Neutral Citation Number: [2021] EWHC 1045 (Comm)

Case No: CL-2020-000066

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2021

Before :

The Honourable Mrs Justice Cockerill DBE

- -

Between :

(1) ANTHONY DOUGLAS KING	**Claimants**
(2) JAMES PATRICK KING	
(3) SUSAN MAY KING	
- and -	
(1) BARRY STIEFEL	**Defendants**
(2) ROBIN FISHER	
(3) PETER SWAIN	
(4) PRIMEKINGS HOLDING LIMITED	
(5) CLARE VICTORIA TOOMER	
(6) RODERICK JOHN COWPER	
(7) PETER DAVID LEVINGER	
(8) TEACHER STERN LLP	
(9) PAUL DOWNES QC	
(10) JACOB ISAAC RABINOWICZ	

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Christopher Newman (instructed by **Metis Law Limited**) for the **Claimants**
Catherine Addy QC and Joseph Sullivan (instructed by **Macfarlanes LLP**) for the **First to Fourth Defendants**
Daniel Lightman QC and Charlotte Beynon (instructed by **Kennedys Law LLP**) for the **Fifth to Eighth and Tenth Defendants**
Charles Hollander QC (instructed by **DAC Beachcroft LLP**) for the **Ninth Defendant**

Hearing dates: 15, 16, 17, 18, 22 and 23 February 2021
Draft sent to Parties: 19 April 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE COCKERILL

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00 AM 26 April 2021.**"

Mrs Justice Cockerill :

Introduction

1. On 28 April 2017 a claim in fraudulent misrepresentation brought by the Claimants ("the Kings") against the Second to Fourth Defendants to this claim commenced in the Chancery Division before Marcus Smith J. The claim is referred to below as "the Misrepresentation Claim". The misrepresentations alleged arose out of the negotiations for the sale of a company founded by Mr James King, Kings Solutions Group Limited ("KSGL") to the Fourth Defendant, Primekings. The trial was listed for 20 days.

2. It is fair to say that the case did not go as the Kings hoped. On Day 10 of that action the Kings discontinued that claim, apologised to those Defendants, and consented to pay the costs of the action on the indemnity basis. After short argument, Marcus Smith J ordered a payment on account of £1.7 million to be made in relation to that costs liability ("the Payment on Account Order").

3. From these basic facts has sprung a multiplicity of litigation which must inevitably put any observer with a taste for nineteenth century fiction in mind of the infamous Jarndyce case. The current claim is but one outcropping of that litigation.

4. In this action the Kings bring a claim in unlawful means conspiracy against the First to Fourth Defendants ("the Primekings Defendants"), and those Defendants' legal representatives in the Misrepresentation Claim: the Fifth to Eighth and Tenth Defendants, Teacher Stern LLP and certain partners, a former partner and an employee of that firm ("the Teacher Stern Defendants") as well as Primekings' leading counsel Mr Paul Downes QC. The conspiracy is dealt with further below, not least because it defies any powers of precis.

5. The Kings claim substantial damages on the basis that but for this conspiracy they would have won the Misrepresentation Claim, or that they would now be owners of a 40% stake in KSGL, or that they would not have had to pay costs arising out of the Misrepresentation Claim. They also claim damages for a variety of other more unusual heads of loss.

6. The three groups of Defendants each apply to strike out those claims.

7. The principal other proceedings to which reference will be made are:

    i) The Detailed Assessment Proceedings: the proceedings before the Senior Courts Costs Office wherein the costs ordered to be paid pursuant to the Payment on Account Order were assessed. Those proceedings closed late last year with a certificate being issued in the sum of £2,726,154.87, including £337,309.14 for interest as at 17 November 2020 and £168,664.00 for the costs of assessment.

    ii) The Professional Negligence Action: the proceedings in this court whereby the Kings seek damages against their own legal team in the Misrepresentation Claim ("the Misrepresentation Team" collectively and also "the Misrepresentation Solicitors" and "the Misrepresentation Counsel") for breaches of duties of care and fiduciary duties. That case remains live;

iii) The s. 994 Proceedings: the proceedings in the Companies Court in which it is alleged that Primekings and a number of other Respondents acted in a manner unfairly prejudicial to the interests of the Kings as shareholders in KSGL. Parts of the Kings' points of claim have now been struck out by Mr Tom Leech QC (sitting as a Deputy High Court Judge) in a judgment [2020] EWHC 2861 (Ch), but some aspects of the dispute remain live.

8. There is also one separate piece of litigation in the other direction. In a claim in the Chancery Division Kings Security Systems Limited ("KSSL") claimed against Mr Anthony King ("Mr King") for breach of fiduciary duty, the central allegation being that he took a bribe from KSSL's company car provider. In a judgment [2021] EWHC 325 (Ch) Mr Andrew Lenon QC (sitting as a Deputy High Court Judge) has found in favour of KSSL.

9. Regrettably this judgment can be neither short nor user friendly because there are a number of complications, principally:

i) Each set of Defendants seeks the strike out on a different basis, and each application itself contains a number of different components;

ii) The nature of the claim necessarily involves some consideration of the other proceedings; and

iii) That necessary overlap has been intensified by the fact that Mr Newman, acting for the Kings, has defended the claim very much by reference to what one might term the wider field of battle, rather than focussing only or mainly on the arguments advanced by the Defendants.

10. I have structured this judgment as follows:

i) Introduction

ii) The Law

a) The Legal Principles on Strike out and summary judgment

b) The relevance of the absence of a defence

c) Is there a need for an applicant for summary judgment to swear to the absence of real prospect of success?

iii) The Facts

a) The Misrepresentation Claim

b) Further Litigation

c) Enforcement of the Payment on Account Order

d) The s. 994 Proceedings

e) The Professional Negligence Action

f) The Detailed Assessment Proceedings

g) The current proceedings

iv) The Particulars of Claim

v) Clarifying what is in issue

a) The Claim for the Value of the Misrepresentation Claim

i) Iteration 1: The Pleaded Threats

ii) Iteration 2: The Inferential/Unpleaded Threats

b) The Costs Claim

c) Analysis of the Claim: result

vi) The Costs Allegations: the Effect of the Final Costs Certificate

a) The law

b) The issue and submissions here

c) Discussion

vii) CPR 38.7 and abuse of process

viii) Discrete Issues

a) Immunity from Suit (Mr Downes only)

b) Mr Rabinowicz (Mr Rabinowicz only)

c) Without prejudice Privilege

d) The status of the unpleaded case

ix) The substance of the pleaded claims

a) Inferences of fraud and pleading fraud

b) The Pleaded Threats

c) The "Hidden Contingency Fee"

d) The Accounts Evidence

e) The £3 million costs figure

f) Shadow ledger

g) The Smith and Williamson evidence

h) The 577 hours issue

i) Conclusion

x) The Inferred Threats

a) The conflict of interest

b) The extraordinary events

c) Mr Downes' failure to exploit the B share error

d) The absence of Howard Smith

e) Conclusion

xi) Post-script: The conduct of the Kings' case

a) Specific allegations which lack basis

b) The leap from thinking the worst to accusation

c) Full and Frank disclosure

d) Routine accusations of impropriety

The Law

The Legal Principles on Strike out and summary judgment

11. The most often cited summary of the law in this area is in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) [15]. It has been applied by the Court of Appeal more than once, and on innumerable occasions at first instance. No-one overtly suggested that there was any fault to be found with it. I shall revert to it further below.

12. There is one aspect of the law on summary determination to which I should give particular attention, though in practical terms it has little impact on my decision. The Kings were emphatic that there is binding Court of Appeal authority stating that where a defence has not been filed, the facts pleaded in the Particulars of Claim have to be assumed to be true. This point was made by reference to *Thomas v News Group Newspapers* [2001] EWCA Civ 1233 and to what Mr Newman referred as "the Thomas Principle".

13. This so-called principle was derived from the passage at [3] where Lord Phillips M.R. said:

> "In this case the appellants had taken out their strike-out application before filing a defence. In such circumstances … The court proceeds on the assumption that the facts alleged by the claimants will be proved at the trial and considers whether, on that premise, the claim has any realistic prospect of success. If it does, it is permitted to proceed to trial; if it does not it is struck

> out unless there is some other compelling reason why the case should go to trial."

14. This authority is not one which has attracted much attention from the textbook writers, save in the context of the offence or tort of harassment. It does not, contrary to Mr Newman's submissions, set out any statement of principle as regards the approach to summary judgment. On closer examination it transpired that it was a case which was all about the definition of "harassment". There appears to be no reference to any evidence at all in the case. There was no question about whether the court had to assume all the facts alleged to be true. The reliance placed upon it was therefore thoroughly misplaced and evidences an apparent misunderstanding of the proper use of precedent, and what constitutes precedent, which recurs elsewhere in the submissions advanced for the Kings.

15. The leading cases on this area of jurisprudence are actually entirely different. They are mentioned in the *Easyair* summary:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman;*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of

> the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) …if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. …. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

16. It is worth making some further citation from the *ED&F Man* case. That was a case where the judge entered summary judgment based on an assessment of the facts. He was criticised for having wrongly conducted a mini-trial. That argument was rejected by the Court of Appeal, which considered at [53] that:

> "I would accept … in a case where, with knowledge of the material facts, clear admissions in writing are unambiguously made … a judge is in my view entitled to look at a case 'in the round', in the sense that, if satisfied of the genuineness of the admissions, issues of fact which might otherwise require to be resolved at trial may fall away. … In that respect, the judge was entitled to reject as devoid of substance or conviction such explanation as was advanced for the making of those admissions and in my view he was entitled to conclude that the first defendant lacked any real prospect of successfully defending the claim."

17. The Kings also placed reference on something which was referred to as the "the Silovsky Principle". This "principle" is understood to be a reference to *NHS Commissioning Board v Silovsky* [2015] EWHC 3141 (Comm) where at [3] Leggatt J said:

> "In particular, where there is any issue or potential issue of fact to which the answer might be affected by a full investigation, I shall assume for present purposes that the issue is to be answered in the claimant's favour. Where, however, the question is one of law or is otherwise one which I am as well placed to decide now as a judge would be at trial, it is appropriate that I should decide it now and not put the parties to further cost and delay."

18. As with the so-called "Thomas Principle" this is no such thing. Again it does not purport to be any formal statement of principle. It is best seen as an application of the principles set out above to the facts of the particular case.

19. Mr Newman for the Kings also relied on *S v Gloucestershire County Council* [2001] Fam 313, where May LJ stated at 342:

> "For a summary judgment application to succeed …, the court will first need to be satisfied that all substantial facts relevant to the allegations of negligence, which are reasonably capable of being before the court, are before the court; that these facts are undisputed or that there is no real prospect of successfully disputing them; and that there is no real prospect of oral evidence affecting the court's assessment of the facts. There may be cases where there are gaps in the evidence but where the court concludes, for instance from the passage of time, that there is no real prospect of the gaps being filled. …. Secondly, the court will need to be satisfied that, upon these facts, there is no real prospect of the claim in negligence succeeding and that there is no other reason why the case should be disposed of at a trial."

20. This authority takes matters no further. It is relevant to the approach to summary judgment on the facts on particular kinds of cases. The principles applicable to summary judgments are more authoritatively set out on the authorities to which I have referred.

21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.

22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up. Mr Lightman QC referred me to the recent cases of *Riley v Sivier* [2021] EWHC 79 (QB), at [14], and *Hunt v Times Newspapers* [2012] EWHC 110 (QB), at [28]-[29]. Both of those echo long-established authority both pre and post CPR such as the well known dictum of Megarry V-C in *Lady Anne Tennant v. Associated Newspapers Group Ltd* [1979] FSR 298. These are encapsulated in the Court of Appeal's decision in *ICI* which is itself summarised in *Easyair*.

23. I should deal specifically with the law on summary judgment and claims in fraud, not least because it was at least implicit in the submissions for the Kings that such serious allegations were not suitable for summary determination.

24. The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts. I have done so in a case heard very close in time to this application: *Foglia v The Family Officer and others* [2021] EWHC 650 (Comm), where at [14] I gave some examples of other cases in which this course was also followed. In other cases, such as *AAI Consulting Ltd v FCA* [2016] EWHC 2812 (Comm) and *Cunningham v Ellis* [2018] EWHC 3188

(Comm) fraud claims were struck out on the basis that the particulars of claim were inadequate in themselves to support the claims being made.

25. In terms of the approach to summary judgment in fraud claims Primekings commended to my attention the judgment of Stuart Smith J in *Portland Stone Firms Ltd v Barclays Bank plc* [2018] EWHC 2341 (QB) at [25] – [29], in the context of the approach to be taken when faced with an application to strike out a claim in fraud. In summary:

    i) The Court should bear in mind that cogent evidence is required to justify a finding of fraud or other discreditable conduct, reflecting the court's conventional perception that it is generally not likely that people will engage in such conduct.

    ii) Pleadings of fraud should be subjected to close scrutiny and it is not possible to infer dishonesty from facts that are equally consistent with honesty.

    iii) However, in view of the common feature of fraud claims that the Defendant will, if the underlying allegation is true, have tried to shroud his conduct in secrecy, the Court should adopt a "generous" approach to pleadings.

26. There is one potential distinction between the position in relation to an application for summary judgment under CPR r. 24.2 and an application to strike out under CPR r. 3.4(2)(a). As just noted, under CPR 24 evidence is admissible to show that the pleaded allegations are fanciful – albeit that the court will be very cautious about rejecting a claimant's factual case at the summary judgment stage.

27. When considering an application to strike out however the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible. This is noted in *Terry Allsop v Banner Jones Limited* [2021] EWCA Civ 7 by Marcus Smith J (giving the judgment of the Court of Appeal) at [7], citing the judgment of Arnold LJ in *Libyan Investment Authority v King* [2020] EWCA Civ 1690, at [96]:

> "In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call "reasonable arguability". Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case."

The relevance of the absence of a defence

28. A recurring theme in the submissions advanced for the Kings was the fact that the Defendants have not served defences. It was argued that the rules do require a Defendant to file a defence, even if they have taken out a summary judgment application. Although on one level the point is not relevant, given the assumption which

I make for the purposes of the strike out application, I deal with this point at some considerable length because it is absolutely plain from the submissions made to me that the Kings regard this absence as being highly significant to the point of pointing a powerful positive inference as to the merits.

29. That can be seen from the following passage of Mr Newman's submissions:

> "… when the rules are being breached and, in my submission, quite plainly breached, then the reason why there is potentially an inference there is because those Defendants are choosing to breach the rules and they have got very high quality legal advice and they must have been advised that there is at least an argument that the rules are being breached and so that raises the question why have they decided that their best interests lie in exposing themselves to potential criticism and the sorts of arguments that I am now able to make?
>
> The answer must be because the alternative is worse. The alternative being to file a defence which either has to admit the claim or has to admit large parts of the claim or, at best, would have to advance arguments on the facts so implausible that I would be sitting here today saying to your Ladyship "Have a look at this defence, my Lady, plainly it is weak." In those circumstances, the Defendants should not be permitted to benefit from their own breach of the rules in that regard."

30. The basis for this argument was outlined by Mr Newman on Day 4 of the hearing. It was submitted that is what the rule says. Reference was made to rule 15.2:

> "15.2 Filing a defence
>
> A defendant who wishes to defend all or part of a claim must file a defence."

31. It was contended that while at CPR 15.4.2(c) there is a carve out where a Claimant applies for summary judgment, there is no carve out for the "vice versa situation". This was further said to be supported by CPR 24.4.2 which provides that if a Claimant applies for summary judgment the Defendant need not file a defence.

32. Reliance was placed as supporting this argument upon [19] of *Simmons & Simmons v Hickox* [2013] EWHC 2141 (QB). Coulson J, considering an application for indemnity costs and hence the question of whether the Defendant's conduct had been out of the norm, said as follows at [17-20]:

> "17. There are other reasons why I consider that the defendant's conduct was out of the norm: one is that the defendant never provided, and has yet to provide, any sort of defence to the remaining part of the claim, that is to say, to the £305,000-odd in relation to outstanding fees. True it is that that is only one-sixth of the total claim but, nonetheless, that is a not insignificant sum, and it does seem to me to be most unfortunate that the

> summary judgment application has obscured the fact that no defence to that amount has ever been stated. …
>
> 19. There was an argument as to whether or not a defendant in the position of this defendant was required to serve a defence in any event, it being plain pursuant to CPR 12.3(3), that the issue of a summary judgment application meant that the claimant could not obtain a default judgment. Mr Salzedo said that that did not prevent the provision by the defendant of a defence, and as a matter of the rules that is plainly right, but as a matter of practicality it seems to me that a defence was required. That is not only because the summary judgment application did not deal with all of the aspects of the claim but also because in circumstances such as these a pleaded defence is very often the best possible way of setting out what the defence actually might be in advance of a hearing, such as today's would have been.
>
> 20. Mr Carpenter suggested that it might potentially have been a waste of costs to draft a defence if the summary judgment application had been successful, but that is not right for two reasons: one, because, as I have said, the summary judgment application did not deal with the whole claim, but secondly and more importantly, given that this was a point of law, the matter could have been very shortly stated and very easily conveyed by way of a pleaded defence."

33. I do not consider that this case does state, as Mr Newman contended, that it is a breach of the rules for a Defendant who applies for summary judgment not to file a defence. As can be seen from the fuller citation which I have given the judge was there considering whether conduct had been "outside the norm" for the purposes of indemnity costs. The reason the conduct was considered to be so was that no defence was filed – but the key point being that there was no defence to a portion of the claim, and the summary judgment application went only to the other portion of the claim.

34. The question has to come back to the rules.

35. CPR 15.3 states:

> "15.3 Consequence of not filing a defence
>
> If a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it."

36. CPR Part 12 sets out *inter alia* conditions to be satisfied before an application for default judgment can be made. CPR 12.2(3) provides:

> "The claimant may not obtain a default judgment if –
>
> (a) the defendant has applied –

(i) to have the claimant's statement of case struck out under rule 3.4; or

(ii) for summary judgment under Part 24,…"

37. CPR 15.4 provides:

"15.4— The period for filing a defence

(1) The general rule is that the period for filing a defence is—

(a) 14 days after service of the particulars of claim; or

(b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim….

(2) The general rule is subject to the following rules—

(a) rule 6.35 (which specifies how the period for filing a defence is calculated where the claim form is served out of the jurisdiction under rule 6.32 or 6.33);

(b) rule 11 (which provides that, where the defendant makes an application disputing the court's jurisdiction, the defendant need not file a defence before the hearing);

(c) rule 24.4(2) (which provides that, if the claimant applies for summary judgment before the defendant has filed a defence, the defendant need not file a defence before the summary judgment hearing); ..."

38. It is also perhaps worthy of note that CPR 15.11 provides as follows:

"15.11— Claim stayed if it is not defended or admitted

(1) Where—

(a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4;

(b) no defendant has served or filed an admission or filed a defence or counterclaim; and

(c) the claimant has not entered or applied for judgment under Part 12 (default judgment), or Part 24 (summary judgment),

the claim shall be stayed.

(2) Where a claim is stayed under this rule any party may apply for the stay to be lifted."

39. It is certainly right that these rules appear to have been drafted primarily with the orthodox situation of summary judgment applications by the Claimant, as opposed to reverse summary judgment applications by the Defendant, in mind.

40. However the absence of any automatic sanction for not filing a defence tends to indicate that not filing a defence is not a breach of a rule. That is strongly supported by the fact that the only "sanction" which does exist, default judgment, is explicitly not available where summary judgment has been applied for by a Defendant. Further it seems clear that the CPR views jurisdictional challenges and summary judgment as alternative means of the claim proceeding in the absence of a defence without being susceptible to default judgment.

41. A point which is notable about these provisions is the absence of any automatic sanction on the Defendant for failing to file a defence. If the Claimant does not act by applying for default or summary judgment, CPR 15.11 is the only automatically operative provision in Part 15. There is no penalty as such – there is simply a risk of default judgment being entered following the Claimant's application. If none is entered and no other steps are taken by the Claimant, the claim is (eventually) stayed.

42. That absence of automatic sanction at the time when a defence falls to be filed and the fact that the rules plainly contemplate jurisdictional challenges and summary judgment applications as being suspensory of the right to apply for default judgment, provide a powerful indication within the rules that there is no breach by failing to file a defence even when the application for summary judgment is launched by the Defendant and not by the Claimant, as is more usual.

43. It would in particular seem to be nonsensical for the CPR to specifically provide that no default judgment could be entered if an application for summary judgment had been made if the view were to be taken that the Defendant in question was in breach of the CPR by not filing a defence. I would add that this chimes with the other logical point – that there seems to be no good reason for why the rules would (as it is clear they do) suspend the obligation to file a defence where the summary judgment application comes from the Claimant and not do so when the same application comes from the Defendant. This is the more so since a reverse summary judgment application is most likely to come where there is a clear defence in law. In such circumstances it would be both illogical and contrary to the overriding objective to require a Defendant to file a defence condescending to particulars where if he is right on the law, those facts are completely irrelevant.

44. To add to this, and to the same effect, there has been some consideration in the authorities of the question of whether CPR 15.11 is a sanction. If it were, it might tend to indicate that not filing a defence is a breach of the rules in and of itself, rather than simply giving the Claimant the initiative as regards applying for default judgment. Those authorities (in particular *Football Association Premier League Ltd v O'Donovan* [2017] EWHC 152 (Ch), *Citicorp Trustee Co Ltd v Al-Sanea* [2017] EWHC 2845 (Comm), *John McLinden v Shiao Chen Lu* [2018] 4 WLUK 569 and *Bank of Beirut (UK) Limited v Sbayti* [2020] EWHC 557 (Comm)) tend to indicate that the discretion to lift the CPR 15.11 stay should not be approached as a relief from sanctions application and "*is not intended to place an especially heavy burden on the claimant to discharge before the court will agree to the stay being lifted*".

45. I accordingly conclude that the Defendants are not in breach of the CPR for not filing a defence. The absolute clarification of this point may however be a matter which commends itself to the attention of the Rules Committee.

Is there a need for an applicant for summary judgment to swear to the absence of real prospect of success?

46. This is a rather similar point – a formal point which makes no difference to the real issues for determination, but which assumes a significance because of the weight subjectively placed on it by the Kings.

47. The issue is simply stated: is an applicant for summary judgment required to serve a witness statement which states that the maker believes that the other party has no real prospect of success? The Kings say that it is so required and say that any such application (notably the Teacher Stern application) which does not do this does not comply with Practice Direction 24 paragraph 2(3)(b).

48. The importance placed on this point is again best seen in Mr Newman's submissions. In writing he said the following:

> "The Kings do not believe this is an oversight – it simply reflects the fact that the TS legal team, whilst asking for the case to be struck out, are not able to put the necessary statement before the court with a statement of truth to discharge the burden…
>
> In circumstances where the TS Ds have ample funds and the benefit of the highest quality legal advice, the inference must be that whilst their legal team are able to make lots of arguments about coherence and plausibility, they are (quite properly) not allowing their clients to place evidence before the Court denying the claim because doing so would put the legal team in breach of their duty not to mislead. That, it is submitted, speaks volumes."

49. To similar effect in oral submissions:

> "What I would ask your Ladyship to note is that they are not saying anywhere in that application notice that the improper pressure side of the case has no real prospect of success on the facts…. there simply is no statement of belief from any relevant person before you, my Lady, stating that that part of the claim stands no real prospect of success at a trial and from that your Ladyship can infer that either it is believed to be possibly correct or believed to be certainly correct or at least believed to raise a very serious triable issue which is not suitable for summary determination."

50. This is another area where I have concluded that there has been a misunderstanding of the relevant law on the part of the Kings and their team.

51. Practice Direction 24, subparagraph (3) says:

> "The application notice or the evidence contained or referred to in it or served with it must (a) identify concisely any point of law or provision in a document on which the applicant relies and/or (b) state that it was made because the applicant believes that on the evidence the respondent has no real prospects of succeeding on the claim or issue (as the case may be) of successfully defending the claim or issue as to which the application relates."

52. This is a relatively simple point – what the Practice Direction requires is that where an application for summary judgment is made (in whole or in part) on the evidence, it is necessary to make a statement as to no real prospect of success. But where a point of law is relied upon as the sole basis for a summary judgment application, all that needs to happen is that it be identified. In the middle lies the situation where there is an application based on a point of law, and evidence; that will require both identification of the point of law and the attestation as to no real prospect of success.

53. Mr Newman in support of his submissions relied on the judgment of Chief Master Marsh in *Goldtrail Travel v Grumbridge* [2020] EWHC 1757 (Ch) where the Master cited in passing the passage at paragraph 24.2.5 of the White Book which says "*the essential ingredient is the applicant's belief that the respondent has no real prospect of success.*"

54. This provided another troubling example of what was at best an apparent misunderstanding of the nature of precedent. What was relied upon was the (unreported) case in which (in passing) the Master rehearsed a segment from the *White Book*. It was apparently relied upon (without attribution) because that partial quotation on its face supported the Kings' case, and without considering whether it formed part of the ratio of a case raising this point – which it plainly did not.

55. Further the *White Book* commentary, while often helpful, has no status as precedent. Yet further the full passage from the relevant portion of the *White Book* states this:

> "In *ED&F Man Liquid Products Ltd v Patel* … it was said that under r.24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden is indicated by para.2(3) of the Practice Direction supplementing Pt 24; the applicant must (a) identify concisely any point of law or provision in a document on which they rely, and/or (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial. The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial."

56. That of course makes clear that (i) the passage relates to the *ED&F Man* case – which considered summary judgment on the facts and (ii) that even in that context the and/or distinction, apparent on the face of the PD was noted.

57. I conclude that it is clear on the face of the rules that to the extent that an application is made on the basis of a question of law, there is no requirement for the evidence to contain a statement as to the absence of a real prospect of success.

The Facts

58. This summary of the facts is intended to assist understanding of this judgment. It is not intended to be exhaustive; indeed, any exhaustive account would be so complex as to be confusing rather than helpful for present purposes.

59. As noted above, the Defendants in this claim are the lay clients (First through Fourth Defendants) and their sometime legal representatives (Sixth to Tenth Defendants), who were party to various legal proceedings against the King family and a related trust. All of these previous legal proceedings arise substantially out of a dispute concerning Primekings' investment in (and partial buyout of) KSGL, which was formerly in the sole control of the Kings.

60. KSGL is the parent company of KSSL. KSSL was incorporated by Mr James King in 1971. Initially, its business consisted of installing television aerials. Later it moved into the provision of security services and grew substantially. It now provides a wide range of security services to site operators across the UK, including major retailers and a number of police forces. Mr King joined KSSL as an apprentice after leaving school at the age of 17. He became a director of the company in 1999 aged 30 and Chief Executive Officer in 2005. Mrs Susan King is the wife of Mr James King and the mother of Mr King.

61. Prior to the Primekings investment in December 2013, KSGL (and KSSL) was a family company. The shares in KSGL were owned as to 20% by each of Mr King's parents and Mr King and as to 40% by the JPK No. 1 Discretionary Settlement. This was a family trust for Mr King and his family (the "Trust").

The Misrepresentation Claim

62. In late 2013 KSGL and KSSL were in financial difficulties. In November 2013 Mr King and Mr James King were introduced to the Second Defendant, Mr Fisher, who had been connected by marriage to Mr Nathan Kirsh, a South African billionaire. They met Mr Fisher and Mr Stiefel, together with Mr Peter Swain, an associate of Mr Fisher, in London to discuss the possibility of Mr Fisher and Mr Swain investing in KSGL through Primekings Holdings Limited.

63. The Kings do not now accept that the Primekings investment was the only way for the KSGL group to avoid bankruptcy, but it does appear that the financial situation was dire. KSSL had gross tax liabilities of over £2.5 million, overdrawn directors' loans in excess of £550,000, and trade creditors exceeded £5.2 million. According to the information memorandum produced on behalf of KSGL, the Kings were seeking an initial £2 million to £2.5 million equity investment to replenish its balance sheet and fund future growth.

64. Negotiations took place in November and December 2013. It appears to be common ground that at a certain point in those negotiations the following proposals were discussed:

    i) Primekings would acquire 60% of the shares in KSGL, diluting the Kings' holdings to 40%;

    ii) £1 million of funding would be provided by Primekings through share subscription;

    iii) Mr James King and Mrs King were to receive £2 million initial consideration, and further consideration for their shares of £3 million payable at a rate of £1 million per annum if KSGL's EBITDA exceeded £3 million in each of those years;

    iv) A £3 million loan facility would be provided to KSGL.

65. The Kings considered these to have been the terms of a complete proposal (subject to contract) reached on 7 December 2013, which they call the "initial agreement". The proposals were said by Primekings to be only proposals envisaged to be in a final agreement, subject to due diligence. It was their case that no final agreement had been reached.

66. A key factor in Primekings' due diligence seems to have been KSGL's liability to GE Money, who had been the source of a major line of credit for KSGL. Mr Swain made contact with GE personally. On 18 December 2013 he met representatives from GE, a Mr Cole and a Mr Weedall. The meeting was also attended by a turnaround consultant, Ms Lord. It was initially planned that KSGL's commercial director, a Mr Evans, would attend this meeting. However Mr Swain had passed word that Mr Evans' presence was not wanted. There was and is a dispute about whether this was said to be because GE did not want Mr Evans to attend.

67. Also on 18 December 2013, Mr King and Mr James King and the Misrepresentation Solicitors (including a partner at that firm, Mr Wilson), met Mr Fisher and Primekings' lawyers (from Teacher Stern, the Eighth Defendant). During that meeting, at around 3pm, Mr Fisher took a call from Mr Swain. He left the room, then re-entered and put Mr Swain on speakerphone for the Kings to hear.

68. It is accepted that Mr Swain at least purported to tell the Kings the outcome of his meeting with GE. However, the representations of Mr Swain as to GE's position would become central to the Misrepresentation Claim. The Kings (at least initially) stated that Mr Swain represented to them in the 18 October 2013 meeting that:

    i) All KSGL's accounts were frozen;

    ii) GE had lost complete faith in the management of KSGL (and on that basis had excluded Mr Evans from the meeting);

    iii) GE was no longer prepared to support KSGL and there would be no further funding.

69. Following this meeting, written agreements were signed on 20 December 2013, pursuant to which:

    i) Primekings (a) purchased all 402 ordinary shares previously held by the Second Claimant, Mr James King and the Third Claimant Mrs King for £750,000, with a further £1.25m to be paid by way of deferred consideration when KSGL had sufficient funds, with the intention of it being paid within 3 years and (b) subscribed for a further 1507 shares for £1m;

    ii) The Trust continued to hold 402 ordinary shares and Mr King 201 shares – such that Primekings held c.76%;

    iii) Primekings agreed it would reduce its holding to c.60% if, over the next 3 financial years, KSGL hit annual EBIDTA targets of £3m (and if KSGL did not meet such targets Primekings could acquire the Trust's shares for their nominal value);

    iv) Mr James King and Mrs King were allotted 6 B shares;

    v) Ki Finance SARL provided a loan of £3m working capital; and

    vi) Mr James King and Mrs King resigned as directors and Mr Stiefel, Mr Fisher and Mr Swain, were appointed as directors. Mr King continued in his role as a director and managing director of the trading subsidiary, KSSL.

70. The Kings refer to this as the "revised agreement". Primekings saw this as the only agreement. The point is that, if compared to the proposals described above, the agreed terms are clearly less advantageous to the Kings.

71. It appears from both the documentary evidence and the events as they have unfolded that the Kings had understandably mixed feelings about this deal. Their family business had received much-needed investment, but at the cost of losing control to the extent they would be unable to block even special resolutions. All members of the King family, apart from Mr King, had to resign their employment as part of the deal. It seems to have provoked in the Kings an amalgam of rancour and gratitude. As time has passed, the latter has entirely disappeared.

72. On 31 March 2015 the final instalment of the £1.25 million was paid to Mr James King and Mrs King. On the same day, the Kings sent pre-action letters to Mr Stiefel, Mr Fisher and Mr Swain. The letters alleged that the three representations made by Mr Swain by telephone about GE's position at the 18 December 2013 were fraudulent, and had given the impression that KSGL was in a more financially precarious position than the actuality. This, it was (and continues to be) said, caused them shortly thereafter to enter the less advantageous "revised agreement".

73. Part of this disadvantage, which became of particular relevance at trial, was said to be the issuing of Mr James King and Mrs King with 6 "B" shares in the "revised agreement", as opposed to a prior proposal to receive their payment as cash from Primekings. Rescission and damages were sought. The letters went on to accuse Mr Stiefel, Mr Fisher and Mr Swain of committing criminal offences under sections 89 and

90 of the Financial Services Act 2012 and reserved the right to report them to the Financial Conduct Authority and/or the Police without further notice.

74. The claim was issued on 16 July 2015: James Patrick King & Others v Primekings Holding Limited, Peter Swain and Robin Fisher HC-2015-0002953 (the "Misrepresentation Claim") against the present Second to Fourth Defendants (the "Misrepresentation Defendants"). Mr Stiefel, though sent a letter before action, was not a defendant. The Kings were the claimants in those proceedings. The claim was in fraudulent misrepresentation, with "back-up" claims in conspiracy and economic duress. There was no claim for innocent misrepresentation. The Kings were represented in the Misrepresentation Claim by the Misrepresentation Team.

75. The Misrepresentation Defendants instructed Teacher Stern. That firm and certain key individuals that made up the Misrepresentation Defendants' legal team are now Defendants in these proceedings. The Fifth and Sixth Defendants were solicitors at Teacher Stern: Mr Cowper was the partner leading the litigation team, and Ms Toomer was the lead associate. Mr Levinger acted as a consultant to the Teacher Stern litigation team. Teacher Stern instructed Mr Downes QC to act in the Misrepresentation Proceedings; he is the Ninth Defendant to these proceedings. Mr Rabinowicz is a solicitor and partner at Teacher Stern who became involved in early 2019 in the costs assessment process following the discontinuance of the Misrepresentation Claim.

76. By their defence dated 22 October 2015 the Misrepresentation Defendants admitted that Mr Swain had related to Mr Fisher what he had been told by GE as to its position at the meeting that he and Ms Lord attended with them. They also admitted the "gist" of the representations relied on by the Claimants, save that Mr Swain:

    i) Stated that GE had told him that KSGL's account was frozen and would remain frozen unless a deal was done;

    ii) Did not say that Mr Evans was excluded from participation in the meeting because GE had lost faith in the management of KSGL and the Kings. He further averred that he probably only said GE had lost faith in the Kings;

    iii) Stated that GE had told him that there would be no further funding support unless a deal was done.

77. In short, the Misrepresentation Defendants defended the statements on the ground that they were true in all material respects and/or were believed to be true. Further, the defence went, the Kings did not suffer loss by reason of the deal in any event: entry into the deal saved the business which would otherwise have entered a formal insolvency, with the Kings losing the value of their shareholdings. In all, they contended that there was no fraud, no misrepresentation, and no loss, that the claim was hopeless, and that the extremely serious allegations advanced by the Kings should never have been made.

78. The nature of the present claim brings to the fore a number of matters in the conduct of the Misrepresentation Claim, which are said in the present proceedings to variously constitute or indicate a conspiracy to unlawfully procure a discontinuance from the Kings and/or fraudulently inflate costs.

79. A total of six costs budgets were provided to the court and to the Claimants in the course of the litigation, on 7 March 2016, 3 June 2016, 21 September 2016, 20 February 2017, 10 March 2017 and 26 April 2017. Each were certified by Mr Cowper with a statement of truth. The first, 7 March 2016, projected the Misrepresentation Defendants' costs to trial at £2.7m.

80. At the first CMC on 15 March 2016, the Misrepresentation Defendants stated in their Precedent H that £76,558 had already been spent on witness statements prior to that CMC.

81. On 30 September 2016 Ms Toomer signed, filed and served a witness statement in respect of a CMC stating that another Teacher Stern associate had done £3,327.50 of work relating to Smith & Williamson's expert evidence prior to 7 March 2016, as shown in costs budgets dated 7 March 2016, 3 June 2016 and 21 September 2016. It also states that approximately 80% of the time anticipated for witness statements had already been incurred, and that the remainder would be for consideration of the Claimants' witness statements. It is alleged in the present proceedings that Mr Downes had a hand in drafting that witness statement.

82. The final budgeted costs of the Misrepresentation Defendants were £1,989,857.86.

83. On 3 January 2017 it is alleged in the present proceedings that Mr Stiefel (via Macfarlanes LLP) made an allegedly improper threat to report the Kings' solicitor, a Mr Blakey of the Misrepresentation Solicitors, to the SRA. The Kings refer to this in their Particulars of Claim as the "SRA Threat".

84. On 1 February 2017 Mr Downes drafted a mediation position statement relating to the Misrepresentation Proceedings. It contains wording characterised in the Claimant's Particulars of Claim as the "Allegations Threat". There is some dispute as to whether it may be referred to in these proceedings, or whether the position statement is protected by mediation privilege. I will deal with this as a discrete issue below.

85. On 17 March 2017, Mr King alleges that Mr Stiefel told him that he and his family would be "ruined and destroyed" by the Misrepresentation Proceedings, but if they dropped them Primekings would take the B shares (worth £2m) as payment to cover the Misrepresentation Defendants' legal costs. The Kings refer to this in their Particulars of Claim as the "Ruined and Destroyed Threat".

86. The trial of the Misrepresentation Proceedings was listed for 20 days before Marcus Smith J in May 2017. The trial began on 27 April 2017.

87. Mr King was the first witness called by the Claimants. He was cross-examined by Mr Downes for 5 full days and part of a sixth. The following events during that cross-examination were drawn to my attention in this application:

    i) On Day 2 of the trial Mr King confirmed in cross-examination by Mr Downes that the idea of the deal involving deferred consideration to Mr James King and Mrs King by redeemable B shares came from the Misrepresentation Solicitors. Immediately following this, Mr Downes asked Mr King whether he had complained about the Misrepresentation Solicitors or if Mr King had intimated

a professional negligence claim against them. He did not pursue that in further cross examination at that point.

ii) On Day 4, Mr Downes took Mr King to documents which demonstrated that, contrary to the Kings' pleaded case, the B-share mechanism was part of negotiations from 14 December 2013, i.e. 4 days before the alleged fraud took place.

iii) On Day 6 – in the Monday morning session just after the weekend – Mr King delivered what has been termed the "long speech". In it, Mr King said he had reconsidered his evidence over the weekend and that the key words "*unless a deal was done*" were used. Mr King recalled that after Mr Swain initially informed the Kings there would be no support by GE, Mr Fisher left the room, and on return informed the Kings that Mr Swain had managed to talk GE around, and that they would continue support if a deal was done with Primekings.

iv) On Day 7, Mr Weedall and Mr Cole of GE gave evidence. There are two key features of their evidence. They confirmed in cross-examination that if there was no deal done by 20 December 2013 GE had no ability to provide an additional overpayment to meet KSGL's cash shortfall. Their evidence also seemed to suggest that Mr Swain could have reasonably believed that the relevant accounts were "frozen" from the conversation they had.

v) On Day 8 Mr Wilson of the Misrepresentation Solicitors was due to give evidence. Before doing so, he handed up to the judge a "list of corrections" to his witness statement. This included an amendment that removed the allegation that the B-share mechanism was added after the alleged fraud.

vi) Mr James King was cross-examined on Day 9, Thursday 11 May 2017. His position in cross-examination remained that the words "*unless a deal was done*" were not used either to him or Mr King. His evidence was therefore at odds with that of Mr King.

88. On 12 May 2017, a non-sitting day, the Kings met their legal advisors in conference. The Kings were advised that their case had collapsed in the course of their evidence, and it could not continue. A formal written advice was provided on Sunday 14 May 2017, which advised the Kings that there was no claim left that could be advanced, and that the Misrepresentation Counsel were professionally embarrassed and could no longer act.

89. This was said to be on the basis that, *inter alia*:

i) The evidence from GE was that Mr Swain could have had a reasonable belief in the statements he said over the phone;

ii) Mr King's "long speech" was contradictory of their pleaded case on "*unless a deal was done*", supportive of the Defendants' position, and also contradicted by Mr James King's evidence.

iii) As such, there was no credible case of fraud remaining. The Defendants' approximate version of events was variously (a) now supported by Mr King; (b)

supported by GE witnesses. That was also fatal to the alternative cases in conspiracy and economic duress;

iv) Further, no amendment was possible to save the claim, because Mr King's evidence on the representations now contradicted Mr James King's;

v) The advice also highlighted that while the principal problem was the GE witnesses' evidence, Mr King's evidence was extremely disappointing, that he came across as evasive and that at least some of his evidence would not have been considered to be credible. He was said to be at risk of being found not to have given honest evidence;

vi) Finally it considered that the way in which the evidence had come out had further undermined any prospect of achieving rescission.

90. It was recommended that the Kings discontinue, with an apology, and agree to pay costs on the indemnity basis. On 15 May 2017, day 10 of the trial, this is what happened. The apology was read out in open court.

91. On the issue of costs, Mr Downes made an application for payment on account of £1,872,053.60, being the figure in the 26 April 2017 budget, minus £177,500 representing the final 10 days of the trial that now would not be needed, plus 3% for the budget process. Mr Downes also told Marcus Smith J that there would be more costs, and referred to applications for third party disclosure and costs of specific disclosure. The Misrepresentation Defendants were awarded a payment on account of costs of £1,700,000 by 4pm on 12 June 2017 (the Payment on Account Order).

92. One witness for the Kings was not called due to the discontinuance: a Mr Howard Smith of KPMG. The Kings suggest Mr Smith would have said there were other potential investors in November 2013 (i.e. other than Primekings), that KSGL seemed to have sufficient funds to pay salaries in December and trade through to January, and that KPMG would have a small number of staff on standby to re-commence marketing the business on a solvent basis.

93. The Kings failed to pay the sum specified in the Payment on Account Order by the date specified.

Further Litigation

94. Between 15 May 2017 and the present the Kings have been involved in four separate pieces of litigation besides the present:

i) Primekings sought to enforce the unpaid Payment on Account Order by Part 8 proceedings (the "Part 8 Proceedings").

ii) The Kings disputed the costs Primekings stated it incurred in the Misrepresentation and Part 8 Proceedings, leading ultimately to a detailed assessment hearing listed for 7 days before Master Whalan (the Detailed Assessment Proceedings").

iii) An unfair prejudice petition in respect of KSGL (the 's. 994 Proceedings').

iv) The professional negligence action against the Misrepresentation Team (the "Professional Negligence Action").

95. In addition, as already noted, KSSL issued proceedings in bribery against Mr King and Mr Evans relating to use of cars provided by a supplier of KSSL. Mr King counterclaimed against KSSL in the tort of abuse of process, on the basis that KSSL's predominant purpose in bringing the bribery claim was to obtain the Kings' minority shareholding in KSGL at an undervalue and/or damage Mr King reputationally.

96. By a judgment dated 18 February 2021 (the fourth day of hearing the present applications) Andrew Lenon QC (sitting as a Deputy High Court Judge) found Mr King liable to KSSL in the sum of £45,666.47, and dismissed the counterclaim (*Kings Security Systems Limited v Anthony Douglas King and Stephen John James Evans* [2021] EWHC 325 (Ch)). Mr Lenon QC noted that he did not regard Mr King's evidence on the relevant matters as reliable or honest.

Enforcement of the Payment on Account Order

97. To return to the aftermath of the Misrepresentation Claim, on 13 June 2017 Teacher Stern drafted a without prejudice letter to the Claimants stating that their likely total costs liability to Primekings was £2.7m, and offered the Claimants the opportunity to agree this figure by way of a contract.

98. On 22 June 2017 an interim charging order was granted over shares and property owned by the Kings and the Trust to secure the Payment on Account Order.

99. On 29 June 2017 Teacher Stern wrote to solicitors for Mr James King stating that the costs order obtained on 15 May 2019 by Mr Downes did not include costs for third party disclosure, which exceeded £200,000.

100. The interim charging order was made final on 3 August 2017. On 24 August 2017 the court ordered the Claimants to attend for oral examination pursuant to CPR 71, as part of the enforcement of the Payment on Account Order. In the application relating to this process, the Misrepresentation Defendants stated that the total costs claim exceeded £3m.

101. On 11 and 12 October 2017 the Kings were questioned about their assets before Master Linwood. Primekings were again represented by Mr Downes QC. At that hearing, outside the court, the Kings allege Mr Downes made an offer to the Kings to settle the costs claim. There is dispute about whether this discussion was without prejudice or on an open basis. Mr Downes then drafted a letter to be sent to the Kings requesting further information about the Professional Negligence Action, including a clause that the Kings would not rely on the court-door discussion. The court adjourned the proceedings with liberty to restore, and ordered the Claimants to pay the costs of the CPR 71 application.

102. On 27 October 2017 Primekings, Mr Fisher and Mr Swain issued a Part 8 Claim Form seeking an order for sale of the Claimants' shares in KSGL, as an enforcement action on the Payment on Account Order. These are the Part 8 Proceedings. An order for the sale of the shares was made by Deputy Master Cousins on 23 March 2018.

103. On 23 May 2018 a judgment of Deputy Master Cousins confirmed the earlier decision in the Part 8 Proceedings, and directed the parties to attempt to agree directions for the valuation and process of sale of the Claimants' shares in KSGL. In a skeleton argument for this hearing the Misrepresentation Defendants informed Deputy Master Cousins that their total costs in the Misrepresentation Proceedings would be in the region of £2.2m.

104. On 10 July 2018 Ms Toomer of Teacher Stern stated to Mr King that the figure billed to Primekings for the Misrepresentation Proceedings was £3,213,026.99.

105. A further judgment of Deputy Master Cousins in the Part 8 Proceedings, dated 6 August 2018, re-confirmed the order for sale and refused to stay the Part 8 Proceedings pending the determination of the s. 994 Proceedings.

106. The Claimants paid the sum due by the Payment on Account Order on 10 October 2018. This was apparently funded by receipt of funds from the Misrepresentation Solicitors' insurer, following a determination by the Legal Ombudsman. The Kings have not disclosed the basis on which that payment was made, or the reasons given for that payment.

107. On 12 October 2018 Ms Toomer contacted the Kings to apologise and correct the figure provided on 10 July 2018 relating to the amount for which Teacher Stern had invoiced Primekings. She stated that the figure of £3,213,026.99 was inclusive of VAT, and incorrect: the correct figure was £2,855,501.94, again inclusive of VAT, due to a double-counted invoice.

108. A hearing took place before Deputy Master Cousins on 17 October 2018, intended to determine the form of the order for the sale of shares. As payment had been made on 10 October 2018, the Deputy Master instead heard submissions on costs.

109. On 27 December 2018 Deputy Master Cousins ordered the Claimants to pay the costs of the Part 8 Proceedings on an indemnity basis, to be determined by the court unless agreed.

The s. 994 Proceedings

110. On 19 March 2018 the Claimants issued the s.994 Proceedings in respect of KSGL against various respondents, including Mr Stiefel, Mr Fisher and Primekings.

111. The s. 994 Proceedings alleged prejudice on numerous grounds, including allegations that Primekings and its representatives on the KSGL board had deliberately sought to minimise KSGL's profit to minimise or avoid paying Mr James King and Mrs King for their B shares, and to attempt to acquire Mr King's shares at the lowest possible value. It also alleged that the Part 8 Proceedings was a further attempt to acquire the Kings' shares at an undervalue. The primary relief sought was purchase of the Kings' shares at market price without any discount.

112. As noted above, on 6 August 2018 Deputy Master Cousins refused to stay the Part 8 Proceedings pending the s. 994 Proceedings.

113. Detailed points of claim were served on 20 January 2019. These detailed points of claim rehearsed much of the long history of the relationship between the Kings and

Primekings: the change between the "initial" to "revised" agreement, the alleged misrepresentations, alleged abuse of the Part 8 Proceedings to unfairly deprive the Kings of their shares, the trial and discontinuance of the Misrepresentation Proceedings, the charging orders obtained in June 2017, and the CPR Part 71 oral examination of the Kings.

114. On 20 December 2019 the First, Second and Fourth Defendants issued an application to strike out parts of the points of claim in the s. 994 Proceedings. This was heard on 7–8 October 2020. On 19 November 2020, following a full judgment handed down on 29 October 2020 Mr Tom Leech QC (sitting as a Deputy High Court Judge) struck out parts of the points of claim, including the allegations surrounding the alleged misrepresentations on 18 December 2013. By way of a further judgment dated 19 November 2020 he ordered that the Kings should pay £40,000 on account of costs. This payment was made on 16 December 2020.

The Professional Negligence Action

115. As indicated above, the Kings have also issued a professional negligence action arising out of the conduct of the Misrepresentation Proceedings, against the Misrepresentation Team.

116. This claim was issued on 6 December 2019, alleging breach of fiduciary duty and gross negligence: that "*the chance to win an overwhelmingly strong case was thrown away by the negligence and breach of duty of the Misrepresentation Solicitors*". Part of the claim, to which I will come in more detail later, is that the Misrepresentation team were intimidated by Primekings and Primekings legal team. The Kings in that claim seek damages to compensate them for loss of a (100%) chance that rescission would have been granted following success in the Misrepresentation Proceedings, the Misrepresentation Solicitors' legal fees (that would have been recoverable from the Misrepresentation Defendants on victory), and costs incurred by the Kings in subsequent proceedings flowing from the decision to discontinue the Misrepresentation Proceedings. Particulars of Claim were filed on 7 May 2020 (ie shortly after this claim was commenced).

117. On 29 July 2020 the Misrepresentation Solicitors filed a defence, denying the allegations in full. The Misrepresentation Counsel filed a defence on 30 July 2020, again denying the claims in full and, of particular relevance to the present claim, explicitly denying they were intimidated by the Misrepresentation Defendants' conduct of the case.

118. Recently Misrepresentation Counsel have served a draft Amended Defence. Following this hearing the Kings' solicitors wrote to me drawing to my attention the fact that the amendments were in the Kings' eyes significant, and indeed raised "red flags" in the context of this case. In particular it was said that the purport of some of the amendments was that Misrepresentation Counsel "*now wishes to emphasise that it is possible that Primekings intimated personal consequences for DWF if the case continued to a judgment, and that such matters may have been concealed from him, that tends to show that the Kings might be right*".

119. It was also said that "*The fact that eight substantive amendments are being made generally casts doubt on whether the Barristers' Defence when filed (and relied on at*

February hearing) was a proper and accurate representation of the barristers' position on the facts when alleging the King claim is a 'conspiracy theory'."

The Detailed Assessment Proceedings

120. On 24 February 2019 Teacher Stern submitted an Amended Bill, in relation to the Misrepresentation Claim, which was certified by Mr Rabinowicz. On 12 March 2019 Teacher Stern wrote stating that unless the Kings were able to make a reasonable offer on the bill of costs they would finalise and serve the bill and notice of commencement of assessment. On 2 April 2019 the bill was served, commencing detailed commencement proceedings. The signature of Mr Cowper, who left the firm on 31 March 2019, does not appear on the bill.

121. The served bill stated Primekings' incurred costs were £2,370,878.51 in the Misrepresentation Claim (not including the Part 8 Proceedings costs). There are a few features of this bill to which various courts' attentions have been drawn:

    i) 577 hours was said to have been spent on witness statements after Ms Toomer's 30 September 2016 witness statement indicated that 80% of witness statement costs had already been incurred;

    ii) It included a small sum said to be for work on an expert report with Smith & Williamson in 2016 (as shown on the March 2016, 3 June 2016 and 21 September 2016 budgets).

122. On 23 April 2019 the Kings applied to stay the detailed assessment of costs in the Misrepresentation Claim due to an overlap in issues with the s. 994 Proceedings. The same application was made by the Kings regarding the detailed assessment of costs in the Part 8 proceedings on 13 June 2019.

123. On 10 May 2019 a series of invoices, a schedule of invoices, a schedule of payments, and payment records were provided to the Kings by Ms Toomer and Mr Rabinowicz on behalf of Mr Fisher, Mr Swain and Primekings. It is on or around this point that Mr Rabinowicz is said to have joined the conspiracy presently alleged.

124. The stay applications were heard together on 8–9 August 2019, with further submissions made in writing. The Claimants served written reply submissions on 18 September 2019, and the Misrepresentation Defendants (via Mr Downes) served written submissions in answer on 27 September 2019. In that answer, the 577 hours spent on witness statements in the run-up to trial was defended as reasonable by Mr Downes, who also suggested certain ways in which such costs could have been incurred. The total length of the written submissions served was 106 pages, of which over 70 were served by the Kings.

125. The Kings argued that the overlap meant the detailed assessment proceedings should be stayed in favour of the s. 994 Proceedings otherwise the High Court Judge hearing the latter might be "embarrassed" or "put in a strait jacket" by findings arising from the detailed assessments.

126. Both stay applications were rejected on 19 December 2019 by Master Whalan. At [28-29] of his judgment he said:

"28. I state at this point my overall conclusion that it is not appropriate to stay the detailed assessment proceedings. My reasons are as follows:

(i) It is not sufficient for the Claimants to identify some purported commonality of issues between the proceedings. The alleged overlap must be of such relevance to justify the conclusion that this constitutes a 'rare or compelling case'. The allegations pleaded by the Claimants in the s.994 petition in respect of the Part 7 and 8 detailed assessments comprise a very small part of the varied and wide-ranging claims ….

(ii) The Senior Courts Costs Office has considerable experience and expertise in hearing and determining arguments in relation to misconduct per CPR 44.11. It regularly resolves issues concerning the alleged conduct of a party or that party's legal representative in respect of the substantive or detailed assessment proceedings….

(vi) The Defendants' entitlement to their costs was established in orders sealed on 22nd May 2017 and 27th December 2018 respectively. The payment on account of costs of £1.7m was due to be paid by the Claimants by 12th June 2017 but not actually discharged until 10th October 2018. Deputy Master Cousins, as noted, concluded that the Claimants were guilty of 'procrastination'…. Realistically, it is unlikely that the hearing of the assessments will be listed much before the end of 2020 … Nonetheless this is likely to be before any trial of the Unfair Prejudice Petition. Further delay (in addition to that already triggered by the Claimants) will constitute an unreasonable prejudice to the Defendants.

(vii) The issue of time and delay is given added emphasis when one considers again the nature and extent of the Claimants' allegations in the s.994 petition. The Claimants allege fraud - a material dishonesty in claiming for work that was not as a matter of fact undertaken - in the context of a widespread conspiracy hatched by the Defendants and their professional representatives. Very specific, damaging allegations are levied against the professional conduct of several senior practitioners at Teacher Stern, the Defendants' solicitors. A stay of these assessment proceedings will leave these allegations hanging over the Defendants' solicitors for an unreasonably protracted period of time. I agree that to leave such serious allegations of impropriety hanging over the heads of professionals constitutes a powerful pointer against ordering a stay(s). …

29. Ultimately, therefore, the Claimants have not demonstrated grounds for a stay of the detailed assessment proceedings. Identification of some pleaded or evidential issues which potentially overlap falls a long way short of demonstrating the

> rare and compelling circumstances required to order a stay of the assessments."

127. Master Whalan held that if the Kings wished to advance their argument that the bill had been fraudulently overstated, they should do so at the earliest opportunity, which was in the detailed assessment proceedings. There was no appeal against his refusal. But shortly thereafter the Kings issued this Claim.

128. There was a hearing for directions to detailed assessment on 20 February 2020. At that hearing the Kings were also ordered to pay the costs of the stay applications on the indemnity basis, despite the Kings submitting the costs of the stay applications should be reserved to the detailed assessment because of alleged *prima facie* evidence of costs fraud.

129. Following this hearing, there was some complexity about the Kings obtaining a transcript of the hearing in order to pursue an appeal. This appears to have arisen due to Teacher Stern apparently contacting two suppliers of court transcripts – Epiq and Ubiqus. This is a subject about which Ms Toomer later wrote about to Metis Law. It is said in the present claim that this was done deliberately to obstruct the Kings and disguise Mr Downes' misleading the court at that hearing.

130. On 25 February 2020 the Misrepresentation Defendants served an amended bill of costs. This amended bill totalled £2,452,657.51.

131. The Kings served points of dispute in the Detailed Assessment proceedings on 19 March 2020. This was the same day on which the Particulars of Claim in this action were served. These points of dispute raised allegations of costs fraud, relying on alleged inconsistencies in the various bills and budgets submitted by the Misrepresentation Defendants and alleging that the bills had been mis-certified, and allegations that the bill exceeded the sums invoiced, alongside taking issue generally and on a number of grounds with the reasonableness of the costs incurred.

132. The detailed assessment hearing was listed for 12–17 November 2020. On 9 November 2020 Mr King (acting in person) served a skeleton for the purpose of the Detailed Assessment hearing. On 11 November 2020, Mr King provided an amended points of dispute striking through the allegations of costs fraud and relying only on points concerning the reasonableness of the costs. That document indicated an intention to take the allegations of fraud in the High Court proceedings. Permission to drop these points was given by the Master at the hearing, which proceeded as listed, albeit requiring less court time than foreseen.

133. Final Costs Certificates were issued dated 18 November 2020. The Master assessed the costs of the Misrepresentation Proceedings at £2,220,181.73 (being approximately 90% of what was claimed) and the costs of the Part 8 Claim at £355,235.06 (being approximately 97% of what was claimed). The costs of the Detailed Assessment proceedings were themselves awarded on the indemnity basis. Including interest (as at 17 November 2020) and costs of the Detailed Assessment, the sums payable by the Kings were £2,726,154.87 in the Misrepresentation Proceedings and £411,541.84 in the Part 8 Claim.

The current proceedings

134. It is therefore against, and occasionally alongside, this background that the present claim was issued, and the present applications are made.

135. On 5 February 2020 the current proceedings were issued. The central claim is in conspiracy. The Claim Form alleges that:

> "The First to Ninth Defendants have unlawfully conspired to provide false and inflated cost information (including artificial costs budgets) to the Claimants and the Court with a view to causing damage to the Claimants by (a) improperly pressurising the Claimants and their legal team with improper threats of adverse costs (b) obtaining an improper payment on account of costs in favour of the Second to Fourth Defendants in the sum of £1.7m by misleading Marcus Smith J, which payment on account vastly exceeded the actual costs spent."

136. It also alleges that the First to Tenth Defendants covered up this conspiracy by:

i) Providing false information to a costs draftsman and attempting to launder that false information by submitting it to a Master;

ii) Presenting a fraudulently inflated bill of costs to the Senior Courts Costs Office;

iii) Ensuring the Kings were not provided with any information about the costs fraud;

iv) "*Deploying a cynical and determined strategy of delay and obfuscation aimed at ensuring that the Claimants are bankrupted by interim costs orders before key evidence of fraud emerges from third parties, in order to stifle this claim*";

v) Intimidating the Kings and their lawyers to prevent this claim being brought or decided on its facts.

137. Particulars of Claim were served on 19 March 2020. As will be discussed further below they allege a "Common Design" with three goals:

i) To pressure the Kings' legal team to discontinue the claim by misleading the Kings into believing they would face adverse costs more than Primekings knew they would incur, and using threatening conduct (the so-called "Discontinuance Goal");

ii) To enrich Primekings by falsely inflating costs that would be incurred to obtain the Kings' shares in KSGL at an undervalue (the so-called "Enrichment Goal"); and

iii) To cover up the above (the so-called "Cover-Up Goal").

138. The Teacher Stern Defendants served a lengthy Part 18 request on 20 April 2020. This was answered on 6 May 2020.

139. On 14 May 2020 the Ninth Defendant issued his present strike out application. The same day the First to Fourth Defendants issued their present summary judgment and strike out application.

140. Also on 14 May 2020, the Fifth to Eighth and Tenth Defendants issued a stay application. This was followed on 2 June 2020 with their present summary judgment and strike out application.

141. On 22 November 2020 I heard an *ex parte* application to preserve evidence in the present claim, issued by the Kings against the First to Eighth and Tenth Defendants. I dismissed that application and required its making to be notified to the Respondents to the Application.

142. On 11 January 2021 the First to Fourth Defendants applied for permission to rely on further evidence in support of their present application. The Ninth Defendant made a similar application on 20 January 2021.

The Particulars of Claim

143. At the heart of this application is the pleaded case. Since no defences have been served the critical document is the Particulars of Claim. It is a document of 25 pages in length (i.e. it is just within the page limit generally imposed in the Commercial Court). It is dated 19 March 2020 and is signed by Mr Newman. It is verified by statements of truth by all of the Kings.

144. It is, I regret to say, a document which is profoundly unsatisfactory in a number of respects.

145. A pleading in these courts serves three purposes. The first is the best known – it enables the other side to know the case it has to meet. That purpose, and the second are both expressly referenced in the following citation from the speech of Lord Neuberger MR in *Al Rawi v Security Service* [2010] EWCA Civ 482; [2010] 4 All ER 559, [18]:

> "a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments at trial."

146. The second purpose then is to ensure that the parties can properly prepare for trial – and that unnecessary costs are not expended and court time required chasing points which are not in issue or which lead nowhere. That of course ties in with the Overriding Objective, which counts amongst its many limbs "*(d) ensuring that [the case] is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases…*".

147. This is a point which feeds into the dictum of Teare J in *Towler v Wills* [2010] EWHC 1209 (Comm), at [18]-[21]:

> "The purpose of a pleading or statement of case is to inform the other party what the case is that is being brought against him. It

> is necessary that the other party understands the case which is being brought against him so that he may plead to it in response, disclose those of his documents which are relevant to that case and prepare witness statements which support his defence. If the case which is brought against him is vague or incoherent he will not, or may not, be able to do any of those things. Time and costs will, or may, be wasted if the defendant seeks to respond to a vague and incoherent case. It is also necessary for the Court to understand the case which is brought so that it may fairly and expeditiously decide the case and in a manner which saves unnecessary expense. For these reasons it is necessary that a party's pleaded case is a concise and clear statement of the facts on which he relies."

148. The third purpose for the pleading rules is less well known but no less important. The process of pleading a case operates (or should operate) as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.

149. Particulars of Claim, in particular, should generally aim to set out the essential facts which go to make up each essential element of the cause of action – and thought should be given to whether any more than that is either necessary or appropriate, bearing in mind the functions which a pleading serves and whether any components of what is pleaded are subject to rules requiring specific particularisation.

150. This is a point which is not infrequently forgotten today. As Christopher Clarke LJ said (in a judgment with which Sharp LJ agreed) in *Hague Plant v Hague* [2014] EWCA Civ 1609, [2015] CP Rep 15, at [76] and [78];

> "Particulars of Claim must include a concise statement of the facts on which the claimant relies: CPR 16.4. (1) (a) . But they need not, and should not, contain the evidence by which they are to be proved or the opposing party's pleadings or admissions. Whilst it may be appropriate in some circumstances to rely, as proof of dishonesty, on the fact that the defendant's account of his position requires explanation and that he has given several different accounts, all unacceptable, this can and should be done in a concise way, referring to documents (but not necessarily quoting in extenso) which makes clear what is the issue. The pleading cannot be used as the first draft of an opening or a delineation of points for cross examination….
>
> Pleadings are intended to help the Court and the parties. In recent years practitioners have, on occasion, lost sight of that aim. Documents are drafted of interminable length and diffuseness and conspicuous lack of precision, which are often destined never to be referred to at the trial, absent some dispute as to whether a claim or defence is open to a party, being overtaken by the opening submissions. It is time, in this field, to get back to basics."

151. The danger which attends pleadings which neglect to conform to this fairly minimalist approach can be illustrated from the same case, where Briggs LJ described the pleading in issue thus, at [23]:

> "So far from being a concise statement of the primary facts relied upon in support of the claim, it comes across as a rambling narrative …, serving no apparent purpose, and obscuring, rather than clarifying, the claimant's own case."

152. Not dissimilar criticisms could be made about the Particulars of Claim in this case, and it is certainly the case that there are points where I conclude that it positively obscures the Kings' case. I am persuaded also that the defects in the pleading have complicated the applications before me.

153. The starting point is perhaps the target at which the Particulars of Claim should be shooting – which is the cause of action in question. Here the claim is one in unlawful means conspiracy. The constituent parts of that clause of action have been summarised by the Court of Appeal in *Kuwait Oil Tanker Co SAK v Al-Bader (No 3)* [2000] 2 All ER (Comm) 271, at [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

154. Those elements are not readily discernible in the Particulars of Claim. A flavour of the pleading can be gained from quoting the section entitled "The Common Design":

> "16. On a date or dates unknown but between April 2015 and 7 March 2016, Mr Stiefel, Mr Fisher, Mr Swain, Primekings, Ms Toomer, Mr Cowper, Mr Levinger, Teacher Stern, and Mr Downes ('the First Nine Defendants') reached an understanding that their case strategy would involve working together to achieve the following goals ('the Common Design'):
>
> 16.1. The Discontinuance Goal - Placing pressure on the Kings and their legal team to discontinue the case (thus avoiding a fair adjudication on the facts) by (i) misleading the Kings into believing that if they did not discontinue then they might ultimately become liable to Primekings for an amount of legal costs which in fact Primekings knew it would not incur (ii) using threatening conduct to intimidate the Kings and their lawyers for that purpose.
>
> 16.2. The Enrichment Goal - If a costs order was secured, enriching Primekings and Teacher Stern at the expense of the Kings by means of obtaining an order for a payment on account for a sum higher than the costs actually incurred and which could

> be used to improperly obtain the Kings' shares for less than their fair value.
>
> 16.3. The Cover Up Goal - At all times preventing the discovery of the Common Design.
>
> 17. The means by which such goals were to be achieved would necessarily include (and did in fact include) (i) presenting false information about legal costs incurred and likely to be incurred to the Kings, to the Kings' legal representatives and to the Court, which would involve deceit and contempt of court (ii) intimidating conduct intended to influence the Kings and their representatives, which is a contempt at common law.
>
> 18. The Common Design is ongoing and continues at the present time. It cynically seeks to exploit the fact that Courts are reluctant even to countenance the possibility that senior legal professionals might engage in such conduct."

155. The Common Design is then said to be capable of being inferred from a list of six so called facts, one of which is said to be the Cover Up itself. Only one of these facts – the alleged Contingency Fee Arrangement – predates 2017. This portion of the pleading runs to some 65 paragraphs.

156. The key allegations are:

i) An alleged "hidden contingency fee arrangement" whereby Primekings were only liable for disbursements if the case was "commercially successful". It is said to follow (though is not explicitly pleaded) that such an arrangement was unlawful, and so no fees were payable by Primekings to Teacher Stern or Mr Downes;

ii) Solicitors of Teacher Stern signing statements of truth on costs budgets they knew to be false;

iii) The "SRA Threat", the "Allegations Threat" and the "Ruined and Destroyed Threat" made in the course of the Misrepresentation Claim;

iv) Exerting (other) improper pressure on the Kings' legal team in the Misrepresentation Claim, and procuring the £1.7 million Payment on Account Order by fraud;

v) The "Discontinuance Goal" was said to have been achieved:

> "in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law), including, but not limited to, the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat."

vi) As, on the Kings' case, costs in the Misrepresentation Proceedings were not recoverable or were fraudulently inflated, all the representations made about costs by the present Defendants – whether to a court or to the Kings – were false and all the Defendants knew them to be false when they were made. This includes witness statements, costs budgets anything said in court by Mr Downes and all offers to agree costs with the Kings. All matters concerning costs pre-discontinuance are alleged to be part of the plan to force the Kings to discontinue, and post-discontinuance are part of the Cover Up.

vii) Further, Primekings seeking to recover those costs following discontinuance, and in particular by attempting to recover those costs by obtaining the Kings' shares in KSGL for less than their fair value, is to attempt to enrich itself at the Kings' expense.

157. Part way through this recital comes what transpires to be a key paragraph within the pleading. Under Heading 5 at [35] "Discontinuance and Payment on Account" this is pleaded:

> "On 15 May 2017, the tenth day of the trial, the Kings discontinued the Misrepresentation Proceedings. Such discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law), including, but not limited to, the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat. Pending disclosure, the Kings infer from those threats and the matters set out in the Schedule to these Particulars ('the Schedule') that other threats of a similar nature were made to the Misrepresentation Solicitors and the counsel team. That inference is strengthened by …"

158. The Schedule referred to is entitled "SCHEDULE OF COMMENTS MADE AND ACTIONS TAKEN PURSUANT TO THE COMMON DESIGN INTENDED TO MAKE THE KINGS AND THEIR LEGAL ADVISERS ANXIOUS ABOUT CHALLENGING COSTS AND SO INTENDED TO INFLUENCE THEIR CONDUCT IN LEGAL PROCEEDINGS".

159. It has one comment from the first day of trial; that Mr Downes QC stated during opening submissions: "*Unbelievably, there is an issue taken with the amount the lawyers on this side are charging*." That is pleaded to be an attempt by Mr Downes, pursuant to the Common Design, to deter the Kings and their legal team from ever seeking to challenge the costs numbers which were being advanced by Primekings and which it is alleged he knew were false. The other comments date from 2019 and include Mr Downes accusing the Kings of lacking "bottle", and some statements made by individuals at Teacher Stern questioning the propriety of the allegations made.

160. There is then a section devoted to similar fact evidence - or, as it is entitled "*Similar Conduct Demonstrating Modus Operandi*". There is then a section entitled "*Particulars of Knowledge*" which deals with the allegation that the Defendants knew that the figures

presented to Marcus Smith J in respect of the payment on account application were false.

161. That is followed by a section on Loss, Damage and Causation which sets out the claims which I have outlined above.

162. The pleading is unclear in the extreme, and combines tendentiousness with a combination of oversupply of evidence and undersupply of proper particulars.

163. As will be apparent, the conspiracy pleaded includes allegations that the Defendants deceived the court. There are no particulars given of deceit which enable the reader to ascertain on what basis these very serious allegations made against professionals are advanced. There is no clarity about the extent of the basis for the inference sought to be drawn. While much evidence is pleaded, the pleading leaves the inference to be drawn on the basis of "*inter alia*" these matters. It pleads a key agreement, the "*Hidden Contingency Agreement*" without any proper particulars or explanation for lack of particulars. And the allegation of improper pressure, to the extent that it is wider than the pleaded threats, is impossible to discern.

164. Those acting for the Teacher Stern Defendants raised the question of particularisation. They focussed on areas where they perceived a lack of proper particularisation and intimated that an RFI would be forthcoming, which it in due course was. I shall deal with the Response to the RFI in relation to the relevant parts of the case. In summary however it does not materially advance the reader's understanding of the case.

165. I entirely endorse the criticisms made by the Teacher Stern Defendants of the Particulars of Claim. The pleading failed in the following respects:

i) The pleading of fraud was inadequate;

ii) There was insufficient particularity in the plea of knowledge;

iii) The requirements for pleading a claim in aggravated damages were not met;

iv) It was not as brief or concise as possible;

v) Many paragraphs contained more than one allegation;

vi) It manifestly did not set out only those factual allegations which are necessary to enable the other party to know what case it has to meet;

vii) The headings and definitions were contentious and could by no means have been adopted without issue by the other parties;

viii) The line between particulars and primary allegations is not at all clear.

166. This lack of clarity has persisted into the case advanced before me. For example, the Claim Form unequivocally put the conspiracy as one to do with costs:

> "The First to Ninth Defendants have unlawfully conspired to provide false and inflated cost information (including artificial costs budgets) to the Claimants and the Court with a view to

> causing damage to the Claimants by (a) improperly pressurising the Claimants and their legal team with improper threats of adverse costs (b) obtaining an improper payment on account of costs in favour of the Second to Fourth Defendants in the sum of £1.7m by misleading Marcus Smith J, which payment on account vastly exceeded the actual costs spent."

167. The pleaded conspiracy set out in the Particulars however faces two ways. It initially apparently focusses also on costs as the primary basis of the "Common Design", and indeed seems on its face to say that a main purpose of the conspiracy to inflate costs was to pressurise the Claimants into discontinuing. But then at [35] it places emphasis on discontinuance in conjunction with improper pressure in the context of the Misrepresentation Claim. That then links to the main loss plea at [101] which claims the Misrepresentation Claim would have succeeded.

168. Finally, at the hearing of these applications almost no emphasis was put on the costs allegations, with the primary focus being very much on the discontinuance and the Misrepresentation Claim.

Clarifying what is in issue

169. The starting point must therefore be to clarify what is properly in issue.

The Claim for the Value of the Misrepresentation Claim

Iteration 1: The Pleaded Threats

170. Although as I have noted, the case in the Claim Form, and under the heading in the pleading which might be supposed to embrace the nature of the conspiracy, focuses on the costs aspect, this was not the centre of the submissions before me. Nor is it the financial centre of gravity of the claim.

171. At the core of the case inherent, though not properly expressed in the pleading, is a claim that there was a conspiracy to procure the discontinuance of the Misrepresentation Claim; and that that caused the loss of an otherwise copper bottomed claim.

172. This can be seen at:

i) [16.1(ii)] of the Particulars:

> "The Discontinuance Goal - Placing pressure on the Kings and their legal team to discontinue the case (thus avoiding a fair adjudication on the facts) by … using threatening conduct to intimidate the Kings and their lawyers for that purpose."

ii) [35] of the Particulars:

> "[The] discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure

> was a contempt at common law), including, …, the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat."

173. The factual nature of the three pleaded "threats" ("the Pleaded Threats") is as follows:

i) The SRA Threat: On 3 January 2017, an alleged threat by Mr Stiefel to report one of the Claimants' solicitors, Mr Jason Blakey (the lead litigation partner at the Misrepresentation Solicitors), who was handling the Misrepresentation Claim, to the SRA for a number of reasons including on the basis that a letter before action had been sent to Mr Stiefel but not followed by proceedings (the "SRA Threat").

ii) The Allegations Threat: On 1 February 2017, an alleged threat by Mr Downes in the mediation position statement, this time aimed at the Kings' legal team, by way of referring to "*allegations… which should never have been made in the first place*".

iii) The Ruined and Destroyed Threat: On 17 March 2017, an alleged comment by Mr Stiefel to Mr King that the Kings would be "*ruined and destroyed by the litigation*" but if the Kings dropped the proceedings, Primekings would take certain B shares belonging to the Kings in lieu of payment to cover their costs (the "Ruined and Destroyed Threat").

174. I deal with these threats first, because it was accepted by Mr Newman in argument that it was not the Kings' case that these threats were causative. On Day 5 of the strike out hearing I raised with Mr Newman the fact that his submissions had yet to touch on the pleaded case. His answer was that the evidence to which he had been taking me at some length showed that the conduct said to be evidenced by the Pleaded Threats did continue into the trial and caused the discontinuance.

175. Probing this further we had the following exchange:

> "MRS JUSTICE COCKERILL: So am I right that your case is not actually about the threats which you have pleaded. It is about the threats which you infer from the material that you have been taking me through?... Do you not rely on the pleaded threats, but just on the inferred threats?
>
> MR NEWMAN: No, it is the inferred threats during the trial which is what causes the actual loss because, of course, it is the last final threat which has the effect which causes the case to collapse…
>
> MRS JUSTICE COCKERILL: Do you say that if the inferred threat were not there, your pleaded threats would be causative?
>
> MR NEWMAN: … We say that it – we have never suggested or meant to suggest that the expressly pleaded threats, being the SRA threat, the allegations threat and the ruin and destroy threat, could have given rise to the events, no, that has never been suggested by us and we would not plead that as being the case."

176. So Mr Newman expressly disavowed any case that the Pleaded Threats caused the discontinuance.

177. That was a realistic concession, for a variety of reasons. In particular, given that all of these threats were made before the trial started, it would always have been entirely fanciful to suppose that they could have caused the discontinuance which happened on Day 10 of the trial, after a lot of water had flowed under the bridge.

Iteration 2: The Inferential/Unpleaded Threats

178. That then leaves the inferential/unpleaded case. In the light of that concession [35] of the Particulars of Claim needs to be read as follows:

> "On 15 May 2017, … the Kings discontinued the Misrepresentation Proceedings. Such discontinuance resulted in significant part from the improper pressure applied to the Misrepresentation Solicitors and the Kings' counsel team by Primekings and their legal team pursuant to the Common Design (and which improper pressure was a contempt at common law),… . Pending disclosure, the Kings infer from [the SRA Threat, the Allegations Threat, and the Ruined and Destroyed Threat]… and the matters set out in the Schedule to these Particulars ('the Schedule') that other threats of a similar nature were made to [the Misrepresentation Solicitors and Counsel]. That inference is strengthened by [PoC [35] then lists various matters from which it is said other similar threats can be inferred]."

179. That pleading has now been supplemented by the late evidence of Mr King in his Seventh and Eighth witness statements, a "Note Summarising the King Claim relevant to all the Applications" ("the Note") and the oral submissions of Mr Newman.

180. The essence of that case is that in the Misrepresentation Claim the Defendants "*[intimidated] the claimants and/or their legal team, … to make them so frightened at the possible consequences of proceeding with the case, that they would withdraw their powerful claim and apologise.*" In essence, it is said that the Defendants identified mistakes made by the Misrepresentation Team, and threatened to "*expose the full extent of the legal team's negligence to the Kings and the Court if the legal team did not cause the Kings to discontinue the case on terms specified by Primekings*". This unpleaded threat is at the heart of the Kings' case: The Threat. It is worth pausing here to note that although [35] says that the Kings will rely on threats of a "similar" nature to the Pleaded Threats, the Threat is nothing like those threats.

181. Given that the case which was being advanced was not one set out in the Particulars of Claim, nor even consistent with the pleaded case as to "similar" threats, it was regrettable that no amendment had been made or draft amendment proffered. It was the more so in circumstances where the only reason for not advancing this case at an earlier stage appears to have been a deliberate decision on the part of the Kings not to waive privilege; and indeed where one response to a request for further particulars of the claim in this respect was to reject the inquiry as an attempt "*to fish for materials covered by legal advice and litigation privilege*".

182. This is a point made very recently by Lord Hamblen in the *Opkabi* case [2021] UKSC 3 (in the context of a jurisdiction challenge, but the point is equally valid here):

> "105. In the present case, not only did the parties choose to swamp the court with evidence, but it appears that the claimants chose not to update their pleadings to reflect the evidence. We were told that this is because they wanted to avoid producing various iterations of the pleading, but if they wanted to advance a case which was not reflected by their existing pleading then they should have amended it. In that way the proper focus of the inquiry can be maintained."

183. The position as to absence of a pleading is still less satisfactory when one considers that a case on precisely the same issues has been pleaded in the Professional Negligence claim. It is therefore very hard indeed to understand why by the time this application was heard there was not even a draft Amended Particulars of Claim setting out the case which the Kings actually do desire to run.

184. The position which faces me is that there are therefore two aspects to the claim which may be being made – the actual case (unpleaded – the Threat) and the inferential case (alluded to in the pleading but not particularised or argued before me). Strictly speaking it would probably be right to proceed only on the basis of the pleaded case. However I will deal here and later in this judgment with the case advanced *de bene esse*; not least because it is quite apparent to me that the Kings have a passionate belief in the merits of this claim and because Mr Newman chose to spend the majority of his time in oral submissions on this aspect.

185. The substance of the unpleaded case however logically comes after the issues as to whether that case would be capable of being pleaded so as to contain the requisite elements to amount to a viable cause of action. This has two elements: causation and knowledge.

186. The argument here derives from the relation of the plea in this action to the case advanced in the professional negligence action. In that case (also in Particulars of Claim signed by Mr Newman, and under Statements of Truth signed by all the Kings) it is pleaded that:

i) The Misrepresentation Team were (at best) negligent in settling the Misrepresentation Particulars of Claim without checking the underlying documentation and spotting the B share consideration issue [23-25];

ii) The Misrepresentation Team breached their duties in not bringing this negligence to the attention of the Kings [46, 49];

iii) The King's primary case pleaded at [51] of the Particulars is then that the Misrepresentation Team reached an understanding with Primekings that the Misrepresentation Team would not be accused of improper conduct if they caused the case against Primekings to be withdrawn. That is in effect a plea of a dishonest conspiracy between the Primekings Defendants, and the Misrepresentation Team to bring about the discontinuance and thereby hide their own negligence;

iv) The secondary case is that if no such understanding was reached, then the Misrepresentation Team were made to feel so professionally exposed by what had been communicated to them by Primekings that they collectively came to the view that a discontinuance on whatever terms Primekings insisted on was the only way to avoid significant personal consequences for them;

v) The tertiary case is that the Misrepresentation Team felt so professionally exposed by their own negligence (all of them being aware of the threatening conduct which the Primekings Defendants had engaged in) that their judgment was clouded, giving rise to grossly negligent conduct;

vi) The Misrepresentation Claim was then withdrawn because the Misrepresentation Counsel advised that "*there was no claim left that could be advanced any further and [Counsel] told the Kings that they would have to represent themselves if they wanted to continue with the case. That advice was wrong and the legal team knew it was wrong (and so acted in breach of fiduciary duty)*" [99] (see also [110.1];

vii) "*Anthony King indicated that he accepted the advice*" [101].

Knowledge

187. All three of the primary/secondary/tertiary professional negligence claims can only work if: (i) the Misrepresentation Team had been negligent and had not advised their clients of that negligence and (ii) the Defendants knew both of the negligence and the lack of its disclosure. Without knowledge there could be no threat. Without knowledge of absence of disclosure there could be no threat (because if the Kings knew, the threat would have no teeth). That is also the underpinning of the Inferred threats.

188. Knowledge is a matter which has to be pleaded pursuant to CPR PD 8.2(5). Obviously since the Inferred Threats have not been pleaded there is no formal pleading on this. But as the Inferred Threats case has emerged the issue was raised. The Teacher Stern Defendants' skeleton says:

i) At [71]: *"The Claim contains no allegation that any of the Defendants knew of either the alleged gross negligence of the Kings' legal team or the non-disclosure of that negligence. In those circumstances, it is not possible to see how they could be liable for* "*exploiting*" *that negligence.*"

ii) At [103] "*The attempt to allege that the Defendants* "*exploited*" *those conditions is (i) entirely unclear and (ii) not sustainable in circumstances where it is not alleged anywhere in the PoC or RFI Response that any of the Defendants knew of the alleged gross negligence of the Kings' legal team or the non-disclosure of that gross negligence*".

189. Mr Newman did not grapple with this difficulty at all in his submissions. The matter was put in the skeleton argument thus:

> "Since the Kings expressly plead that their legal team had been negligent (and Primekings revealed it during cross-examination) and the Defendants exploited the undisclosed conflict of interest

> arising from that, it is obvious that the Kings are alleging that the Defendants knew about the negligence and its non-disclosure to the Kings. Clearly, Primekings cannot have exploited something they did not know about. And they cannot have 'revealed during cross-examination' something they did not know about."

190. Reliance was also placed both in the skeleton and the Note on the response to RFI 40 which stated as follows:

> "The Fifth to Eighth Defendants are well aware of what happened at the trial and so are in a position to plead back to paragraph 109 in accordance with CPR16.5……..40.2. The other factors were (i) the gross negligence of the Kings' legal team in pleading a case which was inconsistent with the documents in the trial bundle, as revealed during cross-examination by Primekings after lunch on Day 4 (ii) the fact that such negligence was never disclosed to the Kings in breach of IB(1.12) of the SRA Handbook and gC51 of the BSB Handbook. That meant that there was an undisclosed conflict of interest which Primekings exploited through its threatening conduct further to the Discontinuance Goal of the Common Design."

191. Based on this, in the Note Mr Newman contends that: "*So all of these Defendants have known for nine months that the Kings are alleging that the Defendants knew about the negligence of the Kings' legal team and exploited the fact that was not ever disclosed to the Kings.*"

192. However this is plainly no pleading of knowledge; nor does it set out what would be required to be pleaded were such a pleading to be made. The reasoning is plainly circular. If it is the Kings' case that threats were used to induce the Misrepresentation Team to procure a discontinuance there must be a clear case, at least as a matter of allegation, of how that threat had teeth. It is not enough to say you threatened, therefore you knew, because the presence or absence of knowledge is central to the very existence of the threat. What may be a threat if the Teacher Stern Defendants knew about the breach of duty and absence of disclosure becomes no more than ordinary litigation tactics – an attempt to distract or rattle the other side - if there is no knowledge of breach of duty, just (for example) knowledge that the other side's case was going rather badly for them. Examples of the latter might be an observation that a witness had not come up to proof or that a pleading was not consistent with underlying documents.

193. Ultimately the Kings' case on this point (i.e. the basis for any plea of knowledge) was said to lie in the Professional Negligence Particulars of Claim and in Mr King's Eighth statement. In his Note Mr Newman referred to [50-53] of the former and [73], [74], [77], [78], [80], [83], [90] of the latter. There is nothing in the pleading which amounts to a case on knowledge. It merely sets out the Kings case against the Misrepresentation Team.

194. As for Mr King's statement, this is similarly deficient. To be clear:

i) [73] sets out the negligence on which reliance in placed – the error of Mr Wilson (see paragraph 87 above). [74] then says the he believes it had been spotted as an error because Mr Downes asked if any claim had been made against DWF;

ii) [77] says that he believes that the Primekings Defendants agreed not to expose to the Kings the conduct of Mr Wilson and the fact the remainder of the Misrepresentation Team had not checked the underlying documents, so long they caused the Kings to discontinue on specified terms. [78] sets out the obverse side of the threat and deals with discontinuance;

iii) [80] states that Mr King believes that the Misrepresentation Team thereafter became passive, to facilitate the discontinuance;

iv) [83] says that Mr Downes was quick to threaten to allege professional misconduct against the Misrepresentation Team and that Mr King believes he would have used the knowledge of the error in the pleading and the witness statement to the advantage of his client;

v) [90] says: "*I believe that Primekings intimated to my legal team the possible personal consequences for them if the case continued to a judgment, and that led to an informal understanding with Primekings that our legal team would not be accused of improper conduct by Primekings if [leading counsel] caused the case to be withdrawn following the close of our evidence.*"

195. Having done the very best I can and considered the argument very carefully I see nothing which amounts to material which could support a proper plea of knowledge.

196. It follows from this that the claim based on the Inferred Threats in relation to the Misrepresentation Claim and the discontinuance is fundamentally flawed and cannot succeed.

197. As I have explained above, this has nothing to do with any evidence which might be called. In a sense this makes the causation argument academic, but I deal with it for completeness

Causation

198. Causation of loss is an essential part of all claims in tort. Where an unlawful means conspiracy is alleged the loss complained of must have been caused by the unlawful acts complained of. This is plain from *Kuwait Oil Tanker*, at [108-9] and perhaps most powerfully from the judgment of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 188.

> "Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted, the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement."

199. This has been more recently reiterated by the Supreme Court in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19, [2020] AC 727 at [9]:

> " a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort."

200. It is therefore no good identifying arguable unlawful acts - or even clearly unlawful acts, together with loss which was caused by a lawful act, or by an unlawful act performed by someone else. The act complained of and the loss must link up.

201. The Kings' case on causation here is that one necessary condition for and the major cause of the discontinuance was the gross negligence of the Misrepresentation Team and the ensuing conflict of interest which arose. However it is said that that situation was then "*exploited*" by the Defendants by means of the Inferred Threats, with the result that those threats are the legal cause of the Discontinuance.

202. The pleaded case on causation here is not that the Inferred Threats caused the discontinuance of the Misrepresentation Claim, but that "*discontinuance resulted in significant part*" from it [35] or "*were a substantial factor in causing the Kings to discontinue … as the approach of the Kings' legal team was heavily influenced by the threatening conduct*." [109]. These are not orthodox pleadings of causation, but for present purposes I assume them to be adequate.

203. How this case has to be said to work is that the Inferred Threats themselves were causative of the key breach of duty alleged in the Professional Negligence Action – that of advising discontinuance. The way that it was put in argument was "*it is the inferred threats during the trial which is what causes the actual loss because, of course, it is the last final threat which has the effect which causes the case to collapse…*"

204. Before going on to consider this point in more detail I should deal with the Kings' main arguments in relation to the point. Mr Newman contended that causation of loss is always an issue of fact to be decided by the trial judge in light of all of the evidence. He made this submission by reference to the case of *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch); [2004] 2 B.C.L.C. 191, where Jonathan Crow QC (sitting as a Deputy High Court Judge) said, at [89.1]: "*The first is that causation is a question of fact. As such, it is plainly unsuitable for summary determination.*" That was itself a statement by reference to the dictum of Lord Steyn in *Three Rivers (No. 3)* [2003] 2 AC 1, at 194: "*Causation is an essential element of the plaintiffs cause of action. It is a question of fact. The majority in the Court of Appeal and Auld LJ held that it is unsuitable for summary determination. That is plainly correct*". Neither of those were however purporting to be determinations of a point of principle. They were simply statements as to the suitability of the causation issue in those cases for summary determination.

205. Of course causation is an issue of fact; and equally of course it will very often be unsuitable for summary determination. However it cannot be said that this will always

be so. The question is whether in this case the Defendants can satisfy me - to the necessary standard for summary judgment – that the Kings' case on causation is defective.

206. The issue here is that exactly the same relief is claimed here on the basis that it was caused by the conspiracy as is claimed against the Misrepresentation Team in separate proceedings on the basis that their advice was the legal cause of the discontinuance, and pursuant to a primary case that the advice was caused by an agreement between the Misrepresentation Team and Primekings.

207. Dealing first with factual causation, as to the facts which give rise to that claim of causation there can be no real dispute. One result of the waiver of privilege by the Kings is that I have seen Misrepresentation Counsel's written advice. It plainly does give (in effect) the clear advice that there was no claim left. Equally plainly one can see from the fact of the discontinuance (and indeed from the contemporaneous notes of the discussions which led up to the discontinuance) that that advice caused the discontinuance. Mr Newman was (and remains) emphatic that the Misrepresentation Team said that the case could not go on unless the Kings wished to represent themselves. Whether that is what was said is to some extent in issue in the Professional Negligence Action, but that is immaterial here where it is the Kings' case against these Defendants which is in focus.

208. The Defendants say that the Professional Negligence Claim, deliberately run by the Kings, causes a very serious problem for the Kings' claim in this action. That is because if the Kings are correct and they had a good claim and the Misrepresentation Counsel knew this, that advice to discontinue was (as the Kings positively aver in the Professional Negligence Action) at least grossly negligent and in breach of fiduciary duty. In those circumstances what caused the discontinuance is not any threats by the Defendants, but that breach of duty by the Misrepresentation Team.

209. I have given this line of argument very careful thought and have concluded that I can go part of the way with the Defendants on this argument, but no further.

210. I am with the Defendants only as to the primary case in the Professional Negligence Action. Logically, and as a matter of the pleaded case in that action, that (different) conspiracy, leading to the breach of duty in advising discontinuance, is what causes the loss in question. The key point is that the two conspiracies appear on the pleading to be mutually incompatible. I accept the submission that to that extent it should not have been possible for the Kings and their team to put forward both Particulars of Claim in this action and the Particulars of Claim in the Professional Negligence action as documents of truth.

211. I then turn to the secondary and tertiary cases in the Professional Negligence Actions and the case on causation in this action. Here I do accept that - assuming the pleaded facts to be true - the two cases can be compatible, and the conspiracy pleaded in this action could continue to cause the loss. This is because on this approach it was the intent of the Defendants to procure a discontinuance, they acted so as to bring about that result, and their threats were efficacious – albeit that there is another cause, because the result could not be brought about absent the breach of duty which forms the secondary and/or tertiary cases in the Professional Negligence Action.

212. While the Defendants urged me to say that the breach of duty would be a *novus actus interveniens*, breaking the chain of causation, I do not regard that as a realistic argument, certainly at the summary judgment stage. If the Defendants had held the Misrepresentation Team's loved ones hostage, threatening them with violence unless the Misrepresentation Team advised discontinuance I cannot see that the breach of duty would constitute a *novus actus*; if there really were intended threats which so overcame the Misrepresentation Team as to lead to the same result it must be arguable that the analysis would be the same.

The Costs Claim

213. Before proceeding to analyse the costs claim I pause here to note that the costs claim is one which is difficult to follow. This is because it is hard to see how the conspiracy works; and because of the jumbled nature of the pleading the answer to this question certainly does not emerge from that document.

214. However stepping back there appears to be an anomaly with the claim even before one proceeds to break it down into its component parts. The pleaded claim is that the Defendants placed pressure on the Kings and their legal team to discontinue the case by misleading the Kings into believing that if they did not discontinue then they might ultimately be liable for an amount of legal costs which Primekings knew it would not incur. Even assuming the basis for this (the hypothesis that Primekings had no properly recoverable costs because they had failed to take the necessary steps regarding a contingency fee arrangement – the Hidden Contingency Fee allegation[1]) how does the discontinuance factor into this? If the Kings discontinued they would have to pay costs; if they pursued the case to judgment and lost they would have to pay (more) costs. But if they discontinued they would still have to pay costs. Discontinuance reduces the liability – if the case is not good. Only if they pursued the case successfully (i.e. did not discontinue) would they not have to pay costs.

215. The reality appears to be that the costs conspiracy, to the extent it exists, would have to be entirely independent of the pleaded discontinuance goal and be rather different to what is pleaded. There could for example be a claim that there was a conspiracy to mislead the Kings so that they did not know at any relevant time about the Hidden Contingency Fee, such that they could not take that point before any costs liability was determined. That however is not the pleaded case – and on the facts it could not be the case since the Kings raised points about the Hidden Contingency Fee before the costs liability was determined.

216. But putting that to one side, and assuming that the costs conspiracy does not have the logical difficulties I have just identified, I turn to consider how the pleaded claim works.

217. It is trite law that loss is an essential component of a cause of action in tort. Thus an unlawful means conspiracy, such as that alleged in this case, must have caused loss to the claimant, or else the cause of action will be incomplete - as noted in *Ablyazov*, at [9]. Or as Lord Diplock put it in the passage from *Lonrho v Shell* which I have already

[1] I will deal with this further below, but it either means a contingency fee arrangement which could never result in any recoverable costs, because it was not properly documented or (ii) a contingency fee arrangement which resulted in lower costs being incurred than were being listed in the Costs Budgets

quoted: "*the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to the agreement*".

218. When one turns to the costs aspect of the claim one faces a rather different facet of the causation problem which could be seen in relation to the Threats. There the issue is that there is a factual nexus between the main loss claimed and the Threats, but the chain of causation between the two may be said to be either non-existent or (arguably) broken. In the context of the costs allegations however the first issue is to find any link between the losses pleaded and the unlawful acts complained of.

219. The main loss complained of at [110] is the claim lost in the Misrepresentation Proceedings. This can only have relation to the Threats. It does not result from the costs conspiracy.

220. The secondary case relates to a claim for 40% stake in KSGL and is put thus at [111]:

> "The Kings' fallback case is that absent the Common Design, the Share Campaign would not have happened, and they would now be owners of a 40% stake in KSGL worth circa £29,000,000 and would not have been damaged by the Share Campaign, including by non-payment of their B-shares. The early stages of the Share Campaign used pressure created by the false costs numbers to try to deceive the Kings into giving up their shares. When that did not work, the later stages of the Share Campaign relied on the Payment on Account Order as a basis for enforcement proceedings against the Kings. Absent the Common Design, the Payment on Account Order would not have been obtained."

221. This claim too is thus premised on the Payment on Account Order which was part of the discontinuance; absent discontinuance the payment on account order would not have been made. This claim therefore also stands or falls with the Threats element of the conspiracy.

222. The third element of the claim is "*damages in respect of the £1,882,305 paid to Primekings in October 2018*" [112]. That sum is the amount of the payment made by the Kings in respect of costs. It therefore flows (again) from the order on discontinuance, and hence from the discontinuance.

223. I note by way of parenthesis that as to £1.7 million of it directly referable to that order (as being the amount of the payment on account), it would appear that the insurers of the Misrepresentation Solicitors have made a payment in that amount. This appears from the Note lodged by Mr Newman as an adjunct to his skeleton arguments. It is described by him at paragraph 34.2 of that document as "*Having honoured the informal recommendation of the Legal Ombudsman to pay the £1.7m payment on account*." It would follow that there is a very live question as to whether that sum could ever be recoverable, as on the face of it the Kings have been made whole for that portion of the loss and the result if the Defendants were liable would be double recovery.

224. The remaining claim is for injury to feelings:

> "caused by the extreme distress the Kings have been subjected to as a result of the Common Design; any costs to the Kings of obtaining access to justice; damage done to Anthony King's career; legal costs paid to the Misrepresentation Solicitors; damage to the Kings' reputation; aggravated damages; and exemplary damages on the basis that the Common Design involved abuse of their positions by officers of the Court and/or on the basis that the Common Design was calculated to generate a profit for Primekings which Primekings cynically calculated to exceed any likely liability in damages."

225. None of this has any relation to the costs allegations.

226. All of this is only reinforced when one considers the Particulars of Claim, while holding these losses in mind. It will be recalled that the "Common Design" comprised three elements: (i) Discontinuance Goal, (ii) Enrichment Goal (shares) and (iii) Cover Up Goal.

227. The Discontinuance Goal has one element which on its face relates to costs. As already noted, it is alleged that pressure was placed on the Kings and their legal team to discontinue by "*misleading the Kings into believing that if they did not discontinue then they might ultimately become liable to Primekings for an amount of legal costs which in fact Primekings knew it would not incur*".

228. This relates to allegations that (i) there was a Hidden Contingency Fee Arrangement and (ii) that the information provided through the Costs Budgets was deliberately falsified and (iii) the Pleaded Threats.

229. However, there seems to be no way to tie such a costs representation to the decision to discontinue in this case. There are a variety of facets to this. One important one is the timing aspect which itself has two aspects: (i) by the time the discontinuance happened costs had been largely incurred – the difference between discontinuing mid-trial and after trial was marginal; (ii) if these representations were made, they were made well before trial and the idea of a causative link becomes very difficult. If the cause of the discontinuance is the Threats (plus the breach of duty by the Misrepresentation Team – or more properly the breach of duty by the Misrepresentation Team itself caused by the Threats) how can the discontinuance be caused at all by the costs representations?

230. Further, as already noted, it is no longer suggested that the Pleaded Threats were causative of the discontinuance; as such it would also seem illogical for the costs representations to be relied on in this context. Finally and fundamentally the costs aspects (even insofar as they precede the discontinuance) have no effect on the merits of the Misrepresentation Claim. There is therefore absolutely no discernible link which could provide causation in relation to the costs allegations. That deals with the case insofar as it leads to the discontinuance, or relates to damage suffered by reason of discontinuance.

231. The remainder of the Particulars of Claim deals with matters after the discontinuance – what is referred to as "the Cover Up". There are said to have been repeated and dishonest statements as to the costs incurred. All of this goes to what is said to be attempts to ensure that the Kings agreed costs (see [72] of the Particulars).

232. However none of these representations gives rise to any loss. So far as the costs liability is concerned it was incurred in the Misrepresentation Claim, which was over in 2017. Further either that was determined finally by the detailed assessment, or it was not. The representations on any analysis did not increase that liability. They did not give rise to any other loss. It follows that there is no separate loss which arises out of these representations, so there is no complete cause of action to be made out based on these representations.

233. It follows that the portion of the Particulars of Claim which relates to those allegations also falls to be struck out.

Analysis of the claim: result

234. The result – reached very simply and by a straightforward route of analysis of the pleaded claim, entirely divorced from any controversial facts – is that the entirety of the Kings' claim fails. To be clear, the claim fails because no complete cause of action is currently pleaded or could be pleaded:

    i) As regards the main element of the claim (threats causing discontinuance and other losses) the Pleaded Threats are no longer relied on as causative of any loss. The case based on the Pleaded Threats therefore falls to be struck out. Alternatively there is no real prospect of success on it and it would be appropriate to grant summary judgment;

    ii) The same would necessarily follow as regards any further "similar" threats – currently suggested but not particularised in the pleading;

    iii) As regards the unpleaded claim on the Inferred Threats (assuming it can be properly pursued) the case falls to be struck out/there is no real prospect of success because the case must fail on knowledge in circumstances where the Kings cannot plead any case that the Defendants knew (i) of the Misrepresentation Team's (assumed) negligence; and/or (ii) of the Misrepresentation Team's failure to disclose that (assumed) negligence to the Kings.

    iv) As regards the subsidiary part of the claim (costs representations) there the case falls to be struck out/there is no real prospect of success because there is no separate loss which arises out of these representations, so there is no complete cause of action to be made out based on these representations. Further there is no real prospect of success of these being held to have caused the discontinuance.

235. However it is nonetheless important that I deal with the remaining aspects of the argument, in part to ascertain whether there are other reasons why parts of the claim would in any event fail.

236. The remainder of this judgment is thus addressed to the position which would pertain if I were wrong about this first basis for decision.

The Costs Allegations: the Effect of the Final Costs Certificate

237. It is sensible to take the other main issue on the Costs Allegations here, as this largely permits the rest of the judgment to deal with the centre of gravity of the argument which is advanced by the Kings – the threats upon which they rely.

238. Leaving aside the question of the lack of loss relevant to the Costs Allegations, the main issue which arose was the effect of the recent Final Costs Certificate. As already noted, the Kings' case is that there was either never a costs liability because there was no effective contingency fee arrangement or the costs which were incurred were much less than those which were represented to the court on various occasions.

239. The answer which was posed to that line of argument on behalf of all the Defendants was: it is not open to the Kings to say this, because that costs liability has now been conclusively determined in the detailed assessment.

240. The relevant facts concerning this issue are set out at paragraphs 122-133 above.

The law

241. There are two aspects to the relevant law here.

242. The first is the law relating to detailed assessments, which is uncontentious. An order for costs cannot be more than an indemnity i.e. the paying party cannot be ordered to pay the receiving party more than the amount that party is liable to pay to its solicitors: *Gundry v Sainsbury* [1910] 1 KB 645, at 649, 650 and 653. Indeed, the Kings assert this at [22] of the Particulars: "*an informal contingency arrangement would not give rise to any recoverable costs against the Kings*".

243. The second aspect is issue estoppel. Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been determined in earlier proceedings, one party seeks to reopen that issue in subsequent proceedings and the parties in both are the same or their privies.

244. The principles governing issue estoppel were summarised in *Price v Nunn* [2013] EWCA Civ 1002 in light of the Supreme Court's decision in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2014] AC 160. At [68], Sir Terence Etherton stated:

> "Issue estoppel is a form of estoppel precluding a party disputing the decision on an issue reached in earlier proceedings even though the cause of action in the subsequent proceedings is different. It 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 or their privies to which the same issue is relevant one of the parties seeks to re-open that issue. In such a situation, and except in special circumstances where this would cause injustice, issue estoppel bars the re-opening of the same issue in subsequent proceedings. The estoppel also applies to points which were not raised if they could with reasonable diligence and should in all the circumstances have been raised, but again subject to special circumstances where injustice would otherwise be caused."

245. Lord Sumption explained the effect of an issue estoppel in *Virgin Atlantic* at [22]:

> "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."

246. This latter facet of the test may be referred to as the "*could and should*" aspect.

247. I should also deal here with the concept of abuse of process. This is important in this case because the parties to this action are different to the parties to the Misrepresentation Claim.

248. Abuse of process is a distinct concept, although it shares an underlying common purpose of limiting abusive and duplicative litigation. Issue estoppel forms part of the substantive law of *res judicata* whilst abuse of process forms part of the court's procedural powers (per Lord Sumption in *Virgin Atlantic* at [25]).

249. The core principles applicable to abuse of process are set out *in extenso* in *Johnson v Gore Wood & Co (A firm)* [2002] 2 AC 1. Although the circumstances in which abuse of process can arise are not limited, Lord Bingham (at [31]) cited examples where it may be established, including a collateral attack on a previous decision or where a party brings a claim or raises a defence in later proceedings which should have been brought or raised in earlier proceedings ("*Henderson v Henderson abuse*"). As Simon LJ noted in *Michael Wilson & Partners v Sinclair* [2017] 1 WLR 2646 at [48], the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest in not having issues repeatedly litigated.

250. The key point for current purposes is that a claim may comprise an abuse of process as amounting to an attempt to relitigate a point which was or should have been raised in earlier proceedings even if the parties to the second set of proceedings are not the same as those in the first set of proceedings. That will occur if it would be manifestly unfair to the parties in the second set of proceedings that the same issues should be relitigated or if to permit such relitigation would bring the administration of justice into disrepute. This is set out clearly in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1 per Sir Andrew Morritt V-C at [38]:

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. … (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly

> unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

251. Moreover, it is irrelevant that the tribunal in the first set of proceedings may be different from the tribunal in the second set of proceedings. This can be seen in the decision of the Court of Appeal in *Taylor Walton v Laing* [2007] EWCA Civ 1146, [2008] B.L.R. 65 (a previous judicial finding) and in *Arts & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm) [2014] 1 Lloyd's Rep IR 219 per Hamblen J at [45]-[47] (a case of a previous arbitral award). If the disappointed party wishes to challenge the decision of the first tribunal, the correct route is by way of appeal.

The issue and submissions here

252. The submission of the Defendants is that the question of whether there was an enforceable liability for costs was or should have been taken in the Detailed Assessment proceedings, and that the Kings are now barred, whether by way of issue estoppel or abuse of process, from taking the point in this litigation.

253. The answers posited by the Kings are essentially threefold:

i) The issues were not taken and there is therefore no identity of issue;

ii) There is no identity of parties such that issue estoppel could arise;

iii) As for "should" an abuse of process cannot bite either because (a) the Detailed Assessment proceedings were unsuitable to the taking of such issues, because of their format or (b) Mr King was a litigant in person operating in difficult circumstances because of the Covid-19 pandemic.

Discussion

254. I shall leave issue estoppel to one side, because it was tacitly accepted by the Defendants that there were some difficulties with this approach. But one might perhaps start with the proposition that but for (i) the slightly different line-up and (ii) the circumstances of the costs assessment there would be only one issue which could realistically prevent this being a straightforward issue estoppel case. That is the question of whether the nature of the proceedings was unsuited to the determination of these issues.

255. On this issue the very clear answer at which I arrive is that there is nothing in the nature of a costs assessment which is unsuited to those determinations. On one level one can see this from the fact that certain of the costs issues which raise questions of fraud were originally taken by the Kings in their Points of Dispute for the detailed assessment – which it will be recalled were served on the same day as the Particulars of Claim in this action. On another level it is a plain matter of logic – the costs assessment process is there to determine what is the enforceable costs liability; it would be bizarre if it were to be said to be unsuited to determining issues which go to the heart of whether there is any costs liability at all, or which have a major impact on the amount owing.

256. What Mr Newman for the Kings says to this is that the Kings relied on the guidance in the case of *Drukker & Co v Pridie Brewster & Co* [2006] 3 Costs LR 439, which they say was endorsed by Tom Leech QC dealing with the s. 994 Proceedings.

257. Taking *Drukker* first, the headnote of that case states this:

> "When considering whether there is jurisdiction under s 70 Solicitors Act 1974 for costs judges to hear allegations of negligence each case should be approached on its own facts. In this case there were wholesale allegations of professional negligence and wide ranging criticism of the solicitors' conduct which affected not only individual items in the bill but which went to the heart of the retainer. In these circumstances the costs judge did not have jurisdiction to hear such matters."

258. That is reflected in the following passages from the judgment of Openshaw J:

> "28. … it is, in my judgment, in the highest degree questionable whether a costs judge has the jurisdiction to hear claims of professional negligence of this wide ranging nature and extent….
>
> 31. Assessments are of course now heard by a costs judge. They are experts in costs. They do not try any other type of case. Of course, they do sometimes hear witnesses; they do sometimes hear and determine allegations of misconduct, but always within the context of the assessment of costs. The issues usually concern some discrete part of the bill. In our judgment – for I sit with assessors – the type of trial which would be required to resolve the issues in this case is entirely unsuitable by reason of its factual complexity and subject matter for trial by a costs judge.
>
> 33. … the issues are factually complex; witnesses must be called and cross-examined as to disputed facts; experts will be called; the allegations impute professional negligence; the papers are voluminous. Each of us is clearly of the opinion that these issues are not suitable for trial by costs judges. Such matters should be tried in the High Court.
>
> 37. Each case should be approached on its own facts: in my judgment, in these circumstances, the Master did not have jurisdiction under s 70 of the Solicitors Act (or otherwise) to hear such wholesale allegations of professional negligence and such wide ranging criticisms of the solicitors' conduct, which affected not just individual items in the bill of costs but which went to the heart of the retainer.
>
> 38. Even if he had jurisdiction, he was correct not to have exercised it, since it would be an abuse of the process of the court to allow the defendants to raise by way of the Points of Dispute to the Bill of Costs before the Master precisely the same

> allegations which they made in the pre-action protocol procedure, thereby putting the claimants to the very considerable costs of contesting the same, and which they did not pursue in a High Court action after the protocol had run its course.
>
> 39. The factual complexity of these matters made them entirely unsuitable for trial before a costs judge. The matter should be litigated, if at all, in the High Court."

259. Does this case provide any authority for the proposition that "*issues requiring witness evidence and cross-examination are for the High Court*" (what Mr Newman referred to as "the Drukker Principle")? In my judgment it manifestly does not. One need only look at [31] of the judgment to see that.

260. One can also see that the Court is by no means purporting to lay down any principle at all. The case is authority for no wider proposition than that there may be some complex cases which are unsuited for trial before a costs judge, and that the question of whether that is the case or not will turn on the facts of the particular case.

261. That particular case was one where (as Openshaw J notes) what was in issue was an assessment of the party's own costs as between him and his solicitor, in circumstances where he claimed that he should not have to pay 70% of the bill because the solicitors had been professionally negligent. Those allegations were effectively a free standing cross claim (which had been "trailed" by way of pre-action protocol letter somewhat earlier, but not pursued) and would effectively involve (i) unpicking the original retainer and (ii) trying the professional negligence allegations.

262. It is also worthy of note that *Drukker* was not itself decided on the basis of this line of argument. In *Drukker* what was decided was that "*It was an abuse of the process of the court to seek to raise before the costs judge on an assessment of costs matters which could – and should – have been litigated before the court after the exchange of the pleadings in the pre- action protocol.*"

263. I turn then to the argument that Tom Leech QC in his 29 October 2020 decision in *King v KSGL* [2020] EWHC 2861 (Ch) endorsed the so-called Drukker Principle. The relevant part of the judgment reads thus:

> "137. Mr Newman also submitted that the detailed assessments of the costs of the Misrepresentation Claim and the Part 8 Claim would not determine the issues in the Petition. He drew my attention to *Nicholas Drukker & Co v Pridie Brewster & Co* [2006] 3 Costs LR 439 where Openshaw J held that the costs judge did not have jurisdiction to decide allegations of professional negligence and criticisms of the solicitors' conduct which affected not just individual items in the bill but which went to "the heart of the retainer": see [34].
>
> 138. …I am not prepared to strike out extracts (7) to (14) for the following reasons:

> i) I accept Mr Newman's submission that there is no general "proper forum principle". I also accept his submission that the costs judge is highly unlikely to make findings which will assist the judge hearing the Petition to determine whether the detailed assessments formed part of the Campaign."

264. This is absolutely not a case of Tom Leech QC endorsing "guidance" from *Drukker*. It is hard to understand how that submission can sensibly be made. In particular:

    i) There is no guidance in *Drukker*;

    ii) Tom Leech QC does not "endorse" that decision. He does not purport to do more than summarise the outcome of the case;

    iii) His decision at [138(i)] is about an entirely separate point. It is a factual conclusion that the costs judge would (on any analysis) not be dealing with the question of whether the detailed assessments formed part of the Campaign.

265. I therefore conclude that there is nothing in either of these authorities which assists the Kings on this point. Nor, given that the point is entirely clear, can the Kings pray any misunderstanding in aid when it comes to the question of "*could and should*". If the Kings formed the view that *Drukker* encapsulates the principle contended for, or that Tom Leech QC "endorsed" it, there was no sensible reason for them to do so.

266. This then brings me to the question of "*could and should*". It follows from what I have found already that there was no reason why the Kings "could" not have raised the issues of whether there was any liability and various of the other points on the costs amounts in the detailed assessment. What is said in response to this is in effect twofold.

267. The first point is that "*Complex cases such as this have to be considered cumulatively and never on a piecemeal basis. The SCCO would never have been able to take into account most of the matters set out in the POC in this case.*" The first part of this was effectively the argument run before and rejected by Master Whalan. It is plainly wrong that the question of what costs were properly recoverable would have to be decided in these proceedings – that is what detailed costs assessments are there for.

268. Of course it is right that a number of aspects of the argument set out in the Particulars of Claim in this case would have been ones which the SCCO would not have taken into account. But that is not because it could not, but rather because they were not germane to the issues of recoverable costs. It is hard to tell whether this elision by the Kings is deliberate or not. It either evidences the lack of structured thinking which affects the Particulars of Claim or a determination on the part of the Kings to pursue matters the way in which they would prefer to do so.

269. Coming back to basics:

    i) There is no reason why such issues as the 577 hours and the expert evidence could not and should not have been determined in the Costs Assessment. Indeed, plainly the Kings originally intended them to be so determined. Similarly as regards such questions as mis-certification.

ii) There is no reason why the amount of fees actually incurred – by reference to either such issues as the accounts or the "shadow ledger" (as to which see further below) could not have been determined.

iii) There is no reason why the existence of any contingency fee arrangement and its enforceability should not equally be determined in the Costs Assessment. While disclosure and witness evidence might well have been needed, there is no reason why that could not have been done.

270. The second point raised by the Kings is the endorsement which they say that they received from Master Whalan for this approach. The skeleton says:

> "It is difficult to see how the Kings can have abused the Court process by following the guidance in Drukker, endorsed by Tom Leech, by doing their best to simplify the assessment under COVID conditions, in a way which was expressly endorsed by Master Whalan [fn. See Master Whalan comment: "quite rightly……"]"

271. Again this argument seems to be completely misconceived. In the first place whether or not Master Whalan endorsed the approach is neither here nor there for present purposes; the Kings took this decision themselves, and Master Whalan's comment came on Day 3 of the assessment – well after they had done so. It therefore cannot justify the rightness of the decision.

272. Secondly, in the context of the debate which had gone before, Master Whalan's passing comment of "quite rightly" appears to have been related to the limiting of matters on which he needed to hear evidence. It seems very possible that (despite the skeleton argument served by Mr King, where if one is interested and with the benefit of hindsight one can certainly discern what was intended) Master Whalan did not have a full appreciation of the fact that these points were still to be attempted to be revived later. This is because at the outset of the hearing, when urged by Mr Mallalieu for Primekings to disallow the amendment, and to formally dismiss those points of dispute he said this:

> "I am clear as to my function, which is to assess the bills. The effect of the variation is to remove what would otherwise be articulated objections to the defendant's recovery … those obstacles to the defendants' recovery disappear."

273. But in any event, I do not consider that Master Whalan's throwaway remark of "quite rightly" can assist the Kings.

274. If there is nothing to be gained for the Kings by reliance on *Drukker* or indeed their view on what *Drukker* imported, or the supposed approval of it by Master Whalan the answer to the "should" element of the analysis becomes quite clear: these points should have been raised in the costs assessment.

275. All that remains is the question of "*special circumstances which would cause injustice*". This was not specifically relied upon by Mr Newman, but Ms Addy QC for Primekings very properly drew this point to my attention in paragraph 47 of her skeleton. It is a point to which I have given considerable thought.

276. There seem to me to be two arguments which might have been enunciated on behalf of the Kings in this regard. The first is that I should regard there as being special circumstances because Mr King was not legally represented at the detailed assessment hearing and he had to attend by phone. It was said in Mr Newman's skeleton as noted above that the Kings were "*doing their best to simplify the assessment under COVID conditions*".

277. However Mr King's skeleton for the assessment seems to undercut both these points. At paragraph 1 of his skeleton he notes that he has received some *pro bono* legal assistance in preparing the skeleton. That appears to be borne out by the liberal citation of authority within the skeleton. It is further supported by Metis Law's letter of 4 November 2020 which makes it clear that they were advising Mr King in relation to the Detailed Assessment proceedings.

278. Secondly he nowhere says that he is abandoning points to simplify the assessment under COVID conditions. Rather he says "*Just as it would be my right to decide now not to contest the Bills at all I can also choose to only take certain points if I wish to see Mr Dyson LJ in Al-Medenni v Mars UK…*". I also note that it does not appear to have been the case that the Kings were without legal advice other than *pro bono* advice generally. As will be appreciated, by this stage in the timeline the Kings were represented in these proceedings.

279. The second aspect which might be said to comprise "special circumstances" is whether the nature of the allegations are themselves so grave that an exception should be made. The authorities are not particularly forthcoming on the subject of what constitutes special circumstances. One might perhaps trace an analogy with the cases dealing with attempts to set aside or resist enforcement of a judgment or an award obtained by fraud or illegality, where the abuse of process arguments are also deployed.

280. Both of these impose a high hurdle and do not suggest that any allegation of fraud can suffice. In the former context there is a need to show conscious and deliberate dishonesty and that the evidence which was suppressed was material in the sense 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 (see *Takhar v Gracefield* [2019] UKSC 13).

281. In the latter the court will generally not refuse enforcement unless:

    i) There is a strong prima facie case (at least of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing);

    ii) The evidence was not previously available or reasonably obtainable.

    (see *Alexander Bros v Alstom* [2020] EWHC 1584 (Comm) [2021] 1 Lloyd's Rep. 79 at [74]).

282. Thus in the latter case I concluded that allegations of illegality even if endorsed by a foreign court would not count as special circumstances precluding enforcement unless (possibly) the merits were particularly compelling: see [165-70].

283. It follows that the nature of the allegations would not in my judgment *per se* constitute special circumstances. It may be that if there was a strong prima facie case on the merits in relation to such serious allegations the special circumstances exception would apply. For reasons which are already evident (and for further reasons to which I will in due course come) this is not a case which could pray that particular line of argument in aid.

284. It follows then that were this a case where there was identity of parties I would conclude that there was a clear case of issue estoppel as regards the costs allegations, insofar as they put the amount of the costs liability in the Misrepresentation Claim in issue.

285. The question is whether a different outcome results because of lack of identity of parties. On this I conclude without any difficulty at all, that the same outcome must result. The attempt to run these points now is a blatant attempt to go behind both the decision on the detailed assessment and the decision of Master Whalan not to stay that detailed assessment; a decision which was taken expressly so that Primekings had finality on the indemnity costs order which it had obtained (by consent) in the Misrepresentation Claim.

286. It cannot be said that anything has changed between the time when those decisions were made and now: the costs issues are no different now to what they were then. This is particularly tellingly illustrated by the fact that the Points of Dispute were served on the same day as the Particulars of Claim in this action.

287. Having had the decision of Master Whalan not to stay the assessment, the Kings took what was plainly a deliberate decision to remove those points from the Detailed Assessment; it appears that they did so in full knowledge that there was an argument that an estoppel would arise if they argued the points, and given that the point was raised squarely in the Reply to the Points of Dispute they were also alive to the abuse arguments which would arise if they did not. They chose to take that decision based on a desire to run the points in this litigation – the same desire which formed the basis of their arguments (rejected) before Master Whalan. Their reliance on *Drukker* was manifestly erroneous. Nor can there be any reliance on the supposed reservation of rights in this context. It was made quite clear to the Kings that this was not accepted.

288. There was time to decide the issues – 7 days had been set aside when the issues were live. The late abandonment of the issues will have led to a waste of court resources *vis a vis* other litigants. There was, as I have noted, nothing in the issues which was unsuitable for determination in the Detailed Assessment.

289. It follows that those aspects of the claim which put in issue the recoverability of Primekings' costs of the Misrepresentation Claim, or which take issue with their amount, are abusive and fall to be struck out.

290. On this basis the part of the conspiracy claim which is based on the costs allegations must fail in its entirety, because it is predicated on allegations at paragraph 16 that representations were made about legal costs which "*Primekings knew it would not incur*" that the order for payment on account was "*for a sum higher than the costs actually incurred*".

291. The costs aspect of the claim therefore fails for a second reason.

CPR 38.7 and abuse of process

292. I turn next to the second argument which also raises questions of abuse of process. This is one however which arises in the context of the main claim.

293. CPR 38.7 provides:

> "A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –
>
> (a) he discontinued the claim after the defendant filed a defence; and
>
> (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim."

294. The issue here arises out of the discontinuance of the Misrepresentation Claim, and the fact that it is alleged in this claim that but for the threats the Kings "*would have won*" the Misrepresentation Claim (as it is squarely put at paragraph 110 of the Particulars of Claim). All the Defendants say that CPR 38.7 is squarely engaged and that it would be abusive for the Kings to bring this claim without permission under CPR 38.7 – which would not be forthcoming. Further they say that to the extent that CPR 38.7 is not technically engaged (for example as regards Defendants who were not parties to the Misrepresentation Claim) permitting relitigation of those proceedings would be an abuse of process.

295. One issue which arises is whether arguments on abuse of process are engaged where there has been a discontinuance. Ironically this is an issue which has been recently considered between (substantially) the same parties. The question arises because there is a first instance decision of HHJ Matthews, *Ward v Hutt* [2018] 1 WLR 1789, in which the judge refused to strike out a claim for abuse of process where the previous claim had been discontinued.

296. In that case a liquidator discontinued a misfeasance claim against two directors for payments made in breach of fiduciary duty but then commenced a second claim against them in their capacity as partners of the recipient firm on the basis that the payments were a preference. The judge held that the second claim arose out of substantially the same facts and that CPR Part 38.7 was engaged but declined to strike out on the basis of *Henderson v Henderson* abuse.

297. In *King & Ors v Kings Solutions Group Limited & Ors* [2020] EWHC 2861 (Ch), Mr Tom Leech QC (sitting as a Deputy High Court Judge) held (acceding to Ms Addy QC's submissions) that *Ward v Hutt* was wrong because the judge wrongly interpreted *Virgin Airways* as re-drawing the boundary between *res judicata* and abuse of process and treating the principle in *Henderson v Henderson* as part of the law of *res judicata* applying such authorities. He concluded that "*it remains open to a party to rely upon Henderson v Henderson abuse of process where the first claim has been discontinued as well as resulting in a judgment or compromise*". He therefore found that it would be unjust and an abuse of process for such allegations to be made against Mr Steifel (as

well as striking them out against Primekings and Mr Fisher for failure to comply with CPR 38.7). The Kings have not sought permission to appeal that decision.

298. The Kings submitted that Mr Leech QC's decision (i) will not assist the Court as that involved different facts and (ii) it was not correct. They contend that he overlooked the fact that the paragraphs he struck out were not a "claim", but rather a few introductory paragraphs to a s. 994 petition, apparently accepted by Primekings who largely admitted them in their Points of Defence.

299. I am obviously not bound by Mr Leech QC's decision on different facts; though it is not really open to the Kings to impugn its correctness when they have not sought to appeal it.

300. Approaching the question here on the facts of this case, the starting point is whether *Ward v Hutt* does present a roadblock. I conclude that it does not. Indeed Mr Newman did not really seek to challenge Ms Addy QC's detailed submissions on the law.

301. The Kings' arguments on this issue essentially addressed the extent to which there was identity of issue. The first argument is that it is a false point because the issue goes to quantum only. That is because the relevant plea is at paragraph 110, in the context of loss and damage.

302. Anyone who has followed the judgment thus far will be unsurprised to find that I reject that argument instantly. The specific plea is only at paragraph 110, in the context of loss, but it is (now) clear that intent to cause and causation of that discontinuance is at the heart of the claim brought. Indeed Mr Newman was very emphatic about that , when I suggested at the outset of the hearing that his pleaded case seemed to be confined to the Costs Allegations:

> "MR NEWMAN: So, the discontinuance goal contains, obviously, the overall goal of achieving a discontinuance, because we say they had no answer to the case on the facts, and therefore to win the case they needed to get the Kings to withdraw.
>
> MRS JUSTICE COCKERILL: But that is not pleaded.
>
> MR NEWMAN: It is pleaded later on, my Lady, at paragraph 110.
>
> MRS JUSTICE COCKERILL: Well, it is pleaded as part of your quantum case, Mr Newman. What you have pleaded relates only to discontinuance in relation to what you say is a costs fraud.
>
> MR NEWMAN: No, that is not right, my Lady. It says: "*Discontinuance – placed pressure on the kings: (i) by misleading them about the level of costs liability; (ii) using threatening conduct to intimidate the Kings and their lawyers for that purpose, and the purpose is to procure a discontinuance*.""

303. That argument can therefore be dismissed.

304. The second argument is that CPR 38.7 is about preventing claimants from reinstituting claims which they have discontinued (or very similar claims based on the same facts). What is said is that the present claim was not discontinued but that a completely different claim - a claim seeking rescission based on misrepresentations made and relied upon in December 2013 – was discontinued. Logically that claim could only ever be based on facts prior to the date it was issued on, namely 7 July 2015.

305. By contrast, it is said, this claim relates to how the Misrepresentation Claim was conducted after it had been issued, and the facts it is based upon obviously postdate the issue date. Thus the common design is alleged to have begun on "*On a date or dates unknown but between April 2015 and 7 March 2016*". The first costs budget alleged to have been misleading was on 7 March 2016.

306. It is also said that the language of CPR 38.7 makes clear it concerns claims, not "averrals", still less particulars of loss and that there is therefore no factual overlap at all, so that this claim is not based on the same or similar facts as required by CPR 38.7.

307. This is effectively the same argument by another route, and can be dismissed with equal ease. This claim may relate to how the Misrepresentation Claim was conducted, but it is based on a positive case that the Kings "*would have won*" that claim and is for the value of that claim. It is therefore very fundamentally about the merits of that claim, and is based on the same facts. To win at trial the Kings will plainly need to prove that they were right in the Misrepresentation Claim. And indeed it is telling that Mr Newman spent rather more time in his oral submissions addressing the merits of the Misrepresentation Claim than he did in addressing the issues raised by the Defendants in this strike out/summary judgment application.

308. Mr Newman then submitted that there is a distinction because Primekings would not need to tender evidence about what happened on 18 December 2013, since this is a "*loss of a chance to win litigation*" claim where it is well established that the Court looks at the evidence in the case said to have been thrown away and does not seek to try the original claim. Reference was made to *Phillips & Co v Whatley* [2007] PNLR 27 at [2]: the court does "*not to seek to try the original claim, but to measure its prospects of success and assess damages on a broad percentage*" with the benefit of any doubt usually going to the innocent party.

309. I note first that the analogy between the cases is not a strong one – that was a case of a professional negligence claim where a writ had not been issued in time, rather than a root and branch re-averral of the merits of a complex fraud claim.

310. But in any event it may be true that Primekings would not need to tender evidence about what happened on 18 December 2013 – after all, the parties have the benefit of the transcripts from the trial. But that does not mean that the same issues confronting Marcus Smith J would not be considered, such that the same issues were live. Further, given the circumstances of the discontinuance, it would be surprising if the Kings did not positively want to hear from the Primekings parties.

311. I conclude without difficulty therefore that CPR 38.7 is engaged. But that is not the end of the story because (i) not all of the parties to this action were parties to the Misrepresentation Claim and (ii) I need to take a view about whether permission would

be given under CPR 38.7. The answer to both of these questions, say the Defendants, lies in arguments about abuse of process.

312. That is essentially because in *Westbrook Dolphin Square Limited v Friends Provident Life and Pensions Limited* [2011] EWHC 2302 (Ch) Arnold J held at [45] (a passage unaffected by the decision on appeal at [2012] EWCA Civ 666]):

> "Counsel for Friends Provident submitted, and I accept, that the principles identified by the maxims *nemo debet bis vexari pro una et eadem causa* (no-one should be vexed twice in respect of one and the same cause) and *interest reipublicae ut sit finis litium* (it is in the public interest that there be an end to litigation) should inform the court's approach to CPR 38.7. In my judgment it follows that there is an analogy between the principles to be applied to an application under r. 38.7 and those applied by the courts under CPR r. 3.4(2)(b) with respect to *Henderson v Henderson* abuse of process. The main difference I perceive is that under r. 38.7 the onus lies upon the applicant to show that it should be given permission to bring the new claim, whereas under r.3.4(2)(b) the onus lies upon the defendant to show that the new claim is an abuse of process."

313. As for granting permission under the rule, in *Hague Plant Ltd v Hague* [2014] EWCA Civ 1609, [2015] CP Rep 15 at [60] – [61] Briggs LJ said:

> "… it seems to me that the rule leaves it to the court to decide whether to grant or refuse permission having regard, as I have said, to the public interest in finality.
>
> It is true that the Notes to the current edition of the White Book use the phrase "exceptional circumstances" as characteristic of the sort of explanation likely to be required in an application for permission under Pt 38.7, but it is dangerous in my view to erect that as a test imposed by the rules, not least because of its inherent uncertainty. To that limited extent the judge may have mis-described the ambit of the court's discretion to give such permission. The real question for the judge was whether, having abandoned the de facto directorship claim in the light of Jean Angela's Defence (in which the other defendants precisely concurred) a sufficient explanation was offered for its re-introduction to overcome the court's natural disinclination to permit a party to re-introduce a claim which it had after careful consideration decided to abandon".

314. The question is then whether on the facts of this case there would be an abuse of process if the Kings were to pursue the line of argument which involves contending that the Misrepresentation Claim would have succeeded. Essentially for the same reasons given above in relation to CPR 38.7 I conclude that it would be an abuse of process. The claim in this action which gives rise to effectively the whole quantum of the claim is entirely dependent upon proving that the Misrepresentation Claim would have succeeded. That

means that the Kings would have to prove the merits of that claim – by one means or another – and to effectively seek to go behind the discontinuance.

315. I should note that very much as a fallback position, the Kings contend that permission should be given/there is no abuse of process "*where the claimant was misled or tricked by the Defendant, where important new evidence has come to light…*" They submit that there is compelling evidence in this case that the Kings were tricked by their own lawyers who were under pressure from Primekings. As noted in relation to the costs conspiracy abuse of process arguments, I agree that consistently with the broad merits based approach a court might well refuse to strike out in circumstances where it was apparent that there was such compelling evidence. For the reasons to which I will come I do not consider that this case falls into this category.

316. It follows that, even had the case not fallen to be struck out on the causation point, it would fall to be struck out pursuant to CPR 38.7 and/or as an abuse of process.

317. The main conspiracy claim therefore fails for a second reason.

Discrete Issues

318. It follows that the remainder of the arguments are academic. I do however propose to deal with them for completeness. I turn first to a number of issues which apply only as regards some of the Defendants, then to two "housekeeping" issues.

Immunity from Suit (Mr Downes only)

319. Mr Downes contends that insofar as the claim brought against him relates to actions in court, he is protected by the principle of immunity for things done in the ordinary course of proceedings. This argument is regarded as significant because both as to the Pleaded and the Inferred Threats once actions in court are removed it is said that what remains could not credibly found the claim brought.

320. The Kings contend that the advocate's immunity from suit has been substantially done away with following *Hall v Simons* [2002] 1 AC 615, remaining only arguably in place as regards defamation or conspiracy to defame; and this argument cannot therefore avail Mr Downes.

321. The best way to deal with this point is to trace through the authorities in chronological order, placing *Hall v Simons* in its context.

322. The starting point then is the case of *Marrinan v Vibart* [1963] QB 234. This was, like the present, a conspiracy case; it was alleged that there was a conspiracy to make a false report to the DPP about Mr Marrinan (a disbarred barrister). It makes clear that prior to *Hall v Simons* the immunity was not one limited to defamation but extended to any form of proceedings. Salmon J stated at 238:

> "The immunity that witnesses enjoy in respect of evidence given in a court of justice extends to statements made in preparing a proof for trial and, in my view, also to statements made in a report to the Director of Public Prosecutions … and to evidence given in any judicial proceedings recognised by the law… It is

> true that in nearly all the reported cases in which the principles to which I have alluded were laid down, the form of action was for damages for libel or slander, but in my judgment these principles in no way depend upon the form of action. … the immunity to which I have referred is not only an immunity to be sued for damages in libel or slander. The immunity, in my judgment, is an immunity from any form of civil action."

323. The next case is the decision of the House of Lords in *Darker v Chief Constable for West Midlands* [2001] 1 AC 435. This expressly applied the rule in *Marrinan* to advocates. *Darker* concerned allegations again of conspiracy – this time to defraud and fabricate evidence by the police (conspiracy to injure and misfeasance in public office). Lord Hope summarised the "core" principle of immunity as follows at 445H:

> "This immunity, which is regarded as necessary in the interests of the administration of justice and is granted to [a police witness] as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the judge. They are all immune from any action that may be brought against them on the ground that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause"

324. Lord Cooke held, at 453H, that:

> "to prevent the evasion of this immunity it is necessary to rule out also allegations of conspiracy to give false evidence, as was held in *Marrinan v Vibart*."

325. Then comes *Hall v Simons* itself. This is the case in which the House of Lords decided that advocates are no longer immune from suit in respect of negligence in the conduct of court proceedings. One can see from the judgments of Lord Steyn and Lord Hoffmann that the panel was not thinking about removing the broader immunity but was focussing on negligence. Thus Lord Steyn stated, at 678-679:

> "… the "cab rank" rule cannot justify depriving all clients of a remedy for negligence causing them grievous financial loss. It is "*a very high price to pay for protection from what must, in practice, be the very small risk of being subjected to vexations litigation (which is, anyway, unlikely to get very far)*"*:* Cane, Tort Law and Economic Interests, p 236. Secondly, there is the analogy of the immunities enjoyed by those who participate in court proceedings: compare however Cane's observation about the strength of the case for removing the immunity from paid expert witnesses: at p 237. Those immunities are founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case. For these reasons they prevent legal actions based on

> what is said in court. As Pannick has pointed out this has little, if anything, to do with the alleged legal policy which requires immunity from actions for negligent acts…."

326. And Lord Hoffmann at 697:

> "This argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court. So is the judge, counsel and the parties. They cannot be sued for libel, malicious falsehood or conspiring to give false evidence: *Marrinan v Vibart* [1963] 1 QB 528. The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say ..."

327. Perhaps most clearly Lord Hobhouse at 740 stated:

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity..."

328. There is then *Jones v Kaney* [2011] 2 AC 398 in which, building on the hints dropped in *Hall v Simons*, the House of Lords abolished the expert witness's immunity for negligence.

329. It follows that neither *Hall v Simons* not *Jones v Kaney* affected the immunity beyond actions for negligence.

330. That such an immunity remains appears clear based on more recent authorities. In *JSC BTA Bank v Ablyazov (No 14)* [2018] 2 WLR 1125, Lord Sumption observed at [23] that:

> "[a] witness… is absolutely immune from civil liability for things said in evidence or in circumstances directly preparatory to giving evidence. An action against him for negligence or defamation would fail. If it were framed in conspiracy, it would still fail."

331. Likewise Martin Spencer J in *A and B v The Chief Constable of Hampshire* [2012] EWHC 1517 (QB) at [20]-[25-27] rejected a submission that the law had been changed by *Jones v Kaney*. It was argued in that case that in the light of *Jones v Kaney* it could not be said with confidence that the core immunity relied upon still survives, and that it would be wrong to strike out a claim where the relevant principles of law are still evolving. Martin Spencer J rejected the argument in round terms:

> "The Supreme Court in *Jones v Kaney* cannot be taken to have intended to abolish the core immunity under examination in the present case, which has been enjoyed by witnesses, parties and their advocates for centuries. As Mr Beer points out, *Jones v Kaney* is concerned with the liability of a "friendly" expert to the party who instructed him. *Arthur JS Hall v Simons* was concerned with the liability of an advocate to his own client….In *Arthur JS Hall v Simons*, in considering the justification for a barrister's immunity from suit by his client, Lord Steyn referred (at page 679) to the "analogy of the immunities enjoyed by those who participate in court proceedings", thereby recognising the continued existence and importance of the "core immunity"."

332. So too in *Baxendale-Walker v Middleton* [2011] EWHC 998 (QB) the arguments were fully rehearsed by a distinguished cast of counsel at [66-95] and Supperstone J concluded at [94]:

> "… the decision in *Jones v Kaney* does not touch on the immunity of a witness (whether they be a witness of fact or expert opinion) or a party to proceedings in respect of things said or done in the ordinary course of proceedings in respect of claims brought against him by an opposing party; nor does the decision affect the law on judicial immunity…"

333. There was nothing in the arguments put forward by Mr Newman for the Kings which really engaged with this line of authority – and he did not deal at all with these recent authorities. While the cases do deal specifically with different situations (witness immunity, judicial immunity and so on) the fundamental point being made is that aside from the specific carve outs made by *Hall v Simons* and *Jones v Kaney* the immunity remains.

334. The reliance placed by Mr Newman on *Clerk & Lindsell* (23rd ed.) at 9-137, *Charlesworth & Percy* at 2-308 and *Jackson & Powell* at 12-009 was misplaced. The passages cited all dealt with immunity in relation to negligence, and therefore not with this point. But when one looks further on in *Jackson & Powell* at 12-112 the point is dealt with in terms which clearly supports the case advanced for Mr Downes: "*Advocates should continue to enjoy the same immunity as others from any action brought against them on the ground that things said or done in proceedings were done or said maliciously or falsely: Taylor v DPP*."

335. It follows that I accept the submission that in any event all the allegations relating to Mr Downes' conduct in court would fall to be struck out.

Mr Rabinowicz (Mr Rabinowicz only)

336. The point in relation to Mr Rabinowicz can be taken swiftly. Mr Rabinowicz, is specifically alleged only to have joined the conspiracy on 10 May 2019, some two years after the Discontinuance had taken place. This means he cannot be liable for the losses relating to the discontinuance.

337. While it is not necessary for all parties to a conspiracy to have joined the conspiracy at the same time in order for them to be liable, it is well established that a defendant will have no liability for specific losses incurred or caused before he became a party to the conspiracy.

338. The argument which was advanced for the Kings did not take issue with this line of authority. It was rather said that "*since the POC was filed, the Kings have been ordered to pay over £1.1m. Since such losses occurred after it is alleged that Mr Rabinowicz joined the common design*".

339. That of course does not match up with the way that damage is pleaded. But in any event it is not enough as a matter of law for damage to occur after the relevant party has joined the conspiracy, if that damage flows from acts committed before he joined. This can be seen in *Kuwait Oil Tanker Co SAK v Al Bader* (17 December 1998) cited by *Mumford & Grant* at paragraph 2-127. That authority is endorsed by Flaux J in *Erste Group v SC* "*VMZ Red October*", *Red October Steel Works* [2013] EWHC 2926 (Comm), [2014] B.P.I.R. 81 at [103] (a conclusion left untouched by the Court of Appeal):

> "*Kuwait Oil Tanker* … establishes that a late joiner to a conspiracy cannot be liable for loss which has already been caused before he joins the conspiracy."

340. In that case Flaux J preferred to leave to the trial judge the question of what acts caused what loss. However here there is no similar question about the causation of this loss – the loss alleged is caused by the discontinuance, which happened long before Mr Rabinowicz is alleged to have joined the Common Design. In the premises, there are no reasonable grounds for bringing the Claim against Mr Rabinowicz and it falls to be struck out as against him, even absent the conclusions which I have reached already.

341. The case which was really run here was not one which originated in the pleaded conspiracy. Rather it was a claim which depended on establishing that there was no liability for the costs in the amount assessed. That of course falls with the conclusion which I have reached on abuse of process as regards the costs assessment.

Without Prejudice Privilege

342. Although the relevance of the Pleaded Threats appears now to be vestigial there is an issue which arises as to without prejudice privilege in relation to one of the Pleaded Threats. Mr Lightman QC pointed out that technically this issue should be decided first, because to the extent that the Pleaded Threats have to be considered, the removal of one affects the evidence base. That is logically right, though I have preferred to deal with the structural issues first.

343. As for the argument on this point it can be quickly summarised. One of the Pleaded Threats concerns the contents of a mediation statement. It is common ground that in general such statements are subject to without prejudice privilege unless one of a number of specific exceptions (set out in *Unilever Plc v Proctor & Gamble* [2000] 1 W.L.R. 2436, at 2444-2445) apply. The one which is prayed in aid in this case by the Kings is "unambiguous impropriety".

344. The Kings' submission is that this hurdle is cleared. The skeleton stated:

> "the Kings have pleaded that the statements were made with the intention of applying improper pressure in contempt of court by (i) threatening (ii) exaggerating possible costs exposure. That is an allegation of fact. No defence has been filed denying it. Nor has Mr Downes in his two witness statements denied those factual allegations. This strike out application has to be assessed on the assumed basis that it is true."

345. The submission of the respondents in summary was in essence that the material relied on was a country mile from anything which could be considered "unambiguously improper".

Discussion

346. I will start with the law. The reasoning behind this exception is that where the hurdle is met it would be an abuse for the privilege to be invoked (because it is operating as a "cloak" for the impropriety): *Savings and Investment Bank v Fincken* [2004] 1 W.L.R. 667 (CA), at [57], per Rix LJ.

347. The test is not lightly found to have been met. The privilege is regarded as an important one, fulfilling an important function. As Hoffmann LJ pointed out in *Forster v Friedland* (CA, unrep, 10 November 1992), "*the value of the without prejudice rule would be seriously impaired if its protection could be removed [for] anything less than unambiguous impropriety*".

348. Thus the *Unilever* case concerned a claim brought on the basis of threats to bring infringement proceedings (regarding a patent for washing machine tablets) said to have been made during a without prejudice meeting. The Court of Appeal held that it would be an abuse of process for Unilever to be allowed to plead anything that had been said at that without prejudice meeting. In so doing Robert Walker LJ at 2449 noted the:

> "….underlying objective of giving protection to the parties, …: "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers … sitting at their shoulders as minders….
>
> The expansion of exceptions should not be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation."

349. It is therefore unsurprising that the cases in which the hurdle has been met have been very extreme. In *Hawick Jersey Ltd v Caplan* (26th February 1988), statements made amounted to plain admissions that the proceedings were brought dishonestly and that in those circumstances they amounted to threats to further a dishonest purpose which were not protected by the without prejudice rule. In *Forster v Frieldand* Hoffmann LJ was unwilling to find unambiguous impropriety in a case where something said in a without prejudice meeting was sought to be used to demonstrate that a case was being

advanced dishonestly. Similarly in *Fazil-Alizadeh v Nikbin* (25th February 1993, unreported) the Court of Appeal held the test was not met where it was not clear that an admission was being made that a settlement agreement was forged.

350. The courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule.

351. The rigour with which the courts approach this can also be seen in *Berry Trade Ltd v Moussavi (No. 3)* [2003] EWCA Civ 715, at [48] where the judge applied the test of whether there is a serious and substantial risk of perjury. The Court of Appeal rejected this approach decisively:

> "…we can see nothing in the authorities to support it. On the contrary, it seems to us to weaken significantly the requirement of unambiguous impropriety and of the need for a very clear case of abuse of a privileged occasion."

352. This can also be seen in the very recent case of *Motorola v Hytera Communications Corp Ltd* [2021] EWCA Civ 11 [2021] 2 WLR 679.

353. In that case the Court of Appeal considered the question what standard of proof the court should apply when considering the potential application of the unambiguous impropriety exception. Males LJ, with whom Rose and Lewison LJJ agreed, held, at [57]:

> "I would conclude that the courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the unambiguous impropriety exception has been recognised, cases in which it has been applied have been truly exceptional."

354. He also held at [64] that there is no test of a "good arguable case" of unambiguous impropriety when that issue arises at an interim stage of litigation; rather, the test "*remains one of unambiguous impropriety. Nothing less will do. That is a test which, deliberately, is difficult to satisfy but the fact that it arises on an interim application is no reason to dilute it…*"

355. The facts against which this argument arises is that the mediation statement relied on stated (with the Kings' emphasis):

> "There is no real prospect of the claim succeeding, and so the Claimants are left facing two alternatives. They can pursue the case to trial, after which they will almost certainly be ordered to pay the Defendants' costs on the indemnity basis in light of the nature of the **allegations** made against the Defendants (**which should never have been made in the first place**) and the

> weakness of the Claimants' case. **The Defendants' total budgeted costs are £1,823,997.86 and, of course, when indemnity costs are ordered, the court is not bound by the budget.**
>
> Alternatively, they can discontinue their claim now, and seek to come to an agreement with the Defendants by which the Defendants might be persuaded to agree to accept payment of their costs on the standard rather than indemnity basis. Whilst the Defendants accept that this course of action is unlikely to appear especially attractive to the Claimants, it is by far the better of the two alternatives now available to them.
>
> There are references in the papers to the hugely distressing impact that the events of 18th December 2013 had upon the Kings. This is not doubted but **the Claimants should be in no doubt that if the Defendants have accurately assessed the merits of this claim: the trauma of the trial and its aftermath will be far far worse.**"

356. Pausing here, this would seem to fall squarely within the ambit of the cases where the court has said that the hurdle of unambiguous impropriety has not been met. In terms of content this mediation statement is certainly frank – but that is exactly what one expects a mediation statement to be.

357. It is also notable that all but one of the passages emphasised are quite plainly not untrue. So:

    i) The budgeted costs were this figure – and the contrary is not suggested by the Kings;

    ii) It is trite law that if indemnity costs are ordered the Court is not bound by the costs budget;

    iii) This claim, the Professional Negligence Claim, the other litigation - and the upset which I have seen clearly evidenced in Mr King's witness statements in this action - demonstrate the accuracy of the warning that the trauma of the trial and its aftermath have been far, far worse than a settlement ahead of trial would have been.

358. There remain therefore two aspects. The first is the phrase "*allegations which should never have been made*". The second is the assumption as to intention upon which the Kings rely. What is said as to the first is that this imported a threat to the Misrepresentation Team, because allegations which should never have been made can result in complaints to professional regulators (and of course may result in allegations of professional negligence, for example if a client's funds are effectively wasted chasing the chimera of a baseless claim).

359. I assume in the Kings favour that it might be said that, though directed to the Kings themselves, this statement might be seen as importing something directed to the Misrepresentation Team. This is a point which would of course be contentious, but I

would tend to the view that such a reading was possible. However I would by no means regard this phrase as one which (even in the case of it being used to try to settle a good claim) was "unambiguously improper". It is a phrase which is not uncommonly found bandied about in hard fought commercial litigation, particularly where allegations of fraud are in play. It may be used rather more often than it should be in an ideal world; it tends to reflect an absence of best practice, and of compliance with the constructive approach which this Court urges upon those who practice before it.

360. But it is not unambiguously improper – indeed the fact that it is not infrequently used also reflects the difficulties in assessing which side of the propriety line a case falls. When allegations of fraud are in play there may well be a spectrum in terms of having material before the pleader/legal team which they judged to be reasonably credible and which appeared to justify the allegation of fraud – that being the test set out in *Medcalf v Mardell*. This is a point to which I shall return later in this judgment.

361. Further its (regrettable) prevalence in cases of this sort has reduced it to a state where it would tend to be regarded (particularly in the context of mediation statements, whose contents are not governed by any rules, are protected by privilege and are not known for their restraint) as "mere puffery". I do not consider that any experienced litigator would regard them as more than aggressive timewasting and as not being in the best of taste. There is for example a qualitative difference between this and the unambiguous threat in *Unilever*. And yet that unambiguous threat was not regarded as sufficient to displace the without prejudice privilege of the occasion.

362. The assumption which lies at the heart of the Kings' case on this point does not cut across this point. So (despite the reservations which I have expressed about the blanket making of such an assumption) I do proceed out of an abundance of caution on the basis that that assumption should be made. But even if it were the case (which is the essence of the assumption) that Primekings/their legal team knew that the Kings had a good case and that they were intending to and trying by various means to pressure the Misrepresentation Team to persuade the Kings to discontinue, that does not transform the statement in question into unambiguous impropriety. That statement has to have that quality in and of itself. That seems to be clearly indicated by the authorities – for example *Fincken* at [57] where Rix LJ focussed on the importance of the privilege itself being abused.

363. I also note that were this not the case there would be a rather odd result, namely that the relevant statement would not be privileged for the purposes of a summary judgment application (because the assumption of the underlying facts would bring that about), but the statement would be privileged at trial, because the Kings would not be able to pray that unambiguous impropriety in aid without assuming the facts pleaded to be true.

364. I therefore conclude that (to the limited extent that the Pleaded Threats remain relevant) the so-called Allegations Threat is not unambiguously improper and hence is protected by without prejudice privilege and cannot be considered.

The status of the unpleaded case

365. One point which was raised was the status of the unpleaded threats. It was submitted that I should decide this case only on the basis of the Pleaded Threats. As I have indicated above I have been minded not to follow this course in looking at the structural

issues, essentially to ensure the Kings understand that the case they advance has been considered. I have therefore *de bene esse* looked at how those allegations (if they had been pleaded) would fit in and whether, if pleaded, they could produce an arguable case.

366. However the point is certainly one which should be considered. If it is right nearly all of the argument addressed to me on behalf of the Kings was irrelevant to the case which could properly be run, and the case would fail even more emphatically than I have already found it does.

367. I have noted above that particulars of knowledge, fraud and breaches of trust require to be pleaded. In order to plead a proper case on the Inferred Threats case such particulars would be required. At present a case on inference is pleaded as to the existence of the Common Design by reference to "inter alia" certain facts – almost none of which refer to the key time period. There is no pleading as to knowledge or (to the extent a case in deceit is maintained) as to fraud. At points the matters which are relied on are given in the form "Pending disclosure" (for example at [21] and [35]).

368. Where particulars are required it is not permissible to avoid the need for giving particulars by saying that particulars will be given at a later stage. Warby J in *Duchess of Sussex v Associated Newspapers* [2020] EWHC 1058 (Ch), [2020] EMLR 21 stated, at [59]:

> "The suggestion, …. that particulars cannot be provided or should not be expected until after disclosure is contrary to the long-standing principle that a party alleging misconduct must give particulars before obtaining disclosure (see, for instance, *Zierenberg v Labouchere* [1893] 2 Q.B. 183, 188 (Lord Esher MR)). It is also bad on the facts. The complaint has two aspects. The first is an allegation of improper conduct towards the claimant's father. Such allegations should not be made, if the claimant cannot give details of what was done and when."

369. The Court may at the stage of summary judgment or strike out permit a little latitude where a party has recently discovered facts which it would wish to plead. But this is not the case here. As I have already noted, the facts which underpin the Inferred Threats case have been known to the Kings for some time, and they have taken an entirely conscious decision not to waive privilege until now. Having done so they have apparently deliberately chosen not to (as they should have done) come to this hearing with a formulated draft pleading, so that the Court can assess the case properly – and indeed see whether (i) counsel is prepared to plead and clients to give statements of truth on such serious allegations and (ii) whether the pleading meets the strike out test. It is perhaps telling that a document was instead put forward in the form of the Note which did not have to comply with any of these requirements.

370. It follows that the argument on the unpleaded Inferred Threats should properly be excluded.

The substance of the pleaded claims

371. The substance of the claims are therefore not relevant to this determination. I do however propose to consider at least some aspects of them in some detail – first by reference to the pleaded case and then by reference to the unpleaded case on the Inferred Threats. This is for a variety of reasons. The first is that (as I have indicated above) were the prima facie substance of the claims that there were threats or other dishonesty compelling it is possible that this would come into the equation either in relation to abuse of process (see paragraph 283 above) or via "*some other compelling reason for trial*".

372. Here I note that Mr Newman did not explicitly suggest that I should refuse summary judgment on the basis that even if there was no real prospect of success, there was some other compelling reason why the matter should nonetheless proceed to trial. However the subtext of quite a lot of what was said, in particular as regards the status of the Defendants, was imbued with the suggestion that it was very important that the matter proceeded to trial, regardless of the merits. So too, as I have noted above, were the arguments in relation to abuse of process essentially focussed on the underlying facts, if not strictly on the merits of the claims.

373. The second reason is that it is clear to me (as I have already noted) that the Kings are deeply personally involved in this litigation and that they strongly desire to have the details of the claims ventilated and considered. While I have reached the very firm conclusion that the claim is fundamentally flawed and must be struck out I consider it right that they have the benefit of the consideration which I have given to the details of the case, not least when other related litigation remains ongoing.

374. The third reason is that a certain amount has been said about whether the evidential basis of those allegations justified them being pleaded in the first place and I have been left at the close of the case with some considerable concerns about the way in which aspects of the case have been pursued. It would seem wrong – in particular when it may have an impact on costs and against the background where similar allegations are being pursued in other litigation - not to record those concerns.

375. I will deal first with some relevant points of law and then with certain aspects of the pleaded claim, which largely relates to the costs allegations. I will then deal with some of the submissions made relating to the Inferred Threats which includes some consideration of the conduct of the Misrepresentation Claim.

Inferences of fraud and pleading fraud

376. I have made a number of points above about what the requirements of a compliant pleading are and why. As I have noted a fairly minimalist approach is generally acceptable - and to be commended. There are however exceptions. One of these is pleading fraud.

377. Allegations of this nature do require to be pleaded. CPR Part 16, PD paragraph 8.2 makes this clear: "*The claimant must specifically set out the following matters in his particulars of claim where he wishes to rely on them in support of his claim: (1) any allegation of fraud…*" Similarly, paragraph C.1.3(c) of the Commercial Court Guide provides that "*(i) full and specific details should be given of any allegation of fraud, dishonesty, malice or illegality; and (ii) where an inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged must be fully set out*".

378. In *Barrowfen Properties v Patel* [2020] EWHC 1145 (Ch), at [7], Birss J adopted the principles that apply to a plea of fraud/dishonesty as set out in *Three Rivers DC v Bank of England* [2003] 2 A.C. 1 and *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), at [12]-[23], as follows:

> "(i) The use of the word "fraud" or "dishonesty" is not necessary in a pleading if the facts which make the conduct fraudulent are pleaded.
>
> (ii) The function of pleadings is to give the party opposite sufficient notice of the case which is being made against them. An allegation of fraud/dishonesty must be sufficiently particularised by pleading the primary facts relied on.
>
> (iii) At an interlocutory stage, the court is not concerned with whether the evidence at trial would establish fraud, but only whether the facts pleaded disclose a reasonable prima facie case which the other party will have to answer at trial. If the plea is justified the case must go forward to trial and the assessment of whether the evidence justified the inference is a matter for the trial judge.
>
> (iv) For a valid plea of fraud/dishonesty the claimant does not have to plead primary facts which are consistent only with dishonesty. The correct test is whether, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. There must be some fact or facts which tilts the balance and justifies an inference of dishonesty."

379. This links to the limitations which there are upon counsel in putting forward allegations of fraud. In *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120 Lord Bingham said this, at [22]:

> " … [the Bar Code of Conduct] 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 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."

380. As Lord Steyn noted in the same case, deciding whether this requirement is met can pose very difficult problems for the pleader. There will often be a spectrum of views as to which side of the line an allegation falls: "*What the decision should be may be a difficult matter of judgment on which reasonable minds may differ*."

The Pleaded Threats

381. As I have noted already reliance was not placed on these as being themselves causative. They take place instead as part of the pleaded basis for inferring that threats were made. I ignore the Allegations Threat for the reasons already given.

382. The Pleaded Threats relate to the discontinuance. So far as that aspect of the case is concerned, the background which one has to have in mind is what is being alleged as the actual substance of what was done. I deal with this further below in the context of the Inferred Threats, but in essence what is being said is that it is to be inferred that threats were made which were of sufficient potency to persuade the King's then legal team to (primary case) dishonestly/ (secondary case) grossly negligently advise the Kings that their very good claim was so hopeless that it must be abandoned. Either the threats must be capable of making the legal team behave in knowing and flagrant breach of their core professional obligations or they must be capable of making them completely panic and mess up the case to a startling degree.

383. The starting point therefore is that the threats which are sought to be inferred are substantial threats; it is fanciful to suppose that less would cause an entire suite of professionals to behave in so shocking a way.

384. There is a problem for the Kings here. Not only is it clear that the Pleaded Threats did not cause the discontinuance, it is apparent from the timeline that if they are properly to be called threats at all, they are certainly not very potent matters. This is because the Pleaded Threats are matters which took place some months before the trial commenced; and yet despite them the trial started (with, on the Kings' case, their lawyers still giving bullish advice about their prospects of success) and proceeded for 10 days before being abandoned with the greatest reluctance by the Kings. It is therefore fanciful to suggest that the Pleaded Threats were causatively potent; and as I have noted it is no longer contended that they were.

385. But this also has an impact on the substance of these threats as a basis for the inference of other more substantial threats. I entirely see that if there is evidence that A has previously threatened an opponent B with death or injury for some reason, that might form part of the evidence which provides the basis for a case that he has separately threatened another opponent C (or indeed B) with something very unpleasant if C or B does not withdraw a claim. But I struggle to see how A intimating an intention to pinch B's book if B will not give it to him would provide very much of a basis for inferring that A had separately threatened B to burn down B's house if B did not withdraw a claim.

386. Yet this is analogous to the nature of the Pleaded Threats. I have already noted the flimsiness of the Allegations Threat. The other threats are of a similar order. So the

SRA threat is said to be "*to report the King's solicitor Jason Blakey to the SRA on the basis that an LBA had been sent to Mr Stiefel but not followed by proceedings.*".

387. I note by way of parenthesis that this pleading plainly mischaracterises what was said. What was said was not that the basis of the complaint would be that a letter before action had been sent but had not been followed by proceedings. What was said was this:

> "Your firm has (1) made wrongful allegations that Mr Stiefel is guilty of a criminal offence without any evidence whatsoever to support such complaint; (2) commenced civil proceedings against KIF in breach of warranty of authority; and (3) published defamatory statements against Mr Stiefel to a third party."

388. The point about not following up with proceedings refers to (1), and what was said was this:

> "Having made these allegations against Mr Stiefel, the Court Proceedings were subsequently issued without naming Mr Stiefel as a Defendant. It is abundantly clear that the allegations were wholly without merit and should never have been made.
>
> It is not unreasonable in the circumstances to infer that the allegations were made as an attempt to exert pressure on Mr Stiefel in order to try to settle a civil claim for damages. You will be aware how serious such conduct is, and that it in itself can amount to the criminal offence of blackmail.
>
> No form of apology has ever been received … for these baseless and yet extremely serious allegations of criminal liability. Nor have the allegations ever been withdrawn, or any explanation offered as to why they were made. You have the opportunity to do so now."

389. What was therefore being said was not that the Kings' solicitor had misbehaved by making an allegation and not pursuing proceedings, but that he had misbehaved by making allegations for which there was no proper basis and then not withdrawing them.

390. Again whether the approach taken was best practice or expressed optimally may be open to debate. There are (for example) two views about whether such a letter is a professional courtesy or whether allegations of professional misconduct should simply be made without such "*shots across the bows*". It might well be said that logically if there has been professional misconduct it should be reported regardless of whether it is later withdrawn and apologised for. Certainly this litigation has shown clearly how such correspondence can be subjectively perceived as a litigation tactic or a threat.

391. But leaving aside that point, the reality is that (particularly in cases where fraud is alleged) such correspondence is by no means uncommon; it is an unattractive part of the give and take of hard fought modern commercial litigation, particularly against the background of the penumbra cast by *Medcalf v Mardell*. So even if the correspondence were a bald indication of an intent to report, I would consider it of very minor significance in the context of allegations of threats sufficiently substantial to give rise

to such flagrant and serious breaches of duty as are alleged. But the correspondence is not even such an indication. As the first quote above makes clear, it is an invitation to provide a response to the concerns expressed. It provides no basis for making the inference that the Inferred Threats were made.

392. As for the "Ruined and Destroyed Threat", it may be recalled that this is pleaded as being that Mr Stiefel told Mr King that his family would be "*ruined and destroyed*" by the litigation unless they dropped the case. As a threat one can see that this might have more substance – in two situations. The first is if (i) this were contended to be causatively potent (ii) it was pleaded as being made to the lawyers and (iii) there was some discernible link to discontinuance. But none of these is the case. (I do note however that there is a question mark over (ii): in the Professional Negligence Action it is pleaded at [38] that it was shared by Mr King with his lawyers, but that their response was that the Kings had a very strong case.)

393. The second situation in which this "threat" might be said to be of some relevance is if it were said that the Inferred Threats were made by Primekings, in particular Mr Stiefel for Primekings. But that does not appear to be the case. It therefore seems to me that the Pleaded Threats provide nothing to indicate that the claim that there were Inferred Threats is strong. On the contrary had it been necessary to deal with this case on the merits based on the Pleaded Threats, I would have concluded without much hesitation (and bearing well in mind the caution applicable to deciding fraud cases on the facts at the summary judgment stage) that the pleaded case lacked even fanciful prospects of success.

The "*Hidden Contingency Fee*"

394. The Kings' original case in this action related to costs. The Claim Form, as already noted, places the conspiracy squarely as one to provide "*false and inflated costs information*". In the Particulars of Claim the primary case as to costs is that the actual costs arrangement that was in place involved a contingency, and it was "hidden" i.e. not written down. If that is the case, as a matter of costs law, there would not have been any recoverable costs against the counterparty – pursuant to section 58 of the Courts and Legal Services Act.

395. The basis for this allegation seems very difficult to ascertain. A request for further information was made in relation to it. The response which came back did not progress matters. As to a request for details of the agreement the answer said:

> "The Claimant was not a party to the Hidden Contingency Agreement, hence why it is referred to as "hidden" …Requests for details of a hidden contingency arrangement entered into as part of the covert conspiracy (part of which was a deliberate cover up) demonstrate that this Part 18 request has been made by the Teacher Stern defendants for the improper purposes of (i) delaying this case and (ii) seeking to find out what evidence the claimants had."

396. A further request posited on the basis that an inference was being drawn as to the existence of the agreement referred the Defendants back to multiple paragraphs of the Particulars of Claim (including the paragraph of which particulars were being sought).

None of these appear to me to provide any basis for an inference of a hidden contingency fee arrangement, though they provide material which might provide an inference that costs budgets were inaccurate.

397. Perhaps the high point of the pleaded case is that "*Teacher Stern have refused … to provide the Kings with native format emails showing scrutiny by their own clients of the costs being incurred. That is because Teacher Stern knows that doing so would show that a normal hourly rate retainer was not being operated.*" It is not at all clear how such a request to provide material pre-disclosure which was not relevant to the claim set out in the Claim Form could provide any legitimate basis for such an inference.

398. What is also troubling is how this allegation appears to remain live and to be pursued in circumstances where it now appears to be common ground that there were at least some invoices provided by Teacher Stern which were paid by Primekings in relation to this matter; the "shadow ledger" allegation to which I will come shortly is predicated on the Kings saying that some only of the invoices were false.

The Accounts Evidence

399. The Kings rely heavily on the Primekings accounts, which they say show that Primekings spent zero on legal expenses in 2015 and 2016 and only around £1.2 million in 2017. This is relied upon in part to sustain the case as to Hidden Contingency fee/false costs budgets but also as an indicator of fraud, not least because it is said that dishonest explanations were given for the accounts by Mr Downes and Ms Toomer.

400. On this point I conclude that the accounts are obscure and certainly do not provide clear evidence of anything. I can understand why they may have caused concern in the minds of the Kings, but I certainly do not regard them as giving rise to even a good case that the incurred costs were only £1.2 million – particularly in the light of some detailed evidence from Mr Popperwell which goes through the invoices and payments made, and which supports the larger figure which was found by the Costs Judge on the Detailed Assessment.

401. As to how the £1.2 million figure derives, this is a rather complex point and certainly does not emerge clearly from the evidence even now. The basis upon which it was said to be dishonest vis a vis Mr Downes was that "*it can't be a mistake that a defendant who is very familiar with accounts and has accountancy training, used to lecture in accounts, accidentally came to this conclusion because it is just not plausible*".

402. Whether this is a permissible inference must, it seems to me, depend upon the materials which were available to Mr Downes at the time and the material available to the pleader. There was not time to go into this level of detail at the hearing. However I note that Mr Downes' evidence on this is that at the time he had a very limited amount of material as to how the figure had been arrived at, that he made an inference from the accounts, but accepts now that his inference was wrong. On its face this would appear a perfectly credible explanation.

The £3 million costs figure

403. The allegation made at [60] of the Particulars of Claim is that

> "On 10 July 2018 Ms Toomer (acting on the instructions of Mr Fisher, Mr Stiefel and Mr Swain) stated to Anthony King that the figure billed to Primekings was £3,213,026.99 (a figure Ms Toomer, Mr Fisher, Mr Stiefel and Mr Swain intended the Kings to interpret as being exclusive of VAT). That was false and Ms Toomer, Mr Fisher, Mr Stiefel and Mr Swain all knew it was false. In fact, less than £1.256m had been billed to Primekings."

404. Mr Newman explains the gravamen of the allegation thus:

> "when Teacher Stern wrote that down in that context, they did not have any honest belief that that was the true value of the costs claim and that they were willing to ramp it up in that regard because they wanted to put as much pressure as they could on the Kings to hand over all of their shares."

405. This is made against a background where it is said that as part of the "Cover Up" the Defendants were very unwilling to provide the Kings with a costs figure because they were "*all aware that the true costs were less than £1.256 million*"

406. There had already been one statement that the costs incurred were over £3 million. This came in the context of an application to question Mr King as to his assets which was made on 24 September 2017.

407. The Kings are made suspicious about this figure because (i) on 13 June 2017 Teacher Stern had indicated that the likely total liability excluding VAT was £2.7 million (ii) on 22 May 2018 Primekings had informed the Court via a skeleton argument in the enforcement proceedings that costs likely to be due to Primekings (including interest) would be in the region of £2.2 million – a figure which was reiterated by Teacher Stern in correspondence in early June 2018 and (iii) just after the £1.7 million had finally been paid in respect of the Payment on Account Order on 12 October 2018 Ms Toomer indicated that the £3,213,026 figure was wrong and the amount actually owing as at the date of discontinuance was £2,855,501.94 inclusive of VAT (the reason given being the double counting of an invoice).

408. Suspicion is also said to be raised by the fact that in the s. 994 Proceedings an amendment was made to the pleading as regards the £3 million figure, moving away from saying that Ms Toomer's letter "confirmed" the amount currently billed to "stating that" this was the amount billed – and adding "including VAT". Mr Newman's explanation of the inference raised by this was:

> "This particular case is a very good example where …. they are removing any statement to the court that that was correct, and we say that is significant because, firstly that means the original plea was false, and it must have been known to be false to Primekings because Primekings must have known how much it had paid."

409. The Kings advance a primary case that there was never an authentic invoice that could have been double counted, and as a backup that if there was such an invoice Ms Toomer did not in fact genuinely double count it in error.

410. These are allegations of fraudulent and probably criminal behaviour. The primary case is that the Defendants deliberately concocted an invoice which they added to the sum owing. The second is that Ms Toomer did not double count in error; which equates to an allegation that she deliberately double counted it.

411. Once again I am left unclear as to the basis upon which the primary case or the secondary case is advanced. Interpreting the case pleaded as best I can in the light of Mr Newman's submissions it appears that there are two limbs to this. One is that it is to be inferred from the changes in the figure that there was a dishonest inflation of the figure, and later a dishonest reduction of the figure. The second is that the amendment to the pleading itself raises an inference of fraud because Primekings knew what it had paid. As to the latter I regard this as utterly hopeless. For one thing the figure given was not one which related to what had been paid. For the second, there is no reason to suppose that Primekings, Mr Fisher and/or Mr Swain would be *au fait* with the minutiae of correspondence on costs such that they would even have seen this letter.

412. As to the first (and primary) argument, I do not regard it as one which appears to have much, if any strength. I quite understand that the picture which emerged as to the costs was not as clear as it might have been. It is plainly the case that there were inconsistencies. There is something of an oddity that in early June 2018 Teacher Stern said that the costs of the underlying action plus interest (but not including the costs of the enforcement proceedings) were £2.2 million, whereas in early July it gave the £3 million figure (though the amount given as the relevant figure for the purposes of what the Kings had to pay was given as £2.7 million). But the explanation Ms Toomer has given accounts for it perfectly.

413. It is true also that Ms Toomer's witness statement did not make clear that the figure in the 13 June letter did not include VAT; but that did not make it a representation that the figure did include VAT. Nor does the fact that Teacher Stern included VAT when Primekings is VAT registered provide a basis for inferring nefarious intent. Again there seems to be no basis for inferring that the Primekings Defendants read every letter before it was sent by their solicitors (which would be highly unusual in my experience); and the applicability or non-applicability of VAT to costs bills is the source of frequent confusion even with experienced solicitors.

414. Overall, I reiterate that this allegation, on which much weight was placed, did not strike me as a strong one. Indeed it seemed to me, based on the material I saw unclear (unless one starts from a presumption of dishonesty) why there would seem to be a basis for rejecting the explanations given and building upon them an edifice of such serious allegations.

Shadow ledger

415. The next point I deal with because (i) it was the most detailed iteration of the costs fraud argument, (ii) on a previous hearing I expressed some tentative views that it might have some merit and (iii) Mr Newman contended there was no answer to it in the evidence. It is, regrettably, a point which is somewhat difficult to set out clearly in a judgment.

416. The starting point is the same base allegation – namely that Primekings and the Teacher Stern Defendants falsified the costs figures. As part of the evidence in this application

Mr Popperwell swore a statement with the purpose of verifying the figures charged and paid. He did that by setting out the invoices sent to Primekings and how they were paid.

417. The Kings did not accept this evidence. They contended that one could deduce from the evidence the existence of a "shadow ledger" which suggests that "*evidence has been created by Teacher Stern and Mr Popperwell's clients by merging together work from one case, which is this case, and another case or other cases which are nothing to do with the order made by Mr Justice Marcus Smith.*" The contention is that this was done deliberately in order to justify what is said to be inflated costs figures being sought from the Kings.

418. What appeared to be the case when I was taken through the evidence by Mr Newman at the *ex parte* disclosure hearing was that close focus was to be had on the matter number for the Misrepresentation Claim (PRI075/3). It was common ground, for example, that PRI075-1 was a different matter, and should not appear on the bill for the Misrepresentation Claim. The Kings submitted that one could see bills for this matter being "repurposed" into the bill for the Misrepresentation Claim; for example a printed copy of a transaction report showing payment for "BILL NO 8401" being made into Teacher Stern's client account originally had the /1 number, but had been manually changed to /3.

419. My attention was also drawn to the fact that as a ledger the account looks odd, in that payments never balance, and there were "commercially improbable" overpayments. In his evidence Mr King set out the invoices in ledger format which he said showed implausible patterns. He then produced a second table in ledger format stripping out the invoices which he regarded as dubious. The result (which I described as "*rather beautiful*") was a smaller, much tidier table which on its face balanced nicely.

420. I however also expressed in the *ex parte* hearing a number of doubts about the arguments which underpinned this editing process. For example if, as the Kings contended, there had been deliberate alterations, they were of the most inept variety (with alterations manifest on the face of the documents). On their face they presented more credibly as examples of an original wrong accounting entry being corrected than as a forgery with nefarious intent. But at that stage I would certainly have regarded the point as within the bounds of arguability.

421. However Ms Addy's pellucid treatment of this point in argument made its hopelessness quite clear; and also raised a question about how it could have been pursued by anyone who had read the underlying documents thoroughly or said to have been unanswered in the evidence. Taking a few examples from her demolition of it:

    i) A payment of £50,000 was excluded simply because it had the reference PRI75.3 rather than PRI075/3;

    ii) A payment of £120,000 was ignored, although the SWIFT transaction report explicitly stated that it was paid with reference to a bill which Mr King accepts was referable to the correct proceedings;

    iii) Mr King's analysis excludes a payment which pays an invoice which carries the notation "Claim by the Kings Family" – which could only have been the

Misrepresentation Claim. That invoice also on its face includes reference to Mr Downes QC's counsel fees for a hearing before Master Matthews.

422. The result is that the so-called shadow ledger is demonstrably unsound. All of the material which demonstrates its unsoundness was in the appendix to Mr Popperwell's original statement. Ms Addy's submission that the way in which the shadow ledger was compiled by Mr King was disingenuous appears to have some real force.

The Smith and Williamson evidence

423. The point in relation to Smith and Williamson is that the detail of the bill in due course provided included entries for dealing with an expert report from Smith and Williamson, when Mr King has ascertained from a partner at Smith and Williamson that they were not formally instructed until a later date.

424. On this I quite see that this gives rise to material which calls the veracity of certain entries on the bill into question. However it seems to me that the explanation given for the Defendants - that the billing covered a pre-meeting and was simply misdescribed in the bill - appears perfectly credible. Certainly the evidence supports the contention that there were preliminary contacts and discussions at this time. Those are contacts and discussions which would properly be billable to the client. There are no relevant entries covering exactly that work, so the entries and the work match, apart from the fact that the description attached is wrong.

425. Accordingly I do not consider that this point provides any strong support for the Kings' costs fraud case. That was tacitly accepted by Mr Newman who described it as a "*prima facie case, enough to survive a summary judgment application when taken … in combination with other points.*"

The 577 hours issue

426. This is one of the issues which is pleaded as part of the Cover Up. The core of the complaint is that a witness statement of Ms Toomer dated 30 September 2016 asserted that witness statements were substantially complete; but that was not put before Master Whalan at the hearing in August 2019, when 577 more hours than this were sought.

427. It is said that:

i) The witness statement shows that either it was itself knowingly false, or that the extra 577 hours in the bill were fraudulent. Mr Newman described it as "*powerful evidence of fraud*". This was a point originally taken but ultimately not pursued in the Detailed Assessment;

ii) The failure by Ms Toomer to provide it before the hearing (it was requested in June 2019) was done deliberately "*so as to ensure that the Kings could not make oral submissions about it*" [86.2] and that this was done on advice from Mr Downes;

iii) The approval by Teacher Stern and Primekings of a skeleton of Mr Roger Mallalieu which stated that the 577 hours in the bill on witness statements after 30 September 2016 was explicable on the basis of a "*further … round of*

evidence" was done knowing it to be false. (A similar point is made as regards Mr Downes' skeleton for an earlier hearing).

428. I do not conclude that the evidence on this is strong; indeed I am troubled as to the basis on which the full extent of these allegations are made.

429. As to the first point it remains unclear to me how this proposition follows from the evidence. Certainly the pleaded case does not set out the basis for the inference. 577 hours is certainly a large number to be added after such a statement is made. But there are a number of explanations which do not involve fraud. One is that Ms Toomer's original statement contained the wrong figures, owing to some reporting error. Another is that the 577 hours was itself a mistake. A third is that both were right, but that in the event this time was spent over three months, whether by overzealousness to get the statements perfect, or by inefficiency, or overmanning the job. The latter seems perfectly credible in circumstances where 316 hours were spent reviewing the Kings' evidence, and that figure was not questioned as unreasonable by the Kings. That coheres with the Master's own view – he ultimately disallowed 114 of the 577 hours.

430. As to the second point, the delay in provision of the witness statement is a point which loses quite a lot of its sting in circumstances where the document was provided shortly after the hearing, and the position was corrected before the Master gave judgment. But even if it had not been provided it is not at all clear how the inference arises either as to Ms Toomer acting deliberately, or as to Mr Downes advising her so to do.

431. As to the skeleton argument point, certainly Teacher Stern had accepted that the explanation given was not correct and that it did indeed relate solely to the Primekings witness statements in the Misrepresentation Claim, but I cannot see that it follows that Teacher Stern knew this point to be wrong or should be taken to have allowed this line in the skeleton argument to go forward "*in an attempt to deceive the court*" as is alleged. Further the transcript indicates that the error in the skeleton did not infect the actual argument – which proceeded on the basis that the hours related solely to the original statements.

Conclusion

432. I therefore conclude that there is nothing in the originally pleaded case which indicates that the substance of the allegations is very strong, such that it would give pause in the context of either the abuse of process arguments or in granting summary judgment.

433. I have already noted that as regards the pleaded basis for the Threats aspect of the claim I would have concluded that the pleaded case was insufficient to withstand summary judgment on the merits. As regards the Costs aspect of the claim had this claim not already failed (i.e. if there had been a pleaded loss, and had the central contention not been barred by abuse of process) I would regard the claim as weak, but I would probably have granted a conditional order, on the basis that (i) the factual basis was sufficiently complex (ii) there was sufficient evidence of error which might provide a slim basis for such allegations and (iii) those serious allegations would be best and most clearly dealt with at trial.

434. However I would have done so on the basis that the entire case required to be repleaded; and I would have indicated that certain allegations appeared not to be capable of being pursued.

The Inferred Threats

435. I will now consider briefly the substance of the unpleaded case on the Inferred Threats – which it is plain is the real case being run.

436. This creates some difficulties because of the cross over with the Professional Negligence Action, which is an entirely separate action. In the passage which follows I am making no determinations and expressing no views as to that action. All that I am doing is (i) ascertaining whether (if a case had been pleaded and had set out all the requisite components of a cause of action) it might have had sufficient prospects of success to survive summary judgment or the CPR 38.7/abuse of process arguments, and (ii) reflecting on certain aspects of the putative case which cause concern.

437. For these purposes I proceed on the basis that I should assume (in the Kings' favour) that (i) the Misrepresentation Claim was a good one, and (ii) the case being made by the Kings involves the lower hurdle of establishing that the Inferred Threats caused the Misrepresentation Team to offer grossly negligent advice (as opposed to conspiring with Primekings and/or "deliberately scuttling" the Misrepresentation Claim).

438. As a result of the latter I will not consider the allegations made in Mr Newman's note which go only to the "scuttling"/sabotage primary case save insofar as they can also be said to support a case that there were threats which led the Misrepresentation Team to negligently advise that the Misrepresentation Claim was hopeless.

The conflict of interest

439. One matter on which much emphasis was placed was that the Misrepresentation Team had a conflict of interest arising out of the fact that they had not spotted that the underlying documents were not consistent with the pleaded case – in particular as to the pleading on quantum arising out of the B Shares. It could have been actionable if it had caused loss. I will assume for present purposes that this was a possibility.

440. This fact came to the surface on Day 4 of the trial. It is not suggested that the Misrepresentation Team knew of this fact before this point. Therefore the conflict of interest could only arise and be exploited at or after this point. However the problem which I have already noted earlier in the judgment remains – it could only be exploited if Primekings knew not just of the possible negligence, but also that that had not been disclosed to the Kings. There is no suggestion that Primekings did know this. The putative conflict of interest therefore cannot assist the Kings causatively – or consequently as a "merits" point.

The extraordinary events

441. The Note at paragraph 21 sets out what are said to be a number of "extraordinary events" which happened between Day 4 and discontinuance which it is said form part of a web of facts which together put a sinister complexion on the case (by reference to

Compania Naviera Santi SA v Indemnity Mar Ins Co (The Tropaioforos) [1960] 2 Lloyd's Rep. 469).

442. I will deal with the Howard Smith evidence, on which most emphasis was placed, separately. However I do not see these points as raising any basis for such an inference. In particular:

i) The fact that a substantial written advice (running to 35 pages) may have been commenced well before it was handed over raises no basis for an inference of nefarious activity or that it was produced by threats. Any such advice is a very serious matter, which would require careful thought and reflection. I would be very surprised if it could conceivably be written overnight or even in a couple of days. Any barrister giving such advice would want to reflect on it and indeed very probably sleep on it after completion;

ii) There is an allegation that a purdah order was breached. However this allegation appears to proceed on a misconception – witnesses were excluded from watching the evidence of other witnesses, but were only formally in purdah when giving their own evidence;

iii) Negative comments made to the Court/non notification of helpful evidence. These were not particularised in the Note and were not pursued in any depth;

iv) There is an allegation [Note 21.5] that Mr Blakey "*doctored his own notebook to create a false evidence trail*" and that the pages showing this were suppressed. As to this:

a) While it may be the case that the King's legal team have some material which justifies this extremely serious allegation, from the material deployed before me I was unable to discern what it was.

b) The point about "doctoring" the notebook appeared to depend upon imputing some nefarious motive to the addition of annotations reflecting unfortunate bits in Mr King's cross-examination (failure to answer the question and so forth) next to the note of his evidence in chief. If it is indeed suggested that this provides the basis for inferring that the notes were deliberately doctored I would regard that as an absurd contention and one lacking proper basis.

c) Even if it were the case, such behaviour (which is certainly consistent with a lawyer taking "protective" notes as a case goes badly wrong) seems to have no link which would make it a basis for an inference of threats being made by/for Primekings.

d) Similar points could be made in respect of an argument that because certain of the Misrepresentation Team's notes, including a "to Do List" of 10 May 2017 were not provided as part of pre-action disclosure, when the page before and the page after were, there is an inference that this material was deliberately suppressed.

v) Exception is taken to liaison between Mr Downes and Misrepresentation Counsel during the course of trial. Again this was not particularised in the Note (reliance being placed on a note which dates from the time of the discussions which finalised the terms of the discontinuance) and not really pursued orally. Liaison between opposing counsel is of course both commonplace and expected by the Court in furtherance of the overriding objective during trial. It may be that the King's legal team have some material which justifies the extremely serious allegation that such liaison went beyond what was proper, but from the material deployed before me I was unable to discern what it was. Again such behaviour seems to have no link which would make it a basis for an inference of threats being made by/for Primekings;

vi) Reliance is placed on the poor performance in the witness box of the partner from the Misrepresentation Solicitors. There seems to be a good basis for saying that this witness's performance was poor. Again I fail to see how this provides any basis for inferring that there had been threats, particularly when the witness in question had obvious very good reasons of his own for trying to distance himself from what had gone wrong;

vii) Suppression of disclosure. It is said that important disclosure which came from Primekings on 8 May 2017 was hidden from the Kings by their own legal team, and that this was a concealment which continued in a pre-action letter and even in pleadings recently filed in the Commercial Court. This point was not pursued at any length before me and does not emerge clearly from the Note.

Mr Downes' failure to exploit the B share error

443. One matter which was said to be very significant in the inference that threats had been made was the fact that Mr Downes did not exploit with any witness the fact that the pleadings and witness statements signed with Statements of Truth were all wrong as a result of the B Share Problem. This was said to be evidence of Primekings keeping to their side of the nefarious understanding and to justify the inference.

444. This is a point which I would entirely understand being made by a litigant in person, because it completely fails to understand the techniques of cross-examination. It is however rather strange to find it pursued with any enthusiasm by counsel. It is often thought by non-lawyers that good cross-examination consist of confronting the witness repeatedly and "*rubbing his nose*" in every discrepancy. A good cross examiner will however usually aim to get the good answer she wants for the purposes of closing submissions and move swiftly on before the witness can start to dig himself out of the hole.

445. As Keith Evans says in "*The Golden Rules of Advocacy*" p. 102:

> "STOP WHEN YOU GET WHAT YOU WANT ….Don't indulge yourself. If you do, things may start to go horribly wrong"

446. Or, to quote Sir David Napley in his classic work "The Technique of Persuasion" p. 113:

> "If .. you have elicited from the witness – or a different witness – an admission which assists your case, do not, in your understandable enthusiasm, put the same or similar question again; you may well get a different answer which nullifies the good which your earlier answer achieved."

447. What one sees Mr Downes doing on the transcript is simply him following this golden rule. I therefore fail to see how this could provide any basis at all for an inference of impropriety.

The absence of Howard Smith

448. One point from which the inference that something untoward was going on was the situation with Howard Smith – and a spreadsheet produced by KPMG.

449. It is the Kings' case that Howard Smith, a KPMG witness, was to be a star witness for the Kings, as he was well-placed to comment on the cash flow of the business and that nefarious intent could be inferred from his centrality to the claim, and from the fact that his evidence was repeatedly moved back, with him ultimately not being called.

450. The main point here was the centrality of his evidence. It was said that he would have established that Primekings' claim that KSGL would be insolvent if investment was not found immediately was untrue. Mr Newman said:

> "Howard Smith was going to give evidence which was completely supportive of the claim and he was going to say that they could pay the wages and the business wouldn't go into administration and the business would be re-marketed, which is completely contrary to the case which is being put to all the witnesses throughout that week by Primekings"

451. This assertion was based on what Mr Newman (more than once) called the witness statement of Mr Smith. This was a document bearing Mr Smith's name, which certainly did set out a statement to this effect.

452. However there was a very significant problem with this submission. That problem was that the so-called witness statement of Mr Smith was no such thing. It was an unsigned witness summary. I have no evidence that Mr Smith would have given evidence to the same effect as the witness summary. I in fact have no evidence that he had ever seen it. The basis for this argument is therefore manifestly flawed.

453. Further Mr Newman referred me to a document which he said would have formed the basis of Mr Smith's favourable evidence – a spreadsheet which was said to show that KSGL could have afforded to carry on; however that document was one which was predicated on a cash injection which was only going to happen if the deal went ahead. The factual underpinning of the evidence which it was said that Mr Smith could give was therefore also demonstrated to be flawed.

Conclusion

454. It follows that even assuming that the case as referenced in the Note had been pleaded or sought to be pleaded (which it was not) that case provides no basis for an inference of threats which would have more than fanciful prospects of success, and does not come close to the kind of compelling material which might conceivably assist in the context of the abuse of process arguments.

455. In striking out the claim and/or granting summary judgment I am not therefore by any means stifling a claim which should be heard. What I am doing is bringing a proper conclusion to a claim which is structurally fatally flawed, abusive and lacking in pleadable substance.

Post Script: The conduct of the Kings' case

456. As will by now be apparent, in considering the applications I have repeatedly been troubled by aspects of the way in which the Kings' case was put forward. After careful reflection I have considered that I should say something about this aspect specifically for the benefit of those involved in this and the wider litigation; as well as because some of these issues are ones which should be marked with disapproval by the Court.

Specific allegations which lack basis

457. I have indicated above a number of allegations which were not formally pleaded in this action but which were pursued with what appeared to be an insufficient basis. There were also allegations in this action which were pleaded but which appeared to lack basis.

458. One is the allegation that Mr Rabinowicz certified the Amended Bill in the knowledge that it was false (Particulars at [81]). Another is the allegation that Mr Downes knew the Bill to be false. I entirely understand the basis whereby it is said that Teacher Stern and Ms Toomer knew the Bill to be false, though as I have indicated I regard the basis for the falsity argument as slight, even if it could be properly run (which I have concluded earlier it cannot, in the light of the fact that the bill has now been formally assessed at 90% of the sum claimed). I can also (just about) understand that it may be said that Primekings as clients (with a pleaded very keen interest in costs and an incentive to keep a track of what was billed) would know if a bill was false. But when it comes to Mr Rabinowicz, no basis for knowledge as at 24 February 2019 appears to be pleaded – on the contrary the Kings' own pleaded case is that he joined the Common Design on around 10 May 2019. The 24 February Bill was not relied on before me, is not otherwise mentioned in the Particulars of Claim and is not apparently in the voluminous bundles which were placed before me. It is also hard to understand how, even at the later stage, Mr Rabinowicz, with no underlying knowledge of the case, should have ascertained that the bill was false. This is not explained.

459. As regards Mr Downes also the basis for knowledge of falsity appears on the face of the pleading to be inadequate. What is pleaded as a basis is that he used to work in banking and is highly financially literate. As I have noted above in relation to some other matters, it may be that the Kings' legal team have other material to add to this which they consider forms a proper basis for making such an allegation of dishonesty. However looking at the material which I have been given I am cannot currently discern one.

460. I therefore do have concerns about the basis on which some of the allegations in this case were advanced. I note that this approach appears not to be confined to this part of the litigation; I see from [240] of Mr Andrew Lenon QC's judgment in the KSSL case that he highlighted a number of serious allegations being made in that case without any proper foundation.

The leap from thinking the worst to accusation

461. One hallmark of the submissions which were made, which submissions I am sure are a reflection of the Kings' own views, is that the very least point in whatever context becomes "powerful evidence" in favour of the underlying allegations.

462. Very many examples of this could be given. I take just a few. The first is the approach taken to the non-service of defences, and the fact that the Defendants have not engaged on the facts in relation to most of the allegations. This approach – perfectly logical (and indeed proper) in the context of an application of this nature - has been transmuted in the Kings' eyes to acknowledgements of guilt.

463. Thus Mr Newman's Note had an Appendix "FAILURE TO DENY ALLEGATION OF IMPROPER PRESSURE DURING THE TRIAL", and the following were a selection of ways in which the point was made over the course of his submissions:

    i) "*this case cannot be defended realistically, and the reason why it is not being defended through a defence, my Lady, is because there's been so many explanations given and so many accounts given of what should be a single number but it is impossible to plead back to without admitting some serious unlawful conduct at some point.*"

    ii) "*why is it that no defences have been put before your Ladyship today or draft defences. It is because, in my submission, there just isn't a defence to this claim that could ever be advanced that wouldn't result in the Kings getting the justice that they deserve, that they have been waiting for so long*"

    iii) "*These defendants must know that they are taking a huge risk of at least adverse inferences enough to defeat their applications be drawn from their silence on these points… we say there is a very powerful inference there that they don't have answers which they can provide, and aren't providing them because they don't exist.*"

464. Another example is that at the hearing of the s. 994 Proceedings strike out, in the course of Ms Addy explaining the background to the application, the Deputy Judge asked Ms Addy about the allegation that the £1.7 million Payment on Account figure, and whether he was right that the allegation was that Marcus Smith J ordered it on a false basis. Ms Addy responded "*Yes, the petitioners do take issue with the content of the submissions that were made by Mr. Downes, QC, … but those submissions were made by Mr. Downes and the judge made the order he did.*" That is said by the Kings to found a powerful inference because: "*Where a party fails to deny a serious allegation, there is normally a powerful inference that that is because they know it is correct.*". It is hard to understand how this argument comes to be made on any sensible reading of this passage of the transcript. There was no allegation; the Deputy Judge was plainly merely

trying to orient himself in the (morass of) issues and Ms Addy was providing an answer indicating that from her perspective the point did not go anywhere.

465. Perhaps the most telling example is the so-called Transcript Fraud. When the Teacher Stern Defendants made a request for Further Information of paragraph 19 of the Particulars ("*The existence of the Common Design is to be inferred (inter alia) from…*") the Reply (signed by Mr Newman) asserted that "*since the case was pleaded further facts evidencing the conspiracy have emerged*".

466. The facts relied on were that Ms Toomer had told Metis Law that the audio file for a hearing (of the Kings' unsuccessful application to stay the Detailed Assessment) had not been received by the transcription-provider, Epiq. It was stated in terms that she had "*misled Metis knowing that such evidence would support the case of the Kings*". This situation was also later relied upon in support of an inference that the Inferred Threats were made.

467. I note that no explanation of this situation had been sought prior to this allegation being made.

468. A response was given on behalf of Teacher Stern/Ms Toomer five days later. The explanation was that Epiq had failed to produce the transcript urgently, as requested because their systems were down and they had not received or could not locate the instruction. The request via them had been cancelled and another provider (Ubiqus) asked to produce the transcript – and had then been chased when Ubiqus reported they had not yet received the audio file. When asked, Ms Toomer had mis-summarised this saga and had referred to the wrong transcript provider. The letter attached all the relevant emails and invited the Kings to withdraw the allegations.

469. Those very serious allegations have not been withdrawn. They have been maintained with full vigour up to and during the hearing before me. In his skeleton Mr Newman stated that the explanation is "*most implausible*" and that the inference that Ms Toomer "*lied to the Kings because she wished to deny the Kings documentary evidence is not in the context of this case as a whole … unrealistic.*"

470. In oral submissions – despite the emails which on their face show the problems which Teacher Stern encountered with Epiq - he described the cancellation of the Epiq order as "*a cynical ploy to really slow everything down and make it impossible for Mr King to get the transcript*" and the absence of emails with Ubiqus as supporting the Kings' case that "*this was a bit of a ploy, a bit of sharp practice, one might see it as, to try and stop the Kings getting a transcript*".

471. The reason the inference is said to arise, and why the Court would at trial be asked to disbelieve the explanation given by Ms Toomer is that "*Ms Toomer had a real motive to ensure the Kings couldn't get this transcript which provides, we say, categorical evidence that her and her clients were misleading a judge about the accounts evidence*".

472. There are two points to make here. The first is that even if there was a basis to make these very serious allegations in the RFI (which seems dubious based on the material I have seen) I cannot understand how, in the light of the explanation and the provision of the emails with the transcribers, this allegation could properly be pursued before me (and – as it has been – in the other litigation between the parties).

473. The second goes back to my first sub-heading. It is that this episode highlights beautifully the approach taken by the Kings and their legal team to this case. Anything unhelpful to the Kings is immediately seen as suspect on the basis of previous suspicions – hence the "inference" that a mislaid transcript was the product of some attempt to keep vital evidence from the Kings. In the Kings' eyes there are no mistakes, only conspiracies.

474. Another example of this tendency is the correspondence arising out of the recent amendment to Misrepresentation Counsel's defence in the Professional Negligence Action, to which the Kings' legal team were very keen to draw my attention. The amendments in question are minor in the extreme. One makes clear that the Misrepresentation Counsel can only plead to their own lack of contact with Mr Wilson. That is said to "*emphasise the acceptance of a legitimate possibility that a member of the legal team … did contact Mr Wilson to bring to his attention what transpired on Day 4*" and to be a "*serious red flag*". Another clarifies the Misrepresentation Counsel's absence of knowledge of what was said to other members of the team. Similarly it is said to be "*implicit in the proposed amendment that the barristers are accepting that there is a real possibility that a highly relevant development on the case may have been concealed by DWF from both the counsel team and the Kings*". It takes a determined and thoroughly skewed reading of those amendments to take from them the points which were made by Metis Law in their letter to me.

475. This feeds into an approach to the legal argument (said to be in reliance on *Blockchain Optimization v LFE Market Ltd*. [2020] EWHC 2027 (Comm) at [53]) that because facts in support of an allegation of fraud have to be viewed cumulatively it is possible to justify an allegation of fraud by pulling together the widest possible variety of complaints and saying "*cumulatively these permit us to infer fraud*".

476. This is not, in my judgment, an appropriate approach to inferring fraud. What *Blockchain Optimisation* says is that:

> "I agree … that it is not enough merely to plead a representation and to assert that it was made fraudulently - the primary facts from which the court is invited to infer that the statement was made fraudulently must be pleaded. But the pleading as a whole has to be taken into account, and statements which are asserted to be factually untrue, when taken cumulatively, can go to support an allegation that they were all made fraudulently, even if individually they would be equally consistent with innocence."

477. That does not mean that an inference of fraud can be justified by lumping together a number of disparate allegations which bear no relation to the conspiracy, fraud or deceit which is said to sound in damages. One cannot ask the court to infer fraud against A in relation to a particular transaction because (for example) he once stole a sweet from a shop, or because he lied to get out of an unwanted dinner engagement.

478. Reliance was also placed for the Kings on *Compania Naviera Santi SA v Indemnity Mar Ins Co (The Tropaioforos)* [1960] 2 Lloyd's Rep. 469; but that case illustrates the point nicely. That was a scuttling case. The "apparently trivial" circumstances relied on were that the master found time to shave, and the crew packed their suitcases before

abandoning ship, but the logbooks were left on board. The relevance to the fraud alleged is immediately apparent.

479. What the cases do not say is that one can jumble together a vast array of different, apparently trivial or marginally suspicious facts relating to different matters and turn them into a valid pleading of fraud.

480. That the claim is dependent on this approach is manifest from the response to Teacher Stern's RFI where it is said "*All of the facts pleaded in the Particulars of Claim support the inference of a conspiracy, especially the attempts to cover it up set out at paragraphs 44-100*". Thus the main pleaded basis for a conspiracy in 2015/2016 relating to the Misrepresentation Claim, and which was causatively over by 15 May 2017 are a collection (which might not inaccurately be referred to as a "ragbag") of allegations which relate only to the assessment of the costs of the action. This is also clear from:

i) The pleading at section IV of the Particulars of "*Similar Conduct Demonstrating Modus Operandi*", which brings into the picture matters in relation to the Part 8 Claim and the Kings' legal expenses insurance. It was referred to in the Note as "*powerful similar fact evidence …[which] tends to show that exaggerating legal costs and seeking to interfere with opponents' legal representation are viewed as a legitimate way of doing business by Primekings, Teacher Stern and Mr Downes*".

ii) The reliance on the fact that Teacher Stern had aggressively chased Master Cousins for a sealed order, including intimating a likelihood that they would report him to the Judicial Conduct Office.

481. There is also a huge amount of circular reasoning involved in this approach. The so-called Transcript Fraud is used to infer fraud because there is said to be dishonesty, but the inference that it itself evidenced dishonesty depends on an assumption that there is a conspiracy.

482. Thus the desire to allege fraud/dishonesty/conspiracy becomes a kind of philosopher's stone which transforms innocent errors into dishonest conspiracies - from which in turn the main conspiracy can itself be inferred.

Full and frank disclosure

483. Another aspect of the way in which the case has been run is that I have doubts as to the way the shadow ledger material was presented to me at the *ex parte* hearing. As the matter was *ex parte* there was an obligation of full and frank disclosure on the applicant. Having now been taken through the material by Ms Addy it certainly seems to me that whether consciously or not, the obligation was not discharged. The problem may in part have arisen from the fact that the argument was put together by Mr King, who may not fully have understood the obligation on him, and who (not being a lawyer, and given the emotional toll of this litigation) I suspect may genuinely struggle to comprehend the points which might and should be made against his case. It may be the case that the legal team did not fully get on top of the materials so as to be able to make good that deficiency. But the net result was that points which could and should have been made about this line of argument were not drawn to my attention.

Routine accusations of impropriety

484. Another concern which I have is that the correspondence from the Kings' legal team has been characterised by a hair trigger approach to accusing their correspondents of impropriety. So, when Teacher Stern asked for further particulars of what I have indicated was a manifestly unsatisfactory pleading and intimated that an RFI would otherwise be served, that letter attracted a robust response in correspondence, describing the proposed RFI as "*a transparent ruse*". This is just one of a number of occasions when those instructed for the Kings appear to have responded to correspondence in a manner which steps well beyond mere abrasiveness into allegations of misconduct for which no justifiable basis can be discerned.

485. In other correspondence addressed to Teacher Stern it was said that they and Primekings "*are seeking to use the product of their wrongdoing (such being but not limited to, an improperly obtained payment on account and an artificial and false bill of costs filed in Court wrongfully endorsed with a statement of truth) to stifle this claim.*"

486. Further, in the course of this litigation in correspondence addressed to those representing the Teacher Stern Defendants allegations were made that they were *"using … threatening techniques in response to this claim"*. This was said to *"powerfully support[] the claimants' case that such techniques were used in May 2017"*. This is not the only occasion when the allegations made against these defendants have been extended, apparently reflexively and without any apparent basis, from those Defendants to those who now represent them in this dispute.

487. Similarly in the response to that RFI it was pleaded (by Mr Newman) that the RFI demonstrated that "*this Part 18 request has been made by the Teacher Stern Defendants for the improper purposes of (i) delaying this case and (ii) seeking to find out what evidence the Claimants have*". The basis for this response (which itself implicitly accused Teacher Stern's legal team of improper conduct) was not clear. While Metis Law Limited and Mr Newman have repeatedly stated in correspondence and in argument that they do not accuse the current legal team of any of the Defendants of impropriety there are a number of occasions where the logic of the accusation being made (that something wrong is being done through the legal team) necessarily extends to those members of the legal team.

488. Such matters are not strictly a matter for a judgment, but having noted them with considerable concern in the course of the submissions, it has seemed to me right that I should highlight the point. As I have indicated many of these accusations appeared to lack basis; even on those occasions where the point might be arguable it would certainly have been preferable if all of these accusations, which seemed to serve little legitimate purpose, had been avoided.

489. Certainly, too, the correspondence seems to have been conducted with no regard at all for paragraph A1.10 of the Commercial Court Guide which states: "*The Court expects a high level of co-operation and realism from the legal representatives of the parties. This applies to dealings (including correspondence) between legal representatives as well as to dealings with the Court.*". I would hope that this point is noted and acted upon.