Neutral Citation Number: [2020] EWCA Civ 1690

Case No: A3/2020/0616

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HHJ Simon Barker QC sitting as a Judge of the High Court
[2020] EWHC 440 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 December 2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

(1) LIBYAN INVESTMENT AUTHORITY **(2) LIA ADVISORY SERVICES (UK) LTD** **(formerly known as Dalia Advisory Ltd)** **(3) MAPLECROSS HOLDINGS INVESTMENT CO LTD**	**Claimants / Respondents**

- and –

(1) ROGER MILNER KING **(2) INTERNATIONAL GROUP LTD** **(3) BEESON PROPERTY INVESTMENTS LTD** **(4) STOKE PARK ESTATES** **(formerly known as Beeson Investments)** **(5) CHARLES MONTGOMERY MERRY** **(6) CONRAD STRATEGIC PARTNERS LTD**	**Defendants/ Appellants**

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Patrick Green QC and **Rachel Tandy** (instructed by **Croft Solicitors**) for the **Appellants**

Andrew Onslow QC and **Kate Holderness** (instructed by **Hogan Lovells International LLP**) for the **Respondents**

Hearing date: 26 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30 am on 14 December 2020

Lord Justice Nugee:

Introduction

1. This appeal is concerned with the question whether the Court has power to permit the Claimants to amend so as to introduce new claims after the expiry of the limitation period. This issue is one that crops up frequently in litigation and has generated a substantial amount of authority, unsurprisingly since what is usually in issue is whether a claim which is otherwise statute-barred can be litigated at all, and hence the stakes are high. This case is no exception: if the Claimants are not permitted to amend, that will put an end to the current action, and it is very doubtful if the Claimants would be able to bring another one.

2. The appeal does however raise what appears to be a novel point. In circumstances where the Court has struck out the entirety of the Claimants' currently pleaded case, can the Court nevertheless subsequently permit new claims to be brought?

3. In the present case HHJ Simon Barker QC on 23 October 2018 struck out the latest version of the Claimants' Particulars of Claim (the Re-amended Particulars of Claim or **"RAPOC"**) against all the Defendants, of whom there were then seven, on the basis that there was no reasonable prospect of any of the claims succeeding. So far as the then 1st Defendant was concerned, that was that. HHJ Barker however thought that the Claimants might be able to re-cast their claims against the then 2nd to 7th Defendants (now the 1st to 6th Defendants and the current Appellants). He therefore did not strike out the Claim Form. That was deliberate, and intended to give the Claimants an opportunity, without having to start again, to see if they could reformulate their claims in a viable manner against those Defendants. The Claimants took that opportunity and duly applied to amend by pleading a Re-re-amended Particulars of Claim (**"RRAPOC"**). The Claimants accepted that the claims in the RRAPOC were *"new claims"* and that they were, or arguably were, statute-barred and hence that they had to rely on the power of the Court in CPR r 17.4, which permits the Court to allow a new claim to be pleaded after the expiry of the limitation period, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the applicant has already claimed a remedy in the proceedings (CPR r 17.4(2)).

4. That application also came before HHJ Barker and by his judgment dated 26 February 2020, given effect to by his Order dated 3 March 2020, he held that for the purposes of CPR r 17.4(2) he could compare the proposed new claims pleaded in the RRAPOC with the claims in the struck out RAPOC and that since they did arise out of the same or substantially the same facts as had been there pleaded he had power to allow the amendments, which he proceeded to do.

5. The Defendants sought permission to appeal on a number of grounds. HHJ Barker refused permission to appeal. On 20 July 2020 permission was granted by David Richards LJ, but limited to a single ground, Ground 7, which was that HHJ Barker had no power to grant permission to amend because there was no claim *"in issue"* in the action, the existing claims all having been dismissed. The words *"in issue"* do not appear in CPR r 17.4, but they do appear in s. 35 of the Limitation Act 1980 (**"LA 1980"**), which is the section under which CPR r 17.4 was made: s. 35(4) and (5) permit rules of court to be made if the new cause of action arises out of the same, or

substantially the same, facts *"as are already in issue on any claim previously made in the original action."*

6. By a Respondent's notice dated 3 August 2020 the Claimants (the current Respondents) seek to uphold HHJ Barker's judgment on alternative grounds. In summary these fall into three parts. Grounds 1 to 3 advance further arguments why HHJ Barker was right to compare the RRAPOC with the RAPOC. Ground 4 puts forward an alternative argument that the new causes of action arose out of the same or substantially the same facts as were in issue on the claims made by the Claim Form, and that the RAPOC could be looked at for that purpose. Ground 5 invites the Court to vary HHJ Barker's Order of 23 October 2018 under CPR r 3.1(7), or correct it under CPR r 40.12 (the slip rule), so as to delete the striking out of the RAPOC.

Relevant provisions – s. 35 LA 1980 and CPR r 17.4(2)

7. It is convenient to set out the text of the relevant provisions at the outset. Starting with s. 35 LA 1980, this provides, so far as material, as follows:

> "**35 New claims in pending actions: rules of court.**
>
> (1) For the purposes of this Act, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced—
>
> …
>
> (b) in the case of any other new claim, on the same date as the original action.
>
> (2) In this section a new claim means any claim by way of set-off or counterclaim, and any claim involving either—
>
> (a) the addition or substitution of a new cause of action; or
>
> …
>
> (3) Except as provided by section 33 of this Act or by rules of court, neither the High Court nor the county court shall allow a new claim within subsection (1)(b) above, other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Act which would affect a new action to enforce that claim….
>
> (4) Rules of court may provide for allowing a new claim to which subsection (3) above applies to be made as there mentioned, but only if the conditions specified in subsection (5) below are satisfied, and subject to any further restrictions the rules may impose.
>
> (5) The conditions referred to in subsection (4) above are the following—
>
> (a) in the case of a claim involving a new cause of action, **if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action**; …"

8. CPR r 17.4 was made pursuant to the power in s. 35(4) LA 1980. It provides, so far as material, as follows:

> "**17.4 Amendments to statements of case after the end of a relevant limitation period**
>
> (1) This rule applies where—
>
> (a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and
>
> (b) a period of limitation has expired under—
>
> (i) the Limitation Act 1980; or
>
> …
>
> (2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only **if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.**"

9. I have added the emphasis to the relevant wording in s. 35(5) LA 1980 and CPR r 17.4(2), and as can be seen they are not in identical form.

Facts

10. Given the limited basis on which the Appellants have permission to appeal, it is not necessary to set out the facts in great detail, but some account should be given. Further details can be found in HHJ Barker's two judgments of 23 October 2018 (**"the 2018 Judgment"** or **"2018 Jmt"**) and 26 February 2020 (**"the 2020 Judgment"** or **"2020 Jmt"**), the neutral citations of which are *Libyan Investment Authority v Warwick Street (KS) LLP* [2018] EWHC 2877 (Ch) and *Libyan Investment Authority v King* [2020] EWHC 440 (Ch) respectively. There has of course at this stage been no trial or facts found, but those set out below are taken from the pleadings, and from the skeletons and chronology prepared for the appeal, and I did not understand them to be contentious.

11. The claim arises out of a joint venture between the parties. The 1st Claimant, the Libyan Investment Authority (**"the LIA"**), is the sovereign wealth fund of Libya; the 2nd Claimant (**"LIA UK"**) is a London-based subsidiary of the LIA; and the 3rd Claimant is the vehicle used by the LIA to participate in the joint venture. The 1st Defendant, Mr King, is a businessman who, with his family, owns a group of companies known as the International Group; this includes the 2nd to 4th Defendants. The 5th Defendant, Mr Merry, is a surveyor and the 6th Defendant is his company; they acted as property consultants to Mr King.

12. The joint venture was for the proposed development of a hotel and retail complex at Maple Cross in Hertfordshire near Junction 17 of the M25. The proposed hotel was much the more valuable part of the project. The hotel site was owned by one of Mr King's companies (as was the retail site). By early 2010, Mr King's group had both conditional planning permission for the development of the hotel site and reports from Strutt & Parker, one from 2007 valuing the site with planning permission at £17m, or £20m if a management contract with a leading hotel group had been secured, and one from 2009 to the effect that on the basis of a site cost of £18m the completed hotel was capable of achieving, on certain assumptions, a future capital value of £58m.

They also had an agreement in principle with a hotel group. On the basis of the reports that had been obtained, the LIA was invited in February 2010 to invest £10.5m for a 50% share in the venture, and on 12 May 2010 Mr Layas, the then executive director of LIA UK, wrote to Mr King confirming, subject to contract, that the LIA were proceeding with the purchase of a 50% shareholding for £10.5m, with completion expected in June.

13. It appears that it was only then that thought turned to the LIA obtaining its own advice on value. Mr Layas initially instructed Savills to provide valuations of the hotel and retail sites, but on 17 June 2010 Mr Furze of Savills telephoned him to alert him to a major discrepancy between Savills' initial view (which was that the hotel site was only worth £5.7m) and the price being paid. Mr Layas's reaction was apparently to disinstruct Savills, and on 18 June to ask Mr King to assist. At any rate on that day Mr Merry contacted King Sturge and briefed them on the development project. He told King Sturge that the estimated value of the joint venture was £21m, with £18m attributed to the hotel development and the balance to the retail development.

14. On 22 June Mr King sent a letter of instruction to King Sturge asking them in the first instance to send a draft letter to Mr Merry for review, and once it was in final form, to re-address it to the LIA. On 23 June King Sturge duly sent a draft letter to Mr Merry for approval. After discussion with Mr Merry a revised version was sent to Mr Layas as director of LIA UK later that day. This was a lengthy letter (**"the King Sturge letter"**) which concluded that based on the information King Sturge had been given, including Strutt & Parker's valuation, they supported the assumptions made and considered an enterprise value of £21m appropriate.

15. Mr Layas forwarded the King Sturge letter to the LIA, and on 27 June 2010 the Board of Directors of the LIA approved the investment in the joint venture. The joint venture agreement was signed, and the £10.5m paid, on 19 July 2010. Over the next six months certain other sums, totalling £1.76m, were also invested by the LIA pursuant to requests for further funding.

16. The development however did not proceed, nothing was built, and the joint venture companies went into liquidation. Relations between the LIA and Mr King broke down in or about 2013. The Claimants claim to have lost all or most of their investment.

Procedural history

17. This action was commenced by Claim Form issued on 18 July 2016, one day before the expiry of 6 years from the entry into the joint venture agreement. The claim was brought against King Sturge as 1st Defendant; it had by then been renamed Warwick Street (KS) LLP but I will continue to refer to it as King Sturge. The 2nd to 7th Defendants were those that are now 1st to 6th Defendants, namely Mr King and Mr Merry and their respective companies.

18. The Claim Form under "Brief Details of the Claim" identified four separate claims:

    (1) A claim against King Sturge for damages for fraudulent misrepresentations contained in the King Sturge letter, the alleged misrepresentations being that King Sturge regarded the assumptions and calculations as reasonable, or as not

unreasonable, and that the Claimants could rely on the letter as a valuation notwithstanding the disclaimers it contained.

(2) A claim against King Sturge for compensation for breach of fiduciary duty in sending the King Sturge letter knowing or suspecting that the assumptions and calculations in it were unreasonable and that the Claimants would regard it as a valuation, or being reckless as to such matters.

(3) A claim, initially against the 2nd to 7th Defendants, for damages for conspiracy to injure the Claimants by means of the King Sturge letter, the 2nd to 7th Defendants being said to know that King Sturge's *"said representations"* were untrue, or to have no belief in their truth or to be reckless, not caring whether they were true.

(4) A claim against the 2nd to 7th Defendants for damages for procuring King Sturge to commit a breach of fiduciary duty.

19. The action progressed slowly. It is not necessary to go into the reasons but some reliance was placed on the evolution of the pleadings so I will trace the history of that. The Claim Form, together with Particulars of Claim, was served towards the very end of the four months available on 16 November 2016. In February 2017 the Claimants served draft Amended Particulars of Claim; on 5 May 2017 the then 2nd to 7th Defendants served a single Defence, pleading to the draft Amended Particulars of Claim (despite the fact that they had not yet been formally amended). On 12 September 2017 Chief Master Marsh ordered the Claimants to serve the Amended Particulars of Claim by 20 October 2017, duly verified by a statement of truth, and on 20 October 2017 the Claimants did so in a version revised from that served in draft in February.

20. On 2 March 2018 the Claimants issued an application for permission to re-amend their Particulars of Claim; on 22 March 2018 they issued a further application to amend that application so as to embrace an amendment of the Claim Form and a revised version of the proposed Re-amended Particulars of Claim; and on 18 June 2018 they put forward a further revision to the proposed Re-amended Particulars of Claim, which was the form for which they ultimately asked permission (ie the RAPOC). In the meantime the 2nd to 7th Defendants had on 29 March 2018 issued their own application to strike out the Claim Form and the Amended Particulars of Claim (or the Re-amended Particulars of Claim if permission were granted to the Claimants to re-amend), or for summary judgment on the claims against them on the basis that they had no reasonable prospects of success.

The 2018 Judgment

21. Both the Claimants' applications for permission to amend and the 2nd to 7th Defendants' application for strike out or summary judgment came before HHJ Barker, sitting as a Judge of the High Court, in October 2018. He delivered a reserved judgment on 23 October 2018 (ie the 2018 Judgment). We were told that he had not circulated it to counsel in draft prior to its delivery but read it out during the morning of 23 October, with the result that the parties had had no advance notice of what he was going to say.

22. In his judgment he dealt first with the application to re-amend in the form of the RAPOC. Apart from some tidying up and pleading of further details, the substantive change sought to be introduced was to widen the conspiracy claim to include King Sturge as one of the conspirators, and the only amendment to the Claim Form was to the same effect, namely to add King Sturge as a defendant to the conspiracy claim. The amendments were not opposed by the 2nd to 7th Defendants (2018 Jmt at [2]); King Sturge did not oppose the amendments as such, on what is called the *Mastercard* basis (2018 Jmt at [2]), that is that for limitation purposes the amendments should be deemed not to date back to the issue of the Claim Form but to the date of the application to amend: see *Mastercard Inc v Deutsche Bahn AG* [2017] EWCA Civ 272 at [4] per Sales LJ where he held that the Court can permit an amendment on terms that for limitation purposes it should not date back to the date of issue of the claim form (as provided for by s. 35(1) LA 1980) but should take effect from some later date. (This is a useful practice which avoids the need to issue a fresh action, and can have other uses; indeed in one of the last cases I heard in the High Court it was used to avoid what would otherwise have been a lengthy and costly interlocutory battle on CPR r 17.4(2) by the parties being persuaded to consent to an order permitting the amendment on terms that it would relate back either to the issue of the claim form or to a later date depending on whether the trial judge, who would be in a much better position to determine the point, concluded that it did or did not fall within CPR r 17.4(2)).

23. In the present case King Sturge argued that the claim in conspiracy against them was a new claim that opened a new line of enquiry and so could not be introduced after expiry of the limitation period, at any rate so as to relate back to the date of the Claim Form, but HHJ Barker concluded that it was artificial to regard the existing claims against King Sturge for deceit and intentional breach of fiduciary duty as having no overlap with the question of their relationship with the 2nd to 7th Defendants (2018 Jmt at [39]). He continued (at [40]):

> "Accordingly I shall make an order permitting reamendment of the amended particulars of claim and, if required, amendment of the claim form as sought by the claimants. Whether the claim in its reamended form has any realistic prospect of success is of course a different and the next question."

24. He then proceeded to consider that question, noting that CPR r 3.4(2)(a) provides that a court may strike out a statement of case if satisfied that it is bound to fail, and that CPR r 24.2 provides that the court may give summary judgment against a claimant if it considers that the claimant has no reasonable prospect of succeeding on the claim and there is no other compelling reason for a trial (2018 Jmt at [41]-[42]). After a detailed consideration of the facts relied on by the Claimants he concluded that the case against King Sturge based on deceit, falsity, dishonest intention and state of mind was far-fetched and unrealistic (2018 Jmt at [119]), and that the suggestion that the Claimants relied on the King Sturge letter as a property valuation rather than a business valuation was untenable (2018 Jmt at [120]).

25. That was sufficient to dispose of the claims against King Sturge, and also the claim against the 2nd to 7th Defendants for procuring King Sturge to commit a breach of fiduciary duty. That left the conspiracy claim against them. HHJ Barker had said earlier in his judgment (2018 Jmt at [50]) that he did feel *"some disquiet"* about a number of matters, namely (1) the role, conduct and motives of Mr Layas (although

he was not a defendant); (2) the role, conduct and motives of Mr King; and (3) the concerted efforts of Mr Layas, Mr King and Mr Merry to secure the LIA's board's approval to investment in the venture. But he accepted a submission made by Mr Jonathan Adkin QC for the 2nd to 7th Defendants that the only alleged unlawful act pleaded in support of the conspiracy was deceit by means of the King Sturge letter, and only King Sturge was alleged to have been deceitful, saying (2018 Jmt at [117]):

> "That is a valid point. The logic of the story, if put on the basis of King Sturge having been duped, does not emerge on any fair reading of the current RAPOC. The pleading would require refinement, perhaps considerable refinement and reworking, were the case to be put in that way."

26. He therefore concluded that the RAPOC had no realistic prospect of succeeding at trial (2018 Jmt at [121]). He continued at [122]:

> "That said, I now return to the position of the second to seventh defendants. If there is a basis for reformulating the claim against them on the basis that King Sturge was not a knave, I would not be minded to strike out the action against them at this stage… For the avoidance of doubt, as presently pleaded, the RAPOC does not plead a case having a real prospect of success. The claim against King Sturge must be dismissed. The claim against the second to seventh defendants, but not the RAPOC, might proceed further."

27. The parties made submissions on consequential matters after the judgment was handed down on 23 October 2018. We were referred to various passages from the transcript of the submissions which I will mention as necessary later. At this stage it is sufficient to note that Mr Adkin submitted that the claim against the 2nd to 7th Defendants should be dismissed, but HHJ Barker adhered to the view that he had indicated in his judgment and gave a short Ruling, which so far as material was as follows:

> "Rather than strike out the case in its entirety and leave it to the claimants to issue again and start again, if they can identify some case against either some or all of the second to seventh defendants and/or someone or others, I will leave the claim form hanging by a thread in relation to the second to seventh defendants on the basis that Mr Adkin suggests, which is that unless within a period, and I think three weeks is a reasonable period, 14 days I think is a little onerous because a lot of rethinking will have to be done, unless within three weeks an application is issued and served seeking permission to advance particulars of claim in some new form against some or all of the second to seventh defendants, then the claim form too is to be treated as having been struck out without further order being required against those defendants, and in relation to the first defendant, the claim form and the particulars of claim are struck out in their entirety and in relation to the second to seventh defendants the particulars of claim are struck out in their entirety. So that is really the substantive resolution of the defendants' application."

October 2018 Order

28. His judgment was given effect to by an Order dated 23 October 2018 (**"the October 2018 Order"**). The relevant paragraphs are paragraphs 1 to 3 which provided as follows:

"**The Claimants' Applications**

1. The Claimants have permission to amend the Claim Form and re-amend the Particulars of Claim in accordance with the drafts served on 22 March 2018 and 18 June 2018 respectively. All further references in this Order to the Claim Form and Re-Amended Particulars of Claim are references to those documents in accordance with this Paragraph.

The IG Defendants' [ie 2nd to 7th Defendants'] Application

2. The action is dismissed as against the First Defendant [King Sturge] and the claims against the First Defendant set out in the Claim Form and Re-Amended Particulars of Claim are struck out.

3. As regards the claims advanced against the Second to Seventh Defendants:

   3.1 the Re-Amended Particulars of Claim are struck out and the claims advanced in them are dismissed; and

   3.2 Unless by 4pm on Tuesday 13 November 2018 the Claimants:

      (i) issue and serve an application seeking permission to amend the Claim Form and to advance further amended Particulars of Claim against the Second to Seventh Defendants; and

      (ii) pay a further sum of £80,000 into the Court Funds office to stand as security for the Second to Seventh Defendants' costs of any such amendment application

   the Claim Form shall stand struck out and the action shall stand dismissed as against the Second to Seventh Defendants without further order.

   3.3 In the event that the Claimants issue and serve an application for permission to amend and provide security in accordance with paragraph 3.2 above:

      (i) the striking out of the Claim Form and dismissal of the action as against the Second to Seventh Defendants shall be stayed pending the determination of such amendment application;

      (ii) if the amendment application is refused, the stay shall be lifted upon such refusal and the Claim Form shall stand struck out and the action dismissed as against the Second to Seventh Defendants without further order; and

      (iii) the hearing of such application is reserved to HHJ Barker QC, sitting as a Deputy Judge of the High Court, subject to availability."

The remainder of the Order dealt with costs and permission to appeal. Various points on the drafting of this Order were raised in the course of argument, but again I will pick them up so far as necessary later and it is not necessary to set them out here.

29. The Claimants sought permission to appeal this Order but permission was refused by Floyd LJ on 23 January 2019. Although nothing in my view turns on this, we were sent the Grounds of Appeal after the hearing from which it is clear that the Claimants

did not seek to challenge the form of the Order as opposed to the substance of it.

30. The Claimants also duly issued an application to amend by 13 November 2018 and made the required payment into court. The application to amend sought to re-amend the Claim Form and advance Re-re-amended Particulars of Claim. The application initially came before HHJ Barker for two days in May 2019, but on the second day the Claimants put forward a further revision to their proposed pleading (to what is now the RRAPOC) and the hearing was adjourned and resumed for a further two days in June and July 2019. The RRAPOC advances four claims against what had been the 2nd to 7th Defendants and are now the 1st to 6th Defendants: (1) a claim for damages for the tort of deceit in making or causing to be made false representations in the King Sturge letter; (2) a claim for equitable compensation or damages for breach of their duty as agents; (3) a claim for equitable compensation or damages for dishonestly assisting Mr Layas to breach his fiduciary duty as executive director of LIA UK; and (4) a claim for damages for conspiracy with one another and with Mr Layas to injure the 1st and 3rd Claimants by unlawful means as set out in claims (1) to (3).

The 2020 Judgment

31. HHJ Barker handed down judgment on 26 February 2020 (ie the 2020 Judgment). Having set out the background and the course of the litigation so far, the factual allegations, and the claims pleaded both in the initial iteration of the proposed pleading and the final version put forward, he turned to what he described as threshold issues, of which the first was limitation. He recorded (2020 Jmt at [48]) that the Claimants accepted that there was a reasonably arguable limitation defence to their claims as set out in the RRAPOC, but that their case was that their claims were within the scope of s. 35 LA 1980 and CPR r 17.4.

32. At [53] he referred to the submissions of Mr Andrew Onslow QC for the Claimants in response to an argument that had been raised by the Defendants that there were no facts at all presently in issue because the RAPOC had been struck out in their entirety by the October 2018 Order. Mr Onslow relied on the terms of CPR r 17.4(2) and submitted that the proposed new claim arose out of the same facts as the claim previously made, and that this was within the language and ambit of CPR r 17.4(2). HHJ Barker accepted this argument at [75] which I should cite in full:

> "In my judgment, there is nothing in the point that, because there is no extant pleading to be compared with the proposed RRAPOC, there are no facts presently in issue in order to undertake a qualitative analysis. The language of CPR r.17.4 requires there to be ongoing proceedings, which there are, and the assessment of the new claim to be made by comparison of the facts in the new claim to the facts in respect of which a remedy has already been claimed. At one level, that that is something that may be done is demonstrated by the fact that both sides' legal teams have done it and expressed it, albeit somewhat differently, in schedules and detailed submissions. Further and importantly, the whole point of paragraph 3 of the 23.10.18 order was to permit the Claimants an opportunity to reformulate a claim focussed primarily against the Defendants and not KS because of, and therefore based on, the facts then pleaded. I note that the language of s.35 is rather different from CPR r.17.4, but the argument before me was as to the engagement of CPR r.17.4. On this preliminary point I agree with Mr Onslow QC's submissions."

33. He then went on to compare the facts alleged in support of the new claims in the

RRAPOC with those in the RAPOC, saying at [77] that the facts alleged as central to the claim in the proposed RRAPOC were nearly identical to those previously alleged, and at [78] that while the now 1st to 6th Defendants had replaced King Sturge as the primary target the underlying facts relied upon were substantially the same. After further analysis his conclusion at [87] was that the proposed claim in the RRAPOC did not fall foul of CPR r 17.4. In the remainder of his judgment he considered, and rejected, a submission that to allow the claim to continue would involve an abuse of process, and then considered each of the proposed claims and whether they were sufficiently pleaded and had a reasonable prospect of success. Having concluded that they did, he granted the Claimants permission to re-amend the Claim Form and serve the RRAPOC in the revised form sought by them.

Ground 7

34. The Defendants sought permission to appeal, and as already referred to, this was refused by HHJ Barker, but granted, limited to Ground 7, by David Richards LJ. Ground 7 is in these terms:

> "The learned Judge erred in concluding at paragraph 75 that he had power to grant permission to amend the Particulars of Claim in the form of the RRAPOC under CPR 17.4(2) in circumstances where the claims sought to be pleaded in it were all time-barred or arguably time-barred and all of the existing claims had been dismissed and the existing Particulars of Claim struck out. The learned Judge ought properly to have concluded that he had no such power, because there was no claim already in issue in the action and therefore the new claims could not be said to arise out of the same or substantially the same facts as such a claim, the existing claims all having been dismissed."

35. This argument is based on the wording of s. 35(5)(a) LA 1980 which, as referred to above, differs somewhat from the wording of CPR r 17.4(2). As appears from the 2020 Judgment at [75] HHJ Barker had himself noticed this difference in wording but it appears he did not receive any argument based on the wording of s. 35(5)(a), the argument before him being conducted solely by reference to the terms of CPR r 17.4(2). This is confirmed by the transcript of submissions made by Mr Adkin on 3 March 2020 when applying to HHJ Barker for permission to appeal, where he accepted that the terms of s. 35 had not been drawn to the Judge's attention by any of the counsel involved, to which HHJ Barker's reaction was that it was a point that was not before him and a completely new point; and again by the terms of the N460 form completed by HHJ Barker summarising his reasons for refusing permission to appeal in which he said:

> "limitation was argued by the Defendants solely by reference to CPR 17.4 and this would be a new point and one which the Claimants did not have cause or an opportunity to address; the Court of Appeal is best placed to decide whether to grant permission to appeal on this new point."

In those circumstances HHJ Barker can scarcely be criticised for not having dealt with it. Nevertheless it is a pure point of law, and one that goes to the jurisdiction of the Court, for which David Richards LJ has granted permission, and so it is now before us.

36. The point is in fact a very short one, and in my view it is well made. The starting

point is that CPR r 17.4 is a rule of court made in exercise of the power conferred by s. 35(4) LA 1980. This was not disputed by Mr Onslow, who appeared, together with Ms Kate Holderness, for the Claimants on this appeal. As such, by the express terms of s. 35(4), CPR r 17.4 could only provide for the Court to permit a new cause of action to be pleaded after the expiry of the limitation period in the circumstances specified in s. 35(5)(a). That requires, in the case of a new cause of action, that the new cause of action arises out of the same, or substantially the same, facts as *are already in issue on* a claim previously made in the action. CPR r 17.4(2) must therefore be read as subject to this implied restriction as otherwise it would be *ultra vires*.

37. That was the argument advanced by Mr Patrick Green QC, who appeared with Ms Rachel Tandy for the Appellants. In my judgment that argument is plainly right, and there is no sustainable argument to the contrary. As subordinate legislation, the scope of CPR r 17.4(2) could of course be narrower than permitted by s. 35(4) and (5) LA 1980 (and in at least one respect it is, in that CPR r 17.4(2) requires the party applying for permission to have already claimed a remedy in the proceedings, which is not a requirement found in s. 35(5)(a): see *Law Society v Shah* [2008] EWHC 2515 (Ch) at [26]-[28] per Norris J); but it could not be wider than permitted by s. 35(5)(a). Indeed Mr Onslow accepted that CPR r 17.4(2) must be interpreted consistently with s. 35(5)(a).

38. Quite apart from that, there is Court of Appeal authority that the words *"are already in issue on"* are to be read into CPR 17.4(2): see *Goode v Martin* [2001] EWCA Civ 1899. In that case the claimant had suffered a head injury in an accident on the defendant's yacht and had no memory herself of the circumstances of the accident but had pleaded an account of it derived from another person present; the defendant had pleaded a quite different version of the facts in his defence, and the claimant wished to add, after the limitation period had expired, an alternative claim based on the defendant's account. The context was therefore very different from the present case, and the effect of reading the words *"are already in issue on"* into CPR r 17.4(2) was to widen its scope by permitting the claimant to rely on facts pleaded in the defence rather than just the particulars of claim (and as Mr Onslow reminded us, Brooke LJ only felt able to do this by reason of the interpretative obligation in s. 3 of the Human Rights Act 1998: see at [41]-[47]). Nevertheless the actual decision of the Court was that CPR r 17.4(2) should be interpreted as if it read:

> "The court may allow an amendment whose effect will be to add … a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings." (emphasis in original)

See at [46] where this formulation by counsel is set out and at [47] where it is accepted by Brooke LJ. That is part of the *ratio* and hence binding on us: see also *Akers v Samba Financial Group* [2019] EWCA Civ 416 at [24] where McCombe LJ accepted that CPR r 17.4(2) falls to be read in that way.

39. For both these reasons there is in my judgment no doubt that we are bound to read CPR r 17.4(2) as if it contained the words *"are already in issue on"* as set out in *Goode v Martin*. On any normal reading of this language that requires identifying, at the time when permission is sought from the Court, what facts are then in issue, and

this cannot be done by looking at facts that were previously in issue, but are no longer in issue.

40. Mr Onslow said that this was to put far too much weight on the single word *"are"* and submitted that it was a perfectly tenable interpretation of the rule that it included facts that had been put in issue on a claim previously advanced. I am unable to accept this submission. The usual presumption is that ordinary words are to be given their ordinary meaning unless there is any reason not to. One therefore starts by giving the word *"are"* (or perhaps one should say the phrase *"are already in issue"*) its normal meaning, and its normal meaning requires one to look at the relevant time at matters that are then in issue, not those that were previously. There is to my mind no justification for reading it in any other way.

41. The point can be illustrated by taking a very simple example, which is no doubt much more common than the rather unusual circumstances of the present case. Suppose a claimant issues a claim and pleads two causes of action, A and B. Some time later he drops cause of action B and deletes it from his pleading along with the facts relied on in support of it. He then seeks to amend to add cause of action C which is by now statute-barred. The Court can undoubtedly permit him to do so if the facts relied on in support of cause of action C are the same, or substantially the same, as the facts in issue on cause of action A. But can the Court do so by comparing the facts relied on in support of cause of action C with the facts formerly pleaded, but now deleted, in support of cause of action B? I would have thought the answer to that was plainly No, on the simple basis that those facts are no longer in issue and hence not facts that *"are … in issue"* at the time the Court is asked to grant permission.

42. When this example was put in the course of argument to Mr Onslow, he accepted that that might be so, and very properly referred us to *Carr v Formation Group plc* [2018] EWHC 3575 (Ch) where Morgan J at [42] considered almost precisely this example, as follows:

> "In these circumstances, I need to ask for the purposes of the limitation issue which has now arisen, whether I should disregard the fact that paragraph 14 was removed from the claim form by an amendment in February 2016. I consider that the answer to that question emerges from considering the following example. Suppose that a claim form contains a concise statement as to the nature of two different claims, claim A and claim B. Both claim A and claim B are in time as regards limitation. Some time after the claim form is issued, it is amended to remove claim B. Some time later, the claimant wishes to amend the claim form again to reintroduce claim B, which is now out of time. Should the court hold that claim B is not a new claim because it was in the original claim form before amendment or should it consider that claim B is a new claim because it is not already in the claim form when the claimant applies to reintroduce it? I consider that the answer is clearly the second of these alternatives. It follows from this reasoning that when I consider the claim against the First Defendant as a joint tortfeasor which appeared in the particulars of claim served pursuant to the 2018 claim form, I should compare the claims in the particulars of claim with whatever remained in the 2015 claim form in 2018."

43. I agree with Morgan J in the example he gives. And for these purposes I do not see that it makes any relevant difference whether the claimant has unilaterally dropped cause of action B, or the Court has struck it out, or granted summary judgment on it. In each case, the facts formerly relied on in support of cause of action B are no longer

on the pleadings and no longer in issue, and cannot be used for the comparison required by CPR r 17.4(2).

44. But if that is right, as in my judgment it is, the same must apply here where the entirety of the RAPOC had been struck out by the October 2018 Order so that the facts pleaded in the RAPOC were not facts in issue by the time the application to amend came before HHJ Barker in May 2019. Mr Onslow sought to distinguish *Carr v Formation Group plc* on the basis that here the Claim Form had not been struck out but had been deliberately kept in existence. I agree, as I explain below, that this is a matter of some potential significance, but I do not see that it has any impact on the present question. The October 2018 Order is to my mind entirely clear on the point. It struck out the entirety of the RAPOC not only as against King Sturge (paragraph 2), but also as against the 2nd to 7th Defendants (paragraph 3.1), and none of the later paragraphs affect this. By the time the Claimants' application to amend came before HHJ Barker in May 2019, therefore, the RAPOC did not subsist, and the facts pleaded in it could not be said to be facts that *"are … in issue"*. It was therefore wrong for HHJ Barker to embark, as he was asked to do and did, on a comparison between the facts in the RRAPOC and the RAPOC. I come back below to what I think he should have been asked to do, but for the reasons I have given I consider that Mr Green is right on the simple point advanced by him under Ground 7.

45. Mr Onslow advanced a number of submissions in answer to this point, which between them cover Grounds 1 to 3 in the Respondent's notice. Despite Mr Onslow's eloquence I do not find any of them sufficiently persuasive to cause me to take a different view. The first argument was that the relevant provision was CPR r 17.4(2); the CPR were made by the Civil Procedure Rule Committee established under the Civil Procedure Act 1997 (see ss. 1 and 2); the Committee had evidently interpreted s. 35(5)(a) LA 1980 as permitting them to make a rule in the form of CPR r 17.4(2); and that language was not ambiguous. All of that may be true, but I do not see that it changes the analysis. What the Committee may or may not have thought is ultimately not determinative, but it is very unlikely that they deliberately sought to introduce a form of rule in CPR r 17.4(2) that did not comply with s. 35(5)(a) LA 1980, and for the reasons I have given we are in any event bound to read CPR r 17.4(2) as if it contained the words *"are already in issue on"*.

46. Mr Onslow's second argument was that it was not necessary that the facts in issue be facts in issue on a subsisting or extant claim; it was enough if the facts which underlay a previously pleaded claim were disputed, and reference to the RAPOC and the Defence showed what the facts were which were pleaded in the RAPOC, and which ones were disputed in the Defence. In other words, although he did not put it quite this way, he was asking us to construe "*facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings"* as if it meant *"facts which were pleaded in a claim already made in the proceedings and which are disputed"*. But this is not what it says. I think that facts *"are in issue on a claim"* only if there is an extant claim which has not been resolved. Once the claim has been resolved, whether by being dropped, or by being struck out, or by judgment being given on the claim either summarily or after trial, there is no longer a claim, and there therefore can be no facts in issue on that claim. In the present case all the claims in the RAPOC had been struck out and so did not exist. And although I agree that in a normal case where there is a full set of pleadings,

one can look at all the pleadings to see what is in issue, as the defence will indicate which of the facts alleged in the particulars of claim are disputed and which not, here there were at the relevant time no Particulars of Claim at all as they had been struck out in their entirety, and Mr Onslow fairly accepted that in those circumstances the Defence fell away too.

47. Mr Onslow's third submission was that the Defendants' construction of CPR r 17.4(2) would not give effect to the overriding objective, and there was no justice or logic in requiring the comparison to be with a claim that was still in existence as opposed to one that had been abandoned and struck out. That can be conveniently taken with his fourth submission, that the policy behind CPR r 17.4(2) was that identified by Colman J in *BP plc v Aon Ltd* [2005] EWHC 2554 (Comm) at [52] where he referred to what he had said at first instance in *Goode v Martin* [2001] 3 AER 562 as follows:

> "Whether one factual basis is 'substantially the same' as another factual basis obviously involves a value judgment, but the relevant criteria must clearly have regard to the main purpose for which the qualification to the power to give permission to amend is introduced. That purpose is to avoid placing a defendant in the position where if the amendment is allowed he will be obliged after expiration of the limitation period to investigate facts and obtain evidence of matters which are completely outside the ambit of, and unrelated to those facts which he could reasonably be assumed to have investigated for the purpose of defending the unamended claim."

And at [54] where he said:

> "The substance of the purpose of the exception in subsection (5) is thus based on the assumption that the party against whom the proposed amendment is directed will not be prejudiced because that party will, for the purposes of the pre-existing matters [in] issue, already have had to investigate the same or substantially the same facts."

These passages were cited and described as *"helpful"* by Tomlinson LJ in *Ballinger v Mercer* [2014] EWCA Civ 996 at [34].

48. Mr Green countered with a slightly different statement of the policy by Hobhouse LJ in *Lloyds Bank plc v Rogers* [1997] TLR 154 where he said of s. 35 LA 1980:

> "The policy of the section was that, if factual issues were in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts."

He showed us that this statement had been frequently cited in later cases, including by Colman J in *BP plc v Aon Ltd* at [53] and by Lord Collins JSC in the Supreme Court in *Roberts v Gill & Co* [2010] UKSC 22 at [41].

49. I do not think it is necessary or helpful to seek to resolve the slight difference between these statements of policy. In the vast majority of cases they will march together, as a defendant is likely, and only likely, to investigate factual issues if they are going to be litigated anyway. In any event, as both counsel accepted, judicial statements of the policy behind s. 35 LA 1980 and CPR r 17.4(2), necessarily at a high level of abstraction, are not and could not be a substitute for applying the wording of the provisions. It is possible to point to examples where neither statement of policy

would be in point: thus Mr Green accepted that there would be nothing wrong – nor indeed unusual – in a claimant who had pleaded claim A amending to plead claim B based on (substantially) the same facts and then dropping claim A. And one can go further and say there would be nothing wrong in the claimant in such a case amending to plead claim B having already decided to drop claim A: as Mr Onslow pointed out, CPR r 17.4(2) expressly contemplates (as does s. 35(2)(a) LA 1980) that claim B can be pleaded in *substitution* for claim A, not just in addition to it. In such a case it is obvious that claim A is no longer going to be litigated, but this does not stop the claimant relying on the facts in claim A to amend to bring in claim B, so long at any rate as he does it at a stage when claim A is still on the pleadings. Conversely, CPR r 17.4(2) can be applied in circumstances where the defendant has not in fact investigated anything at all – indeed as I explain below, it may have to be applied where the claim form has just been served on the defendant and the defendant may know very little about it. But again that does not prevent the claimant in a suitable case from adding, or substituting, claim B.

50. In those circumstances I see no value in attempting to rank, or reconcile, the slightly differing expressions of policy by Colman J in *BP plc v AON Ltd* and by Hobhouse LJ in *Lloyds Bank plc v Rogers*. The general sense is clear enough that an amendment can be allowed to plead a new cause of action if the underlying facts are already the subject of the proceedings, but this cannot determine the question of how CPR r 17.4(2) is to be applied to the very unusual facts of the present case.

51. Mr Onslow's fifth argument was that the Defendants' construction of CPR r 17.4(2) would be incompatible with the Claimants' right of access to the court under the Human Rights Act 1998 and the European Convention on Human Rights. This argument was not developed at any length and the only authority cited was *Goode v Martin* where Brooke LJ held that if the rule prevented the claimant from relying on the facts pleaded by the defendant it would impose an impediment on her right of access to the court which would require justification, and that the rule so interpreted would not have any legitimate aim (at [43]-[44]). We also received very short argument from Mr Green on the point. He said that the Claimants' right of access to the court had not been impeded: they had had by his count 7 attempts to plead their claim and had arguably had a far greater indulgence than many judges would have allowed them.

52. I do not propose to consider the point at any length. It is no doubt the case that any limitation defence can be said to impede the right of access of a claimant to the court, but there is no suggestion that limitation defences are unjustifiable *per se* and indeed it is plainly justifiable in principle that there should be a system of limitation (with the result that some claimants will be unable to bring claims) as limitation has long been recognised to serve a public purpose: see *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* (1986) 2 Const LJ 224 at 225 where May LJ referred to the interest of the public in seeing an end to litigation. Once the principle of limitation is accepted, it seems to me inevitable, as well as in the interests of the parties, that there will be certain bright-line or hard-edged rules so that everyone knows where they stand; and one of those is the provision in s. 35 LA 1980 that once a claim is statute-barred, it cannot be added to an existing claim so as to defeat the limitation defence except in narrowly specified circumstances. It also seems to me entirely justifiable that one of the rules is that found in s. 35(5)(a), namely that

permission can only be granted if the new claim arises out of the same or substantially the same facts as those in issue on an existing claim in the action, and also justifiable that that should not extend to a claim arising out of facts that were formerly in issue on a claim that had at one stage been advanced but was no longer, for whatever reason, an extant claim.

53. This does not put the Claimants here in a position analogous to the claimant in *Goode v Martin* where she could not have anticipated what the defendant was going to say until she saw his defence. Here the Defendants applied to strike out the Amended Particulars of Claim as early as 29 March 2018 (paragraph 20 above), and that gave the Claimants plenty of time before the hearing in October 2018 to consider whether they wished to bring forward any alternative claims in case the strike-out succeeded. Had they applied to amend by bringing forward the claims now in the RRAPOC as an alternative at a stage when their existing pleading was still in existence, they might well have been able to do that. By leaving it until after the claims in the RAPOC had been struck out they have run into the problems they have; but I do not think this means that the rule serves no legitimate aim, or is an unjustifiable restriction on their right of access to the court, or engages the interpretative obligation in s. 3 of the Human Rights Act 1998.

54. I have now considered and rejected all Mr Onslow's arguments directed at the simple point raised by Mr Green on the meaning of *"are … in issue"*. For the reasons I have given Mr Green is in my judgment right that the facts pleaded in the RAPOC could not be said to be facts that *"are … in issue"* at the time that the application to re-re-amend came before HHJ Barker and I would therefore hold that Ground 7 is made out and, subject to the points raised in Grounds 4 and 5 of the Respondent's notice, allow the appeal.

Ground 4 of the Respondent's notice – amendment by reference to the Claim Form

55. Ground 4 of the Respondent's notice raises a rather different point. It takes as its starting point the undoubted fact that HHJ Barker did not by the October 2018 Order strike out the Claim Form as against the 2nd to 7th Defendants, and as I understand it proceeds by the following steps:

    (1) The action was not dismissed and the Claim Form was not struck out by the October 2018 Order.

    (2) The new claims were therefore permissible if they arose out of the same or substantially the same facts as were in issue on the claims in the Claim Form.

    (3) To identify the facts on which those claims were based resort can (and must) be had not only to the terms of the Claim Form but to the pre-existing Particulars of Claim (ie the RAPOC).

    (4) It follows that although the RAPOC had been struck out, the Judge was nevertheless entitled to compare the facts in the RRAPOC with those in the RAPOC as he did.

56. This is a more subtle, and to my mind rather better, argument than those I have already considered, but I do not accept it either. I have no difficulty with step (1). It

is entirely clear from the 2018 Judgment at [122], the post-judgment discussions on 23 October 2018, and the Ruling then made by HHJ Barker (paragraphs 26 and 27 above) that he intended to leave the action and the Claim Form in its then form in existence, and this is what the October 2018 Order did.

57. This is a convenient point at which to address some of the criticisms of the October 2018 Order raised in argument. I accept that the detailed forensic scrutiny which it received on the appeal reveals that in one respect (paragraph 3.3(i) as referred to below) it is not perfect, but apart from that it seems to me to be clear enough and to do precisely what HHJ Barker intended it to.

(1) Paragraph 1 deals with the Claimants' applications to amend the Claim Form and re-amend the Particulars of Claim and grants them. It has been suggested that it was illogical for HHJ Barker first to grant permission to re-amend the Particulars of Claim and then strike them out. I do not share this view. This was something raised before HHJ Barker himself in the post-judgment discussions and dealt with by him in his Ruling on 23 October 2018 where, after the passage I have already cited (paragraph 27 above), he continued:

> "I do not accede to Mr Harris's suggestion or submission that rather than give permission for RAPOC I should recognise where the road has ended and just refuse permission on the grounds that there was nothing actually to give permission for, because the argument on that application was not about whether there was anything to give permission for but whether or not certain criteria had been fulfilled and that was a separate question, so I think it is right to have an incremental order in that way rather than a round-up order."

This follows the structure of the 2018 Judgment where HHJ Barker had dealt with the applications separately, first considering and deciding the Claimants' applications and then turning to the Defendants' application. On the Claimants' applications he was naturally only concerned to deal with the arguments raised, and as already set out (see paragraphs 22 and 23 above) on those applications the 2nd to 7th Defendants did not oppose the amendments, and King Sturge only opposed them on a narrow basis which the Judge rejected. In those circumstances I see nothing wrong in his granting the Claimants' applications before turning to the question whether the claims as so amended should be struck out, or in the way he reflected that in the October 2018 Order. Indeed I think it was a logical way to structure it, and that it helps to make clear that the question of striking out was assessed by him against the Claimants' latest version of their pleading.

(2) Paragraph 2 deals with the claim against King Sturge. It strikes out the claims in the Claim Form and the RAPOC against King Sturge and dismisses the action. That is straightforward and clear (and incidentally I see nothing wrong in referring to the action being dismissed: the CPR may not themselves use the term *"action"*, preferring to use the term *"proceedings"* (see eg CPR rr 7.1 – 7.3), but it is the conventional way of referring to the proceedings brought by a single claim form, and to dismiss an action is a common expression with a well understood meaning of putting an end to the proceedings entirely in the defendant's favour).

(3) Paragraph 3 by contrast is deliberately worded differently. It first strikes out the claims in the RAPOC against the 2nd to 7th Defendants and dismisses the claims advanced in them (paragraph 3.1). This is not conditional on anything but takes effect in any event. This is what the Judge intended: see the 2018 Judgment at [122] and his Ruling, in both of which he makes it clear that the RAPOC are struck out in their entirety in any event.

(4) The question was raised in argument whether it was appropriate for the Judge to use the power in CPR Part 3 to strike out the claims rather than the power in CPR Part 24 to grant summary judgment on them, given that the basis for his October 2018 Judgment was that the claims then pleaded had no reasonable prospect of success. I do not myself see that anything significant turns on this (and Mr Onslow for his part frankly accepted that the distinction between striking out and summary judgment was not something that one would see reflected in any of his thinking), but for what it is worth I think he was probably entitled to do that. As Mr Green pointed out, the wording of CPR r 3.4 which confers the power to strike out is not in the same terms as the former RSC Ord 18 r 19. CPR r 3.4(2)(a) provides that the Court may strike out a statement of case if it *"discloses no reasonable grounds for bringing or defending the claim"*; RSC Ord 18 r 19(1)(a) by contrast provided that the Court might order to be struck out any pleading on the ground that it *"discloses no reasonable cause of action or defence, as the case may be"* and, significantly, Ord 18 r 19(2) provided that on an application under paragraph (1)(a) no evidence should be admissible. That illustrates that the practice on such an application was to consider, without evidence, whether what was pleaded, assuming it could be proved, disclosed a cause of action. It is not obvious, at any rate to me, that the same is true under the CPR where the words *"no reasonable grounds for bringing the claim"* are rather looser than the former Ord 18 r 19(1)(a), and the former Ord 18 r 19(2) has not been reproduced. Instead Practice Direction 3A, which supplements CPR r 3.4, provides at paragraph 5.2 that while many applications under r 3.4(2) can be made without evidence, it is for the applicant to consider whether facts need to be proved and evidence should be filed and served; and at paragraph 1.7 that:

> "A party may believe that he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate."

Since, as I have said, nothing in my view turns on it, I do not think we have to reach any concluded view on the point, but this certainly suggests that there is nothing wrong in the practice of bringing an application under both Part 3 and Part 24 on the basis that the claim is factually hopeless (something that Mr Green suggested happens every day up and down the country), and that HHJ Barker was entitled to strike out the RAPOC under the powers in Part 3 of the CPR rather than grant summary judgment under Part 24. Indeed for my part I think that if he had granted summary judgment against the Claimants, the logical consequence would have been that he should have then dismissed the action entirely as final judgment would have been granted on all the Claimants' claims, and it is difficult to see that it could properly have been

kept alive at all.

(5) What he in fact did is found in paragraph 3.2 which was to make an unless order striking out the Claim Form and dismissing the action unless the Claimants issued an application to amend and put up security. Again that seems to me to be clear and exactly what the Judge intended, as shown by the terms of his Ruling. It is a separate question what he thought that might achieve (which I consider below under Ground 5 of the Respondent's notice), but as to what he intended to do, and did, I do not think there is any difficulty.

(6) Paragraph 3.3(i) then provides that if the Claimants did apply to amend and provide security, the striking out of the Claim Form and dismissal of the action *"shall be stayed pending the determination of such application"*. This is admittedly poorly worded (as by paragraph 3.2 if the Claimants did these things there was nothing to stay as the unless order would not bite) but the Judge was very probably not personally responsible for the wording, the order being drafted by counsel in the normal way, and the meaning when read with paragraph 3.3(ii) is clear enough, namely that the question of the striking out of the Claim Form should be suspended pending the determination of the application to amend, but that if the amendment application were refused, the Claim Form should stand struck out, and the action be dismissed, without the need for any further order. The practical effect of this does not seem to me to be in doubt, and, as Mr Green submitted, this infelicity does not in any event cast any doubt on the plain meaning of paragraphs 3.1 and 3.2.

58. Reverting to the steps in Mr Onslow's argument, step (2) is that the Judge should have assessed the new claims against the claims in the Claim Form. Again I agree. The position the Claimants were in at the time of the hearing in May 2019 and following does not seem to me to be difficult to understand. They had an extant Claim Form (in fact in an amended form as a result of paragraph 1 of the October 2018 Order, although the amendment, which solely concerned King Sturge, went nowhere). They had no extant Particulars of Claim as the RAPOC had been struck out. What in those circumstances I think they should have asked the Judge to do is first give them permission to re-amend the Claim Form, and then, if permission were granted, to serve the RRAPOC (as Arnold LJ pointed out in the hearing, this would not strictly be an amendment as there was nothing to amend, the RAPOC having gone, but it would be a new pleading particularising the claims in the re-amended Claim Form). They needed to ask for permission to re-amend the Claim Form first as the RRAPOC did not particularise the claims as set out in the Amended Claim Form, which were all predicated on King Sturge having been dishonest or otherwise deliberately committing a wrong. If the new claims had been permitted to be added to the Claim Form, then I do not see any difficulty in the Court giving the Claimants the opportunity to particularise them by serving the RRAPOC. The real question in my view therefore was whether the Claimants should be permitted to re-amend the Amended Claim Form by adding or substituting what were accepted to be new claims.

59. Mr Green submitted that this was not what the Judge had intended, referring to a part of the transcript of the post-judgment discussions where he had said:

> "I don't think there can be any question about the RAPOC surviving, the only question is whether the claim form itself is also struck out or dismissed at this stage

> or whether that is left to breathe life and if there is no revised version of RAPOC, that dies, or, if there is some life, then some alternative particulars of claim based on reformulating the RAPOC but based on that claim form, that's how I would have thought the thrust of what I have come to works."

He said that the words *"based on that claim form"* meant that the Claimants were only being given a chance to re-plead their case if they could do it within the four corners of the existing Claim Form. That I do not think can be right because, as Mr Onslow pointed out, paragraph 3.2(i) of the October 2018 Order expressly refers to the Claimants making an application seeking permission to amend the Claim Form and to advance further amended Particulars of Claim. Whatever the Judge may have had in mind therefore, his Order does provide on its face for the possibility of the Claim Form being amended.

60. It is step (3) in Mr Onslow's argument which has given me most pause for thought, but ultimately I have come to the clear conclusion that I cannot accept it. There were I think two strands to Mr Onslow's argument here. The first was that one cannot compare the new claims with the claims in the Claim Form alone, as this did not tell you enough about the facts. He pointed out that CPR r 16.2(1)(a) and (b) only require the claim form to contain a concise statement of the nature of the claim and to specify the remedy which the claimant seeks, whereas CPR r 16.4(1)(a) requires the particulars of claim to include a concise statement of the *facts* on which the claimant relies. That is reflected in the prescribed form of claim form (Form N1) which has a space for "Brief Details of the Claim", whereas the very purpose of the particulars is to particularise the claims. Mr Onslow, in answer to a question from Arnold LJ, confirmed that his case was that it followed that one could never use the claim form as the comparator for the comparative exercise required by CPR r 17.4(2).

61. I do not accept this, for two reasons. The first is that although the details of the claim that a claimant has to include in the claim form can be brief, there is a certain minimum that every claimant has to include, and claimants can – and many do, including the Claimants in the present case – go rather beyond the minimum if they want to. Mr Onslow referred us to the decision of Akenhead J in *Travis Perkins Trading Co Ltd v Caerphilly County Borough Council* [2014] EWHC 1498 (TCC) (***"Travis Perkins"***) at [22] where he said that only brief details are required to describe the nature of the claim; that while it is open to a claimant to be specific and restrictive in what it, he or she seeks to claim by way of the brief details, it is not necessary; and that the Court should not be prescriptive about what is required, all that is prescriptive being the wording of the rule. But Akenhead J also cited from the judgment of Cooke J in *Nomura International plc v Granada Group Ltd* [2007] EWHC 642 (Comm) where at [39] he had said that because of the similarity of the terms of the rule and because the underlying policy must be the same, reference could be made to authorities on the equivalent rule in the RSC (Ord 6 r 2), one of which was *Marshall v London Passenger Transport Board* [1936] 3 AER 83; and in that case (cited by Akenhead J at [21]) Romer LJ had said that the plaintiff must give the defendants some general idea of the nature of his claim, and that it was not sufficient for the plaintiff to indorse his writ merely with a claim for damages, or damages for breach of contract or negligence, but he had to give some indication of the contract said to be broken, or the duty which the defendants were said to have failed to perform. I accept therefore that a claimant does not need to put very much in the way of details in the claim form (although he can add more if he wants to), but there is a

certain minimum that he needs to state. There will therefore always be facts stated in the claim form, even if they are quite exiguous. In the present case as I have said they are in fact quite detailed.

62. But the more compelling reason why I consider that the comparison required by CPR r 17.4(2) can be done with the claim form alone is that there are circumstances where this is all that is available. A claim form is a *"statement of case"* within the meaning of the CPR: see the definition of *"statement of case"* in CPR r 2.3. The claimant can therefore amend it under Part 17 which permits amendments to statements of case. That includes CPR r 17.1(1) by which a party may amend his statement of case before it has been served on any other party; such an amendment does not need permission, but may be retrospectively disallowed by the Court under CPR r 17.2. Suppose the claimant issues a claim form, as claimants frequently do, right at the end of the limitation period. The claimant then has four months before he has to serve it (CPR r 7.5). It follows that if the claimant wishes to, he can add a new claim to his claim form in those four months prior to service and does not need prior permission to do so. But if the new claim is, or arguably is, statute-barred at the time of the amendment, the defendant can, once it has been served, challenge that under CPR r 17.2, and the Court will have to consider whether it could have been permitted under CPR 17.4(2). That will require the comparative exercise to be done, and if, as may well be the case, no particulars of claim have yet been served, that will have to be done by reference to whatever has been pleaded by way of brief details in the claim form. That may, depending on how detailed the claimant has chosen to be, be a difficult exercise but since the onus is on the claimant that is to some extent his own responsibility; on the other hand it may be a very simple one even if the details are the irreducible minimum. Suppose for example a claimant brings a claim for professional negligence against a solicitor, and then amends the claim form before service by adding a new claim for fraud. That, on the authority of *Paragon Finance plc v D B Thakerar & Co* [1999] 1 AER 400, would be a new claim that on any view did not arise out of the same facts, and if statute-barred, or arguably so, would fall to be disallowed under CPR r 17.2 and r 17.4(2) however brief the details of the claim.

63. I do not therefore accept Mr Onslow's submission that it is never possible to do the comparative exercise on the basis of a claim form alone.

64. The second strand to his argument was this. In fact here the Claimants had fully particularised the claims in the Amended Claim Form, most recently in the RAPOC. That showed the facts that they relied on for those claims. Those facts could therefore be looked at for the purpose of interpreting the claims on the Claim Form, with the result that the Judge was entitled to compare the RRAPOC with the RAPOC despite the latter having been struck out.

65. He relied on two cases in support. The first was *Evans v Cig Mon Cymru Ltd* [2008] EWCA Civ 390 (***"Evans"***). Here the claimant had issued a claim form claiming loss and damage arising out of abuse at work. The claim form was issued just within the limitation period, but served some time later after the limitation period had expired. Particulars of claim and a medical report were served with the claim form, both of which made it clear that the claim was actually intended to be a claim for personal injury arising out of an accident at work. When the defendants took the point that the particulars of claim departed from the abuse claim in the claim form, the claimant sought to amend the claim form by substituting *"an accident"* for *"abuse"* but was

met with the argument that that was a new claim that was statute-barred and prevented by CPR r 17.4. That argument succeeded before both the district judge and the circuit judge, but the Court of Appeal allowed an appeal. The reasoning is found in the judgments of Toulson LJ at [26] and Arden LJ at [30]-[32] and is to the effect that the claim form, when read with the benefit of the particulars of claim served with it, contained an obvious clerical error. That meant it could be corrected as a matter of interpretation and hence that to substitute *"an accident"* for *"abuse"* in the claim form was not in truth to raise a new claim at all but to correct an error in expression of the claim that had been brought all along.

66. That seems to me to be a particular application of two well established principles applicable to the interpretation of documents, namely (i) that documents intended to be read together can be read together, and (ii) obvious mistakes can be corrected as a matter of interpretation. I have no difficulty with either proposition, or their application to the circumstances in that case, but they do not seem to me to establish Mr Onslow's proposition or have any direct bearing on the present case. There is here no difficulty in interpreting the Amended Claim Form. It is clearly worded and no-one has suggested that it is ambiguous, let alone that it contains a clerical error that can and should be corrected by reference to the Particulars of Claim.

67. The second case was Akenhead J's decision in *Travis Perkins*, already referred to above. He had to consider whether the brief details of claim on the claim form were apt or sufficient to cover a claim later advanced in the particulars of claim (see at [17]). In his summary of the principles at [22] he drew from *Evans* the principle that:

> "(d) In construing or understanding what was intended by the wording used, the court can and where necessary should have regard to the context or 'factual matrix' (as per Arden LJ in *Evans*) in which the claim has been prepared. It is legitimate to have regard to the Particulars of Claim, particularly if served promptly at or about the time of the issue and/or service of the claim. It is legitimate to have regard to correspondence and applications sent or served at or about the same time as the claim. Indeed it may be legitimate to look further back in time for exchanged communications between the parties, albeit that caution may need to be exercised to limit this exercise only to such communications which clearly demonstrate what was intended to be the subject-matter of the proceedings which followed."

This goes rather further than *Evans* in suggesting that regard can be had to the particulars of claim not only when served with the claim form, but also *"particularly"* when served *"about"* the time of service of the claim. I have some reservations about this as normally a document has a single meaning when first executed, or at least communicated, and cannot change its meaning in the light of later developments; and I have quite serious reservations about the use Akenhead J made of the principle. In that case the claim form had been issued on 26 July 2013 (see at [8]); the date when the claim form was served does not appear to be given in the judgment, unless I have missed it, but must have been shortly afterwards as on 2 August 2013 the parties agreed a stay (see at [12]), which would not have been necessary had the proceedings not yet been served; and after various extensions of time had been agreed the particulars of claim were not served until early November 2013 (see at [13]). Nevertheless Akenhead J concluded at [27] that because the parties had agreed to the extension of time, the Court could have regard to the particulars of claim as an aid to interpretation of the claim form served some three months before. That seems

doubtful to me, particularly so when the whole question was whether the particulars of claim went beyond the claims advanced in the claim form.

68. But none of this matters for present purposes. What matters for present purposes is that *Travis Perkins*, like *Evans*, is a case about interpreting or construing the brief details on the claim form. In the present case, as I have already said, there is no ambiguity or difficulty of construction in the brief details of claim given in the Amended Claim Form. There is no need to resort to the RAPOC to understand them.

69. These decisions do not in my judgment justify the conclusion that when comparing the new claims with those advanced in the Amended Claim Form, the Court could and should have had regard to the facts which had been alleged in the RAPOC (but which for reasons given above were no longer facts in issue as the RAPOC, and the claims as there articulated, had all been struck out). In my judgment what the Court should have been asked to do was much simpler, which was to compare the new claims sought to be substituted in the draft Re-amended Claim Form with the claims as articulated in the Amended Claim Form.

70. That was not done, and it is not at all self-evident that the outcome of the exercise would have been the same as the outcome of the exercise HHJ Barker was asked to do, which was to compare the facts alleged in the RRAPOC with the facts that had been alleged in the RAPOC. To take one example, the third of the new claims sought to be added was pleaded in the Re-amended Claim Form as follows:

> "Further or alternatively equitable compensation or damages for dishonestly assisting Rajab Layas to breach his fiduciary duty as executive director of the Second Claimant by participating in the deceit of the Claimants and/or concealing from the Claimants the opinion of Savills and/or procuring the KS Letter on the basis of false and/or misleading instructions."

But the claims as advanced in the Amended Claim Form, although they are quite detailed (taking up a whole page of closely typed text) nowhere mention Mr Layas at all, let alone a breach of fiduciary duty by him; nor do they mention Savills, or their opinion, or the fact that it had been concealed; nor do they refer to the instructions to King Sturge, or allege that they were false or misleading. Had the question therefore been asked whether this new claim arose out of the same or substantially the same facts as were in issue on the claims made in the Amended Claim Form, I think the inevitable answer would have been No.

71. I need not multiply examples. This is because it is not a matter for us to decide whether any of the new claims can stand when compared with the claims in the Amended Claim Form. This is the effect of a direction given by David Richards LJ at an interlocutory stage in this appeal when there was some dispute about precisely what was and was not within the scope of the appeal. He identified that there were three matters before the Court: the Appellants' Ground 7, the Respondents' Ground 4 and the Respondents' Ground 5. He summarised the Respondents' Ground 4 as follows:

> "the Respondent submits that, because the re-amended claim form has not been struck out, it was entitled to rely before the Judge on the text of the re-amended particulars of claim (even though they had been struck out) for the purpose of satisfying the conditions for permitting the re-re-amendments."

That seems to me an accurate précis of Ground 4. And he directed as follows:

> "If the appeal is dismissed on any of these three grounds [viz the Appellants' Ground 7, and the Respondents' Grounds 4 and 5], the re-re-amended particulars of claim will stand. If, on the other hand, the Appellant succeeds on his Ground 7 and the Respondent fails on its Grounds 4 and 5, the order giving permission for the re-re-amended particulars of claim will be set aside and the claim will be dismissed.
>
> In other words, the result will either be that the re-re-amended particulars of claim stand in their entirety or they are struck out in their entirety. The Court of Appeal will not be called upon to exercise any discretion or to undertake any comparison of the re-amended particulars of claim with the re-re-amended particulars of claim or to remit the matter for further hearing below."

It follows that if, as for the reasons I have given I think we should, we dismiss the Respondents' Ground 4, then there is no question of us undertaking a comparison between the new claims sought to be pleaded in the Re-amended Claim Form and the claims pleaded in the Amended Claim Form, nor of remitting this question to the High Court.

Ground 5 of the Respondent's notice

72. Ground 5 of the Respondent's notice is that the Court of Appeal can and should exercise either the power to vary the October 2018 Order under CPR r 3.1(7) or the power to correct accidental slips or omissions under CPR r 40.12 so as to give effect to HHJ Barker's intention. The variation sought was to replace paragraph 3.1 and 3.2 with the following:

> "3. As regards the claims advanced against the Second to Seventh Defendants:
>
> ~~3.1 the Re-Amended Particulars of Claim are struck out and the claims advanced in them are dismissed; and~~
>
> ~~3.2~~ u~~U~~nless by 4pm on Tuesday 13 November 2018 the Claimants:
>
> (i) issue and serve an application seeking permission to amend the Claim Form and to advance further amended Particulars of Claim against the Second to Seventh Defendants; and
>
> (ii) pay a further sum of £80,000 into the Court Funds office to stand as security for the Second to Seventh Defendants' costs of any such amendment application
>
> the Claim Form and the Re-Amended Particulars of Claim shall stand struck out and the action shall stand dismissed as against the Second to Seventh Defendants without further order."

73. With all respect to those who think otherwise, this strikes me as a bold but impossible attempt by the Claimants to rewrite history and extricate themselves from a difficulty of their own making. One of the things that is crystal clear is that HHJ Barker intended on 23 October 2018 to strike out the entirety of the RAPOC then and there, not only as against King Sturge but as against the 2nd to 7th Defendants as well. That is understandable since he had just delivered a judgment holding that *all* the claims in the RAPOC, both as against King Sturge and the 2nd to 7th Defendants, had no

reasonable prospect of success, and in those circumstances I find it difficult to see how he could properly have allowed any of them to remain on the pleadings. Yet this is the effect of the proposed variation – I decline to call it a correction since to my mind it is not. In those circumstances I do not see that we have any business varying the October 2018 Order which did what the Judge intended it to do and was certainly *an* appropriate order for him to make in the circumstances, if not the only appropriate order. If anything, it is the Appellants who to my mind might have had an argument for suggesting that he should have gone further and struck out the Claim Form as well; but they did not do that and that question is not before us. There is certainly in my view no warrant for rewriting his Order so drastically as to convert the striking out of the RAPOC from an immediate and final striking out into a contingent striking out conditional on the Claimants failing to apply to amend and put up security. That does not seem to me either a proper use of the power to vary in CPR r 3.1(7) or within the slip rule in CPR r 40.12.

74. Nevertheless out of deference to Mr Onslow's argument and because Floyd and Arnold LJJ take a different view, I will explain in more detail why I take this view. I will start with CPR r 40.12(1), which provides as follows:

> "**40.12 Correction of errors in judgments and orders**
>
> (1) The court may at any time correct an accidental slip or omission in a judgment or order."

This "slip rule" is the successor to a similar provision in the RSC.

75. The notes in the *White Book (Civil Procedure 2020)* at §40.12.1 suggest that essentially the rule exists to do no more than correct typographical errors, but I accept that that is too narrow a view. The rule was considered by the Court of Appeal in *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (No 2)* [2001] EWCA Civ 414. There the trial judge had ordered an unsuccessful claimant to pay the costs of the two defendants, but had limited the defendants to one set of costs between them from a certain date. On appeal the Court of Appeal held that that was wrong, and that both defendants should have their costs of trial without such limitation, and substituted an order to that effect. The consequence was that interest on costs ceased to run from the date of the trial judge's order and only ran from the date of the Court of Appeal's order. Aldous LJ referred to various authorities which drew a distinction between having second thoughts or intentions (where the rule cannot be invoked) and giving true effect to the Court's first thoughts and intentions (where it can): see at [22]-[25]. In the case before them the only issue raised on the costs appeal was whether the defendants should or should not be restricted to one set of costs, and all that the Court of Appeal had intended to do was to remove that restriction and not alter the general right to costs under the judge's order (see at [26]). The Court of Appeal's order could therefore be corrected to give effect to that intention.

76. A number of other points emerge from that case. One is that if the Court uses the words that it intends to use but they do not have the effect that the Court intended them to have, that order can be corrected under the slip rule: see at [23] where Aldous LJ cites a statement by Robert Goff LJ to this effect from *Mutual Shipping Corporation v Bayshore Shipping Co Ltd* [1985] 1 Lloyd's LR 189 (***"Mutual Shipping"***) at 195. That is a familiar principle from the law of rectification, which

seems to me to share a number of features with the slip rule: in each case the jurisdiction can be invoked to correct a written expression which does not give effect to the actual first thoughts of the person concerned, but cannot be invoked to give effect to second thoughts.

77. A second point is that the rule cannot be invoked if all that has happened is that a judge has misunderstood or misappreciated the law; that can only be corrected by appeal. See per Aldous LJ at [22] citing a statement to that effect by Sir John Donaldson MR from *Mutual Shipping* at 193. Again that seems to me to be similar to the law of rectification. If for example A intends to transfer a property to B and executes such a transfer, he cannot obtain rectification by asserting that although he did intend to execute the transfer he thought wrongly that certain tax consequences would follow and would not have done it that way had he appreciated what the actual tax consequences were.

78. A third point, again cited by Aldous LJ at [24] from Robert Goff LJ in *Mutual Shipping*, is that the rule in terms requires an "accidental slip or omission", an "animal [which] is I suspect, usually recognizable when it appears on the scene."

79. Applying these tests, I consider that the October 2018 Order did not contain any accidental slip or omission in paragraph 3.1 in striking out the RAPOC as against the 2nd to 7th Defendants. There is no question of any clerical error. Nor is there to my mind the slightest doubt that this is precisely what HHJ Barker intended to do. He said so in the 2018 Judgment at [122] *("The claim against the second to seventh defendants, but not the RAPOC, might proceed further"* – paragraph 26 above). He said it again in post-judgment discussions (*"I don't think there can be any question of the RAPOC surviving"* – paragraph 59 above). He said it a third time in his Ruling (*"in relation to the second to seventh defendants the particulars of claim are struck out in their entirety"* – paragraph 27 above). His October 2018 Order provided for it at paragraph 3.1 in clear and unequivocal terms. To change that now to provide that the RAPOC should not be struck out unless the Claimants failed to apply to amend and put up security would not be to give effect to his first thoughts; it would not in fact even be to give effect to his second thoughts as he was never asked to consider changing his Order in this way and we do not know what his reaction would have been.

80. Mr Onslow said that his intention was obvious. He formulated it as follows: "the Court's intention was to give the Claimants the opportunity to salvage their case by way of making amendments to the Claim Form and the Particulars of Claim." He initially added "so as to advance a new cause of action notwithstanding limitation" but on reflection agreed that it was wrong perhaps to bring in any reference to limitation. I think he was right to make that amendment, as the post-judgment discussions on 23 October 2018 leave it rather unclear whether HHJ Barker actually had limitation in mind. What he himself referred to were two considerations: one was that allowing the Claimants to continue without starting again would avoid the need to pay a second £10,000 issue fee (although he recognised that that would not break the bank of the Claimants); the other was that he did not want to put the Claimants in the position of facing an abuse of process argument of the "could and should have brought it before" type (that is under the so-called rule in *Henderson v Henderson* (1843) 3 Hare 100). On limitation he in fact said *"limitation is not in issue because it is a dishonesty claim"*. It is true that Mr Adkin corrected him by saying that there

were two reasons why the Claimants would want to keep the Claim Form alive, one being to avoid a *Henderson v Henderson* argument, and the other being to seek to relate their claim back and thereby avoid limitation issues. But the Judge does not appear to have picked this up in the further discussions, and certainly did not mention limitation in his short Ruling. On the other hand it is fair to say that when he came to give the 2020 Judgment, he said (at [75]) that the whole point of paragraph 3 of the October 2018 Order was to *"permit the Claimants an opportunity to reformulate a claim focussed primarily against the [2nd to 7th] Defendants and not [King Sturge] because of, and therefore based on, the facts then pleaded."*

81. On this material I do not think we can be confident that HHJ Barker's actual first thoughts on 23 October 2018 were focused on permitting an amendment of the claims in such a way as to avoid limitation issues. But in any event I do not think it would change matters if they were.

82. This is for two reasons. The first, which is probably the more important one, is that the October 2018 Order, by deliberately keeping the Amended Claim Form alive, did give the Claimants an opportunity to bring themselves within CPR r 17.4(2). As I have sought to explain, that in my view enabled the Claimants to bring forward any new claims which could survive a comparison with the matters pleaded in the Amended Claim Form. It is true that on the view I take it did not enable the Claimants to rely on the facts and claims pleaded in the RAPOC, all of which had been struck out, but only on the matters pleaded in the Amended Claim Form, but that was the effect of keeping the Amended Claim Form alive but not the RAPOC. HHJ Barker was himself rather doubtful whether this would prove to be of any use to the Claimants – he referred in the post-judgment discussions to the possibility that there might not be *"a legal way through the thickets"* and that the fact that the conspiracy claim was predicated solely on the deceit claim *"may prove to be an insuperable obstacle"*. So he was not holding out any great prospect of the Claimants being able to find a way to plead their new claims – he was just giving them the opportunity to do it if it could be done. The fact that on the view I take they went about it the wrong way and failed to find a legal way through does not mean that he did not give them the opportunity he intended them to have, or in my view justify a re-writing of his Order.

83. Second, even if, which I have doubts about, HHJ Barker thought the effect of his Order would be to enable the Claimants to bring forward new claims by comparing them with the claims in the RAPOC which he had struck out, he was in my view for the reasons I have given under a misapprehension. But that does not mean that the October 2018 Order did not do what he intended it to do, which was to strike out the currently pleaded claims in the RAPOC but keep the Claim Form (alone) alive; it means that the consequences in law of doing this were different from what (on this hypothesis) he thought they would be. That is not something that I consider enables us to characterise the October 2018 Order as containing an accidental slip or omission, or entitles us to rewrite the Order under the guise of correction. In my view CPR r 40.12 is simply not available in the circumstances of this case.

84. That leaves CPR r 3.1(7). This provides as follows:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

I pass over the question whether it is appropriate for the Court of Appeal, when hearing an appeal against an Order made in March 2020, to exercise the power in CPR r 3.1(7) so as to vary an Order made in October 2018 which has not itself been appealed (and indeed where permission to appeal was refused), and where no application was made to the Court below to do so; this was not an argument pressed by Mr Green. Nevertheless despite the apparent width of CPR r 3.1(7), the power to vary which it contains must be exercised on a principled basis.

85. The applicable principles are to be found in the judgment on Rix LJ in *Tibbles v SIG plc* [2012] EWCA Civ 518 at [39]. Although warning against any attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion might arise, he said that the jurisprudence had laid down firm guidance that the discretion might normally only be appropriately exercised where there had (i) been a material change of circumstances or (ii) the facts on which the original decision was made had been (whether innocently or not) misstated. It is immediately apparent that neither is the case here.

86. He also adverted to a third type of case where there had been a manifest mistake in the formulation of the order, citing as an example *Edwards v Golding* [2007] EWCA Civ 416. In that case the Master had made an order joining a third defendant into a libel action where the claim could no longer be pursued either against the first defendant (who could not be found and had never been served) or against the second defendant as the claim had been discontinued against him. That meant the order was misconceived, and led to the Master making an order that he had no power to make: see per Buxton LJ at [6], [26]. The Master also made a mistake as to the effect of his order, which he had intended to keep the issue of limitation alive for the benefit of the third defendant but which had in fact failed to do so. The Judge had decided that this fundamental error entitled him to set the Order aside pursuant to CPR r 3.1(7), and Buxton LJ held at [26] that that was open to him. On analysis this is not simply a case where CPR r 3.1(7) was invoked because an order did not have the same effect as intended, but where it was entirely misconceived both because there was no power to make it at all and because it did not achieve what it was meant to. I do not think it justifies the invocation of CPR r 3.1(7) simply on the basis that an order that does what it was intended to do has consequences that are not fully foreseen. In my judgment this is not an appropriate case for the principled exercise of the discretion in CPR r 3.1(7) at all.

87. But let me assume I am wrong about that and that this is, contrary to my view, an appropriate case to re-consider the question of what order should have been made on 23 October 2018. In that case, I still do not see that it would be right to make the striking out of the RAPOC conditional on the Claimants failing to apply to amend or put up security. On 29 March 2018 the 2nd to 7th Defendants applied to strike out the claims on the basis that they all depended on King Sturge being found to have acted dishonestly or have committed other deliberate wrongdoing, and that such a case was unsustainable. That gave the Claimants, as I have pointed out above, ample time to consider, before their existing claims were struck out, whether they wished to plead any further claims in the alternative. On 23 October 2018 having heard full argument the Judge held that the claims were indeed unsustainable and struck them out unconditionally. I do not see that it can possibly be said that he was wrong to do so. Indeed I have real doubts whether having reached the conclusion he did, he could

properly have done anything else than strike out the RAPOC. Although CPR r 3.4(a) confers a discretion on the Court, it would be a very unusual step for a judge to decline to strike out, or grant summary judgment on, a claim that he had held to be hopeless. On what principled basis could he properly do that? It does not seem to me to be a good reason for refusing to strike out a claim that has been held to be unsustainable that it is desired to keep it artificially alive on the pleadings so as to allow the claimant not to litigate that claim but to bring another one.

88. The view I take therefore is that this is not a case where CPR r 3.1(7) can properly be invoked at all; but even if it were appropriate for us to reconsider the question of what order should have been made on 23 October 2018, we ought to come to the same conclusion as the Judge, namely that the RAPOC should have been struck out immediately and unconditionally.

89. There was some suggestion that this was to take an overly-technical view and that it was unjust to the Claimants who the Judge thought did have claims with real prospects of success against the current Defendants. My response is that limitation frequently turns on the application of hard-edged rules which do not allow room for any discretion: if a claim form is issued one day late the claim fails, however strong; if issued one day in time, it can go forward even if demonstrably weak. Here the hard-edged rule is that if a claimant wishes to add a new claim after the limitation period has expired on the basis that it arises out of the same facts as his existing claim, he has to do that before, and not after, his existing claim has been disposed of. The Claimants in fact had not one but two opportunities to try and get their alternative claims on the pleadings: they could have applied to add them before their existing claims were struck out, which they did not do. And because of the order made by the Judge, which was unusually generous to them, they were given a second opportunity by the Amended Claim Form being kept alive, although that, for the reasons I have given, required them in my view to justify their new claims by comparison with the Amended Claim Form, not with the claims in the RAPOC which had been struck out. It is not at all clear that they could have justified their new claims on that basis, but the Judge never purported to guarantee that they would be able to, and they did have the opportunity to try. That seems to me enough to satisfy the requirements of justice to the Claimants.

90. In those circumstances I would dismiss Ground 5 of the Respondent's notice.

Conclusion

91. For the reasons I have given I would uphold Ground 7 of the Appellant's notice, and dismiss Grounds 4 and 5 of the Respondent's notice. It follows, in accordance with the directions given by David Richards LJ (paragraph 71 above), that I would allow the appeal, set aside the order giving permission for the RRAPOC, and dismiss the claim.

Lord Justice Arnold:

92. I am grateful to Nugee LJ for setting out the relevant provisions, the facts and the procedural history. I agree with Nugee LJ that Ground 7 of the Appellants' notice should be upheld and Ground 4 of the Respondents' notice should be dismissed for the reasons he gives. I respectfully disagree with his conclusions on Ground 5 of the

Respondents' notice, however. My reasons are as follows.

93. In giving permission to appeal on Ground 7 of the Appellants' notice David Richards LJ said that "[o]n the facts of this case, this is a highly technical argument". I agree with that assessment. The reason that it is a highly technical argument is that, in his judgment of 26 February 2020 ("the 2020 Judgment"), the judge held at [77] that "[h]aving regard to the detailed comparison of the previous Particulars of Claim, and the proposed RRAPOC … my view is that the facts alleged as central to the claim in the proposed RRAPOC are nearly identical to those previously alleged". Thus the judge's conclusion was that the new claims sought to be advanced by the Claimants against the Second to Seventh Defendants comfortably satisfied the test laid down by CPR rule 17.4(2) (and the Second to Seventh Defendants were refused permission to appeal against that conclusion). Furthermore, the judge stated in the 2020 Judgment at [75] that "the whole point of paragraph 3 of the 23.10.18 order was to permit the Claimants an opportunity to reformulate a claim focussed primarily against the [Second to Seventh] Defendants and not KS because of, and therefore based on, the facts then pleaded [i.e. in the Re-Amended Particulars Claim]". The argument that the judge did not have jurisdiction to permit the re-re-amendments to the Particulars of Claim by virtue of section 35(5) of the Limitation Act 1980 is only available to the Second to Seventh Defendants because the form of the order made by the judge on 23 October 2018 ("the First Order") does not properly give effect to his intention as thus expressed.

94. In my judgment the answer to the problem lies in the judge's clearly reasoned judgment of 23 October 2018 ("the 2018 Judgment"). As the judge recited at [1], he had before him three applications: two applications by the Claimants to re-amend the Amended Particulars of Claim to add a claim for unlawful means conspiracy against the First Defendant ("King Sturge", referred to by the judge as "KS") to the existing claims for deceit and intentional breach of fiduciary duty, and an application by the Second to Seventh Defendants to strike out the claim form and Particulars of Claim alternatively for summary judgment dismissing the claims against them. As the judge explained at [3], the Second to Seventh Defendants' application was supported by King Sturge, albeit that King Sturge had not issued its own application.

95. The judge first considered the Claimants' applications and concluded that, contrary to King Sturge's contention, the re-amendments satisfied rule 17.4(2). Accordingly, he said at [40]:

> "… I shall make an order permitting reamendment of the amended particulars of claim and, if required, amendment of the claim form as sought by the claimants. Whether the claim in its reamended form has any realistic prospect of success is of course a different and the next question."

96. The judge then went on to consider the Second to Seventh Defendants' applications. At [41] he noted that, under CPR rule 3.4(2)(a), "a court may only strike out a statement of case if satisfied that it is bound to fail". At [42]-[47] he discussed the tests applicable under CPR rule 24.2: did the claim have a real prospect of success, and if not was there some other compelling reason for trial? The judge was correct to distinguish between the two tests in that way. As is well established, under rule 3.4(2)(a) the facts pleaded must be assumed to be true and (unlike under r.3.4(2)(b)

and (c)) evidence is inadmissible, whereas under rule 24.2 no such assumption is required and evidence is admissible to show that the pleaded allegations are fanciful. Furthermore, as can be seen from Practice Direction 3A paragraph 1.7 (quoted by Nugee LJ in paragraph 57(5) above), "bound to fail" in rule 3.4(2)(a) means bound to fail "because of a point of law" even if it has a real prospect of success on the facts.

97. It is plain that, as foreshadowed at [40], the test which the judge applied in the remainder of the 2018 Judgment was not the rule 3.4(2)(a) test ("bound to fail"), but the rule 24.2 test ("no real prospect of success"). Thus, at an early stage in his analysis, he stated at [50] that he felt "disquiet" as a result of three points concerning the conduct of the Second to Seventh Defendants. He went on to say that these matters "go to the reality of the claim … these matters constitute some weight in the scale of reality".

98. Most of the judge's reasoning concerned the three claims against King Sturge. His analysis was not simply of the pleaded claims, but involved detailed consideration of the contemporaneous documentary evidence. At [77] he said that one of the Claimants' allegations was "unrealistic". At [80] he said that the inferences which the Claimants sought to draw in certain paragraphs of the Re-Amended Particulars of Claim "go too far". At [87] he said that there was "no realistic or proper factual basis for alleging or inferring" what the Claimants alleged. At [109] he referred to the consequences if the deceit claim against King Sturge had "no prospect of success". At [118] he said that the first "stumbling block" to the Claimants' case was that King Sturge's conduct was "apparent from the contemporaneous documents". He concluded:

> "119. The case against King Sturge based on deceit, falsity, dishonest intention and state of mind is, in my view, far-fetched. In other words it is unrealistic.
>
> 120. The contention that the claimants or the LIA received the letter as, and relied upon it as, a property valuation rather than a business valuation is, in my judgment, untenable.
>
> 121. I therefore reach the conclusion that the RAPOC has no realistic prospect of succeeding at trial.
>
> 122. …. As presently pleaded, the RAPOC does not plead a case having a real prospect of success. The case against King Sturge must be dismissed. …."

99. Thus it is crystal clear that the judge's conclusion was that, upon analysis of the evidence, the claims against King Sturge had no real prospect of success. It followed that summary judgment should be granted dismissing those claims. He did not decide that, considering solely what was pleaded in the Re-Amended Particulars of Claim, the claims were bound to fail.

100. Turning to the claims which the Claimants were at that stage advancing against the Second to Seventh Defendants, those were claims for conspiracy with King Sturge and for procuring breach of fiduciary duty by King Sturge. As counsel for the Claimants accepted in this Court, it necessarily followed from the judge's conclusions

in relation to King Sturge that those claims had no realistic prospect of success either. That is no doubt why the judge stated at [121] and [122] that "the RAPOC" as a whole had no real prospect of success.

101. By contrast with his conclusion that the case against King Sturge "must be dismissed", however, the judge reached no such conclusion against the Second to Seventh Defendants. Again, the reason for this is clear from the 2018 Judgment. As the judge explained at [111], counsel then appearing for the Claimants had submitted that "even if there is no real prospect of success against King Sturge for fraudulent misrepresentation or intentional breach of fiduciary duty or as a conspirator, the utilisation of King Sturge by the second to seventh defendants is not also rendered unfit for trial". He went on to note and consider the response of counsel then appearing for the Second to Seventh Defendants as follows:

> "116. In reply, Mr Adkin first addressed the submission that if King Sturge was a fool and not a knave, the claims against the second to seventh defendants might still progress. Mr Adkin submitted that paragraph 49.1 cannot provide such a route because there is no plea that any of the second to seventh defendants made a representation when the only alleged unlawful act is deceiving by means of the letter and only King Sturge is sued for the tort of deceit.
>
> 117. That is a valid point. The logic of the story, if put on the basis of King Sturge having been duped, does not emerge on any fair reading of the current RAPOC. The pleading would require refinement, perhaps considerable refinement and reworking, were the case to be put in that way."

102. The judge concluded at [122]:

> "That said, I now return to the position of the second to seventh defendants. If there is a basis for reformulating the claim against them on the basis that King Sturge was not a knave, I would not be minded to strike out the action against them at this stage. For example, in the pleading at the moment no reference has been made to the project cash flow document showing the cost of the site at £18 million which was forwarded to the LIA's board by Mr Layas. It is conceivable, on the material to which I have been referred, that that might form a realistic element of such a claim. …. The claim against the second to seventh defendants, but not the RAPOC, might proceed further."

103. Thus it is also clear that the judge's conclusion was that the claims then being advanced against the Second to Seventh Defendants had no real prospect of success, but that it might be possible for the Claimants to reformulate their case against the Second to Seventh Defendants in a manner which would have a real prospect of success. That would require "refinement, perhaps considerable refinement and reworking" of the Re-Amended Particulars of Claim, in other words re-re-amendment. Accordingly, whereas he granted summary judgment dismissing the

Claimants' case against King Sturge, he did not grant summary judgment dismissing the Claimants' case against the Second to Seventh Defendants. Instead, it is plain that he intended to give the Claimants the opportunity to apply for permission to re-re-amend the Particulars of Claim (and if necessary to re-amend the Claim Form) to try to advance claims against the Second to Seventh Defendants which did have a real prospect of success. He did not intend to make an order which would prevent the Claimants from doing that.

104. As Nugee LJ has explained, the judge delivered the 2018 Judgment orally. This was followed immediately by argument as to the consequential order which should be made. It can be seen from the transcript of the argument that, to begin with, the judge was under the impression that there would be no limitation issue, but that he was corrected by counsel then appearing for the Second to Seventh Defendants, who said "I don't know whether there will be limitation [issues] or not because I don't know what their claim is". At the conclusion of the argument on this point the judge gave a short extempore ruling in which he said:

> "Rather than strike out the case in its entirety and leave it to the claimants to issue again and start again, if they can identify some case against either some or all of the second to seventh defendants and/or someone or others, I will leave the claim form hanging by a thread in relation to the second to seventh defendants on the basis that Mr Adkin suggests, which is that … unless within three weeks an application is issued and served seeking permission to advance particulars of claim in some new form …, then the claim form too is to be treated as having been struck out without further order being required against those defendants and in relation to the first defendant the claim form and the particulars of claim are struck out in their entirety and in relation to the second to seventh defendants the particulars of claim are struck out in their entirety."

He went on to say, however, that he would give the Claimants permission to re-amend the Particulars of Claim as sought.

105. The relevant parts of the order as drawn up ("the October 2018 Order") have been set out by Nugee LJ in paragraph 28 above.

106. In my view the October 2018 Order did not accurately reflect the judge's reasoning in the 2018 Judgment, was internally inconsistent and was procedurally incoherent. It did not accurately reflect the reasoning in the 2018 Judgment because that reasoning was, as I have demonstrated, based on summary judgment, not striking out. It was internally inconsistent because it both gave permission to re-amend the Particulars of Claim (paragraph 1) and struck the Re-Amended Particulars of Claim out (paragraph 3.1): if the Re-Amended Particulars of Claim were strikable, then permission to re-amend should not have been granted. It was also internally inconsistent because it struck out the Re-Amended Particulars of Claim and dismissed the claims in them (paragraph 3.1), but also gave the Claimants the opportunity to apply to amend the claim form and to "advance further amended Particulars of Claim", i.e. to re-re-amend the Particulars of Claim (paragraph 3.2): if the Re-Amended Particulars of Claim were struck out, then there was nothing to re-re-amend. It was procedurally incoherent

because it stayed the striking out of the claim form and the dismissal of the action against the Second to Seventh Defendants (paragraph 3.3(i)) when no stay was required since no immediate order striking out the claim form and dismissing the action was made against the Second to Seventh Defendants, but only an unless order (paragraph 3.2). Further confusion is caused by the use, in apparent contradistinction, of the terms "action" and "claims". Under the CPR, there are no actions, only claims: see *Civil Procedure 2020* volume 2, paragraph 9A-393.

107. What the judge should have done was to make an order which (i) granted permission to amend the Claim Form and re-amend the Particulars of Claim, (ii) granted summary judgment dismissing the claims against King Sturge and (iii) granted summary judgment dismissing the claims against the Second to Seventh Defendants unless the Claimants (a) applied to re-amend the Claim Form and re-re-amend the Particulars of Claim within the time specified, (b) put up security and (c) obtained permission to make the amendments they applied for. If he had done that, much of the subsequent confusion and difficulty would have been avoided.

108. Be that as it may, the key points about the October 2018 Order for present purposes are that, on the one hand, it struck out the Re-Amended Particulars of Claim, but on the other hand, it permitted the Claimants to apply to re-re-amend the Particulars of Claim.

109. Subsequently the Claimants did issue an application for permission to re-amend the Claim Form and to re-re-amend the Particulars of Claim, and put up further security for costs, within the time limited. After four days of argument on a variety of issues, the judge held for the reasons given in the 2020 Judgment that the Re-Re-Amended Particulars of Claim set out claims against the Second to Seventh Defendants for deceit, unlawful means conspiracy, breach of agency duties and dishonest assistance in breach of fiduciary duty on the part of Mr Layas (a director of the Second Claimant) which had a real prospect of success. The Second to Seventh Defendants have been refused permission to appeal against those conclusions. The judge also held that the introduction of these new claims was permissible because, although the Second to Seventh Defendants had an arguable limitation defence to the new claims, the new claims fell within rule 17.4(2). Accordingly, he made the order dated 3 March 2020 ("the March 2020 Order") granting the Claimants permission, as against the Second to Seventh Defendants, to re-amend the Claim Form and to re-re-amend the Particulars of Claim.

110. As Nugee LJ has explained, the sole ground on which the Second to Seventh Defendants have permission to appeal against the March 2020 Order, Ground 7 of the Appellants' notice, is that the judge did not have jurisdiction to permit the introduction of the new claims under section 35(5) of the 1980 Act having regard to the terms of the October 2018 Order, and in particular paragraph 3.1.

111. Although the present formulation of this argument as a jurisdictional one rooted in the language of section 35(5) was not presented to the judge prior to the 2020 Judgment, the point was made by counsel then appearing for the Second to Seventh Defendants that, as the judge recorded the submission at [53], "there were no facts at all presently in issue because the Claimants Re-Amended Particulars of Claim were struck out in their entirety by the 23.10.18 order".

112. In my view the judge's answer to this submission at [75] is instructive. Although he said that the fact that there was no extant pleading did not prevent the rule 17.4(2) test from being satisfied, the more fundamental point he made was the one I have quoted in paragraph 93 above, namely that the "whole point" of paragraph 3 of the First Order was to give the Claimants an opportunity "to reformulate a claim … based on the facts then pleaded". That is a clear statement from the judge as to what his intention had been, and thus as to why, as a matter of substance not form, the Claimants should be permitted to re-re-amend the Particulars of Claim to advance the new claims if the rule 17.4(2) test was satisfied.

113. In these circumstances, the question which arises on the appeal is whether, assuming that the October 2018 Order stands in its current form, the judge was correct to hold that the fact that the Re-Amended Particulars of Claim had been struck out did not prevent the rule 17.4(2) test from being satisfied. I agree with Nugee LJ that, for the reasons he gives, the judge was not. In short, facts pleaded in a statement of case which has been struck out cannot be said to be facts which "are already in issue".

114. I also agree with Nugee LJ that, for the reasons he gives, the Claimants cannot get round this problem by relying on the fact that the Amended Claim Form was not struck out and arguing that it was therefore permissible to have regard to the Re-Amended Particulars of Claim even though it had been struck out (Ground 4 of the Respondents' notice). In short, the fact that the Amended Claim Form was not struck out does not alter the fact that the Re-Amended Particulars of Claim were struck out and therefore could not be used as the basis for the comparison required by section 35(5) and rule 17.4(2).

115. I would, however, add two points in relation to the submission made by counsel for the Second to Seventh Defendants that the only amendments which were open to the Claimants following the October 2018 Order were ones which lay within the four corners of the Amended Claim Form. I do not accept this submission for three separate reasons. First, as Nugee LJ has explained in paragraph 59 above, this contention is inconsistent with paragraph 3.2 of the October 2018 Order, which expressly permitted the Claimants to apply to re-amend the Claim Form. Secondly, it is not only a contention which was not advanced before the judge, but also it is inconsistent with the way in which the matter was argued before the judge, which was to compare the facts alleged in the draft Re-Re-Amended Particulars of Claim with those alleged in the Re-Amended Particulars of Claim: see the 2020 Judgment at [67]-[78]. Thirdly, it is not a contention in relation to which the Second to Seventh Defendants have permission to appeal. Accordingly, if and in so far as Nugee LJ is saying anything different in paragraphs 82 and 89 above, then I respectfully disagree.

116. I turn therefore to Ground 5 of the Respondents' notice. The Claimants contend that, if necessary, paragraphs 3.1 and 3.2 of the October 2018 Order should either be corrected pursuant to CPR rule 40.12 or varied pursuant to rule 3.1(7) in the manner set out by Nugee LJ in paragraph 72 above.

117. I do not understand it to be disputed that, if the October 2018 Order were corrected or varied in this way, then that would have the consequence that the judge did have jurisdiction to make the March 2020 Order. The Second to Seventh Defendants contend, however, that there is no proper basis for either correcting the October 2018 Order pursuant to rule 40.12 or varying it pursuant to rule 3.1(7).

118. Before proceeding further, I should address a preliminary objection taken by counsel for the Second to Seventh Defendants, namely that the Claimants did not apply to the judge under either rule 40.12 or rule 3.1(7) and therefore it is now too late for the Claimants to do so. I do not accept this. The Claimants did not make such an application because the Second to Seventh Defendants' jurisdictional formulation of their argument based on section 35(5) was not raised until after the judge had given the 2020 Judgment. It only became necessary for the Claimants to make such an application once the Second to Seventh Defendants raised, and obtained permission to appeal on, this ground. In any event, this Court has all the powers of the court below. If the court below should have corrected or varied the First Order, then this Court can do so. Although counsel for the Second to Seventh Defendants submitted that the Second to Seventh Defendants had been prejudiced as a result of the point only being raised for the first time in the Respondents' notice, he failed to substantiate that submission. It is true that, as he pointed out, the Claimants were refused permission to appeal against the October 2018 Order, but that is irrelevant because the present application is not to challenge the substance of the order, but to correct or vary its wording so as to conform to the judge's intention.

119. Rule 40.12(1), which is commonly referred to as the "slip rule", provides that the court "may at any time correct an accidental slip or omission in a judgment or order". The slip rule cannot be used to enable the court to have second or additional thoughts, but it does enable the court to correct an order so as to ensure that it reflects the court's intention and to prevent the order from having an unintended consequence: see *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Ltd (No 2)* [2001] EWCA Civ 414, [2001] RPC 913.

120. In my judgment the First Order can and should be corrected pursuant to rule 40.12 as proposed by the Claimants since that would give effect to the judge's intention and prevent the order from having an unintended consequence. That the correction would give effect to the judge's intention can be seen most clearly from the 2020 Judgment at [75], where he stated in terms what his intention had been. In my view, however, it is also clear from the 2018 Judgment. As I have explained, it is clear from the 2018 Judgment that the judge intended to give the Claimants the chance to apply to re-re-amend the Particulars of Claim to plead viable claims against the Second to Seventh Defendants. Furthermore, he made an order paragraph 3.2 of which expressly permitted the Claimants to apply to re-re-amend the Particulars of Claim. True it is that the judge also expressed an intention to strike out the Re-Amended Particulars of Claim, and made an order in paragraph 3.1 giving effect to that expressed intention, but it is clear that he did not in his short extempore ruling think through the contradiction between that expressed intention and the intention manifested by the 2018 Judgment and given effect to in paragraph 3.2. In those circumstances the October 2018 Order can and should be corrected to cure that inconsistency and give effect to the intention expressed in the 2018 Judgment.

121. In case I am wrong about that, I turn to consider rule 3.1(7). This provides that the court's power under the CPR "to make an order includes a power to vary or revoke an order". The leading authority on the principles to be applied when considering whether to exercise this power is *Tibbles v SIG plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591. One of the circumstances which was recognised as being a proper one for the exercise of the power was summarised by Rix LJ at [39(vi)] as follows:

> "*Edwards v Golding* [2007] EWCA Civ 416 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake by the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention."

122. If it is concluded that rule 40.12 cannot be invoked because the judge intended definitively to strike out the Re-Amended Particulars of Claim, rather than merely making an unless order, then I consider that the principle articulated by Rix LJ is squarely applicable to the present case. The judge's adjudicated and manifest intention in his 2018 Judgment was to permit the Claimants to try to reformulate their claims against the Second to Seventh Defendants, but not to pre-empt any issue which might then arise as to limitation. He did not realise that the effect of making an order in the form in which he did would not permit the realisation of that intention. Accordingly, the order should be varied in a manner which does permit the realisation of that intention.

123. I would add that, just as the Claimants were refused permission to appeal against the October 2018 Order, there was no appeal by the Second to Seventh Defendants either. It is therefore not open to the Second to Seventh Defendants to contend that the judge should not have given the Claimants a final chance to re-re-amend the Particulars of Claim to plead viable claims against them, but should have granted summary judgment finally dismissing the case against them, which is what I understand Nugee LJ to be saying in paragraph 87 above. Moreover, it is not unusual for judges dealing with summary judgment and/or strike out applications who can see that it may be possible for claimants to reformulate their case to advance viable claims to give the claimants a final opportunity to do so.

124. For the reasons given above, I would correct or vary the October 2018 Order as proposed by the Claimants and on that basis dismiss the Second to Seventh Defendants' appeal against the March 2020 Order.

Lord Justice Floyd:

125. I agree with Nugee LJ that Ground 7 of the appeal should be upheld, and Ground 4 of the Respondents' Notice should be dismissed for the reasons he gives. Once pleaded facts have been struck out from a pleading, they cease to be "in issue" or "already in issue".

126. I have, however, been unable to reach the same conclusion as Nugee LJ in relation to Ground 5 of the Respondents' Notice. It seems to me to be clear that the form in which the judge's order was drawn up had the effect of frustrating the judge's underlying intention, which was to allow the Claimants to attempt to advance a case against the Second to Seventh Defendants based on the facts alleged in the RAPOC, but without asserting a claim in deceit against King Sturge.

127. As it stands, the October 2018 Order provides, by paragraph 3.1, that the RAPOC be struck out and then, by paragraph 3.2 and 3.3, that it can be made the subject of an application to amend. That chronological sequence is what opens up the argument, which we have held is entitled to succeed in the form of Ground 7 of the appeal. That argument is that, contrary to the judge's intention, none of the facts alleged in the RAPOC can form the basis of an application to amend. Yet, if the chronology of the order had been reversed and the pleading left intact until the new claim had been added by amendment, or if the striking out of the particulars of claim had been made to occur only if a satisfactory amendment was not formulated, no such problem would have arisen. That analysis suggests that the IG Defendants' success on Ground 7 lies more in an accident arising out of the form of order rather than in any inherent merit.

128. In *Bristol Myers Squibb v Baker Norton Pharmaceuticals* (cited above at [75]) the Court of Appeal explained that it is legitimate in principle to use the power to correct an order to be found in CPR 40.12 in a case where the words used in the order fail to give effect to the court's intention. In *Tibbles v SIG plc* (cited above at [121]) this Court noted the use of the general power in CPR 3.1(7) to vary an order where a mistake by the judge in the formulation of his order had had the effect of frustrating the court's intention. This is what the court considered had happened in *Edwards v Golding* [2007] EWCA Civ 416 where the Master's intention had been to leave a limitation defence alive, but the order as formulated, because of the doctrine of relation back, frustrated that intention: see Rix LJ at [32] to [33] and [39(vi)].

129. In determining the court's intention one looks, of course, to the judgment on which the order is based, but other matters may be important. Material relevant to determine the court's intention may be derived from the context, from discussions or correspondence concerning the form of order, as well as the subsequent conduct of the parties, and indeed the judge.

130. The starting point is the 2018 judgment itself. In that judgment, the judge distinguished between the Claimants' case against King Sturge and that against the IG Defendants. In layman's terms, the case against King Sturge was dead, but that against the remaining defendants was not, and might survive. That was because, even if the case of deceit by King Sturge was put to one side, there remained concerns about the conduct of the remaining defendants which were sufficient to justify allowing the Claimants an opportunity to amend. The judge explained what he had in mind if a case against the remaining defendants was to be advanced, at [117]:

> "The pleading would require refinement, perhaps considerable refinement and reworking, were the case to be put in that way".

131. The exercise the judge had in mind in his judgment was there stated in the clearest possible terms. It was to be a refinement and re-working of the *existing pleading*, based on the facts which were already there but excluding the allegations of deceit by King Sturge. Thus, when the judge later spoke of striking out the RAPOC, he cannot in my judgment have been intending to refer to the removal of the facts alleged in the RAPOC as a basis for an amendment exercise. He plainly intended that the Claimants should be allowed to put forward an amended pleading based on the factual allegations in the RAPOC. The order which was then formulated should have given effect to that intention, and not frustrated it.

132. The judge also made it clear in the 2018 judgment that he was aware that the Claim Form had been issued at the end of the limitation period. It must be recalled that the first part of the 2018 judgment was dealing with whether permission should be given to amend the pleadings so as to *arrive* at the RAPOC. At the outset the judge explained at [2]:

> "That the reamendment should relate back to the date of the claim form, which was issued on the brink of the expiry of the relevant limitation period, is essential to the claimants."

133. The *sole* issue in that amendment application (as the judge said at [23]) was whether the criteria under section 35(5) of the Limitation Act 1980 and CPR 17.4(2) were satisfied. Although the judge elided these two provisions without the additional words which are to be taken as written into Rule 17.4(2) as a result of *Goode v Martin* (cited above at [38]), he was certainly conscious of the need to find a basis for any new claim in the previous version of the pleading. Indeed, he recognised it was essential that they should be able to do so. The subsequent paragraphs of his judgment contain multiple references back to the amended particulars of claim to provide such a basis for the RAPOC. I do not see how the judge can have thought that the same tests would not apply to further amending the RAPOC, given that any potential claim was likely to have arisen at the same time.

134. The procedure adopted by the judge, which involved reading out his long judgment followed by immediate arguments as to the form of order, helps to explain in part some of what followed. We were taken to several parts of the transcript of the discussion on the form of order which followed the spoken judgment. The IG Defendants were pressing for an order that the Claim Form be struck out, bringing the action to a complete end, whereas the Claimants sought an order that the "claim be struck out unless a draft amended particulars of claim, together with an application, are lodged within 21 days and then subject to the determination of that application". It is worth setting out what counsel for the IG Defendants, Mr Adkin QC, suggested to the judge just before he gave his Ruling:

> "If your Lordship is minded to give the Claimants some time to amend, then the Order should be that the order [semble action] is dismissed but that the dismissal is stayed for a period of … 14 days, and if the claimants apply for permission to amend within that period, then the stay will extend until that application is heard."

135. The order sought by the Second to Seventh Defendants gave them what they wanted, namely the end of the action against them. If that course was not to be followed, then the parties appear to have been agreed that the appropriate form of order would be to stay the striking out of the Claim Form (for a period which was in dispute) to enable an application to be made to amend. In neither case was there any need to strike out the RAPOC.

136. The judge did say in his subsequent Ruling, set out by Nugee LJ at [27] above, that "in relation to the Second to Seventh Defendants the particulars of claim are struck out in their entirety". My understanding of this, and of the various comparable expressions in the post judgment discussion which preceded it, was that it was the

judge's way of saying that the *claims* in the RAPOC were to go, based as they were on alleging deception by King Sturge. I see nothing in any of this to suggest that the judge intended, by a striking out of the RAPOC, to cause the Claimants to seek to amend without the benefit of any of the facts in the RAPOC.

137. Mr Green QC made something of the judge's remark that "limitation is not an issue because it is a dishonesty claim". Whatever the judge was thinking of at this precise point, I cannot understand how he can have supposed that the amendment application he was allowing for the RAPOC would not have to meet the tests which he had just identified and applied to the amended particulars of claim.

138. No doubt recognising that it is necessary to put forward some rational explanation of how the judge foresaw that the amendment application would proceed, Mr Green QC suggests that the record shows that the judge had in mind an amendment exercise in which the only reservoir of fact on which the Claimants could found their RRAPOC lay "within the four corners of" the brief set of details in the Claim Form. He described this opportunity as "wafer thin": I regard this submission as completely unrealistic and illusory. I accept that it is possible, at least in theory, for the court, in a limitation case, to require a claimant to re-plead his case solely in reliance on the skeletal details in the claim form. A claim form is a statement of case, and may allege rudimentary facts which remain in issue despite the demise of the particulars of claim. The question for us, however, is whether it is realistic to suppose that this is what the judge had in mind in the circumstances of the present case. Given what I have said so far, and the complexity of the case which it was plainly contemplated would be brought against the Second to Seventh Defendants, it seems to me that it is inconceivable that the judge had in mind a possible amendment based only on the facts pleaded in the Claim Form.

139. It is notable that, in their subsequent opposition to the RRAPOC, the Second to Seventh Defendants did not even advance the suggestion that the judge had intended to limit the Claimants to the facts pleaded in the Claim Form. Their skeleton argument for the amendment application in 2019 contains a single sentence at paragraph 60 which says: "Thus there are no facts which are "already in issue"". There was no attempt to explain why those words mattered. As the judge later observed, the case before him was argued on the basis of Rule 17.4 and not on the language of section 35. The skeletons contained annexes comparing paragraphs of the RRAPOC with the RAPOC. On that basis, the point concerning the words "already in issue" simply did not arise. So far as one can see, the point was addressed only by Mr Onslow for the Claimants in oral argument (see paragraph [53] of the 2020 Judgment). The record betrays a complete lack of confidence in the proposition that what the judge had intended by his October 2018 Order was to bar the Claimants from reliance on the facts alleged in the RAPOC. That is, no doubt, because the submission that the judge had actually intended to constrain the amendment process in the way now suggested by the Second to Seventh Defendants is a deeply unattractive one. The ingenious proposal that what he had in mind was an amendment based on (or "within the four corners of") the brief details in the Claim Form had obviously not yet occurred even to the Defendants. Their case was the even more startling one that there was nothing at all on which such an amendment could be based.

140. The judge's reaction in 2020 to the argument that "there were no facts already in issue" was exactly what one would have expected on the basis of the above. He said

that "the whole point" of his October 2018 Order had been to allow the amendment exercise to proceed "based on the facts then pleaded". In other words, those pleaded in the RAPOC.

141. I would accept that the judge's reaction cannot be in any sense conclusive, but it certainly bears serious consideration. In my judgment that reaction is consistent with his judgment and with the whole history of what occurred subsequently. It supports the conclusion that the judge cannot have intended to prevent the Claimants from using the facts pleaded in the RAPOC as the basis for their new claims.

142. My Lord, Nugee LJ concludes for reasons he gives at [79] to [83] above that the proposed correction of the judge's order lies outside the power in CPR 40.12. I entirely agree with him that there is "not the slightest doubt" that HHJ Barker intended to strike out the RAPOC. The reason he had that intention was that, based as they were on the deceit of King Sturge, they did not disclose reasonable grounds for bringing a claim. His remarks about the RAPOC not proceeding further, or surviving, must be understood in that context. In making those remarks the judge was not dealing with the mechanics of precisely when the striking out would take effect, or the precise point at which the facts pleaded in that statement of case would cease to be available to formulate an amended claim. In my view, it is clear that he did not intend to remove the RAPOC from the picture when it came to formulating an amended claim against the remaining defendants. On the contrary, it is clear that he intended the RAPOC to provide the basis for such a claim.

143. I agree that Mr Onslow drew back from the submission that the judge's intention was to afford the Claimants the opportunity "to advance a new cause of action notwithstanding limitation". That does, on any view, go too far. Nevertheless, I remain of the view that the judge must have been thinking that the new amendment exercise would take the same form as the one he had just been considering, and would be a fruitless exercise in the absence of factual allegations on which to base it.

144. Finally, I do not agree that the slip in the present case can be characterised as a mere failure to appreciate the legal consequences of the order which was intended to be made. On the view which I take, the judge intended to give the Claimants the opportunity to formulate a claim against the IG Defendants based on the factual allegations in the RAPOC. His order failed to give effect to his intention because of the sequence in which striking out and amendment were arranged in his order.

145. In agreement with Arnold LJ, I do think that CPR 3.1(7) provides an alternative basis for varying the order which the judge made. This is not an order which does what it was intended to do but which has consequences which were not foreseen. The order does not permit the very amendment exercise which the judge had in mind because of the way in which it has been drawn.

146. The court has power to correct the failure of the 2018 Order to give effect to the judge's intention, both under CPR 40 and CPR 3, and should do so.

147. It follows that, in agreement with the conclusion of Arnold LJ, I would dismiss the appeal.