Neutral Citation Number: [2023] EWHC 453 (Comm)

Case No: CL-2020-000066

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 02/03/2023

Before :

MR JUSTICE JACOBS

- -

Between :

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

- -

- -

Catherine Addy KC and Joseph Sullivan (instructed by **Macfarlanes LLP**) for the **1st to 4th Applicants**
Daniel Lightman KC (instructed by **Kennedys LLP**) for the **5th to 9th Applicants**

John Taylor KC and Nathalie Koh (instructed by **Womble Bond Dickinson (UK) LLP**) for the **1st Respondent**
William Flenley KC and Richard Sage (instructed by **Beale & Co LLP**) for the **2nd Respondent**

Hearing dates: 7th and 8th December 2023

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

This judgment was handed down remotely at 9:00 am on Thursday 2nd March by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

MR JUSTICE JACOBS

INDEX

MR JUSTICE JACOBS :

A: Introduction

1. On 26 April 2021, Cockerill J handed down a 93-page judgment, with 489 paragraphs, following a 6-day hearing of an application by 10 defendants for reverse summary judgment or to strike out proceedings for unlawful means conspiracy which had been commenced by Anthony King and his parents, James and Susan King, (together, "the Kings"). The claim in those proceedings was CL-2020-000066, and Cockerill J's judgment is [2021] EWHC 1045 (Comm). The defendants' reverse summary judgment/ strike out application was successful. At a "consequentials" hearing on 27 May 2021, Cockerill J certified that "the Claim is totally without merit". The "Claim" referred to the Claim Form issued by the Kings on 5 February 2020, and the Particulars of Claim dated 19 March 2020 in the action for unlawful means conspiracy. I shall similarly use the expression "Claim".

2. Cockerill J refused an application for permission to appeal, and the Kings sought permission to appeal from the Court of Appeal. This was dismissed on paper by Males LJ in trenchant terms on 20 June 2021. In paragraph 1 of his reasons, Males LJ said:

> "The judge demonstrated, in a conspicuously detailed and patient judgment, that this claim is thoroughly misconceived. She dealt at length with all of the matters which the applicants now seek to raise in their grounds of appeal. For the most part, the applicants simply fail to engage with her reasoning, which is entirely convincing. I have reached the firm conclusion that an appeal would have no real prospect of success. It is unnecessary in these circumstances to say much about each of the applicants' individual grounds. The applicants are or should be well aware of where their claim has been struck out and why an appeal would not succeed. The have merely to read the judgment."

3. Prior to the dismissal of the application for permission to appeal, 9 of the 10 defendants to the Claim sought to invoke the court's jurisdiction to make a wasted costs order against the barrister and solicitors who had represented the Kings in the proceedings including the 6-day hearing. There were two groups of defendants who made that application. The first group comprised the 1st – 4th Defendants to the Claim, namely Barry Stiefel, Robin Fisher, Peter Swain and Primekings Holding Ltd ("the Primekings Parties"). They are now the 1st – 4th applicants in the proposed wasted costs proceedings. The second group of defendants comprised the 5th – 8th and 10th defendants to the Claim. One of the defendants in the second group was the solicitors firm Teacher Stern LLP, and the remaining defendants were partners in or otherwise associated with that firm. I shall refer to them as the TS Parties. There was one further defendant to the Claim, namely Paul Downes KC, but no wasted costs application has been made by him. I shall refer to the Primekings parties and the TS Parties collectively as "the Applicants".

4. The court's wasted costs jurisdiction has been discussed in numerous cases, and CPR Practice Direction 46, paragraph 46 PD.5, sets out the basic approach:

> "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 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 is 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."

5. Applications for wasted costs will therefore generally proceed in two stages where the questions in paragraph 5.7 (a) and (b) need to be considered. This judgment follows a lengthy Stage 1 hearing, which occupied the best part of 2 days. I heard oral submissions from Ms Addy KC for the Primekings Parties and Mr Lightman KC for the TS Parties. Both submitted that this was an appropriate case for the matter to proceed to a "Stage 2" hearing.

6. The applications were opposed by Mr Taylor KC on behalf of Mr Christopher Newman and Mr Flenley KC on behalf of Metis Law. Mr Newman and Metis Law were, respectively, counsel and solicitors for the Kings in the struck-out Claim. I shall refer to them collectively as "the Respondents".

7. The issue is therefore whether the wasted costs applications should proceed to Stage 2.

B: Factual and procedural background

8. There is a complex and extensive litigation backdrop to the present application. The events and litigation prior to February 2021 are fully described in Cockerill J's judgment. The parties also referred to aspects of the litigation subsequent to Cockerill J's judgment, including a decision of the Court of Appeal in one of the ongoing pieces of litigation between the Kings and some or all of the Primekings Parties: *Re King's Solutions Group Ltd* [2022] EWCA Civ 1943, on appeal from [2020] EWHC 2861 (Ch) (Tom Leech QC (as he then was)). Although it will be necessary to refer to some aspects of the litigation background, it is not necessary to describe it in detail, since it can be found in Cockerill J's judgment. The following summary is sufficient for present purposes. (In this judgment, bracketed numbers refer to paragraphs of Cockerill J's judgment, except where the context otherwise requires, e.g. because I am referring to the paragraph of a legal authority discussed in the judgment.)

9. The Claim was but one element of a widescale litigation which originated with a claim in fraudulent misrepresentation brought by the Kings against three of the Primekings Parties ("the Misrepresentation Claim"). Although one of the present Primekings Parties, Mr Stiefel, was not a defendant to the Misrepresentation Claim, this is not of central importance in the context of the present application. It is therefore convenient, unless the context otherwise requires, simply to refer to the "Primekings Parties" in this judgment, whether I am referring to the three Primekings parties who were defendants to the Misrepresentation Claim or the four Primekings who were defendants to the Claim.

10. The Primekings Parties were represented in the Misrepresentation Claim by Teacher Stern LLP and Mr Downes KC. On 15 May 2015, the Kings discontinued the Misrepresentation Claim on the tenth day of trial before Marcus Smith J, and publicly apologised in open court to the defendants and consented to pay costs on the indemnity basis ("the Discontinuance"). The Kings were ordered to pay £1,700,000 on account of costs. (See [86] – [93].)

11. The Discontinuance led to four further sets of proceedings, described in [94] – [133]. Aspects of these proceedings featured in the argument before Cockerill J and before me.

12. One of those proceedings concerned the recovery of costs incurred by the Primekings Parties in relation to the Misrepresentation Claim. At the time when the Claim was commenced, there had been no detailed assessment of those costs. That assessment was only concluded in November 2020. There had, however, been an unsuccessful application by the Kings for a stay of the detailed assessment proceedings. This had been refused by Master Whalan in December 2019 [126]: i.e. shortly before the commencement of the Claim.

13. Another set of proceedings comprises a professional negligence action (the "Professional Negligence Action") by the Kings against the solicitors and counsel who had acted for them in the Misrepresentation Claim, and had advised in relation to the Discontinuance. Part of the claim in that action is that the lawyers ("the Misrepresentation Team") had been intimidated by Primekings and the Primekings legal team. That claim was issued in December 2019. There has been no application to

strike it out, and the trial is due to be heard in the summer of 2023. The Kings are conducting that case in person, although it appears that Mr Newman is assisting them.

14. A third set of proceedings comprises an unfair prejudice petition under section 994 of the Companies Act 2006. The relevant Primekings Parties applied, in December 2019, to strike out parts of the points of claim. The strike out application was heard in October 2020 by Mr Tom Leech QC (now Leech J), and he struck out parts of the claim but allowed other parts to remain. An appeal against his judgment was successful in December 2021, subsequent to the decision of Cockerill J.

15. Accordingly, the state of play in other proceedings at the time of issue of the claim form in respect of the Claim in February 2020 was that:

    (1) The Primekings Parties had commenced detailed assessment proceedings, and Master Whalan had refused a stay. The detailed assessment had not, however, been carried out;

    (2) The Kings had recently issued and served the Professional Negligence Action;

    (3) The s 994 proceedings, which had been commenced in April 2018, were subject to a strike-out application recently submitted by the relevant Primekings Parties, but yet to be determined.

16. On 6 February 2020 the Kings issued the Claim against the Primekings Parties and TS Parties and Paul Downes KC, claiming damages of some £58 million and exemplary damages. The Claim set out in the claim form appears to focus on what Cockerill J described (and I will describe) as the "costs conspiracy". Thus, paragraph 1 of the claim form said:

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

17. As described by Cockerill J at [136], the claim form then goes on to allege that the various defendants covered up this conspiracy by:

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

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

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

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

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

18. However, the figure of £58 million referred to in the claim form indicated that the Kings were advancing a claim which went well beyond a claim simply related to the Primekings Parties' claims for costs. This became apparent when the Particulars of Claim were served on 19 March 2020. The Particulars of Claim are described and analysed in immense detail, with significant criticisms made, in the judgment of Cockerill J. As summarised in [137], the Kings alleged a "Common Design" with three goals:

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

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

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

19. The TS Parties then served a lengthy Part 18 Request for further information on 20 April 2020, and this was answered on 6 May 2020. Later that month, Mr Downes and the Primekings Parties issued applications to strike out the Claim or for reverse summary judgment. The TS Parties initially issued a stay application, and then subsequently an application to strike-out or for reverse summary judgment. Evidence was served in support of, and in response to, those applications.

20. The applications were heard at the 6-day hearing in February 2021. Cockerill J handed down judgment on 26 April 2021 in which she acceded to each of the applications to strike out and gave summary judgment on the Claim. Mr Newman and Metis Law acted for the Kings throughout the Claim and in relation to consequential matters after judgment was handed down, until 20 May 2021. However, they ceased to act on that day. The Kings therefore acted in person at the consequentials hearing.

21. In their skeleton arguments for the consequentials hearing, the Applicants intimated their intention to apply for wasted costs orders and to seek directions in relation thereto. Such applications had been previously foreshadowed in correspondence on 11 May 2021 subsequent to Cockerill J's decision. The Applicants' submission to Cockerill J, in the light of the judgment, was that the tests to be considered at Stage 1 of the two-stage process envisaged by PD 54 were satisfied, and that the court could therefore move to Stage 2.

22. By the time of the hearing, Metis Law and Mr Newman were represented by solicitors and leading and junior counsel. Mr Flenley and Mr Taylor each submitted skeleton arguments in response to the wasted costs application. As explained in the skeleton

argument of Mr Taylor for the consequentials hearing, the letters dated 11 May 2021 intimating the wasted costs application had resulted in both Mr Newman and Metis Law considering that there was a conflict of interest in continuing to act for the Kings at the consequentials hearing. In relation to the substance of the wasted costs application, it was submitted that this was inappropriate for summary determination. The judge's attention was drawn to various authorities concerning the summary nature of wasted costs applications.

23. The consequentials hearing resulted in an order dated 27 May 2021. As previously described, Cockerill J certified that the Claim was "totally without merit". She ordered that the Claim be struck out against all of the defendants and that judgment be entered against the Kings; that the Kings pay the defendants' costs of the Claim, such costs to be subject to detailed assessment on the indemnity basis if not agreed; and that the Kings make payments on account of the defendants' costs, including £597,500 to the Primekings Parties and £420,000 to the TS Parties, by no later than 4.00 pm on 24 June 2021. None of those costs have been paid, and there appears to be no real prospect of payment either for the sum ordered to be paid on account or the greater sum that those parties say that they have incurred (some £615,000 for the TS Parties and £878,000 for the Primekings Parties).

24. Cockerill J gave an oral judgment as to why she considered that the claim was totally without merit, recognising that the test was a high one. She referred to various tests to be found in the authorities, for example that the judge "is confident after careful consideration that the case is truly bound to fail", and that "there is some logical problem with the claim, which makes it utterly hopeless and such that no rational argument can be raised". In the course of her judgment, she accepted a submission of Mr Taylor that a case should not be denoted as totally without merit because it failed on abuse of process (which was an argument advanced in various contexts, as described in more detail below). She said in relation to abuse of process:

> "I think were that the only point he would be absolutely right, because that is a point which was susceptible of very serious argument. I came to a very clear view, but it was susceptible of serious argument".

25. Her reason for the "totally without merit" certification was that:

> "The claim lacked rational basis at the very first stage. There was no properly pleadable cause of action because each claim lacked at least one constituent element. I think my conclusion is that the claim was totally without merit at that stage. When one adds to it that there was an element of the argument on abuse as well, that might add something, but it really stands or falls on that first part. So I am going to certify this case as having been totally without merit".

26. As far as the wasted costs application, Cockerill J gave various directions including that:

    (1) The identities of Mr Newman and Metis Law be anonymised and not disclosed to any third parties pending the Stage 1 hearing. (Following argument at the

beginning of the Stage 1 hearing, I considered it appropriate that this anonymity provision should be lifted);

(2) the Applicants file and serve written statements of grounds, identifying "what each Respondent is alleged to have done or failed to do and the costs which are sought against each Respondent"; such grounds to be supported by any evidence to be relied upon;

(3) the wasted costs applications be listed for a Stage 1 hearing before Cockerill J, with the hearing to be held in private; and

(4) any application for Cockerill J to recuse herself to be made no later than 28 days after the statement of grounds had been filed and served. (Mr Taylor's skeleton for the consequentials hearing had submitted that Cockerill J should recuse herself.)

27. It appears from the transcript of the hearing that Ms Addy and Mr Lightman did not press for an order, there and then, for the case to go directly to a Stage 2 hearing. This may be because Cockerill J said, prior to argument developing on wasted costs:

> "In relation to how we proceed: I am not entirely happy with the idea of proceeding in this format, whether or not I am the judge involved, because of the complexity of the applications which are being made against the factual background, bearing in mind the importance of fairness; bearing in mind the importance of those acting for the recipients of the application being able to understand exactly the case which has to be met. I have in my mind the analogy to committal proceedings where one needs to set out specific acts of contempt and I also have in mind, of course, the causation aspect which although it is a matter for the second stage, there is authority…which indicates that at the beginning it is incumbent upon the applicant to provide the court with evidence of the costs incurred as a result of the specific conduct relied upon, and that concern which I have about this format ties in with the point about permission to appeal and so I will require, if it is me who deals with this, some persuasion that that is the right way to go."

28. Subsequently, Cockerill J gave brief written reasons for her decision relating to the wording of the order concerning the statement of grounds, by way of resolving an argument as to how detailed these grounds should be. She accepted wording that reflected the requirements of the CPR, and said that it would be "inappropriate to set out prescriptively at this stage what may be required in relation to different allegations". She went on to say:

> "2. Having said that the Applicants will no doubt have taken on board the points that:
>
> i. the case advanced has to be clear enough to enable the Respondents to understand the case they have to meet and prepare for the hearing;

> ii. and in the case of a complex wasted costs application with potentially multiple alternative claims a lack of clarity as to individual claims and causative links between breaches and costs may render the Stage 1 hurdle harder to meet."

29. It is apparent from both the transcript of the consequentials hearing and these reasons, that Cockerill J considered that, notwithstanding her powerful judgment and the "totally without merit" certification, the wasted costs application raised substantial issues. Contrary to a submission of Ms Addy, I do not read anything that Cockerill J said as encouraging a complex application with a variety of alternative cases. Cockerill J was concerned to see that the Applicants' case was clearly set out, including their case as to the alleged causative consequences of the points relied upon. This is reflected in her brief written reasons set out above, where she referred to difficulties which a complex claim may face in meeting the Stage 1 hurdle. When considering the potential application for recusal, Cockerill J was conscious of the fact that a wasted costs application against solicitors and counsel would require her to address matters from a different perspective to that which was relevant to the determination of the strike out/ reverse summary judgment application. She said:

> "I would like the respondents to the applications to consider whether it is actually not in their interests for me to hear the application for the reason that if you go with another judge they will read my judgment perhaps more as, not quite containing holy writ, but as being a thing fixed than I might be inclined to do. I have tried in the judgment to make clear that my criticisms were based on what was known to me, and were I to hear any application for a wasted costs order I would be well open to persuasion that if I have gone too far in the judgment I should accept that, but certainly none of my colleagues can have the in-depth knowledge which I have, and that is possibly going to make them less inclined to divert(?)[1] through the judgment and less inclined, perhaps, to have an understanding of the nuances which may positively be helpful to the respondents. It is entirely a matter for the respondents whether they do want to pursue recusal."

30. In accordance with the May 2021 Order, on 12 October 2021 the TS Parties and the Primekings Parties filed and served their respective written statement of grounds with supporting witness statements and exhibits. These are lengthy documents: the Primekings Parties' is 25 pages, and the TS Parties' a further 19 pages. The latter document adopts the points raised by the Primekings Parties, but develops other points.

31. On 5 November 2021, Mr Newman applied for Cockerill J to recuse herself from hearing the wasted costs applications. No recusal application was made by Metis Law. In a letter dated 20 December 2021, Womble Bond Dickinson (solicitors for Mr Newman) confirmed that if the applications were listed before a judge other than

[1] The word "divert (?)" appears in the transcript of the hearing.

Cockerill J, they would not seek to argue that this would comprise a reason for the applications not to be allowed to proceed on grounds of proportionality.

32. On 8 February 2022 Cockerill J informed the parties that, as a matter of case management, she would assign the wasted costs applications to another judge. The case was in due course listed for a 1 ½ day hearing, with 1 ½ days pre-reading. The hearing in fact lasted the best part of 2 days, with the Applicants ultimately having more than an equal share of time. One of the issues addressed was the estimated length of the proposed Stage 2 hearing: Ms Addy and Mr Lightman estimated some 3 days, whereas Mr Taylor and Mr Flenley considered that at least 5 days would be required.

33. In that context, Mr Taylor was able to point to the significant underestimates by the Applicants' counsel of the time required for their own submissions on the Stage 1 argument. There was much force in this point. Both Ms Addy and Mr Lightman referred, in the course of their submissions, to their inability to develop certain points as a result of shortage of time. This meant, for example, that a large number of Ms Addy's alternative cases were not addressed in any detail. In relation to their oral reply submissions, following submissions by Mr Taylor and Mr Flenley, their estimate of 45 minutes turned into submissions lasting 1 hour 40 minutes. Although I have no doubt that the hearing would have progressed more quickly if it had been heard by Cockerill J, a substantial reason for the inadequacy of the time estimate, the lack of time to develop argument on all the alternative cases, and indeed the ultimate length of the reply submissions, was the complexity of the arguments, including alternative cases, which the Applicants wished to advance.

C: The judgment of Cockerill J

34. As might be expected from a strike-out application from multiple defendants heard over a period of 6 days, there were a very large number of issues which were debated before the judge and which were addressed in her judgment. In this section, I identify and summarise what seem to me to be the key relevant parts of the judgment in the light of the arguments addressed on the wasted costs application.

35. Sections (i) to (iii) of the judgment [1] – [139] were an introduction, a discussion of the legal principles concerning summary judgment and strike out, and a summary of the facts, including a description of other litigation between the various parties.

36. Section (iv) [143] – [168] described the Particulars of Claim. Cockerill J described this document as profoundly unsatisfactory in a number of respects [144]. The judge described the pleading as unclear in the extreme, combining tendentiousness with a combination of oversupply of evidence and undersupply of particulars [162]. In paragraph [165], she summarised a large number of deficiencies in the Particulars of Claim. The judge did not, however, simply strike out the pleading without more on the basis of those deficiencies. She went on to consider, with immense care, what the substance of the case was, and whether that could withstand the reverse summary judgment/strike out application.

37. In paragraph [166], she referred to the fact that the claim form had put the conspiracy as one to do with costs. However, at the hearing "almost no emphasis was put on the costs allegations", albeit that the Particulars of Claim focused on costs as the primary basis of the "Common Design" alleged by the Kings [167]. As described above, the

"Common Design" was pleaded as achieving various goals, pleaded as the "Discontinuance Goal", the "Enrichment Goal" and the "Cover Up Goal". Those goals are described at [154]. The conspiracy on which the argument focused was one which placed emphasis on the discontinuance of the Misrepresentation Claim in conjunction with improper pressure that the defendants were alleged to have applied. Cockerill J described this, in the next section of her judgment, as "a conspiracy to procure the discontinuance of the Misrepresentation Claim; and that that caused the loss of an otherwise copper bottomed claim".

38. Section (v) of the judgment was headed: "Clarifying what is in issue". The judge here described the conspiracy to procure discontinuance. The pleading had referred to various threats made prior to the proceedings, but Mr Newman accepted that these threats did not, at least in themselves, cause the discontinuance and therefore the main loss claimed [174] – [177]. The case therefore depended upon other threats alleged to have been made. These were described by Cockerill J as the "inferential/ unpleaded threats". The Particulars of Claim did refer to various "inferred" threats; i.e. threats of a similar nature to those made prior to the proceedings. However, the threat which was at the heart of the case was an "unpleaded" threat, which Cockerill J described as follows [180]:

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

39. The judge considered it unsatisfactory that this threat or intimidation, which lay at the heart of the case, had not been clearly pleaded in the Particulars of Claim. This was particularly unsatisfactory in circumstances where precisely the same issues had been pleaded in the Professional Negligence Action [183]. Despite the absence of a proper pleading, she did not strike out the case simply on that basis. She thought that the substance of the argument should be addressed, not least because it was apparent that the Kings had a passionate belief in the merits of the claim and because Mr Newman, in his submissions, had spent the majority of his time on it: [184].

40. The judge then considered whether the case would "be capable of being pleaded so as to contain the requisite elements to amount to a viable cause of action" [185]. She identified two critical components of the cause of action against the defendants, knowledge and causation [185]. The judge focused particularly on knowledge [187] – [197]. This was because it was obviously not sufficient, in order to establish a claim against the defendants, for the Kings to show that the legal team acting for them in the

Misrepresentation Claim were negligent or felt professionally exposed, as alleged in the Professional Negligence Action. As the judge put it at [187]:

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

41. She then considered the arguments advanced by Mr Newman as to why, based on various materials, there was a sufficient case of knowledge. Her conclusion [195] was that:

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

42. There had also been substantial argument by the defendants as to whether there was a sufficient case of causation. The judge's ultimate conclusion on this issue, in the context of the Threat/ intimidation that lay at the heart of the case, was favourable to the Kings: see [212].

43. The judge's conclusion on this aspect of the case is encapsulated in her summary at [234 (i) – (iii)]:

> "i) As regards the main element of the claim (threats causing discontinuance and other losses) the Pleaded Threats are no longer relied on as causative of any loss. The case based on the Pleaded Threats therefore falls to be struck out. Alternatively there is no real prospect of success on it and it would be appropriate to grant summary judgment;
>
> ii) The same would necessarily follow as regards any further "similar" threats –currently suggested but not particularised in the pleading;
>
> iii) As regards the unpleaded claim on the Inferred Threats (assuming it can be properly pursued) the case falls to be struck out/there is no real prospect of success because the case must fail on knowledge in circumstances where the Kings cannot plead any case that the Defendants knew (i) of the Misrepresentation Team's (assumed) negligence; and/or (ii) of the Misrepresentation Team's failure to disclose that (assumed) negligence to the Kings."

44. In the "Clarifying what is in issue" section, the judge went on to consider, separately, the costs conspiracy claim. The judge considered that the loss flowing from the

Discontinuance could only result from the threats, not the costs conspiracy [219]. She considered that other aspects of the costs case also flowed from the Discontinuance [221] – [222]. Her conclusion on what she described as the "subsidiary part of the claim" was expressed in paragraph 234 (iv) as follows:

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

45. These conclusions were in themselves sufficient to result in reverse summary judgment/ strike out. However, the judge then went on to deal with the remaining aspects of the argument, in part to ascertain whether there were other reasons why parts of the claim would in any event fail [235].

46. I note in passing that, as previously discussed, the judge's "totally without merit" decision was based upon her analysis in the part of her judgment culminating in paragraph [234], rather than any of the arguments which she subsequently considered.

47. Section (vi) of her judgment concerned the effect of the "Final Costs Certificate". This was a reference to the certificate made at the conclusion of the detailed assessment in November 2020, some 9 months after the Claim had been commenced. In summary, the defendants' argument here was based on issue estoppel or abuse of process. It was directed towards the costs conspiracy element of the claim (which Cockerill J had described as "subsidiary").

48. The judge addressed this issue over 9 pages and 50 paragraphs [241] – [291]. The judge considered, after discussion of various authorities, that the arguments about costs which formed part of the costs conspiracy case could have been raised in the detailed assessment proceedings [e.g. 255], and should have been so raised [274]. The question arose, however, of whether there were "special circumstances which would cause injustice" [275]. Cockerill J said that this was a point to which she had given "considerable thought". She decided, ultimately, that there were no special circumstances [283]. She indicated, however, that the answer might have been different if there was a strong prima facie case on the merits in relation to the allegations made [283]. In a later part of her judgment (Section ix), she addressed the question of whether there was a strong prima facie or compelling case on the merits; a point which tied in with her conclusion on abuse of process.

49. As previously noted, Cockerill J stated in the consequentials hearing that the abuse of process point would not of itself have justified a totally without merit certification.

50. Section (vii) of the judgment was headed: CPR 38.7 and abuse of process. The essence of the defendants' argument was that the court's permission to commence the Claim was required following discontinuance of the Misrepresentation Claim. This argument was only available to the parties to the Misrepresentation Claim (see e.g. [294] and [311]): Mr Stiefel and the TS Parties were not party to those proceedings. Accordingly, they needed to rely upon abuse of process.

51. Cockerill J decided [292] – [315], in summary, that CPR 38.7 did apply in relation to those defendants who were party to the Misrepresentation Claim and its discontinuance. All defendants could also, in principle, rely upon abuse of process. Consistent with her approach to abuse of process in the context of the costs conspiracy argument, the judge said that the court might well refuse to strike out the claim, as an abuse of process, if there were compelling evidence that the Kings had been misled or tricked [315]. If there were such evidence, then it seems that Cockerill J considered that this would also potentially affect the exercise of the court's discretion to grant permission pursuant to CPR 38.7. However, for reasons given at length in Section (ix) of her judgment, the judge did not consider that there was any such compelling evidence.

52. Section (viii) of her judgment was concerned with a number of "Discrete Issues". The parties' arguments at the Stage 1 hearing did not refer to most of the points discussed in this section. However, at paragraphs [365] – [369] the judge addressed the status of the unpleaded threats. She said that she had been minded not simply to decide the case on the basis of the pleaded case, but to consider whether, if pleaded, the threats could produce an arguable case. Her conclusion in [370], however, was that the "unpleaded Inferred Threats should properly be excluded". I understand that the judge was therefore identifying this as an additional reason for reverse summary judgment/ strike out, albeit that it was not the primary ground on which she had decided the case.

53. Section (ix) of the judgement addressed "The substance of the pleaded claims". The judge gave three reasons for addressing this issue. First, if the claims had substance, then this might come into the equation in relation to abuse of process or "some other compelling reason for trial" in the context of reverse summary judgment. Secondly, the Kings had a strong desire to have the details of the claims ventilated and considered. Thirdly, the judge wished to record her concerns about the way in which aspects of the case had been pursued, and the evidential basis of some of the allegations. She concluded in relation to the pleaded claims:

> "[432] I therefore conclude that there is nothing in the originally pleaded case which indicates that the substance of the allegations is very strong, such that it would give pause in the context of either the abuse of process arguments or in granting summary judgment.
>
> [433] I have already noted that as regards the pleaded basis for the Threats aspect of the claim I would have concluded that the pleaded case was insufficient to withstand summary judgment on the merits. As regards the Costs aspect of the claim had this claim not already failed (i.e. if there had been a pleaded loss, and had the central contention not been barred by abuse of process) I would regard the claim as weak, but I would probably have granted a conditional order, on the basis that (i) the factual basis was sufficiently complex (ii) there was sufficient evidence of error which might provide a slim basis for such allegations and (iii) those serious allegations would be best and most clearly dealt with at trial."

54. She then addressed the unpleaded threats, which "it is plain is the real case being run" [435]. Her conclusion at [454] – [455] was as follows:

> "[454] It follows that even assuming that the case as referenced in the Note had been pleaded or sought to be pleaded (which it was not) that case provides no basis for an inference of threats which would have more than fanciful prospects of success, and does not come close to the kind of compelling material which might conceivably assist in the context of the abuse of process arguments.
>
> [455] In striking out the claim and/or granting summary judgment I am not therefore by any means stifling a claim which should be heard. What I am doing is bringing a proper conclusion to a claim which is structurally fatally flawed, abusive and lacking in pleadable substance."

55. In a post-script to the judgment, she set out further concerns as to the way in which the Kings' case had been put forward.

D: The grounds of the wasted costs applications

56. The Statement of Grounds served by the Primekings Parties in their wasted costs application runs to 25 pages including 44 footnotes. The application was made against both Mr Newman and Metis Law. The application identified the three principal reasons upon which the application for reverse summary judgment/ strike out had succeeded. These were referred to as the "No Pleaded (or Pleadable) Cause of Action Ground", the "Costs Abuse Ground" and the "CPR 38.7/ Re-litigation Abuse Ground". These related to the conclusions which Cockerill J had reached, as summarised above, in Sections (v), (vi) and (vii) of her judgment.

57. The case advanced, in paragraphs 5 and 6 of the Grounds, was:

> "5. In the circumstances, no reasonably well-informed competent legal practitioner applying their objective professional judgement would have drafted and/or issued and/or served the Claim Form and/or no reasonably well-informed competent legal practitioner applying their objective professional judgement would have drafted and/or served the Particulars of Claim and/or evaluated the chances of success of the Claim as being such as to justify the commencement and/or the continuance of the proceedings. From the outset and, or alternatively, by reason of the various subsequent events which are identified further below, the Barrister and/or the Firm ought reasonably to have appreciated that the litigation in which they were acting constituted an abuse of process (by reason of the Costs Abuse Ground and/or the CPR 38.7/Re-litigation Abuse Ground) and/or was in pursuit of no pleaded or pleadable cause of action (by reason of the No Pleaded (or Pleadable) Cause of Action Ground).
>
> 6. Accordingly, by advising the Claimants to proceed with and/or by taking any and all steps to facilitate the issue and/or continued pursuit of the Claim, the Barrister and/or the Firm

> each acted improperly, unreasonably and/or negligently, including by lending themselves to an abuse of process."

58. In paragraphs 7 and 8, the Primekings Parties said that it was reasonable to infer that either or both of Mr Newman and Metis Law had advised the Kings to commence and/or continue with the Claim, and that they had not at any stage advised discontinuance.

59. The Grounds then went on to address, in turn, the Costs Abuse Ground, the CPR 38.7/ Re-litigation Abuse Ground, and the No Pleaded (or Pleadable) Cause of Action Ground.

60. Paragraphs 31 – 39 addressed the costs incurred by the Primekings Parties for which the two Respondents should be made liable. This was divided into two sections.

61. First, the relevant periods were identified. The primary case was that the Respondents should be made liable for all of the Primekings Parties' costs of the Claim. There then followed a series of alternative dates at which advice to discontinue should have been given. In broad summary, these alternative cases were based upon:

    (1) 16 April 2020, when the Points of Reply were served in the detailed costs assessment proceedings (where it was alleged, as an alternative to discontinuance, that the Respondents ought to have advised that the Claim be stayed);

    (2) 14 May 2020, when the reverse summary judgment/ strike out application was served (where it was again alleged, as an alternative, that the Respondents should have advised that the Claim be stayed);

    (3) 2 June 2020, when the TS Parties' reverse summary judgment/ strike out application was served;

    (4) 4 September 2020, when the Primekings Parties' solicitors reserved the right to seek wasted costs;

    (5) 29 October 2020, when the judgment of Tom Leech QC was handed down;

    (6) 18 November 2020, when the Final Costs Certificates were issued; and

    (7) 11 January 2021, when an application was made to rely upon the Final Costs Certificates.

62. Secondly, the Grounds set out the quantum of costs claimed in respect of various time periods. Some additional allegations were made in relation to this point, for example that the Primekings Parties' costs had been exacerbated by the volume of witness evidence served by the Kings.

63. The conclusion in paragraph 43 of the Grounds was that it was just for Mr Newman and Metis Law to pay any or all of the Primekings Parties' costs of the Claim on a joint and several basis. It was no answer for Metis Law to argue that it had relied upon the advice of a barrister, in circumstances where it was obviously and glaringly wrong, and

where Metis Law ought to have appreciated that the litigation in which it was acting constituted an abuse of process.

64. The Statement of Grounds of the TS Parties ran to 19 pages. They adopted the grounds of the Primekings Parties, and the 19 pages therefore contained "further and additional facts, matters and grounds". Three further grounds were advanced as follows.

65. First, the TS Parties alleged a "deliberate and unjustifiable failure" by Metis Law to ensure that the Kings complied with the requirements of the Practice Direction – Pre-Action Conduct and Protocols". The case advanced includes an allegation of dishonesty or close to dishonesty, namely that the reason given in the claim form for not complying with the protocol was, as Metis Law knew or ought to have known, "disingenuous and wholly unjustifiable".

66. Secondly, the TS Parties relied upon the failure on the part of Mr Newman and Metis Law to engage adequately or at all with the flaws and defects in the Particulars of Claim, despite their being highlighted in correspondence and in the request for further information served by the TS Parties on 20 April 2020.

67. Thirdly, the TS Parties alleged a failure on the part of the Respondents to take immediate steps to abandon their opposition to the defendants' strike out applications upon receipt of the defendants' skeleton arguments for the strike-out hearing. In the course of his reply submissions, however, Mr Lightman said that he was not pursuing this ground.

E: Legal principles in relation to wasted costs applications

68. The statutory provision granting jurisdiction to make a wasted costs order is the Senior Courts Act 1981, s.51 which states in relevant part that, subject to rules of court, a wasted costs order may be made where costs are incurred by a party "(a) as a result of any improper, unreasonable, or negligent act or omission on the part of any legal representative….". This provision is reflected in CPR PD 46 rule 5.5, set out above. As previously described, rule 5.7 provides for the 2-stage procedure.

General principles

69. The leading decisions in this area of the law are *Ridehalgh v Horsefield* [1994] Ch 205 and *Medcalf v Mardell* [2002] UKHL 27. In *Lady Archer v Williams* [2003] EWHC 3048, para [45] Jackson J helpfully summarised a number of matters which emerged from *Ridehalgh*, in which he had acted as counsel. They are as follows:

    i. The word "improper" connotes conduct which would be regarded as improper according to the consensus of professional opinion.

    ii. "Unreasonable" connotes conduct which is vexatious or designed to harass the other side, rather than advance the resolution of the case.

    iii. "Negligent" does not connote conduct in which all the ingredients of the tort of negligence are present. On the contrary, the word "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.

iv. The mere fact that lawyers have pursued a hopeless case or hopeless defence does not mean that their conduct was improper, unreasonable or negligent. It is often the duty of lawyers to put forward a hopeless claim or hopeless defence, if the client has rejected wise advice and insists upon that course of action.

v. Lawyers responding to a claim for wasted costs are put in a difficult position, if their client declines to waive privilege. Accordingly the judge must make full allowance for the inability of those lawyers to tell the whole story.

vi. It is essential for the claiming party to demonstrate a causal link between the improper, unreasonable or negligent conduct complained of and the wasted costs which are claimed.

vii. Wasted costs claims should not be permitted to develop into a costly form of satellite litigation. A wasted costs claim should not be allowed to go forward, if it cannot properly be dealt with by means of a simple and summary procedure and at a cost which is proportionate to the sum claimed.

70. There was no significant dispute as to these principles, except (vii). The import of Ms Addy's submissions was that whilst this might be the general approach, there may be cases which should be approached differently. She submitted that it was not necessary for every wasted costs claim to be capable of being addressed in a simple and summary procedure. Some cases, such as the present, call out for a remedy, even if there is a degree of complexity to the application, particularly bearing in mind the very significant amount of costs which her clients had incurred and in respect of which they have no real prospect of recovery from the Kings.

71. I do not accept this argument. There is a long line of consistent authority, summarised in more detail in Section F below, which fully accords with what Jackson J said as to simple and summary procedure and proportionate cost. Cases in the Commercial Court are no exception, even though the amounts spent by parties are often very high. Recently, Bryan J applied this line of authority in dismissing a wasted costs application at Stage 1 where a payment on account of costs in the sum of £1.44 million had been ordered: *Lakatamia Shipping Co and others v Baker McKenzie LLP* [2021] EWHC 2072 (Comm).

72. In *Medcalf*, the House of Lords strengthened the guidance, previously given in *Ridehalgh*, in respect of cases where the client has refused to waive privilege. (In the present case, the Kings have refused.) In that case, counsel had made serious allegations of fraud against the claimant (Mr Medcalf) whose claim had succeeded at first instance. Those allegations were made in the context of an appeal against the first instance judgment. The appeal, as well as the allegations, were emphatically dismissed by the Court of Appeal. The Court of Appeal (by a majority) made a wasted costs order against counsel who had appeared for the unsuccessful defendant/ appellant. That decision was reversed by the House of Lords.

73. Mr Medcalf's case for a wasted costs order involved the argument that the barristers had acted in breach of paragraph 606 of the Code of Conduct, because they could not have had "reasonably credible material which as it stands establishes a prima facie case of fraud". This gave rise to a question as to whether that case could be addressed fairly in circumstances where there had been no waiver of privilege by Mr Mardell. At

paragraph [23], Lord Bingham (with whom Lord Hoffmann and Lord Rodger agreed) said this:

> "But with the benefit of experience over the intervening years, it seems that the passage 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. The point was well put by Mr George Lawrence QC, sitting as a Deputy High Court Judge in *Drums and Packaging Limited v Freeman*, unreported, 6th August 1999, when he said at paragraph 43:
>
> > 'As it happens, privilege having been waived, the whole story has been told. I cannot help wondering whether I would have arrived at the same conclusion had privilege not been waived. It would not have been particularly easy, in that event, to make the necessary full allowance for the firm's inability to tell the whole story. On the facts known to D3 at the time it lodged this application, D3 might very well have concluded that the firm would not be able to avoid a wasted costs order, even on the 'full allowance' basis recommended by Sir Thomas Bingham, MR'.
>
> 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. This reflects the old rule, applicable in civil and criminal cases alike, that a party should not be condemned without an adequate opportunity to be heard. 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 satisfied (a) that there

> is nothing that the practitioner could say if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order."

74. Although *Ridehalgh* and *Medcalf* remain the leading authorities, a large number of other cases were referred to by the parties at the Stage 1 hearing. By and large these served merely to highlight, or illustrate the application of, the basic principles described above. I refer to some of these cases where appropriate below. There are, however, three areas of authority which have particular relevance to the arguments advanced.

Hopeless cases

75. Issues of wasted costs in the context of hopeless cases were addressed by the Court of Appeal in *Dempsey v Johnson* [2003] EWCA Civ 1134. The judge had made a wasted costs order in favour of a defendant. He had applied the approach in *Ridehalgh* and had asked whether the appellant had been negligent in the sense that they had been prepared to continue to act after receipt of a particular letter, when no reasonably competent solicitor could have considered that there were any prospects of success. The appellants argued that this was no longer the correct test, following *Medcalf*: mere negligence was not sufficient for a wasted costs order, which would only be appropriate if the lawyers had acted in a way which amounted to an abuse of process. Whilst rejecting that argument, but nevertheless allowing the appeal, the Court of Appeal referred to the need to have particular regard to the conflicting interests that are involved when there is an allegation that a hopeless case was pursued when no reasonably competent solicitors would have appreciated that it was bound to fail.

76. The main judgment was given by Latham LJ, who said at [28]

> "In cases where the allegation is that the legal representative pursued a hopeless case, the question was correctly identified by the judge as whether no reasonably competent legal representative would have continued with the action. It is difficult to see how that question can be answered affirmatively unless it can also be said that the legal representative acted unreasonably, which is akin to establishing an abuse of process. That is the concept which seems to me to be the appropriate concept when assessing the exercise of judgment, which is essentially what the legal representative is doing in balancing the various interests which have to be balanced in such a situation. I can see, however, that negligence could be the appropriate word to describe a situation in which it is abundantly plain that the legal representative has failed to appreciate that there is a binding authority fatal to the client's case. That may, of itself, justify making a wasted costs order, although in practice it is difficult to envisage a case in which that situation would have persisted to trial without the other party having drawn the case to the other side's attention."

77. At paragraph [30], Latham LJ identified the question, in the particular case, as being whether or not no reasonably competent legal advisor would have evaluated the chance of success in the proposed argument as being such as to justify continuing with the

proceedings. He said that on the facts of that case the judge could only come to a conclusion adverse to the appellants if he had the opportunity of seeing privileged material.

78. Mance LJ agreed with the reasoning and conclusions of Latham LJ, but added some further words on the subject of pursuit of a hopeless case and negligence.

> "[34]…The authorities identify pursuit of a hopeless case as a head requiring separate attention. Once unsuccessful litigation has been brought to an end, hindsight is likely to encourage suggestions that the legal advisers to those who pursued or defended it should not have lent it their assistance, or should not have done so for as long as they did. In *Ridehalgh v Horsefield* [1994] Ch 205,233F–234F Sir Thomas Bingham MR as he was, giving the judgment of the court, emphasised that a legal representative "is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail". The client may, for example, be insisting on giving evidence in support of a view of the facts which the legal representative himself considers and may well have advised has no chance of being accepted. But the legal representative is not the judge, and the client is entitled to have his case on the facts determined by a court.
>
> [35] The Master of the Rolls went on to distinguish cases where a representative lent his assistance to proceedings which were an abuse of the process of the court. The examples he gave were of clear cases, e.g. the pursuit of litigation for reasons unconnected with its success, or the pursuit of dishonest litigation; but he added that: "it is not always easy to distinguish between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it" (p. 234E–F).
>
> [36] In the passages referred to in the previous paragraphs, the court was not directly addressing the problem of negligence in the conduct of litigation. An example of negligence leading to the pursuit of litigation having no prospect of success might, however, be a legal representative pursuing a claim or a defence in ignorance of an authority at the highest level from which no-one aware of it could sensibly have thought that any future court would depart. One would not, I think, speak of the solicitor having abused the process in this context, but his or her negligence could, in my view, be relevant to an application for a wasted costs order.
>
> [41] Where, as in *Persaud v Persaud*, the gist of the complaint is the pursuit of a hopeless case, the approach to an application for a wasted costs order is, in the absence of any specific indication

> of negligence, likely to be to consider whether the conduct of the litigation amounted to an abuse of process. But, even that question may, as Latham LJ has said, resolve itself into a general enquiry into whether or not the legal representative pursued a claim or defence which no reasonably competent practitioner could have done. That invokes a test also familiar in cases where negligent conduct is alleged. I note in parenthesis that, when the court in *Persaud v Persaud* came to the facts, it addressed submissions put in such terms: see e.g. paragraphs 29 and 30."

79. This decision shows that, in the context of hopeless cases, something "akin to establishing an abuse of process" by the legal advisers will usually be required, albeit that there may be cases (such as where there is a binding authority fatal to the client's case) which fall short of that. *Ridehalgh* again provides authority as to what is meant by abuse of process in this context. In the passage at page 234 D- F referred to by Mance LJ, Sir Thomas Bingham MR said:

> "It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."

80. I was also referred to the decision of the EAT (Elias J) in *Ratcliffe Duce & Gammer v Binns* [2008] 1 Lloyd's Rep PN 12. Elias J applied a test of abuse of process, albeit without *Dempsey* having been cited to him. He held that a wasted costs order was not appropriate in a case where it was "not suggested that the case was being pursued for any improper purpose or anything of that nature". He went on to say, consistent with prior authority, that:

> "[22] Furthermore, a particular problem arises in circumstances where the privilege of the client is not waived. In those circumstances it will be a very exceptional case indeed where a court will be entitled to infer that a party is abusing the process of the court by pursuing a hopeless case. The reasons are again explained by the Master of the Rolls in *Ridehalgh* …"

The status of Cockerill J's decision

81. One area of legal dispute was the extent to which any findings of Cockerill J are binding on the Respondents in the context of the wasted costs application. Mr Taylor submitted that any findings in Cockerill J's decision are only binding as between the parties to the proceedings, and therefore are not, as a matter of principle, binding on Mr Newman. I agree. This proposition is clearly supported by the judgment of Neuberger J in *Brown v Bennett* [2002] 1 WLR 713, para [103]. Ms Addy did not challenge this submission: she accepted that the judgment of Cockerill J is not *res judicata* against either of the Respondents.

82. However, Ms Addy submitted that it would now be an abuse of process for the Respondents to seek to challenge, in the context of the wasted costs application, any aspect of Cockerill J's decision, since to do so would be a collateral attack on that judgment. She referred to the decision of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, and submitted that it would be manifestly unfair to the Applicants for them to have to relitigate the relevant issues determined by Cockerill J.

83. I reject that submission. There is no authority which suggests that it is an abuse of process for a barrister or solicitor, in the context of a wasted costs application, to challenge aspects of the decision which has led to the application. The scope for such challenge is likely in most cases to be somewhat limited, because the prior decision (here of a High Court judge)– even if not binding as *res judicata* – would be persuasive authority as a matter of precedent. However, I see no reason why a barrister or solicitor should not be able to defend a wasted costs application by saying that the judge's view of a particular point was erroneous. I consider that this could be a permissible part of a defence to a case where the applicant is saying (to use the terminology of *Dempsey*) that no reasonably competent legal adviser could have considered that there were any prospects of success or could have pursued the case. A solicitor or barrister would in my view be entitled to say that one reason why a competent legal adviser could have considered that the case had a prospect of success was because, notwithstanding the judge's view ultimately expressed in the judgment, the argument advanced was sound. Generally speaking, however, legal advisers will not have to go so far; since their case will usually be that the particular point rejected by the judge was fairly arguable, even though the judge decided against it.

84. I consider that this approach is supported as a matter of both principle and authority. As for principle, the basic approach is that stated by Simon LJ in *Michael Wilson & Partners v Sinclair* [2017] EWCA Civ 3, para [48] (5):

> "It will be a rare case where litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process".

85. I do not consider that wasted costs applications against legal advisers should be examples of such "rare" cases. Indeed, the approach for which Ms Addy contends would potentially lead to unfairness and an artificial approach to the question of whether a reasonably competent legal adviser could properly have pursued the case or a particular argument. Mr Taylor was able to illustrate this in the course of his argument concerning the "costs conspiracy" alleged in the claim form and Particulars of Claim.

The costs conspiracy was not the principal area of argument before Cockerill J. Her primary ground of decision in relation to the costs conspiracy [234 (iv)] was that there was no separate loss which arose from the relevant representations. She later referred [433] to the absence of a pleaded loss. Mr Taylor submitted that a relevant loss was indeed pleaded, and that a reasonably competent barrister could take the view that not only was it pleaded but also that it could properly be pursued. It seemed to me, as discussed in more detail in Section G below, that this argument had some considerable force. If so, then I can see no justification for preventing Mr Newman from relying on that argument, when defending the wasted costs application.

86. Mr Taylor was able to rely, in the context of abuse of process, on the decision in *R (on the application of B) v X Crown Court* [2009] EWHC 1149 (Admin). In that case, a barrister sought to defend himself against a wasted costs application on the grounds that the discharge of a jury, and the consequent wasted costs, were not caused by his conduct but by the judge's unreasonable and unnecessary decision to discharge them. Hickinbottom J held that such an allegation was not an impermissible collateral attack on the judge's original decision. In the course of his judgment, he said (at [41(iii)] of the judgment) that he had not been referred to any case "that supported the proposition that the conduct of a judge cannot be questioned in a wasted costs application at first instance". I was similarly not referred to any such authority.

87. Ms Addy submitted that this decision was not relevant, because it was a criminal case where (see [41 (i)]) no concept of issue estoppel or similar procedural bar can arise. She said that there was a very different landscape in civil proceedings. I do not accept that this is a relevant distinction. There is no reason in principle why the principles concerning abuse of process should not be applied where the underlying proceedings were criminal. Indeed, one of the leading cases in this area is the decision of the House of Lords in the "Birmingham 6" case, where a civil claim was struck out because it was a collateral attack on the prior criminal case: *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. In the *X Crown Court* case, the "collateral attack" argument did not fail simply because the original proceedings were criminal proceedings. In paragraph [41], Hickinbottom J gave a number of reasons why the argument failed and why a challenge to the prior decision was permissible.

88. Ms Addy also drew attention to one of the other reasons given by Neuberger J in *Brown v Bennett*, at para [103], as to why there was a danger in relying too heavily upon the prior judgment in that case: namely that the legal advisers in that case had not argued the case at the ultimate trial. In the present case, by contrast, the Kings had been represented by the Respondents throughout the action and the hearing. I do not consider that this makes any real difference to the abuse of process analysis, save in one respect favourable to the Respondents. By the time of Cockerill J's "totally without merit" decision, Mr Newman and Metis Law had ceased to act, and they therefore had no opportunity to address Cockerill J on that issue. Ms Addy's submissions accepted that her abuse of process argument could not extend to the "totally without merit" determination.

89. Accordingly, I conclude that the judgment is not binding on the Respondents and is not immune from criticism, on the basis of collateral attack, in the context of the wasted costs application against them. It is apparent from Cockerill J's remarks at the consequential hearing that, in general terms, this was her instinct as well. As she said: "If I have gone too far in the judgment, I should accept that …". It is also, in my view,

consistent with the approach of Neuberger J in *Brown v Bennett*. In paragraph [102] – [103], Neuberger J identified various dangers in relying too heavily, in the context of wasted costs applications, on the judgment from which the application arises, and in particular the need to avoid the wisdom of hindsight.

90. Although I have addressed this collateral attack/ abuse of process argument in some detail, I ultimately did not think that it was a critical point. This is because, as Ms Addy was inclined to accept, a wasted costs application could properly be defended by legal advisers on the basis that, notwithstanding a judge's adverse decision, they could reasonably have concluded that an argument could fairly be advanced, or that a different view could be taken to that of the judge.

Reliance by solicitors upon counsel

91. There are a number of cases where wasted costs orders have been made against solicitors despite a barrister having been instructed and notwithstanding reliance on that counsel's advice. The applicable test and principles were not in dispute.

92. As stated by Gross J in *Isaacs Partnership v Umm Al-Jawaby Oil Service Co Ltd* [2003] EWHC 2539 (QB) at [44 (1)]:

> "In general, though a solicitor is entitled to rely on the advice of counsel properly instructed even if counsel's advice proves to be mistaken or misconceived, the solicitor must not do so blindly: the solicitor must not abdicate his professional responsibility and remains bound to exercise his own independent judgment".

93. In *Ridehalgh* at 237G, Sir Thomas Bingham said:

> "A solicitor does not abdicate his professional responsibility when he seeks the advice of counsel. He must apply his mind to the advice received. But the more specialist the nature of the advice, the more reasonable is it likely to be for a solicitor to accept it and act on it".

94. In *Locke v Camberwell Health Authority* [2002] Lloyds Rep PN 23, Taylor LJ (at page 29) said that where the barrister's advice is "obviously or glaringly wrong, it is [the solicitor's] duty to reject it". The Primekings Parties, in their grounds and skeleton argument, proposed a test of "obviously and glaringly wrong", and I accept that this test is appropriate.

F: Threshold issue -- suitability for summary determination?

The arguments in outline

95. The Respondents submitted, as their primary position, that there was a short answer to the present application. The wasted costs jurisdiction is intended to be a summary process for determination of straightforward cases, and the applications made by the Applicants were entirely unsuitable for that process. They submitted that the cases advanced were in effect substantial professional negligence actions, and that a

considerable amount of court time would be required to deal properly and fairly with the points raised.

96. The Applicants acknowledged that the applications might have a degree of complexity, and would take some time to resolve. However, as previously stated, they estimated that this would take no longer than 3 days, and that justice required the Applicants being permitted to seek recovery of substantial costs which they would otherwise have no prospect of recovering. Although further substantial costs had been incurred in preparing the applications, the work on their side had now been done and the costs from this point would not be so significant.

The case-law

97. In *Medcalf v Mardell* [2002] UKHL 27, Lord Bingham at [24] citing *Ridehalgh v Horsefield* [1994] Ch 205, 238-239, reiterated that wasted costs hearings should only be permitted if measured in hours; and he urged courts to be astute to control costly satellite litigation.

98. Lord Bingham also cited the Privy Council case of *Harley v McDonald* [2001] 2 AC 678 at p 703, para 50:

> "As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to 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 are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed."

99. Lord Bingham went on at [24]:

> "Save in the clearest case, applications against the lawyers acting for an opposing party are unlikely to be apt for summary determination, since any hearing to investigate the conduct of a complex action is itself likely to be expensive and time-consuming. The desirability of compensating litigating parties who have been put to unnecessary expense by the unjustified conduct of their opponents' lawyers is, without doubt, an important public interest, but it is, as the Court of Appeal pointed out in *Ridehalgh v Horsefield*, at p 226, only one of the public interests which have to be considered.

100. Similarly, Lord Hobhouse said (at [57]) that the jurisdiction is discretionary and should be reserved for those cases where the unjustifiable conduct can be demonstrated without recourse to disproportionate procedures.

101. Similar statements and sentiments, to those in *Medcalf,* have been made and can be found in many cases, before and after *Medcalf v Mardell*, where wasted costs applications have been dismissed.

102. In *Hedrich v Standard Bank London Ltd* [2008] EWCA Civ 905 the Court of Appeal held at [10] (5) that "hearings should be measured in hours not in days or weeks*"* in the context of the following passage:

> "The overriding requirements of the procedure to be followed are that any procedure must be fair and must be as simple and summary as fairness permits. Hearings should be measured in hours not in days or weeks. Judges must not reject a weapon which Parliament has intended to be used for the protection of those injured by the unjustifiable conduct of the other side's lawyers, but they must be astute to control what threatens to become a new and costly form of satellite litigation (238G–239A)."

103. The court reiterated this point at paragraph [78], Ward LJ saying that:

> "I cannot emphasise strongly enough the established authority that this is a summary remedy which should be capable of being dealt with in hours rather than days".

Ward LJ had sympathy for the applicants, who had "spent a fortune in this sorry litigation", but nevertheless dismissed the appeal from the refusal of the judge to order wasted costs. He referred to the need for "this form of satellite litigation … to be rigorously confined".

104. Similarly, Lord Woolf MR said in *Wall v Lefever* [1998] 1 F.C.R. 605 at 614:

> "The wasted costs jurisdiction is salutary as long as it is not allowed to be a vehicle which generates substantial additional costs to the parties. It should not be used to create subordinate or satellite litigation, which is as expensive and as complex as the original litigation. It must be used as a remedy in cases where the need for a wasted costs order is reasonably obvious. It is a summary remedy".

105. Likewise, in *Re Merc Property Ltd* [1999] 2 BCLC 286, Lindsay J explained at p. 300a that the "wasted costs jurisdiction has to be reserved for summary process in clear cases" and dismissed the application before him, observing with apparent concern that it had taken up "a whole day".

106. In *Lady Archer* [63] Jackson J said:

> "Despite the best efforts of judges, and dare I say it, textbook writers, the true nature of the wasted costs jurisdiction is still insufficiently appreciated. This is a procedure for dealing with relatively straightforward claims which are capable of summary disposal at a proportionate cost. It is not a vehicle for mounting a complex professional negligence action in circumstances where much of the relevant evidence is obscured from the court's view".

107. More recently, Bryan J in *Lakatamia Shipping Co Ltd v Baker McKenzie LLP* [2021] EWHC 2702 (Comm) [75] warned against applications which have "all the hallmarks of heavy satellite litigation the furtherance of which is to be deprecated".

108. Mr Taylor submitted, and I accept, that a good indicator of whether an application is apt for summary disposal is the degree of complexity involved in the allegations made against the representative and, in particular, the number and variety of those allegations:

    a. In *Kagalovsky v Balmore Invest Ltd* [2015] EWHC 1337 (QB), Turner J refused a wasted costs application, reasoning at [30] that *"*the sheer number and variety of allegations and the volume of material generated in support of this application is sufficient of itself to show that the case could not be characterised as "plain and simple"". The stage 1 application was refused because of the "further time and resources which would be involved in proceeding to a substantive determination of this application [which] would be disproportionate and inconsistent with the concept of summary determination" [30]. The Court reasoned that given the stage 1 hearing lasted one day, the stage 2 hearing would likely last around two or three days.

    b. In *Re Freudiana Holdings Ltd* [1995] 11 WLUK 442 the Court of Appeal held that the wasted costs application (which involved points of claim running to over 40 pages) should not have been pursued in light of the "sheer number of allegations [made against the representative]".

    c. In *Lakatamia* at [77] Bryan J found that the application was "worlds away" from a summary determination as "the allegations are of wide scope – they most closely resemble allegations of professional negligence". At [37] he noted that the Stage 1 application had already "resulted in the deployment of very much more than half a day of judicial time" and dismissed the application at that stage.

Discussion

109. I consider that the present applications are wholly unsuitable for determination in the summary process described in the authorities. This is by no stretch of the imagination a straightforward case. There are numerous aspects of the case which, individually and collectively, lead to that conclusion.

110. First, the statement of grounds filed in support of the applications comprise 25 pages of allegations from the Primekings Parties and 19 further pages from the TS Parties. These documents read as though they are pleadings in a substantial professional negligence action, and in reality that is indeed what the applications entail. The grounds contain numerous alternative cases, which would require the court to look at the development

of the Claim, and the strike-out applications, at different points in time. There are various allegations as to what the Respondents knew or ought to have known, or were or should have been aware of, or ought to have done. The Primekings Parties' grounds contains some 23 allegations as to what ought to have been known or done. The TS Parties adopt these and add some of their own. The cases advanced would therefore require extensive fact findings on these matters, and ordinarily these would require careful consideration at a trial rather than determination in a summary process.

111. Secondly, not only will consideration need to be given to the conduct of the Respondents at each of the points in time relied upon by the Applicants, but significant questions will arise as to causation at each point in time. Indeed, as the discussion in Section G below shows, the applications raise a fair number of causation issues. In my view, these are far from straightforward and are inherently unsuitable for summary determination.

112. One of the important causation issues arises from the fact that the Kings are plainly determined litigants who, as Cockerill J's judgment indicates, firmly believe in the existence of the conspiracy which the Claim was designed to expose. This is also evidenced by the broad canvas of litigation involving the Kings described earlier. There is a substantial argument, on causation, that – irrespective of the nature of the advice given by the Respondents or of their assistance in advancing the Claim – the Kings would have been determined to litigate, and that the Applicants would have been facing a claim which they would have needed to apply to strike out anyway. The Applicants' response is that the Kings would not have been able to formulate their own claim, and would have needed assistance from the Respondents which, on the Applicants' wasted costs argument, should never have been provided. That argument might have some force if no proceedings could properly have been started in any shape or form. But for reasons set out in Section G, I disagree with that proposition on the basis of the present evidence.

113. If the Applicants were to fail on the argument that the Respondents should never have lent any assistance at the start of the proceedings, then they would need to rely on one or more of their alternative cases; namely that the proceedings should have been discontinued at some stage between issue and the hearing of the strike-out case. However, the alternative cases, based on discontinuance, will be met by the argument that, having started, the Kings could and would have continued. These and other causation arguments are, in my view, unsuitable for determination in a summary process.

114. Thirdly, the factual and legal background to the applications is extremely complex, as can be seen from the very lengthy judgment of Cockerill J. This will necessarily make a Stage 2 hearing lengthy and complex. I recognise that I came to this case afresh, not having dealt with the reverse summary judgment/strike out application. Even so, I spent some time reading into the case prior to the hearing, heard argument over the better part of 2 days, and have now subsequently spent far longer in reviewing the materials and writing this judgment. My view during the hearing was that this was a complex case unsuitable for determination in a summary process, as envisaged by the case-law, and this still remains my firm view.

115. Fourth, as Mr Flenley submitted, the Primekings Parties' grounds identified a very large volume of documents on which they proposed to "refer to and rely upon". These

comprised approximately 16,000 pages of documents, which would (at 300 pages per lever arch file) fill 53 lever arch files, even before the court starts to consider any authorities. I accept Ms Addy's point that, at least for the purposes of the Stage 1 application, the core documents could be distilled down to a couple of (double-sided) lever arch files. However, if the application were to proceed to Stage 2, on the wide-ranging basis proposed in the applications, a very large amount of underlying documentary material would be in play.

116. Fifth, this is obviously not a case where the application could be dealt with in hours rather than days. Even on the Applicants' case, approximately 3 days would be required for Stage 2. I consider that this is likely to be a significant underestimate. Mr Taylor submitted that a minimum of 4-5 days would be required, and in my view that is correct. Mr Flenley submitted that the stage 2 hearing would be measured in weeks rather than days. There is force in that submission. It is certainly not difficult to see that the Stage 2 process will last at least as long as the original hearing before Cockerill J.

117. This is unsurprising, given the width and nature of the case advanced. This requires most of the significant decisions reached by Cockerill J to be revisited through the prism of a question different to those which she was, at least directly, considering: namely whether no reasonably competent legal advisor would have evaluated that the chance of success on each relevant argument was such as to justify commencing or continuing with the proceedings. Ms Addy summarised the applicants' argument in her reply submissions as follows: having regard to Cockerill J's judgment, which in her submission could not be challenged, the position is that "no reasonable lawyer, properly considering the matters, should have put their name to the pleading or issued and served the claim form".

118. This formulation of the principal argument tends, however, to oversimplify the case being advanced in the grounds of the Applicants and the written and oral submissions which were advanced on their behalf. The Applicants rely not simply on negligent conduct, but also upon allegations that the Respondents acted improperly (as well as unreasonably). Impropriety is the most serious of the grounds upon which wasted costs orders can be sought. Moreover, various different themes or strands were apparent in the Applicants' case, and the argument on their behalf. These included the following: the Respondents improperly pursued a hopeless case; the court should infer that positive advice as to the merits of the Claim and its prospects of success was given by the Respondents to the Kings; the Respondents lent themselves to an abuse of process; there was an insufficient basis for pleading the case. Viewed overall, the case advanced is in my view far more wide-ranging than the case advanced in *Medcalf,* where the ultimate decision (after, in effect, the Stage 2 hearing) was that the application was not suitable for determination in the summary wasted costs jurisdiction.

119. In the context of the wide-ranging allegations advanced, CPR PD 54 paragraph 5.7 envisages that, subsequent to the Stage 1 hearing, evidence may be served by the respondent for the purposes of the Stage 2 hearing. Mr Taylor indicated that Mr Newman would wish to serve evidence, albeit that the evidence could not reveal privileged matters. It can hardly be said to be unreasonable for Mr Newman to wish to do so, given the width and seriousness of the allegations which are made against him. It is also not difficult to envisage that the Applicants may wish to challenge that evidence, and that cross-examination would be required.

120. Sixth, the complexity of the applications is in my view reflected in the amounts which, as I was told, had been spent by the Applicants in reaching the present stage. The Primekings Parties costs in the application to date are £360,000 and the TS Parties' costs to date £200,000. If this were a straightforward matter, it is difficult to see costs on that scale being incurred.

121. A related point, which needs to be specifically considered under CPR PD 46 paragraph 5.7 and to which I will return below, is whether the wasted costs proceedings are justified "notwithstanding the likely costs involved". The Applicants did incur significant costs on the strike-out application. Cockerill J ordered very significant payments on account, as previously described. The total amounts potentially in play, in the wasted costs applications, are obviously larger than those payments, and there is also claim for interest. The Primekings Parties' costs (prior to any detailed assessment) were around £878,000, of which £597,500 was ordered as a payment on account. The TS Parties' costs were (prior to any detailed assessment) around £615,000, of which £420,000 was ordered as an interim payment.

122. It is therefore clear that the incurred and prospective costs of the wasted costs exercise will be very significant. If it is correct that the Stage 2 hearing will last at least as long as the hearing before Cockerill J, then it is reasonable to assume that the Applicants' costs (including those already spent) will approach those which were incurred for the reverse summary judgment/ strike out applications. As can be seen from the above figures, the Primekings Parties have already spent, in relation to the wasted costs application to date, around 40% of the amount which was spent on strike-out, and this was in preparation for a Stage 1 hearing estimated to last 1 ½ days (or 3 days with judicial pre-reading). The TS Parties' figure is somewhat lower (32%), but still significant. In addition, substantial costs have been incurred, and will be incurred in the future, by the Respondents: the figures to date are £240,000 (Mr Newman) and £140,000 (Metis Law). It is reasonable to assume that further significant sums, at least of the same broad order of magnitude, would be incurred on the Respondents' side for a Stage 2 hearing.

123. Seventh, there has been no waiver of privilege by the Kings. This means that the court would be considering the substantial case advanced with, as Jackson J put it in *Lady Archer*, much of the relevant evidence obscured from the court's view. I accept that privilege is not a trump card. However, the cases in which the court will be able to come to safe or satisfactory conclusions, in the absence of waiver of privilege, will be relatively rare. Lord Hobhouse gave an example, at paragraph [62] of *Mardell*, of a case where it would be clear that privileged material could not assist the legal adviser.

124. In a case such as the present, however, I do not think it likely that the court could come to any safe or satisfactory conclusions, on important aspects of the case advanced by the Applicants, without seeing privileged material. For example, in the absence of such material, the court would be unable to reach any conclusions as to what advice was actually given by the Respondents to the Kings, and whether (as the Applicants submit) this was positive advice as to the prospects of success or merits of the claim. Similarly, in so far as the case is advanced on the basis that there was insufficient material to plead the conspiracies relied upon, the absence of waiver of privilege means that the court will not have the full range of material that was or might have been available to the Respondents. In that context, I note that at two points in paragraph [442] of her

judgment, Cockerill J referred to the possibility that the Kings' legal team had material, which she had not seen, which justified certain allegations that were made.

125. Against this background, and in accordance with the decision in *Ridehalgh* approved in *Medcalf*, the court will have to give the benefit of any doubts to the Respondents. As Lord Hobhouse said at [61]:

> "The answer given [in *Ridehalgh*] therefore was not to treat the existence of privileged material as an absolute bar to any claim by an opposite party for a wasted costs order but to require the court to take into account the possibility of the existence of such material and to give the lawyers the benefit of every reasonably conceivable doubt that it might raise. So, all that the lawyer has to do is to raise a doubt in the mind of the court whether there might not be privileged material which could affect its decision whether or not to make a wasted costs order and, if so, in what terms and the court must give the lawyer the benefit of that doubt in reaching its decision, including the exercise of its statutory discretion".

As discussed in Section G below, this will in turn have an impact on the question of whether it is likely that a wasted costs order would be made.

126. Eighth, having considered the various arguments advanced by the Applicants, I am far from persuaded that this is a straightforward case for wasted costs at all, whether one is looking at the conduct of the Respondents, or causation. I address each of the principal arguments of the Applicants, as briefly as possible, in Section G of this judgment. Viewed overall, I do not consider that it is likely that a wasted costs order would be made, on the basis of the existing evidence and other materials available to me. But for present purposes it is sufficient to state that there are substantial arguments as to each of the grounds, such that a summary process is in my view wholly inappropriate.

127. Accordingly, I conclude that the applications are not suitable for summary determination, and that in these circumstances (including consideration of the costs involved) the court's discretion should be exercised against this case proceeding to Stage 2. I will, however, now address the arguments raised by the Appellants against this conclusion.

128. Ms Addy submitted that it is only a general rule, but "not an invariable one" that the wasted costs jurisdiction is intended to be a summary process and should not normally lead to overly long or complex hearings. She submitted that the material question is one of proportionality, namely whether the wasted costs proceedings are justified notwithstanding the likely costs involved.

129. I do not accept this submission. The authorities set out above speak with one voice as to the nature of the summary process. It is not simply, in my view, a question of considering proportionality by reference to the costs. The cases make clear that wasted costs applications are indeed intended to be summary, and are not a vehicle for a complex professional negligence action. This is also, in my view, inherent in the requirement in paragraph 46 PD.5, that the court must be satisfied that it has before it "evidence or other material which, if unanswered, would be likely to lead to a wasted

costs order being made". The court is therefore required to form a view, at Stage 1, as to the likelihood of a particular result based on the material which exists. Where the case is very complex, and (as here) has a large number of allegations and alternative cases, with obvious issues as to causation, there are likely to be very real difficulties in the court reaching the positive conclusion that an applicant needs (i.e. that the evidence would be likely to lead to a wasted costs order being made), because the case is so complex and the result unclear. This point was expressed very crisply by Cockerill J in her brief reasons dated 18 August 2021.

130. In any event, even if I were simply to focus on the question of costs, I would reach the conclusion that the wasted costs proceedings are not justified. The proceedings will require a very substantial expenditure of costs on both sides, and it is not difficult to see that the overall costs of the Applicants (leaving aside the Respondents) will approach or exceed the costs which they seek to recover. Given the complexity of the case and the other matters described above, I do not consider that the proceedings are justified notwithstanding the costs involved.

131. The main thrust of Ms Addy's submission on this issue, both in her oral opening and particularly in her reply, was that the court should exercise its case management powers to simplify the case. She submitted that the court could make case management directions which required the Applicants to choose which of their alternative cases they wished to advance. She identified two obvious points in time: the point when the Claim was commenced in February 2020, and the time of the detailed costs certificates in November 2020. In her reply submissions, she said that Stage 1 was not a binary or "all or nothing" process. She did not abandon any of the alternative cases, but submitted that the court could take the view, for example, that it was not satisfied in relation to causation "the further along the proceedings go". That should not, however, detract from the primary case, namely that the proceedings should not have happened in the first place. The court could therefore take the view, whether by reference to causation or by reference to a question of proportionality, that all the alternative cases should not be pursued. She said that the baby should not be thrown out with the bathwater: i.e. that the court should focus on the two key points in time that she had previously identified.

132. In his reply submissions, Mr Lightman said that his clients would limit their application for the stage 2 hearing to three points in time: namely the issue of the claim form, the date of service of the Particulars of Claim, and the date of the response to the Request for Further Information. He went on to say that this meant that he was not pursing points raised at paragraphs 40 – 43 of the TS Parties' grounds. These concerned the allegation that the case should have been discontinued upon service of the skeleton argument for the reverse summary judgment/ strike-out hearing. I did not, however, understand this to mean that the TS Parties no longer supported the Primekings Parties' case, including the various alternative cases and dates advanced in the grounds of both parties.

133. In my view, the court's task at the Stage 1 hearing is to consider the application as presented, and suitability for summary determination, as a whole. The Respondents had submitted from the outset, at the consequentials hearing, that the case was not suitable for summary determination. Cockerill J's August 2021 reasons had in effect warned of the potential problems of a complex application. Complex applications were nevertheless launched. No part of the grounds was abandoned, apart from paragraphs 40 – 43 of the TS Parties' grounds. For the reasons given, I have no doubt that, when

considered as a whole, these applications are wholly unsuitable for the wasted costs process described in the authorities.

134. I have, however, given consideration to whether it would be appropriate to permit the applications to proceed to Stage 2 on the basis of the two key points in time which Ms Addy identified. Even on that basis, however, the case is in my view a complex one, unsuitable for the summary process, for largely the same reasons set out above. Furthermore, as discussed in Section G below, I am not persuaded that, even on this more limited basis, a wasted costs order is likely to be made.

G: The merits of the application and the individual grounds

G1: Introduction

135. In this section, I consider whether I am satisfied that the existing evidence and materials, if unanswered, would be likely to lead to a wasted costs order being made. I accept Mr Flenley's submission (which was not disputed) that, in the present context, 'likely' means more likely than not.

136. There is a degree of overlap with some of the matters considered in Section F. In particular, if the existing materials and evidence, and the arguments based upon them, are such that a complex inquiry would be required, rather than a summary process envisaged for straightforward applications, then this will impact upon whether the court is able to reach the view that a wasted costs order is likely. Where there is a clear and obvious case which can be determined summarily in short order, a court will be able to form a view on likelihood. Where the case has complexity, and would take days to unravel, and to fully address the arguments which will be ventilated, then a positive conclusion, that a wasted costs order is likely, may well be difficult or impossible to reach at Stage 1.

137. In the present case, I am not satisfied that the existing evidence or other material would be likely to lead to a wasted costs order being made. Indeed, there are many aspects of the wasted costs case advanced by the Applicants which in my view lack strength, and where I consider it very unlikely that a wasted costs order would be made.

138. I do not intend to address every aspect of the different alternative cases advanced by the Applicants. I shall focus on what Ms Addy emphasised as being her primary argument, namely that the proceedings should never have been started at all. This will also require consideration of the development which Ms Addy also relied upon as being a critical moment, namely the Final Costs Certificates issued by Master Whalan after the detailed assessment proceedings in November 2020.

139. The thrust of many of the arguments advanced by the Applicants is that the case advanced in the Claim, and in response to the Applicants' various strike-out points, was hopeless and therefore should never have been advanced. I have already referred to the authorities in this area, and in particular the decision of the Court of Appeal in *Dempsey* which indicates that, in the context of hopeless cases, the court will usually be looking to see whether there was something akin to abuse of process. In *Ridehalgh*, quoted above, Sir Thomas Bingham MR gave examples of abuse of process in that context. I do not consider that there is anything, in the existing evidence, which suggests that the proceedings, or the Respondents' conduct of them, were akin to an abuse of process in

the sense described in *Ridehalgh*. As is clear from Cockerill J's judgment, the Kings believe that they have been seriously wronged. They are seeking to use the court's process for the purpose for which it is designed, namely to obtain a remedy for a perceived serious wrong. The Kings' argument and case may have been shown – after lengthy argument and detailed exposition in Cockerill's judgment – to be thoroughly misconceived, as Males LJ said. But that does not mean that it was abusive, in the sense described in *Ridehalgh*, for the Respondents to have advanced it.

140. In the course of her judgment, Cockerill J had to consider a number of arguments based on "abuse of process": in particular, the argument as to the effect of the Final Costs Certificates. The type of "abuse of process" discussed in Cockerill J's judgment is usually referred to as *Henderson v Henderson* abuse of process; in other words, failing to argue in earlier litigation a point which could and should have been argued in the earlier litigation, and then subsequently trying to argue the same point again. I agree with the Respondents' submission that the nature of the abuse of process addressed by Cockerill J was a very different species, or kind, of abuse of process from the examples given by Sir Thomas Bingham MR in *Ridehalgh.*

141. I also agree with their submission that it is not improper, unreasonable or negligent for a legal adviser to act for a client in a case which a lawyer realises might be held to be an abuse of process, in the *Henderson v Henderson* sense. Otherwise, parties who are defending *Henderson v Henderson* points might find that solicitors will not act for them, for fear of those solicitors having to pay wasted costs for having lent their assistance to an abuse of process by the court. Furthermore, cases where *Henderson v Henderson* abuse is raised can give rise to very substantial and respectable arguments, on each side, as to whether the principles in that case apply on the facts of a particular case. The fact that (as here) the judge decides that they do apply does not in itself provide the basis for a wasted costs argument. Indeed, in the present case, Cockerill J recognised that there were substantial arguments relating to abuse of process, in the *Henderson* sense. I shall return to this point below.

142. With this background, I turn to the particular grounds raised by the Applicants. In so doing, I refer mainly to the points made by Mr Taylor on behalf of Mr Newman. This is because the principal responsibility for the pleading of the Claim, and the arguments which were advanced to Cockerill J, fell on the shoulders of Mr Newman. He was a barrister in a leading set of commercial chambers, and (with one exception) it was not suggested that there was any aspect of the case where the case against him might fail, but could nevertheless succeed against Metis Law. The exception is a point raised by the TS Parties (but not the Primekings' Parties) concerning the failure by Metis Law to follow the pre-action protocol.

G2: No pleaded or pleadable cause of action – the costs conspiracy

143. As described in earlier sections, one of the cases advanced by the Kings concerned the "costs conspiracy". Cockerill J considered the substance of the pleaded claims in Section (ix) of her judgment. In relation to the costs conspiracy aspect of the claim, her conclusion on the merits was as follows in paragraph [433]:

> "…As regards the Costs aspect of the claim had this claim not already failed (i.e. if there had been a pleaded loss, and had the central contention not been barred by abuse of process) I

> would regard the claim as weak, but I would probably have granted a conditional order, on the basis that (i) the factual basis was sufficiently complex (ii) there was sufficient evidence of error which might provide a slim basis for such allegations and (iii) those serious allegations would be best and most clearly dealt with at trial."

144. In circumstances where the judge considered, after a review of the evidence, that there was (or was probably) a sufficient factual basis to allow the case to proceed to trial, I cannot see that a wasted costs order would likely be made against the Respondents on the basis that the case was not pleadable. (I will deal with the abuse of process aspect below.) Cockerill J said that she would likely have granted a conditional order in this respect: in other words, she would have allowed the case to go to trial subject the fulfilment of a condition (in all likelihood the payment of sum into court). I agree with Mr Taylor that, in circumstances where there is a weak but (factually) pleadable claim which a client wishes to advance, the barrister should indeed plead it and might be criticised if he or she were to decline to do so. Where there is a weak but pleadable claim, and a barrister pleads it, one is simply not in the territory of wasted costs at all.

145. However, as can be seen from paragraph [433], Cockerill J considered that there had not been a pleaded loss. She had previously addressed this topic in paragraphs [213] – [233] of her judgment.

146. Mr Taylor submitted that, in fact, there was a coherently pleaded case of loss flowing from the costs conspiracy. He submitted that Cockerill J was therefore wrong to conclude that there was no relevant or sufficient pleading. He referred me to various paragraphs of the Particulars of Claim where it is alleged that: (i) one objective of the alleged conspiracy was to obtain an order for a payment on account for a sum higher than the costs actually incurred; (ii) the steps taken pursuant to the alleged conspiracy to inflate costs started in March 2016, long before the trial before Marcus Smith J took place; (iii) the payment on account ordered by Marcus Smith J was, to the knowledge of the Applicants, more than the actual costs incurred, and the judge was misled into ordering a payment on account of £ 1.7 million; (iv) that order was used to take enforcement proceedings against the Kings, which caused them financial loss. Those paragraphs then led to the pleas in paragraphs 112 and 113 of the Particulars of Claim, where claims were made for the sums paid pursuant to Marcus Smith J's payment on account order, as well as an indemnity in respect of all costs and liabilities arising from that order and all sums that the Kings were ordered to pay by the Senior Courts Costs Office, including orders for costs.

147. In my view, there is considerable force in Mr Taylor's argument that there was a pleaded case of loss, and indeed that this was coherent, notwithstanding the conclusions which Cockerill J reached on this issue. However, as previously discussed, it is not necessary for the Respondents to go so far as to show that Cockerill J was wrong on this point, albeit that I take the view that it is open for them to seek to advance that argument. It is sufficient to show that there was no improper, unreasonable or negligent conduct by Mr Newman (the person responsible, at least primarily for pleading the case), or indeed Metis Law, because the view could reasonably be taken that the existing pleading did plead a coherent case of loss flowing from the costs conspiracy. In view of the passages in the Particulars of Claim to which Mr Taylor referred, I consider that such a case on the part of the Respondents would likely succeed, and therefore that it is

not likely that a wasted costs order would be made on the basis that loss had not been pleaded, or pleaded coherently, in respect of the costs conspiracy case.

148. This conclusion is reinforced by the fact, as I was informed by Mr Taylor, that the point on no pleaded loss, in respect of the costs conspiracy claim, could not be found in the Applicants' skeleton arguments for the strike out hearing. This was not disputed in the Applicants' submissions to me. Accordingly, it seems that the point was first taken in oral argument at the strike out. This would suggest that this particular point was not spotted, on the Applicants' side, until very late in the day. It is difficult to see how it could then be said that it should have been apparent to the Respondents at the outset.

149. In their oral submissions, neither Ms Addy nor Mr Lightman really addressed the substance of this aspect of Mr Taylor's argument in relation to the pleading. Their essential case was that it is not permissible, and is abusive, for the Respondents to go behind (i.e. collaterally attack) any aspect of Cockerill J's decision. For reasons already given, I do not accept this argument.

150. However, Cockerill J gave a further reason why the costs conspiracy claim could not succeed, namely that it was barred by abuse of process. There are, however, a number of reasons why this argument does not provide a basis for a wasted costs order in the present context (i.e. the pleading of the costs conspiracy case) or indeed more generally.

151. First, at the time that the case was pleaded in the Particulars of Claim, there had been no Final Costs Certificates. Those were only issued in November 2020, following the detailed assessment. I see no basis upon which it can be said that the costs conspiracy case could not be pleaded, or that there was a clear answer to such case based on abuse of process at the time that it was pleaded, by reference to Final Costs Certificates which were only issued many months later. It is true that in November 2019, Master Whalan had refused to stay the detailed assessment process. But I do not see why that decision meant that the costs conspiracy case was not pleadable in the Commercial Court proceedings. It seems to me that it was the Final Costs Certificates (not, or at least not simply, the refusal of Master Whalan to stay) that were critical to the decision of Cockerill J on abuse of process, and the later decision of the Court of Appeal on the similar issue in the s 994 proceedings. At the time when the costs conspiracy case was pleaded, there were no Final Costs Certificates and the shape that the detailed assessment proceedings would eventually take was not known.

152. Furthermore, the decision of Tom Leech QC in the s 994 proceedings in October 2020, which was favourable to the Kings, shows that a reasonable legal adviser could take the view that Master Whalan's decision in November 2019, to refuse a stay, was not an obstacle to pleading the case in the Commercial Court proceedings. Tom Leech QC rejected the Primekings Parties' submission that there was a general principle about the proper forum in which costs allegations could be made. He allowed the s 994 proceedings to continue, in relation to the costs allegations, notwithstanding the earlier decision of Master Whalan.

153. Secondly, and more generally, even after the Final Costs Certificates had been issued, there were substantial arguments available to the Kings as to why it was not an abuse of process for the costs conspiracy case to be advanced as part of the Claim. It is true that Cockerill J ultimately rejected these arguments. However, as previously noted on a number of occasions, and as is apparent from her lengthy consideration of the point

in her judgment, this was only after she had given considerable thought to the argument on whether there were "special circumstances which would cause injustice". She made it clear, at the consequentials hearing, that the abuse of process argument would not in itself justify a "totally without merit" certification. In my view, this also provides the answer to the alternative date on which Ms Addy sought to focus, namely when the Final Costs Certificates were issued.

154. Accordingly, I conclude that, in the context of the costs conspiracy case, it is very far from likely that a wasted costs order would be made on the basis of the existing evidence and materials. On the contrary, I consider that, on the basis of those materials, the Respondents would be able to show that a reasonable legal adviser could properly take the view that the case was both pleadable and pleaded, and to defeat the contrary argument.

155. This conclusion has, in my view, an impact on the other aspects of the case advanced by the Applicants, particularly in terms of causation.

156. First, it shows that there was a case which could, to use Ms Addy's expression, properly have left the front door. It means that the Applicants were going to have to incur substantial costs in any event in applying for reverse summary judgment/ strike out. Indeed, the costs which they now seek to recover appear to have caused in substantial part by the reverse summary judgment/ strike out in respect of the costs conspiracy case, and in respect of which it is not likely that any wasted costs order would be made. (The same causation point arises in relation to (i) other aspects of the Applicants' case where I consider that no wasted costs order would be made, and (ii) a substantial argument on causation addressed to Cockerill J, but which she did not accept: see [209] – [212]).

157. Secondly, I accept that the costs conspiracy case has, at least to some extent, to be considered separately from the other – and indeed main – aspect of the conspiracy case advanced by the Kings; namely the alleged threats leading to Discontinuance. It does not follow from the fact that the costs conspiracy may have been pleaded and pleadable that the same applies to the other conspiracy, and I shall address that aspect separately below. However, in my view, they are not wholly separate when it comes to considering the position of the Respondents for the following reasons.

158. In *Medcalf v Mardell* Lord Steyn noted at [33]-[35] the difficulties faced by a practitioner instructed to plead fraud: not making the allegations where it is proper to make them may amount to a dereliction of duty:

> "The barrister must promote and protect fearlessly and by all proper and lawful means his lay clients' interests: paragraph 203 of the Code of Conduct. Often the decision will depend on circumstantial evidence. It may sometimes be finely balanced. What the decision should be may be a difficult matter of judgment on which reasonable minds may differ." (emphasis supplied)

159. At [40] Lord Steyn put the test as follows:

> "the question is whether the barristers' beliefs that they had material which objectively justified the allegations unquestionably fell outside the range of views which could reasonably be entertained. The burden of proof is on the party applying for the wasted costs order".

160. It seems to me that, in the difficult area of judgment to which Lord Steyn referred, the (pleadable) existence of the costs conspiracy is bound to influence an adviser's view as to whether a further conspiracy is also properly pleadable. A legal adviser might well consider that the conspiracy which his client alleges did not simply stop at a conspiracy concerning costs, but extended rather further.

161. Thirdly, even if it were only proper to plead the costs conspiracy, this has an impact on the question of the causation question concerning whether the Kings would have been in a position to continue the entire case as litigants in person. Ms Addy said that unlawful means conspiracy is not a straightforward legal concept that would be understood by litigants in person, and that one would not expect a litigant in person to be able to articulate it. Even assuming that to be correct, the pleadability of the costs conspiracy meant that the Respondents could properly plead, or at least explain to the Kings how to plead, a conspiracy case.

162. There is then a factual question as to what would have happened if the Respondents had (hypothetically) said that they could plead the costs conspiracy, but would not assist on the wider conspiracy case. I do not consider that this question is capable of resolution in a summary process. However, I think that it is very reasonable to think that the case as a whole would have continued anyway, resulting in the Applicants having to incur the costs of a summary judgment/ strike out application. The Kings felt very strongly that they were the victims of injustice, and the present evidence suggests that it is probable that they would have wanted to pursue all aspects of the conspiracy which they perceived as having taken place. If the Respondents had said that they would assist on the costs conspiracy but no further, the Kings would then understand the concept of conspiracy. They would have been in a position then to advance their wider case, if necessary as litigants in person. On the present materials, I think it likely that, on this hypothesis, they would have done so, given the history of this litigation. However, it is sufficient to say that the complexity of the case is such that I cannot conclude that the Applicants' case on causation is likely to succeed.

G3: The costs abuse ground

163. I have substantially addressed this point in Section G2 above. In summary, and for reasons already given:

(1) I do not consider that it was an abuse of process for the costs conspiracy case to be pleaded in March 2020, or that the Respondents acted improperly, unreasonably or negligently in proceeding with the case at that stage.

(2) As far as concerns the position after November 2020, when the Final Costs Certificates were issued, there were substantial arguments to be advanced, and which could reasonably be advanced, as to why the Claim should be permitted to continue. These required considerable thought on the part of Cockerill J. The

arguments failed, but it is not likely a wasted costs order would be made on this basis.

G4: CPR 38.7/ abuse of process

164. A number of arguments were in play before Cockerill J and addressed by her in Section (vii) of her judgment. There was an argument as to whether CPR 38.7 was applicable to the Claim at all. Cockerill J dealt with various points made by Mr Newman in that regard, and rejected them. Accordingly, she held [311] that CPR 38.7 was engaged, but that was not the end of the story because (i) not all of the parties to the Claim were parties to the Misrepresentation Claim and (ii) she needed to take a view about whether permission would or should be given under CPR 38.7. On the first point, she accepted the submission it would be an abuse of process, on the basis that the quantum of the claim was dependent upon proving that the Misrepresentation Claim would have succeeded [314]. On the second point, she considered that permission might be given if there were compelling evidence that the Kings had been tricked by their own lawyers who were under pressure from Primekings [315]. However, she did not accept that there was such a compelling case.

165. In my view, there were here, as Mr Taylor submitted, "proper" arguments to be advanced on behalf of the Kings. Cockerill J rejected them, but every case involves the rejection of the arguments by one party and it does not follow that a wasted costs order is appropriate. There is nothing in Cockerill J's decision on "totally without merit" that suggests that such a certification would have been made on the basis of the arguments advanced on this part of the case alone, and indeed she recognised that abuse of process raised substantial points.

166. As far as concerns CPR 38.7, Mr Taylor submitted that the costs conspiracy was not the subject of the prior Misrepresentation Claim, and that CPR 38.7 was inapplicable to that aspect of the case. I did not understand the Applicants to submit, or Cockerill J to have decided, otherwise. Accordingly, CPR 38.7 was not an answer to the costs conspiracy case addressed above.

167. The argument on CPR 38.7 therefore concerned whether the case arose out of facts which were the same or substantially the same as those relating to the discontinued claim. The main themes of the Kings' argument here, repeated in Mr Taylor's submissions, was that the threats, which led to the Discontinuance, were not the subject of the Misrepresentation Claim. The Claim therefore depended upon the proof of facts which were not in issue in the Misrepresentation Claim. Whilst the quantum of the claim would depend upon the assessment of the lost chance to win the Misrepresentation Claim litigation, that would not involve the relitigation of that claim.

168. Cockerill J rejected that line of argument, but I do not consider that it was improper, unreasonable or negligent for the argument to be advanced or that it is likely that a wasted costs order would be made because that point was taken, or because no prior application under CPR 38.7 had been made. This is not a case where, at the time that the proceedings were commenced, there was some binding authority of a superior court which dictated the answer to the CPR 38.7 argument on facts similar to those in issue here. Indeed, neither Cockerill J in her judgment, nor the Applicants in their submissions, referred to any authority on CPR 38.7 in the context of the argument which Mr Newman had advanced.

169. Furthermore, it seems to me that the argument really leads nowhere, or at least not very far, in terms of causation. A fall-back argument advanced by the Kings at the hearing was that permission should be granted under CPR 38.7, on the basis that they had been misled or tricked and where important new evidence had come to light. Cockerill J at [315] accepted that, in principle, such circumstances would potentially justify the grant of permission. She rejected the argument on the basis that compelling evidence did not exist, and she considered that evidence in detail in Section (ix) of her judgment. Again, even though Cockerill J rejected the argument on the facts, I am far from persuaded that there was anything improper unreasonable or negligent in the argument being advanced or that it is likely that a wasted costs order would be made because this point was taken. (In this context, the discussion in Section G5 below is also relevant). If therefore the Kings had, prior to commencing proceedings, asked for permission pursuant to CPR 38.7 – in circumstances where permission was not required for the costs conspiracy case, or for the claim against the 7 parties who had not been party to the Misrepresentation Claim – this may have had the effect of accelerating the argument that eventually took place, but the Applicants' costs of dealing with the argument would still have been incurred and would not have been recoverable as wasted costs. Furthermore, the costs incurred by the Applicants in relation to the costs conspiracy strike-out would still have been incurred, as would the costs incurred by those Applicants who could not rely upon CPR 38.7.

170. The second aspect of the argument in this context was abuse of process. This was the point taken by those Applicants (the majority) who were not party to the Misrepresentation Claim. Cockerill J accepted their argument, but I again accept that there were proper arguments to be made as to why it was not an abuse. Indeed, at the time when the proceedings were commenced, there was a prior decision (*Ward v Hutt* [2018] 1 WLR 1789 (HHJ Matthews)), later held to have been wrongly decided, which indicated that abuse of proceedings could not apply where the prior proceedings had been discontinued. However, leaving that point aside, it seems to me that there were proper arguments to be advanced on this question. These largely depended upon the substance of a case that the discontinuance had been bought about by the threats upon which the Kings relied. As Cockerill J said at [371], were there prima facie substance to the claims that there were threats or other compelling dishonesty, then this would come into the abuse of process equation.

G5: The threat case

171. There were in Cockerill J's view, and indeed in mine, substantial inadequacies in the way in which the case, which really lay at the heart of the Kings' complaint, had been pleaded (or indeed not pleaded). However, I accept Mr Taylor's argument that it is appropriate to consider, as part of the Kings' case, not simply the Particulars of Claim, but also the response to the TS Parties' Request for Information served in May 2021. In the response to questions 40 and 41, the Kings allege that there had been gross negligence of the Kings' legal team in the Misrepresentation Claim, that the negligence had never been disclosed, and that there was therefore an undisclosed conflict of interest "which Primekings exploited through its threatening conduct further to the Discontinuance Goal of the Common Design". They allege that threatening conduct "caused members of the Kings legal team to fear adverse personal consequences if they did not cause the Kings to capitulate entirely by discontinuing, apologising and agreeing to pay costs on an indemnity basis".

172. I also agree with Mr Taylor that this plea of exploitation, at least arguably, could be regarded by a competent legal adviser in the position of the Respondents as a sufficient plea of knowledge on the part of the Applicants. As he said, a reasonably competent barrister could or would interpret the Kings as saying that the Primekings' legal team knew that the Kings' legal team had made serious errors in the statement of case and witness evidence; they knew it had not been disclosed to the Kings, and hence the team were able to agree not to expose to the Kings and the court the failure of the Kings legal team; and that the Primekings' legal team intimated to the Kings' legal team the personal consequences for them if the case continued to judgment. There was force in his submission that the concept of "exploitation", at least arguably, meant that there was an allegation of relevant knowledge; and that, if further particulars of knowledge were required, then those could have been ordered by the court. He also made the point, which was not disputed by Ms Addy or Mr Lightman, that the argument - that further detail of the knowledge of the Primekings' legal team should have been provided - was not to be found in any of the voluminous materials served in the course of the proceedings. Those materials addressed the substance of the Claim on the facts. The point on knowledge was made for the first time in Mr Lightman's skeleton argument for the strike out application. (I note in passing that one reason why the Stage 2 arguments would be complex, and take time to resolve, is that there are substantial points to be made by the Respondents as to the nature of the arguments advanced by the Applicants on the road to the February 2021 hearing before Cockerill J: there appears to have been a degree, perhaps a considerable degree, of refinement to the case that was advanced and ultimately succeeded.)

173. Against this background, I accept Mr Taylor's argument that the heart of the successful summary judgment/strike out application was Cockerill J's view that the case, on the facts, lacked real substance. Thus, she referred in paragraph [195] to the absence of material which could support a proper plea of knowledge. In that context, she considered the evidence of Mr King in his 8th witness statement: see [193] – [194]. She returned to the substance of the "unpleaded case on the Inferred Threats" in paragraphs [435] – [455].

174. There are in my view a number of reasons why it is not likely that a wasted costs order would be made against Mr Newman, or indeed Metis Law, in relation to the decision to advance the case relating to intimidation or threat that was being relied upon. Furthermore, the enquiry which would be necessitated by asking the question whether no reasonable barrister, or solicitor, could have advanced this case (or to use the words of Lord Steyn in *Medcalf*, "whether the barristers' beliefs that they had material which objectively justified the allegations unquestionably fell outside the range of views which could reasonably be entertained*"*) is, in the context of the present case, wholly inappropriate for resolution in a summary process.

175. First, as is clear from Lord Steyn's judgment in *Medcalf*, the decision as to whether to advance a case such as the present will usually depend on circumstantial evidence, and will often be finely balanced and in an area where different views could be taken. The enquiry proposed by the Applicants' wasted costs application would necessitate consideration of the detail of the circumstantial evidence which was identified in paragraphs 16 – 28 of the "Note" submitted by Mr Newman to Cockerill J. This would in itself be a substantial enquiry. Moreover, the Appellants' criticism of the decision to advance the Claim, in so far as it was based on this alleged threat, would fall to be

considered in the context of a case where: (i) as previously discussed, there was a costs conspiracy case that could be pleaded; and (ii) the material allegations, at least as far as concerns the conduct of the Kings' legal team, are also capable of being pleaded and indeed have been pleaded in the Professional Negligence Action. As noted above, there has been no application to strike out that action, which is proceeding to trial in June 2023.

176. Secondly, one theme of the Applicants' argument here is that the factual case which the Kings wished to advance was hopeless. The authorities indicate the care with which one must approach wasted costs applications in this context. As previously noted, this is not a case where there appears to be anything akin to an abuse of process, in the sense described in *Ridehalgh*.

177. Thirdly, the court would not have access to privileged materials, and would therefore not know the full extent of the materials available to the pleader, or the nature of the advice which was given. As previously discussed, Mr Newman would be entitled to the benefit of any doubt. This makes it inherently improbable that an adverse conclusion will be reached against Mr Newman on these issues. This is also the case in relation to Metis Law, whose position is arguably even stronger; without the privileged materials, the court cannot know the extent to which Metis Law relied upon advice given by Mr Newman, or the basis of any such advice.

178. Thus, in so far as the Applicants' argument is that the Respondents gave wrong advice as to the merits of the Claim, the court will therefore not know what advice was given to the Kings, by either of the Respondents, as to the strength of the case. Notwithstanding various arguments advanced by the Applicants, I am not satisfied that there would be any sound basis for concluding, without sight of privileged materials, that the Kings were (negligently) given positive advice as to their prospects of success in the litigation.

179. Similarly, as previously discussed, in so far as the Applicants' argument is that there was insufficient material to enable the Claim to be pleaded, the court will not know the full range of materials in fact available to the Respondents.

180. Fourth, for reasons previously discussed in Section G3 above, there are very considerable problems in the Applicants' case on causation, in the light of the fact that the costs conspiracy case was pleadable and the Kings' obvious determination to ventilate their grievances in court.

181. The "No Pleaded or Pleadable Cause of Action Ground" was formulated in the application of the Primekings Parties. It was supported by the TS Parties. The TS parties also put forward a separate ground based upon the defects in the Particulars of Claim and the Kings' failure to engage with those defects when highlighted in correspondence and in the Request for Information. I do not consider that this ground raises, in substance, any points which are materially different or stronger than those which I have addressed in this section.

G6: Failure by Metis Law to comply with the pre-action protocol

182. This case is advanced by the TS Parties and not the Primekings Parties. I do not need to deal with all of the arguments advanced. Even if there were any validity to the

criticisms made by the TS Parties, I considered that two points made by Mr Flenley were convincing and decisive.

183. First, I do not know whether the Kings instructed Metis Law to issue the claim form without following the pre-action protocol in advance. I agree with Mr Flenley that it would be wrong to blame Metis Law for this if it was acting on the instructions of its clients, and contrary to the advice given to its clients. Since privilege has not been waived, the nature of those instructions, and the advice given, cannot be referred to. If Metis Law was acting on instructions, it would not be lending itself to an abuse of the court process by issuing a claim form, particularly bearing in mind that it was indicated, in the claim form itself, that the Kings were willing to embark upon negotiations and discussions.

184. Secondly, and in any event, on the basis of the existing materials it is untenable to conclude that the litigation would somehow have been avoided. It is obvious that the Kings passionately believed that they are the victims of a gross misjustice, and they have pursued every conceivable avenue to seek redress. I agree with Mr Flenley that it is simply not credible to think that this litigation would have been avoided had the pre-action protocol been followed.

G7: The case generally against Metis Law

185. Since the case for wasted costs against Mr Newman fails for the reasons set out above, the case against Metis Law must equally fail. Had the case against Mr Newman succeeded, I would still have dismissed the case against Metis Law. In short, this is because the prime responsibility for the pleadings was that of Mr Newman, who signed the pleading. I do not consider that any of the alleged deficiencies were so obvious or glaring that it would have been negligent of Metis Law to fail to spot them and to tell Mr Newman how to plead the case.

CONCLUSION

186. Accordingly, it is not appropriate for the wasted costs applications to proceed to Stage 2. Both applications are therefore dismissed against both Respondents.