IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal No. [TBD]**

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
APPEAL NO: EA-2025-000150-RS

IN THE MATTER OF A WASTED COSTS APPLICATION AGAINST THE SECOND RESPONDENT'S REPRESENTATIVES, HILL DICKINSON LLP

B E T W E E N:

DR C M DAY

Appellant

-and-

[(1) LEWISHAM & GREENWICH NHS TRUST]
(2) HEALTH EDUCATION ENGLAND

Respondents in the Substantive Litigation

HILL DICKINSON LLP

Interested Party (Respondent to the Appeal)

APPELLANT'S SKELETON ARGUMENT
In support of application for permission to appeal

A. INTRODUCTION AND ORDER SOUGHT

1. This is Appellant's skeleton argument for permission to appeal the order of Stacey J in the Employment Appeal Tribunal ("**EAT**"); dismissing the appeal against the Employment Tribunal ("**ET**") decision to reject his wasted costs application dated 12 June 2019 ("**the Application**").

2. The Appellant respectfully seeks:

   a. Permission to appeal ('PTA') the order of Stacey J dismissing the Appellant's appeal to the EAT against the decision of EJ Ramsden, sent to the parties on 17 December 2024;

   b. An Order under CPR 52.19 limiting both parties' recoverable costs on this appeal to zero.

3. This appeal raises an important point of principle as to when privilege may be relied upon as a shield to a wasted costs application against a party's solicitors. It also raises

questions about the scope of a solicitor's duty to disclose documents in proceedings where there has already been voluntary disclosure in a strike-out application.

4. In summary, the EAT erred in upholding the ET's dismissal of C's wasted costs application. C seeks permission to appeal under CPR 52.6 on the grounds that:

   a. The appeal has a real prospect of success on the grounds set out below (CPR 52.6(a)); and,

   b. The appeal raises matters of public importance in relation to the proper conduct of litigation in the context of whistleblowing and the use of privilege to suppress protection for whistleblowers. As such, the Appellant contends there is some other compelling reason for the Court of Appeal to hear it (CPR 52.6(b)).

5. Hereafter, the Appellant is referred to as "C" (as he was below) and the Respondent to the PTA application, Hill Dickinson LLP, is referred to as "HD". The Respondents to the underlying litigation are referred to as "the Trust" and "HEE" as necessary.

B. FACTUAL BACKGROUND

6. At the time he brought his claims, C was a postgraduate doctor progressing through a commissioned employment and training programme to become a consultant in Emergency Medicine. During his employment he raised protected disclosures concerning patient safety and deliberate concealment and brought claims for detriments suffered as a result. The Application concerned disclosure failures in that litigation, the litigation having been resolved by a settlement agreement in October 2018.

7. By his Application, supplemented by a further letter dated 2 August 2019, C sought wasted costs against HD after discovering that Health Education England ("**HEE**"), represented by HD, had failed to disclose key documents relevant to his Employment Tribunal claim.

8. No disclosure order was made initially, as is common in the early stages of employment litigation. Limited documents were, however, disclosed by HEE as part of a strike-out application by HEE brought on the basis of their contention that C was not and could not be a 'worker' in relation to HEE, as required for him to fall within the whistleblowing detriment protection regime in Part IV Employment Rights Act 1996 (ERA 1996).

9. The relevant documents to which C's Application relates are known as Learning Development Agreements ("**LDAs**"). They were service-level contracts between individual NHS Trusts and HEE, and they were capable of establishing C's status as a worker of HEE for the purposes of s43K ERA 1996 in that they made it clear that his terms and conditions were determined in (substantial) part by HEE which was the relevant test. For the period material to C's whistleblowing claims, there were two relevant LDAs, dated 2012 and 2014.

10. A 'worker' has whistleblowing detriment rights under Part IV ERA 1996 in relation to an 'employer' The expanded definition of 'employer' in s43K ERA 1996 is unique to the whistleblowing legislation. Had the LDAs been disclosed as part of the limited voluntary disclosure supplied to the ET as part of HEE's strike out application (which initially succeeded before the ET on 25 February 2015), C would not have needed to go to the EAT and then the Court of Appeal to establish that it s43K ERA 1996 applied to his employment with HEE, which took a number of years.

11. After remission from the CA to the ET, a 2012 LDA between predecessor organisations to Lewisham and HEE was disclosed on 14 February 2018, which was the final date (as extended by the parties) for disclosure under the order of REJ Hildebrand dated 10 July 2017 ("**the Hildebrand Order**"). HEE conceded the point just before the remitted ET hearing in May 2018, after receipt of a skeleton argument from Tom Linden QC on behalf of C, which relied heavily on the content of the LDA for the predecessor organisations; however the LDAs relevant to C's employment with HEE were never disclosed, even as the matter proceeded to a final hearing.

12. The 2014 LDA was important because:

    a. It covered the period during which C said he was subjected to detriment by HEE;
    b. It was the contract governing the terms and conditions of C's employment with HEE during the material period, and showed on the facts that HEE substantially determined C's terms of employment (whilst HEE represented by HD had argued that C's position to the contrary was "fanciful", "unarguable", and "irreconcilable with the undisputed contemporaneous documents");
    c. It had been drafted by HEE's representatives in the ET litigation, namely, HD, as part of a greater piece of work done by HD;

d. It showed a change in the relationship between HEE and the the Trust which gave HEE even more control over a post-graduate doctor's training and career progression by embedding the powers of a Post Graduate Dean employed by HEE at the Trust.

As such, it was plainly central to C's claims against HEE in which he alleged (among other things) that the HEE Post Graduate Dean had subjected him to detriment because of protected disclosures, including the deletion of C's National Training Number.

13. C discovered the failure to disclose the LDAs after the litigation had ended, in 2019, via a journalist who obtained the documents through FOI requests. By then, C had entered into multiple agreements in relation to his claims and the costs of those claims ("**the Agreements**"). In a series of revelations, C also learned that aside from failing to disclose the documents, HD had drafted those same documents. At the time of entering into the Agreements, C was unaware that: (a) HEE represented by HD had failed to disclose relevant documents; (b) that HD had drafted the 2014 LDA; and (c) that HD employment solicitors were aware or should have been aware (from mid-2016) of those documents.

14. Consequently, C brought his Application in 2019, though it was heard several years later in 2024. A Reserved Judgment with Reasons was sent to the parties on 17 December 2024, dismissing C's application **("the ET Reasons")**.

15. By EAT Grounds of Appeal dated 28 January 2025 and pursuant to permission granted on 28 May 2025 by Lord Fairley, EAT President, on grounds 1-3 and 5 of the EAT Grounds of Appeal, C appealed to the EAT the dismissal of the Application by the ET.

16. The appeal was heard on 11 March 2026, before Stacey J. Judgment was handed down on 2 July 2026, dismissing the appeal ("**the EAT Reasons**").

C. THE ET DECISION

17. The first issue the ET had to decide was whether the Agreements could be set aside or otherwise did not, on a true construction, preclude a wasted costs application. The ET then went on to determine whether HD's conduct in failing to disclose the LDAs reached the threshold for a wasted costs application.

18. At ¶¶89 – 91 of its decision, the ET set out C's position on the importance of the 2012 and 2014 LDAs, but concluded at ¶101 that the Gold Guide was sufficient to establish that C was a worker of HEE. The Gold Guide was a handbook given to graduate doctors,

and was not in any way contractual. It also did not include the same information as the LDAs. HEE represented by HD had relied (successfully) on the Gold Guide before the ET in 2015 and the EAT in 2016 to illustrate that they did *not* substantially determine C's terms and conditions such that there was no relationship of employment sufficient to meet the test in s43K ERA 1996; and had described C's submissions to the contrary as "fanciful" amongst other things. In the EAT in 2026, C sought, in grounds 2 and 3 of his EAT appeal, to attack the findings in the ET which found that the Gold Guide and the LDAs were, in effect, equivalent (contrary to the findings of the ET in 2015). The EAT did not determine those grounds.

19. In relation to the Agreements, C appealed the findings at ¶¶93 – 122 that all three Agreements precluded C from bringing his Application on the basis that they contained errors of law in relation to the construction of settlement agreements (based on **BCCI v Ali** [2001] UKHL 8; **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849; **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1997] UKHL 28; and **Alliance and another v Tishbi and others** [2011] EWHC (Ch) 1015, as well as on a proper reading of CPR 52.19). C was granted permission to proceed in the EAT on this ground (ground 1). The EAT did not determine that ground either.

20. The ET then asked itself whether the wasted costs jurisdiction was engaged. The ET found it was not (see ET Reasons at ¶¶121-128).

21. At ¶125(a)(ii), the ET considered HD's disclosure duties in the period from 27 June 2016. The ET held that it was unclear why HD did not know about the LDAs upon enquiry of HEE, which the ET would have expected to be made. The ET further found, however, despite having found that HD's conduct was unexplained, that HD should be given the benefit of the doubt in relation to privilege. The ET went on to find at ¶125(b) that the failure to disclose the LDAs by 14 February 2018 (that is, the final date for compliance with the order for standard disclosure), was also unexplained.

22. At ¶125(d) the ET found, addressing the period from 10 July 2017 to 23 November 2017, there had been a voluntary agreement to extend the timescale for disclosure, and that this was therefore a further period of "voluntary" disclosure.

23. At ¶125(e), the ET considered the period from 24 November 2017 to 13 February 2018, and again found that: "*In this period, given the extension to the disclosure deadline, the*

obligation to disclose was confined to the duty not to mislead, which did not require disclosure of any of the LDAs."

24. The other findings at ¶¶125(d) and (e) suggest that the ET regarded disclosure duties as only being engaged on the date of the deadline of an order to disclose, and not (as must be the case) from the date of the order for disclosure – and even in relation to the voluntary duty, the ET failed to have regard to the changing nature of the duty not to mislead in this period as HD employment lawyers became aware of the LDAs.

At ¶126, the ET found no material difference between the LDAs and the Gold Guide, directly contradicting EJ Hyde's strike-out decision dated 25 February 2015 at ¶46, which records HEE's submission that the Gold Guide showed that the Trust and not HEE was the body substantially responsible for determining C's terms and conditions of work. When the Application was heard in the ET in 2024 and subsequently, HD sought to argue that the Gold Guide established the opposite: namely, that it showed that HEE *was* substantially responsible for determining C's terms and conditions, such that disclosure of the LDAs was not necessary.

D. THE EAT DECISION

25. The EAT's decision only addressed ground 5 of C's underlying appeal, which dealt with errors in relation to the law on wasted costs. By that ground, C argued that:

    a. the Tribunal's finding that privilege was the reason HD had not been able to explain its position, was an error of law;
    b. that privilege is not relevant when "*the particular conduct admits of no reasonable explanation*" (**Morris v Roberts (HMIT)** [2005] EWHC 1040 (Ch); see also **Ridehalgh v Horsfield** [1994] CH 205 (approved in **Medcalf v Mardell** [2002] UKHL 27); and,
    c. that the ET had erred in concluding that the threshold test for a wasted costs application was not met, since, in particular, the ET had failed to consider "negligence" in the non-technical sense, and had failed to consider whether it was in fact necessary for HEE to waive privilege for HD to explain their failure to disclose the LDAs.

26. The EAT set out its conclusions at ¶¶34 – 46, and dismissed the appeal, having determined at ¶29 that, contrary to Lord Fairley's preliminary view that ground 5 was

dependent on grounds 2 and 3, that all grounds were contingent on ground 5. Therefore, the only ground that the EAT determined was ground 5, which it concluded disposed of the appeal.

27. At ¶38, the EAT found that:

a. There were a number of obvious and reasonable explanations for the failure to disclose, including that the Gold Guide "*summarised the relationship between the parties, and that the agreements themselves were not anyone's particular focus of attention*";
b. That the failure to disclose would not amount to negligence, either in the technical or every day sense of the word;
c. And that the ET had found that there was no difference of materiality between the summary of the relationship between C and HEE provided by the Gold Guide when compared with the LDAs, by reference to ¶119 of the ET's findings.

28. At ¶39, the EAT found there was no order for disclosure until 13 February 2018, and that there had been no misleading disclosure prior to that point because, as the ET had found, the LDAs were entirely consistent with what was set out in the Gold Guide.

29. At ¶¶40 -43, the EAT summarised the ET's conclusions on C's Application. The EAT then concluded at ¶44 that, even if C could succeed on ground 1 (which related to the construction of the Agreements), his Application would fail because the ET was correct in its conclusion that HD had no acted improperly, unreasonably, or negligently, and that the conduct of HD had not caused C to incur unnecessary costs because the matter would always have needed to be remitted to the ET. At ¶45 the EAT found that there was nothing in the ET Reasons that would lead the ET to exercise the discretion (even had the other thresholds been met).

E. GROUNDS OF APPEAL

E.1 Ground 1: The EAT erred by failing to determine grounds 2 and 3 of the underlying appeal before it dismissed ground 5

E.1.1 <u>The EAT erred by relying on matters in determining ground 5 which were challenged by grounds 2 and 3, which the EAT did not determine</u>

30. C contends that the EAT's failure to determine grounds 2 and 3 was an error of law because the EAT's reasoning on ground 5 depends on matters which were challenged by grounds 2 and 3 which were not addressed.

31. Ground 2 of the underlying appeal (EAT Reasons ¶26) contended that the ET had "*failed to grasp that the 2014 R1 LDA agreement governed the employment relationship between the Claimant and HEE at the relevant time*," and that since the Gold Guide was "*a non-contractual document, the Tribunal had placed impermissible emphasis upon the Claimant's knowledge of the Gold Guide*." Ground 3 (EAT Reasons ¶27) contended that: "*the Tribunal's reliance on the Gold Guide impermissibly contradicted the findings made in the strike out decision of the [2015] Tribunal which were reinforced by the [2016] EAT and not undermined by the Court of Appeal.*"

32. These grounds challenged the very premise of the ET's – and hence the EAT's – conclusion on wasted costs, which could not properly be reached without a proper assessment of the importance of the underlying documents. At ¶38, the EAT stated there was "*no dispute that the Gold Guide summarised the relationship between the parties*". However in grounds 2 and 3, C *was* disputing that the Gold Guide was sufficient to establish that he was a worker of HEE.

33. In dismissing Ground 5, the EAT made a number of findings which were dependent on the ET's challenged finding that there was no material difference between the Gold Guide and the LDAs (see EAT Reasons ¶21, ¶¶38 – 39) which were challenged by EAT grounds 2 and 3.

34. By relying on challenged findings but failing to determine the EAT appeal grounds in relation to those findings, the EAT treated as settled, a proposition that was itself subject to appeal. The consequence was that C's appeal was dismissed without a proper or adequate determination of grounds which, had they been determined, could have materially changed the outcome of the EAT's decision.

E.1.2 <u>The EAT wrongly concluded that ground 5 disposed of the entire appeal</u>

35. It follows that the EAT further erred in concluding that ground 5 was capable of disposing of the entire appeal (see ¶29 and ¶46, EAT Reasons). For the reasons explained clearly by Lord Fairley, President, on the sift, ground 5 could not properly be determined without first determining grounds 2 and 3.

36. Stacey J took a different position to Lord Fairley, but did not explain clearly why she did so. No reasoning is given to enable C to understand why the EAT reached the decision that it did.

37. C therefore invites the Court to find that this ground has a real prospect of success.

E.2 Ground 2: The EAT erred in its application of the principles in Ridehalgh v Horsefield [1994] Ch 205 (as approved in Medcalf v Mardell [2002] UKHL 27)

E.2.1 The EAT erred by concluding that, or otherwise failing to consider whether, privilege attaches to a party's disclosure obligations

38. The question of whether privilege attaches to a party's disclosure obligations was central to whether the test for wasted costs was met. Before both the ET and the EAT, C argued that privilege is not relevant to disclosure obligations.

39. It was an error of law for the EAT to conclude or take at face value that HD's failure to disclose was because of privilege. Privilege is aimed at protection of the disclosure of legal advice: it does not extend to excuse non-compliance with a disclosure obligation. The question of whether HEE or HD should have disclosed the LDAs is simply not a question of privilege.

40. The ET's finding at ¶125(a)(ii) records that HD gave no explanation for apparently not knowing of the LDAs, nor whether it had enquired of HEE about them – an approach the EAT appeared to endorse at ¶38. In both cases, HD was given the benefit of the doubt on the basis of privilege, without any assessment of whether privilege in fact attached – a step that mattered given the ET's express finding that HD's conduct was unexplained and that an enquiry would have been expected, as distinct from a case where the ET genuinely could not know what passed between HD and HEE.

E.2.2 The EAT further erred by considering whether, on the available evidence, the particular conduct admitted of no reasonable explanation (namely, the test in **Morris v Roberts (HMIT)** [2005] EWHC 1040 (Ch))

41. As explained above, the ET found HD's conduct to be unexplained. Even if privilege applied, the ET should still have assessed whether the non-disclosure could have had a reasonable explanation on the evidence. It did not do so, and in C's submission no such explanation was open to it on the totality of its own reasoning (¶125 ET Reasons).

42. Despite this, at ¶38 the EAT attempts to supply "obvious and reasonable explanations" which were not given by HD, and which could not cure the ET's failure to apply the correct analytic framework to the evidence before it.

43. C maintains that, even if privilege did apply (and there was no adequate analysis of whether, in the circumstances, this was in fact the case) this was conduct which admitted of no reasonable explanation. As further set out below, it was also conduct which constituted an abuse of the court's processes.

E.2.3 The EAT extended the "benefit of the doubt" principle in **Ridehalgh** to the failure to disclose the 2012 and 2014 Learning Development Agreements ("LDAs"), which the ET itself had found was unexplained. In so doing, the EAT erred in law.

44. The principle in **Ridehalgh** is not absolute: it does not follow that no further enquiry is needed wherever privilege is claimed. A tribunal must consider, first, whether privilege in fact covers the failure to explain, and second – even if it does – whether the conduct nonetheless admits of no reasonable explanation, as confirmed by **Morris**.

45. The ET's own findings at ¶125 that HD employment solicitors should have been aware (through reasonable enquiry), and from 27 June 2016 were in fact aware, of the LDAs undermine any conclusion that privilege explained the non-disclosure. Had HEE instructed HD not to disclose the LDAs, HD would have been obliged to withdraw its representation – so that cannot be the 'reasonable explanation'.

46. As recorded in ¶125(b)(ii) of the ET Reasons, Mr Wright's evidence was that he "*would not have considered such agreements [the LDAs] 'material' to the legal issues given the state of the law*" (an allusion to HEE's reliance on the position at the EAT (albeit not at the ET) that it was not possible to have two employers for the purposes of the whistleblowing legislation). The Tribunal's view was "*that is not the applicable test for whether material is disclosable*" (ET Reasons ¶125(b) (iii)). The Tribunal went on to find that HD's position reliant on an understanding of the state of the law from 9 March 2016 onwards was "*unpersuasive*" (ET Reasons ¶125(b)(iii)).

47. The fact that HD gave this evidence without any reliance on privilege should have demonstrated to the Tribunal that the reason the documents were not disclosed had nothing to do with privilege. These findings are in and of themselves sufficient to found a wasted costs application: there were relevant documents of which HD were aware that HD did not disclose. These were culpable failures on the facts. The findings further

do not support the conclusion at ET Reasons ¶126, repeated at ¶133(a), that there was no basis for finding that the wasted costs threshold was met. This error was compounded by the EAT in its findings at ¶42 – 43.

E.2.4 Had the ET and EAT properly applied the principle in **Ridehalgh** and **Morris** they would have reached a different conclusion

48. Further and in any event, had the EAT and ET properly turned its mind to the tests in **Ridehalgh** and **Morris** then they would have concluded that the threshold was met and that HD had acted improperly, unreasonably, or negligently. The findings at ¶¶44 – 45 EAT Reasons and at ¶¶127-128 ET Reasons therefore rise or fall with this ground.

49. C therefore respectfully submits that this ground also has a real prospect of success.

E.3 Ground 3: The EAT misapplied the principle in Birds Eye Walls Ltd v Harrison [1985] ICR 278

E.3.1 The ET and EAT erred by failing to consider or consider adequately whether the disclosure for the strike-out application was unfairly selective

50. Before the ET and the EAT, C relied on **Birds Eye Walls Ltd. v Harrison** [1985] ICR 278. In that case, Waite J held that even where there is no order for disclosure, duties still apply. Where a party makes voluntary disclosure (namely, where documents are disclosed before the ET has made an order for disclosure, as was the case here, that party must not be unfairly selective in their disclosure (see **Birds Eye Walls** at 288 B – F). The solicitors of a legally represented party have a duty to the court to ensure full and proper disclosure themselves: the client must not be the one selecting relevant documents (see **Square Global Ltd v Leonard** [2020] EWHC 1008 (QB) at [200]).

51. While the ET and the EAT both cited correctly the legal position, the EAT concluded that there was no error of law because the Gold Guide and the LDAs said the same thing, so C did not need the LDAs (EAT Reasons at ¶39). This compounds the error in ground 1 of this PTA application:it is reliant on the premises challenged in grounds 2 and 3 of the underlying appeal. Further, both the ET and the EAT analyse incorrectly the position in relation to voluntary disclosure, as further explained below.

52. Had the ET and EAT properly considered this point, then they would not have been able to conclude as they did (see EAT Reasons ¶44 and ET Reasons ¶¶129 – 130) that causation was not made out on the further costs incurred by C. C would not have needed

to go to the Court of Appeal to establish that he was HEE's worker. Further or alternatively, C would not have needed a remitted hearing had the LDAs been disclosed at any point up to and including the remitted ET hearing. HEE would not have been able to pursue the strike out; they have been bound to concede the point, or the Tribunal and/or EAT would have been bound to find that C was HEE's worker. The costs of all of those hearings were therefore wasted by HD's failure to disclose.

E.3.2 <u>The EAT further erred by characterising disclosure that should have taken place under an order for disclosure as being "voluntary"</u>

53. The ET's reasoning at ¶¶125(d)–(e) erroneously applied the "absent an order" principle to a period from the Hildebrand Order of 10 July 2017, when an order was in force because there had been an agreed extension of the compliance deadline rendered disclosure "voluntary." This error is compounded in the EAT Reasons .

54. The characterisation of period following the order for disclosure dated 10 July 2017 as one of "voluntary disclosure" is, in C's submission, an error of law. An agreement between the parties to extend a compliance deadline does not revoke or suspend the underlying order. The order remained in force; only the timetable for final compliance was adjusted. The ET found at ¶128(b) that there was no explanation as to why the LDAs had not been disclosed, and noted that by 14 February 2018 the LDAs should have been disclosed as part of standard disclosure. At ¶39 EAT Reasons, there is a finding that "no order for disclosure had been made" prior to 13 February 2018.

55. In C's submission, there was an ongoing duty of disclosure under the Hildebrand Order, namely from 10 July 2017 onwards. Disclosure in that period could not, on any basis, be said to be 'voluntary disclosure', and the failure to disclose remains unexplained. The EAT did not address or rectify the ET's error of law in its Reasons, and endorsed the application of the wrong test to the period in which there was an extant order for disclosure, and during which the usual disclosure obligations applied. Even if it was 'voluntary', the nature of that obligation changed when HD employment solicitors should have been aware and then were aware of the existence of the LDAs.

56. Had the correct standard been applied, the ET would have been required to assess:

a. whether HD complied with its positive disclosure obligations under the Hildebrand Order;

b. whether HD's failure to disclose the 2012 R1 LDA, 2014 Template LDA, and 2014 R1 LDA by 14 February 2018 (which the ET itself acknowledged was unexplained) constituted a breach of HD's duty to the court; and,

c. whether that non-compliance amounted to conduct that was improper, unreasonable, or negligent in the **Ridehalgh** sense.

57. None of these questions were addressed for the ordered-disclosure period because the ET and the EAT wrongly treated the period from the Hildebrand Order up to the extended case management deadline as a single period of voluntary disclosure.

58. C further submits that at points the EAT conflated the pre-disclosure order and post disclosure-order periods, which may have produced a different result in the application of the principle in **Birds Eye Walls.**

59. C therefore contends that this ground also has a real prospect of success.

E.4 Ground 4: The EAT further erred by failing to determine ground 1

60. By failing to determine ground 1, it follows that if the Appellant is successful on any of the other grounds, the ET's decision on the matters relevant to Ground 1 of the underlying appeal (namely, the construction of the various agreements between the parties) should also fall to be remitted.

F. SOME OTHER COMPELLING REASON

F.1 Important point of principle/practice and public interest

61. In the alternative, C contends that there is some other compelling reason for the appeal to be heard. The use of strike-out applications in whistleblowing and discrimination claims raise issues of public interest, since the public interest will usually be in determining claims on their facts and on the evidence at trial. The issues in this case turns on an important point of principle and/or practice in strike out applications, which are often heard before any order for disclosure has been made. Where no disclosure order has been made, and following the decision of the EAT in this case, the scope of "voluntary disclosure" in **Birds Eye Walls** is now unclear, as is the period during which a disclosure order can be said to have taken effect.

62. The impact, in C's case, of the failure by HEE represented by HD to disclose the LDAs went far beyond his interests as claimant, since the effect of that particular litigation strategy meant that C had to go as far as the Court of Appeal to prove a point that would

otherwise have been clear on the evidence at first instance. As such, C says that the appeal concerns the following issues of broad public interest:

a. The extent to which it is acceptable in light of the objects and purpose of the whistleblowing provisions of ERA 1996 to use disclosure strategically (which in C's case had the effect of excluding an entire class of doctors from statutory whistleblowing protection from the 2015 ET decision until the concesion in May 2018).

b. That lack of protection was not in the interests of patients or doctors. The GMC commented on 12 August 2016 "We recognise that a level of concern now exists among doctors in training in England about whether they are adequately protected in their relationship with Health Education England (HEE), and that, as a result, some may feel less secure about raising concerns or fear of suffering detriment to their career. We believe every doctor should feel able to raise concerns with impunity without fear of unfair criticism, detriment or dismissal, and anything that prevents this from happening is not in the interest of patients or doctors".

c. The proper disclosure obligations of legal representatives acting for public bodies where relevant documents are within their own knowledge or control;

d. the extent to which LPP may properly take effect be relied upon in respect of disclosure obligations and under the tests in **Ridehalgh** and **Morris**.

C therefore submits that he meets the second limb of the test in CPR 52.6(1), and that there are other compelling reason for the appeal to be heard.

G. LIMITATION OF COSTS ORDER

63. In addition to seeking permission to appeal, the Appellant respectfully requests an order pursuant to CPR 52.19 limiting the recoverable costs on this appeal to zero – that is, an Order that neither side shall be entitled to recover any amount of legal costs in respect of any Court of Appeal proceedings for which permission might be granted regardless of the outcome of the proceedings.

64. Both the ET and the EAT are jurisdictions in which costs are not ordinarily recoverable, and the Court has a discretion to make an order limiting recoverable costs. This is an appeal which raises important points of principle (as set out above).

65. The Appellant relies upon the following matters in support of his application

a. the means of both parties;

b. all the circumstances of the case (including the points of principle); and

c. the need to facilitate access to justice.

H. CONCLUSION

66. For the reasons set out above, the Appellant respectfully requests:

a. permission to appeal on the basis of his Grounds of Appeal;

b. and Order under CPR 52.19 limiting both parties' recoverable costs on this appeal to zero.

Andrew Allen KC
Elizabeth Grace
Outer Temple Chambers
22 July 2026