Neutral Citation Number: [2021] EWCA Civ 7

Appeal Ref No: A3/2019/2192

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Order of His Honour Judge Pearce (sitting as a judge of the High Court) dated 19 July 2019

Case No E30MA385

Heard remotely at:
Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 8 January 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
MR JUSTICE MARCUS SMITH

- -

Between :

TERRY ALLSOP

Appellant
(Claimant below)

-and-

(1) BANNER JONES LIMITED trading as BANNER JONES SOLICITORS
(2) RAE COHEN

Respondents
(Defendants below)

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Mr Giles Maynard-Connor and **Ms Carly Sandbach** (instructed by **Lupton Fawcett LLP**) for the **Appellant**
Ms Helen Evans (instructed by **DAC Beachcroft LLP**) for the **First Respondent**
Mr Michael Pooles, QC and **Ms Clare Dixon** (instructed by **Mills and Reeve LLP**) for the **Second Respondent**

Hearing dates: 9 and 10 December 2020

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Approved Judgment

This judgment was handed down remotely by emailing the parties and sending a copy to Bailii. The deemed time of handing down is 10:00am on 8 January 2021.

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The matrimonial proceedings between Mr and Mrs Allsop

1. Mr Terry Allsop is a businessman who controlled and owned a number of businesses selling used and new motor vehicles, including through a company known as Chesterfield Motor Company Limited ("CMCL"), of which he was a director and equal shareholder until early 2017 when – for reasons related to his divorce from Mrs Aileen Allsop – he resigned and sold his shares to his former business partner, a Mr Wheeldon-Wright.

2. In the course of his business, Mr Allsop built up substantial wealth although – as it will be necessary to describe – he also lost substantial sums of money through trading on the stock markets. In the words of the judge who heard and determined the financial remedies claim that Mrs Allsop brought against Mr Allsop during the course of their divorce, District Judge Buxton, Mrs Allsop "…has done her best to be helpful to the court. She has been honest notwithstanding that it has been difficult for her to come to terms with the breakdown of a marriage in which she, in a role much outdated nowadays, stayed at home, supported her husband and brought up three children".[1]

3. Mr and Mrs Allsop were married between 11 March 1972 and 27 July 2016, when they were divorced. They separated in March 2013 and, following their separation, negotiations took place as to the division of the matrimonial assets and the appropriate maintenance for Mrs Allsop. Significant issues between

[1] Paragraph 14 of the judgment of District Judge Buxton dated 16 October 2015 (the "Financial Remedies Judgment").

Mr and Mrs Allsop could not be resolved, with the consequence that there was a financial remedies hearing before District Judge Buxton, resulting in the Financial Remedies Judgment and a consequential order (the "Financial Remedies Order"). For the purposes of these proceedings Mr Allsop instructed solicitors – Banner Jones Limited, trading as Banner Jones Solicitors ("Banner Jones") – who retained counsel, Mr Rae Cohen.

4. It will be necessary to consider the findings of District Judge Buxton in greater detail below. For present purposes, however, it is sufficient to note that Mr Allsop was not satisfied with the Financial Remedies Judgment, and sought to appeal the Financial Remedies Order. Detailed grounds of appeal were appended to Mr Allsop's appellant's notice, and written submissions were produced in support of the permission application. Permission to appeal was refused by District Judge Buxton and – on renewed application to a Circuit Judge – also refused by Her Honour Judge Carr, QC, who gave a written judgment setting out her reasons for refusing permission to appeal dated 6 May 2016.

(2) The (present) claim by Mr Allsop against Banner Jones and Mr Cohen and the Applications

5. Mr Allsop brought proceedings against Banner Jones and Mr Cohen, alleging that they had acted in breach of contract and/or negligently in advising and/or acting for Mr Allsop in the course of the matrimonial proceedings between Mr

Allsop and Mrs Allsop. Both Banner Jones and Mr Cohen applied in separate applications (the "Applications"):[2]

i) To strike out the statement of Mr Allsop's case because it disclosed no reasonable grounds for bringing the claim within rule 3.4(2)(a) of the Civil Procedure Rules ("CPR").

ii) To strike out the statement of Mr Allsop's case because it was an abuse of the court's process within CPR 3.4(2)(b). The abuse that Banner Jones (and Mr Cohen[3]) alleged was that Mr Allsop's proceedings constituted a "collateral attack" on the Financial Remedies Judgment and should be struck out, as an abuse of process, for that reason.

iii) For summary judgment against Mr Allsop because he had no real prospect of succeeding on his claim under CPR 24.2.

6. It will be necessary to differentiate between these different grounds of attack on Mr Allsop's claim, because they operate independently and in different ways. The abuse of process contention was, as I have noted, that Mr Allsop's claim should be struck out because it was a collateral attack on the Financial Remedies Judgment. That involves consideration of the interplay between *(a)* Mr Allsop's claims against Banner Jones and Mr Cohen and *(b)* the Financial Remedies Judgment, in order to understand its allegedly abusive nature, irrespective of its other (de)merits. It was clear from the contentions of the

[2] Banner Jones served a Defence before making the application; Mr Cohen did not.

[3] The scope of the two Applications was different. Banner Jones' Application raised all three of these grounds. Mr Cohen's Application was more narrowly drawn, in that it omitted an application under CPR 3.4(2)(a). The Judge who came to hear the applications, His Honour Judge Pearce, did not draw any distinction between the width of the two Applications, rightly so. This judgment takes the same course.

parties – and, indeed, self-evident from the very existence of the jurisdiction – that a claim can be struck out as an abuse of process under CPR 3.4(2)(b) even though there are reasonable grounds for bringing the claim and the claim has a real prospect of succeeding, such that applications under CPR 3.4(2)(a) and CPR 24.2 will fail.

7. In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call "reasonable arguability".[4] Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case.[5]

8. In cases such as this – where the contention is that, but for the alleged breach of contract and/or negligence of the claimant's legal advisers, the earlier ruling against the claimant would have been "better" for the claimant – the claimant must show (in addition to breach of duty) that he or she has suffered loss in the sense that there was a "real" or "substantial" chance that the outcome of the earlier litigation would have been better for the claimant. In Mount v. Barker Austin, [1998] PNLR 493 at 497, where the claimant was contending that his

[4] I appreciate that CPR 3.4(2)(a) refers to a statement of case disclosing "no reasonable grounds for bringing...the claim", whilst CPR 24.2 refers to the claimant having "no real prospect of succeeding on the claim or issue". I adopt the terms "reasonable arguability" or "reasonably arguable" as a convenient shorthand to refer to both tests.

[5] As to the distinction, see Libyan Investment Authority v. King, [2020] EWCA Civ 1690 at [96] (*per* Arnold LJ).

action would, but for the alleged breach, have succeeded when it had failed, Simon Brown LJ put the point in the following way:

"When a person sues his former solicitors for negligence in the conduct of proceedings which has led to his action being struck out his loss is normally measured by reference to his prospects of success in the primary litigation: see Kitchen v. RAF Association, [1958] 1 WLR 563. However, in order to recover for the loss of that kind, the court must be satisfied that the plaintiff had at least a "real" or "substantial" chance that he would have succeeded in the primary action, not merely a speculative one: see Allied Maples Group v. Simmons & Simmons, [1995] 1 WLR 1602 *per* Stuart-Smith LJ at 1614. If his prospects of success fall short of that, the court will ascribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all."

The point is directly relevant to quantum of loss, as Moses LJ described in Laing v. Taylor Walton, [2007] EWCA Civ 1147, [2008] PNLR 11 at [36]:

"...Allegations of negligence during the course of litigation, against solicitors or advocates, will normally involve an attempt by a claimant to demonstrate that the previous conclusion of the court would have been different, absent negligence on the part of the lawyer. In many cases it will, indeed, be necessary to do so in order to prove causation and loss. The paradigm is the loss of a case due to negligent advocacy..."

In tortious claims, the point is not merely relevant to quantum, but it is necessary to show actionable damage in order for the claim to be brought at all. An inability to demonstrate loss of a real or substantial chance that the outcome of the litigation would have been better for the claimant means that the claim in tort is defective in an essential respect, and is liable to be struck out for that reason alone. The same is not true for claims of breach of contract. Mr Allsop's claims against Banner Jones were "parallel" contractual and tortious claims, whereas the claims against Mr Cohen sounded in tort only.

(3) The hearing before Judge Pearce and the Judgment

9. The Applications came before His Honour Judge Pearce, and were heard by him over two days (27 and 28 February 2019). Judge Pearce gave a reserved judgment (the "Judgment") dated 19 July 2019, but apparently handed down later, on 5 August 2019. An order, consequential to the Judgment, was made on 5 August 2019 (the "Order").

10. Paragraph 1 of the Order provided that the Applications "are allowed to the degree provided for in the Judgment handed down today". The effect of the Judgment is summarised in two tables set out at paragraph 193 of the Judgment:

    i) Paragraph 193(a) set out the various breaches of duty alleged against Banner Jones and stated whether that alleged breach survived the Application brought by Banner Jones. The outcome was essentially a binary one – "Yes", the allegation does survive; or "No", the allegation does not survive. In some cases where the allegation was said to have survived the Allegations, there was a footnoted qualification to the "Yes": that qualification was (in all cases) "[s]ubject to a successful application to amend".

    ii) Paragraph 193(b) was in similar form, and dealt with the various breaches of duty alleged against Mr Cohen.

11. The allegations in these tables are numbered "A1...", "B1...", etc. These are not references to the paragraphs in the pleaded allegations in Mr Allsop's statement of case, but to the Judge's own referencing system, setting out the

essence of the alleged breaches, in paragraphs 38 and 40 of the Judgment. The pleaded allegations set out in that table were summaries of the allegations pleaded in draft Amended Particulars of Claim filed on behalf of Mr Allsop. Although permission to amend had not been given at the time of the Judgment, the Judge quite rightly considered Mr Allsop's case in this proposed amended form, for the reason he gave in paragraph 36 of the Judgment:

> "...Since both striking out and entering summary judgment are draconian orders, in that they prevent a litigant pursuing their claim, it is usually inappropriate to make such orders when a lesser order, such as granting permission to amend, would put right any defect in the case such that striking out or summary judgment was inappropriate. Therefore, for the purpose of this application, I consider the Claimant's case as set out in the APOC. Further, I have made allowance as noted above for the possibility that the case may be put in a slightly different way so far as it is alleged that either the First or Second Defendant should have acted themselves or advised others to take action."

12. Although the Judge considered the Applications in the context of the draft Amended Particulars of Claim, and although he indicated, in the Judgment, that the draft Amended Particulars of Claim would, in some respect, require further amendment, no further version of the draft Amended Particulars of Claim has been produced, nor has permission to amend been granted by any court. Nevertheless, for the reasons given by the Judge, it is appropriate, on this appeal, to consider (as the starting point, at least) the draft Amended Particulars of Claim.

13. It is helpful at this point to set out the Judge's very useful summary of Mr Allsop's allegations. The table below sets out:

    i) In Column 1, the number given to the allegation by the Judge.

ii) In Column 2, the Judge's articulation of the breaches of duty alleged by Mr Allsop (as set out by the Judge in paragraph 38 and 40 of the Judgment).

iii) In Column 3, the relevant paragraphs in the draft Amended Particulars of Claim (as stated by the Judge in paragraphs 38 and 40 of the Judgment).

iv) In Column 4, the Judge's findings (as set out in paragraph 193 of the Judgment) as to which allegations should survive and which should be struck out.

(1)	(2)	(3)	(4)
A	**Before the final hearing:**		
A1	1. Not recording or advising that it be recorded that the payments of £50,00 and/or £214,000 to Mrs Allsop were made on account of her entitlement to a lump sum.	46.1 46.2	Yes
A2	2. Failing to correct the description by Mrs Allsop's solicitors of the payments of £214,000 and £50,000 as "*interim*".	46.2	Yes
A3	3. Failing to obtain evidence to support the Claimant's case that the payments of £50,000 and £214,000 were on account of her entitlement to a lump sum.	46.4	No
A4	4. Failing to advise Mr Allsop to have Ms Howe's report reviewed by another accountant.	46.5	Yes
A5	5. Failing to advise Mr Allsop to obtain a formal valuation of the stock of CMCL.	64.2	Yes
A6	6. Failing to seek permission to call further expert evidence on the issue of the value of the stock of CMCL.	64.3 64.4	Yes
A7	7. Failing to ask questions of Ms Howe and/or to seek an order that she give evidence at the final hearing dealing with the value of the stock of CMCL and the impact on calculations of the actual net profits for the year end 31.12.14.	64.5	Yes
A8	8. Failing to obtain evidence as to the nature of Mr Allsop's claims against Barclays.	70 98.1.1 98.1.2	**No**

A9	9. Failing properly to deal with a challenge to Mr Allsop's credibility by reference to a mortgage application.	98.1.3 98.1.4	No
A10	10. Failing to take reasonable steps to ensure that Mr Allsop complied with the disclosure obligation of the Ohbi order.	97.1	**No**
A11	11. Failing to advise that an adjournment of the final hearing should be sought to deal with the inadequacies in the evidence.	98.2	No
A12	12. Failing to instruct Mr Cohen:		
A12(a)	(a) As to the fact that the payments of £50,000 and £214,000 were on account of Mrs Allsop's entitlement to a lump sum.	46.5	No
A12(b)	(b) To argue that a deduction should be made from the value of CMCL to reflect the costs of selling shares.	65.1	No
A12(c)	(c) To argue that the court should use actual rather than estimated profit figures for the year end 31.12.14 in valuing CMCL.	65.2	Yes
A12(d)	(d) To seek an order deferring payment of any lump sum until Mr Allsop's shares in CMCL were sold.	80.1 80.2	No
A12(e)	(e) To identify that there was a potential for double recovery if Mr Allsop were ordered to pay interest on an outstanding lump sum and also to pay enhanced maintenance until the lump sum were paid.	84	**No**
A12(f)	(f) That a Range Rover Evoque used by Mrs Allsop which had an agreed value of £31,000 at the FDR had been excluded from Mrs Allsop's schedule of assets.	97.2	No
A12(g)	(g) That the final order should give allowance for Mr Allsop's costs liability to Banner Allsop Wealth Management.	97.2	Yes *
A12(h)	(h) In any event, in sufficient time before the hearing, to allow Mr Cohen to prepare properly and/or see Mr Allsop in conference.	96	**No**
A13	13. Failing to advise the Claimant to seek an order the interest payable on any lump sum reflecting the value of his shares in CMCL be at a commercial rate rather than the Court rate.	80.2	**No**
B	**Following receipt of the draft judgment:**		
B1	1. Not seeking to correct District Judge Buxton's error as to Mr Allsop's evidence about the nature of the payments made following the meeting on 19 April 2013.	53	Yes
B2	2. Not seeking to correct District Judge Buxton's error as to whether Mr Allsop had an immediate entitlement to £630,522.	71	No
B3	3. Not arguing that the order for division of profits should be based on the trading profits of CMCL after tax paid by Mr Allsop.	92	No

B4	4. Not instructing Mr Cohen to argue that interest should not be payable on the division of profits until the expert instructed under paragraph 5 of the final order had reported.	94	No
B5	5. Not arguing that the final order should give allowance for Mr Allsop's costs liability to Banner Jones Wealth Management.	95B	Yes *
C	**Following the final order:**		
C1	1. Not questioning Ms Howe on whether the division of profits should be based on the trading profits of CMCL after tax paid by Mr Allsop.	93	No
C2	2. Not advising Mr Allsop to appeal the combined effect of the liability for interest and the enhanced level of maintenance on the ground that this amounted to double recovery.	94	**No**
D	**At the outset of the final hearing:**		
D1	1. Not seeking an adjournment of the final hearing.		No
E	**During the final hearing:**		
E1	1. Not challenging the evidence of Mrs Allsop that the payments of £50,000 and £214,000 in 2013 were gifts.	106.1	No
E2	2. Not contending that the cost of selling Mr Allsop's shares in CMCL should be deducted from the value of the shares.	106.2	No
E3	3. Failing to advise the Claimant to seek an order that interest payable on any lump sum reflecting the value of his shares in CMCL be at a commercial rate rather than the Court rate.	109	**No**
F	**Following receipt of the draft judgment:**		
F1	1. Not seeking to correct District Judge Buxton's error as to Mr Allsop's evidence about the nature of the payments of £214,000 made following the meeting on 19 April 2013.	107.1	Yes
F2	2. Not identifying an error as to whether Mr Allsop was immediately entitled to the sum of £630,522.	107.2	No
F3	3. Not challenging the timing of the obligation to pay interest on the lump sums, given Mr Allsop's need to sell shares in CMCL before he could make the relevant payments.	109	No
F4	4. Not arguing that the order for division of profits should be based on the trading profits of CMCL after tax paid by Mr Allsop.	111	No
F5	5. Not arguing that the final order should give allowance for Mr Allsop's costs liability to Banner Jones Wealth Management.	111A	Yes *
G	**Following the final order:**		

G1	1. Failing to advise Mr Allsop that he should seek to appeal:		
G1(a)	(a) The decision of District Judge Buxton in respect of the nature of the payments of £50,000 and £214,000 made in 2013.	108	Yes
G1(b)	(b) The failure of the District Judge properly to value Mr Allsop's shareholding in CMCL.	108A	**No**
G1(c)	(c) The combined effect of the liability for interest and the enhanced level of maintenance, on the ground that this amounted to double recovery.	110	**No**

v) Column (4) also identifies the determinations of the Judge that are actually under appeal. These are *(a)* those allegations which failed to survive the Applications, which *(b)* Mr Allsop has elected to appeal. Mr Allsop has elected not to appeal all of the allegations that were struck out by the Judge. The allegations under appeal and considered in this judgment are **bolded** in Column (4) of the table above and are (using the Judge's designations): A8, A10, A12(e), A12(h), A13, C2, E3, G1(b) and G1(c). Of these:

a) A8, A10, A12(e), A12(h), A13 and C2 are allegations against Banner Jones.

b) E3, G1(b) and G2(c) are allegations against Mr Cohen.

vi) The table does <u>not</u> set out the basis upon which the struck-out allegations were struck-out by the Judge. That is because the Judgment is not (at all times, at least) entirely clear on this point, and the parties before us suggested different bases for the strike-out. Since, therefore, the matter is a controversial matter, it is not addressed in the table, but

it is addressed later on in this judgment, when the specific allegations come to be considered.

(4) The grounds of appeal and permission to appeal

14. Mr Allsop appeals the Order on five grounds. Mr Allsop's grounds of appeal are as follows:

i) *Ground 1*. The Judge erred as a matter of law in finding that the "Phosphate Sewage test" applied when considering the Applications and – in consequence – erred in striking out various claims on the basis that the same failed to satisfy the "Phosphate Sewage test" and so constituted an abusive collateral attack on the Financial Remedies Judgment of District Judge Buxton. More specifically:

a) Ground 1 concerns the articulation of and application by the Judge of what has been described by the parties, and was described by the Judge, as the "Phosphate Sewage test", named because of the decision in Phosphate Sewage v. Molleson, (1879) 4 App Cas 801.

b) The Judge used the Phosphate Sewage test as the test to be applied in determining whether the allegations pleaded in the draft Amended Particulars of Claim should be struck out as an abuse of the court's process under CPR 2.4(2)(b). The essence of Ground 1 is that this was not the appropriate test, and that the Judge erred in law in using it.

c) Ground 1 would appear to apply to all of the allegations **bolded** in Column (4) in the table above and listed in paragraph 12(v) above. However, it is necessary to be clear that even if this judgment were to conclude that the Judge had applied the wrong test, it would not follow that the struck out allegations ought to be reinstated. That is for a number of reasons: *(a)* it might be the case, applying the correct test, that the Judge was correct in his conclusion (even if not in the test that he applied) that the allegations constituted an abuse of process; *(b)* the Judge might also have struck out the allegation on the ground that it did not disclose a reasonably arguable case, which finding would be unaffected by success on this ground of appeal; and *(c)* both Banner Jones and Mr Cohen filed respondent's notices, contending that (in some cases) the Judge's conclusion could be supported on other grounds, notably on the ground that the allegations did not disclose an arguable case under CPR 3.4(2)(a) and/or CPR 24.2. Thus, even if the Judge did not conclude there was no arguable case, Banner Jones and Mr Cohen contended that he should have done.

Ground 1 is considered in Section B below.

ii) *Ground 2.* In the alternative to Ground 1, the Judge erred as a matter of law in applying the Phosphate Sewage test to those allegations against Banner Jones that in substance complained about the poor preparation

of Mr Allsop's case and – in consequence – erred in striking out those claims. As to this:

a) Ground 2 is a variant on Ground 1, and applies to a narrower set of allegations, namely those concerning the preparation of the case prior to the final hearing before District Judge Buxton. The relevant allegations are A8, A10, A12(e), A12(h) and A13.

b) These are all allegations against Banner Jones. As was accepted by Mr Maynard-Connor, counsel for Mr Allsop, Mr Cohen was brought into the case very late by Banner Jones, and allegations regarding negligent preparation of the case were not made by Mr Allsop against Mr Cohen.

c) Essentially, the contention of Ground 2 is that even if the Judge was correct in applying the Phosphate Sewage test to some allegations, he erred in applying it to the allegations of breach of contract/negligence relating to the preparation of the case prior to its final hearing.

Given its nature, Ground 2 is appropriately considered with Ground 1 in Section B below.

iii) *Ground 3.* Further to Grounds 1 and 2, the Judge "erred as a matter of law and/or fact in finding that [Mr Allsop's] claims with respect to [Banner Jones'] alleged breaches in respect of the Barclays/reattribution issues had no real prospects of success and/or should be struck out". As to Ground 3:

a) It is necessary, first, to explain the reference in Ground 3 to the "Barclays/reattribution issues". These issues concern the manner in which District Judge Buxton divided the assets of Mr Allsop and Mrs Allsop as between themselves. Mr and Mrs Allsop had – at least as their starting position – agreed to divide their assets equally. Although the District Judge considered that equality was a fair basis for the division of assets, this was only his starting point. He further concluded (in the face of Mr Allsop's opposition) that the allocation on the basis of equality needed to be adjusted in order to take account of Mr Allsop's substantial gambling losses (which was by way of speculation on the stock market through Barclays Bank plc ("Barclays")). This loss-making speculation served to diminish the estate available for distribution as between Mr Allsop and Mrs Allsop. The Judge determined that a reattribution (as it is termed) should occur, and ordered such a reattribution in the Financial Remedies Order.

b) Although it is not necessary for present purposes to set out the law as to when a reattribution may and may not be made in matrimonial proceedings, it is important to note that a judge's discretion in this regard is fettered by specific principles. District Judge Buxton had regard to these principles in the Financial Remedies Judgment, and he determined that he could, as a matter of law, properly order a reattribution.

c) In the draft Amended Particulars of Claim, Mr Allsop contended that Banner Jones failed properly to prepare Mr Allsop's case, and that, had the case properly been prepared, the District Judge's conclusion on the question of reattribution would have been different: either no reattribution would have been made at all (because the legal requirements for such reattribution were not satisfied) or the reattribution would have been different (in that whilst the legal requirements for reattribution were met, District Judge Buxton would have ordered a lesser reattribution, more beneficial to Mr Allsop).

d) It will be necessary to consider the nature of Mr Allsop's claim in greater detail. Using the Judge's referencing system, the relevant allegation is allegation A8, namely that Banner Jones failed "to obtain evidence as to the nature of Mr Allsop's claims against Barclays". Because this allegation focussed on the preparation of Mr Allsop's case, and because Mr Cohen was instructed only shortly before the financial remedies hearing, there is no similar allegation made against Mr Cohen in the draft Amended Particulars of Claim.

e) By Ground 3, Mr Allsop contends that the Judge erred in striking out allegation A8 on the basis that it disclosed no reasonably arguable case.

f) By its respondent's notice, Banner Jones contends that the Order striking out allegation A8 can be upheld on two alternative grounds. First:

> "...on the basis that [Mr Allsop] has failed to identify significant evidence that would have changed the outcome of the case or alternatively had a real and substantial chance of changing the outcome of the case..."

Secondly:

> "...because it is implicit in his Judgment, and is the case, that [Mr Allsop] had no reasonable prospect of securing a more advantageous order (independently of the issue of collateral attack)...."

It will readily be appreciated that both of these alternate grounds (given my conclusions in relation to Grounds 1 and 2) amount to no more than a contention that allegation A8 fails to disclose a reasonably arguable case under CPR 3.4(2)(a) and/or CPR 24.2. This contention formed a part of Banner Jones' Application (see paragraph 5 above), and the suggestion in the respondent's notice appears to be that the Judge did not address the point, whereas the essence of Ground 3 is that the Judge decided the point against Mr Allsop.[6] This implies a certain lack of clarity in the Judgment as to the precise basis on which the Judge struck out allegation A8. As will be seen, that uncertainty arises also in relation to other allegations that the Judge struck out.

[6] There are three possibilities: (1) the Judge decided the point against Mr Allsop – which is the subject-matter of Ground 3; (2) the Judge did not decide the point at all – which is the subject-matter of the respondent's notice; and (3) the Judge decided the point against Banner Jones. The third possibility does not appear to be either party's reading of the Judgment, for had the Judge decided the point against Banner Jones, Banner Jones would have had to cross appeal.

All aspects of Ground 3 are considered in Section C below.

iv) *Ground 4.* Further to Grounds 1, 2 and 3, the Judge erred as a matter of law and/or fact in:

"...finding that [Mr Allsop's] claims against both Defendants with respect to:

4.1 their failure to raise an argument based on double penalty and/or

4.2 their failure to raise an alternative argument based on a commercial rate of interest

should be struck out as an abusive collateral attack on the [decision of District Judge Buxton] and/or on the basis that the same had no real prospects of success."

As to this:

a) Ground 4 concerns a number of allegations, specifically allegations A12(e), A13 and C2 (as against Banner Jones) and E3 and G1(c) (as against Mr Cohen).

b) These allegations relate to two aspects of the Financial Remedies Order made by District Judge Buxton consequential upon the Financial Remedies Judgment:

i) The first aspect is that Mr Allsop was doubly penalised – or that Mrs Allsop doubly benefited – because of the orders made by the District Judge concerning Mrs Allsop's maintenance payments pending receipt by her, of certain lump sums, from Mr Allsop, combined with an obligation on Mr Allsop to pay interest if those lump sums were paid late.

ii) The second aspect is that the rate of interest payable by Mr Allsop should not have been the default rate of interest – the Judgment Act rate of 8% – but a much lower commercial rate.

c) More specifically, the allegations against Banner Jones allege:

i) A failure, in advance of the hearing, to identify (and, no doubt, defuse) the risk of "double penalty": allegation A12(e).

ii) A failure, in advance of the hearing, to advise Mr Allsop to seek an order that interest be paid at a rate lower than the Judgment Act rate: allegation A13.

iii) A failure to advise Mr Allsop after judgment to appeal the issue of "double penalty": allegation C2.

The allegations against Mr Cohen allege:

iv) A failure, during the hearing, to advise Mr Allsop to seek an order from the District Judge that interest be paid at a rate lower than the Judgment Act rate: allegation E3.

v) A failure to advise Mr Allsop after judgment to appeal the issue of "double penalty": allegation G1(c).

d) It is clear from the wording of Ground 4 that Mr Allsop is seeking to appeal the order striking out these allegations

whether the reason for striking them out was abuse of process or failure to disclose a reasonably arguable case.

e) In Banner Jones' respondent's notice, it is again contended that the Judge's Order should be upheld on the grounds that allegations A12(e), A13 and C2 disclose no claim that is reasonably arguable. In Mr Cohen's respondent's notice, the same contention is advanced in relation to allegation E3 (but not allegation G1(c)).

These points are all considered in Section D below.

v) *Ground 5.* Further to Grounds 1 to 4, the Judge erred as a matter of law and/or fact:

> "...in striking out (or giving Summary Judgment with respect to) the intended claim pleaded against [Mr Cohen] at paragraph 108A of the proposed Amended Particulars of Claim (claim referenced as G1(b) in the [Judgment]) when he had previously confirmed that the Claimant's other claims against [Banner Jones] in respect of the Cap Clean issue (references as A4-A7 in the Judgment) were sufficiently arguable and should not be struck out, and as there was no basis for striking out or giving Summary Judgment in respect of the claim against [Mr Cohen]."

As is clear from the terms of Ground 5, this relates to allegation G1(b), which is an allegation against Mr Cohen only. Ground 5 contends that the Judge erred in striking out allegation G1(b) because:

a) Similar allegations against Banner Jones – specifically, allegations A4 to A7 – were not struck out; and

b) The Judge failed to provide reasons for his decision. The Judgment simply records the existence of the allegation and

then – in paragraph 193(b) – simply records that the allegation is struck out.

Ground 5 is considered in Section E below.

15. The Judge refused permission to appeal in relation to all of these grounds (paragraph 7 of the Order). By an order dated 8 November 2019, Arnold LJ gave permission to appeal on all grounds.

B. GROUNDS 1 AND 2: THE LAW REGARDING "COLLATERAL CHALLENGE" AND THE PHOSPHATE SEWAGE TEST

(1) The approach of the Judge

16. The Judge noted that a claim such as Mr Allsop's inevitably involved the contention that, but for the alleged breach of contract and/or negligence of the Defendants, there was a real or substantial chance that the earlier judgment – here the Financial Remedies Judgment of District Judge Buxton – would have been different, to the financial advantage of Mr Allsop. It followed that the effects of the alleged breach of contract/negligence on the earlier Financial Remedies Judgment must be considered as part of such a claim. As I have described in paragraph 8 above, the Judge was entirely right in this regard.

17. The Judge then made the point that such an inquiry into the Financial Remedies Judgment brought with it the risk of an impermissible collateral attack on that judgment. He therefore conducted a careful review of the authorities on this point in paragraphs 52 to 69 of the Judgment.

18. The Judge set out the law as he understood it in the following paragraphs:

> "63. In considering the proper application of the doctrine of collateral attack in such circumstances, a balance must be struck between two principles. On the one hand, it is desirable that those who have arguably suffered loss as a result of the tort of another should be allowed to litigate their claim; on the other hand, the litigation of a fresh claim may so closely overlap the findings in another case that it is impossible to find for the Claimant in one case without examining the decision of the Judge in the other, yet to do so is almost impossible when different parties and potentially different sources of evidence are before the later court.
>
> 64. In my judgment, this difficult tension is resolved by bearing in mind the availability of an appeal process. If a Judge has erred in their findings on the material before them, then, even if it is arguable other material should have been before them that may have put the case in a different light, the litigant's remedy normally lies in appealing (including, if necessary, an application for permission to rely on fresh evidence) rather than in bringing a claim against the lawyers whose alleged negligence was the cause of the evidential deficiency in the first place. The alternative result would be an abusive relitigation of the same issues. Only evidence that "entirely changes the aspect of the case", as referred to in Phosphate Sewage, can justify the cost and potential unfairness of allowing fresh proceedings to be brought in order to consider what the first court might have decided on the same issue.
>
> 65. I see no reason to depart from the Phosphate Sewage test in considering the abuse of process argument. The passage cited at paragraph 60 above…"

…pausing there, paragraph 60 of the Judgment was the Judge's citation of Buxton LJ in Laing v. Taylor Walton (a firm) at [27], a case that is considered further below…

> "…expressly refers to errors in assembling a case as well as errors in its conduct. That passage is binding upon me. In any event, as a matter of principle, the Phosphate Sewage test reflects a proper balance between the desirability of permitting access to justice for those with legitimate complaints about how previous cases have been prepared and presented and with preventing the inconsistencies and injustices that may arise if litigation between two parties are [*sic*] re-visited in proceedings brought by one of those against a third party."

19. Before us, the parties referred extensively to the relevant law – I have no doubt in far greater detail than was done before the Judge. Section B(2) sets out, in some detail, the substance of a number of the cases that we were referred to. Section B(3) then considers the extent to which the Judge correctly

stated the law on this point in his Judgment. Section B(4) sets out my conclusions as regards Grounds 1 and 2 of this appeal.

(2) The law regarding collateral challenge

20. The law regarding collateral challenge to judicial decisions is an offshoot from or extension of the rules regarding *res judicata*. Indeed, as will be seen, Phosphate Sewage itself is best understood as a case concerning, not collateral challenge, but *res judicata*.[7]

21. A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the cause of action and the parties, which disposes, once and for all, of all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. A party to a *res judicata* will be estopped, as against any other party, from disputing the correctness of the decision, except on appeal. This is known as "cause of action estoppel". The same is true – save to a narrower extent – of "issue estoppel". A final decision will create an issue estoppel if it determines an issue in a cause of action as an essential step in its reasoning.

22. I shall, for convenience, refer to both sorts as "*res judicata* estoppel".

23. *Res judicata* estoppel has as its rationale the importance of finality in judicial decision-making. In The Ampthill Peerage Case, [1977] AC 547 at 569, Lord Wilberforce put the point as follows:

> "English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed

[7] Whether Phosphate Sewage would have been decided as a *res judicata* case today is not a matter that need be considered further in this judgment.

> upon the right of citizens to open or to reopen disputes. The principle which we find in the Act of 1858 is the same principle as that which requires judgments in the courts to be binding, and that which prohibits litigation after the expiry of limitation periods. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

24. There is, thus, a particular form of finality that attaches to final decisions at first instance. It is important to differentiate final decisions from interlocutory decisions, and appeals from decisions at first instance:

i) CPR 3.1(7) lists as one of the court's general powers of case management the power to vary or revoke a prior order made. It is very clear that this provision cannot generally be used to vary or revoke final orders (that is, orders that give rise to a *res judicata* estoppel) and equally clear that even interlocutory decisions will generally only be varied or revoked where either *(a)* there has been a material change of circumstance since the original order was made or *(b)* where the facts on which the original decision was made were (innocently or otherwise) misstated: Tibbles v. SIG plc, [2012] EWCA Civ 518, [2012] 1 WLR 2591. The Financial Remedies Judgment, of course, was a final decision.

ii) The proper route for reviewing a decision – particularly a final decision – is through the appeal process. It is trite, however, that appeals are not generally re-hearings but reviews of the lower court (CPR 52.21 in civil proceedings; and rule 30.12 of the Family Procedure Rules 2010 in family proceedings). New factual evidence, not before the lower court, will generally only be admitted where "special grounds" are met. In the civil courts, these are described in Ladd v. Marshall, [1954] 1 WLR 1489.[8] These "special grounds" are: *(a)* the evidence could not have been obtained with reasonable diligence for use at the trial; *(b)* the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and *(c)* the evidence must be such as is presumably to be believed: it must be apparently credible, although it need not be incontrovertible. Family courts apply a more liberal version of this rule, but the general point holds good.[9]

25. Apart from appeals, and without intending to be exhaustive, there are two main ways in which a final judgment that gives rise to a *res judicata* estoppel can be re-visited by a party who would otherwise be bound by or estopped from challenging that decision in other litigation. These are where:

i) A party seeks to have a judgment set aside on grounds that it was fraudulently obtained: Takhar v. Gracefield Developments Limited, [2019] UKSC 13, [2020] AC 450.

[8] The jurisdiction to admit new evidence is now based on the CPR – but Ladd v. Marshall provides a good statement for how that jurisdiction is exercised.

[9] See Cordle v. Cordle, [2001] EWCA Civ 1791, [2002] 1 WLR 1441; Kaur v Matharu, [2010] EWCA Civ 930, [2011] 1 FLR 698.

ii) New facts come to light that fundamentally change the complexion of the case. This is the *ratio* of Phosphate Sewage Company Limited v. Molleson, (1879) 4 App Cas 801 at 814, where Lord Cairns LC held:

> "As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before."

26. The Phosphate Sewage rule (like the rule in Takhar) thus constitutes an exceptional case where a party, who would, in the ordinary course, be estopped against another party to a final decision from challenging that decision, can properly re-visit that decision.

27. Collateral challenges to prior decisions *ex hypothesi* do not give rise to *res judicata* estoppel. For the purposes of this judgment, a collateral challenge is one where – no matter how similar the issue in question – the parties to the later dispute are different from the parties to the earlier dispute that is the subject of the collateral challenge.[10] As a matter of principle, collateral challenges should not give rise to an estoppel because – even though a dispute or issue has been determined by an anterior final judicial decision – that decision was binding only as between *A* and *B*, whereas the later claim arises

[10] I should be clear that *res judicata* estoppel binds the parties and their privies. I refer to "parties" as a convenient shorthand, but privies will be bound in the same way.

between *A* and *C*. In short, whereas *B* could allege that *A* is estopped from bringing a later claim as against *B*, *C* can make no such assertion, because *C* was not a party to the anterior decision. Generally speaking, where no *res judicata* estoppel arises, *A* is permitted to bring a claim without being fettered by what has been decided previously. There is, in these circumstances, no need for *A* to rely on exceptions like that articulated in Phosphate Sewage, because there is, in fact, no limit arising out of the doctrines of *res judicata* estoppel to prevent *A* from proceeding with his or her claim. As Lowry CJ noted in Shaw v. Sloan, [1982] NI 393 at 397, "[t]he entire corpus of authority in issue estoppel is based on the theory that it is not an abuse of process to relitigate a point where any of the…requirements of the doctrine is missing".

28. Of course, the courts retain a general jurisdiction to control abuses arising out of proceedings that come before them, and the real question on this appeal is the extent of that jurisdiction and the extent to which Phosphate Sewage forms a part of or informs that jurisdiction. The starting point for these purposes is the decision of the House of Lords in Hunter v. Chief Constable of the West Midlands Police, [1982] AC 529. In that case, the claimants (the "Birmingham Six") brought proceedings against the police claiming damages for injuries caused by assaults allegedly perpetrated by the police. The question of whether the police had indeed assaulted the claimants had been considered and determined in the course of a prior criminal trial, the point being relevant to the question of whether confessions made by the claimants had been extorted by violence or not.[11] After an eight-day "trial within a trial" (*voir dire*) in the

[11] To be clear, there was no issue as to the assaults having occurred. The question was whether they were inflicted by the police and occurred prior to the claimants' confessions, and so induced them; or whether they occurred later, and so had no effect on the giving of the confessions.

absence of the jury, during which the police officers and the claimants gave evidence, Bridge J held that the prosecution had discharged the burden of proving beyond reasonable doubt that the claimants had not been assaulted by the police and that their statements had been voluntary and should be admitted into evidence. The claimants were convicted at trial.

29. It was contended that the subsequent civil proceedings, putting this conclusion in issue, constituted an abuse of the process of the court. Lord Diplock articulated the following proposition (at 541):

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

At 542, Lord Diplock cited, to similar effect, *dicta* of AL Smith LJ in Stephenson v. Garnett, [1898] 1 QB 677 at 680-681 and Lord Halsbury LC in Reichel v. Magrath, (1889) 14 App Cas 665 at 668. Beginning with AL Smith LJ:

> "…the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has already been decided by a competent court."

Lord Halsbury LC said:

> "…I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

30. Lord Diplock made clear that this relitigation of the identical issue was but one instance of a wider abuse of process doctrine. Earlier in his speech (at 536) he said:

> "[abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied…It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

31. The civil proceedings in Hunter were not complete re-runs of the earlier criminal proceedings. The allegation that the assaults had been committed by the police was the same, but it was supported by additional evidence in the civil proceedings that had not been before Bridge J at the criminal trial. Lord Diplock considered this point at 545:

> "I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff LJ. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail *in limine* because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns LC in Phosphate Sewage Company Ltd v. Molleson, (1879) 4 App Cas 801, 814, namely that the new evidence must be such as "entirely changes the aspect of the case". This is perhaps a little stronger that that suggested by Denning LJ in Ladd v. Marshall, [1954] 1 WLR 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz, that the evidence "...would probably have an important influence on the result of the case, though it need not be decisive;..."
>
> The latter test, however, is applicable where the proper course to upset the decision of the court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division) is by way of re-hearing. I agree with Goff LJ that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns in appropriate."

32. Hunter is, of course, a decision of the highest authority, but it must be treated with a degree of caution in the present context, for this reason: Hunter

concerned the use of subsequent civil proceedings to challenge an earlier decision in the criminal jurisdiction. As Lord Diplock himself stressed, questions of *res judicata* estoppel – and, by a parity of reasoning, collateral challenge of anterior civil proceedings – arise differently when the anterior proceedings are criminal. Where an anterior criminal decision is later challenged in civil proceedings, it is very difficult to say that a *res judicata* estoppel arises at all, simply because there is no identity of party.

33. Nevertheless, as a statement of general principle, Hunter has informed cases dealing with the collateral challenge of earlier civil proceedings in later civil proceedings.

34. Since the decision in Hunter, the law regarding an advocate's immunity from suit has changed. Advocates are no longer immune from suit, the rule in Rondel v. Worsley, [1969] 1 AC 191 having been overruled by the House of Lords in Arthur JS Hall & Co v. Simons, [2002] 1 AC 615 (HL). One of the reasons for the rule in favour of immunity was said to be that it prevented or reduced the potential for collateral attacks on prior judgments. Thus, when the House of Lords came to consider the advocate's immunity from suit, unsurprisingly the decision in Hunter and the question of collateral attack came under consideration. A number of their Lordships gave the point their consideration:

i) Lord Steyn considered the public policy against re-litigating a decision of a court of competent jurisdiction at 679-680. He considered, first, collateral civil challenges to criminal convictions, before turning to the question of collateral challenges to civil proceedings (at 680):

"That leaves collateral challenges to civil decisions. The principles of *res judicata*, issue estoppel and abuse of process as understood in private law should be adequate to cope with this risk. It would not ordinarily be necessary to rely on the Hunter principle in the civil context, but I would accept that the policy underlying it should still stand guard against unforeseen gaps."

What Lord Steyn meant by the "Hunter principle" is clear from the preceding page (679):

"Prosecuting counsel owes no duty of care to a defendant...The position of defence counsel must however be considered. Unless debarred from doing so, defendants convicted after a full and fair trial who have failed to appeal successfully will from time to time attempt to challenge their convictions by suing advocates who appeared for them. This is the paradigm of an abusive challenge. It is a principal focus of the principle in Hunter v. Chief Constable of the West Midlands Police, [1982] AC 529. Public policy requires a defendant who seeks to challenge his conviction to do so directly by seeking to appeal his conviction."

It is thus clear that the "Hunter principle" was seen by Lord Steyn as a rule against challenging by way of separate and later proceedings a decision that was susceptible of review by way of the appellate process.

ii) Lord Browne-Wilkinson considered Hunter to be of principal application in the case of collateral civil challenges to criminal convictions (at 685):

"But in my judgment, the law has already provided a solution where later proceedings are brought which directly or indirectly challenge the correctness of a criminal conviction. Hunter v. Chief Constable of the West Midlands Police, [1982] AC 529 establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to re-litigate issues decided against him in earlier proceedings if such relitigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. In view of the more restrictive rules of *res judicata* and issue estoppel it is not clear to me how far the Hunter case goes where the challenge is to an earlier decision in a civil case. But in my judgment, where the later civil action must, in order to succeed, establish that a subsisting

conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal."

iii) Lord Hoffmann considered that the question of collateral attack had a number of strands requiring separate examination (at 698). Of the Hunter principle, he noted that "the courts have a power to strike out attempts to re-litigate issues between different parties as an abuse of the process of the court", but that the "power is used only in cases in which justice and public policy demand it" (at 702). He agreed with Lord Diplock's view that the categories in which a court had the duty to strike out proceedings as an abuse of process should not be exhaustively listed (at 702-703):

"I, too, would not wish to be taken as saying anything to confine the power within categories. But I agree with the principles upon which Lord Diplock said that the power should be exercised: in cases in which relitigation of an issue previously decided would be "manifestly unfair" to a party or would bring the administration of justice into disrepute. It is true that Lord Diplock said later on in his speech, at 541, that the abuse of process exemplified by the facts of the case was:

> "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff has a full opportunity of contesting the decision in the court by which it was made."

But I do not think that he meant that every case falling within this description was an abuse of process or even that there was a presumption to this effect which required the plaintiff to bring himself within some exception. That would be to adopt a scheme of categorisation which Lord Diplock deplored. As I shall explain, I think it is possible to make some generalisations about criminal proceedings. But each case depends upon an application of the fundamental principles. I think that Ralph Gibson LJ was right when, after quoting this passage, he said in Walpole v. Partridge & Wilson, [1994] QB 106, 116A, that Hunter's case, [1982] AC 529 decides "not that the initiation of such proceedings is necessarily an abuse of process but that it may be."

The decision in Walpole is considered further below.

iv) Lord Hoffmann went on to say this about the application of the Hunter principle (at 705-707):

> "I do not think, however, that I can entirely agree with the Court of Appeal's view that the question of whether a collateral challenge is an abuse of process depends upon the "weight" to be given to the judgment and that there is a scale of weighting according to the amount of judicial input, with a consent order at one end and a judgment after hearing full evidence at the other. I agree that, as a practical matter, it is very difficult to prove that a case which was lost after a full hearing would have been won if it had been conducted differently. It may be easier to prove that, with better advice, a more favourable settlement would have been achieved. But this goes to the question of whether, in the words of CPR 24.2, the plaintiff has "a real prospect of succeeding on the claim". The Hunter question, on the other hand, is whether allowing even a successful action to be brought would be manifestly unfair or bring the administration of justice into disrepute. In my view, there will be cases (such as conviction on a plea of guilty) in which the *Hunter* principle may be engaged although there has been virtually no judicial input at all. The Court of Appeal accepted this. On the other hand, I can see no objection on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to full trial. In such a case the plaintiff accepts that the decision is *res judicata* and binding upon him. He claims however that if the right arguments had been used or evidence called, it would have been decided differently. This may be extremely hard to prove in terms of both negligence and causation, but I see no reason why, if the plaintiff has a real prospect of success, he should not be allowed the attempt.
>
> There is, I think, a relevant difference between criminal proceedings and civil proceedings. In civil proceedings, the maxim *nemo debet bis vexari pro una et eadem causa* applies very strongly. Fresh evidence is admissible on appeal only subject to strict conditions. Even if a decision is based upon a view of the law which is subsequently expressly overruled by a higher court, the judgment itself remains *res judicata* and cannot be set aside: see In re Waring (No 2), [1948] Ch 221. An issue estoppel created by earlier litigation is binding subject to narrow exceptions: see Arnold v. National Westminster Bank plc, [1991] 2 AC 93. But the scope for re-examination in criminal proceedings is much wider. Fresh evidence is more readily admitted. A conviction may be set aside as unsafe and unsatisfactory when the accused appears to have been prejudiced by "flagrantly incompetent advocacy": see R v. Clinton, [1993] 1 WLR 1181. After appeal, the case may be referred to the Court of Appeal (if the conviction was on

indictment) or to the Crown Court (if the trial was summary) by the Criminal Cases Review Commission: see Part II of the Criminal Appeal Act 1995.

It follows that in my opinion it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a plea of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute. The arguments of Lord Diplock in the long passage which I have quoted from Saif Ali v. Sydney Mitchell & Co, [1980] AC 198, 222-223 are compelling. The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the 1995 Act. I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. Walpole v. Partridge & Wilson, [1994] QB 106 was such a case.

Once the conviction has been set aside, there can be no public policy objection to an action for negligence against the legal advisers. There can be no conflict of judgments and the only contrary arguments which remain are those of divided loyalty, vexation and the cab rank, all of which I have already rejected. Acton v. Graham Pearce & Co, [1997] 3 All ER 909 is a good example of such an action in a case which lay outside the immunity and illustrates the point that bringing such a claim is not in itself an abuse of process. While it is true that there is a power for the Crown to pay compensation to the person wrongly convicted, there is no reason why public funds should be used to pay the accused compensation for loss caused by the negligence of the lawyers who were paid to defend him.

On the other hand, in civil (including matrimonial) cases, it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into dispute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications. There is no public interest objection to a subsequent finding that, but for the negligence of his lawyers, the losing party would have won. But here again there may be exceptions. The action for negligence may be an abuse of process on the ground that it is manifestly unfair to someone else. Take, for example, the case of a defendant who publishes a serious defamation which he attempts unsuccessfully to justify. Should he be able to sue his lawyers and claim that if the case had been conducted differently, the allegation would have been proved to be true? It seems to me unfair to the plaintiff in the defamation action that any court should be allowed to come to such a conclusion in proceedings to which he is not a party. On the other hand, I think it is equally unfair that he should have to join as a party and rebut the allegation for a second time. A man’s reputation is not only a matter

> between him and the other party. It represents his relationship with the world. So it may be that in such circumstances, an action for negligence would be an abuse of the process of the court.
>
> I would suspect that, having regard to the power of the court to strike out actions which have no real prospect of success, the Hunter doctrine is unlikely in this context to be invoked very often. In my opinion, the first step in any application to strike out an action alleging negligence in the conduct of a previous action must be to ask whether it has a real prospect of success..."

35. The abolition of the immunity has obviously had the effect of increasing the number of cases in which a collateral challenge may be mounted, and for this reason, statements of the rule regarding collateral challenge post-dating Arthur JS Hall & Co. v. Simons and relating to anterior civil rather than criminal proceedings are of particular value. One such statement is Secretary of State for Trade and Industry v. Bairstow, [2003] EWCA Civ 321, [2004] Ch 1, where Sir Andrew Morritt V-C (with whom both Potter and Hale LJJ agreed) reviewed the law and articulated the following principles (at [38]):

> "(a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
>
> …[12]
>
> (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge…in the earlier action (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

[12] Proposition (b) concerned the case where the anterior decision was in the criminal jurisdiction, and is for that reason omitted.

36. The Hunter principle is thus quite broadly based, as was also emphasised by Buxton LJ in Laing v. Taylor Walton (a firm) at [12]:

> "The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute. Attempts to draw narrower rules applicable to particular categories of case (in the present instance, negligence claims against solicitors when an original action has been lost) are not likely to be helpful."

37. The mere fact that an earlier judgment undergoes scrutiny in later proceedings will not render that later scrutiny an abuse of process. Indeed, as has already been noted (paragraph 8 above), it will generally be the case in later professional negligence proceedings that the question will have to be asked, "What would have happened to the (earlier) judgment, if the defendant had behaved as he or she should have done?"

38. In Walpole v. Partridge & Wilson, [1994] QB 106, Mr Walpole and his company JJ Walpole & Sons were convicted before Beccles justices of obstructing a veterinary officer in the execution of his duty. His appeal against conviction was dismissed. Subsequently, Mr Walpole instructed a new firm of solicitors – who had not acted for him either before the justices or the Crown Court – to advise him on the merits of an appeal from the Crown Court's decision. Some years later, Mr Walpole commenced proceedings against these solicitors, claiming that in breach of contract and/or negligently they had failed to act with due skill and care in that they had not carried out their instructions with due expedition and, in particular, had failed to lodge an appeal on the basis that the Crown Court had erred in law. The defendant solicitors sought to strike the claim out, on the ground that it amounted to a

collateral attack on a final decision of a court of competent jurisdiction. The Court of Appeal declined to strike the claim out. Ralph Gibson LJ, with whom Beldam and Peter Gibson LJJ agreed, held:

i) The initiation of proceedings for the purpose of mounting a collateral attack on the final decision made by another court of competent jurisdiction in previous proceedings in which the claimant in the later proceedings had a full opportunity of contesting the decision of the earlier court might but would not necessarily be an abuse of process (at 116):

> "…the initiation of such proceedings is [not] necessarily an abuse of process, but…it may be. The question whether it is so clearly an abuse of process that the court must, or may, strike out the proceedings before trial must be answered having regard to the evidence before the court on the application to strike out. There are, in short, and at least, exceptions to the principle."

ii) One such exception was where the claimant was indeed seeking to revisit the decision of the earlier court, but was doing so on the basis of fresh evidence (at 116):

> "Thus, in Hunter's case itself, it was recognised that the initiation of proceedings, in which such a final decision will be questioned, will not be so clearly an abuse of process that the proceedings may be struck out, if the plaintiff relies upon fresh evidence. If the plaintiff is challenged, the fresh evidence on which he relies will have to be shown to meet the necessary standard of credibility and of probative effect."

Ralph Gibson LJ considered that the appropriate test for determining whether the claimant had adduced sufficient evidence to avoid his or her claim being struck out was the Phosphate Sewage test (at 116), and he cited the judgments of Goff LJ and Lord Diplock with approval.

iii) Ralph Gibson LJ noted that the existence of fresh evidence was not the only basis on which a collateral attack might be rendered permissible or not abusive. In Walpole, there was no question of fresh evidence, but rather Mr Walpole had (allegedly) been deprived of the chance of appealing the decision of the Crown Court on a point of law that his then legal advisers had failed to advance (at 117):

> "The collateral attack based upon sufficient fresh evidence, if it succeeds demonstrates nothing more than that two different courts, acting according to law, may properly reach different conclusions upon the same or a similar issue when the evidence before the two courts is markedly different. A collateral attack based upon a failure to advance a point of law on appeal, if it succeeds, demonstrates no more than the unsurprising fact that a court may go wrong in law. It is because of that risk that rights of appeal are given by Parliament and, if a litigant is deprived of the ability to exercise his right of appeal by the breach of duty of his advisers, then, in the absence of any other defence such as immunity, or estoppel, upon which no reliance is placed in these proceedings, I see no reason why he should not be free to pursue a claim for such damages as he may prove that he suffered thereby."

In these circumstances, the Court of Appeal declined to strike out Mr Walpole's claim.

39. In Laing v. Taylor Walton (a firm), the Court of Appeal was considering the case where a collateral challenge was being mounted to an earlier decision, where the claimant bringing the later proceedings was doing no more than seeking to re-argue the same case without any fresh material. The later claim, as here, involved a claim against the solicitors who had acted, in the earlier proceedings, for the claimant in the later proceedings.

40. At first instance, Langley J considered that the judge in the first proceedings, His Honour Judge Thornton QC, might well have been wrong in the decision that he reached. Buxton LJ summarised the position as follows (at [20]):

> "...Langley J concluded...that there was a reasonably compelling case that the decision of His Honour Judge Thornton on the terms of the agreements is open to serious challenge. That conclusion enabled Langley J to find that it would not bring the administration of justice into disrepute to permit the issue of the terms of the agreements to be relitigated; and that in terms of fairness, it would be unfair to Mr Laing if he were not permitted to pursue a case in which he alleges that it was the negligent drafting of the documentation which exposed him to the claim by Mr Watson/Burkle."

41. Buxton LJ noted that there were two difficulties with this approach (at [21]). The first was that it appeared to him that the attack on His Honour Judge Thornton QC's judgment "is in my view not as obviously cogent as Langley J concluded". The second – and for present purposes, more important – point was this. At [22], Buxton LJ noted:

> "…everything said to us and to Langley J in criticism of His Honour Judge Thornton's judgment could have been said to His Honour Judge Thornton (and mainly was so said); and could have been deployed in the appeal from His Honour Judge Thornton that was never brought. What is sort to be achieved in the second claim is, therefore, not the addition of matter that, negligently or for whatever reason, was omitted from the first case, but rather a relitigation of the first case on the basis of exactly the same material as was or could have been before His Honour Judge Thornton."

In these circumstances, the second claim was an abuse of process (at [25]):

> "I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim to advance exactly the same case as was tried and rejected by His Honour Judge Thornton. If His Honour Judge Thornton's judgment was to be disturbed, the proper course was to appeal, rather than seek to have it in effect reversed by a court not of superior but have concurrent jurisdiction hearing the second claim. That the second claim is in substance an attempt to reverse His Honour Judge Thornton is important in the context of wider principles of finality of judgments. In Hunter, at 545D, Lord Diplock said that the proper course to upset the decision of a court of first instance was by way of appeal. Where, wholly exceptionally, a collateral, first instance, action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see *per* Earl Cairns LC in Phosphate Sewage v. Molleson, (1879) 4 App Cas 801 at 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all."

The existence of fresh evidence going to the matter resolved in the earlier proceedings was not the only basis upon which a collateral challenge might be justified (at [27]):

> "I of course agree that it will not necessarily, or perhaps usually, be a valid objection to a claim for solicitor's negligence in or about litigation that the claim asserts matters different from those decided in that litigation. That is so not only of cases where the solicitors have made what might be called administrative errors that have prevented the earlier proceedings from being properly pursued or their outcome challenged by the proper means (e.g., Walpole v. Partridge & Wilson, [1994] AC 106); but also where errors in assembling the evidence or understanding the law are alleged to have led to an incorrect result, as was the case in Hall v. Simons itself. But the present case is significantly different from those just mentioned. The difference is that, as shown in [19] above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of His Honour Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That is an abusive relitigation of His Honour Judge Thornton's decision not by appeal but in collateral proceedings, and in substance if not strictly in form falls foul of the Phosphate Sewage rule."

42. The decision of Moses LJ was to similar effect:

> "36 I should explain why I conclude that the challenge is impermissible. Allegations of negligence during the course of litigation, against solicitors or advocates, will normally involve an attempt by a claimant to demonstrate that the previous conclusion of the court would have been different, absent negligence on the part of the lawyer. In many cases it will, indeed, be necessary to do so in order to prove causation and loss. The paradigm is the loss of a case due to negligent advocacy. But to bring such proceedings for negligence does not bring the administration of justice into disrepute; Hall v. Simons teaches to the contrary.
>
> 37. But such cases differ from the instant appeal in two important respects. Firstly, in the normal run of case, the impugned conduct of the lawyer is independent of the factual conclusions of the court; those conclusions are only relevant to prove causation and loss. His case does not, in reality, involve any challenge to the findings or conclusion of the court. He merely contends that, in the light of the negligence of which he now complains, the court's conclusions would have been different. But this not so in the present case. As Buxton LJ has demonstrated (at [19] and [27]), the claimant cannot establish that his adviser's drafting of the agreements was negligent without challenging the judge's findings as to credibility and fact. To make good the allegations of negligence, Mr Laing must show that his account of the agreements is the truth. He must

demonstrate that His Honour Judge Thornton's judgment of his credibility was wrong.

38. Secondly, generally in actions against legal advisers arising out of litigation, the losing party's allegations of negligence could not have been advanced in the case which he lost. They arise only after the case is concluded. But in the present case, the claimant had every opportunity during the course of the trial to raise, as he would have it, the inadequate drafting. The more Mr Marks, QC emphasised the strength of Mr Laing's position on the basis of the written evidence, the harder it became to understand why the errors of Mr Kelly were not fully aired at trial. On Mr Laing's account the 1999 and 2002 written agreements were inadequate. Mr Laing had every opportunity at trial to explain that the inadequacies were due to the incompetence or misunderstanding of Mr Kelly."

43. Laws LJ agreed with both judgments.[13]

(3) Synthesis and the Judge's approach

44. From this discussion of the cases, the following points emerge:

i) The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an exceptional jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to – indeed, has a duty to – control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people: Hunter at 536 (paragraph 30 above); Bairstow at [38] (paragraph 34 above); Laing at [12] (paragraph 34 above).

[13] Bairstow – considered in paragraph 35 above – is not referred to in the judgment. We asked Mr Pooles, QC – who appeared before the Court of Appeal in Laing – whether Bairstow was cited to the Court of Appeal on this occasion. Mr Pooles' recollection was that it was cited, but he could find no document to confirm that recollection.

ii) Any further attempt to define the circumstances in which this power should be exercised is subject to this overriding formulation of the principle, and can only be helpful if seen in this light. Thus, there can be identified a class of abuse which involves the relitigation of issues which have already once been determined by a court of competent jurisdiction in earlier proceedings. There are a number of statements in the cases suggesting that such relitigation may be regarded as abusive: Hunter at 541 (paragraph 29 above); Hall at 702-703 (Lord Hoffmann, paragraph 33(iii) above); Walpole at 116 (paragraph 37(ii) above); Laing at [22] (Buxton LJ, paragraph 40 above) and [37]-[38] (Moses LJ, paragraph 41 above).

iii) However, the cases make clear that to regard relitigation as even *prima facie* amounting to an abuse of process would be to adopt too rigid an approach and to disregard the importance of individual circumstance and the need to consider each case on its own facts: Hall at 702-703 (Lord Hoffmann, paragraph 33(iii) above); Walpole at 116 (paragraph 37(i) above). It is, to my mind, very significant that when articulating general principles regarding the abuse of process jurisdiction, Morritt V-C did not specifically mention relitigation: Bairstow at [38] (paragraph 34 above).

iv) In terms of the facts and circumstances that render relitigation potentially abusive, the following points are of particular relevance:

a) There is a clear distinction to be drawn between the collateral challenge of an anterior criminal decision when compared to the

collateral challenge of an anterior civil (to include matrimonial[14]) decision. There is a public interest in criminal convictions only being challenged by way of appeal, and for them not otherwise to be called into question. As Lord Hoffmann put it in Hall (in the long passage quoted at paragraph 33(iv) above):

> "...it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a please of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute...On the other hand, in civil (including matrimonial cases), it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into disrepute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications..."

b) There is a second, important, distinction between collateral challenge to anterior criminal rather than civil decisions. As Lord Diplock emphasised in Hunter (at 540), criminal decisions do not give rise to *res judicata* estoppels in the way that civil decisions do. That is, at least in part, because there is no meaningful identity of parties between the earlier (criminal) and later (civil) decisions. That, in turn, means that the abuse doctrine has an inevitably greater role where the anterior proceedings the subject of collateral challenge are criminal rather than civil. The doctrine of *res judicata* estoppel does not operate in the criminal sphere as they do in the civil.

[14] See Hall at 705-707 (Lord Hoffmann, paragraph 33(iv) above).

c) Thirdly, and relatedly, it is necessary to be very clear what is meant by "relitigation". In my judgment, relitigation means arguing the same issue, that has already been determined in earlier proceedings, all over again in later proceedings. In civil proceedings, generally speaking, for an issue to be the same, it will arise as between the same parties (or their privies) That is why, in such cases, the doctrine of *res judicata* estoppel comes into play. The role of the doctrine of abuse of process is, correspondingly, much more limited. The abuse doctrine will only arise where one of the parties to the earlier litigation sues a stranger to that litigation. In such a case, the claim will typically be permissible and not abusive, and that will generally be because the case is not one of relitigation at all. Rather, the stranger to the earlier litigation will be the subject of the later claim because that person has done or failed to do something which (had that person behaved as he or she should) affected the terms or nature of the anterior decision. Why or how that earlier decision was affected will depend on the individual circumstances. It may be that the later claimant's former legal advisers failed properly to prepare the case (see the example in Laing at [27] (Buxton LJ at paragraph 40 above) and [36] (Moses LJ at paragraph 41 above) or failed, in an appeal, to deploy or consider a potentially winning point (Walpole at paragraph 37 above). In all of these cases, what is being focussed on is "the impugned conduct of the lawyer [which is]

independent of the...conclusions of the court" in the anterior decision (Laing at [37] (Moses LJ at paragraph 41 above). None of these cases involves the adduction of new evidence within the meaning of Phosphate Sewage and it is quite clear that these later so-called "collateral" challenges are regarded as permissible even though there was no new evidence which would meet the stringent test in Phosphate Sewage.

v) It follows that, at least where the anterior proceedings are civil, Phosphate Sewage is of no application, and not to be used as a test for the purpose of determining whether the subsequent proceedings are abusive or otherwise. Arnold J was correct to doubt the applicability of the Phosphate Sewage test in Ridgewood Properties Group Ltd v. Kilpatrick Stockton LLP, [2014] EWHC 2502 (Ch) at [43] for exactly these reasons. The fact is that subsequent civil litigation that calls into consideration an anterior civil decision may or may not be abusive depending on facts that may have nothing to do with relitigation in its strict sense or the adduction of "new" evidence within the Phosphate Sewage test. Thus:

a) In Hall, Lord Hoffmann gave an example of subsequent proceedings which – whilst not involving relitigation – was potentially abusive (at 706-707):

> "...The action for negligence may be an abuse of process on the ground that it is manifestly unfair to someone else. Take, for example, the case of a defendant who publishes a serious defamation which he attempts unsuccessfully to justify. Should he be able to sue his lawyers and claim that if the case had been

> conducted differently, the allegation would have been proved to be true? It seems to me unfair to the plaintiff in the defamation action that any court should be allowed to come to such a conclusion in proceedings to which he is not a party. On the other hand, I think it is equally unfair that he should have to join as a party and rebut the allegation for a second time. A man's reputation is not only a matter between him and the other party. It represents his relationship with the world. So it may be that in such circumstances, an action for negligence would be an abuse of the process of the court..."

b) By contrast, Laing (paragraphs 38*ff* above) is a case where the earlier decision of His Honour Judge Thornton was being re-visited in later and distinct proceedings on the basis of no new evidence at all. In those circumstances, it is easy to see how the existence of or potential for divergent judgments of courts of co-ordinate jurisdiction does amount to a potential abuse of the court's processes (as the Court of Appeal found in Laing). In reality (as the Court of Appeal also found in Laing), the subsequent proceedings were no more than an (improper) attempt to appeal the decision of His Honour Judge Thornton.

vi) In her very helpful submissions, Ms Evans, counsel for Banner Jones, sought to deploy the principle of finality of litigation in support of her contention that the Phosphate Sewage test did apply as a test for what was and what was not abusive. I do not accept that contention. Whilst, of course, finality in litigation is important, it is ensured by the doctrine of *res judicata* estoppel: see The Ampthill Peerage Case, quoted at paragraph 23 above. Where the later litigation is litigation that should, properly seen, have been an appeal of the earlier litigation, then the doctrine of abuse may have a role, as in Laing. But where the later

> proceedings are simply alleging a breach of duty on the part of the claimant's legal advisor, which breach resulted in a loss that is measured by reference to the probability that the earlier judgment would have been different, questions of finality of process simply do not arise.

45. In short, the doctrine of abuse of process is best framed, at least in the context of a "collateral" attack on a prior civil decision, by reference to the test expounded by Lord Diplock and Morritt V-C:

> If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if *(a)* it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or *(b)* to permit such relitigation would bring the administration of justice into disrepute.

(4) Conclusions

46. It follows that Ground 1 and, because embraced by Ground 1, Ground 2 both succeed. The Judge erred, in his careful judgment, in placing reliance on the Phosphate Sewage test, and in failing to apply the test set out in paragraph 45 above. As was noted in paragraph 18 above, the Judge relied upon [27] of Laing: he should also have borne in mind [12], [22], [25] and [36]-[38].

47. It will be necessary to reconsider the question of abuse of process to the extent that it informed the Judge's conclusion that certain allegations in the draft

Amended Particulars of Claim should be struck out. Since it will be necessary – when determining Grounds 3 to 5 – to consider the specific allegations made by Mr Allsop against Banner Jones and Mr Cohen, I will consider such questions in the course of my consideration of these specific grounds. In this regard:

i) The Judge was very conscious that the attack on Mr Allsop's claim involved not merely a contention of abuse of process but also of no reasonably arguable case. Thus, in paragraph 71 of the Judgment, he said:

> "[Mr Allsop's] case is dependent on proving that, but for the alleged breaches of duty, the outcome of the financial remedy proceedings hearing would have been more favourable to Mr Allsop. To consider whether the Claimant has a real prospect of success in such an argument and/or whether his claim involves an impermissible attack on the judgment, it is necessary to consider the detail of that judgment, the material upon which it is based and the Claimant's criticism of that material."

Paragraph 80 is to similar effect:

> "The majority of the challenges made by the Defendants to the Claimant's case is that, regardless of any argument of breach of duty, the Claimant has no real prospect of success in showing that the alleged breaches would have made any difference to the outcome of the case and/or that the argument that the breaches would have made a difference is an abuse of process, involving a collateral attack on the judgment of District Judge Buxton. For this reason, the focus in my analysis is largely on the alleged differences in outcome."

ii) It is evident from the Judgment that the Judge considered both elements of the Applications together. It is, at times, difficult to ascertain the precise basis for the decision to strike out a particular allegation. In particular, the Judge appears to have considered <u>both</u> Banner Jones and Mr Cohen to have applied to strike out on the basis

of abuse (see paragraph 3 of the Judgment), when in fact only Banner Jones was taking this point (see paragraph 5 above).

iii) For the reasons given by Lord Hoffmann in Hall at 707 (the last paragraph in the quotation at paragraph 33(iv) above), it is generally preferable to consider whether a claim or allegation should be struck out for failing to disclose a reasonably arguable case, before the question of abuse of process is considered. On this basis, if a claim is not properly arguable, then the question of abuse does not arise. On the other hand, the question of whether a claim or allegation is abusive is one that is best considered when once it has been decided that the claim or allegation is reasonably arguable. As Lord Hoffmann noted in Hall at 705, the true question before the court on an application to strike out for abuse of process is whether the bringing of a potentially successful claim would be manifestly unfair or bring the administration of justice into disrepute. Striking out a claim or allegation on the ground of abuse of process has nothing to do with its arguability. Accordingly, in the following sections of this judgment, I consider first whether a particular allegation discloses an arguable case and only then the question of abuse of process.

C. GROUND 3: THE REATTRIBUTION ISSUE

(1) Introduction

48. The nature of Ground 3 was briefly described in paragraph 14(iii) above. The essential point, as it was put to us by Mr Maynard-Connor for Mr Allsop, was that Banner Jones failed properly to prepare Mr Allsop's case, and that had the

case properly been prepared, the District Judge's conclusion on the question of reattribution would have been different.

49. In order to determine the appeal against the Judge's Order striking out this allegation, it is necessary to consider first the ruling of District Judge Buxton in the Financial Remedies Judgment (Section C(2) below). I then consider the nature of the allegations made by Mr Allsop against Banner Jones in this regard (Section C(3) below). It is fair to say that Mr Maynard-Connor's submissions on behalf of Mr Allsop expanded considerably on the facts and matters pleaded in the draft Amended Particulars of Claim. In considering whether a reasonably arguable case is disclosed, I have had regard to this expansion, so as to consider (as the Judge did) Mr Allsop's case at its highest. Finally, in Section C(4), I consider the Judge's Order, the outcome of Ground 3 and the points raised by Banner Jones' respondent's notice.

(2) The Financial Remedies Judgment

50. The District Judge made a reattribution to the monies to be paid by Mr Allsop to Mrs Allsop in Mrs Allsop's favour in the amount of £630,522. In other words, having ascertained the payments that would be required to divide the matrimonial estate equally between Mr Allsop and Mrs Allsop, District Judge Buxton further obliged Mr Allsop to make a payment of £630,522 out of his share.

51. The District Judge's conclusion in this regard is contained in paragraph 31(10) of the Financial Remedies Judgment and the relevant part of the Financial Remedies Order is paragraph 2(b), which simply provides that Mr Allsop shall pay Mrs Allsop the lump sum of £630,522 by 4:00pm on 15 May 2016.

52. Before turning to the District Judge's conclusions in paragraph 31(10), it is necessary to set out some of the District Judge's reasoning:

i) The District Judge began by noting that this case was unusual in that the parties had effectively agreed to divide their assets equally between themselves, the areas of disagreement being in relation to the value of those assets and when payment by Mr Allsop to Mrs Allsop should be made (paragraph 18 of the Financial Remedies Judgment).

ii) The District Judge accepted equality was a fair basis for the division of assets, "but for [Mr Allsop's] substantial gambling losses. The question is whether they ought to be reattributed and if so to what extent" (paragraph 19 of the Financial Remedies Judgment).

iii) The District Judge rejected the submission made by Mr Cohen on behalf of Mr Allsop that there should be no reattribution at all (paragraph 28 of the Financial Remedies Judgment):

> "The instant case is not about gambling in the sense in which we most often use it, e.g. horse racing, nor is it about costs. It is about reckless speculation on the stock market during the latter years of the marriage. Mr Cohen said I would be creating new law or at least an extension of the existing law if I found that reckless speculation during the currency of the marriage could properly be the subject of an application. For reattribution. I do not accept that proposition…"

iv) The District Judge then considered what, if any, reattribution should be ordered in the case before him (at paragraphs 29, 30, 31(9) and 31(10) of the Financial Remedies Judgment). He concluded (at paragraph 31(9)) that Mr Allsop's total losses were "not less than £4,000,000" and that accordingly each of Mr and Mrs Allsop had lost £2,000,000 on the basis of an equal split of their assets. The District Judge did not

consider it appropriate for Mr Allsop to compensate Mrs Allsop for the full £2,000,000 of her loss (paragraph 31(10)), and he recognised that he needed to take account of the fact that Mr Allsop "does not have any liquid assets" (paragraph 31(10) first bullet). In two later bullet points, the District Judge noted that Mr Allsop had a related claim against Barclays:

> "• [Mr Allsop] hopes to recover between £3-4 million from Barclays Bank plc. The offer he has received is for £630,522. [Mr Allsop] hopes Barclays will increase their offer. They may; then again, they may not. All I know for certain is that the sum of £630,522 is immediately available to him should be choose to settle his claim against Barclays now.
>
> • It is impossible to say how much [Mr Allsop] will ultimately recover from Barclays Bank if he chooses to pursue his claim. [Mr Allsop] hopes to recover between £3-4 million, but this may be no more than unfounded optimism; it may be wildly short of the mark."

v) The District Judge concluded that Mr Allsop could have the £630,522 from Barclays "very quickly if he so chose" (paragraph 31(10.1) of the Financial Remedies Judgment), and ruled that:

> "…it would be fair to leave [Mr Allsop] to pursue his claim against Barclays and to direct that after deducting the reasonable costs of so doing, the net balance should be divided equally between the parties with [Mrs Allsop] giving credit for the reattribution payment of £630,522 which I have determined. If [Mr Allsop] fails to recover more than £630,522, he will not be out of pocket in having paid the said sum to[Mrs Allsop]. The sum will have come from Barclays. At the same time, [Mrs Allsop] will have substantially less than she would have received upon divorce had [Mr Allsop] not been reckless with his gambling with Barclays Wealth. I consider that [Mr Allsop, by reason of the reattribution payment which I have determined, will be making a fair contribution to [Mrs Allsop's] disadvantaged financial position brought about by his reckless gambling…"

(3) The allegations made against Banner Jones

53. Ground 3 concerns allegation A8, namely Banner Jones' alleged failure "to obtain evidence as to the nature of Mr Allsop's claims against Barclays". According to the Judge at paragraph 38 of the Judgment, allegation A8 is pleaded in paragraphs 70, 98.1.1 and 98.1.2 of the draft Amended Particulars of Claim.[15]

54. The draft Amended Particulars of Claim provide as follows:

> "70 Despite the complex nature over the claims made against Barclays and the nature and extent of the offers made by it, which offered various sums which vested in other members of the Allsop family, not just Mr Allsop, and for the most part involved offsetting sums against Mr Allsop's alleged liability to Barclays as opposed to a cash payment to him, Mr Netting failed to advise Mr Allsop, and failed to take reasonable steps to ensure that written evidence in the form of witness statements from Mr Allsop and from Ms Jill Thomas of Banner Jones Wealth Management LLP (Mr Allsop's financial advisor who was assisting in the claims against Barclays) were filed and adduced at the Final Hearing so as to properly present and evidence (1) the claims against Barclays (including the relevant background to the same), (2) the various offers made by it and (3) the costs and expenses that were being incurred by Mr Allsop in pursuing the claims against Barclays (which included £18,197 invoiced by Banner Jones Wealth Management LLP)."
>
> …
>
> 98 Mr Netting further failed:
>
> 98.1 prior to the Final Hearing:
>
> 98.1.1 despite (1) recognising that Mr Allsop's dealings with Barclays and the impact of the same were a "big issue" as confirmed in a letter to Mr Allsop dated 28 July 2014 and (2) it being obvious that witness statements dealing with all relevant matters should be obtained as noted at paragraph 46.4 above to take reasonable steps to obtain and use all necessary and available evidence as to such dealings, including witness statements from

[15] Paragraphs 68 and 69 refer to an error made by the District Judge in considering the offer of compensation from Barclays to be "immediately available". That error was the substance of allegation B2, which was struck out by the Judge and against which there was no appeal before us. That is because the error in the Financial Remedies Judgment was brought to the District Judge's attention and corrected by him in his Form N460 giving his reasons for refusing permission to appeal.

> Mr Allsop and others, including from James Allsopp as to his dealings with Barclays, so that the Allsop families dealings with and the claims against Barclays could be fully explained at the final hearing, Mr Netting further failed to advise Mr Allsop that if James Allsop would not voluntarily provide a statement that a witness summons should be issued against him so that oral testimony from James Allsop could be adduced at the Final Hearing;
>
> 98.1.2 As a corollary, to advise Mr Allsop to make a Subject Access Request in order to obtain information held by Barclays with respect to Mr Allsop's dealings with, and the claims against Barclays. For the avoidance of doubt, had such advice been given, Mr Allsop would have made such a request and further, had such a request being made, the information now relied upon by Mr Allsop in the Barclays claim was available and could and should have been obtained prior to the final hearing…"

55. The essence of the allegation is that Banner Jones failed properly to prepare Mr Allsop's case for trial. There are a number of steps that it is said Banner Jones should have taken, the most significant and obvious of which was a failure to prepare a witness statement setting out Mr Allsop's evidence in relation to his gambling losses. It is clear from the transcripts of Mr Allsop's evidence before the District Judge that Mr Allsop had difficulty in getting his case across because his story was coming out, for the first time, in his oral evidence, and he had no witness statement to fall back on.[16] He was at times, reduced to producing, during adjournments and overnight, written notes trying to articulate his case.

56. In my judgment, the allegation of breach of duty on the part of Banner Jones is reasonably arguable. I say nothing more about its prospects of success, and it is important to note that Ms Evans, on behalf of Banner Jones, whilst making clear that all allegations against Banner Jones were strenuously resisted, did

[16] As Mr Maynard-Connor accepted, Mr Cohen sought to ameliorate the position by having Mr Allsop give his evidence by way of a more extensive examination in-chief than would be usual.

not seek to suggest that the allegation of breach of duty was not reasonably arguable.

57. Rather, as is made clear from Banner Jones' respondent's notice, the reason it was contended that there was no reasonably arguable case was because Mr Allsop had failed to identify facts and matters which, had they been brought to the attention of District Judge Buxton, would have had a real and substantial chance of changing the outcome of the case. As has been described (paragraph 8 above), this is a necessary element, at least of Mr Allsop's tortious causes of action.

58. Considering the terms of the draft Amended Particulars of Claim, there is a clear failure to plead what the effect of a properly prepared case would have been on the Financial Remedies Judgment and the consequential Financial Remedies Order. In the course of his submissions, Mr Maynard-Connor referred us to the terms of the Reply Mr Allsop had pleaded to Banner Jones' Defence and to other material contained in and exhibited to statements of Mr Allsop and Mr Simon Lockley, a solicitor now retained by Mr Allsop. This material, I should be clear, was not new, but was before the Judge on the hearing of the Applications.

59. From this material – and, in particular, from the Reply – it is possible to glean how it could be pleaded that a properly prepared case might have caused the Financial Remedies Judgment and the consequential Financial Remedies Order to be different. In particular:

    i) Mr Allsop sought to contend in the witness box that he had curtailed his gambling on the stock market. His evidence – which, of course, was

not buttressed by any witness statement from him – was simply not believed:[17]

Q (Mr Hajimitis, Counsel for Mrs Allsop)	And that after you had had the conversation with her in 2007 when she had asked you whether you were going to – she did ask you whether you were going to lose the house, did she not, when you told her about the £1 million loss?
A (Mr Allsop)	Yeah.
Q (Mr Hajimitis)	That she was extremely upset?
A (Mr Allsop)	Aileen is very highly strung and does get upset, no denying it.
Q (Mr Hajimitis)	And, in fact, because of the extent of her distress, you told her you were going to stop, did you not?
A (Mr Allsop)	No. I said I would curtail it, which I did do. Drastically.
Q (District Judge Buxton)	"Curtail" means to stop. It does not mean to drift along in some half-baked fashion afterwards.
A (Mr Allsop)	Sorry, I thought...

In the Financial Remedies Judgment, the District Judge noted (at paragraph 29(d) that "...[Mr Allsop] took massive risks. He failed to control his appetite for investment and then took further risks. Above all, he could not grasp the nettle which he himself had planted. Had he done so, his losses would have been far less. Had he ceased trading when he promised [Mrs Allsop] that he would curtail his activities, the losses would have been reduced."

Paragraph 20.2.3 of the Reply avers that part of the preparation for trial would have contained an analysis of the extent to which Mr Allsop

[17] Transcript of the proceedings on 16 September 2016 at p.59.

curtailed his share dealings after 2007, which was (so it is contended) very substantial.

ii) Mr Allsop sought to contend in the witness box that the losses that were undoubtedly incurred by unwise speculation on the stock exchange were not all his. Mr Allsop traded not only in his own name, but in the names of Mrs Allsop and his children. With the exception of his son, James, Mr Allsop appeared to accept, even before us, that this was "his" trading. However, giving evidence to the District Judge, Mr Allsop sought to explain that James traded on his own account, incurring substantial losses of his own, which Mr Allsop "had been unfairly and wrongly persuaded by Barclays into assuming responsibility for" (to quote from paragraph 20.2.1 of the Reply). Although there are passing references in the transcript to James' role in the losses that were sustained, Mr Allsop was unable to make the point with any particularity and it is unsurprising that the Financial Remedies Judgment makes only passing reference to James' involvement.

I stress that I am doing no more than articulating in an abbreviated form, the points Mr Maynard-Connor made on behalf of Mr Allsop. I say nothing about their accuracy or correctness. I turn to the question of whether – if properly pleaded – they would amount to a reasonably arguable claim.

(4) Conclusions

(a) Ground 3 of the appeal: reasonable arguability

60. The Judge dealt with allegation A8 in paragraphs 131*ff* of the Judgment. He concluded, referring to the plea at paragraph 23 of the Reply:

> "139 But on the evidence given by Mr Allsop and the findings on credibility made by the [District Judge], it is not possible to see how this would have altered his conclusions on the issue of reattribution. The Judge's findings, on Mr Allsop's own admission, as to the loss that he had caused to the matrimonial pot inevitably led to the finding of wanton dissipation on this scale.
>
> 140 In so far as there were other aspects of the case where the [District Judge] formed adverse views of [Mr Allsop's] credibility, I have dealt with them separately in this judgment. Taken individually, none of them has merit. Even taking those criticisms collectively, [Mr Allsop] fails to show that, but for the alleged breaches of duty, he had a real prospect of obtaining a better outcome to the claim.
>
> 141 [Mr Allsop] fails to show credible material such that a claim has a real prospect of success, without mounting a collateral attack on the judgment of District Judge Buxton. For this reason, these aspects of the claim should be struck out as an abuse of process and none of the allegations survive [Banner Jones' Application]."

61. It is evident that there is an elision, in these paragraphs, between striking out an allegation as an abuse of process and striking out an allegation for disclosing no reasonably arguable case. Dealing (for the moment) only with the question of whether Mr Allsop's allegations have disclosed a case that is reasonably arguable, I consider that the Judge erred in concluding that there was no reasonably arguable case and that his order striking out allegation A8 must be varied. As to this:

i) Ms Evans stressed – as the Judge did – that Mr Allsop could not, in this case, escape the very adverse findings that District Judge Buxton made

regarding Mr Allsop's credibility.[18] She also stressed – as did the Judge – that on the evidence before him, the District Judge's conclusions might very well be said to be generous to Mr Allsop, and that the District Judge might, quite properly, have made a far more drastic reattribution than he in fact did.

ii) But that is substantially to miss the point. The point is not whether, on the evidence before him, the District Judge reached the correct conclusion. The point is whether, had the evidence been as it should have been, Mr Allsop has a reasonably arguable prospect of showing a real or substantial chance that the outcome of the financial remedies proceedings would have been different and better for him.

iii) Ms Evans sought to contend that the points I have described in paragraph 59 above were before the District Judge, such that more and better evidence produced in the course of preparation for the hearing would have made no difference. That is a contention that is unsustainable when one considers the material that was before the District Judge as against the material that could have been before the District Judge.

62. Whilst I have some sympathy for the Judge in reaching the conclusion that he did given the way in which the draft Amended Particulars of Claim puts

[18] That is not to say that findings on credibility in an earlier decision cannot be considered in later proceedings. For example, a court might conclude that *A* could not be believed on a certain point, and that *A*'s credibility was therefore poor, when material could have been deployed – but negligently was not, showing that *A* was telling the truth on this point, and that the court might have made different findings on credibility if it had seen this material.

allegation A8, I consider that, subject to two points, Ground 3 should succeed. These two points are:

i) The allegation must be fully and properly pleaded in Amended Particulars of Claim; and

ii) Paragraph 98.1.2 of the draft Amended Particulars of Claim pleads that Mr Allsop should have been advised to make a Subject Access Request. I very much doubt that such a request would have elicited anything useful about James' trading. If the point is to remain in the pleading, and this is a point I would make generally, it would be necessary to set out what that Subject Access Request would have revealed, and why that information would have mattered.

(b) The respondent's notice

63. As I have described (paragraph 14(iii)(b) above), Banner Jones have filed a respondent's notice in relation to this allegation. Clearly, it was filed on the basis that the Judge's conclusion on abuse of process was overturned and that, on the proper reading of the Judgment, there was no conclusion (one way or the other) on reasonably arguable case.

64. In my judgment, the Judge did make a finding on this point, and that he struck allegation A8 out on the basis that it disclosed no reasonably arguable case. However, for the reasons given above, it seems to me that a reasonably arguable case has been made out and that allegation A8 should not be struck out. In these circumstances, the point made in the respondent's notice must be dismissed.

(c) Abuse of process

65. In light of the law considered in Section B above, it is plain that there is no abuse of process so far as allegation A8 is concerned. There is no suggestion that the District Judge erred in relation to the material that was before him. This is not a case like Laing where the same point on the same evidence is being run in separate proceedings. This is a case where the whole point is that certain material was not placed before the trial judge, and that had it been, the outcome would or might have been different. There is nothing abusive in this.

D. GROUND 4: THE DOUBLE PENALTY AND INTEREST ISSUES

(1) Introduction

66. The general nature of the double penalty and interest issues – and the points that arise on this appeal – were described in general terms in paragraph 14(iv) above. This section considers in a little greater detail the terms of the Financial Remedies Judgment (Section D(2) below) before considering the points that arise in relation to allegations the various allegations that Mr Allsop seeks to reinstate by this appeal. As to these:

i) Allegations A12(e) and C2 (both against Banner Jones) concern the double penalty issue. A12(e) concerns the adequacy of preparation of the case in relation to this point and C2 concerns the failure on the part of Banner Jones to advise Mr Allsop to appeal the District Judge's order in this regard. These allegations are considered in Section D(3) below.

ii) Allegation G1(c) (against Mr Cohen) concerns the failure on the part of Mr Cohen to advise Mr Allsop to appeal the District Judge's order in this regard. Given its similarity to the allegations made against Banner Jones, this allegation is also considered in Section D(3) below.

iii) Allegations A13 (against Banner Jones) and allegation E3 (against Mr Cohen) both concern the order made by the District Judge as regards interest. As against both Defendants, it is said that they failed properly to advise Mr Allsop to seek an order that interest be payable at a commercial rate, and not the Judgment Act rate. These allegations are considered in Section D(4) below.

(2) The Financial Remedies Judgment

67. District Judge Buxton concluded in the Financial Remedies Judgment:

i) That various of the lump sum payments to be made by Mr Allsop to Mrs Allsop be made by 4:00pm on 15 January 2016 (paragraph 31(11) of the Financial Remedies Judgment). It should be noted that these sums were substantial, amounting to £2,233,142.

ii) That the reattribution payment (the subject of consideration in Section C above) be made by 4:00pm on 15 May 2016 (paragraph 31(12) of the Financial Remedies Judgment). As I have described, this payment was in the sum of £630,522.

iii) That interest be due on any outstanding lump sums at the High Court judgment rate (8%) accruing daily from the date payment was due (paragraph 31(13) of the Financial Remedies Judgment).

iv) That maintenance be paid as follows (paragraph 31(15) of the Financial Remedies Judgment):

> "[Mrs Allsop's] monthly expenses of £6,001.29 are probably less than [Mr Allsop's] given that he pays a monthly mortgage payment of £4,598. The present order which provides for a monthly payment of £2,500 is wholly inadequate. The husband has ample scope to pay himself more as pointed out by Leslie Howe. With effect from 16 September 2015, the payments of spousal maintenance will increase to £11,000 per month reducing to £4,000 per month when the first instalment of capital is paid as provided for by paragraph (11) hereof and to nil when the reattribution payment (£630,522) is paid…"

68. These findings were all incorporated into the Financial Remedies Order made by District Judge Buxton consequential upon the Financial Remedies Judgment.

(3) The allegations regarding the double penalty

69. In the Judgment, the Judge said this regarding the double penalty point:

> 144 [Mr Allsop's] criticism of both Defendants is in essence of a failure to appreciate and/or draw to District Judge Buxton's attention that the order for payment of interest and/or enhanced maintenance pending payment of the lump sums was unfair because:
>
> (a) Mr Allsop did not have easy access to the means to meet the lump sums because the only likely source of monies to do so was the proceeds of sale of the shares in CMCL, yet Mr Wheeldon-Wright's option of pre-emption meant that sale might be delayed;
>
> (b) In any event, to provide for the payment both of interest on outstanding sums and the payment of higher rates of maintenance pending discharge of the sums amounted to a double penalty.
>
> 145 It is clear that District Judge Buxton accepted that Mr Allsop did not have access to liquid assets. He knew that the sale of the shares in CMCL was the likely source of funds and indeed provided for a mechanism by which Mrs Allsop could seek to force such a sale if the funds were not forthcoming. On the other hand, he found Mr Allsop to be guilty of wanton dissipation of assets, to have withheld important financial information from his former wife and to have the potential to raise money from other sources. The [District Judge] noted Mr Allsop's evidence that he had "dragged his heels" in the financial remedy

> proceedings because if he could "resolve [the claim against Barclays] to my satisfaction, I can give [Mrs Allsop] a cheque and I can keep my business". Mr Allsop also said in oral evidence that he had an offer of £6 million from Mr Wheeldon-Wright to buy his shares in the business.
>
> 146 In such circumstances, there is no prospect of [Mr Allsop] maintaining his criticism against either Defendant. There was compelling evidence from which the Judge could conclude that Mr Allsop would delay payment to Mrs Allsop unless such conduct was deterred. Either:
>
> (a) The Judge had regard to that evidence in making the order, in which case this is a clear collateral attack, being based on the same material that influenced the Judge in his decision-making; or
>
> (b) The Judge did not have regard to that evidence, but there is no basis for concluding that he would have reached a different decision had he done so. Quite the contrary – Mrs Allsop would have had a respectable argument that it was perverse not to conclude that there should be some penalty to prevent a delay in the sum being paid."

70. The Judge thus concluded that the allegations should be struck out *(a)* as an abuse of process and/or *(b)* because they disclosed no reasonably arguable claim. It is not completely clear from the Judgment whether the Judge concluded that there was no reasonably arguable claim because there was no loss or whether he also concluded that no breach of duty had been demonstrated. Judging from the opening words of paragraph 144 of the Judgment, my conclusion is that he decided that the allegations disclosed no arguable case for both reasons.

71. I shall deal with the question of whether the allegations are reasonably arguable first. In my judgment, substantially for the reasons the Judge gave in paragraphs 144 and 145 of his Judgment (quoted in paragraph 69 above) the Judge was right. Out of deference to the arguments that were presented to us, I add the following:

i) The term "double recovery" is a misnomer. In no real sense was Mrs Allsop receiving money twice over. District Judge Buxton's order dealt with quite distinct issues:

a) The District Judge noted that, pending payment of the lump sums by Mr Allsop, Mrs Allsop's maintenance payments were "wholly inadequate". The District Judge's order increased them for that reason. Entirely unsurprisingly, those maintenance payments were to continue only until the lump sum payments were made by Mr Allsop. The increase to the maintenance payments thus simply reflected the fact that the existing order did not provide Mrs Allsop with enough to live on.

b) The payment of interest reflects the value of money withheld and served as an incentive to Mr Allsop to pay promptly.

Although it is true to say that the obligation to pay maintenance ceased on payment of the lump sums, and the obligation to pay interest would only begin if the lump sum payments were not made on time, that is the only correlation between the two payment obligations. Otherwise, the maintenance payments and the interest payments address entirely different concerns, and Mrs Allsop would in no sense be receiving double payment if the maintenance payments continued whilst interest accrued on the outstanding lump sums.

ii) The order made by the District Judge is one that was entirely open to him in his discretion. There is no way in which the order that he made could be characterised as one that was not open to him. Indeed, as the

Judge noted, an order not along these lines might actually be regarded as perverse, given the circumstances. Furthermore, this is not a case where it is said that additional or different evidence would or might have caused the Judge to reach a different conclusion. No such evidence has been identified or pleaded.

iii) The substance of allegation A12(e) against Banner Jones is that there was inadequate preparation of the case. It is difficult to understand what this could mean. Clearly, Mr Allsop's legal team did not agree to the Judge's approach: it was resisted, and arguments were made for a different set of orders. The District Judge – for the reasons he gave – made the orders that he did, and clearly rejected Mr Allsop's contentions. Allegation A12(e) appears to amount to no more than an assertion that Mr Allsop's legal team could have argued the point differently and – had they done so – the Judge would have reached a different conclusion. Put this way, not only do I fail to see any arguable breach of duty (no "game changing" argument, that would have or might have won the day, but which was negligently not put is identified), but also I see no arguable case for saying that there was a real or substantial prospect of the District Judge being persuaded away from the course he determined in the Financial Remedies Judgment had the case been put differently.

iv) The substance of allegations C2 (against Banner Jones) and G1(c) (against Mr Cohen) concerns the advice given to Mr Allsop as to which points to appeal. The essence of the allegations is that it was negligent

not to advise Mr Allsop to appeal; and that, if sought, permission to appeal would have been given, and there was a real or substantial chance that a better outcome for Mr Allsop would be obtained on the appeal. These allegations are, in my judgment, hopeless. I am quite prepared to accept that if Mr Allsop had been advised to appeal, he would have done so. However:

a) It seems to me fanciful to suggest that there was any prospect of obtaining a better outcome on appeal. As has been described, Mr Allsop did seek to appeal some points arising out of the Financial Remedies Judgment, but was refused permission to appeal both by the District Judge and by Her Honour Judge Carr, QC (see paragraph 4 above).

b) Given that this was a case where the District Judge's Financial Remedies Order was on this point (to put it at its lowest) clearly within the range of reasonable orders that he might have made, the prospects of obtaining permission to appeal would have been remote and prospects of that appeal succeeding (if permission had been granted) even remoter. In my judgment, it is not reasonably arguable to contend that either Banner Jones or Mr Cohen was in breach of duty in this regard.

72. Accordingly, I conclude that the Judge was right to strike out these allegations as disclosing no reasonably arguable case. In these circumstances, it is unnecessary to consider the respondent's notices. It is also unnecessary to consider the question of abuse of process, and I will confine myself to saying

that it is very difficult to discern what that abuse might be in the case of these allegations.

(4) The allegations regarding the rate of interest

73. In paragraph 147 of the Judgment, the Judge stated:

> "Allegations A13 and E3...are of slightly different quality in so far as they relate not to the imposition of a double penalty but rather that the penalty by way of interest on outstanding monies is excessive. The power to award interest arises by virtue of section 23(6) of the Matrimonial Causes Act. There is a wide discretion as to the correct rate. It is inconceivable that the Judge was not aware that he had a discretion as to the rate of interest to be paid or that to award interest at the judgment rate might be argued to be penal – both points are utterly obvious and will no doubt have been made many times to the Judge whilst on the bench and by the Judge himself whilst he was in practice before his appointment. It follows that the Judge must have consciously made the decision to adopt this interest rate. The allegation is a clear collateral attack on that judgment."

74. Allegations A13 and E3 are in substance the same, the first being made against Banner Jones and the second against Mr Cohen. I consider that the Judge was wrong to strike out these allegations for the following reasons:

i) The allegations are not that the District Judge needed to be told that he had a discretion as regards interest, and that he was not obliged to order interest at the Judgment Act rate. I have no doubt that District Judge Buxton would have been well aware of both points. Section 23(6) of the Matrimonial Causes Act 1973 provides that the court may order that interest be paid "at such rate as may be specified by the order".

ii) Rather, the allegations concern the fact that an argument was <u>not made</u> about the level of interest that the lump sums should carry if they were paid late by Mr Allsop. The Judge needed to be given a reason for departing from the rate he plainly regarded as the default, and it was

for Mr Allsop's legal team to advise Mr Allsop that the argument should be made. Given the difference between the Judgment Act rate and the commercial rates of interest that prevailed at the time of the Financial Remedies Judgment, such an argument could straightforwardly and easily been made.

iii) In my judgment, the failure on the part of Banner Jones and Mr Cohen to advise Mr Allsop on this point is reasonably arguable, both because there is an arguable breach of duty and because it is arguable that there was a real or substantial prospect of moving the District Judge away from an 8% rate.

iv) I do not consider that allegations A13 and E3 amount to an abuse of process. In no way do they involve a collateral attack on the decision of the District Judge. All that is being suggested by way of these allegations is that if an argument that was not made before the District Judge had been made, the outcome would have been better for Mr Allsop.

E. GROUND 5: ALLEGATION G1(b)

75. It is possible to deal with Ground 5 relatively briefly. The nature of Ground 5 was summarised in paragraph 14(v) above. Essentially, Ground 5 rests on two points. First, that there is an inconsistency between the Judge not striking out allegations A4 to A7 (against Banner Jones) and the Judge striking out allegation G1(b) (against Mr Cohen). Secondly, that the Judge gave no reasons for his decision, and this court cannot be assured as to the basis on which the allegation was struck out.

76. I consider these two points in turn.

77. As to the first point, I do not accept that there is a similarity between allegations A4 to A7 and allegation G1(b). Allegations A4 to A7 allege that Banner Jones failed to take certain steps in preparing a point at issue in the financial remedies hearing, as a result of which there was a real or substantial chance that the outcome of the proceedings, on this point, would have been different and to Mr Allsop's advantage. By contrast, allegation G1(b) contends that Mr Cohen failed in breach of his duty to advise Mr Allsop to seek to appeal the same point.

78. It is readily apparent that there is a stark difference between presenting a case negligently such that a point might have been decided differently and advising as to whether that point – decided "wrongly" because the case was negligently put together – should be appealed. Indeed, I consider that the fact that the Judge considered allegations A4 to A7 to be reasonably arguable to be an indicator (albeit no more than that) that allegation G1(b) was not reasonably arguable. That is because the one thing one cannot do on an appeal is assert that the judge decided the case wrongly on the basis of material that could have been, but was not, before the court.[19]

79. Turning to the second point, it is of course regrettable that the Judge did not provide reasons for his decision. That said, there were a great many allegations for the Judge to consider, and he conscientiously considered them. It is significant that although the Judgment was circulated in draft for the parties to identify corrections, this omission was not identified by any party.

[19] I am assuming that the conditions laid down in Ladd v. Marshall (or whatever similar rule might apply in other jurisdictions) are not met.

80. I do not consider that it is appropriate to seek to guess the reason why allegation G1(b) was struck out. Rather, I should consider whether the order made – to strike out the allegation – was rightly or wrongly made, on basis that it is orders and not judgments that are appealed. In my judgment, the order striking out allegation G1(b) was correctly made:

i) Allegation G1(b) is pleaded in paragraph 108A of the draft Amended Particulars of Claim:

> "Further, despite Mr Allsop raising the failure to take into account the impact of CAP clean as a potential ground of appeal, Mr Cohen wrongly advised against this being included for the purposes of Mr Allsop's proposed appeal. As a consequence, the issue was not included within the Grounds of Appeal."

ii) It is not necessarily negligent for a barrister to advise not to appeal a certain point. There are no particulars of negligence pleaded,[20] and I consider that on the face of the pleading and having regard to the additional material outside the pleading there is no reasonably arguable case that Mr Cohen was negligent in this regard.

iii) Furthermore, substantially for the reasons given in paragraphs 71(iv) above, I do not consider there to be a reasonably arguable case that Mr Allsop has suffered actionable loss as a result of the failure to seek permission to appeal in relation to this point. There seems to me to be no reasonably arguable basis for contending that there was a real or

[20] It was suggested in the course of argument that the omission was filled by earlier paragraphs in the draft Amended Particulars of Claim. I do not accept this. Paragraph 108A is obviously and expressly ("Further...") a self-standing point. Nor, for the reasons I have given, can it be said that the negligence alleged is supplied by allegations A4 to A7 against Banner Jones: those allegations are entirely different in nature.

substantial chance that an appeal on this point (assuming permission to appeal was granted) would result in a better outcome for Mr Allsop.

iv) In these circumstances, it is unnecessary to consider the question of abuse of process, and I will confine myself to saying that it is very difficult to discern what that abuse might be in the case of these allegations.

81. For all these reasons, Ground 5 is dismissed.

F. "SWEEP UP" AND CONCLUSIONS

82. The allegations under appeal are: A8, A10, A12(e), A12(h), A13, C2, E3, G1(b) and G1(c). Most, but not all, of these allegations have specifically been considered in the course of this judgment. Thus:

i) Allegation A8 was considered as part of Ground 3, and for the reasons given in Section C the appeal in relation to this allegation is allowed, subject to the allegation properly being pleaded in Amended Particulars of Claim. The pleading in the present draft Amended Particulars of Claim is insufficient.

ii) Allegation A10 has not (so far) specifically been considered in this judgment.

iii) A12(e) was considered as part of Ground 4, and for the reasons given in Section D the appeal in relation to this allegation is dismissed.

iv) A12(h) has not (so far) specifically been considered in this judgment.

v) A13 was considered as part of Ground 4, and for the reasons given in Section D the appeal in relation to this allegation is allowed.

vi) C2 was considered as part of Ground 4, and for the reasons given in Section D the appeal in relation to this allegation is dismissed.

vii) E3 was considered as part of Ground 4, and for the reasons given in Section D the appeal in relation to this allegation is allowed.

viii) G1(b) was considered as part of Ground 5, and for the reasons given in Section E the appeal in relation to this allegation is dismissed.

ix) G1(c) was considered as part of Ground 4, and for the reasons given in Section D the appeal in relation to this allegation is dismissed.

83. Allegations A10 and A12(h) have not, so far, specifically been considered. They do not form part of the subject matter of Grounds 3, 4 or 5, although they may fall within Grounds 1 and 2. Allegation A10 alleges that Banner Jones failed properly to take reasonable steps to ensure that Mr Allsop complied with an order that was made earlier in the financial proceedings and as to which District Judge Buxton made critical comment. Allegation A12(h) alleges that Banner Jones failed to instruct Mr Cohen soon enough, thus giving Mr Cohen insufficient time to prepare and/or see Mr Allsop in conference.

84. Allegation A10 was considered by the Judge in paragraphs 165 to 167 of the Judgment. It is clear from these paragraphs that the Judge struck out allegation A10 not as an abuse of process but because no reasonably arguable case was disclosed. It follows that my conclusions in relation to Grounds 1 and 2 cannot affect the Judge's decision to strike out allegation A10.

85. Allegation A12(h) was considered by the Judge in paragraphs 168 to 172. As with allegation A10, the Judge struck out allegation A12(h) not as an abuse of process but because no reasonably arguable case was disclosed. It follows that my conclusions in relation to Grounds 1 and 2 cannot affect the Judge's decision to strike out allegation A12(h).

86. For these reasons – and more for the avoidance of doubt than anything else – the appeal against the Order striking out these allegations is dismissed.

Lord Justice Arnold:

87. I agree.

Lord Justice Lewison:

88. I also agree.