Neutral Citation Number: [2021] EWHC 2702 (Comm)

Case No: CL-2019-000141

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 8 October 2021

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

LAKATAMIA SHIPPING CO LIMITED **Claimant**

- and –

(1) NOBU SU (aka SU HSIN CHI; aka NOBU MORIMOTO)
(2) TOSHIKO MORIMOTO
(3) PORTVIEW HOLDINGS LIMITED
(4) CRESTA OVERSEAS LIMITED
(5) UP SHIPPING CORPORATION
(6) BLUE DIAMOND SEA TRANSPORT LLC **Defendants**

BAKER MCKENZIE LLP

Respondent

- -

Hill Dickinson LLP for the Claimant
Clyde & Co for the Respondent Baker McKenzie LLP

Written Submissions 20 August 2021, 13, 17 and 22 September 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 8 October 2021 at 16.30pm.

MR JUSTICE BRYAN:

A.INTRODUCTION

1. On 8 July 2021, and after a substantial trial taking place over 17 days, I handed down judgment in favour of the Claimant Lakatamia Shipping Co Ltd ("Lakatamia") against, amongst other defendants, Madam Su (reported as *Lakatamia v Su* [2021] EWHC 1907 (Comm) ("the Judgment")). The Judgment itself runs to some 966 paragraphs over the course of some 218 pages. I found that Madam Su had unlawfully conspired with her son ("Mr Su") to dissipate the net proceeds of the sale of certain of his assets in breach of a freezing order to which Mr Su was (and still is) subject. The assets in question were two Monegasque villas and a private plane. I also held that Madam Su had, by the same conduct, intentionally and knowingly violated Lakatamia's rights in a judgment debt that Mr Su owes to Lakatamia.

2. Pursuant to the Order consequent upon the Judgment, I directed that Madam Su pay damages of €27,127,855.01 and US$857,329.73. I also ordered Madam Su to bear Lakatamia's costs of the action to be assessed on the indemnity basis if not first agreed, and to make a payment on account of those costs of £1,440,000 (Lakatamia's preliminary costs schedule recorded costs incurred of £2,444,637.23). Madam Su was required to pay those sums by 23 July 2021. No payment has been made by Madam Su, and no indication has been given that she intends to pay such costs.

3. Following correspondence between Hill Dickinson (on behalf of the Lakatamia), and Baker McKenzie (who acted in the action on behalf of Madam Su) in which Hill Dickinson indicated that Lakatamia intended to apply for a wasted costs order against Baker McKenzie, Lakatamia issued an application notice on 20 August 2021 (the "Application") seeking such a wasted costs order pursuant to s.51(6) of the Senior Courts Act 1981 and CPR Pt 46.8. In anticipation of the application, Baker McKenzie notified their professional indemnity insurers and appointed Clyde & Co and leading counsel to act on their behalf to resist the application.

4. The Application was supported by an 87 paragraph witness statement running to some 37 pages accompanied by extensive exhibits in the form of the Fourteenth Witness Statement of Russell St John Gardner ("Mr Gardner") a partner in Hill Dickinson (and witness at the trial) who has the conduct of the action on Lakatamia's behalf. The Application was accompanied by a 25 paragraph letter from Hill Dickinson dated 20 August 2021 addressing the first stage of the Court's consideration as to whether it is appropriate to make a wasted costs order (as addressed below). Even at this first stage Clyde & Co made detailed responsive submissions in a letter dated 13 September running to some 26 paragraphs setting out why it submitted that the Application should be dismissed on the basis, so it was said, that it disclosed insufficient merit on its face and raised issues inappropriate for the swift, summary, process required in wasted costs applications. Clyde & Co's submissions prompted a response from Hill

Dickinson in relation to two of the authorities that had been relied upon and what could be derived therefrom which, in turn, provoked a further response from Clyde & Co on 22 September in relation thereto.

5. The sheer size of these initial submissions seeking to persuade me that the first stage is satisfied, so that the Application should proceed to the legal representatives being given an opportunity to make representations in writing to be followed by an oral hearing after which the Court would consider whether to make a wasted costs order, might be thought to be something of an inauspicious start to a wasted costs application, and the summary nature of such an application, not least in circumstances where, as the trial judge, I am intimately aware of what occurred during the trial and what findings I have made, and so am well placed to assess stage one without extensive submissions.

6. It appears (from Clyde & Co's letter of 13 September 2021) that Baker McKenzie has already incurred some £76,133 plus VAT in fees and disbursements in response to Hill Dickinson's lengthy witness evidence and associated submissions, and Baker McKenzie estimates that if the matter proceeds to stage 2 Baker McKenzie would incur further costs and disbursements in the region of £300,000 to £500,000 to the end of a stage 2 hearing. Hill Dickinson (in bringing the application on behalf of Lakatamia) have no doubt themselves also incurred substantial costs to date and would incur further substantial costs going forward. I will need to return to such matters (and the necessary length of a hearing if matters proceed to stage 2) when considering whether the wasted costs application is capable of summary determination.

B. Section 51(6) of the Senior Courts Act 1981 and CPR PD 46 rr 5.5-5.7

7. Section 51 of the Senior Courts Act 1981 provides, amongst other matters, as follows:-

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

8. CPR PD 46 rr 5.5-5.7 provide as follows:

"5.5 It is appropriate for the court to make a wasted costs order against a legal representative, only if –

(a) the legal representative has acted improperly, unreasonably or negligently;

(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;

(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.

5.6 The court will give directions about the procedure to be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.

5.7 As a general rule the court will consider whether to make a wasted costs order in two stages –

(a) at the first stage the court must be satisfied –

(i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and

(ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;

(b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above."

9. It will be seen that CPR PD 46 r.5.5(a) identifies the criteria one or more of which must be satisfied (the legal representative has acted "improperly, unreasonably or negligently"), r.5.5(b) introduces a causal element – the representative's conduct must have "caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted", and r. 5.5(c) provides that "it must be just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs".

10. The parties are in agreement (subject to the view of the Court) that the Application should be considered by the Court following the two stage process envisaged in r. 5.7. I agree that this is the appropriate way forward in the present case, not least given the issues that arise and the consequences of matters proceeding to stage 2. According at this first stage (and in order for the matter to proceed to the second stage), it is for me to be satisfied (1) that there is evidence or other material before me which, if unanswered would be likely to lead to a wasted costs order being made, and (2) the wasted costs proceedings are justified notwithstanding the likely costs involved.

11. In this regard, and as was said by Lord Bingham in *Ridehalgh v Horsefield* [1994] Ch 205 ("Ridehalgh") at pp 239D-F, the wasted costs jurisdiction is:

> " …dependent at two stages upon the discretion of the court. The first is at the stage of initial application, when the court is invited to give the legal representative an opportunity to show cause. This is not something to be done automatically or without careful appraisal of the relevant circumstances. The costs of the inquiry as compared with the costs claimed will always be one relevant consideration. This is a discretion, like any other, to be exercised judicially, but judges may not infrequently decide that further proceedings are not likely to be justified."

C. APPLICABLE PRINCIPLES

C.1 Improperly, unreasonably or negligently

12. The applicable principles in relation to wasted costs orders are well-established, and are largely common ground, although there is a difference of emphasis between the parties in their submissions.

13. In *Ridehalgh* at p. 232 Lord Bingham M.R. stated:

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

14. Whilst it is acknowledged that "improper" is the most "serious" of the three categories of conduct concerned, it "does not require proof of bad faith"- see *Medcalf v. Mardell* [2002] UKHL 27; [2003] 1 A.C. 120 at [38] (Lord Steyn).

15. As to the meaning of "unreasonable", in *Ridehalgh* supra at p. 232 Lord Bingham stated:

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

16. As to the meaning of "negligent", in *Ridehalgh*, supra, at pp 232–233 Lord Bingham stated that the "expression does not invoke technical concepts of the law of negligence" with the result that it is unnecessary to show that the respondent breached any duty to his client. He added: "we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession".

C.2 Causation

17. Lord Bingham also identified, at p 227, that the "jurisdiction is compensatory and not merely punitive". The fact that wasted costs orders are compensatory requires an applicant to prove causation, as is clear from the fact that r 5.5 provides that it is appropriate for the court to make a wasted costs order against a legal representative, only if the legal representative has acted improperly, unreasonably or negligently **and** "the legal representative's conduct has **caused** a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted" (emphasis added). Thus, as Lord Bingham stated in *Ridehalgh* at 237E-F:

> "the court has jurisdiction to make a wasted costs order only where the improper, unreasonable, or negligent conduct complained of has **caused** a waste of costs **and only to the extent of such wasted costs. Demonstration of a causal link is essential**. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body…but it is not one for the exercise of the wasted costs jurisdiction" (emphasis added).

18. It is also clear that causation must be proved on the balance of probabilities, and accordingly the doctrine of loss of a chance has no place in wasted costs applications - see *Brown v Bennett (No.2)* [2002] 1 WLR 713 per Neuberger J (as he then was) at [54]:

> "…the court should ask itself whether, on the balance of probabilities, the applicant would have incurred the costs which he claims from the legal representatives if they had not acted or advised as they did."

C.3 A summary jurisdiction

19. The jurisdiction to make a costs order is a summary jurisdiction. Thus, "It follows, first that the hearing should be short; secondly, that the procedure followed should not be unduly elaborate; and thirdly, that the jurisdiction should only be exercised in reasonably plain and obvious cases…The prime requirement for this summary jurisdiction is that it should be fair and be seen to be fair." (Millett LJ, Re Freudiana (unreported 29 November 1995, at [28]).

20. As Hickinbottom J (as he then was) stated in *R. (on the application of B) v X Crown Court* [2009] PNLR 30, at [57] and following:

> "It is important that, ''Costs applications should be confined strictly to questions which are apt for summary disposal'' (Harley v McDonald [2001] 2

> W.L.R. 1749 at 1768F per Lord Hope)...Where the subject matter is not appropriate for summary disposal…proceedings should not be instigated or, if begun, continued. Of course, although a wasted costs application is compensatory, it is also punitive:''. . . [I]ts purpose is to punish the offending practitioner for a failure to fulfil his duty to the court'' (Harley v McDonald at 1768D per Lord Hope). However, it must be borne in mind that the summary procedure for wasted costs is not the only punitive sanction (and may not be the most appropriate sanction)…I would urge courts to be sensitive both to the summary nature of the procedure and to alternative ways of dealing with apparent misconduct of representatives."

C.4 Evaluation of the evidence

21. In evaluating the evidence served in support of a wasted costs application, the Judge is "entitled to rely on his own impressions and opinions as to whether costs have been incurred reasonably or unnecessarily"- see *Re Freudiana Holdings* [1995] 11 WLUK 442 (CA) (Rose LJ) – this is a recognition that the trial judge is particularly well-placed to evaluate such matters, but this does not involve any reduction in the burden of demonstrating the requisite matters for a wasted cost order.

22. This does not, however involve, or justify, an investigation into the minutiae of conduct in a complex action – on the contrary, if such an exercise is necessitated, an applicant will in all likelihood not have shown a reasonably obvious case that is suited to the wasted costs jurisdiction. As was said by Ward LJ in *Hedrich v. Standard Bank London Ltd* [2008] EWCA Civ 905 at [44]:

> "In my judgment it is necessary for the Bank [the applicant in that case] to show a reasonably obvious case and no clear picture can emerge if the wasted costs application is required to investigate the minutiae of conduct in a complex action. We are to look at the big picture, not the detailed brush-work."

C.4 Legal Professional Privilege

23. The fact of legal professional privilege gives rise to legal and practical difficulties on an application for wasted costs. In this regard a solicitor has a regulatory and legal duty to uphold any arguable rights of legal professional privilege the client (here Madam Su) may have (see per Lord Bingham in Ridehalgh at 237; per Blackburne J in *Nationwide Building Society v Various Solicitors* [1999] PNLR 52 at 69B, and SRA Code of Conduct, r.6.3).

24. In such circumstances I consider that Clyde & Co is correct to submit that the solicitor cannot be expected just to "take a view" on whether privilege does not apply (save perhaps in the most simple and obvious of cases, and I do not consider that that can be said of the present case). The client must be consulted, asked whether they consent to the use of arguably privileged material, and allowed to assert any rights they consider may subsist – as appears below, this is what Baker McKenzie has done in the present case.

25. Where a waiver is sought to help a lawyer to defend a wasted costs application, the significant risk of own interest conflict (recognised in *Ridehalgh* at 237B-C), means a solicitor cannot advise his client on either (i) whether rights of privilege subsist, or (ii) whether to waive any rights of privilege that do subsist. It is therefore necessary to advise the client to obtain independent legal advice (as Baker McKenzie have done as addressed below).

26. In the absence of an informed waiver from the client or a determination by the Court that no privilege subsists, a solicitor is unable to divulge anything arguably subject to privilege, even to the lawyers retained to assist in defending it. It is for this reason that in *Ridehalgh* Lord Bingham made clear that any court contemplating making a wasted costs order must make "full allowance for the inability of the respondent lawyers to tell the whole story".

27. In *Medcalf v Mardell* Lord Bingham considered that the guidance he had given in *Ridehalgh* should be:

> "…strengthened by emphasising two matters in particular. First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently strong to support orders potentially very damaging to the practitioner concerned is another…Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. The court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so…Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order…"

28. On 8 September 2021, Baker McKenzie faxed a letter (English and Mandarin versions) to Madam Su, advising her of the Application. Baker McKenzie asked Madam Su to consent to waive privilege. In doing so, it explained the own interest conflict that prevented it from advising her on the issue, urged her to obtain independent legal advice and offered to pay the reasonable costs of such advice.

Baker McKenzie's Taipei office received a fax from Madam Su on 10 September 2021, of the final page of the Mandarin translation of Baker McKenzie's letter of 8 September, with a handwritten note at the bottom in Mandarin, followed by Madam Su's signature. The handwritten note has been translated as, "I do not agree to waive privilege." Accordingly, and whilst it is not clear whether Madam Su has obtained independent advice, as was suggested to her, it is clear that Madam Su has not waived privilege.

29. Lakatamia acknowledges that the Court should normally make full allowance for the inability of a respondent to a wasted costs application "to tell the whole story" on account of their obligation to maintain their client's legal professional privilege, but identify that no such allowance should be made where the communications in issue are contaminated by iniquity such that there is no privilege to maintain. In this regard they refer to what was said by Buxton J, in the course of making a wasted costs order in *R. v. Liverpool City Council; ex parte Horn [*1997] P.N.L.R. 95 (QBD) at 98, that "legal professional privilege … cannot be invoked by a client who has acted fraudulently, nor can a solicitor connive with the use of such privilege to conceal fraudulent conduct". Buxton J does not cite any authority for such an unqualified and broad proposition, and it may be that the application of the iniquity exception (and its breadth) may not have been debated, the point apparently having been conceded.

30. I am satisfied that the position as a matter of English law is rather more nuanced then as there stated. In *JSC BTA Bank v Ablyazov* [2014] 2 CLC 263, Popplewell J (as he then was), after reviewing the relevant authorities (which did not include *ex parte Horn*) concluded (at 291F-H) that:

> "In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of the solicitor in the circumstances in question…where in civil proceedings there is a deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates privilege."

31. He also considered that any loss of privilege is not, usually, "all or nothing", as an issue is likely to arise as to what is touched by any iniquity. As he stated at 294E-F:

> "The submissions on behalf of Mr Ablyazov and Stephenson Harwood that not all the solicitors' activity can be treated in the same way are well founded. The iniquity does not touch, for example, the entirety of the work concerned with the defence of the claims on the merits. The negation of legal professional privilege is confined to communications which can be said to be in furtherance of the iniquitous strategy."

32. It would not be appropriate, at this stage, to opine upon the breadth of the doctrine of iniquity and loss of privilege, but I agree with the submission made on behalf of

Baker McKenzie that the question of privilege would itself be factually and legally complex, and likely to result in substantial Court time being used to resolve the issues arising. In addition, Madam Su would have a clear interest in such issue, and would have a right to be heard (after obtaining independent legal advice), and indeed be represented if she thought it appropriate to do so.

D. THE HEADS OF APPLICATION

33. Lakatamia rely upon four instances of what it alleges (and will submit if the matter proceeds to stage 2) amount to "improper, unreasonable or negligent conduct" on the part of Baker McKenzie which it alleges caused it unnecessarily to incur what it says were significant costs.

34. Baker McKenzie deny (in relation to all the alleged instances individually and taken as a whole) that the Court has before it evidence or other material which, if unanswered would be likely to lead to a wasted costs order being made and submits that there is no strong prima facie case or indeed any merit in relation to the four instances alleged, that there are insuperable difficulties in relation to causation, that the investigation that would need to be undertaken is not suitable for the summary process of the wasted costs regime, and that that the likely hearing length is well in excess of the half day proposed by Hill Dickinson (a number of days being more realistic) with costs likely to run to many hundreds of thousand of pounds, it being further submitted that the Court cannot be satisfied that the wasted costs proceedings are justified notwithstanding the likely costs involved.

35. More generally Baker McKenzie sets out its position at paragraph 10 of Clyde & Co's letter of 13 September 2021:

> "Baker McKenzie denies that it acted improperly, unreasonably or negligently. If called upon to do so, it will file whatever evidence it can (allowing for rights of privilege) to contest the Application. The assertion in the HD letter that Baker McKenzie "appear to have acted as if they had no obligation beyond advancing a case consistent with their client's (dishonest) instructions" (§7 of the HD Letter) is obviously unsustainable, and should not have been made. The true position is that Baker McKenzie, which at all material times instructed experienced leading counsel, Mr David Head QC, has been acutely conscious of its obligations and always sought to comply with them. What the Application fails sufficiently to recognise, however, is that Baker McKenzie's central obligation was to do its best for its client, in accordance with her instructions, subject (of course) to complying with its professional conduct obligations and its duty to the court."

36. The four instances of what Lakatamia alleges amount to "improper, unreasonable or negligent conduct" on the part of Baker McKenzie which it alleges caused it unnecessarily to incur what it says were significant costs are as follows:-

(1) Baker McKenzie used money received on account of Madam Su's legal costs from Ms Tseng Yu Hsia ("Ms Tseng"), someone who they had themselves (by Baker McKenzie Taipei and Baker McKenzie USA) identified was a fraudster, to pay

themselves without first notifying Lakatamia's solicitors of the source of the money in what is said to be a breach of the freezing order to which Madam Su was and is subject, a breach which it is said continued for some 11 months. In this regard it is said that Baker McKenzie misled the Court and Lakatamia as to the identity of the person paying Madam Su's legal costs by serving witness statements in which they said that one of Madam Su's daughters was funding Madam Su whereas her funding was coming from Ms Tseng. Lakatamia says that these statements were made in circumstances where it appears that Baker McKenzie knew that the money that they were receiving on account of their fees was coming from Ms Tseng (documents which they have disclosed which seem to represent extracts from their own accounting records identify Ms Tseng as the source of the funds).

(2) Baker McKenzie failed to comply with relevant guidance in the preparation of the witness statements made and affidavit of assets sworn by Madam Su, and it is said that Baker McKenzie included within those same witness statements and affidavit of assets evidence that they wished Madam Su to give rather than her own evidence.

(3) Baker McKenzie failed to comply with their obligations in the conduct of the disclosure exercise.

(4) The case run on Monegasque law was hopeless. Baker McKenzie failed to identify a manifest error in the expert report relied upon by Madam Su in the context of the dispute on issues of Monegasque law that fundamentally undermined that report; and Baker McKenzie attacked the independence of the expert instructed by Lakatamia on issues of Monegasque law which was not only unfounded but which they failed (at least in part) even to put to the expert in cross-examination.

E. CONSIDERATION OF THE HEADS OF APPLICATION

E.1 GENERAL OBSERVATIONS

37. As trial judge I am uniquely placed to assess whether I have evidence or other material before me which, if unanswered, would be likely to lead to a wasted costs order being made and whether the wasted costs proceedings are justified notwithstanding the likely costs involved. In this context, and whilst it is important that I give reasons for the conclusions I have reached so that the parties can understand why I have reached the decision I have, I am satisfied that it would be inappropriate, at stage one, to descend into the minutiae of the evidence, and respective submissions that have (unusually) already been made at some considerable length and expense. As it is, the parties' submissions to date (solely in relation to stage one) have resulted in the deployment of very much more than half a day of judicial time - indeed considerably more time than Lakatamia (under) estimates for a substantive wasted costs hearing at any stage two hearing (including an ex tempore judgment that would be contemplated in the context of such a time estimate).

38. In many, if not most cases, a judge faced with a wasted costs application will be asked to address stage one without any lengthy submissions, still less without a mass of material such as that in Mr Gardner's Fourteenth Witness Statement and exhibits thereto, and Hill Dickinson's letter submissions of 20 August 2021 and Clyde & Co's response thereto of 13 September 2021, not least because stage one is designed to take place at a stage before substantial costs have been incurred, and to obviate the need

for such costs being incurred where the Court is not satisfied of the matters specified in CPR PD 5.7(a) (i) and (ii). If it were to be appropriate to descend into the minutiae of the evidence and respective submissions a very substantial amount of judicial time would be consumed which would be contrary to the wider interests of justice, and other litigants. Accordingly, I set out below my reasons as to why I have reached the conclusion I have at stage one. I confirm, however, that I have given very careful consideration to all the matters that have been put before me, set against the backdrop of my intimate knowledge of the action and the issues arising (and determined) therein.

E.2 MS TSENG FUNDING OF MADAM SU'S LEGAL FEES

39. In relation to Ms Tseng's funding of Madam Su's legal fees and the allegation that even if Baker McKenzie believed that Ms Tseng's monies were not in fact Madam Su's, it acted in breach of the freezing order by failing to notify Lakatamia of the fact that the source of Madam Su's funding was Ms Tseng, an issue arises as to whether Baker McKenzie was under an obligation under the freezing order to "tell the Applicant's legal representatives where the money is to come from", Clyde & Co submitting that such an obligation:

> "only arises where the legal advice is being paid out of frozen assets (per Patten J (as he then was) in *Dadourian v Simms* [2008] EWHC 1784, at §161) and Christopher Clarke J (as he then was) in *JSC BTA Bank v Ablyazov* [2011] EWHC 2664 (Comm), at §47)). Accordingly, unless it were proved that Baker McKenzie knew that the funds from Ms Tseng were in fact those of Madam Su (which is not alleged in the Application and is not the case), there is no basis for asserting that it acted in breach of the freezing order by not notifying Lakatamia that the source of the funds for its fees was Ms Tseng".

40. This issue led to a further round of submissions in the form of Hill Dickinson's letter of 17 September 2021, and Clyde & Co's letter of 22 September 2021. In the former letter Hill Dickinson submitted that in both of the cases relied upon the application in issue was not an application that the respondent disclose the immediate source of the funds that were being used to meet his (or its) legal fees. That information had already been disclosed. Instead, what was in issue was, relevantly, whether the respondent should identify the ultimate beneficial owner of the source of those funds. Accordingly, says Lakatamia, neither of these authorities is on point. The complaint made by Lakatamia is not that Madam Su revealed that her fees were being met by Ms Tseng but then refused to provide information as to the source of Ms Tseng's funds (which was the issue before the Court in *JSC BTA Bank* and *Dadourian*). It is rather that she and Baker McKenzie refused to do that which even Mr Ablyazov did not refuse to do: viz. to identify the immediate source of her funding.

41. Hill Dickinson also note that precisely the submission that Clyde & Co invite the Court to accept was rejected in trenchant terms by Sir Michael Burton GBE when it was advanced by Mr Su's lawyer in the underlying proceedings. In a judgment handed down on 15 April 2021 (*Lakatamia v Su* [2021] EWHC 935 (Comm)), he states:

"Finally, the Claimants make an application in respect of paragraph 10(1) of Blair J's Order, which reads:

> 'This Order does not prohibit the Defendants from spending a reasonable sum on living expenses and legal advice and representation. But before spending any money the Defendants must tell the Claimant's legal representatives where the money is to come from.'

Mr Su's previous legal representatives appear to have complied with that order. There has been a number of changes of such representation and the present representative, Scott Moncrieff & Co., have not, despite request, disclosed the source of the money which Mr Su is expending through them in relation to these applications. Mr. Tear has questioned whether paragraph 10(1) applies to the expending of monies supplied by third parties, but in so far as he runs that argument, it seems to me one that has no legs. Plainly, Mr Su is spending the money on legal expenses to fund his actions and applications. Where it comes from is then the question. He is spending someone else's money. It is either being given or loaned to him, but he is spending it and he must now comply with paragraph 10(1). Insofar as there has been reluctance to do so, I now make a specific order to that effect in relation to the present legal representatives and the present applications."

42. This led to a reply from Clyde & Co maintaining that *Dadourian v Simms* and *JSC BTA Bank v Ablyazov* are good authority for the propositions for which they are cited. In each case, clear statements of principle were made that the obligation to inform the applicant of the source of the funds used to pay legal fees only arises if frozen assets are used. Further, so far as the judgment of Sir Michael Burton was concerned it did not bind Baker McKenzie, it was handed down on 15 April 2021 after Lakatamia had been told of the involvement of Ms Tseng on 15 January 2021 and any assessment of the reasonableness, propriety or competence of Baker McKenzie's conduct should be by reference to authorities pre-dating 15 January 2021. In addition, it was not clear that Sir Michael Burton was taken to *Dadourian* or *Ablyazov* or tat he had full argument on the point.

43. For reasons that will become apparent this debate is academic in the present case. However, had it been relevant, my initial views (without having heard full argument as would occur at stage two) are as follows:-

    (1) There are passages in *Dadourian* and *Ablyazov* that support the proposition that the obligation to inform the applicant of the source of the funds used to pay legal fees only arises if frozen assets are used. Specifically, Patten LJ in *Dadourian* stated at [158["The exceptions contained in paragraph 9 of the order are by definition derogations from the freezing order…<u>If the freezing order has no application to the assets in question, then there is no room in my judgment for the operation of paragraph 9</u>…" (emphasis added). He rejected a submission that the obligation to disclose the source of funds applies "regardless of whose money it is or where it comes from." Equally, Christopher Clarke J in *Ablyazov* stated at [37] " …Paragraph 9(a) is one of the Exceptions to the order. It follows, as it seems to me, that, if borrowing for the purpose of paying legal expenses is not a breach of paragraph 4 of the Freezing Order there is no obligation under the last sentence of

paragraph 9 (a) to notify the Bank's legal representatives "where the money to be spent is to be taken from" (although Mr Ablyazov has, in fact, purported to do so in the case of Wintop and Fitcherly). That obligation is not a free-standing obligation whatever the circumstances. It is a condition of entitlement to rely upon the exception provided for by the first sentence of paragraph 9 (a). If there is no need to rely on the exception in order to pay legal expenses, the obligation to provide the information does not arise. If however, use of the monies used for legal expenses is within paragraph 4, then paragraph 9 (a), including the second sentence applies." (emphasis added)

(2) However, there is no doubt that the terms of the Burton Freezing Order were understood by those acting on behalf of Madam Su as extending to the source of the funds even if that was not Madam Su – as the source of the funds was identified (albeit in non-specific terms) as a daughter of Madam Su in witness statements made in October and November 2020. Further, having done so in such terms, I consider that Baker McKenzie were obliged, as solicitors of the Senior Courts, not to mislead the Court as to the actual factual position. That, of course, begs the question as to what Baker McKenzie did know, and in that context legal professional privilege is potentially in play (although Hill Dickinson submit that "the circumstances in which Baker McKenzie received money from Ms Tseng should (at its absolute lowest) have triggered alarm bells").

(3) In the event it was only on 15 January 2021 that Baker McKenzie revealed the source of the funds as Ms Tseng (following the Court on 18 December 2020 having ordered Madam Su to identify the daughter that had been referred to).

44. At paragraph 753(3) of my judgment I stated that:

> "(3) Whilst nothing ultimately turns on this, the likelihood is that when Ms Tseng has been making payments to Baker McKenzie in respect of Madam Su's legal costs, she has in fact been utilising either (undeclared) funds of Madam Su (such payments being set against the backdrop of an unsatisfactory history in relation to what the Court has been told concerning the funding of Madam Su's legal costs) or funds of Madam Su's daughter". (emphasis added)

45. I stand by what I there stated, but I do not consider it appropriate at a stage one consideration to make actual findings as to whether what Baker McKenzie did (and did not) tell the Court amounted to "improper, unreasonable or negligent conduct" as such a finding is not on the operative path, and it would not be appropriate to do so absent giving Baker McKenzie the opportunity to address such matter in detail (as would occur were it appropriate to proceed to stage 2). It is not on the operative path because even if what Baker McKenzie did or did not do amounted to improper, unreasonable or negligent conduct, the key question that would always arise is one of causation, and I am satisfied that a consideration of causation is, and always will be, fatal to this aspect of the application (which also carries the vast majority of the monetary claim for wasted costs due to the alleged causal effect).

46. Lakatamia's case on causation is as follows (as set out at paragraph 10.9 of Mr Gardner's fourteenth witness statement):-

"Baker McKenzie should have notified Lakatamia of the fact that they had received funds from Ms Tseng on or very shortly after 3rd February 2020 but in any event before using the money received to pay themselves. However, it was not until 15th January 2021 that the notification was given. Had Baker McKenzie complied with the Burton Freezing Order, the proceedings would have taken a very different and far shorter course.

(a) Had Lakatamia been told on or shortly after 3rd February 2020 that Ms Tseng was funding Madam Su, Baker McKenzie's own view that the Su family uses Ms Tseng fraudulently to conceal their assets would have become apparent in the days or weeks that followed and before the bulk of the costs that Lakatamia incurred in this litigation had been sunk.

(b) Once this information had come to light and been appropriately addressed, Baker McKenzie would presumably either have come off the record or would have been compelled to conduct Madam Su's defence very differently from the way in which they did. Specifically, even if Baker McKenzie had continued to act for Madam Su, they would have merely put Lakatamia to proof as opposed to running the positive case that was run that Madam Su was a witness of truth who had complied with her disclosure obligations and who had played no part in the wrongdoing alleged against her. In either event, Lakatamia would have incurred legal costs at a far lower level than it in fact did.

(c) However, because of Baker McKenzie's conduct, this did not happen. It was not until the evening of 25th February 2021 that Lakatamia learned that even Madam Su's own lawyers did not believe Madam Su's story that Ms Tseng was a wealthy creditor of the Su family. But by this time, Madam Su's written opening had been served (it had been served at 1:44pm on 25th February 2021), brief fees had been agreed and liability to pay them incurred and the trial was imminently to commence (*i.e.*, on 8th March 2021)."

47. Mr Gardner summarised such a case on causation at paragraph 63 of his fourteenth statement in these terms:-

"63. But for Baker McKenzie's failure to notify the source of Madam Su's funding, it would have become clear to both Lakatamia and Baker McKenzie in or around February 2020 that Madam Su was a liar who had lied about her lack of assets in her affidavit of assets in December 2019 and the source of her funding for her legal fees. Baker McKenzie would presumably have either ceased acting for her soon thereafter or, if not, simply put Lakatamia to proof of its case on behalf of their client. In all likelihood, there would have been no trial but, even if there had been, Lakatamia would not have been called on to meet the positive case that Baker McKenzie ran that Madam Su was a witness of truth who had complied with her disclosure obligations, a case that took many weeks of trial preparation, particularly for Counsel.

> 64. According to my firm's costs draftsman, the costs incurred by my firm since 3rd February 2020 on these proceedings (excluding this wasted costs application) are £441,945 on my firm's fees and £1,509,351.36 on disbursements, i.e., a total of £1,951,296.36. If Baker McKenzie had complied with their obligation to reveal the source of the monies that were being used to discharge their fees, the bulk of those costs would not have been incurred (particularly when combined with the other breaches in relation to disclosure, witness statements and expert evidence set out below). I would estimate that 80% of these costs would have been avoided, i.e., a sum of around £1,561,037.08." (emphasis added)

48. Clyde & Co. on Baker McKenzie's behalf, describe such a case (specifically the passage emphasised above) as "fanciful". Whether or not I would have described the case in such terms, I consider that it is inherently unlikely that the action would have taken any course other than the one it did based on the parties' conduct before and at trial, and the evidence that is before me to date. Lakatamia's assertions to the contrary are bare assertions which are not consistent with, or reflected in, events to date. In this regard:-

(1) I am satisfied that earlier disclosure of Ms Tseng's involvement in funding would not have made any difference to the course of the litigation. This was incredibly hard-fought litigation on both sides that was always going to turn on the veracity of Madam Su's evidence (which itself would inevitably require the lengthy cross-examination of Madam Su preceded by length (and costly) trial preparation for solicitors and counsel alike) raising serious allegations akin to a fraud case. The reality is that Madam Su defended the action "tooth and nail" denying not only any receipt of the sale proceeds but any involvement in the alleged conspiracies. Only a trial was ever going to get anywhere near the truth on such issues (of which Ms Tseng's role, and her alleged funding, was but a part).

(2) I consider that actual events are the best evidence of what would have occurred if there had been an earlier revelation of Ms Tseng's funding (in other words, to matters colloquially, the proof is in the pudding). The revelation that Ms Tseng was funding the legal fees, which did ultimately occur, did **not** result in the trial not proceeding or taking any different course such as Madam Su simply putting Lakatamia to proof (an unlikely scenario in the extreme). The trial did proceed, and Madam Su did stand by her evidence over many days of cross-examination. The overwhelming likelihood is that the action would have proceeded exactly as it did if the revelation had been made earlier at the time Lakatamia says it should have been made. Much of what is submitted by Lakatamia is submitted with hindsight, and with the benefit of the findings in my judgment as to Madam Su and her evidence – those are the very product of the trial which did take place.

(3) In this regard Madam Su stuck to her evidence to the bitter end, and her evidence (and no doubt her instructions to Baker McKenzie) was throughout as per her witness statements, and the revelation as to Ms Tseng's funding made no difference to that either immediately before trial or in her evidence at trial. Her evidence would, in all likelihood, have remained exactly the same if the involvement of Ms Tseng had been revealed earlier, both in relation to the immediately relevant issue (the source of the funding itself) – namely that the

sums advanced were loans, and her wider evidence (that none of the monies from the sale proceeds were received by her) and that Sparklewood was not her company. The revelation in the event caused none of that evidence to change. I have no doubt that the position would have remained the same even if the disclosure had been made earlier and Madam Su's evidence, and the course of the action, would have remained the same.

(4) I am satisfied that the reality is that only the trial process itself would have led to a resolution of the issues. On the evidence before me I do not consider, and see no reason why, Baker McKenzie would have needed to come off the record or acted other than on Madam Su's instructions and based on her evidence, and in furtherance of their professional obligations to her in that regard. Lakatamia's submission to the contrary is, I am satisfied, also inherently speculative.

49. In the above circumstances, I am satisfied that any claim for wasted costs based on this matter, would fail as a matter of causation. I cannot see that Lakatamia would ever be in a position to demonstrate the essential causal link. On balance of probabilities (in reality overwhelmingly likely) the same costs would have been incurred if the revelation had been made earlier. If anything, Lakatamia's suspicions would have been aroused still further, and the likelihood is that yet more costs would have been incurred in advance of, and at, trial. In such circumstances I am not satisfied, and cannot be satisfied, that there is before me evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made. On that basis the application fails at the first stage (see CPR PD46 para 5.7(a)(i)).

50. But even if all the above were wrong (and I am satisfied it is not), wasted costs proceedings would not be justified. As I have already noted, and as is clear on the authorities, wasted costs applications should be confined strictly to questions which are apt for summary disposal. The reality is that if matters proceeded this issue of causation is not one that is apt for summary determination (otherwise than at the level to which I have already concluded above). If matters proceeded there would need to be detailed factual evidence and submissions and detailed factual findings in any judgment – this would be the worst kind of "after the event" satellite litigation. This causation point alone could occupy a very substantial amount of Court time with little or no likelihood of an outcome different to that which has been identified at this stage after the incurring of very substantial costs, and the use of a substantial amount of Court resources. On that basis the application also fails at the first stage on the basis that wasted costs proceedings would not be justified in the context of the likely costs incurred (see CPR PD46 para 5.7(a)(ii)). In this regard I have already noted the costs incurred to date, and the very substantial costs (running into many hundreds of thousands of pounds) that would be likely to be incurred, were the matter to proceed.

51. Due to its alleged causative effect, this alleged instance of misconduct etc carries the largest monetary claim by some considerable margin. However, for the reasons given I am not satisfied, and cannot be satisfied, of either of the matters in CPR 46 PD para 5.7 (a).

52. I will now address the other three matters relied upon. I would note at the outset that none of them have anything like the same (alleged) causative effect in terms of

potential monetary recovery (even leaving aside similar causation issues that arise as addressed below).

E.3 THE PREPARATION OF MADAM SU'S WITNESS EVIDENCE AND AFFIDAVIT OF ASSETS

53. It is said that Baker McKenzie failed to comply with relevant guidance in the preparation of the witness statements made and affidavit of assets sworn by Madam Su, and it is said that Baker McKenzie included within those same witness statements and affidavit of assets evidence that they wished Madam Su to give rather than her own evidence.

54. I can deal with these allegations relatively shortly. In my trial judgment I made a number of criticisms about the drafting and content of Madam Su's witness statements, and the affidavit of assets, which included a failure to comply with paragraph H1.4 of the Commercial Court Guide (and, in fact, CPR PD 32 r. 18). However, I do not consider such failings to be so serious as to amount to misconduct or unreasonable conduct on the part of Baker McKenzie (within the definitions set out in the authorities that I have identified). They could, arguably, amount to a failure to act with the competence reasonably to be expected of a member of the profession, though I would not make such a finding without Baker McKenzie having had the opportunity to defend their conduct in relation to the preparation of the statements and affidavit (were it appropriate to proceed to stage 2).

55. As for other criticisms I made (as to Madam Su's familiarity, or lack of familiarity, with her own witness statements) it is less clear where the fault lies, and I consider it most likely that it ultimately lies at the door of Madam Su herself for failing to ensure that the content of her statements in all respects accurately reflected her recollection in circumstances where Baker McKenzie has stated that "It was plainly the prudent course to afford our client with every opportunity to confirm the accuracy of her evidence" (email of 7 April 2021 (15:38). So far as the allegation that Baker McKenzie included evidence they wished Madam Su to give rather than her own evidence, I consider that this rather overstates what occurred. I consider that what occurred was almost certainly the result of drafting the statements by reference to the factual documents, for consideration by Madam Su in draft, with Madam Su then not giving sufficient attention to whether she knew all that was stated, and whether all that was stated reflected her true recollection.

56. However, once again, the application flounders at stage one as a matter of causation. Madam Su defended the claim against her "tooth and nail", and she stood by her evidence to the bitter end. I found her to be both "very smart" and a "consummate liar". Even if there had not been any failings in the drafting of Madam Su's evidence it is inherently unlikely that that would have resulted in anything other than a full trial and equally lengthy cross-examination of Madam Su.

57. It is said that, "Lakatamia should not have been required to cross-examine Madam Su on evidence that was not her own. Had Baker McKenzie complied with their professional obligations as regards the preparation of Madam Su's witness evidence (which they did not) Lakatamia would have incurred costs at a far lower rate", I do not consider that the assertion in the second sentence stands scrutiny. A very lengthy

cross-examination was inevitable. Indeed Lakatamia (at the PTR) wished to cross-examine Madam Su for longer than I ultimately allowed, and it is inherently unlikely that any (or any significant) costs would have been saved if a different approach had been adopted to the drafting of the witness statements. The reality is that Lakatamia would have used whatever time the Court was willing to allocate to the cross-examination. A constant theme of Madam Su's closing (prepared by Baker McKenzie and counsel) was the sheer number of times that points (on the merits) were put to Madam Su by Lakatamia in cross-examination. Such an approach would have been maintained regardless of whether there were, or were not, points to be made on the drafting. It is also difficult to see the costs incurred as "unnecessary costs", because (in fact) the drafting failures were, in fact, "manna from heaven" for Lakatamia. Far from the cost of exploring such matters being wasting costs they very substantially improved Lakatamia's attack upon Madam Su with the result that little if any weight could be given to her evidence, and they increased Lakatamia's prospects of success at trial.

58. In any event it would be extremely difficult to quantify what (if any) extra costs were incurred, and it would involve much speculation, given that a very lengthy cross-examination was inevitable. I have not re-visited the (lengthy) trial transcripts but my recollection is (as one might expect) that the vast majority of the cross-examination was not on witness statement points. If anything, such points largely emerged, and were (unsurprisingly) then followed up, during the course of the cross-examination as Madam Su's lack of familiarity with her own evidence emerged and Lakatamia's counsel made hay as the sun shone. In consequence (one assumes) other cross-examination in fact had to be shortened to complete the cross-examination within the time allotted. That is all part and parcel of the cut-and-thrust of cross-examination with the cross-examiner reacting to answers given during the course of the cross-examination.

59. In such circumstances I am not satisfied that there is before me evidence or other material which, if unanswered, would lead to a wasted costs order being made in relation to this aspect (CPR PD 46 para 5.7(a)(i)), and wasted costs proceedings would not be justified notwithstanding the likely costs involved. The costs involved in this matter being addressed would far outweigh any order for wasted costs (if any), and again would involve satellite litigation involving consideration of what costs (if any) might have been saved if witness statements had been drafted differently (CPR PD 46 para 5.7(a)(ii)).

E.3 MADAM SU'S DISCLOSURE

60. It is said that Baker McKenzie's conduct of the disclosure process was "improper, unreasonable or negligent" in that they failed to take any timely steps to gather documents from Mr Su's old office. It is also said that Baker McKenzie accepted without apparent demur that Madam Su had no custodians and that Baker McKenzie "drip-fed during the trial selected documents that they themselves had obtained from Ms Tseng". In relation to causation, it is said that "Had [Baker McKenzie] conducted the disclosure exercise properly, Baker McKenzie would either have withdrawn from the case; or the truth (i.e. that Madam Su had conspired with her so to defeat Lakatamia's enforcement efforts) would have emerged much earlier than it did and

the case would have taken a very different and less costly cause". It will be seen that once again causation is in sharp focus.

61. There is no doubt that the best way for a solicitor to fulfil his own duty and to ensure that the client's duty is fulfilled too is to take possession of all original documents as early as possible, and there was a delay in documents being gathered until around a year after proceedings had been issued and after the CMC itself. However, I do not consider that such delay amounts to improper, unreasonable or negligent conduct given Madam Su's own disclosure duties, including the duty to preserve documentation, which any solicitor (not least one of Baker McKenzie's calibre) would no doubt, in the ordinary course, have explained to their client from the outset. More fundamentally I do not consider that any such delay can have had any causative effect. As I have found Madam Su suppressed relevant documentation which should have been disclosed. However, she did this from the very outset, being very selective as to what UP Shipping bank statements she deployed (the remainder having been removed from the files), and as I have addressed at [923]-[927] of my judgment, the rest were suppressed. I do not consider that Madam Su would ever have provided to Baker McKenzie any documentation other than that which she considered to be in her best interests.

62. What Madam Su said about custodians was entirely consistent with her witness evidence. What was said by Baker McKenzie was no doubt based on that evidence (as well, no doubt, as what they had been told by Madam Su). It was the unravelling of Madam Su's evidence at trial that also unravelled the position as to her custodians. For example, if Ms Tseng was an independent third party lending money to Madam Su she was not a custodian of Madam Su. It was the culmination of the lengthy cross-examination that led to the findings I made against Madam Su. When I stated in the judgment at paragraph 920 that "I find it incredible that Madam Su had no custodians at all" this was predicated on what I had found as to Madama Su's continuing involvement in the business and her relationship with its employees. All that was very much in issue before (and at trial). It was the trial process that shed light on the reality as to custodians.

63. It is alleged that Baker McKenzie "drip-fed during the trial selected documents that they themselves had obtained from Ms Tseng". It is Madam Su that had the disclosure duty, and it is Madam Su who "drip-fed" such documentation, and the allegation is not one properly made against Baker McKenzie, Of course if (contrary to my findings) Madam Su had no control over Ms Tseng (which was her evidence and no doubt also her instructions to Baker McKenzie) then Madam Su could not compel Ms Tseng to provide any documentation. I addressed my concerns in this area, and whether "cherry-picking" was going on at paragraph 933 of my judgment. However, I have no doubt whatsoever that Baker McKenzie and leading counsel, would only have said what they did in closing if that was based on the express instructions they were being given by Madam Su (which would be entirely consistent with her witness statements, and with the evidence she had continued to give at trial – albeit that I did not accept such evidence).

64. However even if there was any conduct on Baker McKenzie's part that could be regarded as "improper, unreasonable or negligent" in relation to disclosure (contrary to what I have stated above), once again causation is fatal to the furtherance of a

wasted costs application. In relation to causation, it is said that "Had [Baker McKenzie] conducted the disclosure exercise properly, Baker McKenzie would either have withdrawn from the case; or the truth (i.e. that Madam Su had conspired with her so to defeat Lakatamia's enforcement efforts) would have emerged much earlier than it did and the case would have taken a very different and less costly cause". I do not consider that either of these posited outcomes is at all likely.

65. As to the former, I see no reason why Baker McKenzie would (or should) have withdrawn given the content of Madam Su's witness statements (which must also be what Madam Su was telling/instructing Baker McKenzie). Madam Su was consistent in her evidence (e.g. as to custodians), and if such evidence was true, then she did indeed, not have any custodians. Equally I am satisfied that Madam Su was only ever going to provide such documentation as assisted her case, and I cannot see how Baker McKenzie were in a position to second-guess their client given what she must have told them (which, it can be inferred, must be the same as the content of her witness statements).

66. Nor is there any likelihood that the truth would have emerged (that Madam Su had conspired with Ms Tseng to defeat Lakatamia's enforcement actions), and Lakatamia's assertion in this regard is pure speculation. First, I am satisfied that Madam Su would never have provided the documentation to demonstrate this (as demonstrated by her conduct and evidence through to the end of trial), and secondly it was only through the trial process that it was ever going to be possible to get to the bottom of whether Madam Su was involved in the alleged conspiracies. I am satisfied, based on Madam Su's own evidence, and her attitude to provision of documentation, that it was only the trial process that would ever allow the true position to be revealed.

67. A yet further point is that if the matter proceeded to stage two, this would be another classic example of satellite litigation striving to make findings as to what might have happened on a hypothetical scenario inherently unsuited to summary determination. Not only would such exercise be costly, time consuming and unjustified, but it is inherently improbable that a conclusion would be reached that Baker McKenzie would have withdrawn or the truth would have come out, and any costs saved.

68. In the above circumstances I am not satisfied that there is before me evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made (CPR PD46 para 5.7(a)(i)) nor would wasted costs proceedings be justified notwithstanding the likely costs involved.

E.4 MONACO LAW

69. It is said that the case run on Monegasque law was hopeless, that Baker McKenzie failed to identify a manifest error in the expert report relied upon by Madam Su in the context of the dispute on issues of Monegasque law that fundamentally undermined that report; and Baker McKenzie attacked the independence of the expert instructed by Lakatamia on issues of Monegasque law which was not only unfounded but which they failed (at least in part) even to put to the expert in cross-examination.

70. First, whether English law or Monaco law was the applicable law was a point that was properly arguable albeit I held against Madam Su on this issue (see section J.3.1 of

the Judgment). Secondly, I do not consider the case run on Monaco law was itself hopeless based as it was on expert evidence received from a duly qualified expert. Thirdly, whilst Maître Pastor omitted, in his report, a passage from an authority that was indeed, of particular relevance, I was satisfied this was not deliberate, and equally I consider it unrealistic to suggest that Baker McKenzie should have noticed the omission. As is often the case it is only after the meeting of experts and cross-examination preparation that particular issues come into sharp focus, and were then rightly explored at trial. The point on Monaco law was pursued on behalf of Madam Su in both the written and oral closings (no doubt on instructions), and with the concurrence of highly experienced leading counsel, and I do not consider any criticism can be levelled at Baker McKenzie (or for that matter leading counsel) for maintaining Madam Su's position on Monaco law to the very end, albeit (as is sometimes the case) the writing may well have been on the wall by the conclusion of the closings. I agree that the attack on Maître Manasse was misplaced (as I found) but it cannot be suggested (and is not suggested) that it led to any additional costs being incurred,

71. In any event the costs involved in relation to the Monaco law experts were (in the context of the overall costs) relatively limited. The costs of preparation of the reports themselves would no doubt have been incurred in any event and the cross examination of the experts was completed in short order.

72. I am not satisfied that I have before me any evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made (CPR PD 46 para 5.7(a)(i)), and in any event, the wasted costs proceedings would not be justified notwithstanding the likely costs involved.

F. ADDITIONAL CONSIDERATIONS AND OVERALL CONCLUSION

73. In relation to each of the four instances relied upon, and for the reasons set out above, the two threshold questions stand to be answered against Lakatamia as I am not satisfied that that there is before me evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made (CPR PD 46 para 5.7(a)(i) and I am also not satisfied that the wasted costs proceedings are justified notwithstanding the likely costs involved (CPR PD 46 para 5.7(a)(ii).

74. Such considerations have been addressed by reference to each of the four instances relied upon. However, I consider that the same conclusion is reached standing back and looking at the wasted costs application as a whole. In this regard I am satisfied that the Application is inherently unsuited to summary determination under the wasted costs procedure at stage 2.

75. In this regard Lakatamia estimated the duration of a stage 2 hearing at half a day. That would assume the substantive argument to be completed in 1 hour and 30 minutes (to allow time for an ex tempore judgement within the time estimate) – see *Kazakhstan Kagasy Plc v Baglan Abdullaayevich Zhunus & Ors* [2020] EWHC 128 (Comm) at [16]. This is not a realistic estimate, nor is the Application one that could be categorised as a clear or straight forward one that can be fairly determined in a summary fashion at a hearing "measured in hours not days". The reality is that the allegations raised would involve a hearing of at least two days, and on the evidence

before me could involve costs of many hundreds of thousands of pounds on each side. Even that could be an under-estimate, both as to time and expense, given the number of issues raised and their seriousness. The Application has all the hallmarks of heavy satellite litigation the furtherance of which is to be deprecated.

76. First, it raises allegations that are extremely serious including allegations of professional misconduct including alleged breaches of freezing orders, the Court being misled, funding issues (which could raise money laundering issues) and failure to comply with disclosure obligations and those concerning the preparation of witness statements. Fairness would dictate that such matters would have to be addressed in detail, and they do not lend themselves well to summary determination.

77. Secondly the allegations are of wide scope – they most closely resemble allegations of professional negligence (albeit Baker McKenzie owed no duty of care to Lakatamia) and the Application is worlds away from seeking redress for "an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument" (*Metcalfe*, supra, at [24]).

78. Thirdly, and as already noted, the issues in relation to legal professional privilege would need to be fully aired with a determination as to whether privilege had been lost and if so to what extent. In all likelihood this would need to be determined at a preliminary hearing before the final stage 2 hearing further adding to the costs, and spurring yet further satellite litigation.

79. Fourthly, even if it were found that Madam Su's iniquity meant that she did not have the rights a client normally has to assert privilege a court might well conclude that many communications relevant to the Application were protected whilst others might not be (see *JSC BTA Bank v Ablyazov*) further adding to the costs burden as difficult and time-consuming value judgments would then have to be engaged in by Baker McKenzie as to what was or was not privileged.

80. Fifthly, and for the reasons already given in relation to the four instances (but at this point considered cumulatively), it is unlikely that a wasted costs order would be made not least given the causation difficulties identified and equally, and sixthly, taking the Application as a whole, the wasted costs proceedings would not be justified considering the likely costs incurred which would be disproportionate to any likely wasted costs found (if any).

81. Finally, the time it has taken to read all the submissions and prepare this judgment far exceed Lakatamia's estimate of the time that a stage two hearing would take. The length of the parties' submissions to date, and the necessary judgment in response thereto, may themselves be thought to speak volumes. In future cases I would hope that parties may recognise that the stage one exercise can usually be performed by the trial judge with little more than an identification of the instances of conduct relied upon given the trial judge's familiarity with the issues that arise in the trial.

82. Accordingly, and for all the reasons set out in Sections E and F above, the Application is dismissed.

83. I would hope that the parties will be able to agree an Order reflecting this judgment and any associated matters arising out of the dismissal of the Application in short order, and without further costs being incurred.