Neutral Citation Number: [2023] EWHC 486 (KB)

Case No: QB-2019-004632

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2023

Before :

MR JUSTICE CAVANAGH

- -

Between :

Craig Baxter	**Applicant**
- and –	
(1) Sarah Doble **(2) Sarah Doble Associates Ltd**	**Respondents**

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- -

Daniel Metcalfe (instructed Irvine Yates Solicitors) for the Claimant
Henry Blaxland KC (instructed by Julian Jefferson Solicitors) for the Respondents

Hearing dates: 17 and 18 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Cavanagh :

1. This judgment follows a hearing of the Applicant's application to commit the Respondents for contempt of court. It is common ground that the First Respondent is the sole shareholder, director, and guiding hand of the Second Respondent and that they stand or fall together. To avoid confusion, I will call the Applicant "the Claimant" in this judgment, as he was the Claimant in the underlying proceedings.

2. The application for committal arises out of a claim against the Claimant in the County Court at Exeter by Mr James Persey, in which Mr Persey sought possession of a residential property, 1 Knights Cottage, Plymtree, Cullopton, Devon, EX15 2JU and judgment in respect of alleged arrears of rent. The Claimant had previously entered into an assured shorthold tenancy agreement with Mr Persey in relation to the property. The proceedings were issued in November 2018. They were contested by the Claimant. However, on 4 March 2020, when the matter was listed for a final hearing before HHJ Gore QC, the Claimant abandoned his defence (though not his counter-claim), and judgment was entered against him. By that stage, rent arrears of £14,206.04 had accrued.

3. The ground put forward for the application for committal for contempt of court is that the Respondents provided legal services to Mr Persey in the proceedings in a way that amounted to the conduct of litigation for the purposes of section 12(2) of the Legal Services Act 2007 ("the 2007 Act"), by persons who are not entitled to do so. The Claimant contends that the Respondents conducted the litigation on behalf of Mr Persey from 12 March 2019 to 31 October 2019. Section 14(1) of the 2007 Act provides that it is an offence for a person to carry out a reserved legal activity, which includes the conduct of litigation (as defined in Schedule 2 to the Act), unless that person is entitled to carry on the relevant activity. It is, however, a defence for the accused to show that they did not know, and could not reasonably have been expected to know, that the offence was being committed (s 14(2)). Section 14(4) provides that a person who is guilty of an offence under subsection (1) by reason, inter alia, of an act done in the purported exercise of a right to conduct litigation, is also guilty of contempt of court and may be punished accordingly.

4. The Respondents accept that they are not entitled to conduct litigation, but deny that the steps that they took to assist Mr Persey amounted to the conduct of litigation. The First Respondent, Mrs Doble, is a graduate member of the Chartered Institute of Legal Executives ("CILEX" – this status is now referred to as "CILEX Member-Advance Paralegal"). After some years working as a paralegal for a firm of solicitors, she set up her own business advising and assisting landlords who are having difficulties with tenants. She says that she takes care to ensure that the business does not cross the line into conducting reserved legal activities, including conducting litigation, and that she did not do so on this occasion. In the alternative, she says that, if she did conduct litigation, as defined, on behalf of Mr Persey, she did not know that what she was doing amounted to conducting litigation, and she could not reasonably have been expected to know this.

5. The Claim Form in the contempt proceedings is dated 19 December 2019. It was issued as an application by Part 8 Claim Form under CPR 81.14. On 30 October 2020, Wall J granted permission to the Claimant for the committal application to proceed to a final

hearing, and gave directions for the hearing of the application. Permission to proceed was required pursuant to CPR 81.3(5)(a).

6. The issues raised by these proceedings are potentially of general public importance. There are a number of other businesses which follow a similar operating model to that followed by the Respondents. Some of these assist landlords, and some operate in other spheres, such as taxation. Mr Metcalfe describe those who are unauthorised to carry out reserved legal activities but who run a business giving assistance to litigants in the courts as "a new legal profession." On 28 April 2022, Cotter J ordered that the Law Society, the Legal Ombudsman, and CILEX Regulation Limited ("CILEX Regulation"), an Approved Regulator for the purposes of the 2007 Act, and the regulatory arm of CILEX, be given an opportunity to make representations to the Court. Each of them did so, and I have read and considered the representations. At least in part due to this opportunity being offered to interested parties, there was some delay in the listing of the final hearing.

7. Notwithstanding that the issues in this case are of wider importance, the only issue that I have to decide, in relation to reserved legal activities, is whether the Respondents were conducting litigation on behalf of Mr Persey between 12 March 2019 and 31 October 2019. Though there was some evidence about the Respondents' activities more generally, and the Claimant's counsel, Mr Metcalfe, made some submissions about them, it is important not to lose sight of the need to focus upon the specific acts which are the subject of the committal application.

8. It was agreed between the parties that, at this stage, I should confine myself to deciding whether the Respondents were in contempt of court. If I answer that question in the affirmative, then there will be a further hearing at which submissions can be made about the appropriate penalty. In this judgment, therefore, I will deal with the relevant matters in the following order:

   (1) Findings of fact;

   (2) The relevant statutory provisions;

   (3) The relevant case-law;

   (4) The submissions from the Law Society, the Legal Ombudsman, and CILEX Regulation;

   (5) Did the Respondents conduct litigation on behalf of Mr Persey from 12 March 2019 to 31 October 2019?;

   (6) If so, does the section 14(2) defence apply, on the basis that the Respondents (in practice Mrs Doble) did not know, and could not reasonably have been expected to know, that they were acting in contempt of court and were committing an offence contrary to section 14(1) of the 2007 Act?; and

   (7) Conclusion.

9. The Claimant has been represented before me by Mr Daniel Metcalfe of counsel, and the Respondents by Mr Henry Blaxland KC. I am grateful to both counsel for their submissions.

(1) Findings of fact

10. At the outset, it is appropriate to say something about the burden and standard of proof and the extent to which there has been any disagreement on the facts.

11. In relation to showing that, subject to the statutory defence, the Respondents have committed an offence contrary to section 14(1) of the 2007 Act, the burden of proof rests with the Claimant, and the facts must be proved to the criminal standard (see **HM Attorney-General v Yaxley-Lennon** [2019] EWHC 1791 (QB), at paragraph 3). In other words, I must be satisfied so that I am sure of findings of fact that tend to show, or may show, that the offence was committed. Were it not for the statutory defence, the offence would be one of strict liability or quasi strict liability. It would be necessary only for the complainant to prove that the defendant/respondent did the acts complained of. It is not necessary for me to consider whether it would be a defence for the defendant/respondent to have done the acts without deliberately or recklessly setting out to do so, because Mrs Doble accepts that the Respondents in this case deliberately undertook the activities which are the subject of the committal application. There is, however, the statutory defence. So far as establishing the statutory defence is concerned, it was common ground between the parties (and I agree) that the legal and factual burden rests with the Respondents, and that the standard of proof is the civil standard, i.e. balance of probabilities.

12. In fact, however, so far as the nature and extent of the assistance that was provided by the Respondents to Mr Persey in the possession proceedings is concerned, there is no, or virtually no, dispute of fact. To her credit, Mrs Doble, who gave evidence on behalf of the Respondents, was frank and honest, sometimes to a disarming degree. She did not dissemble and answered all of the questions that were put to her willingly and without hesitation. Her answers were consistent with the documentary evidence, and I have no hesitation in accepting her evidence on these matters as being truthful. Mrs Doble agreed with the points put to her by Mr Metcalfe about the assistance she provided to Mr Persey and so the question whether what she did (on behalf of both Respondents) amounted to the conduct of litigation does not depend upon the resolution of disputes of fact; rather, it depends on the question of law as to what the conduct of litigation means in this context. Given the way that the evidence came out on this issue, I have not had to resort to reliance upon the burden and standard of proof to resolve any matters of fact.

13. It may be that there is not the same level of agreement as regards the factual matters that are relevant to the statutory defence, and I will make my findings in relation to those matters below.

14. It is also important to make clear at the outset that the allegation of contempt of court in the present case does not depend upon proof of any incompetence on the part of Mrs Doble in the assistance that she provided to Mr Persey, or that she misled the Court or the Claimant. Rather, the allegation of contempt is based on the contention that the Respondents, through Mrs Doble, carried out a reserved legal activity, namely conducting litigation, when not entitled to do so. It is not necessary, in order to prove

a breach of the 2007 Act, to go further and prove incompetence, and conversely, it is no defence if an unauthorised person conducts litigation efficiently. I should make clear, however, that it was apparent to me both from the documentary evidence and from the way in which Mrs Doble gave evidence in Court that she was experienced and efficient and carried out her work with complete honesty. On behalf of the Claimant, Mr Metcalfe made some criticisms of things done by Mrs Doble in the course of the litigation between Mr Persey and his client, but, to the extent that there are any valid grounds for criticism at all, it was just that Mrs Doble was not as experienced as some solicitors would have been in relation to the strike out process. The practical reality is that Mr Persey had good grounds for obtaining possession and arrears of rent from the Claimant, and, with Mrs Doble's help, he was successful in doing so. None of this is a defence to the contempt application, however, if the Respondents were conducting litigation in breach of the 2007 Act, and the statutory defence in section 14(2) does not apply. It may have some relevance to penalty, if that issue arises.

The business conducted by the Respondents, and the disciplinary proceedings that were brought against Mrs Doble in 2016-2018

15. Mrs Doble set up the Second Respondent in 2014. When working as a Legal Executive/paralegal for solicitors' firms, she became a specialist in landlord and tenant work. She felt that there was a gap in the market, because she thought that law firms did not value this area of work and because she would be able to offer services to clients at a lower cost than would be charged by law firms. A client offered to provide her with seed-money, and she set up her own business. It was immediately successful.

16. Before she set up her business, Mrs Doble had spoken to CILEX's membership department, and had discussed what she was proposing to do. The membership department did not express any objection or concerns. CILEX Regulation was not consulted.

17. There are two sides to the Respondents' business, advising and assisting letting agents, and advising and assisting landlords.

18. So far as letting agents are concerned, the Respondents advise letting agents on the law of landlord and tenant, and assist them in ensuring that their documents are legally compliant. Some letting agents pay a monthly retainer for Mrs Doble's advice, as and when required. Mrs Doble reviews the letting agents standard documentation, ensuring that the documents are accurate and are consistent with current legislation. She drafts and serves notices on their behalf, again ensuring that they are accurate and legally-compliant. If possession proceedings become necessary, Mrs Doble will advise on the appropriate documents, rules for service, etc.

19. The second side to the Respondents' business consists of advising and assisting landlords who wish to gain vacant possession after a lease has expired. This takes different forms. Sometimes it is limited to helping landlords in their negotiations with tenants and/or the local authority. Other times, the Respondents give assistance to the landlords with the court process.

20. As I have said, Mrs Doble was a Graduate Member of CILEX. She became a Graduate Member in 2012. This was the result of training and study that she had undertaken when working for law firms.

21. Mrs Doble was the subject of an investigation by CILEX Regulation in 2016-18, before she started to do work for Mr Persey. CILEX Regulation contacted her after carrying out a routine check on the websites of self-employed members. CILEX Regulation was concerned about wording on her website which referred to her previous work as a property litigator. The Regulator took this view that the website did not make it sufficiently clear that Mrs Doble was not still conducting property litigation, and so the wording on the website was changed.

22. In the course of the investigation, CILEX Regulation drew another matter of concern to Mrs Doble's attention. The Regulator asked her to explain, step-by-step, the work that she did for clients in relation to possession proceedings. The Regulator told Mrs Doble that the fact that she sent letters to the Court on her company letterhead on behalf of clients, and used phrases such as "act for" and "by way of service" in correspondence, could be deemed to amount to conducting litigation. In particular, CILEX Regulation was concerned about Mrs Doble's practice of sending letters to the Court on behalf of clients on the Second Respondent's letterhead in which the Court was asked to "issue and serve" proceedings. Mrs Doble sought the advice of a solicitor specialising in regulatory work, Mr Jonathan Goodwin. He negotiated with CILEX Regulation and advised Mrs Doble on changes that she should make to her working practices. Mrs Doble implemented the changes. These were, principally, that, though she drafted letters to go to the Court, they were no longer on the Second Respondent's letterhead, and they were perused and signed by the client before they went to the Court.

23. Also, correspondence with the other party to proceedings was, from then on, signed by the client and generally did not use the Second Respondent's letterhead. Mrs Doble continued to compose the letters, however. From then on, the normal practice was that only letters that went out on the Second Respondent's headed notepaper were letters of information or correspondence that the Respondents had been authorised to send on the client's behalf, by means of formal authority from the client. Mrs Doble generally only does this in the period prior to the issue of proceedings (although, as will be seen, she wrote to the Claimant's solicitor on her company letterhead after the proceedings began).

24. The position taken by CILEX Regulation, as Mrs Doble understood it, was that these changes were sufficient to mean that the Respondents were no longer conducting litigation. However, Mrs Doble was disciplined for her past breaches, consisting of conducting litigation in breach of the 2007 Act and the CILEX Code of Conduct. She admitted to breaches that were set out in a letter dated 11 June 2017. Mrs Doble was given a formal warning about her future conduct and was required to advise CILEX Regulation if she were to change practices or area of law in the future. The disciplinary sanction was set out in a formal Determination by Consent Agreement dated 25 January 2018. This Agreement said, at paragraph 5, that the mitigating factors included that Mrs Doble had engaged considerably through the investigation either personally or through her legal representatives, and "Mrs Doble has demonstrated good insight by taking steps to rectify the situation by complying with the recommendations made by the Entity, Authorisation and Supervision team at CILEX Regulation."

25. The Determination by Consent Agreement did not specify the ways in which Mrs Doble had been conducting litigation. In particular, it did not state specifically that she had crossed the line by using her company's letterhead for correspondence with the court. However, in her oral evidence, Mrs Doble said CILEX Regulation's concern had been

about the way in which she contacted the court on behalf of her clients, and, in particular, that documents and correspondence were sent under cover of her letterhead. She said that she asked CILEX Regulation if it was okay if she still forwarded documents to court but changed the wording and did not use the Second Respondent's letterhead. Mrs Doble said, "They were happy with that." So far as the client care letter was concerned, Mrs Doble said in re-examination that whilst CILEX Regulation did not expressly authorise its terms, they did not object and were always aware of what she was doing.

26. Mrs Doble was advised by her specialist regulatory solicitor, Mr Goodwin, that she was now working within the law and could continue with her business. She has not since been the subject of complaints (apart from by the Claimant) or of investigation by CILEX. Mrs Doble said that CILEX Regulation had been made aware that she was drafting formal legal documents such as particulars of claim but had not suggested that this amounted to a reserved legal activity. She also said that, whilst CILEX Regulation had not formally informed her that the terms of service set out in her client care letter were lawful, she had inferred that they regarded them as lawful as they had reviewed all of her documentation during the disciplinary process and made her change certain of them. Where CILEX had not commented on other documents, she regarded this as an indication that CILEX did not regard them as being unlawful.

27. The Determination by Consent Agreement also noted that there had been no loss to any client resulting from the conduct of litigation by the Respondents.

The assistance that was provided by the Respondents to Mr Persey

28. Mr Persey originally issued possession proceedings against the Claimant in November 2018, without the assistance of the Respondents. These proceedings were struck out.

29. Mr Persey instructed the Respondents on 12 March 2019 and was provided with a client care letter, which set out the nature of the advice and assistance that the Respondents were able to, and were intending to, provide, in return for a fee. The letter also gave some advice about the dispute between Mr Persey and the Claimant (and his partner, who was also living in the property). By this stage, it was clear that the Claimant would not give vacant possession of the property unless proceedings were brought against him.

30. The client care letter said the following, inter alia:

> "If the tenant fails to pay up and leave and if you instruct me I can help you prepare the necessary documents to issue proceedings based on the S.8 notice. I will draft and prepare on your behalf the Claim form and Particulars of Claim and advise you on the supporting documentation you will need to go with the claim. I will also supply the covering letter for you to send the Claim form to the County Court at Exeter.
>
> ….
>
> …The Notice of Issue and a copy of the sealed claim will be sent to you. You will need to forward this documentation to me

immediately you receive the same, in order for me to progress the matter and draft the necessary paperwork and ensure you comply with any deadlines.

Standard route of possession

Where this route is used, you will need to prepare a claim form and send this to the court local to the Tenant. The claim will be issued and a copy of the Notice of Issue will be served upon the Tenant. The Notice of Issue must be served on Tenant and the local housing authority and you have agreed to send a copy of this Notice to me as soon as you receive the same, to arrange for the necessary letters to be drafted and sent. A copy of this Notice must be sent marked "to the occupier" at the Property and a further copy on the local housing department…

Shortly before the hearing, you will need to prepare a witness statement and serve the same at Court and on the Tenant. Again this is something I can do for you and is included in the fixed fee below.

….

Your instructions

You have asked me to serve a S.8 notice and prepare, if necessary, a claim for possession.

Responsibility for your case

I will be handling your case personally. I am a Graduate of CILEx and a Director of this firm.

I am authorised to advise and assist you. I cannot sign any court paperwork for you and I will request that you do so when the need arises. You will be recorded on the Court record as a Litigant in Person and the Court will send all correspondence to you…

As part of these instructions you have agreed to send me copies of the correspondence you receive during the course of this matter, so that I can advise and assist you at each stage. My advice and assistance includes drafting any necessary response or documents you may require…

….

Any hearing in this matter will need to be conducted by an authorised advocate and I can refer you to LPC (Legal Practice Clerks) who I refer work to on a regular basis, or I can refer you to a barrister who accepts direct access clients. Alternatively,

> you can choose a firm of solicitors who can represent you in court or I can recommend a local firm for this use.
>
> …
>
> **Costs**
>
> …The Court fee will need to be paid by you to the Court when the Claim is sent to them by way of a cheque made payable to "HMCTS" or if you do not have this facility, by a bank transfer to me in order for me to send a cheque on your behalf."

31. In return for the Respondent's services, Mr Persey was obliged to pay a fee of £600, plus VAT and disbursements, if the matter was undefended. If, as turned out to be the case, the matter was defended, the Respondents would increase the fixed fee or charge an hourly rate. The letter added, "However, I may need to refer you to a different firm who undertakes litigation. I will discuss this with you fully, if that scenario arises."

32. The client care letter was accompanied by the Second Respondent's terms and conditions, which were signed by the client. These stated that the Second Respondent might make disbursements on behalf of the client's behalf, for example court fees or counsel's fees, but that the Second Respondent had no obligation to make such payments unless funds had first been provided by the client for that purpose.

33. The terms and conditions also stated that, if the client was unhappy with the service received, and the complaint could not be resolved, the client had the right to refer the matter to the Legal Ombudsman. Mrs Doble said in cross examination that this was said because it was suggested in the CILEX Code of Conduct that members might be under the supervision of ombudsmen, but she accepted that she was aware that the position taken by the Legal Ombudsman was that it had no jurisdiction over complaints in these circumstances.

34. Alongside the client care letter and terms and conditions, Mrs Doble provided Mr Persey with another document headed "Important Law Update – 16 January 2019". The document said:

> "This update is important as it affects the work that we can and cannot do for you….
>
> As you know, we are not a firm of solicitors and therefore we cannot claim to be solicitors or undertake tasks that solicitors are authorised to do. This is one of the main reasons that we charge much less than solicitors do for the work that we do for you."

35. This document referred to the judgment that had recently been handed down by the Court of Appeal in the case of **Ndole** (which I will deal with below). It was given by the Respondents to clients because Mrs Doble considered it necessary to do so in light of the **Ndole** judgment, and to ensure that the Respondents stayed on the right side of the line, so far as conducting litigation was concerned. Mrs Doble did not obtain specific legal advice before drafting the letter.

36. The document stated that "The Court have stated clearly the serving of a claim form is "conducting litigation". The document then listed, highlighted in bold, the "dos" and "don'ts" of what the Respondents were entitled to do as follows:

> "**We can:**
>
> 1. **Advise and assist you in your matter**
> 2. **Prepare the necessary letters and paperwork to start your matter**
> 3. **Negotiate with the other party and/or their representatives in the matter**
> 4. **Draft Court documentation for your use and signature**
> 5. **Arrange for legal representation at a hearing and provide instructions to those attending.**
>
> **We cannot:**
>
> 1. **Send Court documents to the Court;**
> 2. **Send Court documents to your opponent;**
> 3. **Communicate with the Court in writing on your behalf (using our own letterhead/email signature).**"

37. Under a further heading 'What does this mean for you?' the document explained:

> "Any communications with the Court or any 'service' of documents must be made by you. We can still draft such correspondence for you but if you are communicating by email, the email must come from your email address. Any letters sent must not use our letterhead, but yours. We can still send the documents to Court for you."

38. The letter concluded, "Whilst there are a few tweaks to be made, the judgment does not alter the way in which we have worked for you or will continue to work for you."

39. Pursuant to, and in accordance with, the agreement with Mr Persey in the client care letter, supplemented by the "**Ndole**" document, the Respondents provided services to Mr Persey in relation to his claim against the Claimant until they withdrew following a successful application to the Court by the Claimant, dated 24 October 2019, that the Respondents be joined as parties to the litigation on the ground that they were in contempt of court for having conducted litigation.

40. As I have said, there was, in the event, no significant factual disagreement between the parties as regards the nature of the services that were provided by the Respondents to Mr Persey. They can be summarised as follows:

Legal advice

41. Mrs Doble provided Mr Persey with advice about the merits of his claim for possession of the property occupied by the Claimant, and with advice about the legal steps open to him, and about the procedures that apply to possession proceedings.

42. So, for example, in a letter sent by email on 9 July 2019, Mrs Doble advised Mr Persey about the progress of the proceedings, and the implications of the point taken by the Claimant and Ms Irvine-Yates that the Respondents were unlawfully conducting

litigation on behalf of Mr Persey. In cross-examination, Mrs Doble accepted that she had given some inaccurate advice to Mr Persey in this letter, to the effect that he, as a litigant in person, could take advantage of legal professional privilege.

Drafting and serving notices under section 8 and section 21 of the Housing Act 1988

43. The first step in an attempt by a landlord to recover possession is to serve an appropriate notice under the Housing Act 1988. A section 21 notice is used to terminate an Assured Shorthold Tenancy agreement where the fixed term of the tenancy has expired. It is sometimes called a "no fault" notice. Pursuant to a section 21 notice, a tenant must be given at least two months' notice to vacate the property. A section 8 notice is used for an Assured Tenancy Agreement or an Assured Shorthold Tenancy Agreement, where one of the grounds for recovery of possession that are set out in Schedule 2 to the Act applies. These include where the tenant has broken the terms of the Tenancy Agreement. It is potentially a quicker way of obtaining vacant possession. There are strict rules about how this notice should be completed. For example, the notice must specify the grounds relied upon by the landlord, which may be either Mandatory Grounds or Discretionary Grounds for possession.

44. The service of these notices does not inevitably result in court proceedings: often the effect of service of such a notice is that the tenant will leave voluntarily, or will enter into negotiations with the landlord which will result in the tenant leaving voluntarily. However, the relevant sections provide that orders for possession cannot be made unless one of the notices has been served, and the relevant procedural steps have been followed. Service of a s8 or s21 notice is a necessary first step. A s8 notice also serves as a warning to the tenant to rectify the breach, if there is one.

45. In the present case, the Respondents admit that they drafted a section 8 and a section 21 notice for Mr Persey in or about March 2019 and that they served the notices on the Claimant on Mr Persey's behalf. At this stage, no court proceedings had been commenced (apart from the first proceedings which were commenced by Mr Persey without the Respondents help, and which had been struck out). The notices were drafted by Mrs Doble and were sent by her by first-class post to the Claimant. The notices were signed by Mrs Doble as the director of the Second Respondent and were accompanied by a covering letter on the Second Respondent's headed paper.

Correspondence with the Claimant's solicitor

46. In advance of the commencement of proceedings, Mrs Doble communicated with Ms Irvine-Yates, the Claimant's solicitor, on his behalf. In an email dated 19 March 2019, Mrs Doble said to Ms Irvine-Yates:

> "We have recently been instructed to advise and assist our client regarding the issues surrounding 1 Knights Cottage, Plymtree, Cullompton, Devon, EX15 2JU. Accordingly, we attach a letter of authority, signed by our client, so that we can communicate with you….. We have requested information from our client in order for us to advise him fully and form a full and proper response to you……

Sarah Doble, Graduate of CILEx, Director of Sarah Doble Associates Ltd"

47. Amongst other correspondence, in an email dated 9 April 2019, Mrs Doble informed Ms Irvine-Yates that the claim had been sent to Exeter County Court the previous week.

48. Mrs Doble continued to correspond with Ms Irvine-Yates in relation to the proceedings, after the proceedings had been commenced, at least until 29 May 2019 (shortly after Ms Irvine-Yates had first made the allegation that Mrs Doble was unlawfully conducting litigation).

49. On one occasion, on 20 March 2019, the Claimant phoned the offices of the Second Defendant and spoke to Mrs Doble's secretary, Anita Charles. He did not identify himself. He asked to speak to a solicitor and was told that Mrs Doble was out of the office. He asked specifically for confirmation that Mrs Doble was a solicitor and was told "yes". For reasons that are not clear to me, unless it was in the hope that he could trip up the Respondents, the Claimant recorded this conversation.

50. Ms Charles has provided a witness statement in which she confirmed that this conversation took place. She said that as soon as she had confirmed that Mrs Doble was a solicitor she realised that this was untrue but, before she could correct herself, the man rang off, and left no number to which she could return the call. Ms Charles said in her statement, that Mrs Doble had told her during her training that Mrs Doble was not a solicitor and that Ms Charles should not tell or suggest to anybody that Mrs Doble, the Second Respondent, or any employee of the company, was a solicitor.

51. I accept the evidence of Ms Charles, and, furthermore, I accept Mrs Doble's evidence that at no time has Mrs Doble held herself out as a solicitor or authorised any employee to assert or confirm that she is a solicitor.

Drafting of claim form and particulars of claim for the possession proceedings

52. After the Claimant declined voluntarily to vacate the property, Mrs Doble drafted the claim form and particulars of claim for the second set of proceedings that were brought against the Claimant by Mr Persey. She had Mr Persey's written authority to do so. She discussed the details of the claim with Mr Persey, and obtained from him the information that she considered was necessary to include in the claim form and particulars of claim. Mrs Doble then drafted the claim form, particulars of claim, and a covering letter for the court. She also prepared the necessary enclosures. She then sent them to Mr Persey for approval. Mr Persey asked for amendments to be made to the particulars of claim because the sequence of events had been slightly misdescribed.

Posting the claim form and particulars of claim to the court

53. Once the documentation was approved, and the claim form, particulars of claim, and covering letter was signed by Mr Persey, the Respondents posted the claim form, particulars of claim, enclosures, and covering letter to the court. The covering letter was not on the Second Respondent's letterhead. None of the court documents referred to the Respondents as Mr Persey's representatives. Mrs Doble also ensured that the right number of copies of documents for which multiple copies were required were

enclosed in the pack that was sent to the court. She also emailed a copy to Mr Persey. This was done on or shortly after 3 April 2019.

54. Accordingly, Mrs Doble prepared and posted these documents to the court, but did not sign the documents and did not use her company's letterhead. There was nothing in these documents to indicate that the Respondents had any involvement in the process.

55. It was Mrs Doble's view that this did not amount to filing the claim form and particulars of claim on Mr Persey's behalf. She said that it was a purely mechanical function. Indeed, she said that the Respondents invariably sent paper documentation to the court, rather than using the online process – possession claims online – specifically because the online process utilises a computer generated form which requires the person filling it in to tick a box to confirm that the writer is the claimant. The online form also says that by pressing "send" the writer is issuing a claim.

56. Mrs Doble also said that it is the clients who are responsible for meeting all court deadlines, though in practice the Respondents diarise a date two weeks after sending the claim, so that they can contact the client if they have not been informed that the client has received confirmation from the court that the documentation has been received.

57. In cross-examination, Mrs Doble accepted that she had to take account of the requirements of the relevant Civil Procedure Rules, when considering the contents of the pleadings and the method of service.

Payment of issue fees

58. In accordance with the Respondents' normal practice, the court fee that accompanied the claim form and other documentation (currently £355) was paid by a cheque in the name of the Second Respondent. This was done as a disbursement on behalf of Mr Persey. The Second Respondent had previously been placed in funds by Mr Persey to pay for this. This was done by BACS payment on 3 April 2019. The funds were held in the Second Respondent's client account. Mrs Doble explained that this service is provided because the court payment has to be made by cheque and, nowadays, many clients do not have a cheque book.

Signing a certificate of service of the notice of issue

59. On 15 April 2019, Mrs Doble's secretary, Anita Charles, signed a certificate of service, certifying that she had served Notice of Issue of the proceedings on the occupier of the property at 1 Knights Cottage, Plymtree by first class post. This certificate was on form N215. It contained a statement of truth and said "Rules relating to the service of documents are contained in Part 6 of the Civil Procedure Rules…"

60. The space for signature on the form contains wording, to be struck through as appropriate, to state whether the signatory is "(Claimant) (Defendant) ('s solicitor) ('s friend). None of the words were struck through. There was also a space for "Position or Office held (if signing on behalf of a firm or company)". Ms Charles entered "Secretary". She was, at the time, a secretary employed by the Second Respondent.

61. There is no legal obligation to serve a notice of issue on the occupiers of a property, but it is good practice to do so, in case persons other than the defendant(s) are living in the property and are unaware of the proceedings. It is not a formal step in the proceedings.

62. In cross-examination, Mrs Doble accepted that the signing of the certificate of service, accompanied by a statement of truth, by Ms Charles, meant that the Respondents had engaged in the conduct of litigation, in this limited respect. However, as the concession was made during cross-examination and is concerned with a matter of law rather than a matter of fact, I do not consider that the Respondents (let alone the court) are bound by this concession. In any event, Mrs Doble resiled from the concession during re-examination, saying that as the sending of a notice to the occupier was not a step in the proceedings, this did not involve the conduct of litigation.

Instructing an advocate for the hearing on 21 May 2019

63. When it became apparent that there would be a court hearing in the possession proceedings, the Respondents referred Mr Persey to a solicitors' firm called LPC Law which provided an advocate to act for Mr Persey at the hearing. The advocate was Mr Andrew Gibbs-Ripley. Mrs Doble prepared and communicated instructions to the advocate and liaised with the advocate on Mr Persey's behalf. She also discussed with the advocate some points of law that the Claimants had raised (as she explained to Mr Persey in an email dated 10 May 2019 and 14 May 2019). In the second email she said that she was seeking counsel's opinion on a point made by Ms Irvine-Yates about an alleged defect in service of the claim form. It appears from this email that counsel was someone other than Mr Gibbs-Ripley.

64. LPC Law also had a global Referral Agreement with the Second Respondent, which had been entered into on 16 September 2014, and which had been drafted in accordance with the Solicitors' Code of Conduct. This Referral Agreement stated that "The Introducer agrees not to undertake reserved legal activities as set out in section 12(1) and Schedule 2, paragraph 4, of the Legal Services Act 2007."

65. In addition, Mr Persey directly signed a letter of retainer for LPC Law, dated 29 April 2019. The letter said, "It is usually expedient for us to discuss the details of your case with the Referrer including, where appropriate, the passing on of your instructions from them and sending them a copy of the Advocate's attendance note. If you agree to us discussing your case and sharing our Advocate's attendance note with the Referrer, then please sign the corresponding declaration below." Mr Persey signed the declaration.

66. Mr Gibbs-Ripley attended a hearing at Exeter County Court on 21 May 2019. Mr Persey became liable to pay a fee to LPC Law. The fee was paid on his behalf by the Second Respondent and was recovered from Mr Persey by the Second Respondent, from funds that had been paid in advance to the Second Respondent and which were held on account for Mr Persey. The letter of retainer stated that "The Referrer [i.e. the Second Respondent] will be liable for payment of any invoice submitted by LPC Law pursuant to this Retainer."

67. Mr Gibbs-Ripley attended a further hearing on Mr Persey's behalf on 14 August 2019. Mrs Doble drafted instructions for Mr Gibbs-Ripley and spoke to him about the hearing. LPC's invoice was sent to the Second Respondent, which paid it on behalf of Mr Persey, from funds already supplied to the Second Respondent by Mr Persey.

68. Mr Gibbs-Ripley attended the Case Management Conference on 24 October 2019. Again, Mrs Doble provided instructions to Mr Gibbs-Ripley and the Second Respondent paid his firm's fee, which was paid for from funds already provided to the Second Respondent by Mr Persey.

69. Mr Gibbs-Ripley's attendance notes were sent to Mrs Doble.

70. Mr Persey attended two of the hearings personally and so was able to give instructions directly to Mr Gibbs-Ripley.

71. Mr Metcalfe pointed out that, in the course of providing disclosure of documents in the possession proceedings, the Respondents declined to provide copies of the written instructions that were sent by Mrs Doble to Mr Gibbs-Ripley, on the basis that "they were produced …. either in contemplation of the litigation or during the course of the litigation." The reference to "the litigation" is a reference to the possession proceedings. Mr Metcalfe submitted that this showed that the Respondents were conducting litigation. I do not consider that the position taken by the Respondents, on legal advice, in relation to disclosure in the contempt proceedings, assists me in deciding whether the Respondents were conducting litigation in the possession proceedings.

Drafting of witness statements

72. Mrs Doble drafted witness statements for the purposes of the court proceedings. These consisted of statements by Mr Persey dated 14 May 2019 and 3 July 2019. Mrs Doble drafted the statements based on information provided by Mr Persey. In each case, Mr Persey approved and signed the statements. However, Mrs Doble made use of her expertise to decide what information needed to go into the statements, and to decide upon the appropriate format and structure of the statements. In her witness statement, Mrs Doble said that she advises clients that they need to keep to the facts and keep it simple. She said that she makes it very clear to the client that the statement has to be in their own words and if she has written something they would not say or did not say to her, they must tell her.

73. Mrs Doble posted the statements to the court under cover of a letter that she drafted but which was in Mr Persey's name and was signed by Mr Persey. The statements were also sent to Mrs Irvine-Yates. In an email to Mr Persey dated 14 May 2019, Mrs Doble said, "Given her tenacity for deadlines, I really [ought] to serve the witness statement today/tomorrow." Mrs Doble's position, however, is that the posting of the statements to the court, and to the Claimant's solicitor did not amount to filing or service. In cross-examination she said that she was simply carrying out a "mechanical function".

Drafting of an application notice and draft order

74. Mrs Doble drafted an application notice for a strike-out of an application by the Claimant in the possession proceedings, and a draft order, which were dated 3 July 2019 (along with a supporting witness statement, as referred to above). The documents were signed by Mr Persey. Mrs Doble also drafted a covering letter, signed by Mr Persey, to be sent to the court.

Drafting of the reply and defence to counterclaim

75. In September 2019, Mrs Doble drafted the reply and defence to counterclaim. She forwarded it to Mr Gibbs-Ripley for his comments, and he made some suggestions for changes. She also forwarded it to Mr Persey for his comments and he approved and signed it.

Delivery of the reply and defence to counterclaim to the Claimant, his wife, and his solicitor

76. Mrs Doble then arranged for the document to be sent to the court by Mr Persey's personal assistant, within the time provided for this by a court order dated 27 August 2019, and for copies to be delivered by hand to Ms Irvine-Yates and to the Claimant and his partner (who was not represented by Ms Irvine-Yates but was a litigant in person). As Ms Irvine-Yates was based in Rochdale, Mrs Doble arranged for a process server to effect personal service of the document on her on 20 September 2019. In cross-examination, Mr Doble accepted that this amounted to a request for help with service of a document.

77. In cross-examination, Mrs Doble said that she decides on the method by which documents are sent to the other party, whether by post or personal service. She said that normally documents are sent by post but in this case she decided upon personal service.

Drafting the Case Summary for the CMC

78. Mrs Doble drafted the Case Summary for the Case Management Conference on 24 October 2019.

The allegation that the Respondents were unlawfully conducting litigation

79. This allegation was first made by Ms Irvine-Yates in May 2019. In a letter to Mr Persey dated 25 May 2019, she said that she had been so advised by her regulator, the Solicitors' Regulation Authority ("SRA"). Ms Irvine-Yates said that the SRA told her that to continue corresponding with the Second Respondent could constitute complicity in a criminal offence.

80. In the Claimant's defence and counterclaim to the possession proceedings dated 3 September 2019, the Claimant pleaded that the possession claim should be struck out because Mr Persey had engaged the Respondents to conduct litigation unlawfully, in contravention of sections 13 and 14 of the 2007 Act.

81. At the CMC on 24 October 2019, pursuant to an application by the Claimant, Deputy District Judge Berrett ordered that the Respondents be joined to the proceedings, and at about the same time, the Respondents ceased to act for Mr Persey. This order was set aside by District Judge Ireland on 3 December 2019. The Claimant appealed on this point but was unsuccessful.

82. As I have said, the application to commit the Respondents for contempt was commenced by way of Part 8 Proceedings on 19 December 2019.

(2) The relevant statutory provisions

83. In the **Ndole** case (referred to below) at paragraph 28, the Court of Appeal said that section 1 of the 2007 Act sets out the important regulatory objectives underpinning the statutory scheme. Section 1 provides:

> "1 **The regulatory objectives**
>
> (1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—
>
> (a) protecting and promoting the public interest;
>
> (b) supporting the constitutional principle of the rule of law;
>
> (c) improving access to justice;
>
> (d) protecting and promoting the interests of consumers;
>
> (e) promoting competition in the provision of services within subsection (2);
>
> (f) encouraging an independent, strong, diverse and effective legal profession;
>
> (g) increasing public understanding of the citizen's legal rights and duties;
>
> (h) promoting and maintaining adherence to the professional principles.
>
> (2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).
>
> (3) The "professional principles" are—
>
> (a) that authorised persons should act with independence and integrity,
>
> (b) that authorised persons should maintain proper standards of work,
>
> (c) that authorised persons should act in the best interests of their clients,
>
> (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
>
> (e) that the affairs of clients should be kept confidential.

> (4) In this section "authorised persons" means authorised persons in relation to activities which are reserved legal activities.

84. Sections 13(1) and (2) of the 2007 Act provide that:

> "13. **Entitlement to carry on a reserved legal activity**
>
> (1)The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.
>
> (2)A person is entitled to carry on an activity ("the relevant activity") which is a reserved legal activity where—
>
> (a)the person is an authorised person in relation to the relevant activity, or
>
> (b)the person is an exempt person in relation to that activity."

85. "Authorised person" is defined in section 18(1) as follows:

> "18. **Authorised persons**
>
> (1)For the purposes of this Act "authorised person", in relation to an activity ("the relevant activity") which is a reserved legal activity, means —
>
> (a)a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by virtue of a licence under Part 5), or
>
> (b)a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity.

86. Exempt persons are defined in Schedule 3 to the 2007 Act (see section 19). They include persons who have a right of audience for the type of hearing in question, and litigants in person.

87. It is common ground that neither Mrs Doble nor the Second Respondent was (or is) entitled to carry on a reserved legal activity, either as an authorised person or as an exempt person.

88. Section 14 of the 2007 Act provides that it is an offence for a person to carry on a reserved legal activity if not entitled to do so, unless the defence in section 14(2) applies, and section 14(4) provides that it also amounts to contempt of court:

> "14. **Offence to carry on a reserved legal activity if not entitled**

> (1) It is an offence for a person to carry on an activity ('the relevant activity') which is a reserved legal activity unless that person is entitled to carry on the relevant activity.
>
> (2) In proceedings for an offence under subsection (1), it is a defence for the accused to show that the accused did not know, and could not reasonably have been expected to know, that the offence was being committed.
>
> (3) A person who is guilty of an offence under subsection (1) is liable— (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), and (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine (or both).
>
> (4) A person who is guilty of an offence under subsection (1) by reason of an act done in the purported exercise of a right of audience, or a right to conduct litigation, in relation to any proceedings or contemplated proceedings is also guilty of contempt of the court concerned and may be punished accordingly."

89. The meaning of "reserved legal activity" and "legal activity" is set out in section 12 of the 2007 Act as supplemented by Schedule 2.

90. Section 12 provides:

> "12 **Meaning of "reserved legal activity" and "legal activity"**
>
> (1) In this Act "reserved legal activity" means—
>
> (a) the exercise of a right of audience;
>
> (b) the conduct of litigation;
>
> (c) reserved instrument activities;
>
> (d) probate activities;
>
> (e) notarial activities;
>
> (f) the administration of oaths.
>
> (2) Schedule 2 makes provision about what constitutes each of those activities.
>
> (3) In this Act "legal activity" means—

> (a) an activity which is a reserved legal activity within the meaning of this Act as originally enacted, and
>
> (b) any other activity which consists of one or both of the following—
>
> (i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;
>
> (ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.
>
> (4) But "legal activity" does not include any activity of a judicial or quasi-judicial nature (including acting as a mediator).
>
> (5) For the purposes of subsection (3) "legal dispute" includes a dispute as to any matter of fact the resolution of which is relevant to determining the nature of any person's legal rights or liabilities.
>
> (6) Section 24 makes provision for adding legal activities to the reserved legal activities."

91. Under section 24 the Lord Chancellor may, by order, amend section 12 and Schedule 2 so as to add any legal activity to the list of reserved legal activities for the purposes of the Act.

92. The present case is concerned with the question whether the Respondents were involved in reserved legal activity consisting of the conduct of litigation. There is no suggestion that the Respondents exercised a right of audience. There was some suggestion that the Respondents might have been involved in "reserved instrument activities", as defined in Schedule 2, but section 14(4) makes clear that it is not contempt of court for a person to engage in reserved instrument activities, and so I need not address this issue.

93. The definition of "the conduct of litigation" is to be found at paragraph 4 of Schedule 2 to the 2007 Act. It is as follows:

> "**Conduct of litigation**
>
> 4 (1)The "conduct of litigation" means—
>
> (a) the issuing of proceedings before any court in England and Wales,
>
> (b) the commencement, prosecution and defence of such proceedings, and
>
> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

> (2) But the "conduct of litigation" does not include any activity within paragraphs (a) to (c) of sub-paragraph (1), in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity."

94. Sub-paragraph 4(2) has no relevance for the present case. It will be seen that the definition of "conduct of litigation" in Schedule 2 is very general in its terms.

Earlier legislation

95. Prior to the 2007 Act, the statutory provisions which rendered it a criminal offence and a contempt to conduct litigation without authorisation were to be found in the Courts and Legal Services Act 1990 ("the 1990 Act"). Section 70 of the 1990 Act made it a criminal offence to conduct litigation when not entitled to exercise that right. Section 70(6) provided that a person guilty of the offence of conducting litigation without authorisation would also be guilty of contempt of court. Entitlement to conduct litigation was provided for in section 28, and was limited to those who had a right granted by an appropriate authorised body, by an enactment, by the court or who was a litigant in person. There was no equivalent to the statutory defence that is found in section 14(2) of the 2007 Act.

96. Section 119(1) of the 1990 Act defined "right to conduct litigation" as follows:

> "right to conduct litigation" means the right—
>
> (a) to issue proceedings before any court; and
>
> (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions); …"

97. It will be seen, therefore, that the definition in the 1990 Act, was different from, and, on the face of it, narrower than, the definition in Schedule 2 to the 2007 Act. "Conduct of litigation" did not extend to the commencement, prosecution and defence of proceedings before a court (although there is something of an overlap: the issuing of proceedings and the entering of appearances would no doubt come within the meaning of the phrase). I should add that the version of section 119(1) which was considered by the Court of Appeal in **Agassi** was itself an amendment, made in 1999. The original version of section 119(1) defined the right to conduct litigation as the right:

> "(a) to exercise all or any of the functions of issuing a writ or otherwise commencing proceedings before any court; and
>
> (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)."

I think that it is likely that this earlier amendment was triggered by the civil procedure reforms in 1999 which consigned the word "writ" to history.

98. Unfortunately, perhaps, the Explanatory Notes to the 2007 Act do not explain why the definition of the right to conduct litigation was changed from that which was found in

the 1990 Act. However, in my judgment the explanation can be found in a change that was made to the Solicitors' Act 1974 ("the 1974 Act") by the 2007 Act.

99. Section 20 of the 1974 Act, as originally enacted, prohibited unqualified persons from acting as a solicitor. Section 20 provided that:

> "20 (1) No unqualified person shall –
>
> (a) act as a solicitor, or as such issue any writ or process, or ***commence, prosecute or defend any action***, suit or other proceeding, in his own name or in the name of any other person, in any court of civil or criminal jurisdiction; or
>
> (b) act as a solicitor in any cause or matter, civil or criminal, to be heard or determined before any justice or justices or any commissioners of Her Majesty's revenue.
>
> (2) Any person who contravenes the provisions of subsection (1) –
>
> (a) shall be guilty of an offence and liable on conviction on indictment to imprisonment for not more than two years or to a fine or to both; and
>
> (b) shall be guilty of contempt of the court in which the action, suit, cause, matter or proceeding in relation to which he so acts is brought or taken and may be punished accordingly; and
>
> (c) in addition to any other penalty or forfeiture and any disability to which he may be subject, shall be liable to a penalty of £50 to be recovered, with the full costs of the action, by an action brought by the Society with consent of the Attorney General in the High Court or in any county court, and to be applied to the use of Her Majesty."

(emphasis added)

100. Section 20 was amended by the 2007 Act so that it now simply states, at section 20(1), that "No unqualified person is to act as a solicitor".

101. It will be seen that the words "commence, prosecute or defend any action" appeared in section 20(1)(a) of the 1974 Act. This is similar to the "new" wording in paragraph 4(b) of Schedule 2 to the 2007 Act. In my view, it is likely that Parliament decided effectively to combine the wording that used to be found in separate statutory provisions relating to unauthorised persons conducting litigation and unqualified persons acting as a solicitor into a single statutory definition. In my view also, the effect of this is that the definition of the conduct of litigation in the 2007 Act is somewhat wider than the definition of the conduct of litigation in the 1990 Act.

(3) The relevant case-law and the guidance to be derived therefrom

102. It is convenient to look at the relevant case-law in chronological order.

Agassi v S Robinson (HM Inspector of Taxes) (No 2) [2005] EWCA Civ 1507; [2006] 1 WLR 2126 (CA)

103. This case was decided prior to the enactment of the 2007 Act. It was concerned with the predecessors to sections 12 and 14 of, and Schedule 2(4) to, the 2007 Act, namely sections 70 and 119 of the 1990 Act.

104. As I have said, the definition in the 1990 Act, which was considered by the Court of Appeal in **Agassi**, was different from, and narrower than, the definition in Schedule 2 to the 2007 Act. "Conduct of litigation" did not extend to the commencement, prosecution and defence of proceedings before a court.

105. **Agassi** was not a case about an application to commit for contempt. Rather, **Agassi** concerned the provision of services by a tax advisor (who was a member of the Chartered Institute of Taxation). The tax advisor instructed a barrister under the then-existing "licensed access scheme", BarDIRECT. The issue was whether the tax advisor's costs could be recovered on assessment. The Court of Appeal held that costs were recoverable in respect of lawful aspects of the provision of services, but not in respect of the unlawful aspects. It was necessary, therefore, for the Court of Appeal to consider the extent to which the services that were provided by the tax advisor were rendered unlawful by sections 70 and 119 of the 1990 Act (see judgment, paragraph 20).

106. Giving the judgment of the Court (Brooke, Dyson, and Carnwath LJJ, sitting with Master Hurst as costs assessor), Dyson LJ noted, at paragraph 9 of his judgment, that section 17 of the 1990 Act said that the general objective of the relevant part of the Act was to make provision for new or better ways of providing legal services and for a wider choice of persons providing them, whilst maintaining a proper and efficient administration of justice. Section 17(3) also provided that as a general principle the question whether a person should be permitted to conduct litigation should be determined only by reference to whether he or she was qualified by the educational and training requirements appropriate to the court; whether s/he was a member of a professional or other body which had an effective mechanism for enforcing rules of conduct; and whether the rules of conduct are, in relation to the relevant court, appropriate in the interests of the proper and efficient administration of justice. Section 28 of the 1990 Act provided that a person shall only have a right to conduct litigation if they have a right to do so granted by an appropriate authorised body or the court, or if the person is a litigant in person. At paragraph 16, Dyson LJ said that it was an important feature of the **Agassi** case that the Lord Chancellor had seen fit to authorise specialist tax professionals who were members of the Chartered Institute of Taxation to instruct barristers directly under the BarDIRECT scheme.

107. In **Agassi**, the Court of Appeal considered two separate issues of relevance. The first was whether there had been a breach of section 20(1) of the Solicitors' Act 1974. As Coulson J later said in his judgment at first instance in **Ndole** (below), this part of the decision is important because it grapples with what is covered by the commencement, prosecution and defence of proceedings (wording then appearing in section 20) (see **Ndole**, paragraph 19).

108. Section 20(1)(a) also prohibits "acting as a solicitor". The Court adopted (at paragraphs 36, 41 and 49) the definition of "acting as a solicitor" in the judgment of Potter J in **Piper Double Glazing Limited v DC Contracts** [1974] 1 WLR 777, at 786:

> "…it seems to me to be clear that the words "acting as a solicitor" are limited to the doing of acts which only a solicitor may perform and/or the doing of acts by a person pretending or holding himself out to be a solicitor. Such acts are not to be confused with the doing of acts of a kind commonly done by solicitors, but which involve no representation that the actor is acting as such."

109. The Court did not expressly focus on the meaning of the words, "the commencement, prosecution and defence of proceedings" in section 20, but the court said the following in relation to what might amount to a breach of section 20:

> "43. As was stated in **Factortame** , section 20 must be given a "restricted ambit" because of its penal nature. What does this mean? Where is the line to be drawn? Does the prohibition go any further than what is expressly prohibited? It is common ground that it does not extend to what might be termed purely clerical or mechanical activities such as photocopying documents, preparing bundles, delivering documents to opposing parties and the court and so on. Mr Speaight [counsel for the Bar Council, an Intervener] submits that none of the following activities, if conducted by an unqualified person, would be in breach of sections 20 or 22 :
>
> "a. Delivering to a court office a claim form, appeal notice, application or the like, provided it has been signed by the party himself.
>
> b. Typing or printing out an appeal notice, statement of case or other formal court document, which has been drafted by a barrister.
>
> c. Service of a claim form or other documents.
>
> d. Taking a statement from a prospective witness.
>
> e. Correspondence with the opposing party.
>
> f. Preparing a bundle of documents for use in a court hearing.
>
> g. Drafting instructions to a barrister.
>
> h. Sitting behind a barrister during a hearing to provide administrative assistance."
>
> 44. He described these as "administrative support". It is to be noted that we were shown no statute or rule which prohibits an unqualified person from giving legal advice. Mr Speaight

> accepts that discussing the law with counsel and/or giving legal advice to the client in connection with the litigation is not acting as a solicitor. Since such conduct by unqualified persons is not prohibited, it seems to us that, on an application of the Piper Double Glazing test, it does not amount to acting as a solicitor. Mr Drabble questions whether some of the items in Mr Speaight's list would normally amount to mere administrative support: for example, correspondence with the opposing party which, he submits, is an integral part of the conduct of litigation. Mr Drabble says that it is a question of degree whether correspondence goes beyond what may fairly be described as administrative support for the party.
>
> 45. This is a difficult area. There is no statutory (and so far as we are aware no other) definition of "acting as a solicitor". The phrase "administrative support" may seem to be a convenient label to use to refer to those activities which do not amount to acting as a solicitor, but it is not particularly illuminating shorthand for the only activities that may be carried out by an unqualified person on a proper application of the **Piper Double Glazing** test.

110. There has been consideration in later cases as to whether this passage in **Agassi** should be taken to be an endorsement of the list of activities in paragraph 43 as not amounting to the conduct of litigation. The answer was given by Coulson J in **Ndole** at first instance, [2017] EWHC 1148; [2017] 1 WLR 4367, which answer was endorsed by the Court of Appeal. In **Ndole**, the issue was whether the service of a claim form and the particulars of claim amounted to the conduct of litigation for the purposes of the 2007 Act. Counsel for the claimant argued that it did not, relying upon the list set out at paragraph 43 of **Agassi**. Coulson J rejected this submission, saying:

> "27. Ms Sinclair QC's principal argument was based on para 43 of A**gassi's** case [2006] 1 WLR 2126 which, as I have already noted, was the argument which impressed Judge Grant in the **MSJ Associates Ltd** case. But I regret to say that it did not impress me. Para 43 is no more and no less than a verbatim record of what counsel for the Bar Council argued in **Agassi's** case amounted to administrative support, which (so it was said) was not a restricted activity. What matters is not what was argued, but whether the Court of Appeal expressly endorsed that list. In my judgment, it did not.
>
> 28. There is no express endorsement of the list in paras 44 –45 of Dyson LJ's judgment. The highest Ms Sinclair could put it was that I should read para 45 as a "tacit approval" of the list. I cannot do so. To the contrary, Dyson LJ makes plain in that paragraph that "this is a difficult area". There is nothing in that paragraph which could be said to endorse the list. Given that it was not necessary for the list to be endorsed as part of the Court of Appeal's judgment in any event, it would be an unusual reading of a typically careful judgment of Dyson LJ to find that, contrary

> to his usual approach, he was (tacitly, not expressly) deciding issues that went beyond the particular disputes in the case before him.
>
> 29. Moreover, I would respectfully suggest that the list could not have been endorsed as a list of activities which, in every case, fell outside the meaning of reserved legal activity and which plainly amounted to administrative support. Take as an example one of the items in the list which does not arise in this case, namely "taking a statement from a prospective witness". In the TCC, the written witness statement stands as that person's evidence in chief. Is it really suggested that the taking of such a statement by a third party, amounting to the preparation of the witness's evidence in chief, is merely administrative support, rather than a critical step in the prosecution of the proceedings?"

111. I respectfully agree with Coulson J's analysis. The Court of Appeal in **Ndole** took the same view at paragraph 56 of its judgment (see below).

112. The second relevant issue in **Agassi** was the meaning of the right to conduct litigation in the 1990 Act. This was addressed by the Court of Appeal at paragraphs 53 and ff of its judgment. The Court focused on what was meant by "to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)". The Court said that these words must be given their natural and ordinary meaning and that the penal nature of section 70 of the 1990 Act must be borne in mind (paragraph 54). The Court rejected the submission that a wide interpretation should be given to the phrase. At paragraphs 55 and 56, the Court said:

> "53. Depending on the context, the word 'proceedings' may have a very wide ambit (see **Callery v Gray (No 1)** [2001] 1 WLR 2112 ; and, for an extreme example, see **Crosbie v Munroe** [2003] 1 WLR 2033 , para 34). In the present context the word undoubtedly includes ancillary applications and appeals in the course of litigation. Only a litigant in person or an authorised litigator may issue proceedings. But what is the scope of the right 'to perform any ancillary functions in relation to proceedings (such as entering appearances to actions)'? The background material to the 1990 Act that we have been shown sheds no light on the meaning of these words. Mr Drabble and Mr Carr rely on the statutory objective and the general principle stated in section 17 in support of the submission that the words should not be given a narrow meaning. They submit that there are powerful policy reasons why litigation which is not being conducted by litigants in person should be conducted by authorised litigators. The scheme introduced by the 1990 Act was intended to make provision for new and better ways of conducting litigation and a wider choice of persons providing them 'while maintaining the proper and efficient administration of justice'. It is an essential part of the scheme that the enlargement of the class of persons available to conduct litigation is properly regulated.

> 54. We recognise the importance of these considerations. But the language of section 119 must be interpreted in accordance with the usual rules for statutory interpretation. These include that the starting point is that words should be given their plain and natural meaning. It is also important to bear in mind the penal nature of section 70 . If a person purports to exercise the right to conduct litigation when he is not entitled to do so, he commits an offence. This is not directed at the person who pretends that he is entitled to exercise the right to conduct litigation: that is the subject of the separate offence created by section 70(3) . Section 70(1) is directed at the person who, whatever his state of mind, actually issues proceedings or performs any ancillary functions in relation to proceedings when he is not in fact entitled to do so.
>
> 55. If Parliament had intended to introduce a broad definition of the right to conduct litigation, it could have defined it as the right "to issue and conduct proceedings before the court". That would have been all-embracing and the second limb of the definition that was adopted would have been unnecessary. Instead, Parliament decided to limit the first limb of the definition to the initial formal step in proceedings, namely their issue. It then added a second limb, which, if its meaning is ambiguous or otherwise unclear, should be construed narrowly.
>
> 56. The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation". It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense "an integral part of the conduct of litigation", that does not make it an "ancillary function" for the purposes of section 28."

113. Having set out its views on the meaning and effect of section 20 of the 1974 Act and section 119 of the 1990 Act, the Court of Appeal set out its conclusions at paragraph 57 of the judgment:

> "57. The interrelationship between the 1974 and 1990 Acts seems to us to be as follows. An authorised litigator is not an unqualified person within the meaning of the 1974 Act: section 28(6) of the 1990 Act. A person who is not an authorised litigator may not exercise the right to conduct litigation within the meaning of the 1990 Act and may not act as a solicitor within the meaning of section 20(1) the 1974 Act and may not draw or prepare an instrument contrary to section 22(1) of the 1974 Act. If he purports to do any of these things, he will not be entitled to recover his costs for doing so. A person who does not have a current practising certificate and who is not an authorised litigator within the meaning of the 1990 Act acts as a solicitor in breach of section 20(1) of the 1974 Act at least if he (a) issues proceedings; (b) performs any ancillary functions in relation to proceedings or (c) draws or prepares an instrument relating to legal proceedings contrary to section 22(1) of the 1974 Act."

The relevance of the guidance in Agassi, in light of the changes introduced by the 2007 Act

114. The **Agassi** judgment was handed down on 2 December 2005. The 2007 Act was given Royal Assent on 30 October 2007. As I have said, the definition of "conduct of litigation" in Schedule 2(4) to the Act is wider than the definition of "right to conduct litigation" in the 1990 Act, because it has been extended to cover "the commencement, prosecution and defence of …. proceedings" in any court in England and Wales. I have suggested above that the Parliamentary motive behind the addition of this wording into the 2007 Act was to import language from the original version of section 20 of the 1974 Act. Whether this is right or wrong, it is clear, in my judgment, that the wording of the definition of the conduct of litigation in the 2007 Act is, at least potentially, broader than the wording in the 1990 Act. This is relevant, because the Court of Appeal observed at paragraph 55 of **Agassi** that "If Parliament had intended to introduce a broad definition of the right to conduct litigation, it could have defined it as the right "to issue and conduct proceedings before the court"". Although Parliament did not introduce exactly that wording, it introduced a form of words which expanded the meaning of the conduct of litigation from the definition that was under consideration in **Agassi**. It follows, in my view, that the views expressed by the Court of Appeal to the effect that the meaning of the conduct of litigation in the 1990 Act was restricted to formal steps required in the conduct of litigation cannot be read across so as to apply to the meaning of the phrase in the 2007 Act. In other words, **Agassi** is not authority for the proposition that the meaning of the words "the commencement, prosecution and defence of …. proceedings" in the paragraph 4 of Schedule 2 to the 2007 Act is limited to the formal steps required in the conduct of litigation. In the case of **Ndole**, a case on the meaning of the conduct of litigation in the 2007 Act, referred to below, the Court of Appeal said, at paragraph 57, that **Agassi** did not provide authoritative guidance on the ambit of the conduct of litigation.

115. The Court of Appeal in **Agassi** said, at paragraph 56, that "It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation." However, the Court went on to express the view that the giving of legal advice in connection with court proceedings, and correspondence with the other

party, does not come within the definition in s119 of the 1990 Act. But, for obvious reasons, the Court of Appeal in **Agassi** did not consider whether one or both of these steps amounts to "the commencement, prosecution and defence of …. proceedings". I will return later in this judgment to consider whether, in light of the current statutory wording, and the later authorities, these steps amount to the conduct of litigation.

Malik v Wales [2012] EWHC 4281 (QB) (HHJ Mackie QC)

116. The first case under the 2007 Act, so far as I am aware, was **Malik v Wales**. The judge granted a civil restraint order against the claimant, after he commenced hopeless judicial review and slander proceedings, and a private prosecution. The defendant applied for and was granted a wasted costs order against a company which conducted the litigation on behalf of the claimant, KM Legal Advisory Limited. The claimant was a director of the company, which was not authorised to conduct litigation.

117. The activities carried out by the company were described as follows:

> "30. The litigation in this case shows letters before action, the bringing of the proceedings and the issuing of applications in these proceedings. The letters before action are expressed in terms which indicate that KM Legal is representing the claimant in exactly the same way as a solicitor would. Although in asking questions of Mr. Malik to understand his submissions I put to him some things in other documents, I am only concerned with documents in this action.
>
> 31. The claimant on the claim form is Mr. Malik care of KM Legal Advisory Limited. The statement of truth is signed Mr. Badal Jamil. The name of the claimant's solicitors firm is KM Legal Advisory Limited. Next to the signature position or office held "solicitor", is Mr. Jamil who, according to the witness statement of Mr. Malik, was engaged in some capacity by KM Legal Advisory Limited as a solicitor in a period ending at some point in January. The statement of truth at the bottom of the particulars of claim is signed by Mr. Badal Jamil, solicitor for the claimant.
>
> 32. On 6th February an urgent letter is written by KM Legal Advisory Limited to the master, Master McCloud: "Dear Master, we are writing with reference to the claim", and the letter applies under Part 19 of the CPR for the company to be added as a party to the proceedings, because it is said there is a statement that is defamatory of KM Legal Advisory Limited. That is signed, as one would expect, by the company.
>
> 33. There are documents such as the appellant's notice which appear to be signed by KM Legal Advisory Limited on behalf of Mr. Malik, because that company never became a party in the proceedings. The position is the same with the second appellant's notice in the bundle. On the appellant's notice of 28th March there are questions and answers: "(Q) Are you legally

> represented? (A) Yes. (Q) Your solicitor's name? (A) KM Legal Advisory Limited". It is, it seems to me, abundantly clear that while there are one or two indications pointing the other way, such as the attempt by KM Legal Advisory Limited to get itself made into a party, the overwhelmingly clear impression that one has is of the company conducting litigation."

118. At paragraph 39, the judge said that this amounted to the conduct of litigation.

Heron Bros Ltd v Central Bedfordshire Council (No 2) [2015] EWHC 1009 (TCC) (Edwards-Stuart J)

119. The next case to consider the meaning and effect of the definition of the conduct of litigation in the 2007 Act was the **Heron Bros** case. As with **Agassi**, this was not an application to commit for contempt. Rather, the Defendant in **Heron Bros** applied for leave to contend, at a late stage in proceedings, that the issuance and service of the claim form in the proceedings was irregular and defective because it was done by consultants advising the Claimant, who were not authorised to conduct litigation. The judge decided that he would not permit the Defendant to argue the point (para 24) but went on to consider, obiter, whether the point was reasonably arguable. He did not have to consider whether the Defendant's argument was right.

120. At paragraph 26 of his judgment, Edwards-Stuart J said,

> "In light of these observations [in paragraph 56 of **Agassi**] I see no reason to construe the definition of the conduct of litigation as extending to any activities that take place prior to the issue of proceedings and which do not involve any contact with the court. For example, advising on the merits of starting proceedings or drafting Particulars of Claim."

121. At paragraph 27, the judge said that the act of sending three copies of the claim form and particulars of claim for sealing and issue was arguably an act involving the conduct of litigation, but the act of sending copies of the pleadings to the other party on the same day that they were sent to the court was not the conduct of litigation. At paragraph 29, the judge said that the act of the consultants in serving the claim form on the defendant, after it was issued by the court, was the conduct of litigation.

Ellis v Ministry of Justice [2018] EWCA Civ 2686

122. This was a very different case from the present. This was an appeal by a former solicitor who had breached an order dated March 2016 which restrained him from issuing claims on behalf of others or from assisting others to bring claims in contravention of the Legal Services Act 2007, and who had been made subject to a suspending committal order. Mr Ellis had a grudge against the courts. The judge, May J, had found that Mr Ellis had committed a number of breaches which amounted to the conduct of litigation. These involved (i) two instances of serving or attempting to serve documents including on the Government Legal Department; (ii) one instance of seeking to file documents at court both on behalf of another person and on behalf of himself; (iii) two occasions on which Mr Ellis gave assistance to other people at court hearings in one case "instructing (the litigant) what to say to the Tribunal" and in the other

"driving what happened at the hearing"; (iv) on two occasions providing his address as an address for service. May J was not satisfied, however, that "drafting alone" constituted a breach of the March 2016 order.

123. At paragraph 41, the Court of Appeal (Davis LJ and Moylan LJ) said,

> "41. … this is not the right occasion to embark on a consideration of the meaning and scope of the phrase "the conduct of litigation" in the 2007 Act. I would only note that, since **Agassi** v **Robinson** was decided, the words "the commencement, prosecution and defence of such proceedings" have been included in the definition in sub-paragraph (b). This will clearly impact on the scope of what is included within "ancillary functions", appearing in sub-paragraph (c), as well as the scope of what is caught more generally by sub-paragraph (b) itself.

124. The Court held that seeking to serve documents on the Government Legal Department, the other party in the proceedings, was both the prosecution of proceedings and the performance of an ancillary function. Indeed, Moylan LJ, giving the judgment of the court, said that the opposite was unarguable (paragraph 42). The Court also held that filing documents at court was the conduct of litigation.

Gill v Kassam [2018] PNLR 3 (HHJ Worster, sitting as a Deputy High Court judge)

125. This was an appeal to the High Court from the County Court (see paragraph 5 of the judgment). The issue was whether the judge below had been wrong to decline to strike out the claim in light of the fact that the claim had been issued and prosecuted in breach of section 12 of the 2007 Act. The judge only had a short report of the **Ellis** judgment and his ruling was handed down before the other Court of Appeal judgment which considers this issue in light of the terms of the 2007 Act (**Ndole**).

126. The case is the closest on its facts to the present case, though it is not identical. The claimant commenced possession proceedings and was advised by a business which operated a broadly similar business model to the Respondents in the present case. The business was called "Remove a Tenant". The first step taken by Remove a Tenant was to serve a section 8 notice on the tenant which gave Remove a Tenant's details "for and on behalf of the Claimants". The judge said that this was not conducting litigation.

127. Remove a Tenant then prepared the claim form and particulars of claim. Unlike in the present case they were filed online. The representative of Remove a Tenant typed in the details on the form. He typed in the claimant's name in the signature box. The claimant landlord attended at Remove at Tenant's premises, checked the documents and then the claimant ticked the box on the online form to verify the statement of truth. The court fee was paid by Remove a Tenant having been put in funds by the claimant. Remove a Tenant then prepared a witness statement for the claimant to sign; prepared a hearing bundle; signed certificates of service in relation to the section 8 notice and the hearing bundle, which were signed by the Remove a Tenant representative as the claimant's "friend". Remove a Tenant paid the advocate who represented the claimant at the hearing and then invoiced the claimant for the fee.

128. At paragraph 46, the judge said,

> "The emphasis of the statutory definition at (a) and (b) is on the activity involved in the issue (or commencement) of proceedings, their prosecution and defence, rather than in the provision of assistance to a litigant in preparation or presenting their case. I read the words of (c) to refer to functions ancillary to the activities in (a) and (b)."

129. At paragraphs 48 to 50, he said,

> "48. I accept the point that it is the nature of the "assistance" which Remove a Tenant undertake which is the focus of the statutory test, but that assistance has to be seen as a whole and in context. The context here is that Remove a Tenant are in business to provide these services for a fee, aware of the restrictions on the work it can undertake, and of the fine line between assistance and conducting litigation. They provide a package of services, which in the particular circumstances of this case, included functions which were ancillary to the issuing of these proceedings and their prosecution. It was more than assisting with clerical and mechanical matters; Remove a Tenant were closely involved in the issue and prosecution of this claim. Its role included providing advice, drafting the proceedings, paying the issue fee, preparing a witness statement and certificates of service, preparing a hearing bundle and serving it on the Defendant and the court, making arrangements (through properly qualified solicitors) for an advocate to represent the Claimants, paying for that service, and corresponding with the other party (albeit briefly).
>
> 49. Within that package is the drafting and issue of the claim form. I can accept that the online PCOL [Possession Claims Online] form involves some box ticking, but it also involves some drafting and the identification of how to put the claim. It is not particularly complicated, but the point is that the drafting was done by Mr Turner. More importantly perhaps for the purposes of the statutory definition of the conduct of litigation, Mr Turner has filled in the form in such a way (on my reading of the rules) he has entered the Claimants' name(s) on the form, thereby applying their signature to it. He has also entered Remove a Tenant's address in circumstances where that has then appeared on the Claim Form as "the Claimant or Claimant's solicitor's address to which documents or payments should be sent.
>
> 50. The evidence of [the Claimant] is that he ticked the statement of truth icon, and Mr Turner's evidence is that he entered his address only as a correspondence address. That mitigated the position, but I have concluded that the package of work, taken together, and this aspect in particular, crossed the line, and

> breached the provisions of the 2007 Act. If I am wrong about that, it came perilously close."

Peter Schmidt Theater Rock GmbH v Event Moves Ltd [2018 EWHC 260](Mr Registrar Jones)

130. In these winding up proceedings, an issue arose as to whether a Winding Up Petition should be dismissed because it had been presented by a company which was not authorised to conduct reserved legal activities, and, in particular, to conduct litigation. The evidence before the Registrar of the activities by the company were that it,

> "filed the Petition; was noted as the "legal representative" of the Named Petitioner on "C-e file"; pursuant to Rule 7.5 of the Insolvency Rules 2016 ("the Rules") described itself as the agent for the "petitioner in person" with Mr Murray's contact details being provided; signed (by Mr Murray) the certificate of compliance which must be filed, authenticated and dated by the petitioner or by the petitioner's solicitor (Rule 7.12); served and filed witness statements; accepted service of witness statements; took statements from prospective witnesses (by inference, at least); and conducted correspondence within the proceedings including the 4 May 2017 email requesting an undertaking in respect of section 127 of the Insolvency Act 1986."

131. The company asserted that, in light of **Agassi**, the following activities did not amount to the conduct of litigation:

> "delivering to a court office a claim form, appeal notice, application or the like, provided it has been signed by the party himself; typing or printing out an appeal notice, statement of case or other formal court document, which has been drafted by a barrister; service of a claim form or other documents; taking a statement from a prospective witness; Correspondence with the opposing party; preparing a bundle of documents for use in a court hearing; drafting instructions to a barrister; sitting behind a barrister during a hearing to provide administrative assistance". (paragraph 17 of the judgment)

132. This list came from a list of activities which counsel for the Bar Council had submitted would not amount to a breach of section 20 of the 1974 Act (see **Agassi**, paragraph 43). It was submitted by the Bar Council in **Agassi** that these amounted to no more than acts of "administrative support". It should be noted that this was in a part of the judgment which was dealing with the issue of whether the consultants acting for Mr Agassi were acting as solicitors, contrary to s20 of the 1974 Act, not whether they were conducting litigation as defined in section 119 of the 1990 Act, which is the predecessor to paragraph 4 of Schedule 2 to the 2007 Act.

133. Mr Registrar Jones pointed out that, at first instance in **Ndole**, Coulson J said that the Court of Appeal in **Agassi** had not expressly endorsed the list of activities as falling outside the category of reserved legal activities (the Court of Appeal judgment in **Ndole**, dealt with next, was not handed down when the **Peter Schmidt** case was

decided). Taking the same view, Mr Registrar Jones held that it was obvious that the steps that had been taken by the company in respect of the Winding-Up Petition involved the conduct of litigation (judgment, paragraph 20).

Ndole Assets Ltd v Designer M&E Services UK Ltd [2017] EWHC 1148; [2017] 1 WLR 4367 (Coulson J)

134. The issue in the **Ndole** case was a narrow one, namely whether the service of a claim form was a reserved legal activity for the purposes of the 2007 Act. This question arose in the context of an argument about whether, if so, the service by a person who was not authorised or exempt for the purposes of the 2007 Act was invalid and the claim should be struck out. It was not a committal case.

135. The case was concerned with a building dispute between a main contractor and a sub-contractor. The assignee of the contractor's cause of action brought a claim against the sub-contractor for sums allegedly due for repudiation of the sub-contract and/or damages for breach of contract. A company of claims consultants, not authorised to conduct litigation, wrote to the defendant enclosing draft particulars of claim, 7 bulky appendices and an expert report. The covering letter said, "We act for Ndole Assets Limited". The letter also sought the defendant's agreement to the proposition that it was not incumbent on the parties to follow any specific process prior to service of the claim form. The consultants then corresponded with the defendant and its solicitors. The particulars of claim were signed by a director of the claimant, and the address given was the claimant's address in London. The claim form and particulars were filed with the court by the claimant. On 31 January 2017, the consultants sent a letter to the defendant at its registered office, copied to the defendant's solicitors. The letter said, "Enclosed by way of service on you are the following documents in the above proceedings…." Enclosed with the letter were the sealed claim form, the particulars of claim and the 7 appendices to the claim form. Following further correspondence with the defendant's solicitors, the consultants served further documents on the solicitors, and wrote to them, making various proposals for progressing the proceedings, including the prompt filing of an acknowledgment of service. The consultants filed a certificate of service with the court.

136. Coulson J held that the service of the claim form and particulars of claim amounted to the conduct of litigation because it amounted to the prosecution of proceedings and/or that, as a formal step in the conduct of the proceedings, it was an ancillary function in relation to the proceedings (judgment paragraphs 30 and 31). However, he found that the consultants had not been conducting litigation because in serving the documents they had acted as agents for the litigants in person (paragraph 36). Coulson J said that there was a parallel with the use by solicitors of a process server to effect service of court documents.

Ndole Assets Ltd v Designer M&E Services UK Ltd [2018] EWCA Civ 2865

137. At the appeal, counsel for the claimant did not seek to uphold the judge's reasoning. The Court of Appeal agreed, on the basis that it cannot be correct that anyone could undertake a reserved legal activity simply by reason of being an agent of a litigant in person. If that were right, then prohibition of all six of the reserved legal activities set out in the 2007 Act could potentially be circumvented simply on the footing that the person in question (albeit otherwise having no authorisation or exemption under the

terms of the 2007 Act) was acting as the agent of the litigant in person (judgment, paragraphs 46(2) and 47).

138. Davis LJ, giving the judgment of the Court, observed that this left the conundrum of how one is to avoid the nonsense of process servers or Post Office staff being said to be potentially engaged in reserved legal activities (paragraph 52). The answer to this was not that service of a claim form does not amount to the conduct of litigation: it plainly does (see paragraph 53 and 57-58). **Agassi** is not authority for the contrary view (paragraph 37).

139. At paragraph 56, the Court agreed with the view expressed by Coulson J to the effect that the list in paragraph 43 of **Agassi** was not endorsed by the Court in that case. The point had been left open, and **Agassi** did not provide authoritative guidance on the ambit of the conduct of litigation (paragraph 57).

140. Davis LJ agreed with the Court in **Agassi**, at paragraph 56, that "ancillary" functions would be formal steps required in the conduct of litigation. Service of the claim form would be one such formal step (paragraph 59).

141. At paragraph 62, Davis LJ described what is meant by "service":

> " As Christopher Clarke J said in **Asia Pacific (HK) Ltd. v Hanjin Shipping Co. Ltd.** [2005] 2 CLC 747 at paragraph 20 of his judgment:
>
> "The common thread is that the party serving the document delivers it into the possession or control of the recipient or takes steps to cause it to be so delivered."
>
> In fact, as it seems to me, a perfectly adequate general definition of "service" is given in the Glossary at Section E of the White Book as follows:
>
> "Steps required by rules of court to bring documents used in court proceedings to a person's attention."

142. Davis LJ then went on to consider how to address the problem that process servers or Post Office employees might inadvertently be conducting litigation by serving documents. He said, at paragraphs 67-68:

> "67. In my view this is where substance has to prevail over form. I acknowledge that it is not always appropriate to talk in terms of degrees of agency. But it all depends. In my view the pragmatic solution here, which is the one proffered by Mr Darling, is the correct solution. That distinguishes between those who merely perform an administrative or mechanical function in connection with service of documents and those who undertake, or who have assumed, legal responsibility with regard to service as prescribed by the rules. This in fact, I consider, accords with the acceptance by the court in Agassi in paragraph 43 of the judgment that the statutory prohibition does not extend to "what

> might be termed purely clerical or mechanical activities." Thus the solution is to be found not so much in focusing on the issue of agency or sub-agency but in focusing on the actual role of, and the actual activity undertaken by, the person in question. That is why process-servers and the like are not within the statutory prohibition: they are simply engaged in the "mechanical" activity of actually delivering the claim form. Delivery, for these purposes, is not to be equated with service of a claim form as prescribed by the rules.
>
> 68. The question thus becomes one of fact and degree in each case. Ms Sinclair submitted that would lead to uncertainty. But as to that I strongly suspect that issues of the present kind with regard to service of a claim form are likely to be rare; and in the more general context of the right to conduct litigation, an approach permitting individual assessment of the activity undertaken in an individual case is, by reason of its very adaptability to the circumstances of the particular case, much more likely to achieve justice than a rigid application of an agency-based approach."

143. Applying this approach to the **Ndole** case, the Court of Appeal held that the consultants had conducted litigation when they served the claim form and particulars of claim on the defendant, even though they had acted in good faith and did not think that they were doing so. Davis LJ said, at paragraph 71:

> "71. In my judgment, the course of events, as illustrated by the correspondence, shows that CSD were acting in a way that went significantly beyond performing simply an administrative function or a mechanical activity and shows that they were taking the responsibility for service of the claim form under the rules."

144. The Court found the correspondence to be most revealing: "All the letters that [the consultants] wrote were just the kinds of letters that a firm of solicitors might write in preparation for formal service." Their conduct in serving the claim form, culminating in the certificate of service clearly amounted to the conduct of litigation (paragraph 72). Davis LJ also said,

> "The remedy would have been for the claimant itself to have sent the letter of service with an enclosed claim form and for the claimant itself to have instructed couriers to effect delivery. That, in effect, corresponds to the position taken by the claimant in actually issuing the proceedings in the first place: it and CSD correctly understanding the legislation at least in that regard."

145. Finally, the Court held that even though the consultants had been unlawfully conducting litigation when serving the claim form and particulars of claim, this did not amount to invalid service.

JK v MK [2020] EWFC 2; [2020] 1 WLR 5091 (Mostyn J)

146. This was a case involving a simple and uncontentious "clean break" divorce. The parties to the divorce had jointly engaged a firm of consultants specialising in divorce settlements, called E-Negotiations Ltd, trading as "amicable". They were described as an "online divorce facilitator". The parties had already agreed the terms of the clean-break financial remedy order between themselves before amicable became involved. amicable did not assist them in their negotiations. amicable assisted the parties by drafting the relevant court forms. They drafted the divorce petition, the application for decree nisi, and the statement in support. After decree nisi had been pronounced, amicable drafted the financial remedy order for approval by the court. The documents were all filed with the court by the husband. However, the documents were sent to the court under cover of a letter on amicable's own headed notepaper, though signed by the husband. The letter said that the court fee should be paid from amicable's account with the Ministry of Justice.

147. amicable made clear that it was not a firm of solicitors and at no stage did it go on record as acting for either party.

148. When the court became aware of the consultants' involvement, they and the Queen's Proctor were joined as interveners in order to make submissions on whether the consultants were in a conflict of interest by acting for both parties, and whether they were conducting litigation or reserved instrument activities in breach of s14 of the 2007 Act.

149. Mostyn J said, at paragraphs 15 of his judgment:

> "There can be no doubt that the initiative of amicable has greatly improved access to justice for many people effectively disenfranchised from the legal process by the near total withdrawal of legal aid from private family law proceedings on 1 April 2013….
>
> 16. However, the clear social benefit of a service such as this must nonetheless be subordinate to the law. If the things that amicable are doing are unlawful then they will have to change their business model."

150. Mostyn J held that there was no conflict of interest (paragraph 17). At paragraph 27, Mostyn J held that it is clear from paragraph 56 of **Agassi** that the giving of legal advice per se by someone who is not a qualified lawyer is not prohibited as amounting to conducting litigation for the purposes of paragraph 4 of Schedule 2 to the 2007 Act. He described the language of section 119 of the 1990 Act, which was under consideration in Agassi, as being "nearly identical words" to paragraph 4 of Schedule 2 to the later Act. Mostyn J continued,

> "What if the advice extended to drafting a claim form such as a petition, or an application for decree nisi or the statement in support? It would be surprising if this were forbidden. Imagine if you were getting divorced and you have to fill in Form E. Imagine that your brother was divorced two years earlier. Plainly your brother is not committing an offence if he gives you the benefit of his view of the law. And surely, he would not be in

> breach of paragraph 4 and thus committing an offence if he helped you to fill in your Form E which you, acting in person, intended to file with the court. It is common for litigants faced with filling in Form E to approach their accountant for assistance. Plainly, the accountant would not be in breach of paragraph 4 if she filled in the numeric parts of a travelling draft of the form."

151. Mostyn J said that this was consistent with the view reached by Edwards-Stuart J in the **Heron Bros** case.

152. At paragraph 30 of the judgment, Mostyn J said,

> "30. In my judgment nothing that is done by amicable transgresses paragraph 4. However, I consider that the covering letter sending the documents to the court needs to be changed so that it is not on amicable's notepaper. I cannot see that taking the fee on amicable's account is objectionable."

Solicitors' Regulation Authority v Khan [2021] EWCH 3765 (Ch) (Fancourt J)

153. This case involved proceedings which were brought by the Solicitors' Regulation Authority ("the SRA") to obtain injunctions to restrain Ms Khan, a suspended solicitor, from continuing to carry out the conduct of litigation in her capacity as director of a not-for-profit company, JFP Limited. The nature of the injunctions sought was to restrain Ms Khan from committing criminal offences by carrying out reserved legal authorities despite not being authorised to do so.

154. The central question for the court was whether, as Ms Khan argued, the 2007 Act permitted reserved legal activities to be carried out by employees of not-for-profit companies, even if they had no knowledge of, or training in, the law. Unsurprisingly, perhaps, Fancourt J answered "no" to this question (see judgment, paragraph 32). The court did not have to consider what amounted to reserved legal activities or the conduct of litigation because it was clear that Ms Khan had simply transferred her solicitors' practice wholesale to JFP Limited and had carried on as normal (paragraph 38 and ff).

155. At paragraphs 20 and 21 of his judgment, Fancourt J said,

> "20. The Legal Services Act 2007 brought into force a new regulatory regime requiring firms and other bodies of lawyers and licensed bodies of lawyers and others to be regulated by the Law Society, or other frontline regulators, as well as the individual solicitors or others who practise as partners, members or employees of the firm or body in question. There are, therefore, two layers of regulation, which I can loosely describe as "the firm" and "the individuals".
>
> 21. In summary, regulation under the 2007 Act works by allowing regulators to authorise persons, corporate or individual, to carry out reserved legal activities. The Act exempts others from the need for regulation."

156. One of the arguments advanced by counsel for Ms Khan in opposition to injunctive relief was that the vagueness of the definition of the conduct of litigation meant that there would be unacceptable uncertainty about what Ms Khan was or was not permitted to do. Fancourt J rejected this argument. He said,

> "70. It is true that the courts have struggled over the decades to pinpoint what is and what is not the conduct of litigation (see, for example, **Agassi v Robinson (Inspector of Taxes) (No 2)** [2006] 1 WLR 2126 and **Ndole Assets Ltd v Designer M&E Services UK Ltd** [2019] BLR 147). However, there is a new statutory definition of "the conduct of litigation" in para.4 of Sch.2 to the Legal Services Act which specifies that it means:
>
> "(a) The issuing of proceedings before any court in England and Wales,
>
> (b) the commencement, prosecution and defence of such proceedings, and
>
> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)."
>
> 71. In my judgment, the Legal Services Act itself places responsibility for not unlawfully doing any such matter on the regulated person. Such a person must not carry on a reserved legal activity, which includes the conduct of litigation, without a practising certificate that authorises that person to carry on the particular reserved legal activity. A solicitor is, therefore, responsible in any event not to transgress in that respect and transgression is a criminal offence (see s.14 of the Act)."
>
> 72. In that light, I do not consider that it can be said that an injunction to restrain the carrying on of reserved legal activities as defined in the Act unless Ms Khan has a practising certificate authorising the carrying on of such an activity is unfairly ambiguous. This is not a case of an injunction order being made against a layperson. Ms Khan is a trained lawyer and she has the necessary expertise to understand the drafting of the Legal Services Act and, if she is in doubt, has access to the services of the Law Society to give her advice about it."

(4) **The submissions from the Law Society, CILEX Regulation, and the Legal Ombudsman**

The Law Society

157. The Law Society of England and Wales (the Law Society) is the independent professional body for solicitors, incorporated by Royal Charter in 1845. It made its submissions in its representative capacity, having delegated its regulatory functions to Solicitors Regulation Authority Limited. The submissions were dated 7 July 2022.

158. When making the order dated 28 April 2022, giving the Law Society the opportunity to make submissions, Cotter J specifically invited the Law Society to make submissions as to whether or not the practice of those with a business model similar to the Respondents of giving instructions to advocates pursuant to a referral agreement with a firm of solicitors amounted to the conduct of litigation. This was the only specific matter upon which the Law Society made submissions. However, the observations of the Law Society have wider significance.

159. The Law Society commented on the differences between the definition of conducting litigation in section 119 of the 1990 Act, and the definition of the conduct of litigation in paragraph 4 of Schedule 2 to the 2007 Act. The Law Society said:

> "In the Society's submission this [the definition in the 1990 Act] placed more emphasis on the identification of particular actions, such as issuing a writ, than the current definition in the [2007] Act which includes within its definition the more general words "commencement, prosecution and defence of [such] proceedings."

160. The Law Society submitted that the broader wording in the 2007 Act was related to the wording of section 20(1) of the Solicitors Act 1974 as it appeared prior to the coming into force of the 2007 Act.

161. The Law Society submitted that caution should be exercised in considering the pre-2007 authorities, and in particular **Agassi**, because of the change in the statutory provisions.

162. The Law Society submitted that there is a public interest in the reservation of activities such as the conduct of litigation. The Law Society said that members of the public involved in ligation may not appreciate the difference between being represented by an authorised person and an unauthorised representative. But the differences are profound. The court exercises a supervisory jurisdiction over solicitors as officers of the Court (see section 50 of the Solicitors' Act 1974). So, for example, the High Court has the power summarily to strike off solicitors without reference to the Solicitors' Disciplinary Tribunal. A solicitor's client benefits from compulsory professional indemnity insurance, a discretionary compensation fund, the right to complain to the Legal Ombudsman and a long-established training and disciplinary regime. I may add that the same applies, mutatis mutandis, to clients who are represented by members of the Bar.

163. As I understand the Law Society's submissions, the Law Society accepted that the giving of advice and taking purely mechanical steps do not themselves amount to the conduct of litigation. However, the Law Society submitted that the closer a third party comes to taking steps which are more than purely mechanical, the greater the risk that they are conducting litigation. In the Law Society's view, sending drafted documents to third parties including the court or third party communications are unlikely to be either mechanical steps or advice.

164. The Law Society said that the adoption of the role of agent for a litigant in person does not of itself, provide an exemption from the restrictions. A litigant in person's right to

conduct their own litigation is a personal right which cannot be delegated except to an authorised person.

165. The Law Society accepted that there must be many actions connected with litigation which assist litigants in person and do not amount to conducting proceedings. These include "mechanical" process serving or the giving of advice about the steps that the litigant in person should take or the points that they should consider. The Law Society said that there may be a helpful parallel with the approach of the courts to McKenzie Friends. It is also useful to undertake a comparison with the steps that are commonly taken by an authorised person who is conducting litigation.

166. The Law Society submitted that whether something amounts to the conduct of litigation is a question of fact and degree. It is necessary to look at the substance of the activity and not the form. Depending on the circumstances, the service of proceedings might be a purely mechanical act, or it might amount to the conduct of litigation. In assessing whether a person is conducting litigation, it is necessary to look at each of the individual actions but it may be necessary also to look at the whole series of actions that are undertaken by the person. The court must look at the totality of the actions associated with the litigation and, with the caution required in the context of a penal provision, consider the risks which justify and underpin the restriction.

167. The Law Society said that a solicitor who knowingly facilitated an unauthorised person to undertake reserved activity would be in breach of the solicitors' rules of professional conduct and might be at risk of being struck off.

168. As for the particular issue that was raised, the Law Society said that whilst neither the delivery nor the receipt of instructions to an advocate is a formal step in proceedings, it may nevertheless be part of an activity which, on the facts, amounts to the conduct of litigation. The Law Society said that a person may provide advice on the contents of instructions to be delivered to an advocate without thereby necessarily conducting litigation. The advice may include assistance to a litigant in person in drafting the formal instructions. However, if a person provides ongoing information and direction to an advocate, using their own judgment and responsibility, they may thereby be conducting litigation. Such a function is neither mechanical nor advice. Assuming responsibility for the content of any form of instructions is likely to amount to the conduct of litigation.

CILEX Regulation

169. In a response dated 27 May 2022, CILEX Regulation declined the invitation of the court to intervene in the proceedings and said that the question whether the assistance given by the Respondents in the County Court proceedings amount in whole or in part to the conduct of litigation was a matter for the court. However, CILEX Regulation said that it would welcome the court's determination as to whether sending documents by post amounts to the filing or serving of documents in the course of litigation and, if so, whether this amounts to the conduct of litigation.

170. CILEX Regulation said that it expects those it regulates to satisfy themselves as to the legal position and to ensure that they hold the necessary qualifications, skills and entitlement to provide the services they are instructed to carry out. This extends in

practice to ensuring that they do not carry out any exempt legal activity unless they are duly authorised or an exempt person in relation to the particular activity.

171. CILEX Regulation confirmed that it agreed with Mrs Doble's description of the disciplinary action that was taken against her in 2017. CILEX Regulation said:

> "The disciplinary action arose because Mrs Doble described herself as a litigator and advised [CILEX Regulation] during the course of the investigation that she filed claim forms in court for issue (she posted a letter directly to the court on her business letterhead enclosing the court form requesting the issue of proceedings. [CILEX Regulation] determined that this amounted to conduct of litigation.
>
> Whilst it was satisfied with Mrs Doble's proposals to amend her correspondence and literature to make clear that she was not conducting litigation, [CILEX Regulation had at no time regulated Mrs Doble's firm (or the services it provides)."

The Legal Ombudsman

172. The question asked of the Legal Ombudsman by Cotter J was whether the Second Respondent (or similar provider) would be considered a legal services provider in respect of which a complaint to the Ombudsman would lie. The answer given by the Legal Ombudsman, in a response dated 29 June 2022, was "no". The Legal Ombudsman only has jurisdiction to investigate complaints about authorised persons, namely those who are authorised to carry out reserved legal activities (2007 Act, sections 125 and 128(1)). The Second Respondent is not authorised to carry out such activities.

(5) Did the Respondents conduct litigation on behalf of Mr Persey from 12 March 2019 to 31 October 2019?

173. In order to answer this question, it is necessary to identify where the line should be drawn between reserved legal activities consisting of the conduct of litigation, on the one hand, and legal activities which may be performed by those who are neither authorised to perform reserved legal activities, nor exempt, on the other.

174. Unfortunately, the statutory language is not as helpful as it might be in providing the answer in borderline cases.

175. The definitions of reserved legal activities and of the conduct of litigation must be considered by reference to the statutory regulatory objectives as set out in section 1 of the 2007 Act (see **Ndole** in the Court of Appeal, at paragraph 28). It is clear from section 1 that the statutory purposes are both to widen access to legal services and to ensure that, where appropriate, legal services are only provided by those who are qualified or authorised to do so. As the Law Society pointed out, there are clear public policy reasons why the latter restriction should apply: those who are authorised will have had appropriate education and training; they will be subject to the supervisory jurisdiction of the court and their regulatory body; and they will be suitably insured. However, this does not provide much assistance when applying the law to specific

factual situations: it does not help with working out exactly where the line should be drawn. Indeed, there is a tension between the statutory objectives: the first set of objectives tends towards a broadening out of the class of persons who should be allowed to provide legal services, whereas the second set of objectives tends towards a limitation in the scope of that class.

176. Sections 12 and 13 of the 2007 Act make clear that there is a category of legal activity which does not amount to reserved legal activity. Section 13(3) defines legal activity to encompass activity, not being reserved legal activity, which consists of the provision of legal advice and assistance in connection with any form of legal disputes and the provision of representation in connection with any matter concerning any form of the resolution of legal disputes. It follows that it cannot be the case that all types of provision of legal advice, assistance, or representation in relation to any form of legal dispute will amount to the reserved legal activity consisting of the conduct of litigation.

177. We are thrown back, therefore, upon the definition of the conduct of litigation in paragraph (4) of Schedule 2 to the Act. This does not provide much detail. It is clear, as I have said, that the definition is wider than the definition of the conduct of litigation that applied for the purposes of the 1990 Act. Parliament added the words, "the commencement, prosecution and defence of [proceedings before any court in England and Wales]", in paragraph 4(1)(b). That must cover something beyond the issuing of proceedings, and functions ancillary to the issuing of proceedings, as that is already catered for in paragraphs 4(1)(a) and 4(1)(c), the parts of the definition which were inherited from the 1990 Act. If it did not mean something more, it would be otiose. The additional wording must also, as the Court of Appeal observed in **Ellis**, at paragraph 41, have an impact on the third element of the definition, in paragraph 4(1)(c), "the performance of any ancillary functions in relation to such proceedings (such as entering appearances to action)." Prior to the enactment of the 2007 Act, the words "any ancillary functions" could only mean functions ancillary to the issue of proceedings, because that was the only other activity referred to in the statutory definition in the 1990 Act (as the Court of Appeal observed in **Agassi**). Now, that is no longer the case. Under the 2007 Act, the conduct of litigation includes functions which are ancillary to the commencement, prosecution, and defence of proceedings before any Court in England and Wales.

178. The central question for the present case is what is meant by "the commencement, prosecution, and defence of proceedings." The difficulty with interpreting these words is made all the more acute by two other matters. First, this wording was adopted from the original version of section 20 of the Solicitors' Act 1974, but there was no elaboration or indication in that Act as to what the words were intended to mean, beyond that they were in a section whose main purpose was to prohibit an unqualified person from acting as a solicitor. Second, this wording, now in paragraph 4(1)(b) of Schedule 2 to the 2007 Act, overlaps somewhat with paragraph 4(1)(a). The issuing of a claim form, which amounts to the conduct of litigation pursuant to paragraph 4(1)(a), also amounts to the commencement of proceedings for the purposes of paragraph 4(1)(b). Is this explained by the fact that there are other ways of starting proceedings which do not amount to issuing proceedings, or was Parliament's intention that "the commencement of proceedings" extends to cover steps which go beyond the formal institution of proceedings?

179. It is also very difficult to identify a clear dividing line between what does and does not amount to the conduct of litigation from a review of the authorities. There are a number of reasons for this. There are three Court of Appeal authorities which are binding upon me, but the first, **Agassi**, was dealing with different legislative language (with respect to him, I do not agree with Mostyn J's observation **in JK v MK** that the definition of the conduct of litigation in the 1990 Act was "nearly identical" to the definition in the 2007 Act); the second, **Ellis**, was dealing with the clearest possible case of the conduct of litigation; and the third, **Ndole**, was concerned with a single issue, which was whether the service of proceedings amounts to the conduct of litigation. None is factually similar to the present case. The observations of the judge in the **Heron** case were obiter and the judge in that case was only required to consider whether there was an arguable case that there had been the conduct of litigation. The facts of **Peter Schmidt**, about a winding up petition, and **JK v MK**, about a consensual divorce, were very different from those in the present case. The **Khan** case was also concerned with a very clear case of the conduct of litigation. The only case which bears a similarity to the present case is **Gill v Kassam**, but there are also significant differences: in particular, in that case the advisers used the online claims process, which Mrs Doble carefully avoids using.

180. Nevertheless, there are clues that may be obtained from the statutory language, and from the case-law, which have assisted me in deciding whether the Respondents in this case fell on the right side or the wrong side of the line. In my judgment, there are four key points of general principle which can be identified in the authorities. The first two were identified by the Court of Appeal in **Agassi,** and the latter two by the same Court in **Ndole**.

181. The first is that the starting-point must be the statutory language itself, and the statutory words must be given their natural and ordinary meaning.

182. The second is that it must be borne in mind that this is penal legislation, which may result in a conviction for an offence with a maximum sentence of two years (or for committal for contempt with the same maximum penalty: Contempt of Court Act 1981, section 14(1)). In **Agassi**, at paragraph 56, the Court of Appeal said that, because there are potential penal implications, the very obscurity of the statutory language means that the words should be construed narrowly. However, that was said at a time when the defence that the person accused did not know, and could not reasonably have known, that they were engaged in reserved legal activities did not apply. That defence was introduced by section 14(2) of the 2007 Act. This matters, in my view, because the grounds for a very strict and narrow construction are now less compelling. It is no longer a strict liability offence. Nonetheless, as the Court of Appeal made clear in **Ndole**, it must still be borne in mind, when interpreting the legislation, that this is penal in nature.

183. The third key point comes from the Court of Appeal's judgment in **Ndole**. This is that substance must prevail over form (judgment, paragraph 67).

184. The final point is that the question is one of fact and degree in every case (paragraph 68). The Court of Appeal said that an approach permitting individual assessment of the activity undertaken in an individual case is likely to achieve justice.

185. Neither **Agassi** nor **Ndole** was a contempt case. However, in my view the same approach must be applied in contempt cases. It cannot be right that the conduct of litigation has a different meaning in contempt or criminal cases from its meaning in other cases. Also, the fact that the test is one of fact and degree does not mean that it not a suitable test to apply in a criminal or contempt cases. In many such cases, the question whether there has been a breach will be a question of fact and degree.

186. In my judgment, it is convenient to deal first with the issue of service, i.e. whether the Respondents dealt with the pleadings in the case in a way which amounted to the conduct of litigation, as this has been considered in detail by the Court of Appeal in **Ndole**. I will then look at the entirety of the work undertaken by the Respondents to decide whether, taken singularly or together, this, too, amounted to the conduct of litigation.

The pleadings

187. So far as the claim form and particulars of claim are concerned, the Respondents took the following steps:

- Drafted them (though they were checked, amended, and approved by the client);
- Prepared the enclosures (though these were checked and approved by the client);
- Checked the bundle of documents to be sent to the court, to ensure that the right number of copies were sent;
- posted the claim form, particulars of claim, enclosures, and covering letter to the court;
- Paid the court fee of £355 by cheque from the Second Respondent's account, having been put in funds in advance by Mr Persey; and
- Ensured that the documents were drafted and filed in a way that complied with the CPR.

188. The things that the Respondents did not do were as follows:

- Go on the record as representatives for Mr Persey;
- Sign the claim form or particulars of claim on behalf of Mr Persey or sign the statement of truth on his behalf;
- Use the Second Respondent's letterhead for the covering letter; or
- Make use of the online claims process.

189. So far as the reply and defence and counterclaim was concerned, the Respondents:

- Drafted it (though it was checked and approved by the client);
- Sent it for review by the advocate;

- Made arrangements for the pleading to be delivered to the Claimant's solicitor by hand, using process servers;
- Took the decision that service should be by hand rather than by post; and
- Ensured that the deadline imposed by the court by an order dated 27 August 2019 was met.

190. Again, so far as the reply and defence to counterclaim was concerned, they did not:

- Sign the pleading or the statement of truth; or
- File the pleading with the court (this was done by Mr Persey's personal assistant).

191. In my judgment, the actions of the Respondents, both in relation to the claim form and particulars of claim and in relation to the reply and defence to counterclaim, amounted to the conduct of litigation, and so to reserved legal activities for the purposes of the 2007 Act.

192. The key authority in this regard is **Ndole**. This was a case about the service of a claim form and pleading, rather than the delivery of such a document to the court for issue. It was, therefore, similar to the steps taken by the Respondents in relation to the reply and defence and counterclaim. The similarity between the actions of the consultants in **Ndole**, and the actions of the Respondents in relation to the reply and defence to counterclaim are clear. In both cases, a pleading was delivered to the other party to the proceedings (or their solicitor) in circumstances in which this was a requirement of the court process. In **Ndole**, as in the present case, the pleading was signed by the client, and did not name the consultant/advisor, but this does not prevent it from amounting to the conduct of litigation. The Court of Appeal in **Ndole**, applying the **Hanjin Shipping** case, defined "service" for these purposes as taking place when "the party serving the document delivers it into the possession or control of the recipient, or take steps to cause it to be so delivered" and as consisting of "steps required by rules of court to bring documents used in court proceedings to a person's attention."

193. It is a requirement of the Civil Procedure Rules that a reply and defence to counterclaim is served on the other party: CPR 15.8(a)(ii). The Respondents took steps to deliver the reply and defence to counterclaim into the possession of the Claimant's solicitor, Ms Irvine-Yates, by instructing process servers to serve it upon her in Rochdale. Therefore, they "served" the pleading on her. In light of **Ndole**, this amounted to the "prosecution" of the proceedings for the purposes of paragraph 4(1)(b) of Schedule 2 to the 2007 Act and/or is at the very least a step ancillary to the prosecution of the proceedings for the purposes of paragraph 4(1)(c). It also amounted, in my view, to the "defence" of proceedings (the counterclaim) for the purposes of paragraph 4(1)(b).

194. The Court of Appeal in **Ndole** drew a distinction between the assumption of legal responsibility with regard to the service of documents, as required by the rules, which amounts to the conduct of litigation, and the performance of an administrative or mechanical function in connection with the service of documents, which does not. In my view, the actions taken by the Respondents plainly were of the former type. The process servers performed an administrative or mechanical function. If the reply and

defence to counterclaim had been served by post, the postal workers would have done the same. But the Respondents were not performing an administrative or mechanical function. They were advising and assisting Mr Persey in the litigation. They were ensuring that the rules of court were complied with (which was why process servers were used – to ensure that the document was served in time). They had drafted the pleadings. To use the words of the Court of Appeal in **Ndole** at paragraph 67, they were not "simply engaged in the "mechanical" activity of actually delivering the [pleading]".

195. The only difference between **Ndole** and the present case is that in **Ndole** the service of the documents were accompanied by a covering letter which was on the consultants' letterhead. I do not consider that this feature can make the difference between whether the action amounted to the conduct of litigation or not. The Court of Appeal in **Ndole** did not say that it did. If it were to be so, this would be to promote form over substance, the very thing that the Court of Appeal said in **Ndole** should not be done.

196. The conclusion that the delivery of the reply and defence to counterclaim to Ms Irvine-Yates in these circumstances amounted to the conduct of litigation is consistent also with the other authorities. In **Ellis,** the Court of Appeal said that the service of documents on the other party was both the prosecution of proceedings and an ancillary function. The Court did not say anything about whether Mr Ellis used his own letterhead when serving the documents. There was no suggestion that this was an important consideration. In the **Peter Schmidt** case, the delivery of the claim form was held to amount to the conduct of litigation, even though it had been signed by the litigant, not the advisor. The issue did not arise in **JK v MK**, because the documents were served by the husband, not by the consultants.

197. Even if the statutory language had not been amended between the 1990 and 2007 Acts, and even if the test in **Agassi** was still applicable, the test would be satisfied and the making of arrangements for the delivery of the reply and defence to counterclaim, in these circumstances, would satisfy the **Agassi** test for the conduct of litigation. The Court of Appeal in **Agassi** said that a formal step in the proceedings would be an ancillary activity for the purposes of the then-applicable definition of the conduct of litigation, unless it was a purely clerical or mechanical activity. It is true that the Court gave the delivery of documents as an example of a purely clerical or mechanical activity, but it was clear from the context that this was a reference to the delivery of documents by postal workers or process servers.

198. I have, so far, considered whether the service of the reply and defence to counterclaim was the conduct of litigation. Moving on to the claim form and particulars of claim, in my judgment the reasoning of the Court of Appeal in **Ndole** applies all the more clearly to the delivery of documents to the court as it does to the delivery of documents to the other party. If sending a pleading to the other side by way of service is the conduct of litigation, then sending a claim form or pleading to the court for issue in order to commence the proceedings must also amount to the conduct of litigation. Once again, the fact that the documents were not signed by the Respondents does not matter, nor that they did not go on the record as Mr Persey's representatives. Nor did the fact that they did not submit a covering letter on the Second Respondent's letterhead. The surrounding circumstances of the filing of the claim form and the particulars of claim make clear that this was not merely clerical or mechanical activity: the Respondents advised upon the claim form and particulars of claim, drafted them, ensured that they

complied with the CPR, and paid the court fee. Once again, even if the test in **Agassi** still applied, this would be the conduct of litigation: it was a formal step in the proceedings.

199. As the Court of Appeal made clear in **Ndole**, the fact that the Respondents were acting as agents of Mr Persey when filing and serving documents did not mean that they were not themselves conducting litigation.

200. The Court of Appeal in **Ndole** considered the entirety of the actions undertaken by the consultants in that case when deciding that the service of documents was the conduct of litigation. Applying the same approach to the current case, I am satisfied, to the criminal standard, that the filing of the claim form and particulars of claim, and the arrangements made for service of the reply and defence by the Respondents, amounted to the conduct of litigation.

The other activities undertaken by the Respondents

201. As I have said, I am satisfied so that I am sure, on the evidence, that, in addition to filing the claim form and particulars of claim and serving the reply and defence to counterclaim, the Respondents carried out the following activities on behalf of Mr Persey: they gave legal advice; they drafted notices under section 8 and section 21 of the Housing Act 1988; they corresponded with the Claimant's solicitor; they drafted the claim form and particulars of claim; they paid the issue fees; an employee of the Second Respondent signed a certificate of service of the notice of issue; they gave instructions to an advocate for several hearings in the matter; they drafted witness statements; they drafted an application notice and draft order for the strike-out application; they drafted the reply and defence to counterclaim; and they drafted the case management summary for the CMC.

Things that do not amount to the conduct of litigation

202. In my judgment, it is clear that several of these activities, taken in isolation, do not amount to the conduct of litigation for the purposes of the 2007 Act.

203. The giving of legal advice in itself does not amount to the conduct of litigation. This applies even if the legal advice is about the procedures that need to be followed in the proceedings. This was said in **Agassi,** at paragraph 56, and, in my view, it still holds good.

204. The drafting of the notices under sections 8 and 21 of the Housing Act 1988 do not amount to the conduct of litigation. These are not steps in court proceedings themselves, even though they are necessary precursors to such proceedings. In many, perhaps most, cases, the service of a section 8 and 21 notice will not lead to litigation. The matter will be resolved without the need to issue proceedings.

205. It is also unlikely, in my view, that the service of the notice of issue was, on its own, the conduct of litigation. Though it was a formal document, and one that contained a statement of truth, it was not a document that was required to be served as part of the proceedings, and it was not served on the court or on the other party to the proceedings: it was served on any other occupants of the property.

206. Furthermore, in light of the statutory language and the ruling in **Ndole**, no step that is taken prior to the issue or commencement of proceedings can amount to the conduct of litigation. Paragraph 4(1)(a) of Schedule 2 to the 2007 refers to the issuing of proceedings itself. Paragraph 4(1)(b) refers to the commencement, prosecution and defence of "such proceedings" which can only be a reference to proceedings which have already been issued. Paragraph 4(1)(c) refers to functions that are ancillary to those in 4(1)(a) and 4(1)(b). Thus, the statutory language only applies to events from the issue of proceedings onwards. As this is penal legislation, it is not appropriate to read it any more widely than that. The Court of Appeal in **Ndole** said, at paragraph 59:

> "A legal action cannot be progressed, cannot be prosecuted, unless and until the claim form is properly served, as the judge had noted."

See, also, **Heron** at paragraph 26. (I note, however, as Mr Metcalfe pointed out, that section 14(4) anticipates that the offence of unauthorised conduct of litigation or exercise of rights of audience might arise in relation to "contemplated proceedings". This is explained, in my view, on the basis that the statutory language is belt-and-braces. It is possible, for example, for a person to purport to exercise rights of audience in relation to contemplated proceedings, for example in an urgent injunction application made before a claim is issued.)

207. In my judgment, however, this does not mean that the fact that a respondent has given legal advice or has taken steps before proceedings are issued, such as drafting the claim form and particulars of claim, is irrelevant to the question whether they are engaged in the conduct of litigation. It may contribute to the bigger picture and may, in particular, shed light on whether steps that were taken at a later stage in the proceedings were purely mechanical or clerical.

Should the court look in isolation at each particular action, or should the court consider the matter in the round?

208. In my judgment, the answer is that the court should look at the entirety of the activities undertaken by the Respondents to assist their client and then decide whether, taken in the round, they amount to the conduct of litigation. To do otherwise would be to lose sight of the context in which things are being done, and would lead to the risk of a misleading impression being gained. It would also run the risk of form being prioritised over substance.

209. The authorities show that it is the totality of the activities that have been undertaken that should be focused upon. In **Ndole**, in the context of consideration of whether service of documents amounted to the conduct of litigation, the Court of Appeal expressly took account of the whole course of events, including correspondence that had passed from the consultants to the defendant in the proceedings (judgment, paragraph 71). Similarly, in **Gill v Kassam**, the judge looked at the "package of services" that were provided by the advisors to the client (paragraphs 47 and 48). A similar approach was adopted in **Peter Schmidt**.

210. It is true that this marks a difference from the position under the 1990 Act. Under that Act, as the Court of Appeal said in **Agassi**, an activity would only fall within the definition of the conduct of litigation if it was a formal step in the proceedings.

However, in my view this no longer applies, because the additional wording introduced in the 2007, which includes the prosecution and defence of proceedings, is not apt to cover formal steps in the proceedings and nothing else. The words used in the 2007 Act, referring to "prosecuting" and "defending" the proceedings, are not words that Parliament would have used if it had intended only to refer to narrow or technical steps.

Applying that approach, did the activities of the Respondents, taken in the round, amount to the conduct of litigation?

211. In my judgment, the answer is yes. The Respondents did everything for Mr Persey in relation to the proceedings that a solicitor or other authorised person would have done. They gave full-service assistance to Mr Persey, including drafting all of the documents required to comply with formal requirements, giving instructions to counsel, making a payment to court, corresponding with the other side, and ensuring that all procedural steps complied with the CPR. Someone must have conducted this litigation, and it would be wholly artificial to say that Mr Persey did it himself, albeit with support and guidance from the Respondents. This would be to under-state their involvement. They conducted the litigation for him. Put another way, they were "prosecuting" the proceedings for him. The Respondents' role went far beyond clerical or mechanical assistance. As the Court of Appeal said in **Ndole**, it is a question of fact and degree whether an advisor or consultant crossed onto the wrong side of the line. On the facts of this case, and again applying the criminal standard, I conclude that the Respondents did cross the line and that their involvement in the proceedings, taken as a whole, amounted to the conduct of litigation.

212. The only difference in this case from that which a solicitor or other authorised person would have done is that the Respondents did not formally go on the record or use their own notepaper for covering letters when dealing with the court (though they did use their own letterhead when corresponding with the Claimant's solicitor). In my judgment, it would be wrong, and wholly contrary to the statutory purpose as expressed in section 1 of the 2007 Act, for these matters to take activities outside the meaning and scope of the conduct of litigation. This would be to prioritise form over substance. It would mean that the question whether someone was conducting litigation would depend on an arid technicality. Indeed, to treat this as the only thing that matters would be to provide an incentive for those who were not authorised persons to conceal their involvement from the court, which cannot be right.

213. The matter can be tested in this way. Could Parliament have intended that someone who, unlike Mrs Doble, was a rank amateur and was wholly ignorant of the law and procedure, should be permitted to charge for the provision of this full range of services to a litigant, by taking the steps that the Respondents took in this case? In my view, the answer is in the negative. None of this means that a friend or relative who gives informal advice to a litigant in person, or even who gives them a hand with drafting, is conducting the litigation. Unlike the present case, they would not be prosecuting the proceedings on behalf of the litigant.

214. This conclusion is consistent with the authorities. The case which is, by some distance, closest on the facts to the present case is **Gill v Kassam**. In that case, the judge found that, looking at the package of services, the advisors were conducting litigation. It is true that there are some differences between that case and this, principally that the advisors in **Gill v Kassam** used the online claims process, and applied the claimant's

signature to the online form, and entered their own address as the address to which documents should be sent, but these differences are of minor significance. The overall package of services provided by Remove A Tenant Ltd in **Gill v Kassam** was very similar to the overall package of services provided by the Respondents in the present case. The judge in **Gill v Kassam** regarded it as significant that the claim form was drafted by the advisor (see judgment, paragraph 49). I think that to distinguish Gill v Kassam on the technical ground that the online process was used in that case would be to promote form over substance. Similarly, in **Ndole**, at first instance, Coulson J said, at paragraph 29, that the preparation of a witness's evidence in chief – one of the steps taken by the Respondents in the present case – was a critical step in the prosecution of the proceedings. I prefer the conclusion reached by Coulson J on the relevance of drafting witness statements to the contrary conclusion expressed, obiter, by the judge in **Heron**, which was to the effect that anything which did not involve contact with the court did not come within the definition of the conduct of litigation.

215. It is true that, in **Ndole**, at paragraph 72, the Court said that if the claimant in that case had sent the letter of service with an enclosed claim form and the claimant itself had instructed couriers to effect delivery, the consultants would not have been involved in the conduct of litigation. However, this should not be interpreted to mean that the Court was saying that there would have been no conduct of litigation if a few cosmetic changes had been made. The only issue in **Ndole** was whether service of a claim form was invalid so that the claim should be struck out. The Court of Appeal was not saying that, under the 2007 Act, the conduct of litigation is limited to a few narrow actions.

216. As for the **JK v MK** case, I think that this can be distinguished from the present case. It was concerned with proceedings which were wholly consensual – a formal step that had to be taken before a divorce could take effect. In those circumstances, I respectfully agree with Mostyn J that the involvement of the consultants did not amount to the conduct of litigation. There was nothing to prosecute and nothing to defend. The present case, however, being contentious litigation, is very different.

217. I am reinforced in my view that, taken together, the Respondents actions amount to the conduct of litigation, by the rules that apply to McKenzie Friends. McKenzie Friends are lay persons who provide assistance to litigants in the courts. The question therefore arises whether they are conducting litigation. I agree with the Law Society that some assistance in working out where the line should be drawn between what is the conduct of litigation and what is not, for the purposes of the 2007 Act, can be obtained by reference to the *Practice Guidance: McKenzie Friends (Civil and Family Courts)* ("the Practice Guidance"), which was published by Lord Neuberger of Abbotsbury, Master of the Rolls, and Sir Nicholas Wall, President of the Family Division, on 12 July 2010. I bear well in mind, of course, that in publishing the Practice Guidance, the Master of the Rolls and President of the Family Division were not intending specifically to define "the conduct of litigation" for the purposes of the 2007 Act, and so the Practice Guidance should not be treated as a gloss on the legislation, let alone as if it were statute itself. However, in considering the nature and extent of the activities which McKenzie Friends are permitted to carry out, the Master of the Rolls and the President of the Family Division had to address a broadly similar issue to that which arises in the present case, namely where the dividing line lies between assistance in legal proceedings which should only be given by authorised and exempt persons, and assistance which can be given by any member of the public.

218. The Practice Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts. It is not a Practice Direction. The Practice Guidance states, at paragraph (1), that it is intended to remind courts and litigants of the principles set out in the authorities.

219. The Practice Guidance states that McKenzie Friends have no right to act as advocates or carry out the conduct of litigation (paragraph (2)). The Practice Guidance does not purport to define the conduct of litigation. However, paragraphs (3) and (4) state:

> **"What McKenzie Friends may do**
>
> (3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iii) quietly give advice on any aspect of the conduct of the case.
>
> **What McKenzie Friends may not do**
>
> (4) MFs may not: i) ***act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents***; or iii) address the court, make oral submissions or examine witnesses."
>
> (emphasis added)

220. Paragraph (18) states that McKenzie Friends do not have a right to conduct litigation, unless the courts granted such a right on a case-by-case basis, in accordance with exemptions in the 2007 Act.

221. Paragraph (19) states:

> "Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice."

222. The Practice Guidance, at paragraph (19) reminds us of the policy reasons behind the restrictions on conduct of litigation in the 2007 Act. It is significant, in my view, that the Practice Guidance says that McKenzie Friends, not being authorised or exempt persons, must not "manage litigants' cases outside court". That is exactly what the Respondents were doing.

223. Even if I am wrong in my conclusion that the Respondents' actions should be looked at in the round and, as such, amount to the prosecution of proceedings and so to the conduct of litigation, I consider that some of the actions taken by the Respondents, looked at in isolation, consisted of the conduct of litigation, in addition to the filing of

the claim form and particulars of claim, accompanied by the payment of the court fee, and the service of the reply and defence to counterclaim. Specifically, I think that the giving of instructions to an advocate; drafting of witness statements; the drafting of the application notice and draft order for the strike-out application; the drafting of the reply and defence to counterclaim; and the drafting of the case management summary for the CMC each formed part of the prosecution of the claim. The drafting of the claim form and the particulars of claim was done, ex hypothesi, before the proceedings were commenced, and so did not amount to the conduct of proceedings in themselves, but they are relevant in that they enhance the impression that the total package of services provided by the Respondents, taken as a whole, amounted to the conduct of litigation.

(6) Does the section 14(2) defence apply, on the basis that the Respondents (in practice Mrs Doble) did not know, and could not reasonably have been expected to know, that they were acting in contempt of court and were committing an offence contrary to section 14(1) of the 2007 Act?

224. As I have said, the burden of proof in relation to the statutory defence rests with the Respondents, and the standard of proof is the balance of probabilities.

Did Mrs Doble know that she was acting in contempt of court and was committing an offence contrary to section 14(1) of the 2007 Act?

225. I am fully satisfied that Mrs Doble did not know, and did not believe for a moment, that she was committing an offence contrary to section 14(1) of the 2007 Act. I have already said that I have accepted that she was an entirely truthful witness. It was clear from Mrs Doble's evidence that she thought that, following the disciplinary proceedings against her, she had made alterations in the way that the Second Respondent's business was conducted so as to ensure that, following the changes, neither she nor the Second Respondent were conducting litigation on behalf of their clients, and were not engaging in reserved legal activities. She reassessed the position in early 2019, when the judgment of the Court of Appeal in **Ndobe** was published. She made tweaks to her business model, principally by ensuring that there was no correspondence with the Court on the Second Respondent's letterhead, with a view to ensuring that she and the Second Respondent were not conducting litigation. She prepared the Law Update dated 16 January 2019, referred to above, in which she set out her understanding of what she and the Second Respondent were and were not permitted to do. She genuinely believed, at the time that she assisted Mr Persey with the litigation against the Claimant during the relevant period in 2019, that she was not conducting litigation. This applied even after Ms Irvine-Yates had made the allegation that the Respondents were conducting litigation: even after that, Mrs Doble did not know and did not believe that she was conducting litigation on behalf of Mr Persey. She was still trying hard to do the right thing.

Could Mrs Doble reasonably have been expected to know that she and the Second Respondent were conducting litigation for Mr Persey during the relevant period?

226. I am fully satisfied that the answer is no. This is for the following reasons:

227. First, it is true that, for the reasons I have given, Mrs Doble's belief that she and the Second Respondent were not conducting litigation for Mr Persey was wrong. However, this does not necessarily mean that she could reasonably have been expected

to know that she was conducting litigation. The statutory defence in section 14(2) of the 2007 Act only applies where the court has found that the defendant/respondent has been conducting litigation or otherwise performing a reserved legal activity. It follows that Parliament must have envisaged that there will be cases in which a defendant/respondent was performing a reserved legal activity but mistakenly thought that they were not doing so.

228. Second, in my judgment, Mrs Doble could not reasonably be expected to know that she and the Second Respondent were conducting litigation, for two reasons.

229. First, the law was unclear. The statutory wording itself did not give any clear steer as regards whether any particular advice or assistance would amount to the conduct of litigation. The words "the prosecution of proceedings" are vague and uncertain. The state of the case-law authorities did not provide clarity in this regard. It is not easy to find clear guidance from the authorities. They were all fact-specific. None of the cases was on all fours, factually, with the business model pursued by Mrs Doble. The Court of Appeal in **Ndole** said that it is a matter of fact and degree. The difficulty facing an advisor in trying to work out where the line should be drawn is illustrated by the following observation by the judge in **Gill v Kassam**, at paragraph 46,

> "The emphasis of the statutory definition at (a) and (b) is on the activity involved in the issue (or commencement) of proceedings, their prosecution and defence, rather than in the provision of assistance to a litigant in preparation or presenting their case."

230. In my judgment, the authorities did not provide a person in Mrs Doble's position with a means of differentiating between activity involved in the commencement, prosecution and defence of proceedings, on the one hand, and the provision of assistance to a litigant in preparing and presenting their case, on the other.

231. Second, Mrs Doble had been given advice about what amounted to the conduct of litigation, and had tried to apply the case-law, and had acted in accordance with what she reasonably understood the law to be. She had been subject to disciplinary action by CILEX Regulation and had adapted her business model in a way that satisfied her regulator. Whilst it is true that CILEX Regulation did not specifically and positively assert that the revised business model did not amount to the conduct of litigation, Mrs Doble was justified in drawing that inference. The Regulator knew the changes that she had made and expressed itself to be satisfied with them. Moreover, she had taken advice from a specialist regulatory lawyer and had complied with his advice. She was justified in concluding that the new business model she adopted in 2018 did not amount to the conduct of litigation.

232. There were two developments after that date.

233. The first was that the Court of Appeal handed down its ruling in **Ndole**. Though I have interpreted the judgment in a different way from Mrs Doble, I do not accept the Claimant's submission that, as a person who is neither a solicitor nor a barrister, Mrs Doble should reasonably have been expected to know that the additional tweaks she made to her business model did not mean that she avoided conducting litigation. Nor do I think that she should reasonably have been expected to keep up with the case law,

most of which is not in the law reports, analyse the cases and work out that she was in fact conducting litigation. This is the position, even though the legal responsibility lay with Mrs Doble to get it right and to ensure that she was not breaking the law (see **Khan**).

234. The second development came in May 2019, when Ms Irvine-Yates told Mrs Doble that she had been told by the SRA that Mrs Doble and the Second Respondent were conducting litigation. In my judgment, even then, Mrs Doble could not reasonably be expected to know that this was the position, given the steps that she had taken to ensure that she was operating on the right side of the line, and given that the law was in such a confusing state. The proceedings had become very heated, and she was entitled to think that this was another example of the aggressive way that the Claimant and his legal team were defending the possession proceedings.

(7) Conclusion

235. For these reasons, I find that the Claimant has proved, to the criminal standard, that the Respondents were conducting litigation between 12 March 2019 and 31 October 2019. However, the statutory defence under section 14(2) of the 2007 Act is made out, and so I find that Mrs Doble and the Second Respondent are not in contempt of court.

236. Accordingly, the application to commit the Respondents for contempt is dismissed.

237. Before leaving this case, I should say something about remedy. When I asked him directly during the hearing, Mr Metcalfe said that the Claimant would invite the court to impose a short suspended prison sentence upon Mrs Doble, if contempt was proved. I stress that I have not heard submissions on remedy, and, in light of my finding on the issue of contempt, now do not need to do so. However, I should say that, even if I had found Mrs Doble to be in contempt, I would have been extremely reluctant to contemplate committing her to prison for contempt. As I have said, she has acted with honesty throughout and has attempted at all times to do the right thing and to act in accordance with the law. She acted professionally in her dealings with the Claimant, and, even though she broke the law by conducting litigation without authorisation, the Claimant did not suffer any significant disadvantage as a result. Mr Persey had good grounds for seeking possession from him, as the Claimant eventually conceded.