Neutral Citation Number: [2022] EWHC 1757 (QB)

Case No: QA-2021-000227

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2022

Before :

MR JUSTICE FREEDMAN

- -

Between:

RUTA KERSEVICIENE

Appellant/Claimant

- and –

(1) MIDE QUADRI
(2) ROYAL & SUN ALLIANCE LIMITED

Respondents/Defendants

and four other appeals

CUCEN v ALI & ANOR	QA-2021-000229
YILMAZ v EUI LTD	QA-2021-000232
KELES v TAYLOR & ANOR	QA-2021-000228
MARDARE v OFFER & ANOR	QA-2021-000233

- -

Mr Philip Coppel QC (instructed by **Ersan and Co Solicitors Ltd**) for the **Claimants/Appellants**
Ms Anya Proops QC (instructed by **DWF**) for the **Defendants/Respondents**

Hearing date: 1 July 2022

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Approved Costs Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2.00pm on Thursday 7 July 2022

MR JUSTICE FREEDMAN:

Introduction

1. This is the renewal of an application for permission to appeal which was partially successful. Two grounds were allowed on paper and the remaining three grounds were not allowed. The appellants sought to renew orally one of those grounds, and on 1 July 2022, I refused the application.

2. On 5 October 2021, HHJ Backhouse ("the Judge") in the Mayor's and City of London County Court dismissed an application to debar the respondents from relying on evidence from a solicitor, Mr Stevens. By an order dated 15 February 2022, Sir Stephen Stewart on a paper application gave the appellants permission to appeal against that decision on the first two grounds, which in summary were arguments that the evidence should have been excluded (a) as expert evidence for which there was no permission, and (b) as being unreliable statistical evidence. Sir Stephen Stewart refused to allow an additional ground for permission to appeal, namely that the Judge "*wrongly failed to take into account the contraventions of the UK GDPR by Mr Stevens (a qualified solicitor), in identifying by name the accidents, injuries, medical treatment and requirements of hundreds of other individuals. Being the unlawful processing of personal data (including special category personal data) within the meaning of the UK GDPR."*

3. On Friday 1 July 2022, the Court heard the renewal of the application made by the appellants for permission to rely on the additional ground. The Court refused the application finding that (1) the additional ground was not before the Judge and it was not appropriate to allow the additional ground to be raised for the first time on the appeal, and (2) in any event, the additional ground did not have a real prospect of success nor was there any other compelling reason to give permission to appeal. The Court gave a judgment for so doing, and save to provide context here, it will not repeat its reasoning in that judgment.

4. Unusually, the permission to appeal hearing was attended by leading and junior counsel for the respondents and the solicitor for the respondents. By an email dated 23 June 2022, the respondents by Mr Michael Henman had written to the Ms Ersan for the appellants in the following terms, namely:

> *"I write with reference to the renewed application for leave to appeal listed for 1st July.*
>
> *I would like to confirm that we have instructions from all our insurer clients to instruct Miss Anya Proops QC to attend and make representations on behalf of the respondents at the permission hearing on 1 July. This is on the basis that the application relates to the GDPR, which, as you are aware, is her specialist area. For the sake of transparency, whilst (sic) her fee for this application is £47,500 plus VAT.*
>
> *Whilst my clients are fully aware that the general rule for such a hearing is that the respondent is unlikely to recover its costs, in this instance, in these cases we hereby put you on notice that*

> *Miss Proops will be instructed to seek our clients' costs of attending the hearing on the basis that (a) your clients, are advancing arguments as to the GDPR, which, whilst covered in the original skeleton argument from Philip Hackett QC, were very deliberately not pursued by your counsel, Philip Coppel QC, at the hearing before Her Honour Judge Freeland on 5th October. 2021, those arguments having been unequivocally abandoned, through Mr Coppel, prior to the hearing (as is confirmed by the contemporaneous counsel-to-counsel correspondence), (b) your own counsel has inexplicably failed to draw these highly relevant matters to the court's attention in the context of your clients' application and indeed has gone so far as to contend (wrongly) that GDPR arguments were advanced before the Court on the witness statement issues and (c) in all the circumstances, Ms Proops' attendance is required so as to ensure that the defendants have a fair opportunity to address the case being advanced on the GDPR issues and otherwise, so as to ensure that the Court is properly apprised of the relevant factual background to this case.*
>
> *We make these points without prejudice to our position that these costs would in any event be recoverable against your firm as part of our clients' extant wasted costs application against your firm."*

5. There then followed correspondence between Counsel. On 24 June 2022, Mr Coppel QC sought answers to questions as to (1) whether Ms Proops QC was aware of Mr Henman's email before it was forwarded by Mr Coppel QC to her, (2) whether she approved Mr Henman's email before it was sent, (3) whether professional misconduct was alleged against Mr Coppel QC, and (4) if yes, what was the professional misconduct and the exact basis for the accusation.

6. On the same date, Ms Proops QC replied, refusing to answer the first question on the ground of legal privilege, saying that it was a matter for the court whether there were issues relating to Mr Coppel QC's conduct. However, she said that the respondents were concerned and regarded as serious and important that *"(a) no attempt has been made by you or your clients to draw the Court's attention to the fact that in response to my pressing you in correspondence prior to the hearing, you had, on behalf of your clients, specifically disavowed reliance on any data protection arguments across all issues and, further (b) consistent with that disavowal, you did not (as the transcript shows) rely on data protection arguments in connexion with the attempt to have the witness statement excluded."* The e-mail stated that these matters fortified the respondents' view that it was necessary for Ms Proops QC to be briefed to attend a permission hearing to ensure that the legal and factual position was being fairly and fully presented to the court.

7. After judgment had been given refusing permission to appeal on the additional ground, Ms Proops QC submitted that the costs of the renewal application should be paid by the appellants' solicitors, Ersan & Co, to the respondents. The costs were contained in costs schedules. They contained a total sum of £67,095.78. The large majority of those costs were those of Leading and Junior Counsel, and the large majority of those costs were those of Leading Counsel. The costs of Leading Counsel for opposing the permission renewal hearing were £47,500 plus VAT, which is a total of £57,000. The costs of Junior Counsel were £3,500 plus VAT, which is a total of £4,200.

The basis of the application

8. The basis of the application was expressed to be not negligence, but misconduct. The application was made under CPR 46.8 and/or CPR 44.11. The relevant rules are as follows:

> "Senior Courts Act 1981 section 51(6-7A)
>
> *"(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.*
>
> *(7) In subsection (6), "wasted costs" means any costs incurred by a party—*
>
> *(a)as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or*
>
> *(b)which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.*
>
> *(7A) Where the court exercises a power under subsection (6) in relation to costs incurred by a party, it must inform such of the following as it considers appropriate—*
>
> *(a)an approved regulator;*
>
> *(b)the Director of Legal Aid Casework.*
>
> "CPR PD 46
>
> Personal liability of legal representative for costs – wasted costs orders: rule 46.8

5.1 *A wasted costs order is an order –*

(a) that the legal representative pay a sum (either specified or to be assessed) in respect of costs to a party; or

(b) for costs relating to a specified sum or items of work to be disallowed.

5.2 *Rule 46.8 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the detailed assessment proceedings. In general, applications for wasted costs are best left until after the end of the trial.*

5.3 *The court may make a wasted costs order against a legal representative on its own initiative.*

5.4 *A party may apply for a wasted costs order –*

(a) by filing an application notice in accordance with Part 23; or

(b) by making an application orally in the course of any hearing.

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

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

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

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

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

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

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

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

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

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

5.8 *The court may proceed to the second stage described in paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations.*

5.9 *On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –*

(a) what the legal representative is alleged to have done or failed to do; and

(b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative.

"CPR PD 44

Court's powers in relation to misconduct: rule 44.11

11.1

Before making an order under rule 44.11, the court must give the party or legal representative in question a reasonable opportunity to make written submissions or, if the legal representative so desires, to attend a hearing.

11.2

Conduct which is unreasonable or improper includes steps which are calculated to prevent or inhibit the court from furthering the overriding objective.

11.3

Although rule 44.11(3) does not specify any sanction for breach of the obligation imposed by the rule the court may, either in the order under rule 44.11(2) or in a subsequent order, require the legal representative to produce to the court evidence that the legal representative took reasonable steps to comply with the obligation.

9. In her submissions before the Court, Ms Proops QC referred the Court to the application for renewal. It is necessary to refer to paras. 4-8 of the application which stated the following:

> *"4. The Honourable Sir Stephen Stewart has said that the reason for refusing Appellants' application for permission to appeal on Ground 1(d) is for the reasons given by the judge in her judgement at paras 32-36 and in the respondents' skeleton paras 25 and 31. The Appellant will say that paragraphs 32-36 of the judgment are directed at the issue of disclosure of the document to relevant regulators and do not address the question as to whether the database was lawfully created nor how that impacts on admissibility.*
>
> *"5. The Court, at the invitation of Ms Proops QC for the Defendant/Respondent took into account the extent to which the date had been disclosed and made three errors in doing so.*
>
> *a) This was not the correct approach and demonstrated an error of law. Breaches of UK GDPR are not solely determined by the extent of disclosure of personal information; but rather by the unlawful processing of personal information which includes activities such as storage which, by definition, do not amount to disclosure.*
>
> *b) The Court agreed that data had been disclosed only to Ersan and Co Solicitors Limited who, by virtue of acting for each Claimant already had the relevant data. This fails to address the confidentiality owed by Ersans to each of its clients and fails to recognise the important public policy reasons in protecting such confidentiality.*
>
> *c) Although expressly stating at paragraph 25 of the judgment that the document had become a public document, the judge failed to recognise the implications of this wand to take into account that unlimited publicity was the inevitable consequence of the Defendant/Appellant putting date into evidence.*
>
> *6. Beyond this erroneous reasoning, the Court stated only that the allegation of GDPR breaches was unparticularised.*
>
> *7. The Court is respectfully referred to the Skeleton Argument of Phillip Hackett QC, which was exhibited in the witness statement in support of the Claimant's original debarring application heard on 5.10.21, which the Claimant/Appellant's solicitors believe deals the contraventions of the UK GDPR by Mr Stevens.*
>
> *8. For these reasons, the Claimant/Appellant requests that a hearing be listed at which the Appellant may renew its*

> *application for permission to appeal on Ground 1(d) as envisaged by paragraph 7 of the Order."*

10. The renewal notice needs to be read with paras 32-36 of the judgment and paras 25 and 31 of the respondents' skeleton opposing permission, since the basis of the refusal of Sir Stephen Stewart and those paragraphs were drawn to the attention of the Court in the body of the renewal notice. They read as follows (para. 25 of the respondents' skeleton argument ought to be read with para. 24 which will also be set out):

> *"32. I turn now to the second limb of the application, namely whether to give permission for the claimants to forward this statement and database to the various regulators. It is said that the application is necessary because CPR 21.22, in relation to documents, and 32.12, in relation to witness statements, require the court's permission to disclose the document/statement to a third party. There are exceptions to this requirement in the rules. In CPR31.22(1)(a), permission is not needed "if the document has not been read to or by the court, or referred to, at a hearing which as been held in public". In CPR32.12(2)(c) permission is not required if "the witness statement has been put in evidence at a hearing held in public". As I said at the outset of the hearing, it seems to me that both of those things may have already happened by virtue of today's hearing (at least in relation to the database).*
>
> *33. I should say that the defendants are neutral, although Ms Proops submitted that this application, together with the debarring application, is abusive, being for the purpose of shutting out perfectly admissible evidence of nefarious practices, and bullying the defendants into not putting the evidence forward. However, the defendants do not want to be seen to be actively opposing it, firstly, because they do now want it to be suggested that they have anything to hide from the various regulators, and secondly, because they could see some advantages, for example in the SRA becoming involved.*
>
> *34. Insofar as I am asked to consider the application, the parties agree that the test is that the court has a broad discretion and there must be some good reason to exercise it in the interests of justice in all the circumstances of the case.*
>
> *35. As I said at the beginning of this judgment, the application appears to be predicated on the suggestion of egregious and serious date protection breaches, which, as I have already said, are entirely unparticularised. I do note that similar rather unfocused concerns from Ersan & Co led to the defendants, in January 2021, seeking permission pursuant to CPR31.22 for the sharing of medical reports. I held that CPR31.22 does not bite on medical records, for which the regime is Part 35, and because*

they are not documents which are disclosed but served voluntarily. As far as I know, that ruling has not been appealed.

36. I have not been addressed today on any particular way in which the data protection legislation has been breached, save that Mr Coppel complained that the database contains the names of each claimant. However, as Ms Proops pointed out, that data has been merely disclosed to Ersan, who are acting for all the claimants, and it is for Esan, as data controllers, to decide how to handle that data now it has been received. Ms Proops points to article 9 of GDPR and schedule 2 of the DPA as providing defences to allegations of impropriety. I do not think I need to go into those as I have not been addressed on them, but it does seem to me that in a case where two leading counsel have had input, it ought to be possible for the claimants to say what precisely is objectionable about what Mr Stevens and the insurers have done, such as to merit investigation by either the SRA or the Information Commissioner."

...

"24. With respect to the latter conclusion, the Court did hear oral argument from the Claimants' counsel to the effect that permission should be given on the ground that JS1 was tainted by illegality because, in breach of data protection legislation, that evidence should not have contained data enabling the identification of the relevant claimants (which oral argument was itself advanced in breach of the face of the clear agreement of the Claimants' counsel on behalf the Claimants that no reliance was to be placed on arguments pertaining to data protections before the Court).[1]

25. However, as the judgement makes clear, the Judge dismissed those arguments. She did so, in summary, on the basis that (a) the Claimants, who were represented by leading specialist data protection counsel, had still failed to identify any respect in which the data protection legislation was said to have been breached; (b) it was in any event difficult to see how there would have been any breach of data protection legislation in merely disclosing JS1 to Ersan given that Ersan was already familiar with all the underlying data (including the identity of all the claimants) and could, if necessary, itself take any necessary steps to safeguard the privacy of the data following receipt and (c) in all the circumstances, the Claimants had not established any good reason why the conduct of the Defendants (or their lawyers) warranted investigation by the relevant regulators so as to require JS1 to be disclosed to them. Accordingly, the Disclosure Permission Application was refused.

[1] The skeleton of the respondents at para. 18 also referred to the agreement mentioned in para 24.

> ...
>
> *31. The Judge's reasoning and conclusion on the Disclosure Permission Application is equally unassailable, and obviously so.*
>
> *(1) The Judge was right to conclude the Claimants had mounted no serious case that JS1 was tainted by illegality, and that, in the circumstances, there was no proper basis for granting the permission sought.*
>
> *(2) There is no serious challenge to the Judge's reasoning or conclusions on these issues in the Skeleton. It is telling in this context that, as with the case put on behalf of the Claimants below, the PTA Skeleton does not descend to any particularise account of the manner in which the Defendants and their lawyers are alleged to have breached any provision of the data protection legislation."*

11. In the submission of Ms Proops QC on behalf of the respondents, it amounted to misconduct for the appellants in its renewal application to rely on:

    (1) unlawfulness in respect of the database when unlawful processing had been abandoned prior to the hearing before the Judge in correspondence between Counsel referred to in my judgment refusing permission to appeal on the additional ground;

    (2) the skeleton argument of Mr Hackett QC referring to contraventions of the UK GDPR, when Mr Coppel QC had stated that he intended to rely only on the matters in his skeleton argument and not those relied on by Mr Hackett QC[2];

    (3) the alleged unlawfulness in respect of the database when this had not been relied upon before Judge as a ground to debar the evidence of Mr Stevens and when no attention was drawn to this point before the Court.

12. This misconduct was said to justify the unusual course of awarding costs of the respondents on the renewal application. It was said that these were very grave allegations and it was vital that the respondents attend to correct the position before any permission was obtained to pursue them. It was said that the misconduct was specifically that of Ersan & Co because even if Mr Coppel QC had advised on the application for renewal, the above points would have been obvious to them and they ought not to have signed the statement of truth on the renewal application.

[2] This was what was referred to in paras. 18 and 24 of the respondents' skeleton argument as the agreement of the appellants' counsel.

13. As regards procedural matters, the respondents by Ms Proops QC submitted that:

(1) the information provided to the Court, if unanswered, would be likely to lead to a wasted costs order against Ersan and Co. Thus, the Court should make an order that the first stage was satisfied and so Ersan and Co should have to show cause why a wasted costs order ought not to be made;

(2) the email of 23 June 2022 had given sufficient notice that this application would be made;

(3) the application can be made orally and does not require an application notice in writing;

(4) Mr Coppel QC had his responsibilities to the appellants and should not be responding to the application for Ersan and Co because this was contrary to his responsibilities to his clients.

14. In fact, Mr Coppel QC did reply, and among other things he submitted the following:

(1) there was no prima facie case of misconduct, and no sensible basis on which it could be established for the purpose of Stage 1 that there was a case of improper or unreasonable or negligent conduct;

(2) this was an attempt to circumvent CPR 52PD 8.1 which stated that a respondent would usually not get its costs. This provision from the Practice Direction appears below;

(3) there should very rarely be a wasted costs order in connection with a permission application given that a respondent would usually not obtain its costs, and this was not such a case;

(4) the application was an ambush and contrary to the overriding objective.

15. CPR PD 52B at para. 8.1 reads as follows:

> *"**8.1 Attendance at permission hearings:** Where a respondent to an appeal or cross-appeal attends the hearing of an application for permission to appeal, costs will not be awarded to the respondent unless–*
>
> *(a) the court has ordered or requested attendance by the respondent;*
>
> *(b) the court has ordered that the application for permission to appeal be listed at the same time as the determination of other applications;*
>
> *(c) the court has ordered that the hearing of the appeal will follow the hearing of the application if permission is granted; or*

> *(d) the court considers it just, in all the circumstances, to award costs to the respondent.*

16. None of paras. (a), (b) or (c) applied. As regards (d), a part of the commentary in the White Book at para. 52.5.2 read as follows:

> *"Where a respondent attends a permission hearing the general rule is that they will not be awarded costs except in the circumstances specified in Practice Direction 52B para.8.1. Where costs are sought under Practice Direction 52B para.8.1(b) [it appears that this was an error and ought to read 8.1(d)] Mount Cook Land Ltd v Westminster City Council [2003] EWCA Civ 1346; [2004] C.P. Rep. 12, CA, para.76 provides guidance on the question whether it would be just in all the circumstances to depart from the general rule. Relevant factors that could justify an award of costs are: the hopelessness of the claim; persistence in pursuit of the claim despite the appellant being aware of the facts and/or law demonstrating its hopelessness; and whether the respondent's attendance provides the court with the benefit of an early substantive hearing of the issues at the oral renewal hearing: see Robert v Woodall [2017] EWHC 436 (Ch).*"

17. The Court was referred to by Ms Proops QC to the case of *Bamrah and another v Gempride Ltd* [2019] 1 WLR 1545, which contains a summary of the relevant law and in particular of the jurisdiction under CPR 44.11 and what amounted to "unreasonable or improper conduct". This was summarised in *Ridehalgh v Horsefield* [1994] Ch 205 at 232 as quoted in para. 21 of *Bamrah* as follows:

> *'"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.*
>
> *"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described*

> *as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."*

18. CPR 44.11, unlike the wasted costs jurisdiction, does not apply when the conduct is no more than negligent. Ms Proops QC based the application on misconduct. The renewal application was characterised in the respondents' submissions as dishonest, but dishonesty is not a necessary part of establishing improper or unreasonable conduct.

19. The respondents submitted that the overall justice of the case was that costs should be ordered in favour of the respondents on the facts of this case. Further, it was not accepted that the Court should be limited by Practice Direction 52B para.8.1(d) because this was a punitive jurisdiction against an officer of the Court who had misconducted itself.

Observations

20. I have procedural concerns about the course of action which the respondents have sought to adopt. I shall return to them, but they concern the following factors, namely:

    (1) allegations of professional misconduct made against the legal advisers for the appellants coupled with the making of a wasted costs application before the resolution of the case as a whole;

    (2) the submission that the first stage of the wasted costs procedure should be dealt with by an oral application without a written application;

    (3) the submission that it would be improper for Mr Coppel QC to respond in that he appeared for the appellants, and it would be inconsistent with that for him to respond for Ersan and Co. (In fact, Mr Coppel QC did respond no doubt satisfied that there was no conflict in his making the submissions which he did.)

21. I shall first however consider whether or not these procedural points necessarily arise for determination. In my judgment, there is a simple answer to this application which does not make it strictly necessary to rule upon the concerns above. I reject the argument that it was necessary for the respondents to appear at the hearing to correct the position which they say was wrongly created by the appellants. In my judgment, if they felt that it was necessary to correct the position, that could have been done by a short letter from the solicitors for the respondents to the appellants without the need for attendance at the hearing. In my judgment, if that had been done, the correction would

have been made, and the expense of £67,095.78 would have been saved. The cost of preparing a letter would have been trivial by comparison.

22. It is to be noted that:

(1) there appears to have been no response to the renewal at the time of the renewal document in February 2022. If there was, the Court has not been shown a document;

(2) the first response appears to have been the short email dated 23 June 2022 which has been quoted above. The last paragraph of that email is oblique: it appears to be said that the costs might be captured by the *"extant wasted costs application"*, but it does not say expressly that there is to be a wasted costs application against Ersan and Co. The rest of the email in any event is making criticisms of professional misconduct against Counsel, Mr Coppel QC. That was not cleared up in the subsequent correspondence in response to Mr Coppel QC's email of 24 June 2022.

(3) there was no letter or written submission to the Court identifying the complaint of the respondents.

23. In my judgment, even if there was misconduct of the kind that would otherwise have attracted an order to show cause, this type of written response would have sufficed.

24. There are other reasons why it is not just or appropriate to make an order to show cause as follows:

(1) even without a note to that effect and any attendance by the respondents, the Court was able to glean the appropriate order without assistance from the respondents. After Mr Coppel QC finished his submission, the Court used the attendance of Counsel for the respondents to ask certain short and discrete points and did not wish to have a speech in reply. It was not even necessary to ask these questions, and the Court would have been able to proceed without answers to these points. From the pre-hearing reading and the oral submissions of Mr Coppel QC, it was apparent that (a) the additional ground had not been relied upon below, (b) it was not appropriate to allow the new ground to be run, and (c) the ground did not in any event have a real prospect of success. The Court had the benefit of the order of Sir Stephen Stewart refusing permission and the references to the respondents' skeleton and the judgment, albeit that they were in the context of the CPR 32.12 application.

(2) a letter to the Court would have been an adequate way of registering these points, and an appearance was a matter for the respondents, but it was unnecessary for the resolution of the permission application.

(3) the consequence of permission being granted was not severe, contrary to the submissions for the respondents. There is fixed for Monday 11 July 2022 the hearing of the appeal. In the unlikely event that a letter did not have the effect of permission being refused, the same arguments would have been available on

the hearing of the appeal. This would have been far more proportionate than incurring £67,095.78 on the oral renewal application.

(4) The order of wasted costs should not generally be used to obviate the general rule that the respondents' costs of attending on an oral permission application are not awarded. There were no circumstances in the exercise of my discretion that point to a different result in this case.

25. The gravamen of the argument of the appellants is that the Court ought to have taken into account in granting permission that there was a vast array of sensitive confidential and private information which would amount to a breach of GDPR. As refined in the skeleton argument dated 30 June 2022 on the renewal application, the argument was that the confidentiality and privacy issues without more should have prevented the Court from allowing the witness statement to be adduced. The Court rejected that argument. It may have been over-optimistic to seek to reframe the Part 32.12 argument into an argument in support of a debarring order bearing in mind that (a) the argument had not been run below and (b) the argument had in effect been abandoned. There was a nuanced change referred to in the renewal skeleton, but not in the renewal notice. It is difficult to obtain permission to run an argument not relied on below, and there was a substantial answer to the argument.

26. The appellants ought to have identified expressly in the written renewal application that they were changing the approach, as they did to a greater extent in the appellants' renewal skeleton served on 30 June 2022. They ought not to have referred to the skeleton argument of previous Counsel without identifying the change in tack for the appeal, and the nature of the nuanced change which would be identified in the argument of 30 June 2022.

27. It does not follow that these shortcomings in the renewal application amounted to misconduct. The renewal application and the evidence and other materials were not of such a nature that, unless answered by the appellants, it was likely that a wasted costs order would be made based on misconduct. Without more, it could be construed as a failure of exposition on the part of the appellants and a mistaken attempt to rely on the skeleton argument of previous Counsel rather than improper or unreasonable conduct, let alone dishonest. It did draw attention to the reasoning of Sir Stephen Stewart refusing permission on the additional ground which in turn referred to paragraphs of the respondents' argument, and that argument referred to the agreed position before the hearing before the Judge.

28. It stood to be seen in the context of how the renewal application would be presented. The nuanced approach of the 30 June 2022 renewal skeleton and the presentation of the application to the Court on 1 July 2022 did not amount to misconduct. In my judgment, seen by itself and in context of what followed, the renewal application was not evidence or other material, which was likely unless answered, to amount to unreasonable or improper conduct such as would have given rise to a wasted costs order.

29. Even if that were wrong, I do not accept that there was evidence or other material which, if unanswered, would be likely to lead to a wasted costs order against Ersan and Co. As noted above, the email of Mr Henman refers to Counsel and not the solicitors. I do not accept that if the decision had been that of Leading Counsel that it would be likely to amount to misconduct if not answered to follow Leading Counsel's advice. There are circumstances where it has not absolved a solicitor to follow Counsel's advice, but it is usually the case that a solicitor following advice from especially specialist counsel properly instructed will not be liable for a wasted costs order.

30. In all the circumstances, it has not been shown that unless answered, the evidence and other materials were likely to have led to a wasted costs order.

31. There are a number of further points which should be made. First, if the respondents wish to incur costs at the permission stage because they perceive this as worthwhile, and if they are prepared to pay an amount, even a very high amount, for specialist and highly regarded Counsel, that is a matter between the lawyers and their clients. To the extent that the respondents are insurers, they are well able to look after themselves. This does not militate in favour of a different approach to the incidence of costs as between the parties or in the wasted costs jurisdiction.

32. Second, as regards CPR PD 46 at para. 5.7(a)(ii), at the first stage, the Court should also consider whether the wasted costs proceedings are justified notwithstanding the likely costs involved. The respondents' argument is that the costs are £67,095.78 and therefore the costs are sufficiently substantial to justify wasted costs order. In my judgment, this is not a good argument because the costs could have been contained to the costs of a letter or written submission. In that event, the costs would have been relatively small, and the costs proceedings would not have been justified.

33. Third, I return to matters of concern about the timing of the application. The relevant law was expressed in *Ridehalgh v Horsefield* [1994] Ch 205 at 237-238, in which it is set out that wasted costs orders should generally be sought only after trial. Among the dangers of an earlier application are to distract the lawyers from pursuing their clients' interests and instead defending themselves. An exception might be where the interlocutory battle resolves the dispute between the parties, which is not this case.

34. I am not satisfied that there is a good reason to have this matter dealt with at this stage, even notwithstanding the order made by the Judge after the judgment which she gave in October 2021 for a show cause order as to why there should be a wasted costs order as against Ersan and Co. As of now, that order has been stayed by Sir Stephen Stewart who also found that the arguments based on expert evidence and unreliability (Grounds 1(a) and 1(b)) had real prospects of success on appeal and for which he gave permission to appeal.

35. I do not accept that it was necessary for the Court dealing with the appeal to deal with the wasted costs application. If that were the case, the logic would be that the appellate judge would have to deal with the second stage of the application, and for obvious logistical reasons that would rarely happen. It would be more usual for the second stage to be dealt with by a different judge and remitted to a first instance, in this case to the County Court Judge. The difficulty about a having a hearing about wasted costs at the early stage is that such an application is capable of driving a coach and horses between legal representative and client. I would have adjourned the application until a later

stage, but for the reasons set out above, since there is a summary answer to the application, the Court has been able to deal with it now.

Disposal

36. It follows that the Court dismisses the respondents' application for an order against Ersan and Co to show cause why the respondents' costs of the permission application should not be paid by Ersan and Co.