Neutral Citation Number: [2022] EWHC 1481 (Comm)

Case No: CL-2021-000532

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

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

Date: 01/07/2022

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

MICHAEL WILSON & PARTNERS, LIMITED — **Claimant**

- and –

(1) JOHN FORSTER EMMOTT
(2) M.B. ROBINSON FOR THE ESTATE OF MICHAEL LYNDON BEVERLY ROBINSON (DECEASED)
(3) MR LAW LIMITED
(4) KERMAN & CO, LLP
(5) PHILLIP ALEXANDER SHEPHERD QC
(6) SHEPHERD LEGAL LIMITED
(7) SOKOL HOLDINGS INC — **Defendants**

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Mr Joseph Dalby SC (Ireland) (instructed by **Michael Wilson & Partners Limited**) for the **Claimant**
Mr P.J.Kirby QC (instructed by **Armstrong Teasdale Limited**) for the **2nd 3rd and 4th Defendants**
Mr Charles Dougherty QC (instructed by **DAC Beachcroft LLP**) for the **5th Defendant**
Mr Charles Dougherty QC (instructed by **F Liebling**) for the **6th Defendant**

Hearing dates: 10-11 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. These are applications by the 2nd to 6th defendants for:

    i) An Order that the Claim Form and Particulars of Claim be struck out:

        a) pursuant to CPR r. 3.4(2)(a), on the basis that they disclose no reasonable grounds for bringing the claim; or

        b) pursuant to CPR r. 3.4(2)(b), on the basis that the claim is an abuse of the Court's process; or

    ii) Summary judgment pursuant to CPR Part 24. on the basis that the claimant has no real prospect of succeeding on the claim factually and there is no other compelling reason for the claim to be disposed of at a trial.

2. It is axiomatic that a claim can be struck out as an abuse even though there are reasonable grounds for bringing the claim, trite that evidence is not admissible in respect of an application under CPR r. 3.4(2)(a) and obvious that there will be no need to consider the summary judgment application if the claim is struck out. It follows that I consider below firstly, whether as a matter of law there are reasonable grounds for bringing the claim; secondly, if there are, whether the claim is an abuse as alleged and thirdly, if it is not, whether the claimant has real prospect of succeeding on the claim factually.

Background and Claim against the 6th Defendant

The 1st to 5th Defendants

3. This is the latest in a long line of claims stretching back many years brought by the claimant ("MWP") (who acts throughout by Mr Michael Wilson as its legal representative) against the 1st defendant ("Mr Emmott"). What makes this claim different from those that have gone before is that in this claim, MWP has sued not merely Mr Emmott but (i) the estate of Mr Emmott's former solicitor, Mr Michael Robinson ("Mr Robinson"), who died suddenly shortly after the commencement of these proceedings (the 2nd defendant); (ii) the professional services company through which Mr Robinson provided his services to clients that included Mr Emmott (the 3rd defendant); (iii) a firm of solicitors by which Mr Robinson was retained as a consultant for a period during which he acted for Mr Emmott (the 4th defendant) and (iv) Mr Philip Shepherd QC ("PS"), who was retained by Mr Robinson on behalf of Mr Emmott to act as Mr Emmott's leading counsel (the 5th defendant).

4. In these proceedings, MWP alleges that over the life of its dispute with Mr Emmott, Mr Emmott (acting by Mr Robinson and/or PS) has applied for costs orders to which he is not entitled by operation of the Indemnity Principle, that in consequence MWP is entitled to recover the sums (i) paid in discharge of the costs orders that were made on those applications, (ii) paid on account of its liability under such orders and (iii) paid pursuant to orders to provide security for costs. He maintains that Mr Robinson, the

various entities through which Mr Robinson practiced and PS are all liable either for all the sums claimed or so much of the sums claimed as they each received.

The 6th Defendant and Dismissal of the Claim against itt

5. The 6th Defendant is a professional services company owned solely by PS's wife. PS's wife is a solicitor and she provides her services as a consultant to various law firms using the 6th Defendant. Ms Shepherd (not the name under which she practices) has not at any stage acted for Mr Emmott. Although PS is a director of the 6th defendant, he has no other interest in it and has never at any stage provided his professional services to Mr Emmott or Mr Robinson using the 6th Defendant. I reach that conclusion at this stage because there is no evidence whatsoever to contrary effect.

6. This point has been made throughout both in correspondence and in the evidence filed after the 6th defendant issued and served its current application to strike out or for summary judgment and in support of an earlier application to strike out a previous attempt by MWP to bring this claim, to which I refer below.

7. Ms Shepherd wrote to Mr Wilson about this claim, prior to the issue of proceedings, with a view to explaining why the claim against the 6th Defendant was misconceived, Mr Wilson responded in unnecessarily aggressive terms but without addressing the substantive points being made other than to say that he disagreed with them. It would unnecessarily lengthen this judgment to refer to all the correspondence. However in an email to Mr Wilson, Ms Shepherd summarised the position as she saw it in these terms:

> "To be abundantly clear, Shepherd Legal Limited is my own personal legal consultancy company. No fees have ever been invoiced by or paid to Shepherd Legal Limited in relation to:
>
> (a) the proceedings to which you refer;
>
> (b) any matters relating to John Emmott; and/or
>
> (c) any matters relating to you, Mr Wilson, or MWP.
>
> If you insist on serving proceedings on Shepherd Legal Limited notwithstanding my previous email and the above confirmations, I will apply immediately:
>
> (a) to strike out the claim under CPR rule 3.4(2) and
>
> (b) for the Court to make a Civil Restraint Order against you under CPR rule 3.11 and PD 3C para 5.1.
>
> Given that there are no reasonable grounds for bringing a claim against Shepherd Legal Limited, any claim is clearly vexatious, scurrilous, and obviously ill-founded.
>
> Again, if you insist on serving proceedings on Shepherd Legal Limited notwithstanding the above, then in accordance with CPR Part 6.7(1)(a) you should do so at the business address of

> Armstrong Teasdale Limited at 200 Strand, London, WC2R 1DJ. Please note that CPR Part 6.7(1)(a) provides that "where the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form the claim form **must** be served at the business address of that solicitor" (emphasis added). If service is attempted on Shepherd Legal Limited at its registered office address (which is also my home address), this will not only be a clear breach of CPR Rule 6.7 and not, therefore, effective service, but I will also consider this as an act of harassment.
>
> Given I have no connection whatsoever with the proceedings to which you refer, I cannot accept service of the Orders of HHJ Pelling QC which were emailed to me by you on 5 January 2021. Please can you kindly remove me from all future correspondence in relation to such proceedings."

Mr Wilson's response was:

> "We refer to the enclosed email, the contents of which we note, but with which we disagree given the information available to us.
>
> With respect, we do not need any recommendations, input and advice from you, your colleagues (and P. Shepherd), and will act as we see fit, and in MWP's own best interests given the ≥£7.32m costs fraud MWP has been wrongly subjected to since 2006, to date.
>
> We will not be corresponding with you any further on these topics"

The correspondence continued however, with Ms Shepherd continuing to explain that there was no basis for any claim against the 6th Defendant, not least because it had been a dormant company from its formation in 2015 until 2019. This culminated in an email from Ms Shepherd in which she stated:

> " … if you insist on serving proceedings on Shepherd Legal Limited notwithstanding there is no basis for any claim against it (for the reasons explained to you on multiple occasions), then in accordance with CPR Part 6.7(1)(a) you should do so at the business address of Armstrong Teasdale Limited at 200 Strand, London, WC2R 1DJ."

Mr Wilson responded:

> "Thank you for your email. You/SLL are not in a position to purport to try to dictate to MWP (in its own right and qua Sinclair), and we do not need any advice from you/SLL, as one of the five defendants to our Part 7 Claim"

Mr Wilson then asserted in an email that " *... AT LLP* [that is Armstrong Teasdale LLP] *do not act for and are not on the record for SLL, it is not appropriate for emails to be written from and correspondence and documents to emanate from or be served at its address ..."* In fact in the end MWP served proceedings by post on the 6th defendant at the address of Armstrong Teasdale LLP, the 6th defendant's solicitors.

8. What Mr Wilson had failed to do in any of this correspondence was address the substantive points that had been made repeatedly as to why the 6th defendant could not on any view be liable to MWP, other than to say that he disagreed.

9. As I explain in more detail below, MWP made an earlier and misconceived attempt to issue these proceedings by using the Claim Number of an earlier claim issued by it against Mr Emmott but not any of the second to sixth defendants. The proceedings were struck out on technical grounds. MWP applied to have that order rescinded. That application was opposed by the 2nd to 6th defendants. The 5th and 6th defendants were represented at the hearing of MWP's rescission application (as they are at this hearing) by Mr Dougherty QC. Mr Dougherty made clear at the rescission application hearing that if the strike out order was not rescinded and MWP re-issued the proceedings they should not be re-issued against the 6th defendant since any such claim was misconceived for the reasons explained in the correspondence, some of which I have set out above, and because there was no evidence at all, whether direct or inferential, that supported such a claim even to the level of reasonable arguability. MWP chose to ignore that and re-issued the proceedings not only against the first to fifth defendants but the 6th defendant as well, whilst appearing to accept that no claim could be advanced against it while it was dormant.

10. The paucity of the case against the 6th defendant is readily apparent from the skeleton submissions of Mr Dalby SC (Ireland) for this hearing. In paragraphs 14-17 he seeks to explain the claims against each of the defendants but does not mention the 6th defendant at all. There is a similar omission from paragraphs 26, 35, 38, 39, 49 and 50. In paragraph 60 there is a reference to the "*... alleged costs of ... D6"* but nowhere is there any evidence that the 6th defendant has ever claimed or been paid anything by anyone in relation to any part of the disputes involving MWP and Mr Emmott. In paragraph 65, the 5th and 6th defendants are treated as interchangeable (without any attempt to particularise that allegation) notwithstanding what had been said in the correspondence and Ms Shepherd's 2nd witness statement.

11. In paragraph 72 of his skeleton submissions, Mr Dalby submits that:

> "Regarding D6, the claim is not made against Ms [Shepherd] personally, instead it is made against D6 itself, as the vehicle and nominee for D5. The evidence of [Ms Shepherd] across her Second and Third Witness Statements is almost entirely irrelevant, as it relates to her only. <u>The relevant evidence is at §9, that D5 was a director and controller of D6.</u> C is also prepared to accept that Companies House records reported that the company was dormant from incorporation to 2019" (Emphasis supplied]

The assertion that PS controlled the 6th defendant is said to be based on what Ms Shepherd says in paragraph 9 of her second statement. It is worth setting that out in full:

> "The Fifth Defendant [PS] did remain (and still is) a Director of the Sixth Defendant. However, the Fifth Defendant has never received a salary, benefits or any dividend from the Sixth Defendant. No fees earned by the Fifth Defendant have ever been paid to the Sixth Defendant and none of my consultancy services (or the fees charged or paid in respect of the same) has ever concerned or related to any work or matters concerning or relating in any way to the Claimant, or the First, Second, Third, or Seventh Defendants. "

I do not understand how it can be said that this material supports the proposition that PS is the "*controller*" of the 6th defendant, but in any event that assertion is immaterial in the absence of any evidence whatsoever of its involvement in the disputes that MWP has with Mr Emmott or of any receipt by it of any money from any source relevant to these proceedings.

12. In light of this, at the outset of the hearing, I invited Mr Dalby to confirm whether the claim was being maintained against the 6th defendant. On instructions he told me that it was.

13. I am satisfied that whatever conclusions I reach in relation to the claim against the 2nd to 5th defendants, the claim against the 6th defendant is one that ought never to have been made and that the 6th defendant is entitled to summary judgment accordingly. The 6th defendant is plainly entitled to summary judgment on the basis that at a factual level there is no evidence at all that justifies the commencement or continuation of this claim against it or which shows that anything Ms Shepherd says in her second statement in support of the 6th defendant's strike out and summary judgment application in these proceedings is wrong or untrue. In addition, if and to the extent I conclude that the claim ought to be struck out against the 2nd to 5th Defendants it necessarily follows that the claim must be struck out for similar reasons as against the 6th defendant.

14. Although each of the 2nd to 6th defendants have indicated that they will seek extended civil restraint orders against MWP, for obvious reasons it was agreed between all parties that all issues concerning whether the claim or any part of the claim should be certified as totally without merit and whether a civil restraint order should be made would be decided following the hand down of this judgment and I say no more about those issues at this stage.

The Litigation between the Claimant and First Defendant

15. The history of this dispute goes back many years. It is entirely unnecessary that I set out the detail of the dispute in this judgment. However, it is necessary that I set out a summary of elements to the litigation to the extent necessary to make this claim, the applications and this judgment comprehensible. Since being nominated by the then Judge in Charge of the Commercial Court (Teare J) to manage this litigation I have given a large number of judgments, some of which set out in considerable detail the nature of the dispute and the steps that have been taken in it over the years. Reference should be made to those judgments for any further detail beyond what I set out below.

16. Prior to his death, Mr Robinson had prepared a witness statement in support of what was then his and is now his estate's application to strike out or for summary judgment. In it he described the litigation as having been going on for many years and in courts in numerous different jurisdictions including the BVI, the courts of two states in Australia, the federal courts of Australia and the courts of New Zealand. The litigation has been pursued at first instance and on appeal in at least England, the BVI and in Australia up to an including the High Court of Australia.

17. Both Mr Wilson and Mr Emmott are solicitors qualified both in England and Australia. Mr Emmott is Australian by birth although there is (or was) a dispute as to whether he was domiciled in Australia at any time relevant to these proceedings. It is not necessary for me to consider that issue further and I make no findings in relation to it. Prior to the events giving rise to the litigation between them, both Mr Wilson and Mr Emmott had been partners in major City of London law firms.

18. MWP is a company registered in accordance with the laws of the BVI. In 2002, MWP's business was at all material times the provision of legal and business consultancy carried on from its offices in Almaty in Kazakhstan, where Mr Wilson resides. In 2002, Mr Emmott became a director of and shareholder in MWP. That relationship was governed by a contract that was made subject to English law and was subject to an arbitration agreement.

19. In 2006, the commercial or professional relationship between Mr Wilson and MWP on the one hand and Mr Emmott on the other broke up in circumstances of great acrimony. The detail of why that happened and what each did to the other that caused, or as a result of, the falling out is not germane to the issues that arise in this litigation. However, an aspect of that dispute (though not the only one) concerned 14.75 million shares in a company called Max Petroleum Plc (referred to in the litigation and these proceedings as the "*Max Shares*") and US$1,050,000 referred to in the litigation and these proceedings as the "*Max Cash*". Max Petroleum had been listed in London on the Alternative Investment Market and had very substantially increased in value as a result. The individual principally interested in Max Petroleum was a Mr Sinclair, who was a client and at one time at least a close associate of Mr Emmott.

20. MWP's case against Mr Emmott in relation to this issue is that Mr Emmott was the beneficial owner of the shares and that they had been allotted to him by Mr Sinclair for work done on behalf of Mr Sinclair by Mr Emmott while he was a director of MWP and that in consequence Mr Emmott was accountable to MWP for the shares or their value. Mr Emmott denies that he is or was the beneficial owner of the shares and has always maintained that they belonged beneficially to Mr Sinclair or a company controlled by him called Sokol Holdings Inc – the 7th defendant in these proceedings ("Sokol"). Mr Emmott's case is and always has been that while he was at MWP he acted for Mr Sinclair and Sokol, that the shares were allotted to a company controlled by Mr Emmott called Eagle Point Investments Limited ("EPI") on the instructions of Mr Sinclair and that they are held by EPI on trust for Mr Sinclair or Sokol.

21. I have referred to this issue because Mr Sinclair features heavily in MWP's evidence and submissions in this claim. In summary, MWP maintains that Mr Sinclair was the only individual with an obligation to pay Mr Emmott's lawyers in relation to his disputes with MWP and that Mr Emmott had no obligation to do so. The 1st to 5th

defendants' case is that whilst Mr Sinclair was a third party funder (either personally or via entities he controlled) of (or some of) Mr Emmott's legal costs, who was motivated to provide funding by his desire to protect his interest in the Max Shares, Mr Emmott at all times remained technically liable to his lawyers for his legal fees and on that basis was fully entitled to recover costs from MWP in both the arbitration and litigation that followed. In this context, it should be understood that the Max Shares dispute is and was only ever a part of the global claim that MWP has advanced against Mr Emmott and Mr Emmott has advanced against MWP by counterclaim.

22. On 30 June 2006, Mr Emmott terminated his relationship with MWP and MWP commenced an arbitration in which it sought substantial sums from Mr Emmott. Mr Emmott counterclaimed in those proceedings. The arbitration went on for several years and culminated in an Award published in 2014 under which MWP was held liable to pay Mr Emmott £3,209,613 and US$841,213. Mr Emmott then applied for permission to enforce the Award as a Judgment of the High Court. That application succeeded before Burton J. MWP attempted to appeal that Order on multiple different grounds but without success. A freezing order in favour of Mr Emmott followed. That was the start of the flood of litigation that has continued to this day and of which this claim is the penultimate manifestation. Since these proceedings were commenced, MWP has commenced a yet further claim against Mr Emmott to which I refer in more detail later.

23. This litigation has been described by Gross LJ[1] as "*seemingly interminable"* and by Peter Jackson LJ in the same case as a "…*shameful waste of time and money …"* in which it appeared that " *… Mr Wilson will stop at nothing to prevent Mr Emmott from receiving the award to which, for all his deceit, he is entitled* …" and warned that this " *… pathological litigation has already consumed far too great a share of the court's resources and if it continues judges will doubtless be astute to allow the parties only an appropriate allotment of court time …"*. At a relatively early stage[2] Sir Jeremy Cooke, sitting as a Judge of this court, protested at the habit of Mr Wilson on behalf of MWP as he put it to state that black is white and to deploy in support of the claims and applications that he has made " *… extensive witness statements, much of which contain material that is irrelevant, repetitive and highly argumentative and prejudicial.*" This practice has continued unabated and is apparent in the witness statement deployed in answer to the defendants applications in this case (which contains 219 paragraphs, set out over 66 pages, with an exhibit containing 1001 pages), and in Particulars of Claim and Voluntary Further Information ("VFI") that MWP has served in these proceedings.

24. All this is relied on by the defendants to show what they maintain to be the vexatious nature of these proceedings when viewed in the context of what has gone before. In my judgment however, none of this can be allowed to distract from the essential points that arise on these applications. If MWP can demonstrate that it has a legally sustainable cause or causes of action against the 2nd to 5th defendants, or any of them, and that they or any of them are realistically arguable applying the principles that apply to summary judgment applications, then MWP is entitled to prevail on these applications.

25. The sums due from MWP to Mr Emmott have never been paid, although there have been various set offs and assignments to which Mr Emmott has agreed over the years

[1] Michael Wilson & Partners Limited v Emmott [2019] EWCA Civ 219
[2] Emmott v Michael Wilson & Partners [2017] EWHC 2498 (Comm) at paragraphs 7 and 8

so as to reduce the net sums due. His case is that substantial sums remain due. MWP's case is that following the bankruptcy of Mr Sinclair earlier this year (on MWP's petition), MWP obtained an assignment from Mr Sinclair's trustee of the benefit of all or a significant part of the sums allegedly due to Mr Sinclair's estate from Mr Emmott, that the sums due far exceed the sums due from MWP to Mr Emmott and that in consequence MWP has a set off available that will extinguish the balance of the sums due to Mr Emmott. That issue is due to be litigated at the resumed hearing of an application to discharge the freezing order that is due to be heard later this month and I say no more about it beyond noting that it is MWP's case that the sums allegedly due to Mr Sinclair's estate include sums advanced by Mr Sinclair to fund Mr Emmott's defence of the arbitration and the proceedings that followed, which implies those sums were loans to Mr Emmott.

26. Over the years numerous orders were made by this court in which MWP was ordered to pay Mr Emmott's costs, which were then either summarily assessed or ordered to be the subject of a detailed assessment with a payment on account being ordered. MWP has been ordered to provide security for costs on a number of occasions. MWP complains that Mr Emmott has failed to initiate the detailed assessment of any of the costs where detailed assessment has been ordered, even though either security for costs and/or a payment on account has been sought and ordered. He maintains that the costs which the arbitral tribunal ordered that MWP should pay have never been assessed and that in consequence any claim that Mr Emmott might have to recover those costs is statute barred. However, he also alleges that Mr Emmott was never entitled to costs because he was never under an obligation to pay either the solicitors that he appointed to act for him or counsel who acted on his behalf. MWP's case is that the true client and only person obliged to meet Mr Emmott's legal costs was Mr Sinclair and that Mr Emmott was a cypher.

27. This is a claim that until this hearing MWP and Mr Wilson has always characterised as the "*costs fraud*" – see by way of example his emails to Ms Shepherd referred to above. He maintains that each of Mr Emmott, Mr Robinson and PS knew that Mr Emmott was not liable to pay them for their services and therefore that the claims made for costs leading to the costs orders to which I have referred were fraudulent claims that should never have been made. This has caused MWP to seek to recover the sums that it has paid in compliance with costs orders made by the court whether in the form of sums that have been summarily assessed or sums that have been paid on account of costs that have been ordered to be subjected to detailed assessment or security has been provided.

28. MWP has so far made at least three procedurally misconceived attempts to advance this claim. The first was an attempt to persuade me to order the trial of what Mr Wilson characterised as a "*preliminary issue*", which I declined to order on the basis that if such an order was to be made it had to be made by reference to an issue in a yet to be resolved claim or application and there was then none. This was followed by an attempt by MWP to seek an order setting aside the various costs orders that it now maintains were obtained fraudulently by an application under CPR r.3.1(7). I dismissed that application on the basis that the costs orders were final orders and/or the application was contrary to the practice set out by the Court of Appeal in Terry v. BCS Corporate Acceptances Limited and others [2018] EWCA Civ 2422 and that if such a claim was to be made then it had to be made in a new claim in which amongst other things the allegations of fraud were properly pleaded and particularised.

29. The next attempt by MWP to advance its costs recovery claim occurred on 26 April 2021, when it purported to serve on the defendants to these proceedings a Claim Form and Particulars of Claim. MWP attempted to utilise a case number (CL-2010-804) allocated to an earlier action commenced by MWP, leading to the novel position that two claim forms bearing the same number were issued with the second being issued years after the first one had been issued and in respect of a claim against different parties. I concluded that Mr Wilson had been able to achieve this by pressurising court staff to issue the new claim form using the already utilized 2010 case number. I struck out the new claim form by an order made by me on 9 June 2021 pursuant to CPR r.3.3(4). MWP then issued an application to " … *rescind, set aside, vary or otherwise stay* …" the 9 June order, which I dismissed by an order made by me at a hearing on 20 July 2021. I certified that application as being totally without merit.

30. MWP then sought permission to appeal from the Court of Appeal in relation to the 20 July order. That application came before Males LJ on 10 December 2021 on paper. Permission to appeal was refused and the application certified as totally without merit with the proposed grounds of appeal being described as "*hopeless"*. Males LJ concluded amongst other things that I "*... was entitled to conclude that it was the applicant who had pressured court staff to put the existing claim number on the new claim form and had then refused to allow this to be corrected* …" and that the proposed appeal was "*... vexatious, over complicating what is in reality a straightforward and apparently deliberate failure by the applicant to follow the correct procedure*." It is worth repeating a point I have made already – Mr Wilson is the legal representative of MWP. He is a solicitor of many years standing who conducts all this litigation as MWP's solicitor and occasionally instructs counsel on its behalf, as he has on this application. He is not a litigant in person who is unfamiliar with the procedures of this court. It is also worth noting that in paragraph 104 of his witness statement served in answer to the applications I am determining, served on 23 February 2022 (i.e. over 2 months after the refusal by Males LJ of permission to appeal referred to above), Mr Wilson said that the 20 July order " … *is under appeal to the Court of Appeal and comprises A4/2021/1407, and a decision on the temporary stay and permission to appeal is awaited*'. No retraction, explanation or apology for this plainly wrong evidence has been offered.

31. On 9 September 2021, MWP issued these proceedings and on 21 September 2021, it served the Claim Form and Particulars of Claim on the 1st to 6th defendants. An application by MWP for permission to serve the Claim Form and Particulars of Claim on the 7th defendant out of the jurisdiction has been stood over until after determination of the strike out and summary judgment applications. The strike out or summary judgment applications by the 2nd to 6th defendants were served on 19 October 2021. Mr Robinson died on 14 December 2021 and by an order made by me on paper on 14 February 2022, Mr Mark Robinson (Mr Robinson's executor) was appointed to represent Mr Robinson's estate. On 22 February 2022, MWP applied to set that order aside. After a hearing, no order was made on the application.

32. Finally, on 13 December 2021, MWP issued what is now the most recent claim against Mr Emmott. Mr Wilson did not mention the issue of these proceedings in his evidence in answer to the applications I have to determine. The new claim is a claim to recover from Mr Emmott sums said to have been due from him to Mr Sinclair that MWP claims

to be entitled to recover by operation of the assignment to it by Mr Sinclair's trustee in bankruptcy. I refer to these proceedings hereafter as the "*Sinclair Estate Claim*".

33. Shorn back to the material relevant to this present claim, at paragraph 5 of the Particulars of Claim in the Sinclair Estate Claim MWP alleges:

> "Commencing in or about 2004 to date, Mr Sinclair, whether directly or indirectly (including through Sokol, …) advanced certain monies to [Mr Emmott] (the "Debts"), whether directly or indirectly (including, without limitation, through and involving … M.L.B. Robinson, Michael Robinson & Co, MR Law Limited, Kerman & Co, LLP, Kerman Legal Services Limited, Armstrong Teasdale Limited, … P.A. Shepherd QC …"

At paragraph 6.6, MWP alleges that " *... in accordance with the detailed terms set out in the loan documentation ... "*

> "… all and any recovery made by the Defendant from MWP, in or arising out of the arbitration and related proceedings, including as to all and any security for costs provided by MWP, has to be applied first in repayment of the amounts advanced, before being applied by the Defendant for his own benefit or for the purpose of paying other sums then owing by him to others, including sums owing by Mr Emmott to his legal advisors … "

At paragraph 15.2 of the Particulars of Claim, MWP seeks judgment for the sums so advanced, amongst others, by reference to the trustee's assignment of Mr Sinclair's debts to MWP. The Particulars of Claim in the Sinclair Estate Claim contains a Statement of Truth apparently signed on behalf of MWP by Mr Wilson. It is not necessary to refer further at this stage to this claim other than to note a submission by the 2nd to 6th defendants that this claim is entirely inconsistent with the claim made in these proceedings and entirely consistent with their case that at all times Mr Sinclair providing funding to Mr Emmott to enable him to finance his representation in the litigation. In particular, the reference to sums owing by Mr Emmott to his legal advisors in paragraph 6.6 is submitted to be entirely inconsistent with MWP's case in these proceedings that no sums were due from Mr Emmott to his lawyers.

The Particulars of Claim in these Proceedings

34. Before turning to the applicable principles and the application of those principles to the facts of this case it is necessary that I refer to the Particulars of Claim in these proceedings. The document is prolix, contains significant quantities of entirely irrelevant material, expressed in unnecessarily tendentious terms and fails to focus or focus properly on what causes of action are being alleged against which of the defendants. I have tried to ignore the obviously irrelevant parts of the pleading in the summary that follows.

35. Paragraph 1 is almost entirely irrelevant but it does plead that " … *MWP is also the assignee of certain rights and claims of Thomas Ian Sinclair ("Mr Sinclair"), including the more than US$10,621,247 of debts owed to him by the First Defendant (and his*

fellow stakeholders) with effect from 27 August 2021, and acts qua, in the name of and as the assignee of Mr Sinclair …" The " … *fellow stakeholders …"* are said to be the defendants in these proceedings. Everything that follows down to paragraph 22 is entirely irrelevant to the issues that arise in these proceedings.

36. In Paragraph 22 MWP alleges:

> "… the Defendants have caused applications to be made for and have caused multiple costs orders to be made against the Claimant, and the Claimant has paid significant costs pursuant to the same, as referred to above and set out in the attached Appendix of Costs Orders, which monies have then been shared by the First Defendant with the Second to Seventh Defendants, as "fellow stakeholders" of the First Defendant. "

Quite what "*shared*" was meant to mean in this context in entirely unclear. It is obvious however that sums received by a solicitor by way of costs can and usually will be used to meet counsel's fees and other disbursements as well as to pay sums due to that solicitor, unless those liabilities have been met already by the client, in which case the solicitors will be accountable to the client for the sums so received.

37. In paragraph 23 it is alleged that the costs applications leading to the costs orders under challenge " … *have been supported by false signed statements of truth wrongly issued by the Second and Fourth Defendants* …" and at paragraph 24 that:

> " … The Claimant avers that the First Defendant never had any, and has no liability to pay all or any legal fees and costs and, therefore, that no fees and costs were or are properly claimable or payable by the Claimant to the First Defendant, pursuant to the indemnity principle. Indeed, it is and has always been the First Defendant's case that he is impecunious, has no cash, revenues or assets, anywhere in the world, and accordingly is not able and was never able to undertake liability (including for costs) to all and/or any of the other Defendants."

It is submitted by the 2nd to 6th defendants and I agree that it does not follow from the fact that an individual is impecunious that he has no liability to pay his legal costs. Liability and ability to pay are obviously not the same thing. The contrary is not arguable.

38. At paragraphs 27 – 33, there are pleaded various facts and matters that are relied on as providing inferential support of the allegation that Mr Emmott was never under an obligation to pay his solicitors or counsel including that:

i) The 3rd defendant had commenced proceedings against Mr Emmott to recover its fees, which Mr Emmott had defended on the basis he was not liable to pay the 3rd defendant because he was not contractually bound to the 3rd defendant and was not otherwise personally liable;

ii) Mr Emmott had informed Mr Wilson that " … *on numerous occasions (in 2015 and 2016) that all of the Second to Seventh Defendants, including Mr Sinclair*

> *were his "fellow stakeholders" in the arbitration and litigation with and against the Claimant, and that, accordingly his "hands were tied" and that he had agreed to pass on and to share (whether directly or indirectly) all and any costs, monies or assets received from MWP with them as his "fellow stakeholders" and, effectively, partners …*";

iii) PS had informed the Court of Appeal in the course of hearing that Mr Emmott's lawyers " … *are acting on the basis that they will seek recovery of any funds that they recover from Mr Wilson… We, his lawyers, accept that he [the Defendant] doesn't have any money*…"; and

iv) Mr Emmott had never disclosed any conditional fee agreements or the like between him and his lawyers; nor had he produced any invoices or bill of costs payable, or that had been paid by him nor signed any professionally drawn Bills of Costs in relation to any of the cases where he had obtained costs order requiring detailed assessment.

39. Thereafter there is a repetition of the sharing allegation to which I referred earlier and then there is the only attempt to identify a cause of action in the Particulars of Claim. It is focussed exclusively on a claim against Mr Emmott and is formulated exclusively as a claim in unjust enrichment in these terms:

> "37. In the premises, the First Defendant has applied for, pursued, sought and obtained monies and costs in enormous sums from the Claimant, in breach of the indemnity principle, and on the false basis that the First Defendant is liable to pay costs to his lawyers, when the same is not and has never been true, and on the First Defendant's own case he is impecunious and has no and has never had any cash, revenues or assets, and has never disclosed any such thing.
>
> 38. The First Defendant has been unjustly enriched by the improper seeking and receipt of such monies and the costs paid, as set out in the attached Appendix of Costs Orders. This unjust enrichment is at the expense of the Claimant, and has caused MWP to suffer and incur significant loss and damage, which is on-going. The retention of the enrichment is unjust.
>
> 39. The First Defendant knew at all relevant times all of the matters set out in paragraphs 1 to 36 above. The First Defendant knew at all relevant times that he had no liability to pay all and any fees and costs to his lawyers, and that the Claimant was, therefore, not liable to pay the costs, pursuant to the indemnity principle.
>
> 40. As a result, the First Defendant sought and obtained the Costs Orders and the monies and costs paid thereunder dishonestly, in the knowledge that the First Defendant never had any, and has no liability to pay all and any fees and costs to his lawyers and that, therefore, the Claimant was not liable to reimburse and such fees and costs, pursuant to the indemnity principle, and the same

> could not be properly claimed, and further participated in an unlawful scheme designed to defraud MWP of significant sums.
>
> 41. In its capacity acting qua and as the assignee of the Sinclair Estate from 27 August 2021 to dale, MWP is entitled to whatever rights and benefits were received by or have accrued due to Mr Sinclair, as between him and the Defendants."

40. The only mention of the other defendants comes in paragraph 42, where it is said that MWP claims against all the defendants a declaration that

> "… they are acting, and have acted in breach of the indemnity principle and the law and rules on "specking" agreements and contingent liability contracts and, accordingly, that MWP is now entitled to, and claims, restitution of all of the monies and costs paid, as set out in the attached Appendix of Costs Orders (without limitation), and whatever became of the same.

The prayer claims "*a declaration"* presumably in the terms set out in paragraph 42, "*Restitution as set out above"* which can only be a reference back to the unjust enrichment claim against Mr Emmott set out in paragraphs 37-41or possibly that referred to in paragraph 42, together with interest, which can only be a claim to interest on any sums recovered pursuant to the unjust enrichment claim since no other money claim is contained in the Particulars of Claim, and costs. The Particulars of Claim contains a statement of truth signed by Mr Wilson.

41. What is noticeably missing from the Particulars of Claim is any claim for an order setting aside any of the costs orders to which MWP takes exception whether on the ground of fraud of otherwise or any claim (other than perhaps a claim in unjust enrichment) against any of the other defendants apart from the first defendant. Mr Dalby told me in the course of his oral submissions, that the absence of a claim to set aside the relevant costs orders was deliberate although he did not explain why. If as MWP maintains, the costs orders it challenges were obtained by fraud this failure is inexplicable, particularly in relation to orders allegedly so obtained where MWP has provided security that is held by the court and where an application for repayment could be made if the fraud allegation was made out. This is a potentially significant omission since the second to sixth defendants submit that as long as the orders remain undisturbed, a claim based on unjust enrichment is bound to fail and that any claim of any sort is bound to fail as being a collateral attack on the orders that remain in full force and effect with the possible exception of a claim for damages for the tort of deceit, which however has not been pleaded against any of the 2nd to 6th defendants. I return to these points in more detail below.

42. Notwithstanding that the only cause of action identified is that of unjust enrichment, MWP continues to refer to the matters of which it makes complaint in these proceedings as the "*costs fraud*" – see by way of example the title given to the Particulars of Claim ("*Outline Particulars of Claim as to the Costs Fraud committed from August 2006 to date"*); the sub heading above paragraph 20, where MWP refers to " … *yet further evidence of the costs fraud* …" and paragraph 26, where he refers, without evidence or particularisation, to the 6th defendant as " … *one of the vehicles of the costs fraud* …"

It also describes the costs claims the subject of these proceedings in paragraph 36 of the Particulars of Claim as being " … *the Defendants' fraudulent, unlawful and dishonest scheme from 2006 to date* …".

43. Finally I turn to the VFI. No application has been made to amend the Particulars of Claim so to the extent there are additional causes of action set out in the VFI that do not appear in the Particulars of Claim that does not assist since causes of action have to be pleaded in the Particulars of Claim. It is the pleadings that establish the agenda for trial. No defendant faced with a claim – and particularly one formulated in fraud or involving allegations of dishonesty - should be required to thrash through a document such as the VFI in order to ascertain if there is a claim made in that document that does not appear in the Particulars of Claim, much less be expected to plead to it. Thus whilst I accept that such a document can be used as the means of providing further particulars of claims advanced in the Particulars of Claim, it cannot be used to advance new claims not made in the Particulars of Claim or extend claims pleaded in the Particulars of Claim to defendants against whom that claim has not been made in the Particulars of Claim.

44. Paragraph 7 of the VFI sets out three claims that MWP claim to advance being a "*cost recovery claim",* an *"assigned debt claim"* and an *"unlawful maintenance/champerty claim".*

45. The cost recovery claim is alleged to be advanced against all the " *... Defendants, the Stakeholders or the Team in respect of orders for costs granted by an Arbitral Tribunal and/or the High Court of Justice in proceedings between or involving MWP and the First Defendant (or his agents) (the "MWP/Emmott Litigation") on diverse dates in favour of the Defendants, to be paid by MWP* …". The basis of the claim is said at paragraph 8(a) to be that each relevant cost order was " … *procured on foot of representations that were fraudulent, alternatively untrue, or made recklessly as to whether or not they were true or false by the Defendants* …" and the remedy sought is payment to MWP of the " … *amounts paid by MWP in costs, on account of costs or as security for costs and undertakings in damages, or guarantees in lieu thereof provided and maintained* …" Although it is very difficult to ascertain the nature of the claim being made, it would appear to be a claim for damages in deceit. No such claim is set out in the Particulars of Claim against any of the defendants. No attempt has been made to particularise the claim against any of the defendants in a manner that is remotely conventional for a deceit claim, not least because it fails to particularise what deceit allegations are made against each defendant, what representations each is alleged to have made and the facts and matters from which it is to be inferred that the relevant defendant knew the representations concerned to be untrue or was reckless whether they were true or false.

46. The assigned debt claim is said to be a claim to recover from "*... the First Defendant, or from the Stakeholders ... whether directly or indirectly the amount of US$23,178,890...*" Quite how the 2nd to 5th (or 6th) defendants could be liable for this sum given that the sums paid by way of legal costs by MWP is a fraction of that sum is not explained. It is possible that this is intended to be a damages claim limited to the sums actually received by each defendant on the basis of what is said in paragraph 9(d) and (e) but no where is that stated. The basis of this claim is said to be clause 2 of a document known in these proceedings as the "*Second Addendum*", which inserted a new clause into a Funding Deed, which MWP maintains has the effect of requiring all

sums recovered from MWP to be used first to discharge all monies advanced by Mr Sinclair before meeting legal costs claims and/or the apparent entitlement of Mr Sinclair to receive 30% of the recoveries made by Mr Emmott up to a maximum of £1.2m by operation of a signed memorandum dated 1 May 2020. There is nothing within the Particulars of Claim that refers to such a claim against any of the defendants. I refer in detail to these instruments later when considering whether the defendants are entitled to summary judgment on MWP's factual claim.

47. The Maintenance claim is for all sums received by any of the 2nd to 6th defendants on the basis that Mr Sinclair's funding was unlawful maintenance because Mr Sinclair had no lawful interest in the subject matter of the arbitration or litigation that followed. There is no claim to this effect in the Particulars of Claim.

48. In those circumstances, I conclude that it is not open to MWP to advance either the assigned debt or maintenance claims in the absence of an application to amend the Particulars of Claim, nor to advance as part of the costs recovery claim any cause of action other than a claim in unjust enrichment. Thus it seems to me the primary focus of the applications I have to determine must be the Particulars of Claim as they are but augmented by any particulars contained in the VFI that are relevant to what has been alleged in the Particulars of Claim

Applicable Principles

49. A court may strike out a statement of case if it " … *discloses no reasonable grounds for bringing or defending the claim …"*. In practice the distinction that matters between an application to strike out on this basis and application for summary judgment is that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case – see King v. Stiefel [2021] EWHC 1045 (Comm) *per* Cockerill J at 27, citing earlier Court of Appeal authority to that effect. In consequence, when considering a strike out application under sub paragraph (a) the facts pleaded must be assumed to be true.

50. In relation to pleading fraud, the principles are well established. In summary:

    i) A party is not entitled to a finding of fraud if the pleader does not allege fraud directly or if the facts on which he relies are equivocal – see Three Rivers District Council v Bank of England [2001] UKHL 16; [2003] 2 AC 1 *per* Lord Hope at paragraph 55;

    ii) An allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out - see Three Rivers District Council v Bank of England (ibid.) *per* Lord Hope at paragraph 55;

    iii) Where dishonesty is being alleged, the hope that something may turn up during the cross-examination of a witness at the trial does not suffice – see Three Rivers District Council v Bank of England (ibid.) *per* Lord Hobhouse at paragraph 160; however

iv) The court is not concerned on a strike out application with whether the evidence at trial will or will not establish fraud but only with whether facts are pleaded which would justify the plea of fraud. If the plea is justified, then the case must go forward to trial and assessment of whether the evidence justifies the inference is a matter for the trial judge – see JSC BM Bank v. Kekhman and others [2018] EWHC 791 *per* Bryan J at 44;

v) As Lord Millett stated at paragraphs 184-186:

> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

The most recent summary of the principles applicable to pleading such allegations is that by Arnold LJ at [23] in Sofer v Swissindependent Trustees SA [2020] EWCA Civ 699 in these terms:

> "(i) Fraud or dishonesty must be specifically alleged and sufficiently particularised, and will not be sufficiently particularised if the facts alleged are consistent with innocence: Three Rivers District Council v Governor and Company of the Bank of England (No.3) [2003] 2 AC 1.

> ii) Dishonesty can be inferred from primary facts, provided that those primary facts are themselves pleaded. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be pleaded: Three Rivers at [186] (Lord Millett).
>
> iii) The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence: JSC Bank of Moscow v Kekhman [2015] EWHC 3073 (Comm) at [20]-[23] (Flaux J, as he then was).
>
> iv) Particulars of dishonesty must be read as a whole and in context: Walker v Stones [2001] QB 902 at 944B (Sir Christopher Slade).

51. The principles applicable to an application for summary judgment are now well established and are those identified by Lewison J, as he then was, in Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), as summarised and approved by the Court of Appeal in TFL Management Services Ltd v Lloyds Bank Plc [2013] EWCA Civ 1415 in these terms:

> "26 … The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success …
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable …
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial" …
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents …
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial …
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should

> hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case …
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction …
>
> 27. … it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications … Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy …."

52. As I have said earlier, the only discernible cause of action that is pleaded is a claim in unjust enrichment, which is pleaded against the 1st Defendant alone. When such a claim is advanced, four broad issues arise being:

    i) Has the defendant been enriched;

    ii) Was the enrichment at the expense of the claimant;

    iii) Was the enrichment unjust; and

    iv) Are there any defences?

    see Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221, per Lord Steyn at 227.

53. The recovery of money in restitution is not a matter of discretion. As Lord Reed held in ITC v. IRC [2017] UKSC 29 at paragraph 39: " *A claim based on unjust enrichment does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied*." . Whilst the four headings referred to in the previous paragraph are not legal tests, it is nonetheless necessary to consider each separately in order to avoid " … *an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability* … " – see ITC v. IRC (ibid.) *per* Lord Reed at paragraph 41.

54. Where a party has made a payment pursuant to a court order, "… *the recipient's enrichment is justified by the court order, and so there is generally no prospect of the unsuccessful party recovering the benefit for as long as the order subsists* …" - see Goff & Jones: Law of Unjust Enrichment, 9th Ed., Paragraph 2-31. It has been the law for in excess of 140 years that a judgment cannot be challenged in a subsequent claim other than by a claim in equity to set aside the judgment concerned for fraud – see Sophia de Medina v. Grove and others (1846) 10 QB 166 per Lord Denman CJ at 171 and Takhar v. Gracefield Developments Ltd [2020] AC 450 per Lord Kerr at paragraph 44-45. This principle would apply to any claim by MWP for unjust enrichment against Mr Emmott.

55. Given that the costs orders in issue were all made against MWP and in favour of Mr Emmott and it is not alleged that any payments were made directly by MWP to any of the 2nd to 6th defendants, it is relevant to note that where " … *the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense* …" – see ITC v. IRC (ibid.) *per* Lord Reed at paragraph 41. No question of agency arises or could arise, but an attempt was made by Mr Dalby to suggest that any sums received by the 2nd to 6th defendants was money into which MWP had a proprietary interest. I return to that suggestion below.

56. In relation to the collateral challenge issue, the issues that arise in this case do not concern *res judiciata* estoppel because none of the defendants to this claim (apart from Mr Emmott), and none of the applicants, were parties to the claims or applications in which the challenged costs orders were made. In principle, a party to antecedent proceedings is entitled to claim against persons other than parties to the antecedent claim notwithstanding the outcome in the antecedent proceedings. So for example a disappointed claimant in the antecedent proceedings is fully entitled to bring a claim against his solicitors and counsel retained to conduct those proceedings on the basis that had they not acted negligently and in breach of contract the outcome would have been different and more beneficial to the claimant.

57. That said, the court retains a jurisdiction to control abuse of its processes – see Hunter v. Chief Constable of the West Midlands Police [1982] AC 529, where Lord Diplock summarised the court's powers as being:

> "… the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation

> before it, or would otherwise bring the administration of justice into disrepute among right thinking people."

58. The scope and ambit of this power has been explored in a number of authorities since then. It is not necessary that I set them all out. They were all considered in detail by Marcus Smith J (with whom the other members of the Court of Appeal agreed) in Allsopp v. Banner Jones Limited and another [2021] EWCA Civ 7. Having carried out that review, the judge set out the applicable principles at paragraph 44 and following. In summary:

    i) The jurisdiction to strike out proceedings as an abuse of process is an exceptional jurisdiction, enabling a court to protect its procedures from misuse;

    ii) An antecedent decision of a court exercising a civil jurisdiction is binding on the parties to that action and their privies in any later civil proceedings; but

    iii) If the subsequent claim is between a party to an antecedent claim on the one hand and persons other than parties to that claim on the other, which calls into question the outcome of the antecedent proceedings, then such proceedings may or may not be abusive but whether they are will not depend on any concept of re-litigation, which in its strict sense cannot apply to a subsequent claim is between different parties since as against those parties the issue has not been litigated at all; and

    iv) Following Secretary of State for Trade and Industry v. Bairstow [2003] EWCA Civ 321, in such a case, it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the antecedent claim if (a) it would be manifestly unfair to a party to the subsequent proceedings that the same issues should be re-litigated or (b) to permit such relitigation would bring the administration of justice into disrepute.

Parties' Submissions

59. The 2nd to 5th (and 6th) defendants submit that the claim should be struck out against them because (a) in the absence of a claim to set aside the challenged costs orders as having been obtained by fraud, these proceedings are an abuse applying the principles summarised above; (b) the Particulars of Claim disclose no realistically arguable cause of action; (c) if and to the extent that it is alleged that they or any of them are liable to MWP in unjust enrichment that is unsustainable because none were the direct recipient from MWP of any payment whether made by reference to the orders of which MWP make complaint or at all; (d) if and to the extent that MWP is asserting a claim in deceit, then manifestly it has not been pleaded or at least not to the standard required if a claim is to avoid being struck out applying the principles set out above; and (e) no attempt has been made to plead or support even by alleged inference a claim that any of the defendants had the knowledge necessary to support a deceit claim.

60. At one stage during the hearing, it was submitted by Mr Dalby on behalf of MWP that the defendants could be liable for negligent misrepresentation but it is not alleged that any contract was ever induced by what has been alleged nor is any discernible claim based on negligent misstatement to be found in the pleadings. I address that briefly below. Although it might have been thought that a claim based on an unlawful means

conspiracy was being advanced, Mr Dalby expressly disavowed any such claim so I need say no more about it.

61. MWP submits that the applications should fail because the basis of the claim is misrepresentation and is "*clearly put"*, as is the allegation that the representation "*… were false at the time, which is sufficient, regardless of intention or knowledge …"*. In addition, Mr Dalby maintained that MWP was entitled to maintain a tracing claim against the applying defendants as a means of avoiding the point that none of them received anything directly from MWP. In his written submissions, Mr Dalby submitted that:

i) The defendants had misconstrued the claim as "*… solely … a fraud claim against them*";

ii) The "*costs fraud*" claim was against the 1st defendant (and by implication not against the applying defendants);

iii) The claims against the 2nd to 5th Defendants concern the express or implied representation that the 1st defendant had a liability to them and that claim did not require MWP to prove either knowledge or dishonesty to succeed but merely a false representation that the 1st defendant was liable to pay his lawyers when the paying client was always Mr. Sinclair; and

iv) The claim against the 2nd to 5th defendants was not a collateral attack on the orders because " … *there is nothing to suggest that it was not right and proper for the court to make an order for costs against MWP, on the facts as presented* …"

Notwithstanding this formulation, Mr Dalby then refers to fraud at paragraph 39 of his skeleton, which he asserts is based " … *upon unlikelihood that D2-D5 could not have, or would not have overlooked the true meaning and effect of Mr Sinclair's role and involvement, throughout* …". He concludes at paragraph 43:

> "At the very least, C merely has to show that the representation is untrue. A realistic prospect of success is demonstrated by the prima facie case already established by:
>
> a. Mr Emmott's denial of liability for costs.
>
> b. Mr Sinclair's role and interest".

Mr Dalby submits that

> "If Mr Sinclair had an interest in the Max Shares, then his funding of D1's legal team is explained by his own interest. If he did not have an interest, then as D1 maintained that he did not, then Mr Sinclair's funding was champertous and maintenance. "

Mr Dalby concludes his written submissions by submitting:

> "It is clear that there is inspection and more disclosure to come, and that cross- examination will be key to the court getting to the truth, as to whether or not D1 had a liability to his lawyers. "

Discussion and Determination of Applications.

62. In my judgment the Particulars of Claim must be struck out and/or summary judgment entered for the defendants. My reasons for reaching that conclusion are as follows.

Strike Out based on Causes of Action alleged or Pleading

63. *Restitution*

First, the only cause of action that is discernible on the face of the Particulars of Claim is that made in unjust enrichment against Mr Emmott. and that has not been pleaded in any meaningful sense against any of the 2nd to 5th (or 6th) defendants. No other cause of action apart from restitution is anywhere identified in the Particulars of Claim whether against the applying defendants or otherwise. That of itself justifies striking out the claim against the 2nd to 5th (and 6th) defendants pursuant to CPR r.3.4(2)(a) in the absence of an application for permission to amend.

64. If I am wrong about that and paragraph 42 of the Particulars of Claim should be read as advancing a claim in restitution against the 2nd to 5th (and 6th) defendants, then that pleading is manifestly inadequate and should lead to the same outcome. My reasons for reaching this conclusion are as follows. First, any claim in unjust enrichment must engage with the four key issues identified in the authorities referred to earlier and how it is maintained that the claim can succeed when it is not and cannot be alleged that the 2nd to 5th defendants have been enriched by any payment made to them directly by MWP. If it was to be alleged that the sums received by the 2nd to 5th defendants was money in which MWP retained a proprietary interest (or was the traceable proceeds of such money) that would require to be fully and clearly pleaded. It has not been.

65. As to this last point, although Mr Dalby sought to argue for the first time orally that MWP had retained a proprietary interest in the sums that it had paid pursuant to the orders by reference to which this claim is advanced, that is an argument that was bound to fail not merely because it has not been pleaded (although it has not been) but because it is unarguable substantively in the absence of an order setting aside the costs orders concerned on the basis they had been obtained by fraud. Even if such an order was made, or MWP was otherwise able to contend that the orders were voidable for fraud notwithstanding such an order had not been obtained, it is highly implausible that the effect of such an outcome would result in MWP being able to assert a proprietary interest in the funds prior to that date or in any event to maintain a proprietary based claim against an indirect recipient such as the 2nd to 4th defendants or PS in the absence of knowledge that the sums received were the proceeds of what MWP alleges to the "*costs fraud*" – see by analogy the position that applies in relation to an unconscionable receipt claim as summarised in LIA v. Credit Suisse International [2021] EWHC 2684 (Comm) at [117]-[119].

66. It follows from these conclusions that the application to strike out under CPR r.3.4(2)(a) must succeed in relation to the claims against the 2nd to 5th (and 6th) defendants because

(i) no identifiable claim has been pleaded against them in the Particulars of Claim, (ii) if and to the extent that a claim in unjust enrichment has been pleaded against them in the Particulars of Claim then such a claim cannot succeed because the 2nd to 5th (and 6th) defendants would on this hypothesis be indirect recipients and MWP does not allege in the Particulars of Claim or VFI that it retained, and it did not retain, property in funds that it paid in obedience to the relevant court orders and cannot assert a retrospective propriety interest in such funds after receipt by the 2nd to 5th defendants at any rate in the absence of knowledge by those defendants that the sums received were the proceeds of the alleged "*costs fraud"*.

67. *Deceit*

It was conceded by the 2nd to 6th defendants that on an application of this sort I should accept that in principle <u>if the facts permit</u> it is realistically arguable that a claim in deceit could be advanced against a lawyer by a party to a claim who was not that lawyer's client who sought costs on behalf of a client in that litigation when that lawyer knew his client not to be entitled to the costs order sought applying the Indemnity Principle. I accept that concession subject to the point I made at the outset concerning the possibility that a claim may be abusive even though substantively arguable. That must be so as much in relation to a deceit claim as any other.

68. The real question is whether any realistically arguable claim in deceit has been pleaded against the applying defendants. No deceit claim has been pleaded against any of the defendants in the Particulars of Claim. No claim in damages of any sort has been pleaded against them in the Particulars of Claim. The only discernible claim pleaded in the Particulars of Claim is a receipt based unjust enrichment claim. That of itself makes it impossible for MWP to begin to advance a claim in deceit against any of the 2nd to 5th (and 6th) defendants in the absence of an application to amend and to do so by reference to a draft pleading that satisfies the requirements identified earlier in this judgment.

69. The claimant must plead and (at trial) prove a representation of fact. It is not alleged in the Particulars of Claim or VFI that the 2nd to 5th (or 6th) defendants made any express representations concerning Mr Emmott's liability to pay his solicitors when applying for costs. However, I accept that in principle representations may be made implicitly and be actionable and that it is realistically arguable that by applying for a costs order on behalf of a client, the barrister or solicitor applying impliedly represents that the party on whose behalf the application was being made is liable to pay his lawyers and meet the disbursements the subject of the costs claim. That of itself is not enough to establish a claim in deceit in the absence of an assertion that the lawyer making the application either knew that the client not liable to pay his lawyers and meet the disbursements the subject of the costs claim or was reckless as to whether that was so.

70. Such a claim is asserted albeit in very generalised and unparticularised terms within the VFI. As I have said, that is not a pleading but I accept that if the relevant ingredients of such a claim are to be found in the VFI it would be wrong to finally dismiss the claim without giving MWP the opportunity to apply for permission to amend. In truth however, the relevant ingredients of such a claim are not to be found in the VFI.

71. First, if a claim in deceit is to be made against the 2nd to 5th defendants, it is necessary to identify each costs order under challenge and then in relation to each plead (a) who it is alleged made the implied representation relied on, by what means and to whom its was made, (b) the terms of the implied representation allegedly made, (c) the facts and matters relied on from which it is alleged the implied representation is to be implied, (d) that it is alleged the representation was false, (e) any facts or matters relied on to support the contention that the representation relied on was false, (f) assuming it is so alleged, that the representation was made knowing it to be untrue or recklessly as to whether it was true or false, (g) all the facts and matters relied on from which it is alleged that deceit in this sense is to be inferred, (h) what if any reliance was placed on the representation, by whom and with what result and (i) what loss is claimed to have been caused. No attempt has been made to grapple with these requirements in the VFI. It is simply not good enough to make generalised allegations of wrong doing against the defendants without descending to this level of detail applying the principles set out earlier in this judgment. I fully accept that some of this may be repetitious and that it may be possible to make clear that the same allegation is made against the same defendant in relation to more than one of the costs orders challenged. However unless this level of detail is grappled with the principles that apply to the pleading of fraud set out earlier cannot be and are not complied with and none of the defendants can know the case they must meet and there will be no clear agenda for the subsequent stages in the litigation process or for the trial. In any event, as I have said, unless and until an application to amend is made, even if this material could be found in the VFI. This is so for the reasons given previously and because it is only if and when such an application is made that issues like limitation can be considered.

72. Subject to the point that a deceit claim has to be pleaded with full particularity in the Particulars of Claim, the hurdle on which the defendants' deceit claim most clearly founders is on the need to show that the representor – one or more of the 2nd to 5th defendants in relation to one of more of the orders said to have been obtained by fraud - knew that whatever implied representation is relied on was false, or did not believe it to be true, or was reckless as to whether it was true or false. As I have explained if such an allegation is to be made then it is necessary for the pleader to plainly and distinctly allege fraud against the individual against whom such an allegation is to be made and then set out full particulars of all the primary facts and matters from which the claimant will invite a court at trial to infer deceit. Merely to allege fraud or dishonesty without giving the particulars is not enough and justifies the striking out of the allegation. To set out primary facts without expressly pleading they will be relied on as the foundation of a submission that a representation was made deceitfully will not be enough. It is against that background that the Particulars of Claim and VFI have to be examined.

73. In paragraph 23 there is an allegation that the second and fourth defendants signed false statements of truth. That is ambivalent because a statement can be false without being deceitful. It depends critically on the state of knowledge of the party who in this case signed the statement of truth. The allegation itself says nothing about the state of knowledge of the person who signed the statement of truth since that person could have signed the statement of truth believing it to be true and not knowing the allegedly true circumstances.

74. No attempt has been made to plead the facts and matters on which the claimant will rely to support the contention that the 2nd or 4th defendants signed the statements of

truth deceitfully. As I said earlier, if (as alleged in paragraph 24 of the Particulars of Claim) the 1st defendant was impecunious, that does not support the proposition that in signing the relevant statements of truth either the 2nd to 4th defendants falsely represented that he was liable to pay his legal costs much less that they did so deceitfully. Precisely similar considerations apply to the reliance placed by MWP on what PS told the Court of Appeal on 12 May 2016, pleaded in paragraph 29 of the Particulars of Claim. On its face, it was an acknowledgement that Mr Emmott was impecunious and that Mr Emmott's lawyers were dependent for payment on the sums recovered by way of costs from MWP. That is not consistent with knowledge on the part of PS that Mr Emmott had no liability. Indeed, the submission is actually entirely consistent with a belief on the part of PS that Mr Emmott was liable but could not afford to pay. It does not support the inference that PS, or Mr Robinson who instructed him, knew that Mr Emmott was not liable to pay his lawyers and does not support either the inference that they knew Mr Sinclair was liable to pay.

75. The facts and matters alleged in paragraph 27 of the Particulars of Claim do not support such inferences either for at least two reasons. First, the notion that a firm of solicitors would commence proceedings against the 1st defendant to recover legal fees alleged to be due from him when in fact they knew there was an agreement or understanding or otherwise that he had no such liability is inherently fanciful. It would have to be asserted that the proceedings were a sham designed to disguise the true position if that was to be alleged. No such allegation has been made, either in the Particulars of Claim or the VFI, is inherently improbable and suffers from the difficulty that there is no obvious reason why at that stage the solicitors would wish to commence such a sham claim. Secondly, what Mr Emmott asserted in answer to those proceedings cannot be viewed out of context. That context includes that the proceedings were compromised with a Tomlin Order under which Mr Emmott acknowledged that he was liable for the vast majority of the sums claimed. Once that is understood then the initial response by Mr Emmott's that MWP relies on is ambivalent. Viewed as a whole the commencement, defence and ultimate compromise of the claim simply cannot support the inferences of knowledge and dishonesty that MWP asserts. I refer to this issue in more detail below when considering the summary judgment application.

76. Paragraph 28 is an allegation based on an alleged conversation between Mr Wilson and the 1st defendant. It cannot form the basis of any allegations against the 2nd to 5th (and 6th) defendants for two reasons. Aside from the fact that it is an obviously unparticularised allegation, the key point is that it does not support the allegation of deceit on which MWP seeks to rely applying the test referred to earlier. It does not support the inference that the 1st defendant is not liable to pay his lawyers for defending him applying that test or that any of the 2nd to 5th (or 6th) defendants knew that to be so. It is reflective if anything only of a personal obligation to meet costs bills. It will be necessary for me to refer to the agreements, invoices and the like, which are referred to in paragraphs 31-33 of the Particulars of Claim in more detail later, but none of those factors support the assertion that any of the 2nd to 5th defendants knew that Mr Emmott was not liable to his solicitors applying the test referred to earlier. Distribution of sums received on account of costs to those who were apparently entitled to be paid for their professional work does not support the inference of deceit at the heart of this case applying that test and paragraphs 34 and 37 are simply more generalised and unparticularised allegations of wrong doing.

77. Critically no allegation of deceit is made in the Particulars of Claim and in consequence no allegation is made that the facts and matters to which I have referred are relied as the basis of an inference of knowledge and dishonesty is pleaded either.

78. I turn now to the VFI in order to see whether there is anything pleaded there that is capable of supporting the necessary allegation of knowledge that must be made good if a deceit allegation is to be permitted.

79. Paragraph 8(a) alleges that representations were made that were fraudulent but does not specify by whom the representations are alleged to have been made, to whom or with what alleged causative outcome or in respect of which orders.. It is elementary that if a deceit claim is to be advanced, the claimant will have to plead and prove reliance. No attempt has been to do so in any particularised form. The alleged representations are themselves unparticularised. What is material for present purposes however is anything within the VFI that constitutes a pleading of particulars in support of an inference of deceit in relation to the implied representations on which MWP apparently relies. There is nothing I can see that is properly identified as being relied on as inferential support of knowledge supporting a deceit allegation against any of the 2nd to 5th defendants.

80. Returning to Mr Dalby's oral submissions, he maintained time and again that the focal point of MWP's case is that the implied representations on which it relied were "*untrue"*, relying on what was said in paragraphs 58 and 67 of the VFI. In paragraph 58, what is now said to be the operative representation is pleaded as being:

> "On diverse dates when applying for an order for costs in the First Defendant's favour, the First Defendant and the [2nd to 5th defendants] expressly or impliedly represented to the Arbitral Tribunal or court and to MWP, or applied on the basis, that the First Defendant had a liability to the Team in respect of costs and in the amount of costs claimed or certified (the "Liability Misrepresentation")."

At Paragraph 67 of the VFI it is pleaded that:

> "The Liability Misrepresentation was made intentionally and either made:
>
> a. fraudulently in circumstances where the First Defendant and Team made it knowingly, without honest belief in its truth or recklessly, or careless whether it be true or false;
>
> b). negligently or unlawfully in circumstances where the First Defendant and Team owed a duty of care, a duty of candour and openness to the Court and to MWP, when bound by rules of coral, law and natural justice,"

The allegation of fraud in paragraph 67(a) is bound to fail for the reasons that I have identified above. It is not pleaded in the Particulars of Claim and it is not pleaded with anything approaching the level of particularity required even when taking the Particulars of Claim and VFI together. At one point Mr Dalby argued that once it had been shown that the implied representation was false (i.e. factually incorrect) then it

was for the defendants to show they were not acting fraudulently. This is entirely unarguable. What was required was for each order or possibly cluster of orders relied on to be identified, then who it is alleged made the alleged representation, then that the alleged representation was false and made deceitfully with proper particulars then being given to support the deceit allegation. No attempt has been made to address these requirements. There are a series of unconnected facts pleaded in the Particulars of Claim but no allegation of fraud and in the VFI an allegation of fraud is made but no attempt has been made to connect that allegation to the (or any of the) primary facts which it is alleged supports the allegation of knowledge that renders the alleged representation not merely false but known to be so.

81. In my judgment the allegation of deceit has manifestly not been pleaded to even the level necessary to avoid a strike out. Even treating the Particulars of Claim and VFI as one, no attempt has been made to deal with any of the essential ingredients in a manner that even attempts to comply with basic principle.

82. *Negligence and Unlawfulness*

The alternative plea in paragraph 67(b) of the VFI is that the representation on which reliance is placed was made negligently and unlawfully. Neither of these allegations is pleaded in the Particulars of Claim. The allegation that the representation relied on was made unlawfully takes matters no further.

83. So far as the negligence allegation is concerned, a claim in negligence for misrepresentation other than one that is alleged to have induced a contract (not what is alleged here) must be pleaded so as to satisfy the requirements of a claim in negligent misstatement. Not the slightest attempt has been made to set up such a claim based as it is primarily at any rate on an assumption of responsibility and in this context on an assumption of responsibility by a lawyer to someone other than that lawyer's client in a litigation context. No claim of such a sort appears in the Particulars of Claim and appears only in the skeletal allegation referred to above in the VFI. In those circumstances, it is not open to MWP to rely on such an allegation to avoid the claim being struck out, when no application has been made to amend the Particulars of Claim.

84. *Maintenance and Champerty*

Maintenance and champerty cannot arise because there is no mention of it anywhere in the Particulars of Claim and no application has been made to amend the Particulars of Claim so as to raise such an allegation.

85. In any event, the allegation that any agreement between Mr Sinclair or any entity controlled by him and Mr Emmott would be void on that basis, if that is what is being alleged, is unarguable unless it can be shown that the agreement is one that is likely to undermine the administration of justice having regard to the nature of the agreement itself and the circumstances in which it was made – see Simpson v. Norfolk and Norwich University Hospital NHS Trust [2012] QB 640 *per* Moore-Bick LJ at [21]. As Moore-Bick LJ made clear such an agreement will generally not offend against public policy. If such an allegation was to be made therefore, it is necessary to plead the facts and matters that lift what was agreed out of the norm. No attempt has been made to comply with this requirement even in the VFI.

86. There has been no relevant assignment of any cause of action in this case. Mr Emmott was a party in each of the claims where the costs orders are under attack as I explain in more detail below in relation to the summary judgment applications. There is at best an arguable basis for contending that part of the proceeds of the litigation recovered by Mr Emmott against MWP has been assigned but that is immaterial. That does not support an allegation of maintenance and champerty – see Simpson v. Norfolk and Norwich University Hospital NHS Trust (ibid.).

87. In any event the maintenance and champerty allegation is of no relevance as between MWP and the 2nd to 5th (or 6th) defendants in the absence of an allegation of unlawful means conspiracy, which Mr Dalby maintained was not being pursued.

88. *Abuse of process – CPR r.3.4(2)(b)*

In those circumstances it is not necessary that I consider the collateral challenge issue further at this stage. Had it been necessary to do so, I would have considered that whilst it was arguable that these claims engaged both limbs of the test identified in the authorities referred to earlier (and particularly the second limb, in the absence of an application to set aside the orders the subject of these proceedings on the ground they had been obtained by fraud), it was not so obviously so as to justify striking out the claim on that basis alone. The issues that arise are not ones that can or should be resolved on a summary application of this sort. Unfairness would require a careful factual investigation not possible on an application of this sort and the question whether the claim it would bring the administration of justice into disrepute is one that may depend on the outcome of such a factual enquiry and in any event ought to be investigated in depth at a trial in all the circumstances. This is all the more so because the issue that arises in this case is not one that has arisen before.

89. *Strike Out Applications - Disposal*

Returning to the Particulars of Claim, they must be struck out as not disclosing any "*… reasonable grounds for bringing … the claim…"* under CPR r.3.4(2)(a) for each and all of the reasons set out above. However, had that not been so, it would not have been appropriate to strike out the claim on the ground of abuse under CPR r.3.4(2)(b), applying the principles set out above at this early and summary stage.

Summary Judgment

90. The defendants submit that this claim ought to fail in any event on the basis that MWP has a no better than fanciful case on the central factual premise of its case namely that Mr Emmott was not liable to pay his lawyers and the only party obliged to pay his legal costs was Mr Sinclair.

91. I agree that the evidence available does not support at a factual level the allegations that the claimant makes even to the level of reasonable arguability. It follows therefore that even if I am wrong in the approach I have adopted on the legal and pleading issues relevant to the strike out application, the claim is bound to fail and therefore the 2nd to 5th defendants are entitled to summary judgment.

92. The allegations made are inherently fanciful. If solicitors and leading counsel knew that their client was not liable to pay them, it is blindingly obvious that they would have

taken steps to correct that and would not have adopted the practice of lying to the arbitral tribunal and court since the inception of this litigation. Further, whilst Mr Sinclair had a legitimate interest in funding Mr Emmott's defence in order to preserve what he claimed to be his interest in the Max shares and cash, that was not the sole issue in dispute between Mr Emmott and MWP. That being so it is also inherently fanciful to think that Mr Sinclair would take on the sole and exclusive obligation of paying Mr Emmott's lawyers without ensuring that he had lawful recourse for recovering his outlay in the event that Mr Emmott was successful. It is obvious that could be achieved by the entirely conventional route of lending, whereas it is equally obvious that incurring a primary obligation would defeat such an outcome in the absence of fraud. At no stage has MWP been able to explain why Mr Sinclair would want to adopt such a course or why Mr Emmott would wish to agree to it or having agreed to it then to give dishonest instructions to his lawyers but in any event why any of the 2nd to 5th defendants would wish to endanger their careers and livelihoods and expose themselves to potentially massive claims which some or all of them might not have been able to insure against (being claims in fraud) by dishonestly applying on countless numbers of occasions for costs orders on behalf of Mr Emmott against MWP which they, or one or more of them, knew he was not entitled to on countless occasions over the years since this litigation began.

93. Whilst the inherent implausibility of what is alleged by MWP may not be a complete answer, it provides a powerful contextual backdrop against which the written material that MWP relies on must be examined even on an application of this sort, applying the 4th and 6th principles identified by Lewison J set out earlier. This is not about conducting a mini trial; it is about asking whether the material on which MWP relies establishes a better than fanciful case that the 2nd to 5th defendants conducted themselves as MWP apparently wishes to allege, but as I have explained has not yet pleaded in any coherent way.

94. The confusion in the mind of Mr Wilson about this issue first surfaced in October 2013, in the claim then numbered 2013 Folio 400. In his second statement provided in those proceedings he stated

> "**Mr Emmott is not liable for the fees and costs of Kerman and Counsel**
>
> 6. I have reasons to believe that Mr Emmott has no liability for the fees and costs listed in Kerman's statements of costs (including of both Kerman themselves, as well as counsel), as will be explained in more detail below. Instead, in reality Mr Thomas Ian Sinclair, a resident of Bahrain ("Mr Sinclair"), is the only person liable for those fees and costs.
>
> 7. In March 2007, Mr Emmott claimed to be unable to fund the costs of the arbitration and the ancillary proceedings, and accordingly, requested MWP's consent to third party funding from Mr Sinclair, pursuant to a funding deed (see Mr Robinson's Third Witness Statement of 26 March 2007, filed in this Court, at pages 1-8).

> 8. A year later, Mr Emmott himself confirmed in his 8th UK affidavit of 19 March 2008 filed in this Court, at pages 9-14, that Mr Sinclair was still his sole funder, and that the funding had been increased, and exhibited an Addendum No.1, dated 13 March 2008, to the funding deed, which I understand has been further varied and amended, but details and copies of which have not been disclosed."

The statement went on to refer to the claim by Kermans against Mr Emmott for payment, Mr Emmott's defence and settlement by a Tomlin Order all as set out in more detail earlier in this judgment. Aside from the fact that this point has been live since at least 2013, the point that emerges from this formulation is a complete failure on the part of Mr Wilson to understand the difference between receiving funding from a third party and being liable as primary obligor to pay the fees of the solicitors and counsel. As I have explained, the litigation between Kermans and Mr Emmott does not assist Mr Wilson given the terms of the Tomlin Order.

95. The correspondence that is available all points clearly towards there being a conventional lending arrangement concerning legal costs between Mr Emmott and Mr Sinclair, at least so far as was known to Mr Robinson. As long ago as 24 April 2007, Mr Robinson was in correspondence with Mr Sinclair's advisor in which he stated in a letter of that date:

> "Mr Sinclair has agreed to fund Mr and Mrs Emmott's Defence Costs, as defined in the Loan Agreement ("the Deed"), up to a maximum of £250,000, payment to be made in tranches if required. I hereby apply for payment of a first tranche amounting to £135,646. This sum will be used to pay all outstanding fees for Counsel, for which my firm is responsible, and to pay my firm's two invoices dated 15th September 2006 and 20" November 2006.
>
> Under clause 2 of the Deed such written evidence, that the funds are being applied for the purpose of paying for the Defence Costs, shall be provided as may be required by Mr Sinclair …"

The letter then went on to identify each outstanding fee note from counsel (of which there were 4 of which only one was in respect of PS) and invoice from Mr Robinson's firm. The letter explained that further sums would fall due after 20 November and concluded:

> "If you need any further information, please let me know. Payment of the sum of £135,646 should be made either by cheque or by transfer to my firm's client account, the details of which are: … "

And there then followed the usual banking information concerning account and sort number and the bank at which the account was held.

96. The funding deed is available only in draft in these proceedings and is exhibited to Mr Robinson's last witness statement. In the substantive proceedings between MWP and

Mr Emmott a signed version has been obtained by MWP from Mr Sinclair's trustee in bankruptcy following the assignment I referred to earlier but is not in evidence in these proceedings. As drafted, in so far is material for present purposes it provided:

> "2. **Defence Costs**
>
> 2.1 Mr Sinclair will fund the Defence Costs up to a maximum amount of £250,000.
>
> 2.2 Subject to clause 2.1 above, Mr Sinclair will transfer the Defence Costs (either in a lump sum or in tranches, as required) into the client account held in the name of the solicitor or firm of solicitors for the time being acting for Mr and Mrs Emmott in the Proceedings, save that (for the avoidance of doubt) nothing in this Deed shall require Mr Sinclair to pay the Defence costs directly to Mr and Mrs Emmott or to either of them.
>
> 2.3 Mr Emmott shall provide such written evidence as may be required by Mr Sinclair which is consistent with maintaining any claim for legal professional privilege which Mr and Mrs Emmott may have, to demonstrate that the funds transferred pursuant to clause 2.2 above have been used for the purpose of paying for the Defence Costs.
>
> 3. **Security**
>
> 3.1 Within 90 days of execution of this Deed, Mr Emmott shall procure that a second legal charge will be granted in favour of Mr Sinclair in a form acceptable to him over the property known as 4 Chelwood Vachery, Millbrook Hill, Nutley, East Sussex TN22 3HQ by way of security in respect of sums payable pursuant to this Deed.
>
> 3.2 Mr Emmott undertakes to obtain all necessary consents to the grant of the charge referred to in clause 3.1 above, including (without limitation) consents from Mrs Emmott and Barclays Bank Pic."

The sums were to be repaid by Mr Emmott on 30 days notice to do so from Mr Sinclair – see paragraph 5.1 of the Deed. Interest was payable on the sums outstanding at the rate of 8.25% and in the event that the sums outstanding were not repaid as provided for by clause 5.1, the sum outstanding was to carry interest at 1 year LIBOR to be accrued daily. This deed is referred to in "*Addendum No.1 to the Funding Deed dated 21 May 2007*". The Addendum recites at recital C that under clause 2.1 of the Deed, Mr Sinclair had agreed to fund Defence Costs up to a maximum of £250,000. The sum reflects what is in the draft deed exhibited to Mr Robinson's statement and the phrase "Defence Costs" is a defined term within that deed. The Addendum altered the meaning of that phrase, provided for Mr Sinclair to advance the further sum of £147,500 by way of further funding of the Defence Costs as defined and provided that otherwise the terms of the Deed continued to apply. The Addendum was signed by all relevant parties and dated 13 March 2008.

97. I am satisfied that the deed referred to by Mr Robinson in his letter quoted above is the Deed a draft of which is exhibited by Mr Robinson. Indeed in other proceedings between Mr Emmott and MWP that has been common ground. Whether it was dated as set out in the Addendum does not matter for present purposes. The documents when read together do not support the allegation that an agreement, arrangement or understanding was reached between Mr Robinson (or PS) or any of the other 2nd to 5th defendants with Mr Sinclair that he was to become the or even a primary obligor in respect of Mr Emmott's Defence Costs. The documents are entirely consistent with the loan being to Mr Emmott with Mr Emmott being obliged to repay what was provided on 30 days notice to do so from Mr Sinclair within interest accruing at a significant rate in the meanwhile.

98. Mr Robinson exhibited copies of invoices rendered by his firm that were addressed by his firm to Mr Emmott. Critically for present purposes the date range for the invoices extends beyond the dates of both the Deed (assuming it to have been dated as set out in the Addendum) and the Addendum, as well as before. The date of the last invoice from Mr Robinson is dated 20 September 2012.

99. Mr Robinson ceased acting for Mr Emmott through his own practice the following month – see paragraph 9(i) of his witness statement. The invoices produced cover the whole of the period that Mr Robinson acted for Mr Emmott through his own practice. It is entirely inconsistent with the notion that Mr Robinson regarded Mr Sinclair as his client or as the person responsible for meeting Mr Emmott's legal costs that Mr Robinson should be sending invoices to Mr Emmott. That conduct is entirely consistent with the arrangements being those referred to in the draft Deed and Addendum. In order to avoid that conclusion it would be necessary for MWP to plead and prove at this hearing to a realistically arguable level that these documents were all sham. There is nothing on the face of this material that could lead even arguably to such a conclusion. As I have said the commencement of proceedings against Mr Emmott is consistent with Mr Emmott having the liability to pay his defence costs.

100. I have considered the proceedings brought against Mr Emmott already that culminated in the Tomlin Order sealed on 15 January 2010. MWP maintains that Mr Emmott's defence in those proceedings (brought by the 4th defendant) provides evidence that it is at least realistically arguable that in truth the only individual obliged to pay for Mr Emmott's legal expenses was Mr Sinclair. As will be apparent from what I have said already and from what I say below, there is no evidence of any retainer being entered into with Mr Sinclair to that effect or of any other arrangement to similar effect. In my judgment, Mr Emmott's defence even when viewed in isolation does not have that effect. In paragraph 2 of his defence, Mr Emmott "*... admits that he retained the Claimant ...*". This is not an assertion of a retainer by Mr Sinclair. At Paragraph 5, Mr Emmott asserted that:

> "At all material times, the Claimant was aware that the Defendant was not personally able to fund any fees and disbursements to be charged or incurred by the Claimant … and that such fees and disbursements would be paid by a third parry."

This is not a denial of liability but an assertion that the solicitors were aware that Mr Emmott could not afford to pay and was only able to pay with the support of the third party funder there referred to. The basis of the defence was in paragraph 6, which pleaded:

> "It was a term implied in the Second Retainer that all fees and disbursements … would be paid pursuant to an agreement to be entered into between the Claimant and the third party providing funding for the Defendant's legal fees and that the Defendant would not be personally liable for such fees and disbursements to the Claimant."

And at paragraph 7, he acknowledges in effect that no such agreement was ever entered into because he pleads:

> "7. If the Defendant had been aware that no such funding agreement would be agreed by the claimant, the Defendant would not have retained the claimant …"

Thus in paragraph 7, as in the earlier paragraphs, Mr Emmott accepts that it was he who retained the 4th defendant not Mr Sinclair. It is nowhere alleged in the pleading that any such agreement of the sort contemplated in paragraph 6 was ever entered into and the implication of such a term is implausible applying conventional legal principles. In any event however, as I have said the proceedings were settled by a Tomlin Order in which Mr Emmott undertook personally to pay about 80% of the sums claimed. It provided for the payment by instalments of (a) sums agreed to be due to the 4th defendant and (b) sums due in respect of counsel's fees including fees due to PS. It provided by paragraph 2 of the schedule to the order that the charging order previously obtained would remain in place as security and by paragraph 3 that in default of any payment, the whole of the sum outstanding would be come due and Mr Emmott

> "… irrevocably consents to the lifting of the stay of the Proceedings and to the Claimant entering judgment by consent against the Defendant in a sum equal to the amount of the Costs then outstanding (after deducting any sums paid pursuant to paragraph 1 above) plus the Claimant's costs of and incidental to entry of such judgment."

In my judgment therefore the defence provides a no more than fanciful basis for asserting that it was only ever Mr Sinclair that was liable for Mr Emmott's costs but in any event when the defence is read together with the Tomlin Order by which the proceedings were commenced the case based on those documents becomes plainly fanciful, particularly when read with the other material to which I have referred to above and below.

101. The fourth defendant acted for Mr Emmott from or shortly after the date when Mr Robinson ceased acting for him through his own firm. This followed Mr Robinson starting to provide legal services as a consultant to that firm either individually or via the 3rd defendant. Thereafter Mr Emmott was represented by the 4th defendant until November 2020, when Mr Robinson ceased practice as a solicitor. This change of

representation resulted in a client care letter from the 4th defendant, which is in standard terms. Its opening paragraphs reads:

> "As a result of Michael Robinson joining our firm as a consultant, and his continuing to act for you, we are providing you with our firm's retainer and terms and conditions of business, as these will be the terms and conditions which will apply going forward. Michael will continue to work on this matter, but please note that I shall be the person with responsibility for the matter. I am an Associate Partner. The Partner with ultimate responsibility for the work done is Peter Babb, the head of the litigation department.
>
> You are already familiar with our terms of engagement, but as these are updated periodically, I enclose our current Terms and Conditions of Business. An updated copy of the Terms and Conditions is available for inspection on the firm's website. Any future instructions undertaken by the firm will be on the basis of the Terms and Conditions and charging rates as updated from time to time, unless otherwise agreed in writing.
>
> The Terms and Conditions, together with any engagement letter, form our standard client agreement upon which we intend to rely. For your own benefit and protection you should read these documents carefully before continuing to instruct us. If you do not understand any point, or have any questions, please ask for further information. … "

The 4th defendants' client ledger identifies "*Mr John Emmott*" as being the client and contains no reference to any other person or individual being a or one of the clients. More significantly it records credits to the account from Mr Emmott and from third parties including Sokol. This is entirely consistent with the position being as the 2nd to 5th defendants allege and inconsistent with what MWP allege.

102. The same point arises. If the arrangements were as MWP alleges then this letter and the ledger would have to be at least realistically arguably a sham. There is no material that supports such a conclusion. On its face it is consistent only with the retainer being one between Mr Emmott at the 4th defendant. The point I made much earlier in this judgment arises: why would experienced solicitors such as Mr Robinson from 2007 and the 4th defendant thereafter participate in what would be a fraud on the court at grave risk to their professional futures and go to the trouble of creating what on MWP's case must be the wholesale generation of sham documentation across literally decades when there was absolutely no reason for doing so and when the arrangements could be managed entirely conventionally.

103. In paragraph 28 of its Particulars of Claim, MWP alleges that:

> "In numerous and various meetings in 2015 and 2016 the First Defendant disclosed, informed and stated to the Claimant, and on numerous occasions that all of the Second to Seventh Defendants, including Mr Sinclair were his "fellow

> stakeholders" in the arbitration and litigation with and against the Claimant, and that, accordingly his "hands were tied" and that he had agreed to pass on and to share (whether directly or indirectly) all and any costs, monies or assets received from MWP with them as his "fellow stakeholders" and, effectively, partners."

Aside from there being nothing apart from assertion to support this contention and that Mr Emmott has provided a witness statement in which he denies any such conversations, the real point is that even taken at face value what is alleged does not support the contention that Mr Emmott had no liability for his own legal fees and it was only Mr Sinclair who had any such liability. What is alleged is consistent with there being a funding arrangement and possibly other liabilities owed by Mr Emmott to Mr Sinclair. When viewed in the round with the other material to which I have referred, this assertion does not elevate MWP's case above the fanciful. I have already addressed PS's comments in the Court of Appeal in 2016. What PS said then is not consistent with what MWP alleges in these proceedings and is consistent with the position being as asserted the 2nd to 5th defendants – namely that Mr Emmott is and always was liable to pay his lawyers and did so by obtaining funding from third party funders.

104. Finally some reliance is placed by MWP on Addendum No. 2 to the funding deed ("second addendum"). In my judgment that reliance is entirely misplaced. First as the recitals to the deed makes clear, Mr Sinclair has provided funding of the Defence Costs, which to the date of that deed were said to total £1.265m odd. The terms of the recitals are entirely consistent with both the initial funding deed and the first addendum to it. Secondly, and consistently with the terms of the initial funding deed and the first addendum, the second addendum is made between Mr Emmott and Mr Sinclair, not any of the 2nd to 5th (or 6th) defendants. Thirdly it does not suggest that the funding has been provided by Mr Sinclair as primary obligor or as anything other than a lender. Whilst the language of the second addendum does not say anything about that expressly, again the document cannot be read in isolation. It is expressly an addendum to the initial funding deed and as I have explained that makes clear that what is being advanced is a secured loan attracting interest and repayable on 30 days notice. As clause 4 of the second addendum makes clear, the terms of the initial funding deed as amended by the first addendum continue to apply other than as varied by the second addendum.

105. MWP relies on clause 2 of the second addendum, which inserts two new clauses into the funding deed being:

> "There shall be new Clauses 5.1(A) and 5.1(B) of the Funding Deed as follows:
>
> 5.1(A) Any recovery made by Mr Emmott from MWP in or arising out of the Arbitration Proceedings, including the security for costs pledged by MWP in the Arbitration Proceedings, is to be applied first in repayment of the amounts advanced by Mr Sinclair pursuant to the Amended Funding Deed and this Addendum, before being applied by Mr Emmott for his own benefit or for the purpose of paying other sums then owing by

> him to others, including sums owing by Mr Emmott to his legal advisors.
>
> 5.1(B) For the avoidance of doubt, repayment by Mr Emmott of the loan made under both the Amended Funding Deed and this Addendum does not include any element of profit by Mr Sinclair."

MWP maintains by reference to clause 5.1, that " … *D1 has assigned all, or more than, all his alleged recoveries from the MWP/Emmott Litigation, indicating that he did not have an interest in the subject matter in the first place …*" – see paragraph 59(c) of Mr Dalby's skeleton submissions. He adds at paragraphs 60-61:

> "60. On 12.02.10 by the Second Addendum to the First Funding Deed, all monies recovered and recoverable from MWP were required to be paid to Mr Sinclair, and could not be used or enjoyed by D1, and/or used to pay any legal costs, including any alleged costs of D2 –D6..
>
> 61. Subsequently, and as late as 2018 in the first instance, D1 gifted, transferred and assigned to Mr. Sinclair all of his rights, title, interest and benefits in that part of the arbitral award on quantum amounting to £1,316,396.24p on 03.12.18, pursuant to a Deed of Assignment of 26.11.18, and to £150,072 on 03.12.18, through the Deed of Addendum of 30.11.18, in partial satisfaction of MWP's judgment debts then owed by Mr Sinclair."

106. In my judgment this is misconceived. First, as I have said already, it ignores the effect of the funding deed and first addendum with which the second addendum has to be read. Secondly, it ignores the fact that the scheme of the deed and its addenda is to facilitate and record lending. Thirdly the terms of the second addendum in the recitals and clause 1 are entirely consistent with the sums advanced being loans and fourthly that point is emphasised by clause 4 which maintains in place all the terms of the finding deed and first addendum other than to be the extent varied by clause 2 of the second addendum. Fifthly and critically, MWP's construct ignores in its entirety clause 5.2, which refers in terms to the repayment of a loan. More fundamentally, however, clause 5.1 does not have the effect for which MWP contends. It provides simply that all recoveries are to be applied first to discharge the sum lent by Mr Sinclair or entries he controls before any part of the recoveries can be used by Mr Emmott for his own purposes. Mr Emmott has not assigned anything: he has entered into a contractual obligation as to how any recoveries from MWP are to be expended. The agreement contained in clause 2 of the second addendum does not even arguably support the proposition for which MWP contends namely that by entering into the second addendum Mr Emmott was thereby " … *indicating that he did not have an interest in the subject matter in the first place…*" That is unarguable.

107. Paragraph 61 is likewise unarguable. In summary when Mr Sinclair was threatened with bankruptcy proceedings by MWP, Mr Emmott entered into an agreement with Mr Sinclair whereby he assigned some of what he was entitled to recover under the arbitral awards from MWP so as to enable Mr Sinclair to then assign that benefit to MWP in order to discharge his liabilities to MWP. MWP agreed to this course. Those arrangements demonstrate that Mr Emmott was indebted to Mr Sinclair and discharged

some or that indebtedness by entering into the assignment I have referred to. It is therefore and to that extent consistent with the litigation funding being a loan as in turn is consistent with the terms of the finding deed and first and second addenda to it.

108. The other document relied on by MWP to support its case theory is a letter dated 1 May 2020 from Mr Emmott to Mr Sinclair. It set out various figures as to what Mr Emmott was maintaining he was entitled to recover and then continued:

> "This letter is to record that I recognise, as one of my litigation funders for my costs of the Arbitration, your interest in the Arbitration proceedings and the recoveries I make from MWP by way of principle, costs and interest that I recover and I acknowledge that you have an enforceable interest in 30% of the total recoveries I make from MWP in the proceedings up to a maximum of £1,200,000."

Quite how this document can be said to be consistent with Mr Sinclair being the exclusive obligor in respect of Mr Emmott's legal costs is unclear. With respect the explanation contained in MWP's skeleton submissions on this issue is incoherent. In this regard, I should make clear that in putting forward what was said, Mr Dalby was acting on Mr Wilson's instructions. What is said at paragraph 63 of MWP's skeleton on this document is:

> "… Mr Sinclair's was entitled to 30% of "*total recoveries"* pursuant to the Arbitration from MWP "*by way of principle, costs and interest*", up to a maximum of £1,200,000, as recorded in the signed memorandum of agreement/letter, dated 01.05.20, recognising the vesting and existence of that entitlement, albeit from a date unknown, and previously undisclosed. "

109. I am satisfied that none of this is at all relevant to the issue of fact that arises on this claim namely MWP's case that Mr Sinclair was the exclusive obligor responsible for Mr Emmott's legal costs.

110. That PS entered into two conditional fee agreements also provides no support for MWP's case that it was only ever Mr Sinclair who was liable for the costs of defending Mr Emmott. First, each agreement was entered into by PS with Mr Emmott. If the arrangements were as alleged by MWP no such agreement would have been necessary or appropriate. Mr Sinclair would have been liable to meet Mr Emmott's defence costs. Alternatively, if a conditional fee agreement was required and the underlying arrangement was as alleged by MWP, it would have been with Mr Sinclair not Mr Emmott. Secondly, the agreements are in entirely conventional form being on forms prepared by a specialist bar association. Thirdly notice was given of the first CFA at the time as was required by the Rules then applicable to such agreements. None of this supports MWP's case in these proceedings.

111. MWP places some reliance of a Charge Deed by which Mr Sinclair charged some shares as security for some outstanding fees. There are two deeds that have to be read together being a "Deed of Confirmation" and the charge. It is first necessary to note that there were a number of beneficiaries that included a London law firm, a US law firm as well

as PS and two fellow members of his chambers. The charge in favour of PS was to secure PS's " *... fee notes numbered 36018, 36151, 36260, 36638, 36803 and 39714 in the total sum of £156,032.00 issued by the Chargee to Mr Robinson and/or Kerman & Co. in connection with the Arbitration Proceedings ...*" The Arbitration Proceedings were defined as being those between MWP and Mr Emmott referred to earlier and the charge was expressed to remain in force until:

> "… the earlier to occur of:
>
> (a) the date on which the Chargor has put Mr Robinson and/or Kerman & Co. in funds to satisfy the Secured Liabilities; and
>
> (b) the date on which the Secured Liabilities have been discharged in full;"

With the charge enabling PS to enforce the security in:

> "any of the following events or circumstances:
>
> (a) the Chargor does not put Mr Robinson and/or Kerman & Co. in funds to satisfy the Secured Liabilities on or before the date failing six (6) months after the date of this Deed, unless his failure to pay is caused solely by an administrative error or technical problem and payment is made within three business days; or
>
> (b) the Chargor is declared bankrupt and (a) has not been satisfied;"

This was, in my experience at least, a novel arrangement for a barrister to enter into although, as I have said, it was not only PS but two other members of his chambers who apparently entered into similar arrangements. However, in my judgment this document does not lift MWP's case above the merely fanciful for two distinct reasons. Firstly, it is confined to a fixed asset (a parcel of shares), which is not consistent with MWP's case that there was only ever one person liable for all Mr Emmott's costs namely Mr Sinclair since if that was so there would be no logic in confining the charge to the single asset or its applicability to a limited sub set of the sums due to PS in respect of Mr Emmott's legal fees. Secondly, the charge applies only in respect of a limited subset of fee notes. The effect of the charge has to be considered not only in isolation but together with all the other material to which I have so far referred, which for the reasons I have explained above is not consistent with Mr Sinclair being the sole obligor in respect of Mr Emmott's legal costs. Whether viewed in isolation or in combination with all the other material I have referred to this document does not support the contention that MWP has a factually realistic case that the only person liable for Mr Emmott's legal costs was Mr Sinclair or that Mr Sinclair was anything other than a legal expenses funder.

112. Some reliance is placed on the fact that PS commenced bankruptcy proceedings against Mr Robinson to recover some of his fees. This does not assist either way since it says nothing about who the person was who was responsible for paying Mr Robinson. It reflects only what is obvious – that the liability for counsel's fees was that of the

solicitor who delivered the instructions. It is however submitted by the defendants that the position adopted by MWP in the Sinclair Estates Claim is entirely inconsistent with its position in these proceedings. I agree that it is. A similar point can be made of its position in relation to the reduction of the maximum sums referred to in the world wide freezing order obtained by Mr Emmott against MWP. Whilst it is difficult to see how this claim could be maintained at the same time as the Sinclair Estate Claim and Maximum Sums reduction application, I do not consider that of itself renders this claim fanciful although I accept that it supports such a conclusion when taken together with on the other factors to which I have referred.

113. The issue that I am considering at this stage is whether MWP has established a realistically arguable case that Mr Sinclair was solely liable for Mr Emmott's legal costs (as MWP maintains and must maintain if any of the causes of action on which it relies is to have any prospect of success). In my judgment MWP has failed to establish a better than fanciful case on this issue for the reasons that I have set out above. It therefore follows that even if the conclusions I reached earlier in this judgment concerning the arguability in law and as a matter of pleadings of the various causes of action on which MWP relies is wrong, its claim fails at a factual level with the result that the defendants are entitled to summary judgment in their favour.

Conclusions

114. MWP's claims against the 2nd to 6th defendants are not realistically arguable either in law or fact. For the reasons set out at the outset of this judgment, even if otherwise there was a maintainable claim in either law or fact by MWP against any of the 2nd to 5th defendants, it is manifest that it has no arguable claim of any sort against the 6th defendant.

115. In the result therefore the claim must be struck out and/or judgment entered for the 2nd to 6th defendants.

116. I will hear argument following the hand down of this judgment on (a) the form of order, (b) whether and if so to what extent this claim or any part of the claim ought to be certified as totally without merit (a submission made by each defendant but left over until after hand down of this judgment) and (c) whether and if so in what terms I ought to make a civil restraint order (again an application made by each of the applying defendants and left over until after hand down of this judgment).