003] 1 AC 959, para 15:

> "if a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had known that it was false, it does not matter that he also had some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either. The law simply ignores the other reasons why he paid."

Lord Hoffmann then quoted with approval the part of the advice of Lord Cross quoted above and added, at para 16: "This rule seems to me to be based upon sound policy." Finally, reliance is placed upon the decision of the High Court of Australia in *Gould v Vaggelas* (1984) 157 CLR 215, which was a case of deceit, where Wilson J said, at p 236:

> "The representation need not be the sole inducement in sustaining the loss. If it plays some part, even if only a minor part, in contributing to the course of action taken a causal connection will exist."

34 As to sub-para (iii), the "presumption" of inducement, it is not a presumption of law but an inference of fact. For example, *Chitty on Contracts*, 32nd ed, vol 1, put it thus at para 7-040:

> "Once it is proved that a false statement was made which is 'material' in the sense that it was likely to induce the contract, and that the representee entered the contract, it is a fair inference of fact (though not an inference of law) that he was influenced by the statement, and the inference is particularly strong where the misrepresentation was fraudulent."

A **35** Lord Mustill put it in this way in the *Pan Atlantic* case [1995] 1 AC 501, 551. He said that the representor

> "will have an uphill task in persuading the court that the . . . misstatement . . . has made no difference . . . there is a presumption in favour of a causative effect."

B We were further referred to the decision of Briggs J in a case about fraudulent misrepresentations, namely *Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004, para 241, where he said:

> "First and foremost, in a case where fraudulent material misrepresentations have been deliberately made with a view (as I find) improperly to influence the outcome of the negotiation of the cont[r]act in
C favour of the maker and his principal, by an experienced player in the relevant market, there is the most powerful inference that the fraudsman achieved his objective, at least to the limited extent required by the law, namely that his fraud was actively in the mind of the recipient when the contract came to be made."

See also *Australian Steel & Mining Corpn Pty Ltd v Corben* [1974]
D 2 NSWLR 202, 208–209, per Hutley JA.

36 As to sub-para (iv), rebutting the presumption of inducement, the authorities are not entirely consistent as to what is required to rebut the presumption. However, it is not strictly necessary to address those differences in this case because, however precisely the test is worded—whether what must be proved is that the misrepresentation played "no part at all" or that it did not play a "determinative part", or that it did not play a "real and
E substantial part"—I would accept the submission made on behalf of Zurich that the presumption is not rebutted on the facts as found in this case. There can be no doubt on the judge's findings of fact that, if Zurich had known the true position as to Mr Hayward's state of recovery, it would not have offered anything like as much as it in fact offered and settled for in October 2003.

37 Since the issue was touched on in argument, I would simply say that
F the authorities seem to me to support the conclusion that it is very difficult to rebut the presumption. As it seems to me, the orthodox view is contained in *Sharland v Sharland* [2016] AC 871. In *Smith v Kay* (1859) 7 HL Cas 750, 759 Lord Chelmsford LC asked this question in a rescission case based on an allegation of fraudulent misrepresentation:

> "can it be permitted to a party who has practised a deception, with a
G view to a particular end, which has been attained by it, to speculate upon what might have been the result if there had been a full communication of the truth?"

In *Sharland v Sharland* Baroness Hale of Richmond DPSC observed of *Smith v Kay* that it indeed held that a party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to
H deny its materiality or that it actually played a causative part in inducement.

38 This view is supported by *Downs v Chappell* [1997] 1 WLR 426, 433 where Hobhouse LJ said:

> "The judge was wrong to ask how they [the representees] would have acted if they had been told the truth. They were never told the truth.

> They were told lies in order to induce them to enter into the contract. The lies were material and successful . . . The judge should have concluded that the plaintiffs had proved their case on causation . . ."

See also *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003] 1 AC 197, 244–245, per Lord Millett. The Hon K R Handley wrote an impressive article entitled "Causation in Misrepresentation" (2015) 131 LQR 277, where he expressed this view, at p 284:

> "The representor must have decided to make the misrepresentation because he or she judged that the truth or silence would not, or might not, serve their purposes or serve them so well. In doing so they fashioned an evidentiary weapon against themselves, and the court should not subject the victim to 'what if' inquiries which the representor was not prepared to risk at the time."

39 As to sub-para (v), I would accept the submissions made on behalf of Zurich. In particular I agree that the representee has no duty to be careful, suspicious or diligent in research. As Rigby LJ put it in *Betjemann v Betjemann* [1895] 2 Ch 474, 482: "What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who had committed the concealed fraud." Here Zurich did as much as it reasonably could to investigate the accuracy and ramifications of Mr Hayward's representations before entering into any settlement.

40 As explained above, the questions whether Zurich was induced to enter into the settlement agreement and whether doing so caused it loss are questions of fact, which were correctly decided in its favour by the judge. I accept the submission that the fact that the representee (Zurich) does not wholly credit the fraudster (Mr Hayward) and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement, particularly where those investigations were never going to find out the evidence that subsequently came to light. That depended only on the fact that Mr and Mrs Cox subsequently came forward. Only then did Zurich find out the true position. As Mr Hayward knew, Zurich was settling on a false basis.

41 I do not think that any of the cases relied upon on behalf of Mr Hayward, or by the Court of Appeal in his favour justifies its decision. They include *Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters Subscribing under Policy No 019057/08/01* [2007] 1 CLC 164. Underhill LJ stressed, in his analysis in para 24, that Kyle Bay "was not on all fours with the present case", but that it was illustrative of a similar principle. To my mind it is of no real assistance because it was a case which, as Neuberger LJ observed in *Kyle Bay* at para 42, involved unusual facts and in which the approach of the claimant appeared mystifying. That is not the position here.

42 As to further cases that were said to establish a requirement of belief, in the Court of Appeal Underhill LJ referred at para 12 to *Sprecher Grier Halberstam LLP v Walsh* [2009] CP Rep 16, para 17, *Arkwright v Newbold* (1881) 17 Ch D 301, 324, and *Strover v Harrington* [1988] Ch 390, 407. However, as Underhill LJ said, none of those cases contains any relevant discussion of a principle to the effect that belief in the representation is required before a settlement such as this can be set aside.

43 As to sub-para (vi), knowledge of falsity, as I understand it, it is accepted on behalf of Zurich that, where the representee knows that the representation is false, he cannot succeed. There is some support in the authorities for this view. So, for example *Chitty on Contracts*, 32nd ed, vol 1, para 7-036 says,

> "The burden of proving that the claimant had actual knowledge of the truth, and therefore was not deceived by the misrepresentation, lies on the defendant; if established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation."

Spencer Bower & Handley on Actionable Misrepresentation, 5th ed (2014), p 122, para 11.07 says:

> "A representee cannot be misled by a statement which he knew to be false . . . The representee's knowledge of the truth must normally be full and complete. Partial and fragmentary information, or mere suspicion, will not do, 'suspicion, doubt and mistrust do not have the same consequence as knowledge'. A representee who knows that the representation was false to some extent, but acts on it, may establish inducement if the departure from the truth was significantly greater than expected."

See also *Gipps v Gipps* [1978] 1 NSWLR 454, 460, per Hutley JA.

44 As I said earlier, it cannot fairly be said that Zurich had full knowledge of the facts here. It follows that it is not necessary to express a final view on the question whether it always follows from the fact that the representee knows that the representation is false that he cannot succeed. As explained earlier, questions of inducement and causation are questions of fact. It seems to me that there may be circumstances in which a representee may know that the representation is false but nevertheless may be held to rely upon the misrepresentation as a matter of fact.

45 This very case could have been such a case. The judge considered this possibility in para 2.5 of his judgment (quoted at para 14 above), where he said:

> "At the very least, statements made in the course of litigation will be viewed with healthy scepticism and weighed against the other material available. Often the other party will not be sure, even then, whether the statement is in fact true and will mainly concern himself with how likely it is to be accepted by the court. *Sometimes (a staged road traffic 'accident' for example) the other party may actually be certain from his own direct knowledge that the statement is a deliberate lie. But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial.* This situation is quite different from a proposed purchase, where if in doubt one can simply walk away." (Emphasis added.)

It seems to me that in the kind of case which I have put in italics the claimant may well establish inducement on the facts. This was not however a case in which the judge found that Zurich was certain from its own direct knowledge that Mr Hayward's representations contained deliberate lies.

46 Quantum is not in issue.

47 It follows that I would answer the questions posed by the first issue (and set out in para 17 above) in this way. I would answer (a) no and (b) yes and would allow the appeal.

Issue 2

48 The second issue (also set out in para 17 above) is in these terms:

> "Under what circumstances, if any, does the suspicion by the defendant of exaggeration for financial gain on the part of the claimant preclude unravelling the settlement of that disputed claim when fraud is subsequently established?"

The answer seems to me to follow from the answer to the first question. As I see it, it is difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established.

Conclusion

49 For these reasons I would allow the appeal.

LORD TOULSON JSC (with whom **LORD NEUBERGER OF ABBOTSBURY PSC, BARONESS HALE OF RICHMOND DPSC** and **LORD REED JSC** agreed)

50 I agree with the judgment of Lord Clarke of Stone-cum-Ebony JSC. I add this judgment because of the importance of the matter, about which we are differing from the judgment of the Court of Appeal, based on what I respectfully consider to have been an erroneous conclusion drawn from earlier case law. The issue raised by this appeal is important both as a matter of law and for its practical consequences for insurers and dishonest claimants. I gratefully adopt Lord Clarke JSC's account of the facts.

51 Bogus or fraudulently inflated personal injury claims are not new. One of the great advocates of the 20th century, Sir Patrick Hastings, recounted vividly in his memoirs, "Cases in Court" (William Heinemann Ltd (1949), pp 4–20), how as a young barrister before World War 1 he built up a practice defending insurance companies against such claims. Now as then, they present a serious problem. Personal injury claims usually fall to be met by insurers and the ultimate cost is borne by other policy holders through increased premiums.

52 Insurers may often have grounds for suspicion about a claim but lack the hard evidence necessary to prove fraud. To pursue an allegation of fraud without strong evidence is risky. If in such circumstances insurers settle a claim, not in the belief that it is bona fide but in the belief that it is likely to succeed, and if afterwards they discover evidence which proves that the claim was fraudulent, can they bring proceedings to set aside the agreement and recover damages for deceit? In this case the judge at first instance said yes, but the Court of Appeal said no, because in such circumstances the insurers were not deceived. The question which court gave the right answer is important, both for insurers and for those who advise personal injury claimants.

Strike out application

53 The Court of Appeal [2011] CP Rep 39 rightly rejected Mr Hayward's application to strike out the action on the ground that the issue was res judicata or that the action was an abuse of the process of the court. The claim had been compromised by an agreement but, as Lord Bingham of Cornhill emphasised in *HIH Casualty and General Insurance Ltd v Chase* [2003] 2 Lloyd's Rep 61, paras 15–16, "fraud is a thing apart" and "unravels all". Once proved, "it vitiates judgments, contracts and all transactions whatsoever": per Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712, cited by Lord Bingham. I refer to this matter because in his judgment now under review Underhill LJ called into question the correctness of the Court of Appeal's earlier judgment, and Mr Hayward's arguments on this appeal were similarly flavoured with criticism of it, although it was not open to him to attack it directly.

Judgment of the county court

54 I would like to pay testimony to the judgment of Judge Moloney QC as a model of clarity and cogency. Lord Clarke JSC has set out at, paras 14 and 15, the judge's self-direction as to the law (para 2.5) and his application of it to the facts: para 2.6.

Judgment of the Court of Appeal

55 Briggs LJ's reasoning was short and direct. He held that for a misstatement to be the basis for a claim to rescind a contract, the claimant must have given some credit to its truth and have been induced into making the contract by a perception that it was true rather than false. He said that when judges and textbook writers used the word "influenced" as the touchstone for reliance, they did so in order to accommodate cases where belief in the truth of the statement was a contributory rather than the sole cause of the representee's entry into the contract.

56 Underhill LJ's reasoning was somewhat different but led him to the same place. His starting point was that when a person enters into a contract to settle a dispute he knowingly takes the risk of making a payment for a claim which may be ill-founded, and he pays a sum commensurate with his assessment of that risk. But he said that the risk which a settlor must be taken to have accepted will depend on the circumstances of the case. A settlor will not normally be taken to have accepted the risk that the claimant's case is not just ill-founded but dishonest. However, if it is sufficiently apparent that the settlor intended to settle notwithstanding the possibility that the claim was fraudulent, he will be held to the settlement. The fact that the insurers had pleaded that the claim was exaggerated for financial gain proved their awareness of the possibility of fraud, but they chose to settle the claim with that awareness, and it was contrary to the public interest in the settlement of disputes for them to be allowed to set aside the settlement.

57 Underhill LJ was conscious that the logic of this reasoning was that Mr Hayward's application to strike out the insurers' action ought to have succeeded, contrary to the Court of Appeal's earlier decision. He described it as a "debatable point" whether that decision precluded him from deciding

the case on the reasoning which he thought should apply, but he considered that it was possible to re-cast his reasoning in a form which was perhaps less satisfactory, but which avoided conflict with the earlier decision. He held that although in one sense the misrepresentations operated on the mind of the insurers, that did not constitute reliance in the relevant sense. In deciding whether to settle, the insurers formed their own independent judgment whether the claim was likely to succeed, and there was no "relationship of reliance" of the kind which was required for the insurers' action to succeed. Ultimately, therefore, he allowed the appeal on substantially the same ground as Briggs LJ.

Analysis

58 To establish the tort of deceit it must be shown that the defendant dishonestly made a material false representation which was intended to, and did, induce the representee to act to its detriment. The elements essential for liability can be broken down under three headings: (a) the making of a materially false representation (the defendant's conduct element); (b) the defendant's accompanying state of mind (the fault element); and (c) the impact on the representee (the causation element). Where liability is established, it remains for the claimant to establish (d) the amount of any resulting loss (the quantum element).

59 In this case there is now no issue as to elements (a), (b) and (d). Mr Hayward made false and material representations to the insurers as well as to the court, both directly and through what he told the doctors and his own legal advisers with a view to it being communicated to insurers and to the court. He did so dishonestly, with the intention of inducing the insurers to pay compensation to him on a false basis. The judge's assessment of quantum is not challenged. The issue concerns element (c).

60 In the statement of facts and issues, the parties have identified the critical issue in these terms: In order to set aside a compromise on the basis of fraudulent misrepresentation, to show the requisite influence by or reliance on the misrepresentation, (a) must the defrauded representee prove that it was induced into settlement because it believed that the misrepresentations were true; or (b) does it suffice to establish influence that the fact of the misrepresentations was a material cause of the defrauded representee entering into the settlement?

61 The parties have raised an additional question as to the circumstances, if any, in which suspicion by a settlor of exaggeration of the claim precludes unravelling the settlement when fraud is subsequently established; but in so far as the question involves any point of law, it is enveloped by the first issue.

62 Some torts do not require the claimant to have suffered any detriment. Trespass is an example. Deceit is not in that category. It is essential to show that the defendant's false representation caused the claimant to act to its detriment. It stands to reason that this should be so. The vice of the defendant's conduct consists in dishonestly making a false representation with the intention of influencing the representee to act on it to its detriment. If it does not cause the representee to do so, the mischief against which the tort provides protection will not have occurred.

A misrepresentation which has no impact on the mind of the representee is no more harmful than an arrow which misses the target.

63 Inducement is a question of fact. In a typical case the only way in which a dishonest representation is likely to influence the representee to act to its detriment will be if the representee is led to believe in its truth. It is therefore not surprising to find statements by judges in such cases that the misrepresentee must show that he believed or "relied on" the misrepresentation.

64 *Redgrave v Hurd* (1881) 20 Ch D 1, to which Underhill LJ referred, is an example. The plaintiff, an elderly solicitor wishing to retire, advertised for someone to enter into partnership with him and to buy his house. The defendant responded to the advertisement and negotiations followed, in which the plaintiff stated that the practice brought him in about £300 a year. In fact it did not bring in anything like that amount. The parties entered into partnership and into a separate contract for the sale of the house, which made no reference to the business. The defendant paid a deposit and was let into possession. On discovering that the practice was not worth what the plaintiff had said, the defendant gave up possession and refused to complete the purchase. It was therefore a classic case of a purchaser who claimed to have entered into the contract in reliance on the truth of a misrepresentation by the seller. The plaintiff sued for specific performance; the defendant counterclaimed for rescission of the contract and damages for deceit. The plaintiff succeeded at first instance before Fry J, who was not satisfied that the defendant had proved that he relied on the misrepresentation. The Court of Appeal upheld the dismissal of the defendant's counterclaim in deceit on the ground that he had not sufficiently pleaded or proved dishonesty, but it allowed his appeal on the issue of rescission on the ground that the facts gave rise to an inference that he was induced to enter into the contract by the plaintiff's misrepresentation. Jessel MR said, at p 21:

> "If it is a material misrepresentation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shown either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation."

65 *Smith v Chadwick* (1884) 9 App Cas 187 was another case of a purchaser who claimed to have entered into the contract in reliance on the truth of a misrepresentation by the seller. The plaintiff claimed damages for deceit through having been induced to buy shares in an iron company by false representations in a prospectus as to the output of the iron works. The House of Lords held that his claim failed because the critical words of the prospectus were ambiguous, and the plaintiff had failed to show that he understood them in a sense which was false. Lord Blackburn surmised, at p 200, that the plaintiff's counsel refrained from asking the plaintiff in examination-in-chief how he understood the wording for fear of receiving a damaging answer. The case was cited in the present case for the opening passage in the speech of Lord Selborne LC, at p 190:

"My Lords, I conceive that in an action of deceit, *like the present*, it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." (Emphasis added.)

66 In the same case Lord Blackburn had pertinent things to say about the fundamental link between fraud and damage in an action for deceit, at p 195:

"In *Pasley v Freeman* (1789) 2 Sm LC 66, 73, 86 (8th ed), Buller J says: 'The foundation of this action is fraud and deceit in the defendant and damage to the plaintiffs. And the question is whether an action thus founded can be sustained in a Court of law. Fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies, per Croke J, 3 Bulst 95.'

"Whatever difficulties there may be as to defining what is fraud and deceit, I think no one will venture to dispute that the plaintiff cannot recover unless he proves damage. In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none."

67 So far I have been considering the typical case. But it is possible for a representor to make a false and fraudulent misrepresentation, with the intention of influencing the representee to act on it to its detriment, without the representee necessarily believing it to be true. If the representor succeeds in his object of influencing the representee to act on the representation to its detriment, there will be the concurrence of fraud and deceit in the representor and resulting damage to the representee. In principle, the representee should therefore be entitled to a remedy in deceit.

68 That inducement is a question of fact, necessary to establish causation in all cases but not necessarily in the same way, was recognised and well expressed in the decision of the Court of Appeal of New South Wales in *Gipps v Gipps* [1978] 1 NSWLR 454. A woman sued her former husband for deceit in relation to a property settlement which they had entered into at the time of their divorce. They were joint shareholders in a private company and as part of the settlement the wife transferred her shares to the husband. The shares were valued by an independent accountant, but the husband dishonestly contrived to see that the valuation was a substantial undervaluation. The wife did not trust the husband and suspected that the shares were worth more than the valuation, but she did not know the extent of the undervaluation. It was submitted on the husband's behalf that if a representee knows that a representation is false in a material particular, as a matter of law he or she cannot sue in respect of it. The court rejected that argument.

A **69** After referring to various authorities, including particularly the passage from the judgment of Jessel MR in *Redgrave v Hurd* set out at para 64 above, Hutley JA said, at p 460:

> "The question whether a person has been induced by a statement made to him to enter into an agreement is, in my opinion, a single issue of fact. No doubt pre-contractual knowledge that the statement made is not
B wholly true has a very direct bearing on the resolution of this question of fact but it does not of itself necessarily provide the answer. To say that it does is to formulate a different question.
>
> "To state that a person is induced by a statement is to affirm a causal relation which is a question of fact, not of law. That being so, it is impossible to apply to any situation a rule which produces a final result.
C The trial judge or jury have to answer the question: Did the misrepresentation cause the representee to enter into the contract, it being understood that the representation, as was stated in *Australian Steel and Mining Corpn Pty Ltd v Corben* [1974] 2 NSWLR 202, 207, 'was among the factors which induced the contract.' "

70 Some assistance may also be had from the judgment of Hobhouse LJ
D in *Downs v Chappell* [1997] 1 WLR 426, 433, where he said that for a plaintiff to succeed in the tort of deceit of deceit it is necessary for him to prove that (1) the representation was fraudulent, (2) it was material and (3) it induced the plaintiff to act to his detriment. He added that "As regards inducement, this is a question of fact" and that "The word "reliance" used by the judge has a similar meaning but is not the correct criterion."

71 I agree with Judge Moloney QC's analysis in para 2.5 of his
E judgment. The question whether there has been inducement is a question of fact which goes to the issue of causation. The way in which a fraudulent misrepresentation may cause the representee to act to his detriment will depend on the circumstances. He rightly focused on the particular circumstances of the present case. Mr Hayward's deceitful conduct was intended to influence the mind of the insurers, not necessarily by causing
F them to believe him, but by causing them to value his litigation claim more highly than it was worth if the true facts had been disclosed, because the value of a claim for insurers' purposes is that which the court is likely put on it. He achieved his dishonest purpose and thereby induced them to act to their detriment by paying almost ten times more than they would have paid but for his dishonesty. It does not lie in his mouth in those circumstances to
G say that they should have taken the case to trial, and it would not accord with justice or public policy for the law to put the insurers in a worse position as regards setting aside the settlement than they would have been in, if the case had proceeded to trial and had been decided in accordance with the corrupted medical evidence as it then was.

72 For those reasons, which accord to all intents and purposes with the judgment of Lord Clarke JSC, I too would allow the insurers' appeal and
H restore the order of Judge Moloney.

Postscript

73 It was expressly conceded on behalf of the insurers for the purposes of the present appeal that whenever and however a legal claim is settled, a

party seeking to set aside the settlement for fraud must prove the fraud by evidence which it could not have obtained by due diligence at the time of the settlement. It makes no difference to the outcome of the present case and the court heard no argument about whether the concession was correct. Any opinion on the subject would therefore be obiter, and since the court has not considered the relevant authorities (including Commonwealth authorities such as *Toubia v Schwenke* (2002) 54 NSWLR 46) or academic writing, it is better to say nothing about it.

Appeal allowed.

SHIRANIKHA HERBERT, Barrister

Case No: HC-2015-002539

Neutral Citation Number: [2017] EWHC 99 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: Thursday 26 January 2017

Before :

MR JUSTICE SNOWDEN

- -

Between :

JOSEPH ACKERMAN	**Claimant**
- and -	
(1) ANDREW ROBERT THORNHILL QC **(2) NAOMI ACKERMAN** **(3) BARRY ACKERMAN** **(4) BANA ONE LIMITED**	**Defendants**

- -

Philip Coppel QC and David Bedenham (instructed by **Forsters LLP**) for the **Claimant**
Graeme McPherson QC and Amanda Savage (instructed by **Kennedys Law**) for the **First Defendant**
John Wardell QC and Andrew Mold (instructed by **Berwin Leighton Paisner LLP**) for the **Second to Fourth Defendants**

Hearing dates: 7, 8 and 11 April 2016

- -

Judgment

MR. JUSTICE SNOWDEN:

1. This is an application by the Defendants to strike out the claim against them or for summary judgment in their favour. The claim was issued in June 2015 (the "2015 claim") and followed the trial and settlement of an earlier claim between the same parties that had been commenced in 2011 (the "2011 claim").

2. The application to strike out or for summary judgment is essentially made on the basis that the Claimant is barred by the doctrine of *res judicata*, or by the terms of a settlement of the earlier claim, from pursuing the 2015 claim. In response to the application, the Claimant has produced drafts of an Amended Claim Form and Amended Particulars of Claim (which were further amended at the hearing) for which he seeks permission to amend. The most significant proposed amendment is that the draft amended claim and pleading now includes an application to set aside the judgment of Vos J handed down on 21 December 2011 in the 2011 claim on the grounds that it was obtained by fraud, collusion and dishonesty.

3. In the conventional way, I shall consider whether the claim sought to be made in the final version of the draft Amended Particulars of Claim ought to be struck out, rather than consider that question on the basis of the existing pleadings.

Background

4. The litigation arises out of the ownership of a property business that Mr. Joseph Ackerman ("Joseph"), and his brother Mr. Jack Ackerman ("Jack") established in the early 1960s, known as the Ackerman Group (the "Group"). The Group consisted of a large number of property companies, some individual properties, a sub-group of companies known as the Superetto group, a Gibraltarian trust, a charitable company (Delapage Limited) and its two non-charitable subsidiaries (Haysport Limited and Twinsectra Limited) and a company called Loch Tummel Limited. In general terms, Joseph and Jack each had a 50% interest in the various parts of the Group and when Jack died in 1989, his widow, Mrs. Naomi Ackerman ("Naomi") inherited his share.

5. After Jack's death, the affairs of the Group were run by Joseph, assisted by his son-in-law Daniel Wulwick ("Danny"). However, from 2001, Jack and Naomi's son, Barry Ackerman ("Barry") became involved in the Group's business and began to work part-time with Joseph. After a relatively short time, in about 2004, the relationship between Joseph and Danny (on the one hand) and Naomi and Barry (on the other) deteriorated. This culminated in a decision in February 2006 that there should be a demerger of Joseph's and Naomi's one-half interests in the Group.

6. The demerger did not proceed without difficulty. Naomi complained about the lack of information provided by Joseph and about a number of transactions which he undertook on his own account.

7. Mr. Andrew Thornhill QC ("Mr. Thornhill") is a barrister specialising in tax matters, who first met Joseph in 1977 and had been a long-standing adviser to him in relation to both personal matters and matters in relation to the Group. When Mr. Thornhill heard about the difficulties which had arisen, he offered his services to the parties to assist in concluding the agreed demerger, and in September 2008 he was appointed by both sides to act as an expert to determine the basis for the demerger of the Group.

Mr. Thornhill's appointment was initially made under a document dated 22 September 2008, which was then superseded by a revised document dated 5 December 2008 entitled the "Further Agreed Way Forward Agreement".

8. In outline it was agreed that Mr. Thornhill should undertake a lottery (the "Lottery") to decide how the various individual companies, properties and other assets of the Group should be allocated between Joseph and Naomi, and that he would have exclusive authority from both of them to determine the form of the demerger. It was also agreed that after the Lottery but before the division took place, Mr. Thornhill would have authority to determine adjustments to be made in respect of a variety of matters including, in particular, any cash taken out of the companies for private purposes and in respect of inter-company indebtedness.

9. The Lottery to divide the various assets was performed by Mr. Thornhill on 3 March 2009, but the results were not immediately disclosed to the parties. The Further Agreed Way Forward Agreement of 5 December 2008 was then superseded by an agreement drafted by Mr. Thornhill and entered into on 25 June 2009 entitled "A Revised Further Agreed Way Forward Agreement" (the "RFAWF Agreement"). Under the RFAWF Agreement, both sides gave Mr. Thornhill extensive powers of investigation and decision-making, together with the authority to deal on their behalves with the assets of the Group in order to ascertain the adjustments that were required so as to achieve a fair division of the Group between Joseph and Naomi.

10. In his judgment in the 2011 claim, Vos J held that Joseph and Danny sought to undermine the process to which they had agreed under the RFAWF Agreement by refusing to provide Mr. Thornhill with the necessary information concerning the Group to allow him to ascertain the adjustments to make. Vos J expressed the view that this was very likely to have been because Joseph did not want to separate the Group, but wanted to be able to continue to run it himself using Naomi's half interest without consulting her, as he had in the past.

11. Eventually, on 5 January 2011, Mr. Thornhill published a "Provisional Adjustment Report" setting out the result of the Lottery in 2009 and the adjustments he had decided to make, together with what he had done to give effect to those matters. In the Provisional Adjustment Report, Mr. Thornhill determined that Joseph had removed a substantial quantity and value of assets from the Group, and that as a consequence (i) the entirety of the Group and jointly owned properties should be transferred to Naomi or a company that she owned (the Fourth Defendant, BANA One Limited ("BANA")); (ii) Naomi had a further claim of £20.33 million against Joseph; and (iii) Haysport Limited and Twinsectra Limited had claims for £9 million against Joseph. The Provisional Adjustment Report also disclosed that in late December 2010 Mr. Thornhill had used his powers and authority under the RFAWF Agreement to carry his determination into effect as regards the transfers of shares and assets to Naomi and BANA, and the resignation of Joseph from the boards of the relevant companies.

12. After an exchange of letters before action, on 22 April 2011, Joseph commenced the 2011 claim against Mr. Thornhill, Naomi, Barry and BANA, challenging the Provisional Adjustment Report and what Mr. Thornhill had done in purported exercise of his power of attorney on behalf of Joseph.

13. Mr. Thornhill gave early disclosure in the proceedings in May 2011, and this was followed by disclosure being given by all parties in August 2011. Following disclosure having taken place, Amended Particulars of Claim were served by Joseph on 19 October 2011, and an expedited trial commenced before Vos J on 23 November 2011.

14. Vos J handed down judgment in the 2011 claim on 21 December 2011: see [2011] EWHC 3428 (Ch). In paragraph 6 of his judgment, Vos J summarised Joseph's allegations,

> "In these proceedings, Joseph alleges that Mr Thornhill was guilty of actual bias, collusion and partiality in favour of Naomi and her side of the family, that he acted unfairly and deceitfully, and that he materially departed from his instructions contained within the [RFAWF] Agreement. As a result, Joseph contends that the Report and the steps taken in pursuance of it are invalid and of no effect, and the breaches are so serious as to amount to a repudiation of the [RFAWF] Agreement which is said to have been accepted and therefore be at an end."

15. This summary was expanded in paragraphs 152 - 160 of the judgment which included a list of issues based upon a list produced by Joseph's counsel after the evidence had been concluded. At paragraphs 257-279 of his judgment, Vos J identified the four main legal questions underlying the case – the binding nature of expert determination, procedural unfairness, the materiality of any departure from the expert's instructions, and bias. In relation to the last of these, Vos J made the point, at paragraph 275, that the allegation of bias was an allegation of actual bias as opposed to the appearance of bias. He supported that point with citation of a passage from the judgment of Robert Walker J in Macro v Thompson (No.3) [1997] 2 BCLC 36 at page 65 that referred to older cases which equated actual bias with "fraud or collusion" or "gross fraud or partiality".

16. At the trial, Joseph did not give evidence, and it was left to Danny to explain his position. Vos J was critical of this, given the "serious allegations" that were being levelled at Mr. Thornhill (see e.g. paragraphs 173 and 186 of the judgment). He also found that Danny was a wholly unsatisfactory witness, who had "little or no grasp of the difference between truth and falsehood" (paragraph 182). Vos J was not wholly impressed with Barry either, commenting that he was on occasions deliberately evasive (paragraph 191). Vos J did, however, accept Naomi's evidence in broad terms, and apart from a couple of relatively minor reservations, in relation to Mr. Thornhill he concluded at paragraph 252, that,

> "…I found Mr. Thornhill a reliable and careful witness. He was faced with a most difficult task, which I believe he tried very hard to carry out to the best of his ability."

17. On the issues of whether Mr. Thornhill had acted in accordance with the terms of the RFAWF Agreement and with procedural fairness, Vos J dismissed most of Joseph's allegations. He did, however, find that Mr. Thornhill had breached the terms of the RFAWF Agreement in not giving Joseph notice of certain adjustments that Naomi

had proposed, and that he had also failed to copy some questions and answers from Barry to Joseph. Vos J did, however, describe the latter breach as an extremely technical one, and he rejected any suggestion that the breaches of contract that he had found proved were procedurally unfair or improper, stating, at paragraphs 343-345,

> "343. This is the nub of the case. I have already held that Mr. Thornhill failed, in breach of clause 9(B)(c) to give Joseph notice that Naomi was proposing the transfer of the Superetto companies and all the jointly-owned properties and companies to her.
>
> 344. The level and nature of unfairness is, however, very important to the consequences. I should say first that Mr. Thornhill never acted, in my judgment in anything other than perfect good faith. He genuinely believed that his interpretation of the [RFAWF] Agreement was the correct one. I have concluded that it was not, but that does not mean that he acted in bad faith in acting as he did.
>
> 345. In his closing submissions, Mr. Kitchener focussed on a few crucial points in the chronology in an effort to demonstrate that Mr. Thornhill lost any sense of the necessary impartiality, fairness and independence, and simply associated himself with Barry, Naomi and Mr. Robinson, looking to them for his instructions. I completely reject this analysis, which is wholly contrary, in my judgment, to the evidence. It is a description of events, which was, in my judgment, borne of Joseph's desire to criticise everything that Mr. Thornhill did, without any sense of balance, and to find conspiracies and mis-dealings where there were none."

18. The points made in paragraph 345 were also echoed in Vos J's emphatic rejection of the allegations of actual bias and collusion against Mr. Thornhill. Vos J concluded, at paragraphs 338-340,

> "338. As appears from my factual findings on the evidence, I am not satisfied that Joseph has made good any allegation that Mr. Thornhill acted with actual bias or that he colluded with Naomi's side or with Barry in particular.
>
> 339. The allegations of bias and collusion are, however, much bound up with the allegations of unfairness dealt with below in issue 4. Those findings should, therefore, be considered as part of my findings under this issue.
>
> 340. I should say under this head, however, that I have concluded that Mr. Thornhill retained at all times an attitude of mind which allowed and allows him to make an objective and independent determination of the issues that he had and has to resolve. He never colluded with Naomi, Barry or Mr. Robinson, nor did he actually favour the interests of Naomi and

> Barry over the interests of Joseph and Danny. He was in no sense affected by any prejudice against Joseph. He may have become frustrated and even annoyed by some of Joseph's conduct during the process of reaching the provisional report stage, but I am entirely satisfied that he never became prejudiced against Joseph."

19. The same approach was apparent from Vos J's conclusion as to the materiality of the breaches of the RFAWF Agreement that had occurred. He concluded, at paragraph 383,

> "383. The materiality of the breach would also in my judgment be radically affected if it could be said that Mr. Thornhill had been shown to have lost his impartiality or independence, or to have been biased or collusive with one side…In my judgment, a breach will be very likely to be material if, objectively judged, the challenging party has reasonably lost confidence in the independence of the expert on solid evidential grounds. In other words, one relevant and important circumstance making it most likely that a determination will not stand will be if, objectively viewed, the expert has demonstrated any lack of proper independence. I do not think that is the case here. Mr. Thornhill has acted in such a way as to upset both sides. Ultimately, his provisional Report comes down more on Naomi's side than on Joseph's side; though it may be noted that he only accepted some £23 million of the £70 million worth of adjustments suggested by Naomi. It might well be that the interim nature of the Report would be less relevant if, viewed objectively, Mr. Thornhill had lost his independence so that the court could not be satisfied that he would continue the process with the necessary degree of fairness and independence. But that is not the case here. I am entirely satisfied on the evidence that Mr. Thornhill will, if that is the effect of the court's decision, proceed impartially, independently and fairly to undertake the third stage of the determination process."

20. Vos J refused permission to appeal. He also made an order that Joseph should pay the costs of the Defendants and that Joseph should make payments totalling about £1.4 million on account of costs (subject to a stay if permission to appeal was sought and granted by the Court of Appeal). Joseph then applied to the Court of Appeal, which granted him limited permission to appeal on 13 June 2012, solely in relation to Vos J's findings that Mr. Thornhill had not materially departed from his instructions.

21. However, before the appeal could be heard, on 20 July 2012, the parties signed an order by consent ("the Consent Order") by which they agreed that Joseph's appeal be dismissed on the terms of a settlement agreement contained in the schedule to the order. Those terms included an agreement by the Defendants not further to enforce the costs orders which had been made and set out a revised timetable for completion by Mr. Thornhill of a "Further Provisional Adjustment Report" and then a "Final Adjustment Report" for the purposes of the RFAWF Agreement, which was

confirmed to continue in full force and effect subject to the variations contained in the schedule to the Consent Order.

22. The last clause of the schedule to the Consent Order was in the following terms,

> "18. Save as provided for in this agreement, the rights of Joseph Ackerman against Naomi Ackerman, Barry Ackerman and BANA One Limited remain fully reserved and have not been waived or released pursuant to this agreement or the terms of this Order and its schedule. For the avoidance of doubt, Joseph Ackerman agrees not to continue to pursue or to seek to revive in these proceedings or in new proceedings the claims which are the subject matter of these proceedings."

23. Thereafter, and following representations from both sides, Mr Thornhill provided his "Further Provisional Adjustment Report" to the parties on 15 August 2012. This replaced the Provisional Adjustment Report that had been at the centre of the 2011 proceedings. On 11 February 2013, Mr Thornhill published his "Final Adjustment Report", in which (among other things) he found that Joseph owed Naomi £36 million.

<u>The 2015 claim</u>

24. Joseph's case is that within days of the publication of the Final Adjustment Report in February 2013, an unknown person delivered an envelope to the homes of himself and Danny. He says that the envelope contained documents that related to two transactions from 2008 and 2009 concerning Mr. Thornhill, Naomi and Barry. Joseph contends that he had not seen these documents before. This account is not accepted by the Defendants, but I cannot resolve that factual dispute on the present application.

25. The two transactions which are the subject of the documents that Joseph says were first seen by him in 2013 were referred to in argument as "the Rally Transaction" and "the Edenholme Transaction".

The Rally Transaction

26. In 2008, Mr. Thornhill was the beneficial owner of a number of shares in a company engaged in a waste materials/energy conversion project known as Ethos Energy (Worldwide) Limited ("Ethos"). By a deed dated 24 December 2008 ("the Rally Deed"), a company, Rally Investments Limited ("Rally") of which Naomi and Barry were directors, agreed to pay £500,000 to Mr. Thornhill, who declared himself the trustee of 25% of his beneficial interest in Ethos. In effect, Rally bought one quarter of Mr. Thornhill's shares in Ethos for £500,000.

27. Rally was a wholly-owned subsidiary of Raleigh Limited ("Raleigh"), which was a company that had been established as a registered charity by Naomi in 2008. Naomi and Barry were directors of Raleigh. The £500,000 which was paid by Rally to Mr. Thornhill was provided by Raleigh.

28. In the Rally Deed, Mr. Thornhill further agreed that if the distributions before tax on the Ethos shares concerned fell below £500,000 for the period ending in September

2011, he would pay the shortfall to Rally; or if Rally so elected within two months of the end of the same period in September 2011, that he would repay the £500,000 plus compound interest at 7.5% per annum to Rally and accept a retransfer of the beneficial interest in the Ethos shares. Mr. Thornhill also agreed that by 24 March 2009 he would provide security to Rally over a number of residential properties said to be worth in excess of £1 million to secure his obligations under the Rally Deed.

29. Although Mr. Thornhill was paid the £500,000 by Rally according to the Rally Deed, he never provided the promised security to Rally as required by the Rally Deed. Nor did Naomi and Barry cause Rally to press for the security to be provided.

The Edenholme Transaction

30. A year later, on 24 December 2009, SRS (R&D) Limited ("SRS"), a Jersey company, agreed to buy all of Mr. Thornhill's interest in the shares in Ethos (including the shares that he held on trust for Rally) in return for the allotment of 4,625 shares representing 4.625% of the share capital of SRS to Mr. Thornhill. SRS was a company, the majority of the shares in which were owned by a Mr. John Sweeney.

31. On the same date, Edenholme Estates Limited ("Edenholme"), a company owned and controlled by Naomi and Barry, also subscribed a further £1 million for 7.5% of SRS's issued share capital pursuant to a subscription agreement (the "Subscription Agreement"). It was further agreed pursuant to a shareholders' agreement (the "Shareholders' Agreement") that £200,000 of the £1 million invested by Edenholme would be used to provide working capital to Ethos, and some of the remainder would be used to repay a debt that Ethos owed to an associated company.

32. Joseph alleges that Edenholme's investment into SRS made it more likely that Ethos would be able to pay dividends and hence reduced the chance that Mr. Thornhill would have to pay money to Rally under the Rally Deed. He further alleges, however, that Ethos never in fact paid any dividends or was likely to be in any position to do so.

33. Joseph contends that as well as not taking any steps to cause Rally to require the provision of security by Mr. Thornhill, Naomi and Barry also did not seek any shortfall payment from Mr. Thornhill, or to exercise Rally's option to require repayment of the £500,000 plus interest from Mr. Thornhill, or seek to enforce any such debt. The draft pleading describes these omissions by Rally to enforce its rights under the Rally Deed as the "forbearances".

Joseph's allegations

34. The first conclusion that Joseph seeks to draw from these facts in his 2015 claim is that the entry into the Rally Deed and the forbearances given to Mr. Thornhill in relation to it, placed Mr. Thornhill in a position of conflict of interest and duty which prevented him from acting fairly, impartially and in an unbiased manner as required by the Further Agreed Way Forward Agreement or the RFAWF Agreement. In addition, Joseph further alleges that Rally's payment of £500,000 to Mr. Thornhill pursuant to the Rally Deed and the forbearances given to him by Rally amounted to a bribe or secret commission which Naomi and Barry dishonestly caused to be paid to Mr. Thornhill to induce him to favour Naomi in the demerger process.

35. Joseph's allegation is that instead of rejecting the £500,000 or disclosing the Rally Transaction to Joseph, Mr. Thornhill accepted the money and failed to make disclosure to Joseph. It is said that this amounted to a breach of the contractual and fiduciary duties owed by Mr. Thornhill to Joseph under the Further Agreed Way Forward Agreement and the RFAWF Agreement. I shall refer to these allegations as the "allegations of breach of duty". It is also alleged that Naomi and Barry dishonestly assisted Mr. Thornhill's breaches of fiduciary duty and that the payment to Mr. Thornhill under the Rally Deed and the forbearances given to him were an unlawful means conspiracy entered into between Mr. Thornhill, Naomi and Barry with the intention that Mr. Thornhill should injure Joseph by providing a more advantageous outcome for Naomi and Barry under the RFAWF Agreement than would otherwise have been the case.

36. Joseph further alleges that the existence of the dealings relating to the Rally and Edenholme Transactions were deliberately and dishonestly concealed by Mr. Thornhill, Naomi and Barry during the conduct of the 2011 claim, and in particular that they were concealed from Vos J at the trial in December 2011. Joseph places particular reliance upon the fact that Mr. Thornhill did not disclose the Rally Deed, the Subscription Agreement or the Shareholders' Agreement in the litigation; and he alleges that each of Mr. Thornhill, Naomi and Barry deliberately made no mention of the Rally Transaction or the Edenholme Transactions in any of their pleadings, evidence or submissions to Vos J.

37. Joseph also accuses Naomi and Barry of concealing the existence of a Charity Commission inquiry into their management of the affairs of Raleigh during the proceedings in 2011, and he accuses Mr. Thornhill of deliberately misleading the Charity Commission so as to dissuade it from bringing the Rally Deed to the attention of Vos J at the trial in November 2011.

38. The background to these allegations is that in August 2011, the Charity Commission had opened a regulatory compliance case in relation to the corporate governance and management of the financial affairs of Raleigh by Naomi and Barry. The decision to use Raleigh's money in the Rally Transaction was part of the inquiry, and during the inquiry the Commission was given a copy of the Rally Deed. The Commission was also aware of the 2011 claim, and a member of its Compliance Investigations Unit in London wrote to Mr. Thornhill on 4 October 2011, referring to its inquiry and stating,

> "The Commission considers that the aforementioned deed is directly relevant to issues to be tried in the upcoming proceedings being brought by Joseph Ackerman, and therefore ought to be disclosed pursuant to the test under Part 31 of the Civil Procedure Rules. As a result, the Commission would welcome your views on this matter, and would like to know if you are considering whether or not to disclose this information to the court yourself given the nature of the duty under the CPR."

39. Although the Commission sought a response by 11 October 2011, and sent a chasing letter on 21 November 2011, Mr. Thornhill did not respond. This prompted the same representative of the Commission to write to Mr. Thornhill on 25 November 2011, shortly after the trial had commenced, stating,

> "As our queries remain outstanding we have given further consideration to this matter and it is now our intention to disclose the documents directly to the court on Monday 28 November 2011."

40. Mr. Thornhill responded by email to the Charity Commission on Saturday 26 November 2011 stating,

> "In reply to your letters especially that of 25th November it is my belief that the documents to which you refer have been disclosed. No issue is taken upon them in the pleadings. I give you full permission to speak to Mr. Hughes, my solicitor, on the matter. He will be in court on Monday. Can I assume you will be there?"

41. That email was followed by a further email to the Commission from Mr. Thornhill's solicitor, Mr. Hughes of M&S Solicitors Limited, late on Sunday 27 November 2011. Mr. Hughes stated,

> "I attach a copy of the Agreement dated 24 December 2008 which has been disclosed in these proceedings and should be grateful if you would please confirm that this is the transaction to which you refer.
>
> I shall be travelling by train to London and would be grateful if I may discuss with you further the contents of your letter in order to be clear of your concerns. As I am aware that the Judge has already directed that he wants no slippage in the court timetable, my suggestion would be that I come to see you at your office in the morning if that would be convenient with Mr. Thornhill, and deal with matters with you promptly.
>
> As an officer of the court, I have direct responsibilities where matters of disclosure are concerned and I would like please the opportunity to be briefed about the concerns personally."

42. The representative of the Commission responded by email to Mr. Hughes early on the Monday morning, copied to Mr. Thornhill, stating,

> "The purpose of our correspondence with Mr. Thornhill was to establish whether this matter had been disclosed to the court. In light of the confirmation provided in your email we have no further concerns and do not now consider it necessary to disclose any further information to the court."

43. In a subsequent email dated 21 July 2014, responding to questions from the solicitors acting for Joseph in these proceedings, a different representative of the Charity Commission stated that although the Commission had had no understanding one way or the other in 2011 as to the process by which the Rally Deed had been disclosed, it was the Commission's understanding that the Rally Deed "was before the Court and/or seen by the Judge", and that if that had not been the case the Commission

would have taken steps to ensure that the existence of the document was known to Vos J.

44. In his draft amended pleading, Joseph contends that Mr. Thornhill knew that the Charity Commission had understood from his email, and that of his solicitor, that the Rally Deed had been disclosed to the court; and that by both emails Mr. Thornhill deliberately misled the Charity Commission into thinking that he had disclosed the Rally Deed to the court. Joseph alleges that Mr. Thornhill acted in this way in order to avoid the Commission directly bringing the Rally Deed to the attention of Vos J, because he feared that if it did so, this would damage his credibility as a witness and his defence to the 2011 claim.

45. Joseph alleges that if Vos J had known of the payment of £500,000 made to Mr. Thornhill and the alleged forbearances given to him in connection with the Rally Transaction, or of the Edenholme Transaction, or of the Charity Commission inquiry into Raleigh, Vos J's judgment "would have been materially different … and the outcome would have been more favourable" to Joseph. Joseph contends that by failing to reveal such matters, Mr. Thornhill, Naomi and Barry "colluded to conduct their defence" to the 2011 claim and "improperly influenced the outcome of the trial". As a consequence, Joseph contends that, "By reason of the Defendants' fraud, collusion and dishonesty in securing the judgment", Vos J's judgment in the 2011 claim should be set aside.

46. Joseph further contends that the Defendants continued fraudulently to conceal their dealings from him at the time at which he agreed to the Consent Order, under which it was envisaged that Mr. Thornhill would provide the Further Provisional Adjustment Report and the Final Adjustment Report. Joseph contends that as a consequence, he is also entitled to set that order and those reports aside.

47. The result is that Joseph claims to set aside the RFAWF Agreement, Vos J's judgment in the 2011 claim, the Consent Order and each of the Adjustment Reports. He also seeks further relief to reverse all of the steps taken by Mr. Thornhill under those agreements and reports.

<u>The Defendant's contentions and their application to strike out</u>

48. As might be expected, Joseph's allegations are strenuously denied by each of the Defendants. They deny all allegations of bribery, fraud or collusion, and contend that the Rally and Edenholme Transactions were entirely genuine commercial arrangements that were not intended to and did not affect Mr. Thornhill's impartiality and objectivity in relation to his performance of his duties under the RFAWF Agreement.

49. They further deny that there was any requirement under the RFAWF Agreement or otherwise that all commercial dealings between Mr. Thornhill and either side should cease or be disclosed, pointing out that the history of the matter was that Mr. Thornhill had a long-standing prior relationship with Joseph, and there was nothing in the agreements to suggest that he was required to give that up or disclose his relations with either side. The Defendants also deny any breach of their disclosure or other obligations in the course of the 2011 claim and reject any suggestion that Vos J was misled or that his decision in December 2011 would have been any different had he

known of the Rally and Edenholme Transactions or of the Charity Commission inquiry into Raleigh.

50. The Defendants' evidence is that Mr. Thornhill had actually introduced the opportunity to invest in Ethos to Joseph between 2004 and 2006 and that matters had progressed to the extent that Joseph had deposited substantial sums of money into a solicitors account for the purposes of investing but had not proceeded with the investment. They say that Mr. Thornhill then introduced Ethos to Naomi and Barry; and that Naomi and Barry thought that the agreement in the Rally Deed represented a good investment opportunity for Raleigh which had surplus funds. Barry and Naomi also suggest that they have exercised the right to require Mr. Thornhill to repurchase the shares after the expiry of the period in September 2011. Barry's evidence is that Mr. Thornhill has repaid some of the money due but continues to owe in excess of £520,000 with interest accruing at a compound rate.

51. The Defendants also place significant emphasis on the fact that Barry, Naomi and BANA disclosed the Rally Deed, the Subscription Agreement and the Shareholders' Agreement in their list of documents served in the 2011 claim in August 2011, and then provided electronic copies of the documents to Joseph's solicitors. It is said that this disclosure was inconsistent with any secrecy or dishonesty on the part of the Defendants concerning the Rally and Edenholme Transactions.

52. Mr. Thornhill did not disclose these documents in the course of the 2011 claim. His evidence is that he took the view that they were irrelevant, because he believed that Joseph knew all about the Rally Transaction and had not referred to it in the pleadings. He also states that all of his legal team involved in the 2011 claim knew of the Rally and Edenholme Transactions and of the relevant documents and continued to act for him. Mr. Thornhill also points to the fact that he had disclosed an email dated 22 November 2010 to him from the managing director of Ethos, which made reference to himself, Naomi and Barry.

53. Mr. Thornhill further denies any attempt to mislead the Charity Commission. He contends that the Commission's letter to him was plainly directed at disclosure in the litigation – hence its reference to CPR 31 – and that his response was entirely accurate. Mr. Thornhill also points out that his own email of 26 November 2011 did not in any way seek to discourage the Charity Commission from attending court on 28 November 2011, but offered to meet them at court with his solicitor to discuss matters openly; and that Mr. Hughes' email was in similar terms.

54. Although this is the broad thrust of the Defendants' response to Joseph's allegations on the facts, and they contend that the allegations are obviously without merit, their application to strike out the 2015 claim or for summary determination of it in their favour is primarily based upon a contention that the 2015 claim seeks to raise issues that were either decided against Joseph in 2011, or issues which could and should have been raised by Joseph in those proceedings. They therefore contend that the 2015 claim is barred by the principles of *res judicata*. Alternatively they rely upon the terms of clause 18 of the schedule to the Consent Order as being an express bar to the proceedings.

55. In particular, the Defendants submit that even if (which they do not accept) Joseph was not actually aware of the Rally and Edenholme Transactions during the trial of

the 2011 claim, the documents disclosing such matters were available to him because they were disclosed during the proceedings, and that all of the matters now alleged could with reasonable diligence have been discovered by Joseph or his legal team as a consequence and raised during the 2011 claim in the same way that they have been raised now.

56. In addition, the Defendants say that the alleged non-disclosure of the Rally and Edenholme Transactions and the Charity Commission inquiry into Raleigh would not have been of sufficient importance that they could conceivably have caused Vos J entirely to change the way he approached the evidence at the trial or the way in which he came to his judgment on the 2011 claim.

57. The Defendants accordingly say that this means that there is no basis for permitting Joseph now to re-litigate the issues that were or could have been raised and decided in 2011, or to set aside Vos J's judgment or the Consent Order.

The law on res judicata

58. The modern law on *res judicata* was considered by the House of Lords in Arnold v National Westminster Bank plc [1991] 2 AC 93 ("Arnold") and by the Supreme Court in Virgin Atlantic Airways v Zodiac Seats UK [2014] AC 160 ("Virgin Atlantic").

59. In Arnold, at pages 104-106, Lord Keith described and explained the difference between cause of action estoppel and issue estoppel,

> "It is appropriate to commence by noticing the distinction between cause of action estoppel and issue estoppel. Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened …
>
> Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action. In Henderson v Henderson (1843) 3 Hare 100, Sir James Wigram V-C expressed the matter thus: "
>
> > "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances)

> permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."
>
> …..
>
> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue …
>
> ….
>
> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier."

60. In Virgin Atlantic, Lord Sumption concluded,

> "22. Arnold v National Westminster Bank plc is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

61. Lord Sumption then considered the relationship of the rule in Henderson v Henderson to the principles of cause of action estoppel and issue estoppel and cited the following

passage from the speech of Lord Bingham in Johnson v Gore-Wood [2002] 2 AC 1 at 31,

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

62. In Johnson v Gore-Wood, Lord Bingham also held that the principles set out in Henderson v Henderson apply with at least equal force if the first set of proceedings have been compromised by a settlement. He stated, at pages 32-33,

> "The second subsidiary argument was that the rule in Henderson v Henderson did not apply to Mr Johnson since the first action against GW had culminated in a compromise and not a judgment. This argument also was rightly rejected. An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

63. As Lord Keith indicated in the passage from Arnold referred to in paragraph 59 above, it has always been the case that the principles of *res judicata* will not apply if a

litigant can satisfy the court that the judgment in the earlier litigation was obtained by fraud or collusion, such that it ought to be set aside.

64. The requirements for the setting aside of a judgment on the grounds that it was obtained by fraud or collusion were summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA Civ 328 ("Highland Financial") at paragraph 106,

> "There was no dispute between counsel before us on the legal principles to be applied if one party alleges that a judgment must be set aside because it was obtained by the fraud of another party. The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

65. In addition to the three requirements expressly identified as discussed by Aikens LJ, there has recently been some disagreement in the authorities as to whether there is an additional requirement before a judgment can be set aside, namely a requirement that the evidence of fraud or collusion relied upon in the second set of proceedings must be evidence that was not available, and could not have been discovered with reasonable diligence by the innocent party, at the time that the first judgment was given.

66. One of the earliest statements of principle in this regard was that of Lord Cairns in Phosphate Sewage Co. v Molleson (1879) 4 App Cas 801. The claimant company alleged that it had been a victim of a fraud by the members of a Scottish firm, and lodged a proof of debt in the Scottish bankruptcy of one of them. It also brought proceedings in the Chancery Division in England. The proof of debt was rejected and a challenge to the rejection of proof failed in the Scottish courts. Subsequently, the claimant's action in England succeeded and a declaration was made that the claimant was entitled to compensation from the bankrupt. The claimant then lodged a second proof of debt in Scotland. The only difference between the original proof of debt and the second proof was the addition of some facts that had been known to the claimant

when the first proof of debt was adjudicated upon, but which had not been sought to be included in its proof.

67. The trustee rejected the second proof of debt and successfully raised the defence of *res judicata* against a challenge to the rejection of the second proof. In upholding this plea, Lord Cairns recorded, at pages 814-815, that the additional facts included in the second proof of debt had been known to the claimant company before the first proof was adjudicated upon, and could have been the subject of an application to add them by way of amendment to the first proof. He then continued,

> "As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."

68. The requirement that a claimant must be able to show new facts which were not available, and could not with reasonable diligence have been available to him, was unanimously reaffirmed by the Court of Appeal and the House of Lords in Hunter v Chief Constable of West Midlands [1980] QB 283 and [1982] AC 529 ("Hunter"). The case involved an attempt by the claimants, who had been convicted of the Birmingham bombings in 1974, to sue the police who had arrested them, alleging that they had been assaulted whilst in custody. The trial judge at the criminal trial had held a *voir dire* and ruled the claimants' confessions to be admissible, accepting the evidence of the police that there had been no physical violence or threats made against them. The defendant chief constables applied to have the civil claim struck out as an abuse of process on the basis that it was an attempt by the claimants to mount a collateral attack upon their convictions.

69. The Court of Appeal unanimously held that a claimant who wished to escape from an estoppel arising out of an earlier decision against him had to adduce evidence that was not available and could not have been obtained by reasonable diligence at the earlier trial. Each of the members of the court referred to such evidence as "fresh evidence": see [1980] QB 283 per Lord Denning at page 318, per Goff LJ at pages 334-335 and per Sir George Baker at page 347. In particular, Lord Denning and Goff LJ expressly affirmed the approach of Lord Cairns in Phosphate Sewage v Molleson. Goff LJ concluded,

> "So, it is not permissible to call further evidence which was available at the trial or could by reasonable diligence have been obtained and the fresh evidence must be likely to be decisive."

70. In the House of Lords, Lord Diplock (with whom all the other members of the Judicial Committee agreed) stated, at page 545,

> "There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.
>
> I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff LJ He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail *in limine* because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in Phosphate Sewage Co. Ltd. v. Molleson (1879) 4 App. Cas. 801, 814, namely that the new evidence must be such as 'entirely changes the aspect of the case.' This is perhaps a little stronger than that suggested by Denning LJ in Ladd v Marshall [1954] 1 WLR 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence '... would probably have an important influence on the result of the case, though it need not be decisive; ...'
>
> The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff LJ that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate."

71. Hunter was referred to by Lord Keith in Arnold at page 108D. Lord Keith then went on to consider the question of whether an issue estoppel might be held not to apply if a party adduced "further relevant material that he could not by reasonable diligence have adduced in the earlier". He concluded, at page 109A-B,

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings."

72. A further modern statement of the requirement is that of Lord Bridge in Owens Bank Limited v Bracco [1992] 2 AC 443. The case concerned the question of whether a defendant could resist the registration of a foreign judgment under section 9(2)(d) of the Administration of Justice Act 1920 on the basis that it had been "obtained by fraud". Lord Bridge stated, at page 483F-H:

> "It is not in dispute that if the loan documents were indeed forgeries and the account given by Nano in his evidence in the court in St. Vincent of the transaction on 31 January 1979 at the Hotel du Rhone in Geneva was a fabrication, the St. Vincent judgment was obtained by fraud. But it is submitted for the bank that the language of section 9(2)(d) must be construed as qualified by the common law rule that the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered. Here, it is said, there is no such fresh evidence. This is the rule to be applied in an action brought to set aside an English judgment on the ground that it was obtained by fraud. The rule rests on the principle that there must be finality in litigation which would be defeated if it were open to the unsuccessful party in one action to bring a second action to re-litigate the issue determined against him simply on the ground that the opposing party had obtained judgment in the first action by perjured evidence. Your Lordships were taken, in the course of argument, through the many authorities in which this salutary English rule has been developed and applied and which demonstrate the stringency of the criterion which the fresh evidence must satisfy if it is to be admissible to impeach a judgment on the ground of fraud. I do not find it necessary to examine these authorities. The rule they establish is unquestionable and the principle on which they rest is clear."

73. These authorities were relied upon by Burton J in Chodiev v Stein [2015] EWHC 1428, accepting and reiterating the requirement for new evidence that could not with reasonable diligence have been adduced at the first trial. Burton J also referred to, and relied upon first instance decisions to similar effect by Langley J in Sphere Drake Insurance plc v The Orion Insurance Company plc (unreported, 11 February 1999), and by David Steel J in KAC v IAC [2003] 1 Lloyd's Rep 448 at para 146.

74. Burton J also endorsed the summary of the legal position in *Dicey, Morris & Collins on the Conflict of Laws*, (15th ed) at para 14-138,

> "Any judgment whatever, and therefore any foreign judgment, is, if obtained by fraud, open to attack. A party against whom an English judgment has been given may bring an independent action to set aside the judgment on the ground that it was obtained by fraud; but this is subject to very stringent safeguards, which have been found to be necessary because otherwise there would be no end to litigation and no solemnity in judgments. The most important of these safeguards is that the second action will be summarily dismissed unless the claimant can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence, and which is so material that its production at the trial would probably have affected the result, and (when the fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result."

75. To the contrary effect, however, is the decision of Newey J in Takhar v Gracefield Developments [2015] EWHC 1276 (Ch) ("Takhar"). Newey J considered an application to strike out a claim as an abuse of process. The claim was to set aside an earlier judgment dismissing the claimant's claim to be the beneficial owner of various properties. The claimant alleged that the earlier judgment against her had been obtained by fraud, namely that her signature had been forged on a critical document in the case by the defendants. The question of whether the claimant had signed the document was live during the first trial, but no case of forgery was advanced, and hence no expert evidence was admitted on the point. The second claim was principally founded upon the evidence of a handwriting expert, who had provided a report to the claimant after the dismissal of the first claim, and who had concluded that the signature of the claimant on the relevant document had been forged.

76. After referring to Highland Financial, Newey J addressed the issue of whether there was an additional requirement that the new evidence could not reasonably have been obtained in time for the original trial. At paragraphs 28-32, Newey J considered the decisions in Phosphate Sewage v Molleson (supra), Owens Bank v Bracco (supra), and Owens Bank v Etoile Commerciale SA [1995] 1 WLR 44. He expressed the view that none of these cases was authority for the proposition that, as a matter of English law, the evidence required to set aside a judgment on the grounds of fraud needed to be new evidence that was not available and could not with reasonable diligence have been available at the time of the judgment.

77. Newey J then went on to consider the state of the authorities in the Commonwealth, noting that in Australia and Canada, there was no such requirement: see e.g. Toubia v Schwenke [2002] NSWCA 34. He concluded,

> "37. To my mind, the reasoning in the Australian and Canadian cases is compelling. Finality in litigation is obviously of great importance, but "fraud is a thing apart". Supposing that a party to a case in which judgment had been given against him

could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even if the fraud could reasonably have been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.

38. None of this would matter, of course, if Owens Bank Ltd v Bracco and Owens Bank Ltd v Etoile Commerciale SA provided binding authority that a judgment cannot be set aside for fraud unless there is new evidence which could not have been discovered with reasonable diligence before the judgment was delivered. I do not think, however, that they do. What was said in each case about the domestic rule must, as it seems to me, have been obiter. Neither case was about that rule, and (as I have said) no such rule was held to apply in the context of registration of judgments under section 9 of the Administration of Justice Act 1920 (with which Owens Bank Ltd v Bracco was concerned)…

41. In all the circumstances, the better view seems to me to be that a judgment can be set aside if the loser satisfies the requirements summarised in Royal Bank of Scotland plc v Highland Financial Partners LP…. He does not also have to show that the new evidence could not reasonably have been discovered in time for the original trial."

78. In Chodiev v Stein, after Burton J had drafted his judgment, he was referred to Takhar. This caused Burton J to add a postscript to his judgment declining to follow Takhar. Burton J commented,

"I respectfully disagree with Newey J's decision, by which of course I am not bound… Although I was not referred to the two other Commonwealth decisions, to which Newey J was referred (paragraphs 33 and 34 of his judgment), I specifically addressed the point which plainly weighed with him, drawn from the views of Handley JA both judicially and as Editor of *Spencer Bower & Handley*. I note that Newey J was not referred to Hunter, the House of Lords decision which I consider binding upon me, and which Newey J might well have also concluded to bind him; and although Newey J concluded that the unanimous opinion, after full argument, of the Law Lords and the Court of Appeal in Owens Bank Ltd v Bracco did not bind him, and although he was referred to, but did not follow, the views of *Dicey, Morris & Collins*, he was also not referred to the consistent views of Langley J in Sphere Drake and David Steel J in KAC v IAC…;"

79. Agreeing with Burton J, and respectfully differing from Newey J, I consider that the decision of the House of Lords in Hunter is binding authority for the proposition that a party who wishes to avoid the consequences of an earlier judgment against him on the grounds that it was obtained by fraud (in that case the dishonest evidence of the police officers given at the *voir dire*) must be able to point to new evidence that was not available, and which could not with reasonable diligence have been obtained, at the time of the first judgment. That requirement is consistent with the dicta in all of the other cases to which I have referred.

80. I also think that this conclusion is implicit in the summary of Aikens LJ in Highland Financial to which I have referred in paragraph 64 above. It is notable that the first instance judge in Highland Financial was Burton J, whose judgment expressly referred to and relied upon the decisions of Langley J in Sphere Drake and of the House of Lords in Hunter: see [2012] EWHC 1287 (Comm) at paras 106-112. As such, I think that when Aikens LJ referred in Highland Financial to "*fresh evidence* that is adduced after the first judgment has been given", he was plainly referring to the same type of "fresh evidence" which the Court of Appeal and House of Lords had required to be adduced in Hunter.

Analysis

Res judicata

81. It is evident from the description that I have given of the issues that Vos J addressed in the 2011 claim, that Joseph's claim that he was not bound by the RFAWF Agreement or by Mr. Thornhill's determinations and actions under it was based in part upon an allegation that Mr. Thornhill had acted with actual bias in the sense which I have described in paragraph 15 above. This necessarily entailed an allegation that Mr. Thornhill was acting in bad faith and that he had deliberately colluded with Naomi and Barry so as to favour their interests. Given the terms of his judgment, it is plain that Vos J did not regard the issues of bias and collusion as in any way limited to questions of construction or procedural fairness. Those issues were decided against Joseph by Vos J and permission to appeal in relation to them was refused by the Court of Appeal.

82. Although the draft pleading now sought to be introduced in the 2015 claim seeks to characterise the wrongdoing alleged by Joseph in a number of different ways, it is in my judgment clear that the fundamental issue that it raises is the same issue of actual bias involving fraud and collusion that Vos J considered and decided in 2011. Although the majority of the claim is cast in the form of allegations of breach of Mr. Thornhill's express and implied contractual duties under the Further Agreed Way Forward Agreement and RFAWF Agreement, together with breach of the fiduciary duties that are said to have arisen from Mr. Thornhill's engagement as Joseph's agent pursuant to those terms, the essence of the allegations of breach of those duties is that the Rally and Edenholme Transactions gave (and were dishonestly designed to give) Mr. Thornhill a secret incentive to favour Naomi and Barry over Joseph in his performance of the agreements. The result is that Joseph again seeks to contend that the RFAWF Agreement and the determinations made under it are not binding upon him as a result of Mr. Thornhill having dishonestly colluded or conspired with Naomi and Barry so as to be biased in their favour in his determinations.

83. The correlation between the allegations of actual bias, collusion and lack of good faith considered by Vos J in the 2011 claim, and the allegations in the draft pleadings in the 2015 claim, can be illustrated by the alleged content of the contractual and fiduciary duties said to have arisen from the terms of the Further Agreed Way Forward Agreement and RFAWF Agreement, together with the pleading of breach and of the alleged purpose of the Rally and Edenholme Transactions.

84. In that regard, paragraphs 40 and 43 of the draft Amended Particulars of Claim assert that in order to give business efficacy to the Further Agreed Way Forward Agreement and RFAWF Agreement,

> "Mr. Thornhill was under an implied obligation…
>
> (i) to act fairly, impartially and in an unbiased manner;
>
> (ii) not to engage, or continue to engage, in any personal dealings with any person or entity which put him in conflict (or have the potential to put him in conflict) with his duty to act fairly, impartially and in an unbiased manner, unless with the prior consent of all those involved;
>
> (iii) not to accept any payment or benefit from any person or entity intended (or which might be intended) to influence, or which had the potential to influence, the performance of his functions under the RFAWF Agreement; and
>
> (iv) not to make any arrangements whereby he secured any other financial benefit from any of the other parties to the RFAWF Agreement, whether directly or indirectly, other than as provided by that agreement."

It will readily be seen that the core of those alleged duties are duties to act fairly, impartially and in an unbiased manner and not to engage in dealings or accept benefits that might compromise such impartiality.

85. The content of the alleged fiduciary duties said to have been owed by Mr. Thornhill necessarily follow this analysis. The alleged fiduciary duties owed by Mr. Thornhill are set out in paragraph 46 of the draft pleading, but as paragraph 44 makes clear, these are said to have arisen from the role assumed by Mr. Thornhill under the Further Agreed Way Forward Agreement and the RFAWF Agreement and the terms of those agreements. Moreover, given the nature of the task that Mr. Thornhill was performing under the agreements, any fiduciary duties that he owed must necessarily have been constrained or modified by the express terms of the agreements and any duties to Joseph would necessarily be mirrored by equivalent duties owed to the other parties. As might be expected, therefore, whilst the alleged fiduciary duties are expressed in relatively conventional equitable language (being in essence a duty to act in good faith, a duty not to put himself into a position of actual or potential conflict of interest and duty, and an obligation not to obtain an unauthorised benefit from the other parties to the agreements), such alleged duties broadly track the alleged contractual duties referred to above. In that regard it is also notable that the allegations of breach of duty made against Mr. Thornhill are all simply made by

reference to the alleged contractual and fiduciary duties collectively: see e.g. paragraphs 89 and 90 of the draft pleading.

86. The essence of the case of wrongdoing pleaded against the Defendants is apparent from paragraphs 91 and 92 of the draft pleading. Those paragraphs allege that the making of the payment of £500,000 to Mr. Thornhill pursuant to the Rally Deed, and the alleged forbearances granted to him in not seeking to enforce the terms of the Rally Deed lead to the inference,

> "That the [payment and forbearances] in fact constituted a secret commission to Mr. Thornhill made at the instigation of Naomi and Barry (or either of them) with a view to inducing Mr. Thornhill to be more favourably disposed towards Naomi in the Provisional Adjustment Report and thereafter in the Revised Provisional Adjustment Report and in the Final Report.."

Again, that allegation raises essentially the same issue that Mr. Thornhill was actually biased in Naomi's favour in conducting the process under the RFAWF Agreement that was rejected by Vos J.

87. Further, even if for some reason it were thought that the issues of bias, fraud and collusion now sought to be raised are not in substance the same as the issues that were raised and decided in the 2011 claim, they are issues that were so closely connected with those issues, and which concerned precisely the same relationship between the parties and Mr. Thornhill arising out of the RFAWF Agreement, that in my judgment, unless the material upon which those allegations are based was not available to Joseph or could not, with reasonable diligence have been obtained by him at the time, they could and should have been raised in the 2011 claim. As such, they would fall squarely within the expanded issue estoppel doctrine identified by Lord Sumption in paragraph 22 of Virgin Atlantic (above).

88. Alternatively, and subject to the same caveat, I think that the pursuit of the 2015 claim is clearly barred by the Henderson v Henderson doctrine. To use the concept explained by Wigram V-C, the issues of alleged bribery, collusion and partiality now sought to be raised by Joseph in the 2015 claim as a justification for setting aside the RFAWF Agreement and the determinations "properly belonged" to the 2011 claim which was aimed at precisely the same target and sought essentially the same relief. Applying a "broad, merits-based judgment which takes account of the public and private interests involved" (per Lord Bingham in Johnson v Gore-Wood), I am entirely satisfied that having already taken up considerable court time and resources in fighting a lengthy expedited trial in 2011, it must be an abuse of process for Joseph to seek to have further recourse to the limited resources of the courts to subject the Defendants to a second attempt to show that they had dishonestly colluded and that Mr. Thornhill was biased against him.

89. In that regard I have no doubt that the trial of the 2015 claim would be just as hostile, fiercely fought, lengthy and expensive as the first in 2011. Further, neither the fact that there are substantial sums of money involved, nor the fact that the 2015 claim involves allegations that the Defendants have been guilty of fraud and had given false evidence at the trial in 2011, must necessarily mean that the second claim should be

allowed to proceed. There is a substantial public interest in finality in litigation, and that is reinforced where the parties have entered into a settlement agreement of the litigation. It would not be in the public interest to permit settlement agreements to be undermined, except on the clearest possible grounds.

90. In this case, by clause 18 of the settlement agreement annexed to the Consent Order, Joseph agreed – in consideration of the appeal for which he did have permission being dismissed and the costs order against him not being further enforced – that he would not "seek to revive in new proceedings the claims which are the subject matter of [the 2011 claim]". To my mind that clause plainly contemplates that Joseph would not seek to repeat in new proceedings the claim that Mr. Thornhill had colluded with Naomi and Barry and that he was biased against Joseph.

91. Although Joseph contends that this settlement was, from his perspective, founded on an implicit understanding that the Defendants had not and were not continuing to conceal anything material from him in breach of their alleged duties to him, it is perfectly clear that throughout, Joseph had a deep distrust of Mr. Thornhill, Naomi and Barry and strongly suspected that they were colluding against him. It will also be recalled that Joseph had sought permission to appeal against Vos J's finding that Mr. Thornhill was not actually biased against him and had not dishonestly colluded with Naomi and Barry. Joseph had therefore not accepted Vos J's decision on that point. He was, nonetheless, prepared to enter into the settlement agreement anyway.

92. Accordingly, and for similar reasons to those that were advanced by Mann J in holding that a second claim was barred by the Henderson v Henderson doctrine in Gaydamak v Leviev [2014] EWHC 1167 (Ch) and by Vos LJ in refusing permission to appeal in the same case, [2015] EWCA Civ 256, I consider that unless Joseph can show that he has a realistic prospect of showing that the 2011 judgment should be set aside on the grounds that it was obtained by fraud, I see no answer to the argument that the 2015 claim is barred by the doctrines of issue estoppel and Henderson v Henderson abuse of process.

Can the 2011 judgment be set aside on the grounds of fraud?

93. The critical question which falls to be determined, therefore, is whether Joseph can show that he has a reasonable prospect of setting aside Vos J's judgment on the grounds that it was obtained by fraud. For the reasons that I have explained, and paraphrasing the requirements which I have discussed above, to succeed in setting aside Vos J's judgment, Joseph would have to show (i) that there is some fresh evidence that was not available, or which could not with reasonable diligence have been obtained, at the time of the judgment in the 2011 claim; (ii) that there was 'conscious and deliberate dishonesty' in relation to the concealment of that evidence; and (iii) that the fresh evidence is material, in the sense that was an operative cause of Vos J's decision to give the judgment the way that he did, i.e. that it would have entirely changed the way in which Vos J approached and came to his decision.

94. The first – and fundamental - difficulty which Joseph faces in this regard is that the three documents upon which he now relies - the Rally Deed and the Subscription Agreement and Shareholders' Agreement two documents relating to the Edenholme Transaction – were all disclosed to him by Naomi, Barry and BANA in the course of the 2011 claim. They were, therefore, available in the 2011 claim and could have

been used as a basis for making the same allegations in those proceedings in precisely the same way as Joseph now makes his allegations in the 2015 claim.

95. Joseph attempts to meet this point by contending, first that Mr. Thornhill did not disclose the documents, and secondly that they were "tucked away" by the other Defendants in their lengthy list of documents and were described in such a way that did not draw his attention to the significance of them.

96. I think that the first point is irrelevant: the question is not who disclosed the documents but whether they were available to Joseph. The second point is also not well-founded on the facts or as a matter of law. As a matter of fact, the documents were not simply included in the lengthy electronic disclosure, but were separately included in a list of only 112 documents available in hard copy. Moreover, the documents were provided electronically to Joseph's solicitors at their request. The documents were accurately described and provided in precisely the manner which the CPR requires in order that relevant documents are required to be produced to parties to litigation so that they can be reviewed and, if appropriate, deployed in that litigation. There is, in particular, no obligation upon a disclosing party to describe documents or add commentary to them in a way that highlights their potential relevance to an opponent.

97. It should also be borne in mind that this was fiercely fought litigation over large sums of money with substantial resources being deployed by both sides. Joseph and his solicitors must have been keenly interested to collect evidence to support their case that Mr. Thornhill had colluded with Naomi and Barry and had wrongly favoured them in his determinations under the RFAWF Agreement. Disclosure was also taken into account in a later amendment to Joseph's pleadings. I therefore cannot see how Joseph can contend that the relevant documentary evidence upon which he now relies was not available to him before the trial in 2011.

98. Further, once the documents were available to Joseph, I do not think that the consequences are dependent upon an inquiry into why they were not acted upon. That is doubtless for good practical and policy reasons. The same point was made clearly in Gaydamak v Leviev by Mann J at paragraph 53, and Vos LJ at paragraph 37, each of whom referred to the dictum of Wigram V-C in Henderson v Henderson to which I have referred above,

> "In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."
>
> (my emphasis)

99. In that regard I should also refer to paragraph 114 of the draft Particulars of Claim. That paragraph asserts that,

> "Had Mr. Thornhill not breached his disclosure obligations … Joseph would have relied on those documents to the advantage of his case [and] the judgment of the Court would have been materially different from the Judgment."

The obvious difficulty with that plea is that the relevant documents had been disclosed by the other Defendants, and yet Joseph did not make use of them in the manner he now alleges. Quite apart from the merits or otherwise of the contention that Mr. Thornhill dishonestly failed to disclose the documents, I therefore cannot see how Mr. Thornhill's conduct in that regard can be said to have been an operative cause of Vos J's decision to give his judgment in the way that he did.

100. Further, I also cannot see how the requirement that there be "conscious and deliberate dishonesty" in the concealment of the documents by the Defendants could possibly be made out in circumstances in which Naomi, Barry and BANA actually disclosed the documents, and Mr. Thornhill's unchallenged evidence was that his legal team were aware of the documents throughout and continued to act for him.

101. Standing back, the simple facts are that in an attempt to avoid the consequences of Mr. Thornhill's determinations under the RFAWF Agreement, Joseph mounted a wide-ranging attack in the 2011 claim upon Mr. Thornhill's professionalism and probity, claiming in particular that he had dishonestly colluded with Naomi and Barry and was actually biased against him. That claim was rejected after a lengthy trial, and Joseph agreed to settle it and not to seek to revive the allegations. He now contends he should be entitled to have such a second attempt at obtaining essentially the same result by raising further allegations of fraud and collusion using documents that had been disclosed to his lawyers and which were available to him in the first action. The public interest in finality in litigation must mean that this attempt cannot be permitted. That would certainly be the case if the reason that the documents were not utilised was deliberate choice on the part of Joseph and his lawyers. But the conclusion can be no different if the reason is oversight or negligence on the part of Joseph's lawyers so that, as he claims, Joseph did not see the documents in question until they were mysteriously delivered to him by some anonymous person shortly after Mr. Thornhill delivered his Final Adjustment Report.

102. The further points relied upon by Joseph as a basis for seeking to set aside the 2011 judgment for fraud are (i) the allegations that Mr. Thornhill misled the Charity Commission so as to prevent it from bringing the Rally Deed directly to the attention of Vos J, and (ii) that Naomi and Barry deliberately omitted to refer in their evidence to, and caused their counsel in his submissions to conceal the existence of, the Charity Commission inquiry into Raleigh. I also do not consider that there is any realistic prospect of the 2011 judgment being set aside on either or both of these grounds.

103. As to the charge that Mr. Thornhill misled the Charity Commission, I have set out the relevant exchanges between the Charity Commission and Mr. Thornhill and his solicitor in paragraphs 38-43 above. Although the original Charity Commission letter of 4 October 2011 made a reference to disclosure to the court, taken as a whole and given its repeated references to disclosure under the Civil Procedure Rules, that letter

could plainly be understood to be directed at the question of whether the Rally Deed and associated documents had been disclosed to Joseph in the litigation. In that regard, both Mr. Thornhill's eventual answer by email of 26 November 2011, and that of his solicitor on 27 November 2011, accurately stated that the documents had been disclosed to Joseph in the litigation.

104. The real thrust of Joseph's allegation against Mr. Thornhill is that his email response of 26 November 2011 was dishonestly designed to dissuade the Charity Commission from bringing the Rally Deed directly to the attention of Vos J at the trial as the Commission had threated to do in its email of 25 November 2011. Joseph's draft pleading also makes the same allegation in relation to Mr. Hughes' subsequent email of 27 November 2011 that confirmed what Mr. Thornhill had said and contained a suggestion that he should attend a meeting at the Charity Commission to discuss their concerns.

105. Although the Charity Commission's email of 2014 indicates that it mistakenly believed that the Rally Deed had been seen by Vos J, the fact that the Commission might have been mistaken is not enough to support an allegation of fraud. The relevant question is whether the terms or circumstances of either or both of Mr. Thornhill's or Mr. Hughes' emails provide any support for a finding that Mr. Thornhill thereby dishonestly intended to induce such a misunderstanding to deflect the Commission from its stated course.

106. In that respect, the simple fact is that Mr. Thornhill's email did not seek to dissuade the Charity Commission from pursuing the matter, or from attending court. Quite the contrary, it expressly invited the Charity Commission to speak directly to Mr. Hughes, and ended by assuming that the Charity Commission would indeed be attending court on the following Monday. There is, moreover, no allegation that Mr. Hughes, a solicitor, was involved in any improper or dishonest conspiracy to conceal the documents, or that he was dissembling when he referred to his own direct responsibilities as an officer of the court concerning disclosure, and no evidence was produced to support or explain any such allegation.

107. I therefore simply cannot see how Mr. Thornhill's email, making it clear that the Charity Commission were expected to attend court and were entirely free to talk to his solicitor, still less Mr. Hughes' email confirming Mr. Thornhill's response and offering to meet the Charity Commission, could all be taken to be a dishonest scheme by Mr. Thornhill to throw the Charity Commission off the scent.

108. The final point said to support the allegation that Vos J's judgment was obtained by fraud is the allegation that Naomi and Barry dishonestly concealed the existence of the Charity Commission's inquiry into the management and affairs of Raleigh during their defence of the 2011 claim.

109. I should say at the outset that I have very considerable doubt that there is a realistic case that the existence of the Charity Commission inquiry was dishonestly concealed at all, given that such allegation would seem to involve an implicit, but unpleaded, allegation that the Defendants' legal team were complicit in the concealment. But even if such a case could be put, I simply cannot see how, of itself, and distinct from the question of the disclosure of the Rally Deed and other documents which I have considered above, knowledge that the Charity Commission was inquiring into the

affairs of Raleigh, could possibly have altered the way in which Vos J approached the 2011 claim and came to his decision. Still less can I see that such knowledge would have entirely changed the way that Vos J approached the case. The fact that an inquiry was taking place would not, of itself, have been evidence of anything.

110. I therefore conclude that there is no prospect of Joseph succeeding in his allegation that the judgment of Vos J in the 2011 claim was obtained by fraud.

Conclusion

111. The result is that I find that Joseph's 2015 claim is barred by the principles of *res judicata* and the 2011 judgment cannot be set aside on the grounds that it was obtained by fraud. The 2015 claim must therefore be struck out.

A

Court of Appeal

Day v Lewisham & Greenwich NHS Trust and another (Public Concern at Work intervening)

[2017] EWCA Civ 329

B

2017 March 21; May 5

Gloster, Elias LJJ, Moylan J

Employment — Protected disclosure — Worker — Doctor in training placed in post with NHS trust by body responsible for training — Contract of employment with trust — Claim of detrimental treatment by training body following protected disclosure — Whether terms on which doctor engaged to work substantially
C *determined by training body — Whether doctor "worker" in relation to training body — Whether training body "employer" — Employment Rights Act 1996 (c 18), ss 43K(1)(2), 47B(1) (as inserted by Public Interest Disclosure Act 1998 (c 23), ss 1, 2), 230(3)*

The claimant, a specialist registrar who was in medical training under a contract of employment with the respondent health trust, made disclosures about patient
D safety to the hospital where he worked which he repeated to the respondent training body, which was responsible for arranging and supervising his training placement and paying part of his salary. He resigned from his post and brought a claim, against the trust and the training body, that he had been subjected to a detriment for making a protected disclosure, contrary to section 47B(1) of the Employment Rights Act 1996[1]. An employment judge granted an application by the training body to strike out the claim against it as having no reasonable prospect of success, holding that, although it was arguable that the claimant had been supplied by the training body to do the work
E he did for the trust within the meaning of section 43K(1)(a)(i) of the Act, that body did not "substantially" determine the terms on which he did that work within the meaning of section 43K(1)(a)(ii) and (2)(a), so that he did not come within the extended meaning of "worker" in section 43K for the purpose of bringing a whistle-blowing claim. The Employment Appeal Tribunal dismissed an appeal by the claimant, holding that a person who came within the general definition of "worker" in section 230(3) of the 1996 Act could not also come within the extended meaning of
F "worker" in section 43K in relation to another "employer"; and that, in any event, the training body could not be said to be substantially determining the terms on which the claimant was engaged to work so as to be an "employer" within section 43K(2)(a).

On appeal by the claimant—

Held, allowing the appeal, that section 43K(1)(a)(ii) of the Employment Rights Act 1996 envisaged that both the person for whom an individual worked and the person who introduced or supplied him could substantially determine the terms on
G which he was engaged, either jointly or to different extents; that, since the individual could, therefore, in principle be employed by both, there was no rationale in a provision that provided that if he was a section 230(3) "worker" in respect of either he could not rely on the extended definitions in section 43K(1) and (2) against the other; that, accordingly, the words "who is not a worker as defined by section 230(3)" in section 43K(1) should be read as meaning that the provision was only engaged where an individual was not a worker within section 230(3) in relation
H to the respondent in question; and that, as the tribunal had not engaged directly with

[1] Employment Rights Act 1996, s 43K(1)(a)(2)(a), as inserted: see post, paras 8, 10.

S 47B(1), as inserted: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

S 230(3): see post, para 7.

whether the respondent training body as well as the trust substantially determined the terms on which the claimant was engaged, that matter would be remitted to a fresh tribunal to decide as a preliminary issue (post, paras 11, 18, 20, 22, 23, 25–27, 30, 31, 32).

McTigue v University Hospital Bristol NHS Foundation Trust [2016] ICR 1155, EAT considered.

Per curiam. When determining who substantially determines a claimant's terms of engagement for the purposes of section 43K(1)(a)(ii), a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing on the terms on which the claimant was engaged to do the work (post, para 29).

Sharpe v Worcester Diocesan Board of Finance Ltd [2015] ICR 1241, CA considered.

Decision of the Employment Appeal Tribunal [2016] ICR 878 reversed.

The following cases are referred to in the judgment of Elias LJ:

BP plc v Elstone [2010] ICR 879; [2011] 1 All ER 718, EAT
Croke v Hydro Aluminium Worcester Ltd [2007] ICR 1303, EAT
Fecitt v NHS Manchester (Public Concern at Work intervening) [2011] EWCA Civ 1190; [2012] ICR 372, CA
McTigue v University Hospital Bristol NHS Foundation Trust [2016] ICR 1155, EAT
Sharpe v Worcester Diocesan Board of Finance Ltd [2015] EWCA Civ 399; [2015] ICR 1241, CA
Woodward v Abbey National plc (No 1) [2006] EWCA Civ 822; [2006] ICR 1436; [2006] 4 All ER 1209, CA

The following additional cases were cited in argument:

Keppel Seghers UK Ltd v Hinds [2014] ICR 1105, EAT
Ministry of Defence v Kemeh [2014] EWCA Civ 91; [2014] ICR 625, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

Bates van Winkelhof v Clyde & Co LLP (Public Concern at Work intervening) [2014] UKSC 32; [2014] ICR 730; [2014] 1 WLR 2047; [2014] 3 All ER 225, SC(E)
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Heinisch v Germany CE:ECHR:2011:0721JUD002827408; 58 EHRR 31

APPEAL from the Employment Appeal Tribunal

By a decision on a preliminary hearing sent to the parties on 16 April 2015 an employment judge sitting at London South struck out a claim by the claimant, Dr C Day, against the second respondent, Health Education England, that he had been subjected to a detriment contrary to section 47B of the Employment Rights Act 1996, on the ground that the claim had no prospect of success since he was not a "worker" within the extended meaning in section 43K of the 1996 Act, and Health Education England was not his employer. On 9 March 2016 the Employment Appeal Tribunal (Langstaff J) dismissed an appeal by the claimant [2016] ICR 878.

By an appellant's notice dated 11 May 2016, the claimant appealed, with permission of the Court of Appeal (Elias LJ) granted on 28 September 2016, on the following grounds. (1) The judge erred in his construction of section 43K and his conclusion that, since the claimant was employed by the trust and qualified for protection under section 230(3), he could not take advantage of the extended definition of "worker" with respect to Health

A Education England, and that that would be so even if Health Education England did substantially determine the terms of his engagement. (2) The judge erred in concluding that it was open to the employment tribunal on the evidence before it to find that Health Education England did not substantially determine the terms and conditions on which the claimant was engaged for the purposes of qualifying as an "employer" under
B section 43K(2)(a).

Public Concern at Work intervened in the appeal. Lewisham & Greenwich NHS Trust was named as interested party but took no part in the appeal.

The facts are stated in the judgment of Elias LJ, post, paras 3–6.

James Laddie QC and *Christopher Milsom* (instructed by *Tim Johnson Law*) for the claimant.

C *David Reade QC* and *Nicholas Siddall* (instructed by *Hill Dickinson LLP, Manchester*) for Health Education England.

Thomas Linden QC (instructed by *Public Concern at Work*) for the intervener.

The court took time for consideration.

D 5 May 2017. The following judgments were handed down.

ELIAS LJ

Introduction

1 Part IVA, read together with sections 47B and 103A of the Employment
E Rights Act 1996 ("ERA") (as inserted by the Public Interest Disclosure Act 1998, sections 2 and 5), protects workers who disclose information about certain alleged wrongdoing to their employers (colloquially known as "whistle-blowers") from being subjected to victimisation or dismissal as a consequence. There is an extended concept of "worker" and "employer" in section 43K which ensures that certain persons who perform work but do not
F fall within the general concept of worker found in section 230(3) of the ERA will none the less be able to claim the protection afforded by these provisions. This appeal concerns the proper construction of section 43K and the application of that section to a certain category of doctors operating in the health service.

2 We have heard valuable submissions not only from counsel for the claimant and Health Education England ("HEE"), Mr James Laddie QC and
G Mr David Reade QC respectively, but also from Mr Thomas Linden QC who represented the intervener, Public Concern at Work. He made submissions principally on the scope of section 43K.

Background

3 Dr Day is a medical doctor who wanted to specialise in acute care
H common stem emergency medicine. In early spring 2011 he was accepted by the London Deanery, the body then responsible for training doctors in London, to take up a post from August in that year. He entered into a training contract which the parties agreed was not a contract of employment. He was allocated to the respondent NHS trust.

4 In April 2013 the deaneries were taken over by the local education training boards. They have no independent legal personality but are part of the second respondent, HEE. Trainee doctors are allocated for relatively short fixed periods to NHS trusts. They enter into contracts of employment with each trust. Initially Dr Day worked at the Princess Royal University Hospital and later, following a short career break, was allocated to the Queen Elizabeth Hospital. He trained in intensive care and then in anaesthetics before his engagement came to an end in August 2014.

5 Whilst Dr Day was at the Queen Elizabeth Hospital he raised a number of concerns with both the trust and with the South London Health Education Board about what he considered to be serious staffing problems affecting the safety of patients. He alleges that these were protected disclosures within the meaning of the relevant legislation on whistle-blowers, and he asserts that he was subject to various significant detriments by HEE as a consequence. He took proceedings before the employment tribunal against both the trust and HEE, as the body responsible for the actions of the South London Board. HEE deny any wrongdoing but took a preliminary point that the tribunal had no jurisdiction to hear these claims. In order to bring a whistle-blowing claim, the claimant has to fall within the statutory definition of worker and the respondent has to be his employer. HEE contended that this was not the position and accordingly that, even if the facts alleged by Dr Day were true, HEE could not be liable in law for any acts causing him detriment. It is common ground that he did not fall within the definition of worker in section 230(3) and the only question was whether Dr Day was a worker within the extended definition in section 43K and HEE was his employer as defined in that section.

6 This issue was taken at a preliminary hearing. In principle that was in my view a sensible course of action. There is virtually no overlap in the evidence going to this question and the evidence relating to the merits of the whistle-blowing claims, and a ruling in favour of HEE would bring the proceedings against it to an end. In my view it would have been desirable for this issue to be taken as a preliminary issue to be determined following findings of fact. Unfortunately, the preliminary hearing took the form of an application to strike out the claims on the grounds that they had no reasonable prospect of success. There was an agreed statement of facts as regards the history of Dr Day's involvement with HEE and the employment tribunal plainly had some documentation relating to the terms and conditions of employment. There were also witness statements from both Dr Day and Mr Mckay, an officer who worked on behalf of Health Education South London, who also gave evidence orally. In the light of the material it had, the employment tribunal concluded that the claims against HEE had no realistic prospect of success and struck them out. Dr Day unsuccessfully appealed that decision to the Employment Appeal Tribunal. I gave permission for Dr Day to appeal to this court.

The legislation

7 Section 230(3) of the ERA provides a general definition of worker:

> "In this Act 'worker' . . . means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

A (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual . . ."

B 8 The extended definition of worker relevant to this appeal is found in section 43K(1)(a):

"For the purposes of this Part 'worker' includes an individual who is not a worker as defined by section 230(3) but who— (a) works or worked for a person in circumstances in which— (i) he is or was introduced or supplied to do that work by a third person, and (ii) the terms on which he C is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them . . . and any reference to a worker's contract, to employment or to a worker being 'employed' shall be construed accordingly."

(I will refer to the person for whom the individual works as the end user, and D the party introducing or supplying that worker as the introducer.)

9 The subsection then sets out a number of other groups of workers who are brought within the scope of the section including some working in the NHS and certain individuals pursuing work experience.

10 An extended concept of "employer" is also adopted, being defined by reference to the extended definition of "worker" in section 43K(2)(a):

E "For the purposes of this Part 'employer' includes— (a) in relation to a worker falling within paragraph (a) of subsection (1) the person who substantially determines or determined the terms on which he is or was engaged . . ."

The principal set of relationships caught by this definition is agency relationships, but the section is not limited to them.

F 11 I would make two preliminary observations about these definitions. The first is that, if the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition of "worker". That is so even if the end user and/or introducer can also be said substantially to determine the terms of engagement. The second is that, if the terms of engagement are not G substantially determined by the individual, his employer is the person who does substantially determine them. It is envisaged in section 43K(1)(a)(ii) that this may be both the end user and the introducer. That might be either because the introducer and the end user determine the terms jointly, or because each determines different terms but each to a substantial extent. Mr Reade submitted that notwithstanding that both introducer and end user may substantially determine the terms of engagement, the definition of H employer in section 43K(2)(a) was limited to the person who played the greater role in determining the terms of engagement. He submitted that this follows from the reference to "*the* person" in that subsection. I see no warrant for restricting the scope of the section in that way. By section 6 of the Interpretation Act 1978 the singular includes the plural unless

the contrary intention appears, and in my view it does not do so here. Indeed, Mr Reade's construction involves giving a different meaning to "substantially determines" in subsection (1) than in subsection (2). Since both introducer and end user can in principle substantially determine the terms of engagement for the purposes of the definition of worker, I see no basis for concluding that they cannot do so when it comes to applying the extended definition of employer. This will in some cases have the effect that both introducer and end user are employers and each will then be subject to the whistle-blowing provisions. Indeed, that would seem to be an inevitable conclusion if the terms are determined by the end user and introducer acting jointly. If only one party can be the employer, it is difficult to see by what principle it would be possible to determine who that should be.

The issues in the appeal

12 The question for the courts below was whether Dr Day and HEE were respectively worker and employer within the meaning of the extended definitions. The answer to that question turns on two disputed aspects of the definition of "worker". The first arises in the following way. The extended definition does not apply if the worker already falls within the scope of section 230(3). Dr Day does so with respect to the trust; it is common ground that he was employed by them. Does that prevent him from relying upon the extended definition with respect to HEE? This was not a point considered by the employment tribunal but the issue was argued on appeal before the Employment Appeal Tribunal. Langstaff J held [2016] ICR 878 that since Dr Day was employed by the trust, he could not take advantage of the extended definition with respect to HEE, and that would be so even if HEE did substantially determine the terms of his engagement. Dr Day submits that the judge was in error in reaching this conclusion and has misconstrued the section.

13 The second issue assumes that HEE could in principle constitute an employer within the meaning of section 43K(2)(a) notwithstanding that Dr Day is in a section 230(3) working relationship with the trust. The question then is whether in the circumstances HEE could be said to be substantially determining "the terms on which he is or was engaged to do the work" so as to be an employer within the meaning of section 43K(2)(a)? The employment tribunal analysed the relationship between Dr Day and HEE and the trust respectively. It noted that the terms and conditions of employment were determined by negotiating bodies on which HEE had no representation. Its overall conclusion was that HEE did not substantially determine the terms and conditions on which Dr Day was engaged and therefore Dr Day was not their worker and it was not his employer. There was a training relationship which ran alongside the employment relationship but this was not material to the terms of engagement. The applications were dismissed on the grounds that they had no real prospect of success. The Employment Appeal Tribunal held that this was a conclusion open to the employment tribunal on the evidence before it which displayed no error of law.

14 The principal ground of appeal with respect to this issue is that the employment tribunal wrongly analysed the question it had to determine. Mr Laddie submits that it focused on which body, as between the trust and HEE, played the greater role in determining the terms of engagement and

A thereby failed to appreciate that both may do so. It is further submitted that if the proper test had been applied, the only proper conclusion would have been that HEE did substantially determine the terms of engagement and therefore constituted an employer.

Discussion

B *The first issue*

15 I turn to consider the first issue: did the fact that the trust was a section 230(3) employer preclude HEE from also having that status? Langstaff J concluded that it did. He accepted that a purposive approach should be taken to the construction of the section, following a number of earlier decisions where observations had been made to that effect: see C e g *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303, para 33, per Wilkie J; *BP plc v Elstone* [2010] ICR 879, para 17, per Langstaff J and *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, para 68, per Ward LJ. But in his view the language of the provision was clear and its effect was to deny any remedy to Dr Day against HEE. After referring to the various paragraphs in section 43K(1) the judge continued [2016] ICR 878:

D "37. One feature, however, does cover all: that is that they cannot be a worker as defined by section 230(3). Mr Milsom had no satisfactory explanation for the presence of those words. The list that follows in section 43K(1)(a)–(d) is subject to those introductory words. His submission that the words might be included as mere introductory expression or to provide 'belt and braces' does not suffice, for if a person is within 43K(1)(a) and is also an employee or a limb (b) worker, there is E no need to extend the meaning to include him. If the section had been intended to add a category of employer against whom a person might act in addition to others who were his employer, there would be no need for the words 'who is not a worker as defined by section 230(3)'. They were intended to have a meaning. They have no additional force if construed as Mr Milsom would wish. Construed as Mr Siddall suggests, they apply F a policy to the effect that those who are workers within section 230(3) should adopt the route of complaint set out in sections 43C–43H but have no, and need no, additional protection against those who are more peripheral to their employment. There is no reason in policy to include those who are tangential to the work which is relevant.

"38. Accepting these submissions, as I do, does no violence to the principle of purposive construction. The purpose of this part of the Act is G to extend the meaning of worker to a limited category of other relationships. It is, plainly, to give them a route to remedy which they might not otherwise have (the agency worker, for instance, is likely to be neither an employee nor worker in respect of the end user under whose control the work would normally be performed). That purpose is fulfilled. It does not need the relevant introductory words to be written H out."

16 I respectfully disagree with this conclusion. I would start by observing that there must be some limitation on the words of the section. They cannot be read literally. Take an agency worker who has a second job serving in a restaurant in the evenings. The fact that she is a section 230

worker in an unrelated position could not sensibly preclude her from seeking to rely upon the extended definition of worker with respect to the agency work. Mr Reade accepted that this must be so. Some words need to be added to the provision to limit the impact of these words.

17 The only question is what the limitation should be. Mr Reade suggested that the words to be added were "in respect of the worker relationship described below" so that the provision would read: " 'worker' includes an individual who *in respect of the worker relationship described below* is not a worker as defined by section 230(3)." Mr Linden and Mr Laddie would insert some such phrase as "as against a given respondent" so that the definition of worker would be as follows: " 'worker' includes an individual who *as against a given respondent* is not a worker as defined by section 230(3)." The former insertion would exclude section 43K if the individual has a section 230(3) relationship with either end user or introducer, whereas the latter would allow the section to operate against one of those parties even if there was a section 230(3) relationship with the other.

18 In my judgment, the latter implication is to be preferred. I say this for a number of reasons. First, I would accept, as did Langstaff J, that the whistle-blowing legislation should be given a purposive construction. That does not permit the court to distort the language of a statute on the vague premise that action against whistle-blowers is undesirable and should be forbidden: see the observations to this effect made in *Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, paras 58–59, per Elias LJ. So, as Mr Laddie accepts, if a training body does not determine the terms and conditions of the worker's engagement at all, it cannot be an employer within the wider definition. It can subject a whistle-blowing trainee to a detriment without risk of legal sanction. A court cannot simply ignore the language of the statute to achieve what it conceives to be a desirable policy objective. But where, as here, some words need to be read into the provision because a literal construction cannot be what Parliament intended, then in my view the court should read in such words as maximise the protection whilst remaining true to the language of the statute. In my judgment the words which both the claimant and intervener suggest should be inserted better achieve that objective.

19 Second, in this context I do not accept, as Langstaff J did, that the worker will have no need for protection against the introducer if he has protection against the end user. That is of no use to him if, as is alleged here, the victimisation comes from the introducer itself.

20 Third, for reasons I have given in para 11 above, in my view under the extended definition Dr Day can in principle be employed by both the end user and the third party introducer. There is no obvious rationale in a provision which says that, if the individual is a section 230(3) worker in respect of either the end user or the third party, he cannot rely upon the extended definition against the other. Furthermore, it has odd consequences. It means that, if he is not a section 230(3) worker with respect to either, he may fall within the extended section 43K definition of worker in respect of both and each may be his employer. Conversely, if he is a section 230(3) worker with effect to one of them, he cannot be a section 43K worker with respect to the other.

A **21** I recognise that it can be said that on this analysis the section 230 exception is largely superfluous; it simply removes from the scope of section 43K someone who qualifies as a worker in any event. That was a factor which weighed heavily with Langstaff J. But in my view it is understandable that Parliament might want to make it clear that the section is simply extending the standard definition and that there is no need to engage with section 43K at all if the worker falls within the scope of section 230(3).

B

22 I am reinforced in my conclusion that this is the correct construction of section 43K by the fact that this was also the approach adopted by the current President of the Employment Appeal Tribunal, Simler J, in *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] ICR 1155. That case raised the question whether an end user in an agency arrangement was

C an employer within the meaning of the extended definition in section 43K. It was submitted, relying upon the Employment Appeal Tribunal judgment in the present case [2016] ICR 878, that the end user was not because there was a section 230(3) relationship with the agency itself. Simler J rejected this argument and in so doing highlighted the unsatisfactory consequences if it were right. After citing paras 37–38 of the decision in the present case, set

D out at para 15 above, she continued:

> "24. The respondent trust relies on that reasoning to submit that the opening words of section 43 K(1)—' "worker" includes an individual who *is not* a worker as defined by section 230(3) *but who* . . .'—mean that the extended protection only applies where someone is not otherwise a worker under section 230(3) irrespective of the identity of the respondent

E and the identity of the person with whom the worker has a section 230(3) worker relationship. In other words, if an agency worker has a section 230(3) 'limb (b)' worker contract with the agency, the agency worker is excluded from the extended protection available under section 43K(1)(a) vis-à-vis all others, including the end user. The agency may be insolvent and the end user vicariously liable for the detriments done to the individual in the course of working at the end user by its

F employees because of the protected disclosures, but no remedy is available. Ms Fraser Butlin accepts that this interpretation substantially reduces the protection the provision appears to have been intended to afford but submits that Parliament has specifically delineated the extended protection afforded and further submits that for purposes of clarity and certainty it is important that a worker knows who their

G employer is for the purposes of making a protected disclosure.

> "25. I do not accept this submission . . .
>
> "26. I accept that the opening words in section 43K(1) mean that the provision is only engaged where an individual is not a worker within section 230(3) in relation to the respondent in question. If he or she is such a worker there is no need to extend the meaning of worker to afford

H protection against that respondent.

> "27. However, an important purpose of section 43K is to extend cover to agency workers in relation to victimisation for protected disclosures made while working at the end user. This case exemplifies that situation. Although an employee of Tascor, the claimant was supplied to work at the respondent trust's Bridge centre with the respondent's employees who

were thus in a position to subject her to detriments after she made protected disclosures. It is against that treatment (if it is established) that she requires protection. The extended definition of worker in section 43K(1)(a) potentially provides it in respect of her claim against the respondent. The fact that she has worker status in relation to the agency, Tascor, under section 230 and cannot accordingly rely on section 43K in relation to Tascor (and does not need to do so in any event so far as Tascor is concerned) is irrelevant in relation to her claim against the respondent. She is not a section 230(3) worker in relation to the respondent. The extended definition of worker provides a potential route to a remedy the claimant would not otherwise have had as an agency worker who is neither an employee nor a limb (b) worker in respect of the respondent end user for whom she carries out the work.

"28. Moreover, this construction gives meaning to the introductory words of section 43K(1) which apply to all categories of worker identified at paragraphs (a)-(d) and is entirely consistent with the stated purpose of the provision. There is no resulting uncertainty or lack of clarity. An agency worker may complain to both the end user and the agency about matters of concern, as the claimant did here, as both are potential employers for protected disclosure purposes.

"29. This construction of section 43K(1) gives effect to Parliament's intentions as evidenced by the language of the provision having regard to the statutory and social context. It is unnecessary to resort to a purposive construction that would give an extended meaning of 'worker' beyond the legitimate reach of the subsection (whether because it is thought that the broad objective of the statute would be better effected by that approach or on some other basis)."

23 I agree with those observations. Accordingly, I would find for the claimant on the first ground. HEE could in principle fall within the scope of section 43K(2)(a) notwithstanding that Dr Day had a contract with the hospital trust.

The second issue

24 The second ground of appeal asserts that the employment tribunal erred in concluding that HEE did not substantially determine the terms on which the worker was engaged. There are two elements to this submission. First, Mr Laddie submits that passages in the employment tribunal judgment demonstrate that the tribunal was applying the wrong test; it was asking itself which party, as between HEE and the trust, played the greater role in determining the terms on which Dr Day was engaged. It did not envisage the possibility that both could substantially determine the terms of engagement. Second, he submits that if the correct test had been adopted, the inevitable conclusion would have been that the employment tribunal must have found in his favour.

25 I agree with the first submission. In my view on a fair reading of the employment tribunal decision, it did commit the error alleged. For example, both in paras 42 and 46 the tribunal appears to have seen its task as being to identify "the body" which substantially determined the terms of engagement, as though it were necessary to identify the single body which was primarily responsible. The employment judge evaluated the relationship of Dr Day

A with both HEE and the trust and concluded that the latter had substantially determined the terms. There is no express recognition that both could have done so, which in my view is the proper reading of the provision. This reading of the employment tribunal's judgment is reinforced when the judgment is considered in the light of the submissions in the skeleton argument then advanced on behalf of HEE which we have seen. That was premised on the assumption that the employment tribunal should identify as B the employer the body which played the greater role in determining the terms of engagement. Indeed, that was also the way in which Mr Reade advanced his case before us.

26 Once the question was posed in that way, realistically there was only one answer. The trust clearly played a more significant role than HEE, as I think Mr Laddie accepted.

C **27** In my judgment, therefore, the employment tribunal did not engage directly with the question whether HEE itself "substantially determined" the terms on which Dr Day was engaged. Langstaff J's analysis in the Employment Appeal Tribunal [2016] ICR 878, as Mr Reade submits, is at least consistent with the assumption that it was the tribunal's task under section 43K(2)(a) to determine which of the two employers had played the D greater role in determining the terms of engagement. In my judgment that was a mistaken approach and it follows that the Employment Appeal Tribunal was wrong to uphold the employment tribunal's conclusion.

28 However, I do not accept Mr Laddie's further submission that the employment tribunal would have been bound to find in favour of Dr Day had it properly directed itself. He submits that this follows from the fact that it decides for whom the trainee should work. HEE submitted that on the E contrary, it is clear from the reasoning of the employment tribunal that it would inevitably have found in its favour. I do not accept that submission either, particularly in the context of a strike-out application. It is not for this court to make relevant findings of fact and in my judgment the case needs to be remitted.

29 There is one further matter which I should address which emerged during the course of submissions (although I doubt whether it will have any F material impact upon the analysis which the employment tribunal will have to carry out in this case). The issue is whether, when considering the terms on which the person is engaged, the tribunal is limited to considering contractual terms and must ignore other matters which might affect the way in which the work is carried out but are not contractual in nature. The argument in favour of so limiting it is that in *Sharpe v Worcester Diocesan* G *Board of Finance Ltd* [2015] ICR 1241 the Court of Appeal held that in order for section 43K to bite, there must at least be a contract of some sort with the putative employer. So, it is said, the reference to terms must be to contractual terms. It is right to say that neither party sought to challenge the *Sharpe* decision nor to suggest that we need not follow it. However, even if it be the case that some of the terms of engagement must be contractual (on the assumption that the relationship needs to be contractual), I do not accept H that it follows that a tribunal should limit itself to focusing solely on the contractual terms, although no doubt the terms will be overwhelmingly contractual. The section requires the tribunal to focus on what happens in practice and I do not think that Parliament will have envisaged fine arguments on whether a term is contractual or not before it can be taken into

account. In my judgment when determining who substantially determines the terms of engagement, a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work.

Disposal

30 I would therefore uphold the appeal and remit the matter. In the circumstances I would remit it to a fresh tribunal to decide as a preliminary issue whether HEE substantially determined the terms of engagement of Dr Day. I appreciate that the original application was a strike-out, but as I have explained the former is the more appropriate procedure, and the arguments before us were for the most part conducted as though the employment tribunal had resolved the issue as a preliminary question to be determined. The parties will have an opportunity to adduce evidence about the terms on which Dr Day was engaged by the trust and the tribunal will need to make findings of fact from which to carry out its assessment of the legal question.

MOYLAN J

31 I agree.

GLOSTER LJ

32 I also agree.

Appeal allowed.
Case remitted to fresh tribunal.

ALISON SYLVESTER, Barrister

A

Employment Appeal Tribunal: Scotland

TCO In-Well Technologies UK Ltd *v* Stuart

UKEATS/16/16

2017 April 19 Lady Wise

B

Industrial relations — Employment tribunals — Reconsideration of decision — Award of compensation for unfair dismissal not grossed up to take account of tax liability — Claimant's application for reconsideration out of time — Tribunal making no decision on application or time limit but reconsidering award on own initiative — Whether procedure adopted incompetent — Whether unfair — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237), Sch 1, rr 70, 71, 73

C

An employment tribunal awarded the claimant £106,520 following its finding that he had been unfairly dismissed for making protected disclosures. The claimant sought reconsideration of the award pursuant to rules 70 and 71 of the Employment Tribunals Rules of Procedure 2013[1], on the ground that the compensatory element of the award, to the extent that it exceeded £30,000, should have been grossed up to take account of his tax liability. The respondent employer objected to that application on the ground, inter alia, that it had been made after the expiry of the 14-day time limit prescribed by rule 71. Without making any decision on the claimant's rule 71 application, the tribunal reconsidered the award "on its own initiative", pursuant to rules 70 and 73, and decided that its previous calculation was wrong and the interests of justice required the compensatory element of the award to be grossed up to include the amount of tax payable.

D

E

On an appeal by the employer, contending that the tribunal was not entitled to consider the matter on its own initiative when there was a pending application under rule 71—

Held, allowing the appeal, that it was clear from rule 70 of the Employment Tribunals Rules of Procedure 2013 that an application by a party for reconsideration of a judgment and a reconsideration by the tribunal on its own initiative were alternative processes; that the relevant rules did not provide for both types of reconsideration to take place at the same time nor for a hybrid process where an application made by a party was taken on by the tribunal; that the procedure adopted by the tribunal was accordingly incompetent, since it was not entitled to instigate a reconsideration on its own initiative when the rule 71 application was already before it; that, further, the procedure adopted was procedurally and substantively unfair in that the claimant's application was opposed on the ground that it was out of time and the contentions of the employer were simply ignored; and that, accordingly, the matter would be remitted for a differently constituted tribunal to consider first whether to extend time for the claimant's application in accordance with rule 5 of the 2013 Rules, and then, if an extension of time was justified, whether the judgment should be reconsidered (post, paras 24–26, 33).

F

G

Per curiam. A situation could arise where, in dealing with a rule 71 application on one issue, the tribunal notices an entirely separate issue that may merit reconsideration. Nothing in this case should be taken as an indication that in those circumstances reconsideration of the second, new issue, on the tribunal's own initiative, would be incompetent or inappropriate simply because there had already been a rule 71 application in the same proceedings (post, para 29).

H

[1] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch 1, rr 70, 71, 73: see post, para 23.

The following cases are referred to in the judgment: A

Bastick v James Lane (Turf Accountants) Ltd [1979] ICR 778, EAT
Dhedhi v United Lincolnshire Hospitals NHS Trust UKEAT/1303/01 (unreported) 25 March 2003, EAT
Hardie Grant London Ltd v Aspden [2012] ICR D6, EAT
Jafri v Lincoln College [2014] EWCA Civ 449; [2014] ICR 920; [2015] QB 781; [2014] 3 WLR 933; [2014] 3 All ER 709, CA
Lindsay v Ironsides Ray & Vials [1994] ICR 384, EAT B
Ministry of Justice v Burton [2016] EWCA Civ 714; [2016] ICR 1128, CA
Newcastle upon Tyne City Council v Marsden [2010] ICR 743, EAT
Practice Surgeries Ltd v Srivatsa UKEAT/212/15 (unreported) 26 February 2016, EAT
Shortall (trading as Auction Centres UK) v Carey UKEAT/351/93 (unreported) 26 May 1994, EAT
Trimble v Supertravel Ltd [1982] ICR 440, EAT C

APPEAL from an employment judge sitting in Aberdeen

By a judgment entered into the register on 22 July 2016, the employment judge decided that the tribunal should reconsider on its own initiative its judgment dated 21 April 2016, awarding the claimant, Mr Anthony Stuart, £106,520 following its decision that he had been unfairly dismissed by his D employer, TCO In-Well Technologies UK Ltd. On 23 August 2016 the employer appealed on the grounds that the tribunal erred in law in (1) determining that it was appropriate for it to reconsider the April judgment on its own initiative when there was an out of time application by the claimant for reconsideration under rule 71 of the Employment Tribunals Rules of Procedure 2013 pending; (2) in determining that the interests of justice permitted it to apply grossing up to the award of compensation; and E (3) in reviewing the judgment in order to grant the claimant the benefit of an argument not advanced on his behalf.

The facts are stated in the judgment, post, paras 3–10.

Margaret Gibson, solicitor (*Burness Paull LLP, Aberdeen*), for the employer.

Neil MacDougall (of the Scots Bar) (instructed by *Parabis Scotland Ltd, Glasgow*) for the claimant. F

19 April 2017. **LADY WISE** delivered the following judgment.

Introduction

1 This appeal raises an apparently novel point, namely whether, when G faced with an out of time application for a reconsideration under rule 71 of the Employment Tribunals Rules of Procedure 2013, a tribunal can, instead of determining that application proceed to reconsider the judgment "of its own initiative".

2 The appellant is the claimant's employer and was represented before the tribunal by Mr Howson, consultant, and before me by Ms Gibson, H solicitor. The claimant, who opposes the appeal, was represented both before the tribunal and before me by Mr MacDougall, advocate. I will refer to the parties as claimant and employer.

3 The claimant was employed from 24 March 2014 by the employer, a company providing certain "plugs" or devices to companies in the United

Kingdom sector of the North Sea oil fields and elsewhere. He was initially a sales engineer but from 8 September 2014 held the promoted position of United Kingdom sales manager. He was dismissed on 8 May 2015 in circumstances fully narrated in the tribunal's judgment of 21 April 2016. The unanimous decision of the tribunal recorded in that judgment was that the claimant was unfairly dismissed for making protected disclosures. He was found entitled to a monetary award totalling £106,520·98. The employer has not sought to appeal that decision. This appeal concerns a subsequent judgment of the tribunal dated 22 July 2016 ("the July judgment"), in which the tribunal states that "on its own initiative" it reconsiders the judgment dated 21 April and copied to parties on 22 April 2016. The effect of the reconsideration was to "gross up" the compensatory award element of the total award, although, curiously, the reconsideration judgment while it contains a calculation does not make any order substituting the previously awarded figure.

4 The background to the tribunal reconsidering the decision in relation to the compensatory award is not in dispute. I will set it out chronologically and relatively fully as the context in which the tribunal made the decision to reconsider is important to the issue under appeal.

5 On 9 May 2016 the claimant's representative contacted the tribunal by e-mail pointing out that the compensatory award to the extent that it exceeded £30,000 is subject to tax. In those circumstances it was said that it was standard for the tribunal to gross up the award so that once HMRC has been paid he is left with the figure the tribunal intended to award. It is accepted that the e-mail of 9 May was not copied to the employer and did not constitute a reconsideration application.

6 On 17 May 2016 the claimant's representative again e-mailed the tribunal. This correspondence was more formal and specifically asked the tribunal to "treat this as a request for reconsideration of the claimant's award". The basis for the application was that mentioned in the e-mail of 9 May, namely that the compensatory award should other than the first £30,000 be "grossed up" to take account of the tax liability. The e-mail goes on:

> "We appreciate that the request for reconsideration is outwith the period of 14 days within which the written judgment was issued to parties however would ask that consideration is given to the fact that the principal solicitor handling the matter was out of the office at the time when the judgment was received. The request for reconsideration is made within 14 days of the solicitor's return to the office. The request is also made within 14 days of the tax query being raised with the employment tribunal on 9 May 2016."

The request for reconsideration was duly copied to the employer's representatives.

7 On 31 May 2016 the employer's representatives wrote to the tribunal in response to the claimant's application for reconsideration. Two main issues were raised: first, it was submitted that the application was out of time the 14-day limit for such an application, being 14 days from the date of judgment in terms of rule 71 and that period having expired on 6 May 2016. It was made clear that the employer opposed the application on that basis. Secondly, the employer accepted that the principle that awards should be

grossed up was accepted but that further evidence would be required of the claimant's circumstances before an accurate calculation could be carried out. That would involve additional time and expense and should not be allowed as the matter could and should have been addressed at the original hearing.

8 On 3 June 2016 the claimant's representative wrote to the tribunal addressing the two objections of the employer to the reconsideration application. The point about the principal solicitor having been on leave when the judgment was received was reiterated, reference was also made to the point having been raised informally by e-mail of 9 May 2016. The point was then made that the claimant's representative could find no authority to support the proposition that grossing up should only be allowed if submissions to that effect had been made at the hearing. Reliance was placed on *Hardie Grant London Ltd v Aspden* [2012] ICR D6, which it was said supported the contrary position.

9 On 14 June 2016 the office of the employment tribunal wrote (by e-mail) to both representatives in response to the correspondence. The message confirms that having considered that correspondence the employment judge:

> "is of the opinion that the tribunal appears to have been in error in grossing up. Accordingly in terms of rule 73 the judge considers that the reconsideration should be at the tribunal's own initiative. He suggests that to save expense the reconsideration could be dealt with by written submissions. Indeed the proper calculations should be capable of agreement."

What followed was the judgment appealed against, namely that of 22 July 2016.

The employment tribunal's reasons

10 In so far as relevant to the issue for determination in this appeal the judgment of 22 July 2016 gives the following reasons for substituting a "grossed up" award for the one contained in the April judgment:

> "1. . . . the tribunal received an e-mail from the solicitors acting for the claimant on 17 May indicating that they were concerned that the monetary award had been calculated on the basis of net wages and seeking a reconsideration. They indicated that for the first £30,000 of the compensatory award would be tax free and thereafter that the claimant would be taxed. They asked the tribunal why it had not 'grossed up' the claimant's wages as sought.
>
> "2. The application was considered by the tribunal. It indicated on 9 June that it appeared as if an error had been made and proposed dealing with the reconsideration on its own initiative and on written submissions. No written submissions were received from the employer's agent.
>
> "3. Further submissions were received by the tribunal on 3 June from the claimant's solicitors in relation to the issue of grossing up and they were copied to the employer's agent.
>
> "4. The tribunal having read the correspondence came to the view that there had clearly been an error made by the tribunal in the calculation. They considered that the terms of rule 70 were apt and that the tribunal

A can on its own initiative reconsider any judgment where it is necessary in the interests of justice to do so. In the judgment of the tribunal it is necessary to reconsider the judgment otherwise a considerable injustice will be done to the claimant."

The employer's argument on appeal

B **11** Ms Gibson, for the employer, argued that the tribunal had not been entitled to proceed under rule 73 when there was a pending, albeit late, application under rule 71. The Rules required the tribunal to deal with the rule 71 application including determining the issue of its being out of time. In *Practice Surgeries Ltd v Srivatsa* (unreported) 26 February 2016, para 43, the Employment Appeal Tribunal made clear that an employment judge must give reasons for any decision to extend time, as in the absence of an C extension on a late application there was no jurisdiction to hear it. What the tribunal appeared to have done in this case was attempt to use the power in rule 73 to excuse the claimant for a failure to make a timeous application. The issue of lateness required to be considered first. The issue of whether the claimant should be excused the consequences of a failure to make a timeous application ought then to have been considered. It could not be said that the D tribunal in this case had decided to reconsider the judgment "on its own initiative". Reconsideration arose only because of the claimant's e-mail of 17 May as is evident from the reasons in the judgment appealed against. On any view, therefore, the e-mail of 17 May raised the issue as opposed to the tribunal doing that itself. Ms Gibson contended that rule 73 does not operate independently from rule 71. There is a distinction between the two E separate ways of reconsidering a judgment. The issue of loss was not one for the tribunal acting on its own initiative.

12 Separately, the tribunal had no proper basis under rule 73 to make an award in the interests of justice in the absence of evidence and where it required submissions. To conclude otherwise would mean that a tribunal could reconsider any issue about which no material had been put before it.

13 In so far as it might be argued by the claimant that the test for F interfering with an exercise of discretion and for perversity were relevant, it was submitted that these were not the issue in this appeal which was whether the course taken by the tribunal was competent.

14 As a fallback position Ms Gibson argued that, even if the tribunal was entitled in the circumstances to reconsider the judgment on its own initiative, it erred in law in so doing. No submissions had been made at the hearing in G relation to grossing up and agreed figures on the proposed award had been before the tribunal. In those circumstances it was wrong for the tribunal to look at this as its own error. It was not something focused before the tribunal that the tribunal failed to deal with. It was an error on the part of the claimant, not the tribunal. Reference was made to *Trimble v Supertravel Ltd* [1982] ICR 440, where a tribunal had reduced a compensatory award otherwise payable to a claimant on the basis of contribution. On an appeal H against the refusal of a review of that decision, the appeal tribunal made clear that the review procedure enabled errors occurring in the course of the proceedings to be corrected but would not normally be appropriate when the proceedings had given both parties a fair opportunity to present their case and the decision had been reached in light of all relevant argument.

15 In this case it could not be said that the claimant did not have an opportunity at the hearing to make submissions on grossing up. Reference was made also to *Lindsay v Ironsides Ray & Vials* [1994] ICR 384, *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 and *Ministry of Justice v Burton* [2016] ICR 1128 on the issue of the restriction of the scope of review/reconsideration particularly where any error was arguably that of parties' representatives.

16 Ms Gibson contended that if the grossing up point was obvious then it would surely have been raised at the full hearing. Reconsideration was not apt to excuse one's own failings. For a tribunal to properly review and allow grossing up the *Trimble* test would have had to have been satisfied and it had not been in this case.

The claimant's response to the appeal

17 Mr MacDougall spoke to his written argument and responded to the arguments in relation to competence and separatim perversity. On the alleged procedural incompetency, the procedure began with the claimant's request for reconsideration of 17 May 2016. After opposition had been marked by the employer the tribunal's decision to reconsider of its own initiative was intimated to parties a period of three working days to respond to the suggestion of it being dealt with on written submissions had been afforded. The terms of rule 73 had been complied with in so far as the tribunal had informed parties why the decision was being reconsidered and, separately, the reconsideration had been carried out in accordance with rule 72(2). That rule makes clear that reconsideration can proceed without a hearing but parties must be given a reasonable opportunity to make further representation.

18 The e-mail of 14 June 2016 explains that the judge is going to reconsider on his own initiative because the failure to gross up appears to be the tribunal's own error. Accordingly, the requirement to inform parties of the reason for it was satisfied as was the opportunity to make further written submissions. In the July judgment the tribunal records that no written submissions were received from the employer's agents. The procedure carried out by the tribunal was competent. The employer's argument that it was incompetent because of the pending (late) application under rule 71 was not supported by any authority. What the tribunal was doing was "taking ownership of its own error". In *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743, para 14 the appeal tribunal referred to the relevant authorities and approved those confirming that exceptional circumstances are not required for a review/reconsideration where the interests of justice demanded one. The overriding objective enables the employment tribunal to deal with matters expeditiously, justly and in a manner that saves expense. Nothing in rule 70 or 73 stops the employment tribunal reconsidering on its own initiative where there is a pending application under rule 71. Such a prohibition cannot be implied into the Rules. Standing the overriding objective, the employment tribunal was entitled to proceed as it did. *Practice Surgeries Ltd v Srivatsa*, 26 February 2016, was not in point other than as a reference to extension of time under rule 5, a provision which the employer had acknowledged can be used to assist achieving the interests of justice.

A **19** The employer's second argument ignored the fact that there was more than one possible outcome to the rule 71 application. The employment tribunal acted properly on its own initiative. No one else had told it what to do. The tribunal became aware of an error through the e-mail from the claimant but it did not effect reconsideration because it was told to do so by the claimant who did not have that power. The expression "on its own initiative" should not be interpreted too strictly particularly as a request from B the appeal tribunal can result in a reconsideration of the tribunal's own initiative: rule 70. There was no basis for saying that the tribunal had not acted on its own initiative.

20 The tribunal has admitted that the failure to gross up was its own responsibility and so it cannot be categorised as a claimant error. The July judgment, at para 4, refers to the tribunal's view that "there had clearly been C an error made by the tribunal in the calculation." It was important that the employer had been invited to make submissions in the rule 73 process and chose not to do so. It could have engaged with it but did not and in those circumstances could not complain about the procedure that followed.

21 So far as the second ground or fallback position of the employer was concerned, Mr MacDougall emphasised that the reconsideration judgment involves an exercise of discretion. Therefore the appeal tribunal can D interfere with the decision to gross up the award in the interests of justice only if it was perverse: see *Bastick v James Lane (Turf Accountants) Ltd* [1979] ICR 778, 782–784. One must look not just at the reasoning but also at the outcome. It is not seriously disputed that it is just and equitable to gross up awards to take account of tax. The employer cannot meet the very high test for perversity. The issue of whether the tribunal can is a matter of E law. Gross up is not the test. In *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 reference was made to *Dhedhi v United Lincolnshire Hospitals NHS Trust* (unreported) 25 March 2003, which also dealt with an error on grossing up. Both representatives in that case had erred in the approach put before the tribunal and the tribunal had followed their error as the error was made by both parties and by the tribunal chair. The interests of justice had demanded reconsideration. The dangerous path F argument of Mummery J relied on by the employer related to the mischief of giving litigants a second bite of the cherry. That does not arise in this case. *Shortall (trading as Auction Centres UK) v Carey* (unreported) 26 May 1994 was said to be in point as grossing up was not addressed before the tribunal. In the present case it was not a live issue and so there was no obligation on anyone's part to make submissions about it.

G **22** In Mr MacDougall's submission the cases cited highlight that grossing up is something that should happen as a matter of course. There cannot be any substantive argument that grossing up should not have taken place so the claimants are not seeking a second bite of the cherry just the granting of something that it cannot be disputed should happen. That was sufficient to distinguish any cases relied on by the employer including *Ministry of Justice v Burton* [2016] ICR 1128. In that case Elias LJ had H recognised that where it was being argued that the review would be a second bite of the cherry it would be highly material if a central argument had not been addressed before the hearing. The tribunal in this case, on the other hand, realised that an error had occurred in grossing up. It thought to rectify that error in the most efficient and cost effective manner available. That

could hardly be said to be perverse particularly where the outcome was that the just and equitable practice of grossing up had been achieved.

Discussion

23 Reconsideration of judgments is a procedure peculiar to tribunal decision-making. It is a departure from the rule in ordinary litigation that a judge's rule is functus once he or she has issued a determination, including dealing with any matter of expenses. Accordingly, where a process is the creation of a rule or statutory provision, as opposed to developed at common law, that process can only be undertaken in compliance with those rules. Several of the rules in question in this appeal are in mandatory terms. The relevant provisions on reconsideration of judgments, contained in a standalone section of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are in the following terms:

"*Principles*

"70. A tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again.

"*Application*

"71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

"*Process*

"72(1) An employment judge shall consider any application made under rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the tribunal shall inform the parties of the refusal. Otherwise the tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the judge's provisional views on the application.

"(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the employment judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."

"*Reconsideration by the tribunal on its own initiative*

"73. Where the tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is

being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

24 In my view three main points of construction of those rules arise for consideration and determination in this case. The first point is that rule 70 makes clear that a party's application for reconsideration and separately the tribunal reconsidering on its own initiative are alternative processes. The rules do not provide for both types of reconsideration taking place at the same time, far less some kind of hybrid process where an application starts as an application by a party but is then taken on by the tribunal under rule 73. Secondly, rule 71(1) requires an employment judge to consider any application made by a party under that rule, and on the undisputed facts in this case there was a rule 71 application before the tribunal, namely that of 17 May 2016. It was an opposed application contested, firstly, on the basis that it was said to be out of time and, secondly, on the ground that the claimant's representative had failed to make submissions on the point at the hearing and should not be allowed to involve parties in the tribunal in the additional expense of rectifying that. Thirdly, where the tribunal proposes to reconsider a decision on its own initiative under rule 73 the procedure that is followed is that in accordance with rule 72(2) "as if an application had been made and not refused". This provision is consistent with the tribunal's ability to reconsider on its own initiative being limited to situations where no party had in fact made such an application.

25 The procedure adopted in this case was that the tribunal, faced with an application that was opposed, attempted to remedy the matter by instigating its own reconsideration. The process then undertaken was, in my opinion, both incompetent and procedurally and substantively unfair. The tribunal failed to determine the opposed rule 71 application that was already before it. It was not entitled to instigate the alternative route of reconsideration on its own initiative where that application was pending. Further, the tribunal's reasons failed to record that a rule 71 application had been made and that it was opposed inter alia on the ground that it was out of time. The reference to reconsideration appears only in relation to the tribunal's decision to reconsider. In other words the reasons failed to acknowledge that there was a live issue before the tribunal on the matter of whether reconsideration was available on the issue of grossing up at all. Finally, the tribunal's reasons lack balance. The anticipated injustice to the claimant is relied on as a basis for reconsideration but the points made by the employer in opposition are completely ignored. Accordingly, even had I regarded the procedural mechanism adopted in the July judgment as competent, the process was procedurally and substantively unfair as the contentions of the employer were simply ignored. This was tantamount to a breach of natural justice, as a decision that does not make clear that the arguments of both sides were heard and considered is not one that can withstand scrutiny.

26 I accept the submission of the employer that a proper application of the rules in this case required the tribunal to deal with the rule 71 application on its merits. That would include consideration of whether in terms of rule 5 an extension of time for lodging the application should be granted. Some arguments for and against such an extension were already before the tribunal and required to be addressed and the reasons for granting or

refusing an extension would have to be given: *Practice Surgeries Ltd v Srivatsa*, 26 February 2016. A

27 Rule 5 of the 2013 Rules provides:

> "The tribunal may on its own initiative or on the application of a party extend or shorten any time limit specified in these Rules or in any decision whether or not (in the case of an extension) it has expired."

B

Although the claimant's representative's e-mail of 17 May 2016 made no formal application for extension of time, it is implicit in that e-mail that such an extension was sought. There is an acknowledgement that the application is out of time and a plea that consideration be given to the circumstances in which it came to be made. As already emphasised, the employer's representative had articulated opposition to it being dealt with out of time. In my view there was simply no other option open to the tribunal in such C circumstances than to determine as a first consideration whether the application should proceed, albeit out of time. If an extension was justified, the issue of whether the matter properly fell to be reconsidered in light of the applicable authorities would then require to be addressed.

28 I reject the contention for the claimant that the tribunal in this case followed the rules on reconsideration of its own initiative. The inclusion in D rule 70 including within the term "on its own initiative" action taken following a request from the appeal tribunal is a necessary clarification, as otherwise it could easily be argued that reconsideration following such a request could never fall within the usual meaning of reconsidering on one's own initiative. Far from supporting the construction put on it by the claimant, I consider that the inclusion of this particular route to reconsideration on the tribunal's own initiative tends to support a E conclusion that a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative.

29 The conclusion I have reached is based on the agreed facts of this case, which are that the issue that was the subject of the claimant's application for reconsideration was the very same issue that the tribunal F then sought to reconsider of its own initiative rather than determine the application before it. I do not rule out that a situation could arise where, in dealing with a rule 71 application on one issue, the tribunal notices an entirely separate issue that may merit reconsideration. Nothing I have said in this case should be taken as an indication that in those circumstances reconsideration of the second, new issue, on the tribunal's own initiative would be incompetent or inappropriate simply because there had already G been a rule 71 application in the same proceedings.

30 The decision I have reached on the primary ground of appeal, namely that the employment tribunal in this case was not entitled to reconsider on its own initiative an issue already before it within a pending rule 71 application as an alternative to complying with the mandatory provision requiring a decision on that pending application to be made, is H sufficient to dispose of this appeal. I have recorded the submissions made on the employer's fallback position and the response to it. Some of the points go to the issue of whether this is a case where the discretion to act in the interests of justice should be exercised or whether reconsideration is not justified due to the issue arising from the alleged failure of a party's

representative to draw attention to a matter at the hearing. There are a number of authorities on that point, including that of the Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128. However, as that comprises the second of the two issues raised by the employer in opposition to the rule 71 application and as the tribunal has not yet engaged with that opposition, I express no view as to whether or not this is a case in which the discretion should ultimately be exercised.

Disposal

31 The employer's agent conceded at the hearing that, following the guidance in *Jafri v Lincoln College* [2014] ICR 920; [2015] QB 781, it could not be said that if the appeal succeeded on the primary ground there was only one inevitable outcome of the opposed reconsideration application. She suggested that, standing the particular circumstances of the case and the background to the July judgment, a remit to a freshly constituted tribunal would be appropriate.

32 Mr MacDougall submitted that, were the appeal allowed to any extent, the matter should be remitted back to the same tribunal, the body familiar with the facts of the case and the relevant issue.

33 I have decided that in the particular circumstances of this case it would not be appropriate for the matter of determination of the outstanding rule 71 application to be remitted back to the same tribunal. The points I have made about lack of balance in the tribunal's approach to the reconsideration render such a remit inappropriate and not practicable. Accordingly, I will allow the appeal and remit the matter to a freshly constituted tribunal for consideration of the claimant's opposed application for reconsideration. The procedure to be adopted is for the issues of lateness together with arguments for and against extension of time to be addressed as a first consideration with the matter of the substantive argument for reconsideration then being addressed in the event that the time limit issue is decided in favour of the claimant. I wish to add only my gratitude to those appearing on both sides today for the helpful and constructive way in which submissions were presented.

Appeal allowed.
Application remitted to fresh tribunal.

JENNIFER WINCH, Barrister

Appeal No. UKEAT/0043/18/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 1 May 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

KL LAW LTD — APPELLANT

(1) WINCANTON GROUP LTD
(2) MS J MARZEC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARCIN KOZIK (Representative) KL Law Ltd Censeo House 6 St Peters Street St Albans Hertfordshire AL1 3LF
For the First Respondent	No appearance or representation by or on behalf the First Respondent
For the Second Respondent	Second Respondent debarred from taking part in this appeal

SUMMARY

PRACTICE AND PROCEDURE - Costs

1. Following withdrawal of the Claimant's claims part way through a substantive hearing, the Employment Tribunal dealt with a wasted costs application made against her legal representative by the Respondent. There was no adjournment to enable evidence to be prepared and the Employment Tribunal heard no evidence from the legal representative. The Employment Tribunal made a wasted costs order finding that the legal representative was negligent in relation to the Claimant's disclosure obligations; this caused unnecessary costs; and it was just to make the order.

2. The appeal was allowed and the order set aside. The Employment Tribunal's finding of negligence was in error in circumstances where privilege was not waived and it had no means of establishing what advice was given to the Claimant about disclosure. Further, the necessary element of breach of duty to the court was not considered by the Employment Tribunal. Finally, the causation finding was flawed by a failure to address the question whether the Claimant would have continued with the claim irrespective of any negative advice she received.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an appeal against the judgment of the Sheffield Employment Tribunal (comprised of Employment Judge Little, Ms Hodgkinson and Mr Smith) which made an award for wasted costs against a firm of claims managers who provided legal advice and representation to the Claimant, KL Law Ltd (the Appellant). There were two individuals advising the Claimant within the firm: Mr Kozik (who represents the Appellant) and Ms Lappa (who was also engaged in representing the Claimant's partner, Mr Tatinger, who also pursued proceedings against the Respondent, Wincanton Group Ltd).

2. The basis for the wasted costs order made by the Tribunal was that there was a negligent failure to comply with disclosure obligations causing unnecessary costs to be incurred by the Respondent in the substantive proceedings, and it was therefore just to make such an order in the circumstances. The Appellant challenges the award of wasted costs on a number of grounds.

3. Two points should be made clear at the outset. First, the result of this appeal, whichever way it goes, cannot affect the Claimant's position. Although the Respondent sought a costs order against her in addition to the order sought against the Appellant, it failed to obtain an order against the Claimant because of her limited means. That decision has not been challenged. If the wasted costs order is now set aside, the Respondent cannot revive its application for costs against the Claimant, and she has not therefore had any reason to be involved in this appeal.

4. Secondly, by letter dated 21 March 2018, the Respondent indicated that they would not be resisting this appeal but would leave the matter in the hands of the EAT. I have not, therefore, heard from the Respondent at this hearing. Nonetheless, I have explored, during the course of oral argument, points that might have been put by the Respondent. I am grateful to Mr Kozik for dealing with my questions and for his clear, focused submissions.

The Factual Background

5. The background can be summarised shortly. The Claimant pursued claims of unlawful direct race and sex discrimination (together with claims of indirect disability discrimination which were, in the event, withdrawn on day one of the hearing) and a claim for constructive unfair dismissal. The claims were all resisted.

6. A substantive hearing listed for four days started on 6 March 2017. On day three, following cross-examination, the Claimant was questioned by the Employment Judge. As a result, it was discovered that she had a diary entry recorded in relation to an important conversation with her manager said to have taken place on 25 May 2016. Pages from a diary were produced immediately, translated and, in significant respects, the entry did not tally with what the Claimant said about the meeting in her witness statement. The Claimant was asked whether she had notes or diary entries in relation to other meetings that were important to her claims, namely meetings on 15 May and 6 June 2016, both of which were described in her witness statement. The Claimant said she did have notes recorded in the diary but these had not been disclosed. Concern was understandably raised by the Respondent's counsel, Ms Moss, who expressed concern to the Tribunal that there might be other diary entries which should have been disclosed.

7. The Tribunal proposed an adjournment so that Ms Moss and the Claimant's representative Mr Kozik, could go through the pages that the Claimant had by way of extracts from the diary in question. However, on putting that proposal to the parties, Mr Kozik said the Claimant wished to withdraw her claim. There was a short adjournment during which Mr Kozik was permitted to take instructions from the Claimant, and, following that, he gave confirmation that the Claimant did wish to withdraw her claims. The claims were accordingly dismissed on withdrawal with a judgment to that effect sent to the parties on 20 March 2017.

8. Following the withdrawal, the Respondent applied for costs against the Claimant on grounds of unreasonable conduct in bringing and conducting the proceedings and because they were said to have been misconceived; and against the Appellant on grounds that the claim was both misconceived and because "*disclosure must have been handled negligently*" (paragraph 17).

9. Representations were made to the Tribunal by Mr Kozik at that stage seeking an adjournment of the application to prepare for and obtain evidence to oppose it. The Employment Judge rejected the application to adjourn, concluding that it would not be within the overriding objective to require the parties to return for a costs hearing sometime in the future, not least because, as the Tribunal recorded at paragraph 13, they were told that the Claimant was intending to return to Poland permanently, and there remained only two days hearing time within which to deal with the matter. The result was that the costs hearing proceeded the following day and, as I understand from Mr Kozik, the Tribunal made clear that it would not hear evidence on the application but would proceed on the basis of submissions alone.

10. The Tribunal recorded the essential submissions made by the Respondent in relation to the two applications it pursued. It summarised what Mr Kozik said in relation to the Claimant's position at paragraphs 19 and 20; and what he said on behalf of the Appellant at paragraph 21. The Tribunal set out the terms of Rule 80 of the **Employment Tribunal Rules of Procedure** relating to wasted costs and also referred to the three stage test set out in of **Ridehalgh v Horsefield** [1994] 3 All ER 848, stating that a Tribunal dealing with a wasted costs application should consider:

> **"26. …**
>
> **First, had the representative acted improperly, unreasonably, or negligently? Second, if so did that conduct cause the party applying for costs to incur unnecessary costs? Finally, would it be, in the circumstances, just to order the representative to compensate the other party for the whole or part of the relevant costs.**
>
> **…"**

There was no further amplification or consideration of the general approach to wasted costs orders by the Tribunal.

11. The Tribunal found that there was conduct in relation to the duty of disclosure which did not meet the standard of competence reasonably to be expected of an ordinary member of the claims management fraternity, particularly one with a solid legal background. The Tribunal regarded it as commonplace for employees to keep diaries or other contemporaneous records and concluded the missing documents could not be regarded as obscure or unusual. Moreover, the failure amounting to negligence was aggravated in this case, the Tribunal held, by reason of the fact that the Claimant did in fact provide some diary entries which would have put any reasonably competent representative on enquiry that there might be other relevant entries.

12. Having reached those conclusions, the Tribunal held at paragraphs 27, 28 and 29 as follows:

> **"27. We therefore find that there was negligent conduct.**
>
> **28. We find that that conduct did cause the respondent to incur unnecessary costs. If the representative had sought and obtained from the claimant the missing diary entries it is likely, in our judgment, that by the standard of a reasonably competent representative the claimant would have been advised to either not pursue the claim or, if commenced abandon it or at the very least to severely limit its scope. Moreover if there had been full disclosure to the respondent it would have been in a position to exert legitimate pressure on the claimant to withdraw by pointing out what may well have been serious discrepancies between her pleaded case and her own contemporaneous documentation.**
>
> **29. The final consideration is whether it would in the circumstances be just to make a wasted costs order. We accept that there must be some speculation as to the likely result of there being full disclosure by the claimant to her representative and then full disclosure by the representative to the respondent. However, we believe that the consequences are sufficiently probable in the way we have described them above to make an order which in the first place only addresses a part of the respondent's actual costs and secondly which represents two thirds only of the amount actually being sought by the respondent.**
>
> **We should add that although Rule 84 permits us to have regard to a paying party's means in the context of a wasted costs order we have not been invited to take into account those means. However, clearly the representative is a Limited company, no doubt with assets. We were told that the claimant on behalf of herself and Mr Tatinger's claim had paid some £13,000 to K L Law Limited in respect of Mr Tatinger's costs and her own."**

13. Accordingly, the Tribunal concluded that a wasted costs order should be made so as to reimburse the Respondent in the sum of £6,300 by way of contribution to its total costs of approximately £16,000.

The Grounds of Appeal

14. The Appellant advances a number of grounds on which it is said the Employment Tribunal erred in law in making the wasted costs order. With respect to Mr Kozik, the Notice of Appeal is diffuse, and I do not propose to set out the grounds identified by it in any detail. It is sufficient to refer to the reasons given by Soole J when he permitted this appeal to proceed to a Full Hearing. He summarised the grounds as raising the following points of challenge:

> **"(1) Procedure: the application being presented to the appellant on the morning of the costs hearing against his client (which was the day after she abandoned her claim); and then dealt with in one immediate stage**
>
> **(2) The necessary element of breach of duty to the court (see e.g. *Persaud v Persaud*): this appears not to have been considered**
>
> **(3) Negligence**
>
> **…**
>
> **(5) Causation: e.g. whether earlier advice to abandon would have been accepted."**

15. The grounds were developed by Mr Kozik. He contends that whilst, ordinarily, a failure by a legal representative to comply with his or her disclosure obligations amounts to a breach of the duty owed to the court or tribunal, in this case the Tribunal did not consider this question at all, and, in circumstances where privilege was not waived by the Claimant, Mr Kozik was hampered in addressing this point appropriately. Secondly, in the absence of evidence about the advice offered to the Claimant about her disclosure obligations and what she needed to do and when, and any particular advice given when the second tranche of disclosure was made by her on 28 February, he submits there was no evidential basis for the Tribunal to conclude that the Appellant's conduct amounted to negligent conduct. Finally, so far as causation is concerned, Mr Kozik submits that even assuming there was negligent conduct, the Tribunal made no finding that the Claimant would have acted on advice not to pursue a claim, and there was no evidential basis for that finding. Mr Kozik submits that if any of those errors of law is made out, each is sufficient to vitiate this decision, and it is unnecessary, therefore, to address the procedural and perversity grounds he relies on (as dealt with in writing).

16. Before setting out the legal principles that apply, it is necessary to deal in a little more detail with the chronology in relation to disclosure. As I have indicated earlier, the Appellant accepted instructions from the Claimant and her partner, Mr Tatinger, in relation to unlawful discrimination claims they wished to pursue against the Respondent. There was a hearing of Mr Tatinger's claim in January 2017. The hearing took place in Sheffield but was adjourned. It reconvened in February 2017. The reason for the adjournment was a need to return to Poland to care for a sick relative, and, as I understand the position, both the Claimant and Mr Tatinger travelled to Poland and remained there until the resumed hearing in Sheffield in February 2017. The hearing resumed on 20 February 2017 and, at that point, the Claimant, Mr Tatinger, Ms Lappa and Mr Kozik were all in Sheffield at the same time.

17. There were after-court conferences each evening that involved the Claimant, Mr Tatinger, Ms Lappa and Mr Kozik. During the course of that hearing period, Ms Lappa spent a considerable amount of time with the Claimant taking her witness statement, and there was discussion about documents disclosed by the Respondent and documents that had by that stage been disclosed by the Claimant (who had sent extracted pages from a diary to the Appellant in accordance with her disclosure obligations).

18. Following the conclusion of the hearing in February 2017, Ms Lappa and Mr Kozik returned to St Albans (where they are based) and the Claimant and Mr Tatinger remained in Sheffield. Given budgetary constraints, neither travelled to the other again, but there was a case-conference using Skype on 28 February 2017. In the course of that, further diary notes were referred to by the Claimant and by email, dated 28 February at 9.53pm, the Claimant sent Ms Lappa a series of documents including, as is clear from their description, a number of extracted pages from a diary. Those additional documents, disclosed very close to the date of the substantive hearing in the Claimant's case, were sent immediately by Ms Lappa to the Respondent, as evidenced by email dated 1 March 2017 timed at 4.09pm from Ms Lappa to the Respondent's solicitors, Clarks Legal LLP.

19. Mr Kozik tells me that privilege has not, at any stage, been waived by the Claimant in relation to legal advice given by him on her claim and in relation to the case. Moreover, while not revealing the nature of the legal advice he gave, he submits that the events support a submission that he gave proper advice on disclosure in circumstances where the Claimant provided copies of documents in January 2017 to the Appellant, which were then disclosed to the Respondent in accordance with standard disclosure obligations and produced additional documents on 28 February. Although before the Employment Tribunal on the wasted costs

application there was some reference to privilege, there was no detailed discussion about it and Mr Kozik was afforded no opportunity to give evidence. He says he told the Employment Tribunal that he was hampered in his dealings with the Claimant by the distance between them and budgetary constraints so that Skype was a convenient way of taking instructions and giving advice.

20. Moreover, the Claimant produced the second tranche of documents very late in the day, and, although he was hampered in what he could say to the Employment Tribunal about the advice he had given in relation to disclosure, including after the second tranche of disclosure, he says he told the Employment Judge that he was not at fault and any fault lay with the Claimant. That is, to some extent, reflected in the summary given by the Employment Judge at paragraph 21 of the submissions made by Mr Kozik on the wasted costs application as follows:

> **"21. … Essentially Mr Kozik blamed his client for not telling him that there were more diary entries than had been provided to him. He explained that because the claimant lived in Doncaster and he was based in St Albans the claimant had never visited his office and that communications between them had been via Skype. It appeared that Mr Kozik would not have met the claimant until the recent hearing of Mr Tatinger's claim in which Ms Marzec was a witness. He contended that his organisation had asked the claimant whether there were any other diary entries but suggested that perhaps the claimant had not understood that request because of her alleged mental state. Mr Kozik pointed out that the respondents had never queried whether there were any other diary entries than those that had been disclosed to them. Mr Kozik said that when he had worked for various solicitors' firms in London it had been common practice not to meet the client but to deal via Skype."**

The Applicable Legal Principles

21. The jurisdiction to make a wasted costs order derives, as the Tribunal recognised, from Rule 80 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which provides as follows:

> **"(1) A Tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs -**
>
> > **(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or**
> >
> > **(b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.**
>
> **Costs so incurred are described as "wasted costs".**

> **(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.**
>
> **(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party."**

22. As Elias P (as he then was) held in **Ratcliffe Duce and Gammer v Binns** UKEAT/0100/08, Rule 80(1) of the **2013 Rules** (or rather its predecessor, Rule 48(3) under the earlier Rules**)** precisely mirrors the definition of wasted costs given in section 51 of the **Supreme Court Act 1981**. Accordingly, the authorities applicable to wasted costs in civil cases generally, are equally applicable in an employment context. The two leading authorities analysing the scope of section 51 and the circumstances in which wasted costs orders can be made are **Ridehalgh** and **Medcalf v Weatherill & Another** [2002] UKHL 27.

23. In **Ridehalgh**, the Court emphasised that the courts should apply a three-stage test when determining whether a wasted costs order should be made. The following three questions should be asked:

(1) Has the legal representative, of whom complaint is made, acted improperly, unreasonably or negligently?

(2) If so, did such conduct cause the applicant to incur unnecessary costs?

(3) If so, is it, in the circumstances, just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?

However, it is clear from both **Ridehalgh** and **Medcalf**, as applied in an employment context by Elias P in **Ratcliffe**, that it is not enough simply to establish negligent or other impugned conduct alone. It is also necessary for a duty to the court (or tribunal) to be shown to have been breached by the legal representative if he or she is to be made liable for wasted costs: see the

judgment of Sir Thomas Bingham MR in **Ridehalgh**, and **Medcalf** where Lord Hobhouse referred to those observations with approval. In **Persaud v Persaud** [2003] EWCA Civ 394, the Court of Appeal described this requirement as a need to establish something akin to an abuse of the process of the Court.

24. These cases emphasise the importance of not undermining or putting obstacles in the way of a legal representative fulfilling his or her duty to present the lay client's case in the best way possible, even if it is thought hopeless and even if advice has been given that the case is unlikely to succeed. A wasted costs application inevitably gives rise to the potential for a conflict of interest between a legal representative and the lay client, and legal representatives ought not to be penalised for presenting their client's case when instructed to do so.

25. Moreover, if the wasted costs application is disputed, save in the most obvious case, whether conduct is unreasonable, improper or negligent is likely to turn on what instructions the client gave and what advice the representative provided. Both are covered by legal professional privilege that can only be waived by the client. Where it is not waived, privilege may make it difficult or impossible for a legal representative to provide a full answer to the complaint made against him or her. Where there is doubt in such cases, the legal representative is entitled to the benefit of that doubt (see **Ridehalgh**).

The Appeal

26. Mr Kozik submits that there was no attempt whatever by the Employment Tribunal to determine whether there was a breach of duty or something akin to an abuse of process by Mr Kozik in the failure to disclose the diary entries on the basis for example, that he knowingly made incomplete disclosure of documents or lent his assistance to the Claimant in knowingly

avoiding her disclosure obligations. Rather, the Employment Tribunal held that there was negligent conduct and simply moved to the question of causation.

27. Legal representatives undoubtedly owe duties to the court or tribunal in relation to disclosure obligations, but it cannot simply be assumed where there has been a failure in disclosure, that there was either negligence on the part of the legal representative concerned or that the failure in disclosure was a failure by the legal representative in his or her duty to the court. I agree with Mr Kozik that the failure to address these issues was an error of law sufficient to vitiate this judgment.

28. A particular difficulty in dealing with this application is that the question whether or not Mr Kozik was negligent turned on what instructions were provided by the Claimant and what advice he gave. In a case where privilege is not waived, the difficulty for the legal representative is in providing a full answer to the complaint made against him. This was recognised in **Ridehalgh** where the Master of the Rolls held it will be a very exceptional case where a court will be entitled to infer that a legal representative is abusing the process of the court by pursuing a hopeless case; and where there is room for doubt, legal representatives are entitled to the benefit of that doubt. Here, privilege was not waived.

29. At paragraph 23 the Employment Tribunal made findings about failure to give full disclosure on the part of the Claimant, holding as follows:

> **"23. …**
>
> **We were however much more concerned about the clear failure to make full disclosure of relevant documents. Whilst we considered that the greater fault lay with the claimant's representative, the failure as alleged by her representative of the claimant to provide all the documentation to the representative had contributed to the ultimate failure to discharge the duty of disclosure. In this regard, whilst we accept that the claimant is a lay person we have also been told that she is someway through a five year masters degree in Law in Poland. As an obviously intelligent person with some legal background we fail to see how she could have considered diary entries about meetings or events where she profoundly disagreed with the respondent's documentation as anything other than highly relevant documents."**

A Further, as indicated, at paragraph 21 the Tribunal recorded the fact that Mr Kozik blamed his client for the failure and also referred to the fact that he was hampered by logistical difficulties in communications. It is also clear from paragraph 21 that Mr Kozik's position was that proper advice was given about disclosure and the importance of providing relevant documents.

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30. In these circumstances it seems to me that there was not only no evidential basis for an inference that the failure in disclosure was a breach of duty or an abuse of process by the Appellant, but it is difficult to see how the Tribunal could conclude that there was negligent conduct on Mr Kozik's part in relation to disclosure. For all the Tribunal knew, Mr Kozik gave full and clear advice about disclosure and the importance of providing all relevant documents. For all the Tribunal knew, when the second tranche of disclosure was provided on 28 February, further clear advice was given about the need to go back and check that there were no other diary entries relevant to the case that had not been disclosed; and for all the Tribunal knew, in those circumstances, Mr Kozik fully discharged his own duty to the Tribunal and was not a knowing or reckless participant in the disclosure failings.

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31. In addition, as Mr Kozik submits, since the Employment Tribunal made no finding that the Claimant would have withdrawn whatever advice she received, and since there was no evidence that the Claimant would have withdrawn even if advised to do so, there was no basis for inferring that costs had been unnecessarily incurred by the Respondent as a consequence of the negligent conduct. It is as likely as not that the Claimant would have proceeded, notwithstanding negative advice about her prospects, and that even if disclosure had been given at an earlier stage, the Respondent would have been put to the cost and expense of defending these proceedings in any event.

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32. Unlike the position where an ordinary costs order is made, where there is no need to fix the amount by reference to the additional costs actually resulting from unreasonable conduct, where a wasted costs order is made, the actual loss flowing from the impugned conduct should as far as possible be calculated. Here, the Tribunal could not have known whether Mr Kozik gave advice that the Claimant had a poor or hopeless case and could not have known whether such advice was ignored. In the circumstances, if the Claimant might have continued the action in any event and there was no evidence to the contrary, no costs could have been wasted. Mr Kozik says he was hampered in what he could say in this regard too, because he could not reveal to the Tribunal what advice on prospects or merits was given to the Claimant. Accordingly, so far as causation is concerned, here too there was an error of law.

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33. In light of those conclusions, it seems to me that it is unnecessary to deal with the remaining grounds of appeal (including the ground relying on unfair procedure). I make this observation, however. A wasted costs order is an order that should be made only after careful consideration and any decision to proceed to determine whether costs should be awarded on this basis should be dealt with very carefully. A wasted costs order is a serious sanction for a legal professional. Findings of negligent conduct are serious findings to make. Furthermore, even a modest costs order can represent a significant financial obligation for a small firm. Tribunals should proceed with care in this area.

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34. Although I can understand this Tribunal's desire to avoid an adjournment or hold a future hearing in circumstances where it was possible or even certain that the Claimant would be returning to Poland, it seems to me the interests of justice mean it would have been preferable to allow an adjournment here. This would have enabled the Appellant to prepare to

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resist the application, produce evidence and consider its position, together with any potential conflict it had so far as the Claimant was concerned.

35. It follows, in my view, that the appeal should be allowed because the Employment Tribunal failed to apply the correct legal principles in determining that wasted costs should be awarded, by failing to consider the question of breach of duty to the Tribunal altogether. The evidence did not and could not support a conclusion in these circumstances that the Appellant was in breach of duty or that the conduct was negligent in any event. Further, and separately the Tribunal failed to deal properly with the question of causation. These errors mean the wasted costs order cannot stand and must be set aside. Even if the correct principles were applied, it seems to me that the application could not have succeeded in the circumstances I have described, because there was no basis for making a wasted costs order here, and there is therefore nothing to remit to the Employment Tribunal for re-hearing.

36. For all those reasons, accordingly the appeal is allowed and the wasted costs application pursued by the Respondent against the Appellant is dismissed.

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Employment Appeal Tribunal

Banerjee *v* Royal Bank of Canada

UKEAT/189/19

2020 May 27;
B June 16;
Oct 30

Lord Summers

Industrial relations — Employment tribunals — Reconsideration of decision — Finding of unfair dismissal — Tribunal awarding 25% Acas uplift without any evidence as to quantum of compensation — Respondent at remedies hearing suggesting tribunal reconsider uplift "on its own initiative" — Whether appropriate
C *for tribunal to order reconsideration — Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237), Sch 1, rr 70, 73*

At the liability hearing of the claimant's claim that he had been unfairly dismissed by the respondent, one of the issues listed for determination was whether, if he had been unfairly dismissed, an uplift of compensation was appropriate for failure by the respondent to comply with an Acas Code of Practice. The employment tribunal upheld the claim of unfair dismissal and decided on an uplift of 25%, without making
D any reference to the monetary consequences. The respondent, while regarding that percentage as resulting in an excessive amount, did not seek reconsideration of the judgment pursuant to rule 70 of the Employment Tribunals Rules of Procedure 2013[1]. At the remedies hearing, one of the agreed issues for determination was whether it would be just and equitable to award the claimant a 25% uplift on the sum awarded to him. While the claimant submitted that the decision on the Acas uplift was final, counsel for the respondent submitted that the tribunal had power under rule 70 to reconsider the
E earlier decision on the uplift "on its own initiative" and remarked that if the employment judge took the view that a 25% uplift would be disproportionate "that's what you should do". The employment judge, pursuant to rule 73, ordered a reconsideration of the uplift, stating that, once the parties had calculated compensation, they would have the opportunity to put forward any submissions on whether the percentage uplift should be reduced having regard to the total compensation to be paid.

On an appeal by the claimant—

F *Held*, dismissing the appeal, that, when considering an Acas uplift, an employment tribunal should generally hear evidence about quantum before fixing the appropriate percentage, to ensure it produced a sum proportionate to the gravity of the breach of the relevant code; that the tribunal at the liability hearing had failed to realise that it would not be possible to resolve the issue of the appropriate percentage in the absence of evidence of quantum, but the decision was not final to the extent that it was subject to both reconsideration and appeal; that the respondent's submissions
G at the remedies hearing were in effect that the tribunal should use its own powers, unconstrained by time limits, under rules 70 and 73 of the Employment Tribunals Rules of Procedure 2013 to reconsider the matter of the uplift and not an application, out of time, by the respondent for a reconsideration; that the tribunal's ability to act "on its own initiative" was not vitiated by those submissions, since an advocate was entitled to remind a tribunal of its powers; that, further, the circumstances giving rise to the desirability of reconsideration were already known to the tribunal, and it was clear from the remedies judgment that it considered that it should intervene on its
H "own initiative"; and that, accordingly, the tribunal had been right to exercise its own initiative and seek to reconsider the size of the uplift (post, paras 6, 26, 27, 36, 42, 48).

[1] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Sch 1, r 70: see post, para 20.
R 73: see post, para 22.

Wardle v Crédit Agricole Corporate and Investment Bank [2011] ICR 1290, CA and *Williams v Ferrosan Ltd* [2004] IRLR 607, EAT considered.

TCO In-Well Technologies UK Ltd v Stuart [2017] ICR 1175, EAT(Sc) distinguished.

The following cases are referred to in the judgment:

Abbey National plc v Chagger [2009] EWCA Civ 1202; [2010] ICR 397, CA
Flint v Eastern Electricity Board [1975] ICR 395
King v Royal Bank of Canada Europe Ltd [2012] IRLR 280, EAT
Lindsay v Ironsides Ray & Vials [1994] ICR 384, EAT
Ministry of Justice v Burton [2016] EWCA Civ 714; [2016] ICR 1128; [2017] 4 All ER 603, CA
Newcastle upon Tyne City Council v Marsden [2010] ICR 743, EAT
Secretary of State for Health v Rance [2007] IRLR 665, EAT
Southwark London Borough Council v Bartholomew [2004] ICR 358, EAT
Stanley Cole (Wainfleet) Ltd v Sheridan [2003] EWCA Civ 1046; [2003] ICR 1449; [2003] 4 All ER 1181, CA
TCO In-Well Technologies UK Ltd v Stuart [2017] ICR 1175, EAT(Sc)
Wardle v Crédit Agricole Corporate and Investment Bank [2011] EWCA Civ 545; [2011] ICR 1290, CA
Williams v Ferrosan Ltd [2004] IRLR 607, EAT

APPEAL from an employment judge sitting at London Central

By a decision on a remedies hearing sent to the parties on 1 February 2019, the employment judge awarded the claimant, John Banerjee, compensation for his unfair dismissal by the respondent, Royal Bank of Canada, and decided to order a reconsideration, pursuant to rule 73 of the Employment Tribunals Rules of Procedure 2013, of the decision made at the liability hearing that there should be an uplift of 25% in the claimant's compensation. The claimant appealed the order for reconsideration on the grounds that (1) an invitation to the employment judge by the respondent at the remedies hearing to reconsider the uplift decision on his own initiative was in effect an out of time application to reconsider by the respondent; (2) even if it could not be said that the respondent had applied for a reconsideration, given the respondent's request for the tribunal to reconsider, it could not be said that the tribunal had acted "on its own initiative" for the puposes of rule 73; and (3) the tribunal had erred in failing to give effect to principles concerning the importance of finality.

The facts are stated in the judgment, post, paras 9–19.

Carolyn D'Souza and *Andrew Watson* (instructed by *Setfords Solicitors*) for the claimant.

David Craig QC (instructed by *Freshfields Bruckhaus Deringer LLP*) for the respondent.

30 October 2020. The following judgment was promulgated.

LORD SUMMERS

Facts and circumstances

1 The claimant in this case presented a claim for unfair dismissal. I shall refer to his former employers as "the respondent". The employment tribunal will be referred to as "the tribunal".

A **2** The tribunal decided to separate issues relevant to liability from those relevant to quantum. In co-operation with the parties a liability hearing was fixed and a list of issues agreed. One of the issues allocated to the liability hearing was whether an Acas uplift was appropriate and, if so, what percentage should be applied. The issue (hereafter "the issue") ran as follows:

> "If the tribunal finds that the respondent unfairly dismissed the
B claimant, did the respondent unreasonably fail to comply with the Acas code on disciplinary procedures such that an uplift in compensation is appropriate, and if so, what percentage?"

3 The Trade Union and Labour Relations (Consolidation) Act 1992, section 207A(2), gives tribunals the power to uplift awards for breaches of the Acas Code of Practice relevant to dispute resolution. The tribunal may
C exercise this power if it considers it just and equitable to do so. The uplift may be up to 25%.

4 In *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] ICR 1290 Elias LJ considered section 207A. He directed tribunals to approach the calculation of the uplift in two stages (para 27):

> "Once the tribunal has fixed on the appropriate uplift by focusing on
D the nature and gravity of the breach, but only then, it should consider how much this involves in money terms . . . this must not be disproportionate, but there is no simple formula for determining when the amount should be so characterised."

5 He goes on in his judgment to explain why an uplift calculated only under reference to the "nature and gravity of the breach" can yield
E disproportionately high uplifts. The practical effect of his decision is that tribunals should determine the multiplicand before selecting the multiplier. A tribunal should therefore refrain from fixing a percentage under section 207A until it can be sure it produces a sum that is proportionate to the gravity of the breach of the Acas Code (see also *Abbey National plc v Chagger* [2010] ICR 397, per Elias LJ, at para 102).

F **6** It will be evident from the foregoing that in fixing the Acas uplift the tribunal should, at least in cases where the risk I have adverted to can be foreseen, hear evidence about quantum before fixing the appropriate percentage. No doubt in some cases it is not necessary to hear evidence on quantum. If the sums involved are modest the tribunal may not consider that it is necessary to establish the multiplicand since it can foresee that the final figure will be within an acceptable range. But in some cases detailed
G evidence of quantum will be critical.

7 The respondent referred to *Wardle* in its written submissions to the tribunal at the liability hearing. The written submissions refer to the two-stage test and acknowledge the necessity of establishing what an uplift means in money terms before fixing the Acas uplift. The respondent did not make any oral submission that the issue should be deferred. Nor for that matter did the claimant. The tribunal then wrote its judgment.

H **8** It is not clear to me whether the tribunal omitted to read the respondent's written submissions about *Wardle* or, having read them, did not appreciate their implications. The tribunal proceeded to fix the Acas uplift without reference to the monetary consequences of the uplift. The order ran as follows: "The award of compensation is to be subject to an

uplift of 25% because of the respondent's failure to comply with the Acas Code of Practice."

9 At the time of his dismissal the claimant was employed as a trader in the City and was earning significant sums of money. The respondent calculate that applying an uplift of 25% will yield an uplift of about £261,000. The respondent submitted that this figure was manifestly excessive. The claimant submitted that it was not. He referred to the fact that the respondent had been censured for the way in which it had conducted a dismissal in a previous case (*King v Royal Bank of Canada Europe Ltd* [2012] IRLR 280).

10 No reconsideration was sought within the 14 days prescribed by rule 71 of the Employment Tribunals Rules of Procedure 2013.

11 The respondent supplied me with a number of explanations for this failure. It said that until the parties received the remedies judgment on 1 February 2019 it was not clear that the tribunal had determined the Acas uplift at the liability judgment. The respondent sought to support its understanding by reference to the tribunal's finding that the parties (para 97 of liability judgment):

> "considered that it would be an effective use of tribunal time to determine the level of the Acas uplift at the same time as liability as it turns on the extent of the respondent's default in failing to apply a proper disciplinary procedure."

These observations do not support such an understanding. The tribunal's observations rather tend to suggest that the tribunal had an erroneous understanding of what it could decide at the liability hearing. The respondent sought to say that it did not seek reconsideration because it did not appreciate that a large award was likely. In the circumstances this seems unlikely. I do not consider that an explanation has been tendered that satisfactorily explains why the respondent did not apply for reconsideration. It is not for me to speculate why there was a failure to reconsider. All that I can say is that the explanations offered do not appear to me to be good reasons.

12 The failure of the respondent to apply for reconsideration is a key feature of this case. As will become evident, a party who could have reconsidered and fails to reconsider may be in an uncomfortable position if it later wishes to raise with the tribunal the possibility of the tribunal reconsidering "on its own initiative".

13 The respondent did however mark an appeal. It did so within the relevant time limits. One of the grounds of appeal was that the tribunal had erred in fixing the Acas uplift at 25%. The appeal passed the sift. While the appeal was in dependency before the Employment Appeal Tribunal the remedies hearing took place. In the events that happened the tribunal issued its remedies judgment shortly before the appeal was due to be heard. It decided that it should reconsider the 25% uplift "on its own initiative" (rules 70 and 73 of the 2013 Rules). The respondent then dropped its appeal on the Acas uplift. On the eve of the appeal the respondent abandoned the appeal in its entirety.

14 The purpose of an appeal to the Employment Appeal Tribunal is to deal with issues of law or cases where the factual findings may be said to be perverse. In this case the respondent would have required to satisfy the

A appeal tribunal that the tribunal had made an error of law. That may not have been straightforward. As will become obvious in the paragraphs that follow, if there was an error of law in this case, it had arisen in unusual circumstances. The error was one that both the respondent and the claimant had a hand in creating. The issue they asked the tribunal to resolve was tainted with their own error. In addition, the respondent had provided
B written submissions that accurately stated the law. The tribunal, no doubt beguiled by the terms of the issue and the absence of any oral submission explaining that the issue could not be resolved without further evidence, determined the Acas uplift. I was referred to *Secretary of State for Health v Rance* [2007] IRLR 665, 673 where the appeal tribunal helpfully summarises circumstances in which it can be said an error of law may or may
C not be said to exist. It is not obvious that the appeal tribunal would have regarded the order as marked by error of law.

The remedies hearing

15 The case progressed on to a further hearing on remedies. I was advised that the claimant submitted to the tribunal before the remedy
D hearing that the Acas uplift was res judicata. The parties sought to agree issues. They agreed the following issue (hereafter "issue 2"): "Would it be just and equitable to award the claimant a 25% uplift on the sum awarded to him?"

16 The agreement containing issue 2 is set out in the core bundle.

17 The remedies hearing then took place over four days. Towards the end of the fourth day the parties addressed the Acas uplift. The claimant
E lodged a transcript of the submissions made by the parties. Mr Craig QC for the respondent observed that the tribunal had power to reconsider the Acas uplift on its own motion. Senior counsel for the claimant, Mr Nicholls QC, described this suggestion as "extraordinary". He advised the employment judge that he had not anticipated this submission and had not come prepared to address it (although I see that Mr Craig had trailed the suggestion in his
F written closing submission). Notwithstanding, Mr Nicholls provided the tribunal with a precis of the case law and observed that the power is rarely and sparingly used. He was extremely brief. No cases were cited.

18 The suggestion evidently found favour with the employment judge. He issued his remedies judgment and ordered a reconsideration on his own initiative under rule 73. The order of 1 February 2019 ran as follows:

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> "There shall be a reconsideration of the Acas uplift. Once the parties have calculated the sums to which the claimant is entitled, the parties will have an opportunity to put forward any further submissions on the question of whether the percentage uplift should be reduced, and if so to what extent, having regard to the total compensation to be paid to the claimant."

H **19** This led to a change in the respondent's position. One week after the tribunal issued its remedy judgment and five days before the liability appeal was due to be heard the respondent withdrew the ground of appeal that dealt with the Acas uplift. The day before the liability appeal the respondent withdrew the remainder of its appeal.

The rules on reconsideration

20 The rules dealing with reconsideration are found in the Employment Tribunals Rules of Procedure 2013, rules 70–73. Rule 70 provides:

> "A tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ('the original decision') may be confirmed, varied or revoked. If it is revoked it may be taken again."

21 Rule 71 is not relevant for present purposes. Rule 72(2) is relevant to the present case inasmuch as it is referred to in rule 73. Rule 72(2) provides:

> "the original decision shall be reconsidered at a hearing unless the employment judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations."

22 Rule 73 provides:

> "Where the tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

23 I have little doubt that rule 73's primary purpose is to enable tribunals to act on their own initiative without the involvement of parties. The phrase "on its own initiative" is no doubt intended to stand in contrast with cases where a party acts on its own initiative and makes an application under rules 70–72. This case raises the question of what should happen when one of the parties asks the tribunal to act "on its own initiative".

The grounds of appeal

24 Only one ground passed the sift. I have broken it down into three segments.

Did the respondent apply for reconsideration?

25 The claimant submitted that in substance the respondent's submission to the tribunal in connection with the Acas uplift was an application for reconsideration and should be subject to the rules on reconsideration. If it was truly an application for reconsideration by the respondent, then it was not open to the tribunal to apply rule 73. The claimant provided me with a transcript of the hearing. The relevant part of the transcript is in the core bundle. It records Mr Craig's submission as follows:

> "the tribunal . . . has rules that allow it to reconsider a judgment. Obviously this would be out of time, but you can do that of your own motion, and, indeed, you can extend the time for doing it, and in our submission, if you take the view that a 25% uplift to an award would be

A disproportionate . . . then that's what you should do, and it would be, in our submission, deeply unattractive for the tribunal to do that, and would be forced to make an award for an Acas uplift that was out of all proportion to the wrong, or the harm, that it caused."

26 Having considered this submission carefully, I am of the opinion that it supports the following propositions. Mr Craig on behalf of the respondent
B submitted that the tribunal was entitled to reconsider the order. If the respondent applied to do so Mr Craig accepted "this would be out of time". Mr Craig referred to the alternative means of reconsideration. He submitted: "you can do it of your own motion". This is a reference to the tribunal's separate power under rules 70 and 73 which is unconstrained by time limits. The words "you can do it of your own motion" are at variance
C with the wording of the 2013 Rules. The words he used are drawn from the Employment Tribunals Rules of Procedure 2001 (SI 2001/1171). The 2013 Rules have superseded the 2001 Rules. Rule 13(1) of the 2001 Rules provided:

> "Subject to the provisions of this rule, a tribunal shall have power, on the application of a party, or of its own motion, to review any decision on
D the grounds that: (a) the decision was wrongly made as a result of an error on the part of the tribunal staff; (b) a party did not receive notice of the proceedings leading to the decision; (c) the decision was made in the absence of a party; (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known or foreseen at the time of the hearing; or (e) the interests of justice require such a review."

E

27 After referring to the power of the tribunal to reconsider "of its own motion", Mr Craig returned to the possibility of an application by the respondent and reminded the tribunal that if an application was made "you can extend the time for doing it". Mr Craig thus submitted that both methods of reconsideration were available, although in the case of an application under rules 70–72 the respondent would have to seek leave to be
F heard out of time. Mr Craig went on to say, "that's what you should do". Since an application under rules 70–72 was beyond the 14-day time limit prescribed in rule 71 an application would have had to be supported by an application under rule 5 of the 2013 Rules. The respondent had not sought an extension of time. In that circumstance the words "that's what you should do" can only refer to the tribunal reconsidering "on its own
G initiative" under rule 73. Mr Craig's submission was in effect that the tribunal should use its own powers under rules 70 and 73. While he referred to the possibility of an application for reconsideration, he did not apply for a reconsideration. Thus, in my opinion it is clear that Mr Craig submitted to the tribunal that it should reconsider "on its own initiative". This understanding is consistent with the speaking note for the respondent. In my opinion therefore the respondent was not making an application for
H reconsideration.

Is a party entitled to invoke a tribunal's power to reconsider?

28 The claimant further submitted that, even if it could not be said that the respondent had applied for a reconsideration, it had nevertheless

requested the tribunal to reconsider and, in that situation, it could not be said that the tribunal had acted "on its own initiative". A

29 In this connection the claimant referred me to *TCO In-Well Technologies UK Ltd v Stuart* [2017] ICR 1175. In that case the claimant sought reconsideration pursuant to rules 70 and 71 on the ground that the compensatory element of his award should have been grossed up to take account of his tax liability. The respondent objected that the application came after the 14-day time limit prescribed by rule 71. Without making any decision on the claimant's application, the tribunal reconsidered the award "on its own initiative" under rule 73 and decided the calculation was wrong and that the interests of justice required the compensatory element to be grossed up. The employer appealed. In the appeal tribunal the principal issue for Lady Wise was whether the tribunal was entitled to utilise its rule 73 powers if the claimant had already sought a reconsideration under rules 70–72. Lady Wise looked at the wording of the rules and came to the conclusion that they were separate processes and that an application precluded the tribunal from acting "on its own initiative". I entirely agree with Lady Wise. B C

30 The claimant argued that the following passage, at para 28, supported the claimant's case. D

> "The inclusion in rule 70 including within the term 'on its own initiative' action taken following a request from the appeal tribunal is a necessary clarification, as otherwise it could easily be argued that reconsideration following such a request could never fall within the usual meaning of reconsidering on one's own initiative. Far from supporting the construction put on it by the claimant, I consider that the inclusion of this particular route to reconsideration on the tribunal's own initiative tends to support a conclusion that a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative." E

31 The claimant relied in particular on the following: "a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative." The claimant pointed out that the respondent had made a request saying, "that's what you should do". Ms D'Souza submitted that if such a request was made then the tribunal could no longer reconsider "on its own initiative". F

32 In my opinion, however, the quotation relied on by the claimant has been taken out of context. *TCO* does not involve a party asking a tribunal to act "on its own initiative" under rule 73. *TCO* involved an application to reconsider under rules 70–72. Lady Wise examined the wording of rule 70: G

> "A tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so." H

33 Lady Wise noted that the rule treated reconsideration on its own initiative as an alternative to reconsideration on the application of a party. She concluded therefore that they could not be used in combination. She noted that the rule allowed the appeal tribunal to request reconsideration.

She asked herself whether that undermined her hypothesis and concluded the purpose of the words "(which may reflect a request from the Employment Appeal Tribunal)" was to bring inside the appeal tribunal request within the scope of a reconsideration on the tribunal's "own initiative". Thus, she reasoned, the exception proved the rule. The specific provision made for a request from the appeal tribunal showed that a request or application from outside the tribunal should be treated as excluding a tribunal reconsidering "on its own initiative". I entirely agree with her reasoning and with her interpretation of the rule.

34 The words, at para 28, "a request from any other party, especially one that takes the form of a formal application for reconsideration, excludes the route of reconsideration at the tribunal's own initiative" refer to an application that does not invoke a tribunal's power to "act on its own initiative". *TCO* has no relevance to this case.

35 That leaves the question of principle open for my consideration. Is a tribunal unable to act autonomously "on its own initiative" because submissions are made to it about its power in rules 70 and 73?

36 I am unable to accept that the tribunal's ability to act on its own initiative was removed by the first of Mr Craig's submissions. An advocate is entitled to remind a tribunal of its powers. Of greater delicacy is whether the submission "that's what you should do" impinged upon its power to act "on its own initiative". I acknowledge that the distinction between an application for reconsideration and a reconsideration on the tribunal's "own initiative" might become blurred if a party was entitled to persuade a tribunal to act under rules 70 and 73. But these considerations do not arise here. Mr Craig's submission was brief (very brief). It contains no argument or reasoning. The circumstances that might be thought eloquent of the desirability of reconsideration were already known to the employment judge. It is clear from the remedies judgment that the employment judge did act on "its own initiative". It is evident that he considered he should intervene. It is evident that he informed himself of the relevant rules and case law without the benefit of any submissions.

37 I am not persuaded that the short statement "that's what you should do" could be said to impinge on the "initiative" of the tribunal. I consider that the discomfort that a judge might feel if he or she thought that the respondent was simply getting the tribunal to do what it had culpably failed to do does not arise on the facts of this case. I consider Mr Craig's advocacy remained within the rules. I do not consider that his submission led the tribunal into an error of law.

38 The claimant argued that the route chosen by the tribunal put the respondent in a more advantageous position than it would have been if it had applied for a reconsideration under rules 70–72. It was relieved of the need to argue that the tribunal erred in law in the appeal to the appeal tribunal and it was relieved of the need to apply for reconsideration and, by virtue of its own fault, to apply for reconsideration out of time. In my opinion these points would have more force if they had been raised in connection with the tribunal's decision to exercise its power under rules 70 and 73. But there is no reference in the notice of appeal to the proposition that the tribunal had erred in law by failing to attach weight to the failure of the respondent to seek reconsideration. Nor is there a ground of appeal

submitting that the tribunal erred in law by concentrating on the question of "common mistake". I do not consider that I can entertain this argument.

39 The respondent referred me to *Southwark London Borough Council v Bartholomew* [2004] ICR 358. In that case a local authority applied to a tribunal asking it to review an order it had made "on its own motion" in the "interests of justice". It is an old Rules case. The relevant provision was rule 13(1)(e) of the old Employment Tribunals Rules of Procedure 2001. Although the case differs in a number of respects from the present case and although the point was not argued, the respondent asked me to notice that, although ostensibly acting "on its own motion", the tribunal was addressed by the local authority and asked to review "on its own motion". Although it was interesting to read *Southwark*, the case does not discuss the points submitted to me and is therefore of limited use.

Was the tribunal's decision on the Acas uplift final?

40 The remaining ground of appeal runs as follows:

> "Further, even if the tribunal was properly entitled to reconsider its judgment of its own motion, the tribunal erred in failing to give effect to principles concerning the importance of finality and/or the significance of a party's representative failing to rely on a particular argument."

41 Ms D'Souza drew attention to the definition of the word "judgment" in rule 1(3)(b) of the 2013 Rules. A "judgment" there is defined as:

> "being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines— (i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or (ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue)."

42 In this part of the ground of appeal the claimant submitted that the principle of finality ought to have dissuaded the tribunal from reconsidering the order. The claimant submitted that reconsideration came about because a "particular argument" that had not been ventilated at the liability hearing was entertained at reconsideration. She submitted that the order was a judgment which finally determined the issue of the Acas uplift. She noted that, although the claimant had from time to time described the order as "res judicata", it would be more accurate to say that the order finally determined the issue of the Acas uplift. I accept that the principle of finality is an important principle. It is not however an absolute principle and is subject to many qualifications. The tribunal decision was not final to the extent that it was subject to both reconsideration and appeal. For as long as reconsideration or appeal remained competent, I do not consider that rule 1(3) of the 2013 Rules is in point. As regards the "particular argument" I was referred to *Flint v Eastern Electricity Board* [1975] ICR 395, which makes it clear that a tribunal is not obliged to allow new points to be argued on reconsideration simply because they have been omitted and seem relevant to the disposal of the claim. Phillips J set his face against what he described as "second bites at the cherry" (p 404). But no new arguments were placed before the tribunal at the remedies hearing. The respondent had stated the

A law accurately in its written submission at the liability hearing. There was no "second bite at the cherry". The problem in this case was that the parties did not appreciate that the law articulated in *Wardle v Crédit Agricole Corporate and Investment Bank* [2011] ICR 1290 undermined the issue they had agreed. The question of a new legal argument does not arise, and the principle of finality is not in play. The tribunal was entirely justified in seeking to sort out the problem that had arisen.

B **43** In my opinion this case resembles *Williams v Ferrosan Ltd* [2004] IRLR 607. In that case the appeal tribunal approved the use of the power to review (or, as it is now called, "to reconsider") where the parties and the tribunal had collectively misunderstood the law and had failed to appreciate that an award should be grossed up so as to take account of the tax liability on the payment. This is the source of the tribunal's description of the Acas C uplift as a "common mistake" (para 17). I think the tribunal was right to see the analogy with *Williams* and take the same approach. It may be said that the facts of this case call for reconsideration more strongly in that the respondent had correctly identified the law but failed to realise that, if it did not seek to amend the issue or alert the tribunal to the conflict between his written submission and the issue, the tribunal might fall into error. Justice D would be affronted if matters were left untouched. I accept that it could not be said in this case that "this error would have been corrected by the Employment Appeal Tribunal" (para 17). The respondent's failure to seek reconsideration was a factor that may have troubled the appeal tribunal on appeal from the liability hearing. But that detail apart, *Williams* supports the tribunal's approach.

44 Under reference to this aspect of the ground of appeal, Ms D'Souza E advanced a series of arguments that were not prefigured in the ground of appeal. In light of the view that I have taken it is not necessary for me to set them out at length. They are to be found in the claimant's skeleton argument under "issue 3". She argued, inter alia, that the tribunal had failed to follow the procedures set out in rules 70–73. As a result, the claimant had not had an opportunity to be heard on the question of whether it was "necessary in the interests of justice". She took me through the case law that governs the F exercise of the discretion and pointed out that the tribunal had failed to give the claimant an opportunity to be heard on how these cases should be interpreted. She pointed out that the tribunal had examined the cases for itself and had, she argued, come up with an erroneous conclusion. In the skeleton argument at para 62 et seq arguments based on procedural unfairness and natural justice are set out. Ms D'Souza took me to para 97 of G the remedy judgment and argued that the tribunal had misstated the parties' position in connection with the Acas uplift and the rule in *Wardle*. It was evident, she submitted, that there was not a "common mistake" (*Williams v Ferrosan Ltd*, see above). Ms D'Souza also argued that the tribunal's course of action had meant that the claimant had no opportunity to address it on the significance of the failure to apply for reconsideration and the fact that the respondent had been represented throughout by skilled lawyers and H counsel (*Lindsay v Ironsides Ray & Vials* [1994] ICR 384). The claimant argued that he should have been given an opportunity to address the tribunal on the cases cited by the tribunal at para 26 of the judgment. She pointed out that the claimant had not been heard on the cases referred to by the tribunal—*Ministry of Justice v Burton* [2016] ICR 1128, *Newcastle upon*

Tyne City Council v Marsden [2010] ICR 743, *Flint v Eastern Electricity Board* [1975] ICR 395 and *Lindsay v Ironsides Ray & Vials* [1994] ICR 384.

45 I do not consider that the ground of appeal raises these points. I do not have any locus to determine them. I make the following brief observations in deference to Ms D'Souza's detailed and careful submissions.

46 Where a matter is to be determined that affects the interests of a party to a litigation, it would ordinarily be thought consistent with the precepts of natural justice that the party so affected should be given an opportunity to be heard. It should be remembered however that rule 73 places the authority to decide whether there should be a reconsideration in the hands of the tribunal. I am not perturbed by the absence of detailed submissions in this connection at the remedies hearing. I do not accept Mr Craig's submission that the claimant had an opportunity to set out the arguments referred to above at the remedies hearing. It was not appropriate to make such submissions at that stage. Rule 73 leaves the question of whether to propose reconsideration in the hands of the tribunal. The tribunal evidently apprised itself of the law after the remedies hearing as I would expect it to do and issued its judgment appointing a hearing under rule 73. The remedies judgment sets out its assessment of the cases the tribunal considered to be relevant to the issue of reconsideration. In light of its conclusion, the tribunal made the following order:

> "There shall be a reconsideration of the Acas uplift. Once the parties have calculated the sums to which the claimant is entitled, the parties will have an opportunity to put forward any further submissions on the question of whether the percentage uplift should be reduced, and if so to what extent, having regard to the total compensation to be paid to the claimant."

47 The tribunal knew that the claimant's position was that the order was res judicata. The tribunal's view was that because it was a "genuine, common mistake" the order could be reconsidered "on its own initiative". I acknowledge that this conclusion was reached without the claimant having an opportunity to be heard on why it could not be called a "common mistake" and why other factors, e g the failure to apply for reconsideration, militated against the tribunal hearing the matter on "its own initiative". The tribunal should perhaps have invited submissions on these issues. That approach would appear to me to be in closer harmony with the terms of rule 73. Although this form of reconsideration is both initiated and resolved by the tribunal, there will be cases where the interests of justice make it desirable to give the parties an opportunity to make submissions before pronouncing the order. I accept that paras 26 and 27 of the remedies judgment indicate that *Ministry of Justice v Burton* and *Newcastle upon Tyne City Council v Marsden* were central to the tribunal's reasoning and I accept that the citation of other authorities would have been helpful but I am not satisfied that giving the claimant an opportunity to be heard on these issues would have made any difference to the outcome (see *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449). The overshadowing consideration in the mind of the tribunal was that the order had been pronounced as a result of a combination of errors by both parties and the tribunal. Although the tribunal does not express any view on the size of the

A award for the Acas uplift, I think it is legitimate to infer that it was concerned that the order might lead to an excess of compensation. I do not consider that the arguments laid before me by Ms D'Souza would have made any difference to the outcome. Since however the claimant did not raise these issues in his grounds of appeal these arguments are academic.

48 The respondent submitted that the claimant was not entitled to argue the grounds of appeal because he had agreed to issue 2, set out at B para 15 above. It proceeded on the basis that the size of the Acas uplift was a matter which should be addressed at the remedies hearing. It was not clear to me whether this submission was based on principles of estoppel/personal bar or contractual agreement. Whichever basis is advanced, it is unsound. The submissions supplied to the tribunal made it clear that the claimant submitted that the order was final. In this circumstance it is not possible to C read the issue as amounting to an acceptance that the tribunal was entitled to vary the order if it was just and equitable to do so. In any event I am sceptical of the proposition that contractual analysis or the doctrines of estoppel/personal bar may be applied to court documents designed for the limited purpose of identifying the issues in dispute between the parties. Parties may agree that an issue is in dispute before a court without any implication that they concede the legal or factual predicates on which they D proceed. Although it forms no part of the reasons I have given for the disposal of the appeal, I should observe that I consider the claimant must take a share of blame for the difficulty that has arisen. I acknowledge that the tribunal should have considered the written submission from the respondent that set out the law and should have seen that it would not be possible to resolve the issue in the absence of evidence of quantum. But in E fairness to the tribunal both parties had agreed the issue. Neither party warned the tribunal that it could not resolve the issue consistently with *Wardle* without evidence of quantum. I acknowledge that the respondent could have tried to put the error right. This sort of failure is tailor-made for the reconsideration procedure and it would have been open to the respondent to seek reconsideration. I have explained earlier in the judgment why I consider the explanations they have offered for their failure to do so F are hard to understand. Whatever the position, I consider that the tribunal was entitled to exercise its own initiative and seek to reconsider the size of the Acas uplift.

49 I therefore refuse the appeal and remit the claim back to the tribunal to proceed as accords.

G *Appeal dismissed.*
Case remitted to employment tribunal.

JENNIFER WINCH, Barrister

H

Case No: HQ05X01375

Neutral Citation Number: [2006] EWHC 3291 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

20th December 2006

Before :

MR JUSTICE NELSON

- -

Between :

(1) THAMES TRAINS LTD	**Claimants**
(2) RAILTRACK PLC (In Administration)	
- and -	
MICHAEL ADAMS	**Defendant**

- -
- -

William Stevenson QC and David Platt (instructed by **Halliwells**) for the **Claimants**
Colin McCaul QC (instructed by **Christian Khan**) for the **Defendant**

Hearing dates: 27 – 28th March 2006

- -

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.

.....

MR JUSTICE NELSON

Mr Justice Nelson :

1. The Claimants seek to set aside a consent order of 11 March 2005 recording the terms of settlement of the action between the parties, reached in a telephone call at 1140 a.m. on 25 February 2005, on the grounds that the Defendant is estopped from asserting the validity of the consent order by reason of the unconscionable conduct of his solicitors, or alternatively on the grounds that the settlement was vitiated by unilateral mistake on the part of the Claimants, that mistake being contributed to by the conduct of the Defendant's solicitors. Whether the case is put on the basis of mistake, estoppel or unconscionable conduct, at its heart lies the assertion that the Defendant's solicitor was under a duty to inform the Claimant's solicitor of an earlier offer to settle the matter which she had sent by fax at 10.41 a.m. on 25 February 2005, but which the Claimant's solicitors had not received and knew nothing of during the settlement discussions at 11.40 a.m. on the same day. As an alternative to setting aside the consent order a declaration is sought by the Claimants.

The Facts

2. Michael Adams suffered exceptionally grave injuries in the Ladbroke Grove rail crash on 5 October 1999. He was then a 36 year old successful American businessman who had recently started a job in the United Kingdom. He commenced proceedings against the Claimant train companies to whom I shall hereafter refer as Thames Trains, on 20 January 2003. Judgment on liability was entered by consent on 21 February 2003. The assessment of damages was fixed to commence on Monday 28 February 2005 with a time estimate of 15 days. Discussions had taken place between the parties in an attempt to settle the matter but no settlement had been achieved. Substantial interim payments had been made (the amount of which could not be agreed) together with Part 36 payments, firstly on the basis of a structured settlement, and then on the basis of a lump sum award. As at Friday 25 February 2005 the sum of US$9.3M net of interim payments was in court. The notice of 7 February 2005 resulting in that amount in Court stated that the exact amount of interim payments made, remained to be agreed.

3. At about 9.45 a.m. on 25 February 2005 Ms Louise Christian of Christian Khan, Mr Adams's solicitor, telephoned Mr Rae-Reeves of Halliwells, Thames Trains' solicitors. She sought an increase on the US$9.3M in court, explaining that Mr Adams had been told by his investment advisor that he needed a minimum of $10M to invest for him. Mr Rae-Reeves informed her that there were no further monies available and that the trial would therefore proceed.

4. In accordance with her instructions from Mr Adams, Louise Christian agreed with her partner, Nicola Bould, that she should send a fax to Thames Trains' solicitors explaining that Mr Adams was prepared to accept the US$9.3M in court, subject to three conditions. The fax was sent to Halliwells at 10.41 a.m. on 25 February 2005, in the following terms:-

> "Dear Sirs
>
> **Re: Michael Adams v Thames Trains Ltd (1) and Railtrack plc (2)**

> The Claimant is prepared to settle his claim by accepting the Defendants' payment into Court. This settlement is on the basis that interim payments made to the Claimant are deemed to write off past loss so that the Claimant will receive a cash sum of the US$9.3M which has been paid into Court by the Defendants.
>
> The Defendants are to pay the Claimant's costs on the standard basis to be assessed if not agreed. There are to be no deductions from damages in respect of interim payments made on account of costs or disbursements. The interim payments made on account of costs and disbursements by the Defendants will be deducted from the final total of costs to be paid to the Claimant.
>
> Please confirm by return of fax that the terms of settlement are agreed so that we can notify the Court and all witnesses."

5. Whilst Ms Bould and Ms Christian were dealing with and sending the 10.41 a.m. fax, Mr Rae-Reeves, in spite of saying that no further monies were available, was consulting with his insurer clients to establish whether they would be willing to pay any more money to attempt settlement of the trial. He obtained such instructions and phoned Ms Christian again at 11.40 a.m. He had not by that time received the 10.41 a.m. fax from Christian Khan and was therefore wholly unaware of its existence or content. When he spoke to Louise Christian again at 11.40 a.m. he offered a further $500,000. She told him that she had sufficient instructions from her client to say immediately that such a sum was acceptable. They discussed and resolved between them the issues as to interim payments writing off past loss, the payment of the Claimant's costs on a standard basis, and no deductions from damages in respect of interim payments made on account of costs or disbursements. At no time during the telephone conversation did Louise Christian inform Mr Rae-Reeves of the 10.41 a.m. fax or its content. She did not know whether Ms Bould had sent it but in any event she formed the view that she had no duty to inform Thames Trains' solicitors of the offer to settle contained in that fax. It did however become clear to her during the course of the conversation with Mr Rae-Reeves that he clearly had not received it.

6. After accepting Mr Rae-Reeves' offer Ms Christian spoke to Nicola Bould, and asked her whether the fax had been sent. Nicola Bould spoke to her secretary who confirmed to her and Ms Christian that a fax transaction report said that the letter had been sent. She also asked Ms Bould to send a second fax confirming in writing the terms of the agreement which had been reached during the 11.40 a.m. telephone call and withdrawing the 10.41 a.m. fax which had not been answered. That second fax confirmed the settlement agreement reached on the 11.40 a.m. telephone call between Ms Christian and Mr Rae-Reeves. It accurately recorded the terms agreed on the telephone save that it omitted a reference to the agreement that no deductions would be made from the Claimant's damages in respect of interim payments of costs. The consent order which was signed by both parties on 3 March 2005 corrected this omission. The final sentence of this second fax states that it "supercedes the earlier fax which was sent in error". It should have stated that the first fax was withdrawn. Ms Christian describes this erroneous statement as being her personal responsibility. It is said in Nicola Bould's statement that they needed to withdraw the first fax as quickly as possible as it appeared that Halliwells had not received it. The time when

the second fax was sent is not known but it can be inferred that it was sent soon after the telephone discussion starting at 11.40 a.m. had concluded. There is no evidence as to when this second fax arrived at Halliwells.

7. The 10.41 a.m. fax was received by Mr Rae-Reeves' assistant on her computer at 1331 on 3 March 2005. Halliwells had a system at their offices whereby faxes could be sent directly to an individual personal computer and appeared contained in an e-mail. There was however a systems error at the material time which meant that although faxes were leaving the sender's location showing a successful transmission, they were not arriving on the recipient's personal computer.

8. When the fax of 10.41 a.m. on 25 February 2005 was received by Mr Rae-Reeves on 3 March 2005 he concluded that it was an acceptance of the initial offer of US$9.3M plus interim payments and costs which were the same terms that had been offered by the Claimants at the meeting between the parties on 1 February 2005. There was in his opinion a concluded contract at that time, and any further purported agreement at 11.40 a.m. offering a further $500,000 was based on a mistake, namely ignorance of the fact that the previous offer had already been accepted by the Defendant's solicitor's first fax at 10.41 a.m. Alternatively, had the Defendant's solicitors' fax of 10.41 a.m. constituted an offer and had it been brought to his attention he would have accepted it.

9. Thames Trains sought to set aside the consent order which had been signed in ignorance of the Defendant's solicitor's fax of 10.41 a.m., but a sealed consent order cannot be set aside without the agreement of the parties except in a fresh action commenced for that purpose. No such consent was forthcoming and the application was dismissed. As a consequence the proceedings before me were issued in May 2005.

10. The application to set aside the sealed consent order made in the main action was based solely upon the contention that the 10.41 a.m. fax constituted an acceptance of the Part 36 payment. In the proceedings before me it was initially asserted that the 10.41 a.m. fax was an acceptance of the money in Court on terms already agreed at a meeting on 1st February 2005 and that there was no consideration for the additional $500,000 which the Claimants were not therefore liable to pay. This contention was abandoned by letter dated 15 March 2006 so that the issues before me are estoppel, mistake, and unconscionable conduct by the Defendant's solicitor, arising out of her failure to inform Mr Rae-Reeves of the 10.41 a.m. fax when, as the Claimants contend, she was under a duty to do so.

The evidence.

11. Mr Rae-Reeves and Ms Christian both gave evidence. They confirmed the facts set out above. Mr Rae-Reeves sought to state what he would have done if placed in a similar situation to that of Louise Christian but an objection was made to the adducing of this evidence and the line of questioning was not pursued. Ms Christian said that on 25 February 2005 her client, Mr Adams, was in the United States. She said that she would not answer the question put to her by Mr William Stevenson QC on behalf of the Thames Trains as to whether Mr Adams had made arrangements to fly to England for the trial. That was privileged she said. It was put to her that he had no plans to travel to the UK to which she replied, "I remain silent". It was put to her that had she

been in Mr Rae-Reeves' position she would have expected him to tell her of the 10.41 a.m. fax and its content. She replied that she would have been very upset that the letter had not reached her, not with him, but with her office. She said that a solicitor in such a situation has an overriding duty to his client and must act in accordance with that duty. She rejected the word 'unconscionable' as a description of her conduct. She acted in accordance with her duty to her client whose overriding interest would be to have the extra $500,000. She repeated that she would have been very upset with her office, not with Mr Rae-Reeves, if he had been in her position and failed to tell her about the first fax.

The submissions.

1. Thames Trains.

12. Mr William Stevenson QC submitted on behalf of Thames Trains that Ms Christian was under a duty to inform Mr Rae-Reeves of the 10.41 a.m. fax. It was her failure to speak to Mr Rae-Reeves of which complaint was made, as the Claimants were not saying that Ms Christian had said or done anything, apart from remain silent, which encouraged Mr Rae-Reeves to believe that Mr Adams would not accept the money in Court. The duty of a solicitor is regulated by the Solicitors Act 1974, the Solicitors Practice Rules 1990, the CPR and common law. As an officer of the Court, a solicitor is required to maintain a high level of professional conduct. Accordingly the duty of a solicitor is different and higher than a litigant in person.

13. Practice Rule 1.01 of the Solicitors Practice Rules includes the duty to act in the best interests of the client but equal weight under the Rule is given to the solicitor's independence and integrity, his good repute and the profession's good repute and the solicitor's duty to the Court. Where there is a conflict, the Guidance Notes under 1.02.6 state that the public interest in the administration of justice must take precedence. Mr Stevenson submits that any conduct which is opportunistic or amounts to sharp practice is not in the interests of the administration of justice, that the law should support commercial and professional probity, that solicitors should be able to rely upon their fellow members to act fairly and in a frank and straight forward manner, and that the best interests of litigants are best promoted by a transparent and fair negotiation process. Thus the statutory duty of a solicitor to his lay client is not absolute, but qualified by considerations of public policy.

14. CPR Rule 1.3 requires a party and hence the solicitor acting for him, to 'help the Court to further the overriding objective'. A solicitor has therefore to assist in ensuring that cases are dealt with justly, that parties are put on an equal footing and that costs are saved. Solicitors, as officers of the Court have to be truthful, cite all relevant authorities and co-operate in the proper administration of justice.

15. Rule 19 of the Solicitors Practice Rules, which Mr Stevenson emphasises are statutory, requires that a solicitor must act towards other solicitors with 'frankness and good faith consistent with his or her overriding duty to the client'. A solicitor must not engage in deceitful conduct towards another solicitor. Thames Trains submit that Ms Christian was not frank and that her silence could properly be described as deceitful as she knew that the fax offering to accept the US$9.3M in Court was intended to provide a platform for the settlement of the action, that US$9.3M net of interim payments was a fair and just settlement which she had express instructions to accept,

that if Mr Rae-Reeves had received and read that fax the action would have been settled for US$9.3M as a lump sum rather than US$9.8M, that Mr Rae-Reeves had not received or read her fax, and that Mr Rae-Reeves had concluded the agreement to pay the additional $500,000 because of a misapprehension on his part, namely that Mr Adams would not accept the lump sum of US$9.3M in Court. Ms Christian's refusal to say whether Mr Adams had made any plans to travel to London to attend the trial on 28 February gave rise to the inevitable inference that no such plans had been made and Ms Christian knew it. That is why she knew that she would conclude a final settlement on 25 February. It was however accepted on behalf of Thames Trains that Ms Christian was under no duty to inform Mr Rae-Reeves of her client's travelling plans. What she should have told Mr Rae-Reeves was that a decision to accept the US$9.3M in Court, subject to the three other conditions being satisfied, had been made and communicated by the 10.41 a.m. fax. The fact that Mr Adams was prepared to accept the US$9.3M in Court was the essential determinant to reaching a compromise. The other issues were subsidiary and capable of resolution.

16. During the course of argument Mr Colin McCaul QC on behalf the Defendant submitted that there was no duty on Ms Christian to inform Mr Rae-Reeves of the 10.41 a.m. fax, but conceded that she would have had a duty if a specific direct question, such as, 'Are you going to reject the Part 36 payment?' was asked. Mr Stevenson submits that this concession shows illogicality of the Defendant's position. If there is a duty to give information it is surprising that it only arises if the person who does not have the information happens to ask a question about it.

17. The duty also arises as a matter of public policy as Mr Justice Walker, as he then was, said in *Ernst & Young v Butte Mining plc [1996] 1 WLR 1605*. He there said that whilst solicitors do not owe each other duties to be friendly, chivalrous or sportsmanlike they must be scrupulously fair and not take unfair advantage of obvious mistakes.

18. The duty upon Ms Christian also gives rise to estoppel by acquiescence or representation as defined by Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890*. See also *The Henrik Sif [1982]1 Lloyds Reports 456* and *The Stolt Loyalty [1993] 2 Lloyds Law Reports 281*. The Defendant is estopped from establishing a case at variance with the offer to accept the US$9.3M in Court and seek agreement on other aspects of the claim. Mr Stevenson submitted that the estoppel could be put in a number of ways. Thus it could be said that Mr Adams was estopped from asserting that the compromise and sealed consent order represented the true intention of the parties, or that Mr Adams was estopped from asserting that the action was settled by a payment of the extra $500,000, or that Mr Adams was estopped from denying that the Part 36 offer of US$9.3M was acceptable as the lump sum element of the agreement, or that Mr Adams was estopped from denying that if Mr Rae-Reeves had known of the fax of 10.41 a.m. he would not have offered the additional $500,000, or that Mr Adams is estopped from denying that the Claimants entered into the subsequent agreement at 11.40 a.m. on a mistaken basis, or that it was the conduct of his solicitors which engendered the mistake on the part of the Claimants. Mr Stevenson submitted that the parties were never at idem as to the additional $500,000 and as the consent order did not represent the agreed intention of the parties it should be set aside.

19. In oral submissions Mr Stevenson said that the nature of the estoppel was that Mr Adams was estopped from asserting that there was a concluded agreement at US$9.8M because Ms Christian had a duty to speak but was silent, and it would be unconscionable to hold the Claimants to the bargain when that was based on a misapprehension and ignorance of the fact that Ms Christian had instructions to, and did formally offer to take the money in Court. This should be contrasted with the Defendant's assertion that estoppel did not arise here as the only issue which was estopped was 'that Adams had in fact despatched an earlier lower offer'. Mr Stevenson submitted that that approach was inappropriate as it ignored the contents of the fax and the consequences that arose from it. No agreement would ever have been made on the eventual terms had the fax been received. An empty estoppel devoid of any value, as Mr McCaul submitted, was inappropriate when Thames Trains had been clearly misled and suffered detriment as a consequence.

20. Furthermore, it was submitted on behalf of Thames Trains, the agreement to pay the additional US$500,000 was founded upon a unilateral mistake of fact, namely ignorance on the part of Thames Trains and their solicitors of the 10.41 a.m. fax. This mistake, although not induced by the concealment of Mr Adams' solicitors as it had already been made, was nevertheless encouraged by their silence during the telephone conversation at 11.40 a.m. If there was a duty to speak, the failure to mention the previous offer in the 10.41 a.m. fax amounted to silence leading Thames Trains up the garden path.

21. Mr Stevenson also relied upon the more general doctrine of unconscionability referred to in *Mohamed v Farah [2004] NSWSC 482* and the emerging doctrine of mistake and unconscionability set out in *Chitty on Contract 29th Edition at paragraphs 5-012 and 7-111*.

22. It was common ground between the parties that when Mr Rae-Reeves made his offer at 11.40 a.m. and it was accepted, any other offer lapsed. The 10.41 a.m. offer was not withdrawn but when the US$9.8M offer was put forward it amounted to a counter offer and rejection of the earlier offer. The offer of US$9.3M then fell away.

2. Mr Adams' submissions.

23. There was no duty on Ms Christian to inform Mr Rae-Reeves either that the 10.41 a.m. fax had been sent or of its contents. A party to litigation is not obliged to be the nursemaid of his opponent and it is only in very rare cases that the law imposes a burden upon lawyers to help their opponent's case. A solicitor's overriding duty is to act in the best interests of his client.

24. The cases such as *The Henrik Sif* and *The Stolt Loyalty*, where a duty to assist an opponent's case has been found, are examples of situations where one party has effectively led the other up the garden path. Here, there is no question of Thames Trains' solicitors having set out on a particular course and Mr Adams' solicitors going along with it or encouraging it. All that occurred was that Thames Trains made an offer to settle and Mr Adams' solicitors accepted that offer.

25. There is, Mr Colin McCaul QC submitted on behalf of the Mr Adams, no duty to disclose such an offer unless the express question "Are you going to reject the Part 36 payment?" was asked. Silence therefore rules: if the question is not asked no

disclosure has to be made. Mr McCaul's submissions were forcefully deployed. He gave examples which, he submitted, demonstrated that the Claimants' proposition that there was a duty to inform in these circumstances was absurd. Thus for example if A despatches an offer by first class post to B which does not arrive and B telephones in ignorance of the letter and makes a better offer which is accepted, that agreement is binding in the circumstances. The same applies, Mr McCaul submits, to a letter sent by courier who gets lost and in the meantime the other party phones a better offer which is accepted. The same would also apply in a case where A and B were standing on other sides of a canyon. A shouts across an offer to settle the dispute but a gust of wind carries his words away and B does not hear them. B then shouts across an offer to A which is more beneficial to A than the offer that he has just shouted.

26. In all those situations it would be absurd, Mr McCaul submitted, to state that an agreement has not been finalised by the later offer being accepted. It is the acceptance which crystallises the matter in the law of contract. When a further offer is made all other offers have no value and fall by the wayside. Offer and acceptance is the way of the world. Thus if A makes an offer to B to sell shares on a rising market and the letter is delayed and the shares dive, B, who would have accepted the shares at the first price, is now able to buy them at a lower price. That, Mr McCaul submits, is 'the way the cookie crumbles'.

27. There would equally be no duty to disclose a lower offer which had not been transmitted in oral negotiation. Thus if junior counsel is despatched to make an offer to the other side but pauses on his way to answer his mobile telephone and in the meantime the other side come up to leading counsel and make a higher offer there is no duty upon leading counsel or his solicitor to disclose the fact that the junior had been instructed to make a lower offer which had not reached them. Mr Stevenson submitted that in all the examples given by Mr McCaul there would be a duty to speak, though this was, he said, less clear in the case of counsel and solicitor oral negotiations.

28. There was no unconscionable or deceitful conduct here and if there is no duty then there is no possibility of civil proceedings arising out of paragraph 19.01.1 of the Solicitors Rules. Even if an act of professional misconduct had occurred, it would not in itself confer a cause of action on Thames Trains. The conduct of Ms Christian could not be said to be unconscionable where, as here, she didn't know whether the fax had been sent or not when she received Mr Rae-Reeves' telephone call. There cannot be a duty to tell him of a fax which she doesn't know has been sent. If it had not been sent it would be wrong for her to have told him of her client's instructions. Had she done so she would have been in breach of the rules herself by giving Mr Rae-Reeves privileged information.

29. Estoppel could not arise where there was no duty to disclose but in any event Thames Trains' argument was ill-conceived. By not mentioning the 10.41 a.m. fax either Mr Adams represented that no such offer was in existence which would be estoppel by representation or acquiescence, or Thames Trains' better offer carried with it the assumption on Thames Trains part that no lower offer had been despatched by Mr Adams and that his failure to correct that assumption meant there was a shared assumption that no lower offer had been despatched, which is estoppel by convention. In either of these cases, Mr McCaul submitted, the only estoppel which arose was that Mr Adams would be estopped from asserting that he had actually despatched an

earlier lower offer. It would therefore have no impact whatsoever on the 11.40 a.m. agreement. Furthermore it was the Claimant's own equipment failure, namely their fax system, which caused them to make the offer of a further US$500,000. In such circumstances the Claimants could not have relied upon any conduct by Mr Adams' solicitors in making their offer. Nor could there be any detriment as if Ms Christian should have responded to the enhanced offer by stating that she had despatched her earlier offer, all she would have to say was that was that she withdrew her earlier offer and accepted Thames Trains increased offer.

30. In both *The Henrik Sif* and *The Stolt Loyalty* the parties were estopped from asserting something different from that which their assertions or conduct had led the other side to believe. This does not arise here, the offer was already in existence and no representation about it was made.

31. There was no unconscionable conduct which promoted any mistake which could lead the Court to say that the agreement was avoided. The Court should beware falling into the trap that Barret J did in *Mohamed v Farah* where a general concept of unconscionability arising from an inherent jurisdiction was relied upon. The English courts have not followed the route of saying that if it seems unjust a remedy must be found.

32. In both *The Henrik Sif* and *The Stolt Loyalty* one party deliberately encouraged the other in its mistaken belief. The same was also true in the *Ernst & Young* case where the solicitor's conduct was a major contributing cause of the mistake. The facts here should be contrasted. There is no mistake which needs to be corrected but an alleged duty to inform. There is no 'leading up the garden path' in this case such as existed in *The Henrik Sif* and *The Stolt Loyalty* and *Ernst & Young*. There is no entering into a contract under a self induced misapprehension and hence no mistake. (*Chitty paragraph 5-013*.)

33. The doctrine of mistake and unconscionability only applied in extreme cases where special disability applied. This was not the case here. Mr McCaul submitted the law of business could not work if a party had to disclose every offer made if sent, but not received. There was nothing unconscionable about failing to disclose the contents of an offer which never gets delivered because it is stuck in the post room of the sender.

The Law.

34. A solicitor's overriding duty is to his or her client. The Solicitors Rules, which are statutory, impose a duty of good faith upon the solicitor so that he must act towards other solicitors with frankness and good faith consistent with his or her overriding duty to the client. (Practice Rule 19.1)

35. A solicitor is an officer of the court and accordingly owes a duty to act honestly and with integrity in the proper administration of justice. CPR Rule 1.3 requires a party, and hence the solicitor appearing for it, to help the court to 'further the overriding objective'. A solicitor must therefore deal with cases justly and assist the court, for example, by citing all relevant authorities even those which are against his client's interest.

36. It is clear that a solicitor's duty to the court may bring him or her in conflict with his or her duty to act in the best interests of the client. The basic principles applicable to a solicitor include under Rule 1.01 of the Practice Rules 1990, the solicitor's independence or integrity, the solicitor's duty to act in the best interests of the client, and the solicitor's duty to the court. The conflict between these principles is recognised in the Guidance Notes (The Guide to the Professional Conduct of Solicitors 1999) where in 1.02.6 it is said:-

> "Where two or more of the principles in Practice Rule 1 come into conflict, the determining factor in deciding which principle should take precedence must be the public interest, and especially the public interest in the administration of justice."

37. There is however no general duty upon one party to litigation or potential litigation to point out the mistakes of another party or his legal advisors. Each situation must be judged in the light of its particular circumstances. *(The Stolt Loyalty [1993] 2 Lloyds Reports at 290.)* In the Court of Appeal decision in the *Republic of India and the Government of the Republic of India (Ministry of Defence) v India Steamship Co. Limited (The "Indian Grace")(No.2) 2 Lloyds Reports 12* case Lord Justice Staughton said:-

> "As Mr Rokison put it, a party to litigation is not obliged to be the nursemaid of his opponent, at any rate if the opponent is not an untutored individual but as well acquainted with commercial litigation as the Government of India. The law does sometimes impose a burden on solicitors and counsel to help their opponent's case; but the burden should only be imposed when it is truly necessary as otherwise, to quote Griffiths LJ in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] 1 AC 854*, the client will be tempted to ask 'Whose side are you on'. "

38. In *Ernst & Young* Mr Justice Walker said:-

> "Heavy, hostile commercial litigation is a serious business. It is not a form of indoor sport and litigation solicitors do not owe each other duties to be friendly (so far as that goes beyond politeness) or to be chivalrous or sportsmanlike (so far as that goes beyond being fair). Nevertheless, even in the most hostile litigation (indeed, especially in the most hostile litigation) solicitors must be scrupulously fair and not take unfair advantage of obvious mistakes…. The duty not to take unfair advantage of an obvious mistake is intensified if the solicitor in question has been a major contributing cause of the mistake."

39. On the facts of that case the court held that misleading conduct on the part of the plaintiff's solicitor had been the major cause of the Defendant's solicitors mistaken belief that the plaintiff was not about to serve notice of discontinuance when in fact it was, and that therefore the service of the notice was an abuse of process and would be set aside. In the course of his judgment Mr Justice Walker did not criticise the plaintiff's solicitor for failing to mention Ernst & Young's intention to discontinue as

she did not want to alert the opposition to the idea. The judge described that as 'plainly unexceptionable' and noted that the opposing solicitor also deliberately did not refer to discontinuance. Nevertheless the duty stated was the duty not to take unfair advantage of an obvious mistake, a duty which would exist even if the solicitor had not been a major contributing cause of the mistake.

40. The solicitor's duty to be scrupulously fair must apply in all cases whether he is dealing with a solicitor opponent or a litigant in person. The difference lies in what a solicitor can properly expect an experienced solicitor opponent to be aware of compared with that which a litigant in person might know. Whether or not a solicitor has taken unfair advantage of an opponent must be judged upon the facts, and relevant to that determination will be the experience and knowledge of his opponent.

41. I am satisfied that a breach of the rules of professional conduct will not in itself give rise to a cause of action, though consideration of the duties and responsibilities of a solicitor will illuminate and assist in the determination of whether estoppel or mistake prevent the Defendant from relying upon the agreement made at 11.40 a.m.

42. The underlying basis of equitable estoppel in cases such as this is clearly set out in *The Henrik Sif* by Mr Justice Webster. Relying upon the dictum of Lord Wilberforce in *Moorgate Mercantile Co Ltd* Mr Justice Webster said:-

> "..the duty necessary to found an estoppel by silence or acquiescence arises where 'a reasonable man would expect' the person against whom the estoppel is raised 'acting honestly and responsibly' to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations."

43. In *The Stolt Loyalty* Mr Justice Clarke, as he then was, cited the above passage from *The Henrik Sif* and Lord Wilberforce's dictum in *Moorgate Mercantile Co Ltd* in determining the circumstances in which a person may be held to be under a legal duty to take action of some kind rather than remain silent or inactive. He stated that the underlying basis for the existence of all equitable estoppel was that it must be unconscionable to allow the party estopped to deny that which he had allowed the other party to assume to be true.

44. The estoppel which arises in cases where it is said there is a duty to speak is often described as estoppel by acquiescence. Estoppel by convention may also however arise in similar circumstances. In *Republic of India* it was said by Lord Steyn that estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both, or made by one and acquiesced in by the other. Its effect was to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. The House of Lords in *The Republic of India* considered whether estoppel by convention and estoppel by acquiescence were but aspects of one overarching principle but did not so restate the law. It is however the case that both estoppel by convention and estoppel by acquiescence and general equitable estoppel are founded upon concepts of unconscionability, honesty and responsibility, the expectations of a reasonable man, and detriment to the party making the mistaken assumption. Although Mr Stevenson on behalf of the Claimants says this is solely a case of

estoppel by acquiescence it seems to me that estoppel by convention also falls for consideration.

45. The more general doctrine of mistake and unconscionability referred to in *Chitty on Contract para 5-012* is in my judgment properly restricted to cases of 'special disability' such as poverty, ignorance or lack of advice none of which apply here. Nor would I accept a general inherent jurisdiction in the court to set aside a compromise which it regards as unjust as Mr Justice Barret did in the Australian case of *Mohamed v Farah*. I do not consider that the English courts have espoused such a broad general inherent jurisdiction. My approach is therefore guided by the approach of the courts set out in *The Henrik Sif, The Stolt Loyalty* and *Ernst & Young*.

46. Mistake is a narrower doctrine than the forms of equitable estoppel being considered here. A unilateral mistake which does not relate to the terms of the contract will not render that contract void. *Chitty para 5-065*. There is however an overlap between mistake or misapprehension in the broader sense and the doctrine of estoppel as the case of *O T Africa Line Ltd v Vickers plc [1996] 1 Lloyds Law Reports 700* demonstrates. In that case Mr Justice Mance, as he then was, proceeded on the basis that the party who had made a mistake between pounds and dollars in a figure offered in settlement, would not be bound if they could show that the other party or those acting for it either knew or ought to reasonably to have known that there had been such a mistake. It is I think implicit in his judgment that a duty to speak rather than remain silent arose in those circumstances. On the facts of that particular case he found that there was nothing in the conduct of the party who had not made the mistake which made it inequitable for them to hold the other party to the apparent bargain.

47. I accept the agreement of Thames Trains and Mr Adams that when Mr Rae-Reeves made his offer at 11.40 a.m. the earlier offer lapsed. Alternatively it was withdrawn by the process of negotiations and agreement at 11.40 a.m. and by the second fax sent after that discussion.

Conclusions.

48. By 25 February 2005, one working day before the commencement of the trial on quantum, the parties had been engaged in many months of settlement discussions.

49. Whatever the prior differences had been between the parties they had been moving closer if not inexorably towards a settlement of Mr Adams' claim. Once Ms Christian had been informed by Mr Rae-Reeves that there were no further monies available she obtained instructions to settle the matter on the terms set out in the 10.41 a.m. fax. The fact that she declined to answer questions about Mr Adams' travelling plans from the USA to the UK for the trial on quantum suggests that Mr Adams did not intend to travel to the United Kingdom for the beginning of the trial. It is reasonable in such circumstances to infer that Ms Christian expected to be able to conclude a final settlement of the action before the trial commenced. In other words she was confident that a reasonable compromise would be reached in relation to the three issues set out in the 10.41 a.m. fax to which the acceptance of the US$9.3M in Court was subject. Mr Rae-Reeves on the other hand, although prepared to inform Ms Christian that no further monies were available, felt it appropriate to find out from his clients whether they would in fact pay any more to settle the claim.

50. The trigger for Ms Christian communicating her client's preparedness to accept the money in Court, subject to the three conditions, was Mr Rae-Reeves' statement that no further monies were available. It turned out to be an inaccurate statement though I am content to accept that Mr Rae-Reeves believed it to be correct at the time he made it.

51. The reason why the fax was not received by Mr Rae-Reeves was entirely due to the systems error in his office. Had he received the 10.41 a.m. fax it is probable that a settlement would have been reached upon the terms therein set out and no further payment would have been offered.

52. Ms Christian clearly became aware as soon as Mr Rae-Reeves made the increased offer of the additional US$500,000 that her fax could not have been received but I am satisfied that she did not know at that time whether this was because it had not been sent, or whether it had been sent, but had simply not been brought to Mr Rae-Reeves' attention. The fax had in fact been sent but Ms Christian was not to know this until she had confirmed with Nicola Bould and her secretary that a successful transmission report had been obtained in relation to that fax. As that fax contained an offer to accept the money in Court, not an acceptance of the money in Court, Ms Christian was entitled to withdraw that offer at any stage before acceptance. In such circumstances and by whatever test her conduct is assessed, it cannot properly be concluded that she owed any duty to inform Mr Rae-Reeves of the 10.41 a.m. fax or its contents until she had checked whether it had been sent. If it transpired that it had not been sent and she had informed Mr Rae-Reeves of its content she would have been in breach of her duty to her client in the passing on of privileged information, namely his instructions to her. Her conduct in not informing Mr Rae-Reeves of the fax or its content at that stage cannot in my judgment be described as unconscionable, unfair or taking advantage of her opponent.

53. Should she however, given her duties as a solicitor, and knowing that the fax had not been received, have continued with the conversation and entered into negotiations with Mr Rae-Reeves as if the fax had never been sent? I have considered whether a reasonable man would expect Ms Christian, acting honestly and responsibly, to bring to Mr Rae-Reeves attention the existence and content of the offer in the 10.41 a.m. fax. I have also considered whether her conduct in not doing so can properly be described in all the circumstances as unconscionable or 'deceitful' or 'sharp practice' or taking an unfair advantage of an obvious mistake. The relevant factors which brought the parties to this situation are in my judgment as follows:-

    1. Mr Adams and Thames Trains were both prepared to settle at or around the money in Court.

    2. Mr Rae-Reeves said to Ms Christian that no further monies were available beyond the money in Court

    3. Ms Christian's accepted that, and consequently sent the 10.41 a.m. fax offering to take the money in Court subject to the three conditions.

    4. Mr Rae-Reeves office fax system failed to deliver the fax to him

    5. Ms Christian failed to inform Mr Rae-Reeves of the 10.41 a.m. and its contents

6. Mr Rae-Reeves made an increased offer at 11.40 a.m.

7. Ms Christian accepted that offer.

54. All these factors were relevant to what ultimately happened. The acts or omissions of each side were responsible for the events which occurred. Thus if Mr Rae-Reeves had not informed Ms Christian that no further monies were available, but simply said that he would take further instructions, the 10.41 a.m. fax would not have been sent. What Mr Rae-Reeves said to Ms Christian about no further monies being available was inaccurate, even though I accept he thought it to be true when he told her. If Mr Rae-Reeves had known of the existence and content of the fax of 10.41 a.m. he would not have made the increased offer. But there were two causes of his lack of knowledge, firstly his own office fax system had failed to deliver the fax to him and secondly, Ms Christian did not inform him of the fax or its existence.

55. Ms Christian was entitled to withdraw the offer at any time. It is accepted by the parties that it did indeed lapse when Mr Rae-Reeves made his increased offer. This either constituted a counter-offer, even though he had no knowledge of the original offer, or the original offer simply lapsed as soon as another offer was made. For my part I would add that the negotiation and the acceptance of the 11.40 a.m. offer also amounted to a withdrawal of the original offer as did the contents of the second fax accepting the 11.40 a.m. offer and stating that the first fax was superceded. The fact that this second fax was ambiguously stated does not prevent it operating as a withdrawal of the original offer, if that had not already lapsed. It is important to note that Mr Adams was entitled to change his mind at any time and withdraw the offer before it was accepted, whatever prompted his change of mind.

56. In these circumstances I do not consider that a reasonable man would expect Ms Christian, acting honestly and responsibly, to have informed Mr Rae-Reeves of her earlier offer. Her conduct was not unconscionable, nor deceitful, nor sharp practice, nor was she taking unfair advantage of Mr Rae-Reeves ignorance of her offer, given, in particular, that it had only been made as a result of him inaccurately informing her that no further monies were available, and that he had failed to receive it because of systems failures within his own office. She was not therefore, in my judgment, on the particular facts of this case under any duty to speak. She was entitled to stay silent, act in her client's best interests and accept the increased offer. Had she been asked a specific question she may have been required to answer it depending on its terms, but she was not. As Thames Trains conceded she did nothing to encourage Mr Rae-Reeves 'mistake' save by her silence.

57. It follows that if she was under no duty to inform Mr Rae-Reeves of the 10.41 a.m. fax and its content during the telephone call at 11.40 a.m. she was under no duty to inform him of the offer later, after she had discovered that the fax had in fact been sent. Courtesy may well have dictated that she should have informed him that the offer had been sent but was now withdrawn, but she was not, as a solicitor and officer of the court, under a duty to so inform him.

58. She could, for example, as a matter of courtesy, have said to Mr Rae-Reeves, as soon as she realised in the 11.40 a.m. conversation that he was proposing to offer more money, that she had sent a written offer to accept the US$9.3M in Court subject to conditions after she had been informed by him at 9.45 a.m. that no further money was

available, but now that she appreciated that more money was in fact available that offer was withdrawn. She was not however under any duty to so inform Mr Rae-Reeves during the 11.40 a.m. telephone conversation.

59. I therefore conclude that no estoppel arises here. Had I found that a duty to speak did exist in this case I would not have construed the doctrine of equitable estoppel in such a narrow and convoluted way as Mr McCaul submitted I should. Had there been a duty to speak, Ms Christian would have been estopped from asserting that the matter had been settled at US$9.8M, or from asserting that more money than US$9.3M was needed to achieve settlement of the claim. Estoppel is an equitable doctrine and not one which works in such a mechanistic way as Mr McCaul's submission suggests. Nevertheless the issue does not arise as I am satisfied for the reasons I have given that no duty to speak existed on the facts in this particular case. Each case is fact sensitive. It will depend upon the state of negotiations and what is said and done by and between the parties. In general terms there would in my judgment be no duty to speak in the examples which Mr McCaul put forward, that is the undelivered letter, the lost voice across the canyon, the lost courier and the mobile phone using junior counsel. Each case will depend however upon its own individual facts.

60. The concept of unilateral mistake is difficult to apply to the facts of this case as there was not a self induced mistake but only ignorance of an earlier offer which there was no duty to disclose. The doctrine of mistake in circumstances such as these however operates in a very similar manner to the doctrine of estoppel and as there is no duty to speak, Thames Trains cannot found their case upon mistake.

61. The conclusion I have reached is one which in some ways is counterintuitive in that one would wish the utmost frankness to be used by all solicitors in their dealings with each other and other litigants. Nevertheless I am satisfied that the particular circumstances here as I have analysed above did not require Ms Christian to inform Mr Rae-Reeves of the existence of the earlier offer or its contents and that her duty as a solicitor including her duty to the proper administration of justice, did not require her to give him this information. The claim therefore fails on duty, estoppel, mistake and unconscionable conduct and must accordingly be dismissed.

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allegation.[33] In many cases, for example, a claimant will allege the fact of the defendant's negligence which the defendant denies. The law does not permit a defendant who has compromised a claimant's claim for damages based on the alleged negligence subsequently to pursue the suggestion that he was not in fact negligent for the purpose of avoiding the compromise. Not infrequently, in cases between landlord and tenant, the tenant will seek to claim damages for the failure of the landlord to effect certain external repairs in breach of an alleged implied covenant to that effect. In many situations the law implies no such covenant and yet the landlord might, for example, reduce his own claim for arrears of rent against the tenant because of the tenant's claim. He would not be permitted subsequently to allege that the compromise of the rent claim should be set aside because the tenant's claim was unfounded in law.

2-17 In *Binder v Alachouzos*,[34] D borrowed a total of £65,000 from C, relatives of C and companies with which C was closely associated. D gave cheques by way of repayment of the loans and agreed interest, but the cheques were not met. The various lenders commenced actions against D on the dishonoured cheques. In his defence, D alleged that the loans were made in the course of carrying on the business of moneylending and were void and unenforceable. Shortly before the trial of those actions an agreement was reached which provided, inter alia, that the actions should be discontinued and that D should pay C the sum of £86,565, with interest at 18 per cent, by instalments of £10,000 per month payable on a particular day each month. It was further expressly agreed by D that: (a) none of the transactions the subject of the actions was a transaction to which the Moneylenders Acts applied; and (b) no defence should be raised in any action on the agreement other than as to the quantum of the moneys that had been paid. D paid two or three instalments and then defaulted. In C's action to recover the balance of the sums owing under the agreement, D sought to raise again the issue of the Moneylenders Acts and suggested that the compromise was not binding. The Court of Appeal held that he was not entitled to put forward these arguments since there had been a bona fide compromise of an issue of fact in the previous action, namely whether the original loans were unlawful money-lending transactions.

2-18 In *Colchester BC v Smith*,[35] C and D had been in dispute about D's occupation of certain land. D had asserted through his solicitors that he had acquired possessory title to the land, an assertion rejected by C. In due course, after further correspondence and a threat by C to bring possession proceedings, D entered into a tenancy agreement in relation to the land and, as part of that agreement, he acknowledged that he had "not gained any right title or interest to or in it by adverse possession". That agreement was made in November 1983. In November 1984 C instituted proceedings seeking possession of the land relying upon the terms of the tenancy agreement. In those proceedings D sought to argue, inter alia, that he had acquired possessory title to the land. At first instance it was held on the evidence that D had, prior to the tenancy agreement, acquired possessory title to certain parts of the land, but that he was estopped by contract or convention from disputing C's title to it having regard to the agreement. The Court of Appeal held, following *Binder v Alachouzos*, that there had been a bona fide compromise of a disputed issue in the agreement of November 1983 and that D was prevented from going behind it.

Must be bona fide

2-19 Lack of good faith in the assertion of a claim or the maintenance of a denial, in

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[33] For example *Huddersfield Banking Co v Lister* [1895] 2 Ch. 273 at 278 (fact), *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch. 62 at 73 (law). See also *Norfolk Finance Ltd v Newton* Unreported 15 October 1998 CA.

[34] *Binder v Alachouzos* [1972] 2 Q.B. 151. See also *Panyiatou v Sony Music Entertainment (UK) Ltd*, *The Times,* 30 June 1994 and *FPH Law (a Firm) v Brown (t/a Integrum Law)* [2016] EWHC 1681 (QB); [2016] 5 Costs L.O. 733 at [29] per Slade J.

[35] *Colchester BC v Smith* [1992] Ch. 421.

circumstances where there is no foundation in fact or law to support them, may operate to invalidate a compromise founded thereon.[36] It would seem that, provided a claimant believes that he has a right to make the claim he asserts, even if he has little confidence in its ultimate success, a compromise of it is valid.[37] If, on the other hand, he makes a claim which he knows to be unfounded and derives an advantage from the compromise of the claim, his conduct will be considered fraudulent and the compromise liable to be set aside.[38] In the former case the compromise will be upheld even if the party against whom the claim is made believes that it has no foundation. By compromising it, he puts an end to troublesome litigation.[39] In the latter case, however, if the claim's lack of foundation is known by the other party, any agreement purporting to be based upon it cannot truly be said to be a compromise since no real dispute as such exists.

The legal effect of such an agreement will often arise in connection with third-party rights.[40] As between the parties it may be operative.[41]

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36 *Wade v Simeon* (1846) 2 C. B. 548, *Cook v Wright* (1861) 30 L. J. (Q.B.) 321; (1861) 1 B. & S. 559, *Callisher v Bischoffsheim* (1869) L.R. 5 Q.B. 449, *Blythe Ex p. Banner, Re* (1881) 17 Ch. D. 480, *Holsworthy UDC* [1907] 2 Ch. 62, *Binder v Alachouzos* [1972] 2 Q.B. 151. See para.3-11.

37 *Callisher* (1869) L.R. 5 Q.B. 449, *Blyth Ex p. Banner, Re* (1881) 17 Ch. D. 480. In *Freedman v Union Group Plc* [1997] E.G.C.S. 28, Peter Gibson LJ said that it is "common for a person genuinely to believe in the rightness of a claim, but still to harbour doubts whether it would in fact succeed".

38 *Callisher* (1869) L.R. 5 Q.B. 449, per Cockburn C.J. at 452, *Wade v Simeon* (1846) 2 C.B. 548. See Ch.4.

39 See Ch.3.

40 See Ch.6.

41 See Ch.6. On the one hand, it could be argued that, since no consideration is furnished by either party, the apparent agreement is a *nudum pactum*; on the other hand, the agreement may be seen simply as the equivalent of a release of an "unimagined" claim: see para.2-14.

having been referred back to D1 and D2's solicitors who acted upon it and took no point upon it, must in the circumstances be taken to have been accepted by the parties.

4-36 Where, of course, the provisions of a Tomlin order schedule are clear and unambiguous and truly reflect the parties' prior agreement, there are no grounds for altering the terms thus recorded.[89]

MISREPRESENTATION

General

4-37 A false representation of a material fact, made prior to a compromise and which induces it, may, at the instance of the party misled, operate to vitiate the compromise. The misrepresentation may be set up as a defence to a claim for specific performance of the agreement or as the basis of a claim to have it set aside. If any loss has been occasioned by the misrepresentation it may give rise to a claim for damages (for fraudulent or negligent misrepresentation) or an indemnity (in the case of innocent misrepresentation).[90] This latter aspect is unlikely to have much practical significance in the context of compromise. If the agreement has been embodied or reflected in a court order or judgment, the order or judgment may be set aside.[91]

Are compromises contracts uberrimae fidei?

4-38 Before looking at some instances of misrepresentation in this context, the question of whether contracts of compromise are uberrimae fidei must be considered. Ordinarily, the non-disclosure of a material fact will not constitute a misrepresentation[92] unless it makes that which is represented false.[93] But in certain classes of contract—called contracts uberrimae fidei—there must be full disclosure of all material facts. Without such disclosure a contract of this type is voidable. It has been suggested[94] that compromises belong to this class. However, modern textbooks[95] do not put ordinary compromises of disputes into this category. All the cases relied upon as supporting the view that compromises are contracts uberrimae fidei[96] involved compromises of disputed rights under a will or settlement, often where infant beneficiaries were concerned. The Court of Chancery, as a court of equity, insisted on full disclosure in such cases before being prepared to uphold any agreements reached.[97] There is a strong argument that to extend these authorities to sug-

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89 *Nolan Davis Ltd v Catton* unreported 2001 WL 676767 6 March 2001 TCC.
90 *Chitty*, Vol.1, para.7-046 onwards.
91 See Ch.12.
92 See, e.g. per Lord Atkin in *Bell v Lever Bros Ltd* [1932] A.C. 161 at 227.
93 *Dimmock v Hallett* (1866) L.R. 2 Ch. App. 21.
94 Edwards, *The Law of Compromise and Family Settlements* (1925), pp.141–147, and Kerr, *Fraud and Mistake*, 7th edn (1952), p.96.
95 See, e.g. *Chitty*, Vol.1, para.7-158 onwards.
96 For example *Gibbons v Caunt* (1799) 4 Ves. 849, *Brooke v Mostyn* (1864) 2 De G.J. & S. 373, *Gordon v Gordon* (1816–19) 3 Swans. 400, *Goymour v Pigge* (1844) 13 L.J. Ch. 322.
97 In *Marshall v Marshall* unreported 8 October 1998 CA, Thorpe LJ said this: "When the misfortune of a contested probate action falls on a family, the pressures and stresses are, in many respects, similar to those that afflict a family torn by contested proceedings following the dissolution of a marriage. In my judgment, the negotiation of compromise of such proceedings, whether in the Family Divi-

gest that all compromises belong to this class is inappropriate.[98] However, it is to be noted that in *Bank of Credit and Commercial International SA v Ali*[99] there were suggestions[100] that a general release[101] should only be held to be operative if the party giving the release is unaware of any claim that the party to whom the release is granted may have. As things stand, it cannot be said that these suggestions would translate into a universally applicable proposition of law and the issue may require sustained argument in a case where it arises before a definitive position can be stated.[102]

4-39 The view that compromises generally are not contracts uberrimae fidei is supported by *Turner v Green*,[103] where a compromise of an action for an account was held to be specifically enforceable notwithstanding the suppression of a material fact prior to the conclusion of the compromise by the party seeking specific performance. Chitty J, having cited the general proposition that mere silence in relation to a material fact is not a ground for rescission or a defence to specific performance unless there is "an obligation to disclose", said[104] that "[i]t cannot be contended that [there was] … any obligation to disclose" the material fact in that case. There is a further passage in the judgment[105] from which it is plain that the learned judge did not regard the contract of compromise in that case as requiring uberrima fides. Furthermore, in *Wales v Wadham*,[106] Tudor Evans J had to consider the question of whether at common law a compromise of financial differences between estranged spouses was one requiring uberrima fides. He concluded that it was not. His decision was reinforced by the fact that, in the particular case, the parties had not insisted on full disclosure. Given that whether a contract was to be

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sion or the Chancery Division, must be characterised by candour and not jeopardised by side deals, concealed from one or more of the negotiating parties. In other words, I would hold that there was a duty of full and frank disclosure of facts and circumstances relevant to the weighing of a proposal for the formation of the compromise."

98 See, e.g. the comments of Rimer J in *Clarion Ltd v National Provident Institution* [2000] 1 W.L.R. 1888.

99 *Ali* [2002] 1 A.C. 251.

100 *Ali* [2002] 1 A.C. 251, per Lord Nicholls of Birkenhead at [31]–[32] and Lord Hoffmann at [69]–[70].

101 See para.5-22 onwards.

102 *Ali* [2002] 1 A.C. 251, Lord Bingham of Cornhill (with whom Lord Browne-Wilkinson agreed) at [20] and Lord Clyde at [87] declined to express concluded views on the issue. And see *Chitty*, Vol.1, para.7-183.

103 *Turner v Green* [1895] 2 Ch. 205. See N. Andrews, *Principles of Civil Procedure* (1994), para.13-047. The rationale for this principle was, it is respectfully submitted, put well by Rimer J, as he then was, in *Clarion Ltd v National Provident Institution* [2000] 1 W.L.R. 1888 at 1905: "The compromise of litigation is a contractual exercise in which it is the commonest thing for each side to be aware of facts and matters of which it either knows or at least suspects the other side is ignorant. If each side knew all that the other side knew then either no or only a very different compromise would be reached. In the negotiation of such compromises the parties must be careful not to make any misrepresentations. But there is in my view no general duty imposed upon them in the nature of a duty of disclosure. The negotiations are in the nature of an arm's length commercial bargain. Each party has to look after his own interests and neither owes a duty of care to the other." He also made the following observation: "It would in my view be astonishing if, in the ordinary case, a defendant could later set aside a compromise merely because he had learnt from some 'loose talk at a Bar function' that he had materially overpaid a claimant who, unbeknown to him but well known to the claimant's advisers, probably could not have proved his case at all." See also *Radhakrishnan v University of Calgary Faculty Association*, 2002 ABCA 182 (Court of Appeal of Alberta).

104 *Turner* [1895] 2 Ch. 205 at 208. And see also *Silver Queen Maritime Ltd v Persia Petroleum Services Plc* [2010] EWHC 2867 (QB) at [130]–[140], per Lindblom J.

105 *Turner* [1895] 2 Ch. 205 at 209.

106 *Wales v Wadham* [1977] 1 W.L.R. 199, not criticised on this point by the House of Lords in *Livesey* [1985] A.C. 424, but distinguished in a somewhat different context in *Inclusive Technology v Williamson* [2009] EWCA Civ 718; [2010] 1 P. & C.R. 2.

regarded as requiring uberrima fides "must depend upon its substantial character and how it came to be effected",[107] the learned judge concluded that this one was not.[108]

4-40 A suppression of a fact or document which, if its existence were revealed, would destroy totally (rather than, perhaps, merely undermine to some extent) a claim being advanced by a claimant would involve the claimant in pursuing a claim which he knew to be unfounded. A compromise of such a claim could be invalidated.[109]

4-41 It would appear, therefore, that generally each case would have to be looked at on its own facts to see whether full disclosure was being insisted upon by the parties. In the general run of litigation this is unlikely to be so and indeed negotiations might be hindered by such insistence. Two areas where full disclosure would seem to be required as a matter of law are:

(a) the compromise of a partnership dispute[110]; and
(b) a compromise involving the actual or potential transfer of title to land.[111]

Some examples

4-42 It has already been noted[112] that the assertion of a claim known by the claimant to be baseless, which induces a compromise, will be regarded in law as a fraudulent misrepresentation. Opinions may, of course, differ as to the validity of assertions made. Generally, a statement of unfounded opinion which induces a contract will not be an operative misrepresentation.[113] If, however, a person represents that he holds an opinion when in fact he does not, that will constitute a false representation.[114] The dividing line between statements of opinion and fact may be difficult to determine, particularly where the representor is in a better position than the representee to assess the accuracy and validity of the statement.[115]

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[107] *Seaton v Heath* [1899] 1 Q.B. 782 at 792, per Romer LJ. See *Palmer v University of Surrey* unreported CC; 2014 WL 1097173, where the issue turned on whether a compromise agreement reached in respect of a personal injury claim could be characterised as a contract of insurance. Recorder James Watson QC, sitting as a judge of the County Court, held that it did not. It did not because it did not, applying the dicta of Sir Robert Megarry VC in *The Medical Defence Union Ltd v Department of Trade* [1980] 1 Ch. 80 at 90, have the "hallmarks"' of an insurance contract.

[108] In *Livesey* [1985] A.C. 424, a statutory duty of disclosure was said to arise from the provisions of the Matrimonial Causes Act 1973 s.25. To the extent to which *Wales v Wadham* [1977] 1 W.L.R. 199 was contrary to this view it was disapproved by the House of Lords, but no doubt was cast upon the general proposition referred to in the text.

[109] See para.2-19. There is continuing obligation on parties during litigation to disclose documents that come to their notice: CPR r.31.11. A failure to disclose a material document discovered after the original list of documents is served, or which comes into existence thereafter, could afford grounds for alleging a misrepresentation: see Andrews, *Principles of Civil Procedure*, 1994, para.13–049. Andrews' account arises from a discussion of the position under the RSC. Its rationale is however equally applicable under the CPR.

[110] *Chitty*, Vol.1, para.7-181.

[111] *Chitty*, Vol.1, para.7-175. See Ch.30.

[112] See para.2-19.

[113] *Anderson v Pacific Fire and Marine Insurance Co* (1872) L.R. 7 C.P. 65. "When an opinion is expressed the person who expresses it either does or does not know facts which justify that opinion. The existence of those facts, and his state of knowledge in relation to them, are themselves facts capable of being misrepresented by implication by the expression of opinion … Sometimes an expression of opinion may carry with it no implication other than that the opinion is genuinely held. But on other occasions, as in this case, the circumstances may be such as to give rise to the implied representation that the person knew of facts which justified his opinion": *BG Plc v Nelson Group Services (Maintenance) Ltd* [2002] EWCA Civ 547, per Kennedy LJ.

[114] *Chitty*, Vol.1, paras 6-008—6-009.

[115] cf. *Brown v Raphael* [1958] Ch. 636, *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801, *Chitty*,

4-43 Where, during the course of negotiations, a representation is made which at the time is true but which subsequently becomes false, a failure to disclose the changed position would be, in effect, a misrepresentation.[116]

> In *Gilbert v Endean*,[117] a claimant had, in effect, obtained a judgment against a debtor in a certain sum. Thereafter he agreed to accept a lesser sum on the basis of the debtor's represented poor financial position. It was known by all parties that the debtor's father was a wealthy man but that he had refused to help his son. Before the compromise agreement was signed the father died. The debtor's solicitor knew this at the time of the signing but failed to disclose it to the claimant's solicitor. The Court of Appeal held that the failure to disclose what was clearly a material fact given the earlier position was, in effect, a misrepresentation.

4-44 A statement of intention as to future conduct is not a representation of fact unless the intention of the person making the statement is, at the time of making it, the opposite of what is stated. Thus a party to negotiations with a view to compromise who states his existing intention accurately and honestly but who thereafter, but before the agreement is concluded, changes his mind is not under a duty to disclose it to the other party.[118] A representation by a party that he possesses a settled intention to pursue (or not to pursue) a particular course of conduct when no such settled intention exists can amount to a misrepresentation.[119]

4-45 The legal effect of a misrepresentation of law has hitherto been somewhat uncertain. As in the case of a mistake of law,[120] the dividing line between a misrepresentation of law and one of fact or opinion is often difficult to identify.[121] However, if a statement can fairly be characterised as one of law, such a statement, if incorrect or misleading, has usually been regarded as incapable of amounting to an actionable misrepresentation.[122] However, developments in the law of restitution[123] suggest that the distinction between a mistake of fact and one of law is not sustainable. It would seem to follow that such a distinction could not now also be made in the context of misrepresentation.[124] If that is a correct analysis of the recent authorities, a misrepresentation of law must now be regarded as capable of being relied upon to set aside an agreement concluded in reliance upon it. Since representations of law are frequently made in precontractual negotiations with a view to compromise, it is likely that the court will approach with considerable caution any proposition that an incorrect assertion of law constitutes an actionable misrepresentation in this context.[125]

4-46 Where, however, a misrepresentation is made as to the legal effect of a compromise, particularly where the representee is not independently legally advised, there are circumstances in which the court will intervene:

Vol.1, paras 7-007 to 7-010.

116 It might also be considered to give rise to a unilateral mistake of fact on the part of the party misled known to, or contributed to, by the other party: para.4-25 onwards.

117 *Gilbert v Endean* (1878) 9 Ch. D. 259. See also *With v O'Flanagan* [1936] Ch. 575 CA; *Davies v London and Provincial Marine Insurance Co* (1878) 9 Ch. D. 469, *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170, considered at para.4-48.

118 *Wadham* [1977] 1 W.L.R. 199 at 211.

119 cf. *Livesey* [1985] A.C. 424.

120 See para.4-20.

121 *Chitty*, Vol.1, para.7-017.

122 *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549.

123 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 1 A.C. 153 HL, *Pankhania v Hackney London Borough Council* [2002] EWHC 2441 (Ch).

124 *Chitty*, Vol.1, para.7-017.

125 cf. para.19-50.

In *Hirschfeld v The London, Brighton and South Coast Ry Co*,[126] C was injured when travelling as a passenger in one of D's trains. Not long after the accident a representative of D called on C to see if C intended to make a claim. C said that he did and after discussion he agreed to accept a certain sum from D in full satisfaction of his claims. He signed a deed of release. Thereafter C sought to pursue a claim for a greater sum, alleging that D's representative had told him that if his injuries proved to be more serious than anticipated he could, notwithstanding the terms of the release, seek and obtain greater compensation. It was held[127] that C was entitled to rely upon the misrepresentation to avoid the terms of the release.

4-47 In *Saunders v Ford Motor Co Ltd*[128] C suffered an injury in the course of his employment by D. D's insurers had an office at D's works. A representative of those insurers had a conversation with C during which C agreed to accept £200 in full settlement of all his claims. The insurers' representative told C that the sum was "only for pain and suffering and for [his] absence from work" and, in effect, that if C's condition got worse the position could be reviewed. Paull J held that C was not bound by the agreement because either there was attached to the agreement an understanding that he could come back if his condition deteriorated or because the parties were not *ad idem*.[129]

A misrepresentation may arise in a variety of ways:

4-48 In *Dietz v Lennig Chemicals Ltd*[130] a claim by a widow, on behalf of herself and her child, under the Fatal Accidents Act, arising from the death of her husband, was compromised and, in due course, put before the court for approval. At the time the agreement was concluded she had not remarried, but by the time it was put before the court she had. She had not told her solicitors, who at all times up to and including the court hearing believed that she was unmarried. Indeed, the title of the court papers remained in her old surname. The House of Lords held that the failure to disclose the changed situation (albeit completely innocent) and the use of the old surname in the court proceedings constituted a misrepresentation.

4-49 In *Roberts, Re*,[131] a solicitor misread or misunderstood counsel's opinion on a particular matter and thereby misrepresented its effect to one of a number of legatees he was advising. On the faith of what was represented a particular legatee entered into a compromise of her claims against the estate with other legatees. The Court of Appeal held that it should be set aside.

4-50 Needless to say, once a representation had been made it will be operative only if:

(a) it has been addressed to the party misled; and
(b) it induced the compromise.

These will be matters of fact to be determined.[132]

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[126] *Hirschfield v The London, Brighton and South Coast Ry Co* (1876) 2 Q.B.D. 1. See also *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360 at 362–363.

[127] Mellor and Lush JJ.

[128] *Saunders v Ford Motor Co Ltd* [1970] 1 Lloyd's Rep. 379.

[129] In *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep. 98 at 104–105, Stephenson LJ said that he regarded the decision in *Saunders* [1970] 1 Lloyd's Rep. 379 "as based on a misrepresentation inducing the signing of the receipt … and I would respectfully agree with it". This is indeed arguably the better view of what fell for determination in the *Saunders* case.

[130] *Dietz* [1969] 1 A.C. 170. See also para.27-15.

[131] *Roberts, Re* [1905] 1 Ch. 704.

[132] See, e.g. the analysis of the evidence covering these two matters in *Wales v Wadham* [1977] 1 W.L.R. 199 at 212-214.

General

20-01 The tradition of the Bar and of the solicitors' profession is one of honesty and fair dealing. [1] This extends over many areas, not the least important of which is the course of negotiation with a view to compromise. Dishonest conduct will, of course, carry liability to disciplinary action, but a reputation for untrustworthiness, unreliability and sharp practice is easily gained and by no means readily displaced. It will result in an opponent aware of the reputation being far less disposed to engage in compromise negotiations than might otherwise be the case. Cases in which litigants' interests are not served by the arrival of their cases in court do as a result arrive there.

20-02 Putting forward a false proposition on behalf of a client is often inevitable if it forms part of instructions received in good faith. Any deliberate attempt to deceive an opponent in negotiations must, however, never occur [2]. From the purely legal point of view, once discovered such a deception would afford grounds for setting aside the agreement. [3]

Footnotes

1 Hilberry, Duty and Art in Advocacy (1959), pp.21–22; See The Solicitors Regulation Authority (SRA) Handbook (2018, version 21) and specifically The SRA Principles 2011, esp. Principles 2 and 6. See also *Bolton v The Law Society [1994] 1 W.L.R. 512* at 518–519.

2 From a regulatory perspective such conduct would arguably conflict with Outcome 11.1, which requires solicitors not to have taken unfair advantage of third parties, see The SRA Code of Conduct 2011, O.11.1. Where counsel is concerned such conduct would arguably fall foul of core duty 3, conduct rule 9.1 of the Bar Code of Conduct: see Bar Standards Board, Bar Handbook 2019, 4th edn (April 2019). Such conduct may also, depending on the circumstances conflict with other regulatory requirements that apply, such as those set out in CEDR's Code of Conduct for Third Party Neutrals (2018), and particularly its clause 4.1.

3 See Ch.4. For an illuminating analysis of the issues that can arise in contemporary times and the duties of those involved in negotiations, see *Thames Trains Ltd v Adams [2006] EWHC 3291 (QB)*.