Neutral Citation Number: [2023] EWHC 331 (Ch)

Case No: BL-2020-002259

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

17 February 2023

Before :

MR JUSTICE FANCOURT

- -

Between :

ROBERT DAVID MACKENZIE	**Claimant**
- and -	
(1) ROSENBLATT SOLICITORS (a firm)	
(2) ROSENBLATT LIMITED	**Defendants**

- -
- -

Hugh Jackson and Maxwell Myers (instructed by **Shakespeare Martineau**) for the **Claimant**
Nicholas Bacon KC (instructed by **Browne Jacobson**) for the **Defendants**

Hearing dates: 11, 14-18, 21, 22 November 2022

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10.00 am on 17 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Contents

Mr Justice Fancourt :

Introduction

1. This is a claim in which the Claimant businessman, Bob Mackenzie ("BM"), alleges that the Defendant solicitors acted in breach of duty and negligently in advising him about bringing and continuing a claim against (1) The AA plc ("AA"), (2) Automobile Association Developments Limited ("AAD") and (3) AA's directors and company secretary ("the officer defendants"). The claim was for damages for loss caused by an unlawful means conspiracy, alleged to have happened in late August 2017 ("the conspiracy claim"). BM was the chairman and chief executive of AA and was sacked on 1 August 2017.

2. The central issues in the claim are whether there was a proper foundation to plead the conspiracy claim that was issued on 6 March 2018 or whether instead the Defendant should have advised BM that they could not properly plead it because of professional conduct rules; and, if there was a properly pleadable claim, whether the Defendant failed in breach of duty to advise BM before and after issuing the conspiracy claim that it was a weak claim.

3. There are also important issues about causation and quantum of loss, but the main battleground at trial was the allegations of breach, all of which are denied by the Defendants. I will return later to a list of main issues for decision that the parties agreed on the last day of the trial, and to the pleaded allegations of breach of duty.

4. The conspiracy claim was abandoned by BM in November 2018, shortly before a hearing of applications by all defendants to strike it out. This followed the termination of the Defendant's retainer on about 18 October 2018 and instruction of Wright Hassall LLP in its place.

5. Following the abandonment, two consent orders were made. First, on 21 November 2018, the claim against the officer defendants was dismissed, with their costs to be paid by BM on the standard basis. Then, on 13 May 2019, it was agreed that BM have permission to amend the claim against AA and AAD ("the corporate defendants"), by substituting for the original particulars of claim settled by the Defendant new particulars of claim claiming damages for personal injury against AAD as well as damages for breach of contract against AA and AAD. By the second consent order, the corporate defendants' costs of and occasioned by the amendment were to be paid by BM on the standard basis.

6. BM claims as damages various costs that he says were incurred in or in consequence of the abandoned conspiracy claim: (1) costs paid to the officer defendants pursuant to the consent order of 21 November 2018 and his own costs of assessing those costs; (2) costs paid to the corporate defendants pursuant to the consent order of 13 May 2019; (3) a proportion of the fees he paid to the Defendant for their services prior to 2 August 2018; and (4) £360,000 paid to the Defendant on 2 August 2018 under a fixed fee agreement.

7. The fixed fee agreement was for the Defendants' services in taking the claim forward from 2 August 2018, to trial if necessary. BM alleges that he was misled into making that agreement by Mr Rosenblatt negligently misrepresenting, on 1 August 2018, that he did not know what the outcome of the strike out applications would be. BM alleges that the Defendant then knew that the conspiracy claim had to be abandoned because it was hopeless. BM seeks rescission of the fixed fee agreement or damages for the misrepresentation.

Background to the Instruction of the Defendants

8. The background to the retainer of the Defendant was the dismissal of BM for gross misconduct. There had been an unsavoury incident in a bar at a country hotel, Penny Hill Park Hotel in Surrey ("Penny Hill"), where AA's subsidiary, AA Insurance Services Ltd, was holding an executive "away day" event on 24 July 2017. The incident was captured on CCTV. BM, who appeared to be heavily intoxicated, assaulted another director of that company. The assault continued for about one minute.

9. BM was first suspended, then told that he was to be dismissed for gross misconduct. BM consulted employment specialists at Bird & Bird LLP on 28 July 2017, who advised him that AA probably had a case to dismiss him for gross misconduct and that he should resign first. BM signed a letter of resignation on the grounds of ill-health and this was sent to Mr Millar, the company secretary at AA, on 1 August 2017. AA did not accept the resignation and dismissed him, after BM refused an offer from AA to resign on terms that he left with nothing by way of compensation or reference.

10. The consequence of the dismissal for gross misconduct was that BM was characterised as a "bad leaver" under his service contract. As such he was vulnerable to losing bonuses paid to him in previous years and shares held under a management value participation ("MVP") scheme. These MVP shares had been granted to him and two other directors in 2014, as terms of the management buy-in of AA led by BM. They were potentially very valuable if AA's share price

reached specified levels in 2017, 2018 or 2019. (BM's son, Peter ("PM"), later told the Defendants that the potential value was between £80 million and £220 million and this was reflected in the pleaded particulars of claim.)

11. The dismissal was a disaster for BM, not only because of the loss of his career, income, bonuses and shares, but because the events between 24 July 2017 and 1 August 2017 precipitated a mental health crisis. BM was hospitalised for more than 3 weeks in August 2017 and was in poor health for many months thereafter. He has still not fully recovered.

12. Following his hospitalisation, PM and Catie King ("CK"), his daughter, acted on behalf of BM to try to protect his interests. By 9 August 2017, a meeting had been held with Mr Ian Rosenblatt, the senior partner of the First Defendant firm at the time ("IR"). (IR then became a consultant when his firm was listed as a professional services company on 11 May 2018. Apart from whether a breach of duty occurred before or after that date, nothing turns on the different retainers with the firm and the company, and I shall refer to "the Defendant" in the rest of this judgment.)

Undisputed Facts August 2017 to March 2018

13. The facts set out in the next three sections of this judgment are either uncontroversial or are established by undisputed documents in the agreed trial bundle. As much of the factual dispute in this case is about what was or was not said in the "gaps" between the documented events, and because some of the allegations of negligence are very wide-ranging, it is necessary to deal with these facts in detail. After reciting the important facts, I will turn to the witnesses that I heard and issues about the adequacy of BM's disclosure.

14. For convenience, I refer to dates in this section by reference to day and month only, where the dates fall within the period August 2017 to March 2018.

15. A personal friend of BM, a PR consultant called Nick Miles, made contact with IR on about 2 August. PM said that IR was selected because of his reputation for fighting difficult cases, and the Mackenzies were "looking for options". IR had asked for some documents and Mr Miles sent what he could obtain in emails on 3 August. These showed that AA had been given a medical report on BM, referring to exhaustion and stress, before it fired him.

16. On 3 August, IR sent Mr Miles some initial comments by email. Although there had been no contact between IR and the Mackenzies and certainly no retainer at this stage, IR's comments are of some significance in showing his style of working and how the Defendant came to be retained to assist BM:

> "I will need to see the docs to see what is meant by a bad leaver etc but on the face of it he has a claim for disability discrimination, wrongful dismissal, unfair dismissal, lost opportunity of earning his incentive bonus, and/or the right to be treated as a good leaver depending on the facts around the neurological condition referred to by the Doctor

> His resignation should be affirmed on his behalf and in writing on the basis that he resigned because the way he had been treated at the Board was tantamount to constructive dismissal
>
> He may also have a claim against individual Board members for conspiracy to injure his economic interests
>
> Plenty to work on … Let me know if Peter wants to meet".

The idea of a possible conspiracy allegation therefore came from IR before he had spoken to any of the Mackenzies. This response was forwarded to PM with the comment "I think v promising, no?"

17. As a result, PM and CK met IR in his boardroom on 9 August for about an hour, with Nick Miles and another professional friend of BM present. The day before, PM had sent IR a chronology that Bird & Bird had prepared. The meeting was an introductory meeting for the purpose of IR listening to BM's story and explaining what the Defendant would seek to do for BM, if retained. No retainer was agreed.

18. A few days after that meeting, PM telephoned IR and asked for the advice given to be put in writing, so that he could share it with BM and the family. IR did so in an email dated 14 August ("the Initial Advice"). There was still no retainer – that came later on 23 August, but the Defendant accepts that, from the date of the retainer, the Initial Advice became advice on which BM was entitled to rely and for which the Defendant assumed responsibility.

19. The Initial Advice is important because it sets out strategic advice of IR based on what he had been told by PM or CK on behalf of BM. It starts by setting out "the list of *potential claims* that your Dad has fall[ing] into the following categories…" [*my emphasis*], which included "Conspiracy to injure and breach of fiduciary duty (by the Board members or the incentive cohort").

20. What exactly PM or CK told IR at the initial meeting is unclear, as regards any reason or ulterior motive for the sacking of BM, save that it is common ground that IR was told that there were things in the background that explained why he was sacked, that Mr Martin Clarke (the finance director) wanted BM out, and that the question of BM's incentive shares were discussed in detail. I will return to the question of what exactly the instructions were and make findings about that later.

21. The Initial Advice includes the following paragraphs:

> "[*in a list of categories of possible claim*] Conspiracy to injure (Damages flowing from the decision of the Board or those who would benefit from the plan which was in the best interests of the incentive plan holders, not in the best interests of the Company, thus putting the individuals on the hook rather than the Company alone) …"
>
> "The objective, initially, would be to bring as many claims as possible with as large a potential downside, particularly to individuals, but to the Company as well, so as to get into a settlement discussion

There is nothing like individuals being named in proceedings, particularly if they think the claims are only coming against the Company alone, to get them to focus their mind

The argument on Wrongful Dismissal obviously turns on the definition of "gross misconduct"

Indeed all the claims pretty much pivot around that...

In my view Gross Misconduct is designed to protect the company from an employee, for example, issuing a misleading RNS announcement; Insider dealing; Diverting business etc

A fracas in a bar is not Gross Misconduct in my opinion, albeit I haven't seen the evidence that the Company have used to support this

Furthermore, if Bob's conduct does fall into the category of Gross Misconduct then it was brought about as a result of a severe mental disability, which itself was brought on by the extreme conditions under which he was working, which the company had a duty to protect him from."

"Clearly the conspiracy and unjust enrichment claims require proof and the evidence right now is circumstantial.

The plan, should you hire my Firm, would be to immediately write to each Director individually setting out the claim against them …"

"A letter would also go to the Company setting out the claims for wrongful dismissal, unfair dismissal and disability discrimination

The Company would also be asked to explain how they intend to deal with these claims in the light of separate claims against the individual Directors, who would clearly be conflicted in taking decisions on behalf of the Company, when they themselves face personal claims arising out of their conduct in handling Bob's dismissal.

The Company and the individual Directors would need separate legal advice and arguably the Company and the Directors would be conflicted

This will, hopefully cause mayhem amongst the Board members

All of the above would be in writing; No legal proceedings would be issued at this point and so Bob would not be exposed to any costs risk …

Once responses are received to this we should reassess the position at that point, judge the answers and decide on the next move bearing in

> mind there is no immediate pressure to bring a claim until mid-October …
>
> If you have no appetite to go further once responses are received, then you can withdraw from the fight with no cost exposure to the other side."

This strategy was followed and did not change, save that there was a lengthy delay between the receipt of the answers to the letters and the decision to issue the claim form, which eventually happened on 6 March.

22. On 21 August, BM signed a letter authorising PM to give instructions on his behalf, and on 23 August the retainer of the Defendant was agreed. Its terms required the Defendant to instruct a psychiatrist to prepare a medical report; review the key documents relating to BM's employment and the share incentive plan; and prepare letters to each of the board members of AA and other individuals, asking probing questions about the circumstances of BM's dismissal.

23. The retainer also provided that the Defendant would review BM's matter regularly and would advise him of any risks and circumstances of which they were aware or which they considered reasonably foreseeable that could affect the outcome of the matter (para 4); and that the Defendant was to use appropriate skill and care in providing its services in accordance with applicable professional standards (para 11.1). Simon Walton ("SW"), a partner in the firm of Rosenblatt, would share day to day conduct of the file, with assistants doing some of the work. £25,000 + VAT was asked for on account and was paid. At roughly the same time, BM was discharged from hospital.

24. Further documents were sent to the Defendant and then SW had a conference call with PM and Dr Dhar on 25 August. PM briefed the others in detail on that occasion about BM's circumstances, which included that Martin Clarke was only interested in achieving benefits under the management incentive plan.

25. The strategy set out in the Initial Advice was agreed. Detailed information was then provided by PM and a letter of claim produced, in draft, for the Mackenzies to consider in detail, which they did. In response to an email from Mrs Jane Mackenzie ("JM") sending suggested amendments to the letter of claim and asking about costs exposure, SW advised on 6 September 2017 that:

> "If Bob actually issued proceedings against all those individuals then, if Bob was not successful against one of more of them, he is at risk to pay costs. Obviously, if there are more than one firm, the costs are likely to be higher. However, this is a crucial part of our tactics to cause havoc internally and make all the directors turn on each other. At this preliminary stage, Bob is not exposed to any costs whilst matters remain pre action in correspondence".

26. A final version of the letter was agreed and it was sent on 11 September. There is no dispute that the content was agreed by the Mackenzies and that it accurately reflected the Defendant's instructions. It was not a letter before action conforming to the pre-action protocol but was an initial letter indicating that BM

considered that he might have a claim against each of them ("the Letter of Claim").

27. The Letter of Claim was addressed to each of the individual defendants and Mr Michael Lloyd and Mrs Kirsty Lloyd-Jukes, directors of AA Insurance Services Ltd. It referred to BM's dismissal and the significance of his departing as a "bad leaver" and stated:

> "We are currently investigating the circumstances pursuant to which the Termination Notice came to be given. The main purpose of this letter is to establish what involvement, if any, each of you had in the decision to terminate our client's employment, and to enquire as to why you believed, as directors, it was in the best interests of AADL and the AA Group, and consistent with your fiduciary and statutory duties owed to those companies, to make that decision."

28. Having referred to the relevant terms of BM's service agreement, a series of questions was asked about each addressee's involvement in the decision to dismiss BM, relating mainly to the way in which the board investigated the incident at Penny Hill; on what basis they considered that the incident amounted to gross misconduct justifying BM's dismissal; and whether legal advice had been taken. Questions were then asked about whether the board of AADL met and how AADL made a decision to dismiss BM.

29. Under a heading "**Conspiracy to injure**", the Letter of Claim said:

> "... our client has had cause to question whether or not one or more of the directors, together with other third parties from outside the company, had an ulterior motive in making the decision to dismiss him on the basis of the altercation with Mr Lloyd. In particular, our client has given serious thought to the behaviour of certain other directors in the recent past and certain incidents that have taken place."

Three examples of conduct involving Mr. Clark and Mrs Jill Sherratt were then given, and the letter continued:

> "… the above are only a few examples of facts and matters that took place shortly before the decision to dismiss our client. Those, together with numerous others, have caused our client to suspect that one or more of you used the altercation with Mr Lloyd as a convenient excuse to dismiss him and remove him from the AA Group with the opportunity, as a consequence, to compel him to transfer his MVP Shares for minimal value, to his severe detriment. Our client's suspicions in this regard will be borne out by your responses to this letter….
> At the present time, our client does not know who took the decision, and when and for what reason, to dismiss him. … it is at least possible that our client will have potential claims against one or more of you personally together with ADL and AAPL and/or other AA group

> companies and all of our client's rights are hereby expressly reserved."

It then required each addressee to take steps to preserve all documents.

30. On the same day, the Defendant wrote to Herbert Smith Freehills LLP ("HSF"), who were acting for AA, complaining that a copy of the CCTV of the incident at Penny Hill had not been provided and enclosing a copy of the Letter of Claim.

31. On 18 September, IR and SW attended a without prejudice meeting with HSF, who were instructed by AA. At that meeting, IR and SW were invited to and did watch a CCTV video of the incident at Penny Hill. They were also told that the previous occasion on which BM fractured his ankle, which PM had told IR was an accident, was as a result of a fight with another couple and that BM had been arrested ("the Dodkin incident").

32. On 22 September, Reynolds Porter Chamberlain ("RPC") wrote to the Defendant on behalf of all the officer defendants, saying that they were instructed to act, and SW informed PM that the directors had all instructed one firm to respond to the Letter of Claim.

33. HSF replied to the content of the Letter of Claim on 29 September, denying that the dismissal had been wrongful and asserting dismissal for gross misconduct, which was decided by the board of AA, with no further investigation or process necessary. As to the conspiracy claim, HSF said that none of the information in that section of the Letter of Claim, the accuracy of some of which was disputed, had any bearing on the termination. RPC replied to the Letter of Claim on 29 September 2017, stating that the directors were acting on behalf of the companies and that it was wrong for the Defendant to make allegations of the kind raised without the express instructions of BM. The two letters therefore stated a position and pulled down the shutters. They were (designedly) a challenge to BM to "put up or shut up", as it is sometimes put. There was no real attempt to answer the questions that the Letter of Claim had asked.

34. SW explained to PM that he was encouraged by the fact that neither HSF nor RPC had seen fit to answer the specific questions asked in the Letter of Claim. He pointed out matters that had been raised that required further instructions from BM and PM.

35. JM via PM provided SW on 9 October with BM's response to the letter from HSF. SW responded saying:

> "I have spoken with Ian about the position generally and we don't see any benefit in going back and forth on this in correspondence, especially since many of our questions have been ignored. What we have to do now if you choose to proceed down the conspiracy route as we have advised is to now draft the proceedings against the companies and the individual directors and either issue those proceedings and serve them or serve them in draft. This should be dovetailed with the employment claims".

The email pointed out that the employment claim had to be issued by 1 November 2017 and that, assuming BM and PM wanted to proceed with them (which SW suggested that he should, as it was part of the overall strategy), the Defendant needed to start putting the claims together. The email ended:

> "I do think at this stage we need to ramp it up if we are going to achieve Bob's goals through this route."

This was clearly a reference to the strategy to hit the defendants "hard and fast" with proceedings against all of them, with the aim of achieving a settlement.

36. That request went unanswered and on 13 October IR emailed PM:

> "I'm concerned that we are drifting to nowhere at the moment
>
> we have limited time to get the employment claim filed...
>
> If we don't make that move we will lose any advantage.
>
> I appreciate that your father may not be ready but time is ticking so a decision needs to be made as to whether we are go or no go and this needs to happen over the weekend in my view."

PM replied:

> "I feel the same however I need agreement off the financier. Simon is confirming what has been spent so far and likely cost of drafting proceedings."

The "financier" is a reference to JM, who controlled the family finances.

37. That confirmation of fees was provided by SW on the same day. He emailed PM and CK identifying the High Court and ET work streams, emphasising that if BM did not issue in the ET his hand would be severely weakened. The High Court claim was described as proceedings for conspiracy and potentially personal injury for work-related stress. SW then set out likely costs of each workstream, stating that £13,000 was still held on account, and offering either a 'pay as you go' hourly rate basis of charging or a fixed fee for drafting the claim for each of the two work streams separately. SW recommended that, after he had drafted the conspiracy claim, it was sent to Counsel to review and sign, so that it had Counsel's name on it "to give it further gravitas".

38. By an email dated 15 October, PM replied informing SW and IR that he had agreement to crack on with the High Court and ET proceedings and that they would go down the fixed fee route.

39. On 20 October, SW received two letters from HSF. The first was a pre-action letter about recovery of BM's bonuses for 2015/16 and 2016/17, in the total sum of £1,221,209. The second was a without prejudice offer to settle with BM on the basis that he gave up all claims against AA and its directors and AA in return

agreed not to reclaim any bonus payment. A draft agreement was attached. It offered BM a single-sentence reference, stating that he had been an employee of AADL from his start date until 1 August 2017. The offer was expressed to be open until 30 October.

40. In his email forwarding the two letters to PM, CK and Mr Miles, SW said that it would be necessary to review carefully the bonus documents. Mr Miles was still involved in seeking to deal with any PR angle on behalf of BM. The AA had publicised the nature of BM's conduct at Penny Hill and the Dodkin incident. PM replied that what the letter said about the reasons for BM's gross misconduct (both at Penny Hill and in the Dodkin incident) was "utter nonsense" and that "it is definitely time to turn up the volume". However, the publicity of the Dodkin incident in particular caused JM considerable distress and she emailed PM and CK on 25 October expressing doubt about the Defendant's strategy.

41. At about this time, a friend of PM, Allan Bloor, the managing director of Equity & General, insurance brokers, made contact with SW at PM's request about the possibility of obtaining ATE insurance. He stated (in an email copied to PM) that "in most cases the insurer will need to see Barrister opinion with their prospect of success". This was the first time (other than in the terms and conditions of the Defendant's retainer) that ATE insurance had been raised. In mid-November, PM chased SW to see whether he had made contact with Mr Bloor.

42. On 9 November, SW sent PM and CK a first draft of particulars of claim in the High Court.

43. On 21 November, SW wrote to PM and CK asking them to consider whether to extend the ACAS holding period, following notification of an intended ET claim, and whether he should aim to issue the High Court and ET proceedings before Christmas. The ET deadline would expire on about Christmas Day. PM agreed the proposal and decided not to seek an ACAS extension. PM clearly wanted to establish a position of strength before negotiating. He asked SW on 27 November for an update on progress.

44. On 1 December, SW sent PM and CK a further iteration of the High Court particulars of claim for review, thanking them for their efforts, and said that it was "reading well".

45. On 8 December, SW on behalf of BM wrote to investigative agents asking them if they would act to gather intelligence about the intended defendants and others in connection with the conspiracy issue. This demonstrates that BM was looking for supportive evidence.

46. On 11 December, SW sent PM and CK an email referred to during the hearing as "the options email". It attached a further iteration of the particulars of claim, which "is almost there save for some more detail regarding potential quantum of the damages, in particular with reference to the [MVP] valuations". It said that the High Court proceedings, once signed off by BM, could be issued that week, and that an ET draft would follow and would have to be issued by Christmas. SW then identified two matters that would delay progress of the High Court claim: barrister review and ATE insurance. SW said that a barrister name on the

particulars might add weight, but that he did not think it essential to involve a barrister at that stage. SW reported that he had now spoken to Mr Bloor, who said that an insurer would need to see a barrister's opinion putting the prospects of success at no less than 55%. He said that seeking that opinion would delay the proceedings until the New Year, and that there was no reason why BM could not apply for ATE insurance after issuing proceedings.

47. The two options presented were:

    i) issue before Christmas, without the benefit of Counsel's input or a guarantee of ATE cover;

    ii) issue the ET claim but send particulars of the High Court claim in draft, saying that they would be issued in the New Year and inviting settlement discussion, and in the meantime instructing Counsel to review the particulars and provide an ATE opinion.

    SW said that he was happy to go either route, and the option the Mackenzies decided to take would depend on how much comfort they wanted before finally starting the proceedings.

48. Neither the options email nor any subsequent communication from IR or SW said that seeking to obtain ATE was a waste of time because no barrister would be able to express the requisite degree of confidence about the claim. (SW did tell the Mackenzies in February 2018 that any such opinion would be likely to be heavily caveated.)

49. On 13 December, SW sent to PM and CK his colleague's draft of the ET particulars of claim. This was, in truth, cut and pasted from the draft High Court particulars.

50. There was no response from PM or CK to the options email before SW chased them, on 15 December, because the Mackenzie family had gone to Barbados for a winter holiday. They had taken the draft proceedings with them, to review there. At the same time, Mr Miles was preparing to issue a press release about the impending High Court proceedings, telling BM's side of the story.

51. On 14 December, Mr Bloor sent SW Acasta European Insurance's application form for ATE insurance.

52. On 19 December, CK reverted to SW with some comments added to the draft particulars of claim, and provided a list of further points and questions. One of these was:

> "On the Wednesday 26th July, the Wednesday after the incident, Martin Clarke was to be informed that he was to be replaced. All the board members were aware of this and there is supporting email correspondence I found on Bob's laptop. This was due to the chaotic state of the finance department and his inability to run an effective finance function."

53. SW replied asking for a decision on which of the two options to take, and commented:

> "On the additional points of detail, some of those I am hearing for the first time. For example, that point about Martin Clarke facing the chop. I am concerned about that. I had understood the position to be that Martin Clarke had effective control of the board and was the person who was driving the agenda to remove Bob. If, however, you now believe he himself was going to be sacked, that doesn't quite square with the narrative. Mentioning it would be counterproductive in my view."

"Mentioning it" meant referring to it in the statement of case.

54. PM replied saying that their agreed strategy (which was not quite option 1 or 2) was to issue the ET claim and not issue the High Court proceedings until the second week of January, with barrister input on drafting and "attempt to get ATE council [sic] opinions on likely success in order to obtain ATE prior to filing."

55. The Mackenzies in Barbados reviewed every new draft of the ET claim, which was eventually issued just before Christmas 2017. It included the allegations of conspiring to cause loss and damage to BM for an ulterior motive, namely recovery of his MVP shares and reallocation of those shares to others.

56. On 8 January 2018, SW emailed PM and CK attaching the latest draft of the particulars of claim, which he described as "almost there", subject to one issue about the value of the claim and the MVP shares. SW added that he remained concerned about the Martin Clarke revelation, which did not suggest to him that Clarke was a mastermind directing others on the board to move against BM.

57. Addressing the value issue, PM sent SW further documents from AA's remuneration committee relating to the MVP scheme. It showed that the scheme was a legacy scheme and that the committee had no intention to allocate further awards to executive directors. The share price hurdles were 394p for June 2018 and 440p for June 2019. AA's share price at the time, in mid-January 2018, was around 154p, having fallen from 244p on the date of BM's dismissal.

58. SW and IR then had a meeting with PM on 11 January, following which PM wrote saying that they would like to have ATE in place and so Counsel's opinion would be needed, giving a likely success rate percentage. He asked for further advice about that.

59. This was given by SW on 15 January, explaining that although counsel's opinion would be needed for ATE they did not feel that it was needed to review the conspiracy claim. "This is because we think the claim is in good shape and because it would delay matters …. My understanding was that you wanted to now issue as soon as possible ….". SW asked to be put in funds for the court fee of £10,000. SW was reminding PM that the agreed strategy required fast action rather than delay.

60. At the same time, Mr Miles was working on the "media initiative". Dr Dhar's draft expert report had been sent to him for that purpose. PM sent back the draft particulars of claim and the draft expert report with "minor tweaks".

61. On 22 January, SW sent PM final versions of a claim form for damages for an unlawful means conspiracy and the particulars of claim, for PM to sign on behalf of BM. Dr Dhar signed off the final version of his report on 29 January.

62. Following a conversation with CK, SW wrote on 29 January:

> "More generally, I … understand that there were ongoing discussions among the family as to how you want to proceed. So far as I am concerned, we are ready to issue the proceedings. We are due to receive the AA's response to the Employment Tribunal proceedings tomorrow and, as I suggested to Catie, now that we are so close to that deadline, I think we should wait to see what they say in that document before issuing the proceedings.
>
> Thereafter I am waiting on instructions as to whether or not we are delaying the issue of proceedings in order to get Counsel's opinion and/or ATE cover. As I said to Catie, I don't think that is necessary but it is a matter for you to decide."

63. On 1 February, HSF sent the Defendant AA's Grounds of Resistance to the ET claim. This asserted that AA knew that relations between Mr Clarke and BM were not good. Many of the facts alleged by BM were carefully refuted, on the basis that there were no ulterior motives for BM's dismissal: it was a clear case of gross misconduct. SW commented to Mr Deans: "They have answers for everything. A little too perfect if you ask me."

64. On 4 February, BM sent his own comments on the Grounds of Resistance. A significant number of these, where not "Agreed" or "No Comment", were single word responses to paragraphs: "Nonsense", "Comical" and "Blah Blah" often appearing. "Comical" was the response to the assertion of no ulterior motive. In a discussion with Mr Deans on 6 February, PM and CK were told that further fees would be incurred on taking the case forward, and that they could choose between a fixed fee and an hourly rate basis. PM and CK went away to think about that.

65. On 13 February, CK sent SW and Mr Deans an email (copied to PM) setting out a summary of what was outstanding or required further discussion. The list included (i) whether the content of the Grounds of Resistance required any adaptation of the draft High Court claim; (ii) the Mackenzies' decision on the basis of charging fees; (iii) a request for a rough indication of what Counsel's opinion might cost, and (iv) the possibility of making a Subject Access Request ("SAR").

66. Following that, SW, BM, PM and CK had a phone conversation, recorded in a file note made by SW on 21 February:

> "SW was asked whether there was benefit in getting Counsel's opinion. SW said that if they wanted ATE, then they had to but

> otherwise no. BM was particularly opposed. SW confirmed that opinion from Counsel was likely to be heavily caveated because much of the case relies on disclosure of documents from behind the scenes. SW also confirmed that ATE cover can be obtained at a later point."

The note then deals with the possibility of legal expenses cover on the Mackenzies' home insurance policy, which PM wanted to take some time to investigate. Making an SAR was agreed. It was agreed that, subject to the home insurance policy question, the Defendant would aim to start the claim by Tuesday week at the latest (i.e. without an ATE policy).

67. On 26 February, HSF wrote to the Defendant about the ET proceedings and said that it was about to issue a High Court claim on behalf of AA to recover bonus payments paid in respect of the financial years 2015-16 and 2016-17.

68. On 5 March, SW chased PM for an update on the home insurance policy matter and his instructions on issuing the claim. BM replied swiftly saying that he and JM wished the High Court claim to be issued the next day. SW checked with BM that it was correct that the share price of AA was then 70p. PM confirmed it. He signed off the claim form and particulars of claim on the afternoon of 6 March and the claim form was filed. SW asked for a further payment of £50,000 on account, to cover further work to be done on the case after issue.

69. At almost exactly the same time, HSF served on the Defendant a request for further information about the ET claim. This included requests for particulars of who wanted to exclude BM from the business and why; who wanted to procure the benefit of the incentive shares; who were the "one or more directors" who were to benefit; whether all the directors were alleged to have conspired, and if not, which had; and when those persons conspired. Service of the claim form was delayed for a short time, despite requests from RPC for service, while the publicity was being prepared by Mr Miles. BM encouraged Mr Miles to be aggressive.

70. The Claim Form was served with Particulars of Claim on 7 March 2018. On the same day, the Defendant served an SAR on the Data Protection Manager of AA.

The High Court Particulars of Claim

71. The Claim Form gives details of the only claim as "Unlawful means conspiracy involving two or more of the Defendants arising from breach of contract and/or breach of fiduciary duty and/or breach of statutory duty and/or breach of the Articles of Association". The named defendants were AA, AADL, Mr Clarke, Mr Mark Millar, Mr Blowers, Mr Breakwell, Mr Leach, Mr Andrew Miller and Ms Williams. All the individual defendants except Mr Mark Millar were directors of AA.

72. The Particulars of Claim included a number of preliminary sections (Introduction: The Parties; Background; The Management Buy In and Listing; Management Value Participation Scheme; The Claimant's Service Agreement; and Duties Owed by the Third to Ninth Defendants). These explained that the MVP Scheme was implemented in 2014; had performance review dates to come in June 2018

and June 2019; had a hurdle based on an annualised total shareholder return of 12% per annum; and that BM had 55% of the MVP shares, Mr Clarke 22%, Mr Hewitt (a retired director) 8.8% and the AA's Employee Benefit Trust 14.2%. It was pleaded that article 94.3 of AA's Articles of Association permitted a compulsory transfer notice to be given to a bad leaver to require a transfer of shares to AA or to such other person as is specified by its remuneration committee.

73. The conspiracy claim was advanced in the next three sections of the Particulars of Claim, headed: The Claimant's dismissal; The Claimant's health and well being; and Particulars of Breach.

i) The Claimant's dismissal. This section comprises 24 paragraphs and pleads the incident at Penny Hill, meetings between BM and a director, Mr Leach, and Mr Millar, the company secretary, that took place immediately after the incident, first on 26 July, when BM was told that while the incident was serious a positive outcome for him was expected, and then on 28 July, when he was told that the board had decided to dismiss him, though only one director had seen the CCTV footage (para 39). It pleads that despite BM explaining his medical issues, he was told that his exit would be on the basis of an act of gross misconduct. On 29 July, he was told that the board intended to take a harder stance and would meet the next day. Medical evidence of a consultant psychologist was provided to the directors on 30 July. On 31 July, the board met, with no notice to BM. Bird & Bird were later told that the medical evidence was considered to be a "try on" and that the board's position had not altered. Despite attempts to negotiate on his behalf, BM received notice on 1 August 2017 confirming that he had been dismissed as a Class 1 and Class 2 bad leaver by reason of his misconduct.

ii) The Claimant's health and well being. This section comprises only 4 paragraphs and alleges that the defendants were aware of certain health issues (hearing and diabetes) and were unsympathetic to them; and that, as at least one NED, Mr Leach, was aware, BM's work and the way he was treated, including being undermined by Mr Clarke, caused him to suffer from stress, anxiety and depression. High stress levels, exhaustion and excessive alcohol consumption for 4 or 5 months were alleged to be the cause of his ill-health.

iii) Particulars of Breach. This critical section comprises two paragraphs in which the alleged unlawful conduct and conspiracy of the defendants are summarised. Para 60 starts:

> "In breach of the Service Agreement and/or the Articles and/or their fiduciary and/or statutory duties, the Defendants have together conspired to cause loss and damage to the Claimant".

The consequences of the dismissal as a bad leaver are then spelt out and allegations of improper purpose made. It is pleaded that the individual defendants acted to prefer their own interests over those of the companies and acted without regard to their best interests. There is an allegation that the defendants had no regard to BM's mental well-being, despite the

medical evidence available to them. It is pleaded that "one or more" of the defendants directed AADL to serve the termination notice and that AADL acted unlawfully.

There is then a sub-section headed "*Improper Termination*", which sets out how the decision-making process was contrary to the terms of BM's service agreement and contrary to the articles of AA and AADL and so his dismissal was invalid, procedurally unfair and wrongful. Para 62 pleads that a decision had already been taken by 27 July 2017 and para 65 pleads that BM was unaware that any board meeting had in fact taken place.

Para 69 states:

> "… between 29 July and 1 August 2017, several emails, texts and telephone calls took place between the Claimant's solicitors and either the AA's solicitors or Mr. Millar. On several occasions, Mr. Miller and/or HSF represented that decisions had been made "by the Board" and that they would have to take instructions on proposals made by the Claimant and/or Bird & Bird 'from the Board'. The Defendants will be put to strict proof as to these representations and who, in fact, made such decisions."

The final sub-section is headed "*Improper Motive*" and pleads the basis on which BM infers and believes that the decision to dismiss him was not genuinely related to the incident at Penny Hill, which would have been dealt with differently:

> "… but rather was for an improper and/or unreasonable and/or unconscionable purpose in order to exclude the Claimant from the business and/or to procure the benefit of the Mackenzie Shares for notional value, with the ultimate aim of financially benefiting one or more of the Third to Ninth Defendants." (para 70)

The matters relied upon for the inference are then set out at some length, and include the conduct of Mr Clarke that was adverse to BM in the preceding months, the motive for Mr Clarke's conduct being to benefit financially from the MVP shares, the succession planning for a new CEO, the lack of interest of the Defendants in the reasons for the incident at Penny Hill and their disregard of the medical evidence. The real reasons for BM's dismissal are pleaded at para 71 as being a desire by one or more defendants to pursue a different business strategy and an intention "to invoke the compulsory purchase provisions in the Articles allowing one or more of the Third to Ninth Defendants to purchase the Mackenzie Shares" and to allow the remuneration committee to serve a compulsory transfer notice on BM to transfer some or all of the MVP shares for consideration of one penny.

A letter dated 29 September 2017 giving notice of intention to serve a transfer notice is pleaded, followed by:

> "… the true and real motivation behind the decision by the Defendants to terminate the Claimant's employment was in order to procure the

> Mackenzie Shares at their notional value, thereby depriving the Claimant of that benefit, and to transfer that benefit to one or more of the Defendants. The Claimant suspects one or more of the Third to Ninth Defendants wish to acquire the Mackenzie Shares now at a notional price being a far lower price than those shares will ultimately be worth on one or more of the Incentive Scheme performance review dates." (para 72)

74. The pleaded case therefore attributes the decision to terminate BM's service agreement unlawfully to the board of AA, acting in their own interests and motivated by a desire to be able to exclude BM and reclaim BM's MVP shares, causing loss to BM and benefiting some of their number who could acquire the shares cheaply. So far as the conspiracy claim is concerned, it does not identify individual defendants who were alleged to have acted in combination with others, or who were alleged to have combined to act unlawfully with the intention of harming BM. At various points in the statement of case, it is alleged that "one or more of the defendants" had decided to dismiss BM and directed AADL to serve the termination notice, and that "one or more defendants" wanted to acquire or would benefit from acquiring the shares; but the central allegation in the conspiracy claim is that the board of directors decided to dismiss him, unlawfully, for ulterior purposes, rather than for what happened at Penny Hill. BM was unable to say which directors from among the defendants participated in the board meeting, if there was one, or who otherwise made the decision to dismiss him unlawfully.

75. The Prayer of the Particulars of Claim claims an injunction to prevent transfer of the "Mackenzie Shares"; damages reflecting their fair value, as to which BM's best estimate is that they will be worth between £85,000,000 and £220,000,000 and would pay an annual dividend of at least £3,300,000; alternatively, damages reflecting the fair value of the shares in the event that AA did not hit the performance hurdles as a result of the loss of BM's influence on AA's performance; damages representing loss of benefits under BM's service agreement, and costs. The statement of case is signed "ROSENBLATT" and the statement of truth was originally signed by PM, then two months later was signed by BM.

Undisputed Facts March 2018 to October 2018

76. Again, in this section, I omit the year 2018 when referring to dates falling within this period.

77. On 8 March, HSF wrote to the Defendant complaining that it was inappropriate, given the allegations in the conspiracy claim, for PM to have signed the statement of truth and to have been party to confidential information about AA. They also complained that confidential and sensitive information was included in the Particulars of Claim and threatened to seek an injunction. SW replied explaining that BM's mental health was still fragile and that he was not well enough to review a long and complex document himself. As for the injunction, BM's instructions to SW were: "It is up to them to go for an injunction or not. Peter and I are not agreeing to anything."

78. On 9 March 2018, AA served on BM a compulsory transfer notice relating to his MVP shares. This indicated that the current share price of 75p was well below the prices of 390p and 441p required for the scheme shares to vest. BM forwarded the email and attachments to SW on the same day, complaining of AA's "aggressive bullying".

79. AA had made an offer through ACAS to "drop hands" by way of settlement, meaning that AA would not seek to recover bonuses paid if BM abandoned his ET and High Court claims. On 14 March, ACAS informed Mr Deans that AA was keeping that offer on the table. SW informed Mr Deans that although he had not received instructions yet, BM would not accept that.

80. The confidentiality question appeared to concern BM, who was planning to have an article about him written in the Daily Mail. He sought IR's advice on the wisdom of going into print. IR advised him to leave it for now and wait to see how things played out with the issued claim. BM replied on 19 March saying that he felt he had to go ahead with publication, as long as it would not affect the legal case.

81. The story was covered in much of the "quality" press in early to mid-April. The Guardian ran a story about BM's £225 million claim and AA's annual results, in which AA announced that it had made no provision for paying damages to BM and would seek to recover likely costs of £1 million from him at the conclusion of the litigation. SW sent the article to BM and drew attention to the statement about the legal costs and their recovery.

82. By that time, the Defendant's request for substantial funds on account was causing problems. On 9 April, JM emailed CK saying that she was not going to make any further payments and that BM had to pay himself "to understand how much this is costing to get nowhere. I do not want to be involved". CK forwarded the email to PM, which resulted in payment being made in full the following day.

83. On 16 April 2018, AA compulsorily transferred BM's MVP shares to itself.

AA's Defence and Request for Further Information

84. The single defence of all defendants and counterclaim of the corporate defendants ("Defence") was served on 27 April 2018. It was accompanied by a request for further information ("RFI") about the claim. Para 2 of the Defence pleaded that the Particulars of Claim were liable in whole or in part to be struck out as disclosing no reasonable grounds for bringing the claim, as an abuse of process, or as having no real prospects of success.

85. The Defence disputed that Mr Leach first told BM that the outcome of the investigation would probably be positive for him; pleaded that the board of AA decided on 27 July that it would probably dismiss him for gross misconduct if he did not agree to resign with no compensation, but that no decision was then taken; that on 28 July he was told that the financial terms of his leaving would be agreed as if he had been dismissed for gross misconduct; that the board decided at a meeting on 30 July that BM's conduct had not been influenced by mental illness,

nor did any such illness justify his conduct; and that on 1 August the board decided not to accept BM's resignation and dismissed him for gross misconduct.

86. Addressing the allegations of breach of duty, the Defence pleaded that the claim was embarrassing for want of particularity, but otherwise denied breach and conspiracy, asserting that there was merely unanimous agreement that BM should be dismissed for gross misconduct, which was a lawful dismissal in the best interests of AA.

87. The Defence pleaded that the matters alleged in the *Improper Motive* section of the Particulars of Claim did not provide a proper basis for BM's belief as to the real reasons for his dismissal or to allege conspiracy against the defendants. It then addressed in detail the facts alleged by BM in para 70 of the Particulars of Claim as being the basis of his inference about the reasons for his dismissal, admitting among other matters that Dr Clarke had advised Ms Sherratt to write to BM about her concerns.

88. Specifically, para 71b of the Defence denied that the compulsory transfer provisions of the Articles allowed any of the MVP shares to be sold to other persons and denied that invoking those provisions was done with a view to transferring BM's shares to any of the individual defendants rather than AA itself.

89. In the counterclaim, AA and AADL claimed repayment of bonuses paid to BM in the years 2015/16 and 2016/17 in the total sum of £1,221,209, and declaratory relief in relation to the compulsory transfer of the MVP shares.

90. The RFI asked for clarification about:

    i) which defendants were alleged to hold MVP shares through the Employee Benefit Trust's holding;

    ii) which defendants had decided as soon as 27 July 2017 that BM should be dismissed for gross misconduct;

    iii) the alleged conspiracy, including when and how each of the defendants became a party to it, what acts were undertaken pursuant to it, which defendants combined together to perform such acts, which defendants acted with the intention of injuring BM and the basis for that allegation;

    iv) the motivation of each defendant said to be part of the conspiracy, and how each defendant was in a position to procure the benefit of BM's MVP shares;

    v) whether each of the individual defendants is alleged to have had the ultimate aim (or motivation) of benefiting one or more of their number; and

    vi) which of the individual defendants BM suspected wished to acquire his MVP shares at a notional price.

91. On 2 May, having considered the Defence and the RFI, SW wrote to advise BM on the next steps and the likely costs involved. SW said that he needed detailed comment on each paragraph of the Defence and Counterclaim and each request,

and suggested that it was the right time to instruct a barrister to draft a reply and defence to counterclaim and the replies to the RFI. A second letter offered BM fee options for that work: the fixed fee option was £50,000, exclusive of disbursements, with a 10% reduction if paid in full in advance.

92. On 21 May, CK sent the Defendant a schedule containing BM's comments on the Defence. She said that it would be great to get the Defendant's take on AA's response, what benefit Counsel would bring at this stage, and the next steps after responding to the Defence. BM sent his comments on the RFI the following day. In several places, where what was being sought was particulars of the conspiracy, BM had simply marked "Rosenblatt", apparently indicating that that was a matter for the Defendant to address.

93. Following that, Elizabeth Weeks ("EW") who had by then been brought into the Defendant's team acting on BM's case, suggested an extension of time for the further statements of case, and again said that it was appropriate to engage Counsel. SW followed up on 25 May saying that crucial time to get counsel instructed was being lost, and that their help to prepare the statements of case was "essential at this stage". BM had not agreed to pay fees, but PM then did pay a further £40,000, stating: "We need to have a discussion about fees as we continue to pay requested lumps and we are following your advice with no shared risk". That was the first time that any suggestion had been made that the Defendant should include in its fee structure an element of risk relating to the outcome. In response, SW said that he was happy to have a discussion and that the Defendant's advice from then on would very much depend on the comments being provided on AA's statements of case.

94. In early June, Mr Miles was still engaged in trying to promote BM's side of the case in the press. PM had devised a set of questions to be asked of AA's board, and wanted the text to come in a letter from the Defendant to AA.

95. On 8 June, SW sent BM, PM and CK a first draft reply and defence to counterclaim. In a number of places, where the Defence had refuted in detail allegations that had been made to support an inference of improper motive, SW had written "what do we say about this?" in the draft.

96. A meeting was arranged to elicit the factual input needed. This took place on 13 June 2018. As a result of the meeting, SW was able to send BM, PM and CK late that night an amended draft of the reply and defence to counterclaim, which was then approved by BM and served on 15 June ("the Reply"). EW then worked on completing the response to the RFI.

97. There is a handwritten note made by EW of the meeting on 13 June, however it was common ground that a letter from the Defendant to BM dated 18 June accurately reflected what was said at the meeting. It records the following points:

    i) Directions Questionnaires (DQs) were required to be completed ahead of a CMC likely to take place in October. BM had asked the Defendant to prepare a costs budget for his own purposes.

ii) A barrister should still be instructed sooner rather than later, both to assess the strengths and weaknesses of the claim and for ATE purposes.

iii) Chances of success on the claim were less than 50%, and a barrister would be unlikely to be more positive. The main reason for that was the lack of available evidence to support the case, though it was not unusual in conspiracy cases for evidence to come to light after disclosure.

iv) The weak point in the case was proving that each director bought into the ulterior motive for BM's removal and acted unlawfully to achieve that end. Far from Mr Clarke being central to the conspiracy, it was now understood that there was a plan to dismiss him, which "runs squarely contrary to your case". It also appeared that none of the other defendants were eligible to benefit from the MVP share scheme.

v) An unlawful conspiracy claim against the directors was included to ensure that they were "on the hook" personally, and was the only way in which to name them as defendants.

vi) It might be that the conspiracy claim would be dropped, leaving the claim against the company defendants only, or possibly them and Mr Clarke.

vii) Proving loss in relation to the MVP shares seemed difficult.

viii) Early mediation should be given serious thought, as should settling the proceedings sooner rather than later. It might still be possible to negotiate "walk away" terms.

ix) BM wanted to de-risk the proceedings by obtaining ATE insurance, though the merits of the claim would create a difficulty there. However, there was benefit in obtaining Counsel's advice before a mediation.

98. BM's case is that that was the first time that he had been advised or understood that his claim would probably fail. Other than signing off the Reply, the Mackenzies' first response to the 13 June meeting and letter was to request cost estimates for AA and BM. SW agreed to provide one for BM but explained that he could not do so for AA, though their costs were likely to be at least as high as BM's costs (and had previously been indicated to be £1 million).

99. In response to a request for instructions on whether BM was willing to offer mediation (in the DQ), BM replied: "I would explore mediation at this point if we can do it from a position of strength. I feel we have a compelling case and will detail in a response to the [letter of 18 June]"

100. BM then provided comments on the draft response to the RFI. EW spoke to PM later the same day, 28 June. EW's attendance note of that telephone call records that PM asked whether indicating in the DQ that mediation would be pursued would be a sign of weakness and was told that it would not, as this was a suitable point to consider it. PM wanted more time to consider what the response should be and was visiting IR and SW (at their invitation) the following week. The note also records that PM said that at the first meeting with the Defendant the

Mackenzies had been told that BM "had been treated appallingly and that the case was strong" and that the best part of £400,000 had now been "smashed through" only for the view of the case now to be weak. PM was recorded as being keen to have a breakdown of the future costs of the case, in a budget, so that JM's objections to further expenditure could be managed. PM asked what would be left if the conspiracy claim was dropped, and whether they would be looking for a "golden bullet" in disclosure, and whether that fed into whether the case was "weak at the moment". EW is recorded as telling PM that disclosure would be very important in this case.

101. The Replies to the RFI were signed off by BM on 29 June. As to the questions raised under the sub-paragraphs of [90] above, the replies were:

i) It was now accepted that only Mr Clarke of the defendants held MVP shares;

ii) BM does not know which of the defendants made the decision on 27 July 2017, as he was not a party to it;

iii) BM was unable to provide further information about the specifics of the conspiracy because, as was usually the case, he was not a party to the discussions and communications; however, he reasserted that "one or more of the Third to Ninth Defendants acted in combination to dismiss the Claimant … in the period from at least 25 July 2017 to 1 August 2017"; the true reason for his dismissal was to trigger the compulsory transfer of the MVP shares so that they could be re-allocated to one or more defendant; and that the dismissal was unlawful as it was in breach of BM's contract of employment and the Articles of AA and, if motivated as alleged, was a breach of fiduciary duty by the defendants.

iv) BM could not speak to the mindset of each of the defendants, but it was his belief that the MVP shares could be transferred to any of the defendants, save for those who were non-executive directors.

v) The further information sought was outside BM's knowledge and would become clear on disclosure, but at least Mr Clarke was so motivated;

vi) Mr Clarke and Mr Breakwell.

Mr Clarke and Mr Breakwell were the only defendants who were executive directors of AA. The Replies now expressly stated that "[Mr Clarke] was due to be told on 26th July that he would be replaced and a replacement would be recruited immediately given the Board's view that he was not up to the job"

102. On 4 July, PM had lunch with IR and SW at The Delaunay. SW brought to the meeting and gave PM a draft Precedent H costs budget for BM's future costs of the claim. These amounted to £947,568. What was said at the lunch about the prospects of success of the conspiracy claim is not agreed, though it was common ground that IR said on that occasion that it was necessary to "pivot", by which was meant that the focus of the claim needed to change (away from conspiracy to wrongful dismissal and disability discrimination). The Defendant's case is that

the weakness of the claim as it stood was reiterated; PM said that despite what had been said on 13 June he left the lunch feeling upbeat about the claim's prospects, which could be expected to improve with disclosure. It is also common ground that PM asked IR and SW on that occasion to present a funding option that meant that they were taking some risk in the outcome of the claim.

103. IR sent to the Defendant's practice manager later that day a proposal for a fixed cost funding option with a success element. This would involve BM paying roughly two-thirds of the expected costs up to and including trial at the outset, on a non-refundable basis, with the remaining one-third and an uplift of 20% in the event of "success". IR said in his email to the manager that the case is "now looking weak – but it might improve I would be surprised if it goes to Trial".

104. BM's promised response to the letter of 18 June came in an email of 4 July to SW, copying in IR, PM and CK. He said that the case view as presented "left me under-whelmed". He reasserted his views that Martin Clarke was involved in a conspiracy "around the dividend and my wish to keep it", and said that Clarke knew that his future was in the balance. He concluded:

> "I think we need you to read the director's indemnity policies as a matter of urgency and we should consider some more internal witnesses. We need to get a barrister's opinion to progress the Ate. I am getting more and more confident and we need to get on the front foot."

This, it is clear, was after BM had been advised of the weakness of the claim in a face to face meeting and in the letter of 18 June.

105. On 5 July, SW wrote to PM asking for confirmation that the Defendant was to start reviewing the SAR material and instruct Counsel, proposed to be Mr Leiper QC. PM replied agreeing that "we are all on the same page and need to push ahead with this now". He asked whether Mr Leiper's involvement "was for next steps or ATE or both?". The reply was "Both", to which PM responded "Please instruct".

106. On the same day, EW had a telephone discussion with HSF about the proposals for directions to be sent with the DQs (for which an extension of time had been agreed). EW was told then that both the corporate defendants and the directors were minded to pursue a strike out application in relation to the conspiracy claim. She told HSF and RPC by email that "Counsel has not had a heavy involvement to date" but that they were now seeking to instruct Counsel going forwards.

107. EW reported to BM (copied to CK, PM and SW) on 6 July the intimation of a likely strike out application, saying (as SW had suggested that she should) that it was something that the defendants had previously made noises about in their defence and that it was "an obvious move to make". On 9 July, PM telephoned EW and asked what the chances were of the strike out application succeeding. She told him that the advice on the strength of the conspiracy claim remained as previously advised, and that it was difficult to predict the outcome of the application until its terms were known. EW confirmed that BM would be at cost risk if the application succeeded.

108. RPC confirmed in writing their intention to apply to strike out the conspiracy claim and the claim for damages in connection with BM's shareholding on the basis that they were inadequately pleaded and/or misconceived in law. They expanded on the reasoning considerably in a letter dated 19 July, contending that: the conspiracy claim was barred by the "Johnson exclusion principle", namely that a common law claim cannot be brought to circumvent the terms of the unfair dismissal legislation; that the claim was an abuse of process because it is only a tactical means of litigating against the directors; and that the claim was woefully inadequately pleaded as regards the identity of the conspirators and nature of the conspiracy alleged, and did not disclose any reasonable grounds for the claim brought.

109. Apparently for the purpose of instructing Counsel, Mr Deans in the Defendant's employment law department had done some work on the prospects and possible quantum of a disability discrimination claim. In an internal note, he advised that it would be difficult to prove that the dismissal was for any reason other than the altercation at Penny Hill. A valid claim would therefore depend on establishing that AA knew in advance about BM's mental health issues.

110. On 26 July, HSF sent the Defendant a letter indicating an intention to join with RPC in making a strike out application. They said that the claim for loss in the value of BM's shareholding made against the corporate defendants was a claim for reflective loss that should also be struck out.

111. SW sent both letters to BM, copied to PM and CK, on 26 July. On the same day, BM telephoned IR and said that he was going to do the fixed fee deal, but needed to see his family first at the weekend. Following that, on 29 July, PM emailed IR asking for a meeting with him, BM and CK. This was arranged for 1 August.

112. There is a typed version of minutes of this meeting, which is an important one. It came at a time when the High Court proceedings were already on foot, so BM was liable to incur substantial costs and was at risk for the defendants' costs, and when the defendants had indicated an intention to strike out the most valuable parts of the claim. The minutes are agreed to be an accurate record of what was said.

    i) IR opened the meeting by saying that BM needed to "up the ante", in response to the intimations of strike out, and instructing counsel was now very urgent (PM had in fact authorised this on 5 July but it had not yet happened, pending the decision on costs). IR said that the legal approach needed to be refocussed (around BM's mental health issues), and pointed out that the conspiracy claim based on loss of BM's incentive shares was worthless, because of the low share price. Any claim that depended on BM being at the helm would also fail, since BM's case was that he was so ill that he needed six months' leave. So the value of the claim was lower.

    ii) Significantly, BM then stated that the conspiracy theory was wrong in that there were only 3 people who could conceivably benefit from the MVP shares, only one of whom had been sued. His opinion (expressed to be 100%) was that there had been a conspiracy to get rid of him, so that they could blame him for various matters; not a conspiracy to steal his shares.

iii) Given the view that the compensation sought related to wrongful dismissal and disability discrimination, there was then a discussion about whether the ET proceedings were more worthwhile than the High Court claim, and IR pointed out that the wrongful dismissal claim was a High Court claim, so this was worth more than the ET claim.

iv) IR suggested that a "drop hands" on the conspiracy claim could be sought, but that counsel's advice on that was needed alongside advice on the wrongful dismissal and disability discrimination parts of the claim. The note then records IR saying: "In terms of the conspiracy, it may be for the purpose originally thought, and so may be left in as a theoretical underpinning only". This appears to state that the conspiracy claim was performing a function (of involving the directors) and it may be better to leave it in.

v) IR's strategy was to focus on the disability discrimination as explaining and causing what appears to be gross misconduct, rather than arguing that it was not gross misconduct. BM had the choice of putting in a lot of effort in resisting the strike out applications or dropping the conspiracy claim. If BM wanted out, the Defendant could seek to negotiate a drop hands deal, or alternatively if the green light was given counsel needed to start work.

vi) If the strike out application was defended, BM would be at risk as to HSF's and RPC's costs, and loss would have an impact mentally and on settlement prospects. "We need to be in a position where we have some clear and cogent advice as to what do re the conspiracy (whether to fight on or drop) and to build up the other parts of the case."

vii) BM asked whether he would win the strike out and IR said that "he did not know, but that we could not continue to deal episodically. A QC is needed".

viii) BM had to decide whether to accept the fixed fee proposal or accept hourly billing.

ix) IR stated again that if BM wanted an exit, the Defendant would approach HSF to see whether a drop hands settlement was possible. IR said that he could not provide BM with comfort but that momentum was needed to build the case, and a mediation could take place by Christmas.

The main points were therefore that there was no comfort to be given on the merits of the claim; the conspiracy claim was of doubtful value; BM had to decide whether to settle or fight; it was imperative to obtain Counsel's views on the merits; and BM had either to agree to pay the Defendant on the fixed fee basis offered or on an hourly basis.

113. On the following day, 2 August, BM paid the fixed fee for the future conduct of the claim.

114. Leading Counsel, Adam Solomon QC, was chosen and instructed in writing on 3 August to advise on (among other things):

i) the merits of the High Court claim and the unlawful means conspiracy claim in particular;

ii) the threatened strike out applications, as prefigured in correspondence, and whether these could be met by amendment or by partial discontinuance;

iii) whether the Particulars of Claim needed amending.

BM, PM and CK were told on 6 August that Counsel had been instructed first and foremost to provide urgent advice on the strike out applications threatened by RPC and HSF.

115. Mr Solomon telephoned EW on 6 August with some initial and provisional views. He said that the case "has loser written all over it". It seemed to be a case of gross misconduct (having viewed the video footage of the incident). The loss of the shares was a "strikeable" claim but the conspiracy claim was more difficult (on the Johnson exclusion point). The improper purpose alleged was the other directors benefiting, which did not appear to be the case. The case looked "woeful" and he had concerns about the pleading.

116. A further telephone meeting of the lawyers only took place on 7 August. IR thought that it was a very bad idea to have BM on a call, rather than face to face with Counsel in a consultation. Mr Solomon gave his preliminary conclusions with a view to discussing a tactical approach to the case. He said that the High Court claim looked very weak in view of the CCTV of the incident, the fact that the basis of the conspiracy was advanced on a false premise, and that the quantum argument was problematic in view of BM's offer to resign. The note of the meeting has IR agreeing that to an extent the High Court claim "is a ruse" and that BM was weeks from sacking Martin Clarke. IR stated that the original intention was to put the frighteners on the board of AA in order to manoeuvre BM into a negotiating position. He said later in the conversation that the High Court claim was the obvious thing to do at the time but now it "looked like a basket case". He said that "the clients are aware that the High Court proceedings may be dropped".

117. Mr Solomon considered that the letters written by RPC and HSF about striking out the claim made very valid points. IR noted an assumption that the conspiracy claim should be dropped but Mr Solomon said that the conspiracy claim was what he was least certain about, though he focused mainly on the Johnson exclusion issue. As for the pleading, Mr Solomon said that the claim has not been particularised but that alone is not a ground to withdraw it, as often a pleaded case is a prima facie case based on assertion and is later substantiated by disclosure. The position was nevertheless reached in discussion that the conspiracy claim was at significant risk of strike out and had no merit.

118. Tactically, the choice was identified of waiting for the strike out applications to be issued and then fight them, at risk on costs, or concede elements of the claim immediately (with likely costs consequences), or wait and see what the application looks like and then decide what to concede. Mr Solomon was of the view that the wrongful dismissal claim was weak and that the focus therefore needed to be on the ET claim. He needed more time to consider the papers in

detail and think about the strategy. It was decided to await the applications when issued, since the additional costs exposure was relatively small, and then re-group at the end of the month after the annual holiday season.

119. IR suggested to EW that their clients should just be told that there had been a telephone call with Counsel and that matter would be taken up again at the end of the month. SW was unhappy with that and said that the decision to wait to see what if anything the defendants issued before the 17 August deadline needed to be explained, with the costs implications of that. In the event, EW informed BM, PM and CK on 7 August that having heard Mr Solomon's views they were inclined to let the defendants issue their application, without committing in advance to dropping parts of the claim. The SAR documents were to be reviewed. Nothing was said about the content of Mr Solomon's preliminary opinion about the claim. BM emailed the next day saying that he agreed the strategy.

120. On 10 August, the officer defendants issued an application to strike out all claims against them. On 17 August, the corporate defendants issued an application to strike out substantial parts of the claim against them, including the conspiracy claim. On receipt, PM emailed the Defendant's team to ask whether both options of defending the applications or making amendments to the claim were still open, to which IR replied confirming that they were.

121. On 21 August, the Defendant's legal team had an internal conference call to discuss how to progress matters. SW summarised the position that Mr Solomon "took the view, much like ours, that the conspiracy claim had to go", ultimately leaving a discrimination claim. On 22 August, EW emailed the clients explaining what further steps were needed in the meantime, including trying to agitate the defendants to obtain further information about the treatment of Mr Hewitt and Mr Millar by AA, and making contact with others with a view to obtaining further factual and medical evidence. The email reported that no smoking gun had emerged from the SAR material.

122. On 26 September, EW arranged the date of a consultation with Counsel on 11 October. At about the same time, PM was trying to obtain an opinion from another barrister, Mr Bloch QC, using the offices of Mr Jennings at Wright Hassall to instruct him. The Defendant had not been informed of this. On 1 October, PM emailed EW asking for the consultation with Mr Solomon to be postponed, as they needed to make sure the QC opinion tied in with the ATE application before instructing him. SW replied advising against postponement and asking PM to discuss what he perceived as the ATE issue. PM replied that BM needed to speak to IR. IR called him on 3 October and left a message.

123. IR was suspicious and had discovered that PM had been trying to instruct Mr Bloch using Wright Hassall for a second opinion, not for ATE purposes only, and he emailed PM and BM on 4 October expressing displeasure and suggesting that they instruct Wright Hassall going forwards, because he had no appetite for such "duplicity". BM replied apologising and confirming that IR was correct in what he had stated. BM blamed his poor memory for forgetting what had been agreed on 1 August and said that he had complete confidence that they could proceed successfully, with a lot of hard work.

124. A meeting of BM, JM, PM, IR and SW then took place on 5 October. There was a falling out between IR and the Mackenzies, who accuse IR of having behaved unprofessionally and intemperately, using abusive language. IR denied "effing and blinding" but accepted that he used the "F-word".

125. There are contemporaneous notes of the meeting prepared by the Defendant (not agreed) which record IR saying that at the outset he had to work with a bad hand and that he came up with something based on case thesis and anecdotal evidence. They needed to squeeze the individuals and so went for conspiracy. EW's note of the meeting records someone saying that "conspiracy was clever – it was a wheeze". JM is recorded as asking why the case was being pursued, as in June they were advised that there was a less than 50% chance of success, to which PM responded: "we don't give up. Not going to waste what we've done. The harder we go the quicker it will end."

126. The consultation with Mr Solomon did take place on 11 October. The Defendant's note of the meeting (not agreed) records that Mr Solomon said that the conspiracy claim added no value to the claim. The MVP shares were worthless. The claim for diminution in share value was a claim for reflective loss that was precluded in law. The Johnson exclusion point was properly arguable. But there was no flesh on the bones of the conspiracy claim. He believed that if the strike out applications were fought BM would succeed on some points and lose on others. It was agreed that the Defendant was to write strong letters to RPC and HSF in support of the claim, and then a without prejudice save as to costs letter offering to drop parts of the claim in return for AA dropping its counterclaim. After that, the wrongful dismissal claim left in the High Court could be discontinued and the disability discrimination claim continued in the ET.

127. Mr Solomon produced a draft letter to HSF and RPC on 16 October, which focused on rebutting the Johnson exclusion argument and which was to annex draft amended particulars of claim. SW sent it to BM with some tweaks that he had made on the same day, saying that a note from him on the tactical options would follow (this had been requested by PM). Mr Solomon sent the next day draft amended particulars of claim, which only struck through the claim for reflective loss in para 72(3) but no part of the conspiracy claim itself.

128. Later the same day, PM informed SW that BM was going to instruct another firm to take over the case. There was then an exchange of undignified emails between PM and IR, reflecting the upset on both sides of the relationship.

129. There are very few documents disclosed that postdate the disinstruction of the Defendant. The claim against the officer defendants was dismissed by the 27 November 2018 consent order and the claim against the corporate defendants continued with amended particulars of claim, following the consent order dated 13 May 2019. The amended claim was for damages for wrongful dismissal and personal injury. BM continued to maintain that the Penny Hill incident was not gross misconduct, not just that it was caused by illness.

130. On 7 May 2020, the corporate defendants applied to strike out or alternatively for summary judgment on the majority of the substituted claim for damages, including the personal injury claim. This application succeeded on 25 June 2021,

leaving only the claim for loss of 12 months' salary remaining. BM appealed that decision to the Court of Appeal and his appeal was dismissed on 8 July 2022.

131. A final development apparently occurred shortly before the start of the trial. PM said that the residual claim against the corporate defendants settled in November 2022. The Defendant makes no admissions about this, on the basis that proper disclosure has not been given. A signed, draft order was produced between days 1 and 2 of the hearing, which records that the High Court claim was stayed and the ET claim to be withdrawn, with no order as to the costs of either claim, save that the corporate defendants would retain £110,000 previously paid by BM on account of the costs of the first instance hearing.

The Main Issues for Decision

132. The parties provided with their closing oral submissions an agreed list of the main issues that fall to be determined. These were stated as being:

    i) Was the Defendant entitled to draft/issue the letter of claim?

    ii) Were the Particulars of Claim adequately pleaded? If no, what advice should have been given to BM?

    iii) What advice was the Defendant required to give BM as to merits?

    iv) What advice was the Defendant required to give BM as to costs?

    v) Did the Defendant fail to review the matter regularly?

    vi) What did the Defendant communicate as to Mr Solomon's advice (on 7 August 2018) and was it adequately communicated?

    vii) Has BM proved reliance?

    viii) Is causation of loss established and was there a break in the chain of causation of loss?

    ix) What loss, if any, has BM proved?

    x) Has the Defendant established that BM's loss was reasonably avoidable?

    xi) Was the 2 August 2018 fixed fee agreement entered into as a result of misrepresentation?

    I regard this list as a useful aide-mémoire of the areas that require decisions to be made, though it is not an entirely accurate statement of the pleaded allegations of breach of duty.

133. There is no dispute that the Defendant owed BM a contractual duty to take reasonable care and a duty of care as regards advice given to BM, and its conduct, presentation and advancement of the case on behalf of BM. The principal

questions are whether in any of the respects pleaded the Defendant was in breach of those duties, in particular by wrongly advising that BM's claim was a "good" or "strong" claim, by settling and then issuing a claim form and particulars of claim that could not properly have been pleaded, or by failing to advise at any time that the claim was weak and vulnerable to being struck out before the stage of disclosure was reached. The Defendant did advise on 13 June 2018 that it was likely that the claim would fail.

134. As regards the propriety of the pleading of conspiracy, there is no allegation that this was not in accordance with BM's instructions or that SW did not in fact believe that there was a sufficient prima facie case. BM specifically approved the pleading and still maintains that it is correct. What is contended is that there was no reasonable basis for SW's belief that there was a prima facie case of conspiracy, because there was no evidence to support it. There are few disputed facts that are material to this particular issue. One minor dispute is whether IR or SW had been informed at a meeting in August 2017, or only in an email of December 2017, that Martin Clarke was about to be dismissed from AA. But since, on any view, the Defendant knew of it more than 2 months before the claim form was issued, the dispute seems inconsequential.

135. As regards the alleged failure to advise that the claim was weak, there is a pervasive factual dispute about how negative or positive the Defendant was at various stages of the retainer about the merits and prospects of the claim. Resolution of this depends on an evaluation of the evidence of the witnesses, the content of documents in the trial bundles, and inference from uncontested facts or other facts that I find proved.

136. The first six of the agreed issues derive from various breaches of duty and negligence pleaded in the Particulars of Claim, all of which – with one exception – are allegations that the Defendant failed to advise or provide information to BM at various stages of the retainer. The exception is an allegation that the Defendant wrongly advised BM that there was circumstantial evidence of conspiracy between the director defendants when there was no such evidence. It will be necessary to address later each of the individual allegations of breach.

137. Depending on the answers to the breach issues, there are then questions of factual causation and quantum of loss that arise.

138. It has not been suggested on behalf of the Defendant that, if it was in breach of duty in pleading and issuing the conspiracy claim, costs that were reasonably incurred upon and following the issue of that claim were not caused by the breach of duty. The quantum of loss is however disputed in any event. If it is established that the Defendant should have advised before 6 March 2018 that the proposed conspiracy claim was weak and at risk of strike out but did not do so, there is a live issue as to whether BM would have acted differently in any respect if he had been advised non-negligently at that time. If it is proved by BM that the Defendant wrongly advised that the merits of the proposed claim were "strong" or "good", there is, theoretically at least, a question of whether the Defendant has proved that BM did not in fact rely on such advice in issuing and pursuing the claim.

139. The losses claimed by BM are:

    i) A sum of £178,500 said to be the costs of the officer defendants that BM agreed to pay following the consent order of 27 November 2018 dismissing the claim against them;

    ii) BM's own costs of dealing with the assessment of the officer defendants' costs, in the sum of £5,452.80;

    iii) BM's own costs, paid to the Defendant, for work done in relation to the claim made against the officer defendants (no sum or proportion is identified and BM argued that an inquiry after the trial would be needed to identify this sum);

    iv) A sum of £82,440 said to have been paid to the corporate defendants for their costs of and caused by the amendment to the particulars of claim against them;

    v) £360,000 paid to the Defendant on 2 August 2018 pursuant to the fixed fee agreement of that date.

140. As to quantum of loss, BM's case was in some disarray at trial in that a small selection of documents relating to what happened after 17 October 2018 had been disclosed at a very late stage, to seek to support the sums claimed under [139](i), (ii) and (iv) above. The Defendant complained vociferously that disclosure in relation to causation of loss and quantum had been inadequate; that it had been understood between Counsel in discussion before the PTR (that was then vacated) that full disclosure relating to these heads of claim would be given, but that instead only a self-serving selection of documents were belatedly provided. BM's position was that there had been full disclosure of material documents that were needed to address these issues. I will return to this disagreement later in my judgment.

The Witnesses

141. PM, CK, JM and BM (in that order) gave oral evidence on behalf of BM. IR and SW were called on behalf of the Defendant. No agreed written evidence or hearsay statements were relied on.

142. The evidence of the witnesses spanned 6 days of the trial, with the longest witnesses being PM and SW. Accordingly, I had a full opportunity to assess the witnesses and the reliability of their evidence.

143. The witness statements of IR and SW did not identify the documents from which they had refreshed their memory, or otherwise looked at, in the course of preparing their statements, and did not contain a schedule of those documents, as required by Practice Direction 57AC. It is clear from both statements that there were documents considered, but unclear how extensive that consideration was, or to what extent the content of the statement was influenced by having read documents, and if so which documents. It seems to me likely (and understandable given his professional role) that SW had revisited all the documents from the

Defendant's files before the trial, and may have done so before writing his witness statement. I am less confident how much IR read at either stage.

144. Both witness statements contain passages that are arguing the Defendant's case rather than setting out their recollections of facts. Neither of them states, on points understood to be important in the case, how well he recalls the matter. This nevertheless became clear in the evidence of both IR (who readily admitted to limited involvement but appeared to have a clear recollection of meetings that he attended) and SW (who was very directly involved and seemed to have a very good recollection of events and the detail of the conduct of the retainer).

145. The witness statements of BM, PM, CK and JM present a different problem. Having seen all four witnesses give evidence, it is clear to me that none of the four statements are written using the witness's own words. The four witnesses were different personalities and had very different levels of recall of events (and, indeed, willingness to engage with the facts), but the four witness statements are of a uniform style and tone, giving the impression of a person with a clear overview of events, if not their detail, and a clear picture of the case to be advanced on behalf of BM. This was so even in the case of BM himself, who says in his witness statement that he has limited recollection of certain time periods. He went further in the witness box and said that he has no real recollection of matters other than 3 meetings in September 2017, June 2018 and October 2018, about which he can recall the essentials but not the detail. Comparing the witness statements with the oral evidence given by these witnesses, the true voice of the individual witness does not emerge from their witness statement.

146. The four witness statements are the careful work of a legal team, contrary to the requirements of Practice Direction 57AC that a statement should be so far as possible in the witness's own words. Each statement works by making assertions about what happened, at a level of generality or summary, rather than setting out the facts as recalled in detail, and resembles a position statement seeking to advance a case more than a witness statement. The summary of what happened is often an exaggeration of what is shown by the documents or just inaccurate. There were many instances in the course of the cross-examination of the four witnesses called on behalf of BM where it was evident that the witness could not in fact recall what they stated in their statement, or where what was stated in the statement was contradicted in cross-examination, or was shown to be an untenable interpretation of a document. I am left as a result with real doubt about the reliability of the content of these witness statements.

147. PM was not an impressive witness. He was cautious and hesitant, and appeared unwilling to answer directly the questions that were asked. The persona seen in court was of someone apparently out of his depth with the process that had taken place during the Defendant's retainer and with important issues in the litigation. He professed a lack of understanding of several matters and a poor memory. This was strange because, as the son of an accountant and a former CEO of a large public company, with whose business and board issues he appeared to be very familiar, and as someone qualified and trained as a chartered surveyor in a West End firm, followed by 4 years working as a management consultant and then as a director of his own property development companies, PM was familiar with business and insurance in general and must have been familiar with sophisticated

business issues at the time. As an example, PM says in his witness statement that in June 2018 he was continuously asking the Defendant to share some risk in the case. That is not the question than an innocent abroad in litigation would ask. I consider that PM was much more on top of what was happening in 2017 and 2018 than he was willing to show the court.

148. PM was the principal point of contact between the Defendant and BM during the time (possibly up to and even after June 2018) when BM was not mentally well enough to be giving the Defendant instructions himself. PM was therefore closely involved in everything that happened from the first meeting with IR up to the meeting on 13 June 2018, and afterwards. He therefore followed the progress of the claim from start to finish: nothing happened of which he was unaware, or without his agreement.

149. His cross-examination started with a reluctance to accept that in late 2017/early 2018 he had any real understanding of how ATE insurance worked, and in particular the importance of a barrister opinion on the prospects of success. After about 40 minutes, and finally being shown documents that he had received on 30 October and 19 December 2017, he grudgingly accepted that he did understand at that time that a case had to have a better than 50% prospect of success to obtain ATE cover. It was evident to me, from this and other matters, that PM was well aware of topics on which he was likely to be questioned that were difficult for BM's case on the merits, and that he was keen not be drawn into answering such questions, so far as possible. I formed the same impression of CK in that regard.

150. The main impression that PM gave was of anxiety about answering any question before he had had chance to satisfy himself that it was innocuous. It was clear (and Mr Jackson confirmed) that all BM's witnesses had undergone witness training and had taken seriously the training that they were given, but PM's and CK's performance in particular went far beyond the rather wooden and stilted presentation, or requests for questions to be repeated, that is typical of those who have undergone such training. Here there was evasiveness and unwillingness to engage with the questions in a straightforward way, rather than just a careful attempt to answer precisely the question that was asked.

151. I have no doubt that PM was very familiar with the subtleties of BM's case and the important factual issues. On several occasions he resorted to asserting the key points on which that case depends.

152. I was left with a feeling that there were matters that had happened in the background that I had not been told about and which PM (and CK) did not want to come out. I consider that PM was attempting to present an impression of someone who was very dependent on the Defendant to explain everything to him, which I find was not the case. The preparation for litigation was occurring as BM and PM were making adroit use of Mr Miles's PR skills throughout the process leading up to and after issue of the claim form, to attempt to place pressure on AA or to gain sympathy for BM's position. I find that this continued use of PR to advance BM's case is of significance for assessing the motivation of BM to pursue the case.

153. CK was also a poor witness. There were certain themes that CK was happy to rehearse, such as how the Defendant had always advised that BM had a good claim, that that advice never changed, and that SW repeatedly tried to persuade the Mackenzies that they did not need a barrister's input. CK was obdurate in maintaining, despite the absence of documentary support, that the Defendant had advised that BM had "strong" claims; that all meetings with IR and CK were very positive as to the prospects of the claim; and that the advice in June 2018 that the claim had less than a 50% chance of success related only to the conspiracy element of the claim, because it depended on disclosure.

154. Otherwise, there was unwillingness to engage with questions that were asked, and long pauses to consider the questions (the length and frequency of which does not fully appear on the transcript), then asking (on occasions multiple times) for the same straightforward question to be repeated, with no proper answer emerging. Eventually Mr Bacon had to abandon his attempt to cross-examine CK on certain topics because he was unable to get proper answers.

155. CK said that she was very nervous in giving evidence, which took place over two separate days. Accepting that CK was nervous, and allowing for the fact that giving evidence at a High Court trial is a stressful experience, it did appear to me that her nervousness was principally attributable to the danger she perceived of inadvertently getting something wrong, or revealing something in an answer that would be damaging to BM's case.

156. CK's witness statement suffers from the same failings as PM's statement, to a degree, though there are some specific events or conversations about which CK gives what appears to be her detailed recollection. The witness statement gives the impression that CK has a clear recollection of the events described. The evidence that CK gave in the witness box was of a different quality: either CK did not have a good recollection of what was done at various times and why, or she was unwilling to engage with detailed questions about it.

157. The next witness was Mrs Jane Mackenzie ("JM"). In her witness statement, she explained that she went along with the claim because she understood that it was a good, strong claim. She was not personally involved in meetings or conversations with the Defendant until the meetings in October 2018, but she sent an email in September 2017 asking about costs exposure and sent some emails on behalf of BM at later times. She said that PM and CK relayed to her advice that the claim was strong.

158. It is evident from the documents in the trial bundle and things said by BM and PM about JM (which it is not necessary to repeat) that there was considerable tension between JM (and at times CK) on one side of the family, who favoured great caution before spending large sums on litigation, and BM and PM on the other side, who were much more willing to spend in pursuit of justice for BM in his fight against AA, as they saw it. Emails from JM at the time of events in 2017 and 2018 showed that her focus was, understandably, on BM's health and recovery, and that she felt unable to become involved in the litigation but remained very anxious about financial exposure.

159. As a result, the evidence that JM was able to give about what the Defendant advised was limited. It was clear, however, that whatever the Defendant had advised, PM and CK were reporting to her before issue of the claim that the case was a good case and it was on that basis, reluctantly, she agreed to fund it. She says this in terms in her witness statement. She said when she agreed to the fixed fee agreement in early August 2018, she and BM were proceeding on the basis that the claim was basically a good claim, but there is no suggestion that she was unaware of the advice given in June 2018 or any suggestion that PM, BM and CK had covered it up.

160. JM was a straightforward witness who was clearly upset about what had happened, but her evidence was, save for the 5 October 2018 meeting with IR and the consultation with Mr Solomon a week later, largely limited to what PM, CK and BM had told her about what was said at various times by IR and SW.

161. BM went last and was in some ways the most impressive witness – in that he was straightforward and honestly tried to answer frankly many of the questions that were put to him – but in other ways the least impressive, in that his memory of events (save for 3 particular meetings) was virtually non-existent and much less good than his witness statement implied. He said that he did not remember the particulars of claim but that he accepted that he believed them to be true when he did sign them, and – having had the opportunity to re-read them over a lunch adjournment – he confirmed that he still believes them to be true.

162. Early in his cross-examination, BM confirmed that he could not remember what happened before his first meeting with IR, which he thought was in the second half of September 2017: he could not recall the advice that PM and CK previously sought and obtained from IR or the email containing the Initial Advice. He did recall certain things that he told IR at that meeting; about being impressed with IR; about being embarrassed because he was unable to explain the way that the share incentive scheme worked. He said he recalled IR explaining the strategy of hitting AA hard with a claim, and that IR was the one who suggested conspiracy, not himself.

163. The problem for me is that BM's witness statement purports to give evidence about what was reported to him about PM's and CK's first meeting with IR, and it does not deal with a meeting with IR in September at all. It says:

> "I recall that Pete and Catie met with the Defendant to explain my situation and to ask for advice how I should go ahead. I can recall they told me the advice was that I had good claims to bring in the High Court concerning my dismissal and should go ahead with a High Court Claim. I also recall that the Defendants advice was to include a claim for conspiracy against the directors that would intimidate and worry them and would be borne out when disclosure of documents took place because there would be a smoking gun or something they would not want anyone to see. Their strategy would mean we could expect it to be over quickly and successfully. I was told this early in the claim, shortly after the initial meeting with the defendant in August 2017.

This evidence is not credible in view of the live evidence that BM was able to give. The position was similar for the 1 August 2018 meeting, which is dealt with in BM's statement but about which he said in the witness box that he had no recollection.

164. BM's recollection of the strategy for the claim was clearly also unreliable. He said in the witness box, with emphasis, that any suggestion that his case would not go to trial was nonsense, since he would never start a claim that he was unwilling to pursue. Yet he also accepted, as was clearly the case, that the strategy was to hit the corporate and officer defendants hard ("blast them out of their socks") with a view to obtaining a quick settlement.

165. BM confirmed that his witness statement had been written for him by solicitors in draft and that "he would have amended it", and he recalled spending a lot of time reading documents, which he found difficult, and preparing his statement. He said that although he could not now recall this and could remember his meeting with IR in September 2017, when he signed his statement in May 2022 he could remember what happened after the August 2018 meeting. He said that his memory differs from day to day. Having seen BM give evidence, I am unable to accept that BM had a good recollection in May 2022 of matters that happened in 2017 and 2018 and that he cannot now recall at all.

166. I was provided at the start of the trial with a letter dated 7 November 2022 from Dr Ayman Zaghloul, a consultant psychiatrist, who has been treating BM. He said that BM had memory difficulties secondary to his depressive illness (which was by then in full remission). He confirmed that BM could struggle with his memory, particularly if anxious, and could find it difficult to concentrate for prolonged periods of time.

167. My impression of BM is that, although he was trying his best to recall certain events, his memory is wholly unreliable as a result of the traumas that he has been through. He was very frank in the witness box about the limitations of his recall of events, and I was able to see how limited that recall was, even of the three meetings that he claimed that he could remember. For example, he remembered nothing of the attempt to produce a reply to the RFI, which was one principal purpose of the meeting on 13 June 2018. BM's only clear recollection of that meeting was that, although he was told that the conspiracy claim had a less than 50% chance of succeeding, he was also told that that was normal for this type of claim and that it would improve after disclosure.

168. The witness statement that was prepared in his name and which he signed does not accurately represent the evidence that he was properly able to give the court. It is a narrative written to set out the key components of BM's case. The actual evidence that BM gave in the witness box was of a different character from what is written in his statement: very clear, even dogmatic, about certain points of principle, and quite unable to recall many matters of detail. On certain key points, BM gave the impression of being very clear, and had a tendency to go off the subject to make the point that he wanted to make. This applied in particular to the meeting of 13 June 2018, when BM insisted he was told that the position would be different following disclosure.

169. IR was a confident and colourful witness. He was not shy to express views that many others in his position would have thought were best left unsaid, including his opinion of the Mackenzie family. IR struck me as having a strong intellect and good memory, but with a tendency to shoot from the hip, backing his understanding of how big business operates and his strategic judgment. He came across as arrogant and opinionated, but knowledgeable and experienced.

170. As nominal head of the firm and then a consultant to the limited company that succeeded it, he was not involved in the detail of individual cases, and, if he had to be characterised as a "finder", "minder" or "grinder" within that humorous taxonomy of lawyers in a law firm, was willing to accept that by temperament and skills he was probably a "finder". He was at pains to tell me that he was really very little involved in the proceedings, having delegated day-to-day conduct of the retainer to SW, who in turn brought EW into the case at a later stage. The case, he said, took up virtually none of his time. He was not involved in drafting the Letter of Claim or in producing the particulars of claim.

171. He did not regard himself as an expert on the law, or someone who was involved in the detail of the terms and conditions of a retainer. He had an irregular approach to recording time and keeping attendance notes and little appetite for the electronic document management system that the Defendant used. His driving motivation was to get a commercial result for his client, however difficult the case and whatever (staying hopefully on the right side of the regulatory line) had to be done to obtain it. He described the opponent in the case on more than one occasion as "the enemy" and disavowed concern about how allegations of conspiracy might be received by the enemy.

172. IR clearly was not aware of recent cases in which pleading an allegation of unlawful means conspiracy has been treated as akin to making an allegation of fraud, and professed himself inexpert in the law of fraud and conspiracy (though he had had experience of both in practice). He considered that he did not need instructions from a client to plead an allegation of conspiracy. However, since the Letter of Claim and the claim form and particulars of claim were drafted by SW and not IR, this point was relevant only to an assessment of how readily (and from whom) the suggestion of a claim in conspiracy arose. I accept that it came initially from IR, on the basis of some sketchy detail of the case provided by Mr Miles. IR suggested it to PM as a possible claim and PM and BM between them provided the facts to support it.

173. IR was, however, clearly a truthful witness, even if his recollection may be wrong on certain points. I consider that he was wrong in recalling that it was made clear to the Mackenzies at an early stage that there was no chance of obtaining ATE insurance. IR's essential viewpoint was that BM was in a very difficult position and that the Mackenzies were looking to IR to find a way to get him a negotiating position. The question was "how do we get into a lawsuit to put the frighteners on the AA?". He noted that "The Mackenzies were adamant there was a conspiracy and that Mr Clarke was after his shares".

174. SW was a much more careful witness, who did his best to answer questions as fully as he could. He had a rather hesitant start on the first day but got more into his stride on the second day on which he gave evidence. In between those days,

before he had finished giving evidence, SW had sent an email to Mr Bacon identifying a link to an article about pleading conspiracy. Mr Bacon properly drew this to the court's attention and, in the event, nothing was made of it by Mr Jackson in cross-examination or in submissions. It was incautious and a misjudgement by SW to engage in any communication with his Counsel in those circumstances without permission. I consider that it did not amount to a breach of my direction to SW not to discuss his evidence before it was concluded, and SW's apology for his mistake was accepted.

175. SW too was unaware that pleading an allegation of unlawful means conspiracy came with any regulatory or procedural constraint, but he accepted that it was a serious accusation to make. He defended his position that there were clear instructions from his clients to make the allegations that were made, and explained that he personally believed that there was a credible case of unlawful means conspiracy, even though proof of it would depend on documents within the control of AA.

176. SW was not, however, dogmatic in defending his or his employer's position and made concessions where sensible to do so. He struck me as a capable and conscientious solicitor, who was genuinely trying to do his best for clients who were frustrating to deal with. Although far from an expert on the law of conspiracy, I do not accept the suggestion that he believed that a conspiracy could be carried on by a single person (the claim form he issued correctly referred to "two or more of the Defendants"). His use in statements of case of the expression "one or more", as in "one or more of the Defendants", was a personal linguistic trait he used a little imprecisely on occasions to refer to an uncertain number of a group of persons.

177. In certain respects I consider that SW's memory of matters is inaccurate – that is not a criticism of his honesty in seeking to give a truthful account of what happened, which I am satisfied that he did. Materially, I consider that he was wrong to believe that prior to 13 June 2018 he had explained to BM or PM that the claim was a weak one. He was however clear that he had never advised them that they had a strong or good claim.

Disclosure Issues

178. On the second day of the trial, Mr Jackson applied for permission to rely on a supplementary witness statement of PM. I refused permission but granted him permission to ask some questions in evidence in chief. These did not include the progress of BM's claim after Wright Hassall were instructed, in particular what if any settlement AA was willing to countenance and the reasons why the claim against the corporate defendants continued. Mr Bacon had objected to that evidence being called on the basis that there had been no disclosure relating to it. In my ruling, I said that I was left with real doubt that there had been full disclosure in relation to the matters that PM wished to give further evidence about, and that the few documents that BM had belatedly disclosed were not sufficient.

179. That doubt was reinforced by what I heard during the cross-examination of PM. Privilege was clearly waived during the case in relation to advice that BM was given by new solicitors and Counsel after 17 October 2018, but documents recording the decision-making process about the abandonment of the conspiracy claim and negotiations with RPC that led to the consent order of 27 November 2018 have not been disclosed, except for one self-serving, redacted note of advice of newly-instructed leading counsel. Nor was there disclosure of emails passing between PM and Mr Bloor, relating to ATE or BTE insurance, and between PM and Daniel Jennings relating to ATE and a claim that PM said was made in about June 2018 under the Mackenzies' home insurance policy, before Mr Jennings' firm was instructed in place of the Defendant in October 2018. PM said that there were no such emails, and that he had a dislike of communicating other than by telephone or in person, but I do not accept that there were no email communications in these categories.

180. In communicating with the Defendant, all the Mackenzies commonly used emails to communicate between themselves in relation to what had been sent to or from the Defendant. PM is a professional man who has worked for substantial firms of chartered surveyors and management consultants and runs his own businesses. BM said that he used to receive on occasions hundreds of emails a day when in business. It is incredible that there were no other communications between the Mackenzies and between PM and Mr Bloor relating to insurance cover over an extended period between about December 2017 and October 2018, when Mr Bloor remained involved with insurance matters behind the scenes, and no relevant emails relating to contact between PM and Daniel Jennings from about June 2018 onwards, when he first became involved in assisting with the household policy claim. It is obvious that during this period there was vigorous disagreement between the Mackenzies about how best to proceed, in relation to seeking ATE cover and in relation to payment for the Defendant's services. I cannot accept that there are no emails between the Mackenzies relating to such matters beyond what appeared in the trial bundles.

181. There was similarly no disclosure of documents relating to the negotiation of the May 2019 consent order with HSF, or the final settlement of the claim against the corporate defendants, which I was told had only very recently been achieved. The issue of causation of the various losses claimed was squarely raised by the Defendant in its pleaded defence. The fact that the "issues for disclosure" agreed under Practice Direction 51U (as it then was, now PD 57AD) did not in terms cover these areas does not mean that BM did not have to disclose documents relevant to causation and quantum of loss, particularly after that matter was discussed and agreed before the pre-trial review. Issues for disclosure under PD 57AD are a working tool, not a definition of the extent of disclosure required.

182. As for agreement on the amount of costs payable to the officer and corporate defendants, there were only a few documents disclosed before the trial began; then a further small quantity before day 2 of the hearing. These included a handful of emails on the BM side passing between the Mackenzies and Wright Hassall relating to the costs payable to the officer defendants (which left the picture incomplete) and nothing between Wright Hassall and RPC. There were also few documents relating to the eventual settlement of the claim against the corporate

defendants (including some email exchanges with RPC, who at that stage were acting for the corporate defendants). The emails that have been disclosed show that, as one would expect, there were other communications, both internal to the Mackenzies and with RPC.

183. I am persuaded that there will be other material documents that relate to how the quantum of costs payable was negotiated. The approach of BM's legal team appeared to be that there could be no real issue about quantum, or causation so far as the costs payable were concerned, and therefore it was sufficient to provide only the documents that BM relied upon to prove the amount agreed to be paid. Mr Jackson said, without developing his argument, that there had been full disclosure of documents relating to causation and loss, but I do not accept that is so.

184. I therefore conclude that there has not been appropriate disclosure by BM in the respects identified above. In part, that may be attributable to difficulties in transfer of solicitors files from Wright Hassall to Shakespeare Martineau, but it is a matter of concern, both in relation to the true facts relating to BM's and PM's state of knowledge about the strength of BM's intended claim, and as to proof of losses alleged to have been caused by breaches of duty.

Findings of Fact on Main Disputed Issues

185. In this section, I explain my conclusions on the central factual dispute: what advice did the Defendant give BM on the merits of the claim over the period August 2017 to October 2018, and connected issues. In the next section, I make my findings on each of the allegations of breach of duty. My factual conclusions on the causation questions follow that section.

186. I am quite clear that there was never advice given by the Defendant that the conspiracy claim was a "strong" claim or a "good" claim in the sense that it was likely to succeed or should succeed at a trial. On certainly one and possibly more occasions, at the time when the particulars of claim were in preparation and in connection with the question of whether Counsel should be involved, SW told the Mackenzie family that he was happy with the claim, or that it was "in good shape". This was, in context, a comment on the state of preparation of the draft pleading, or how it was shaping up, and was about whether Counsel's opinion or assistance was needed before, rather than after, issue of the claim. It was not advice on the merits of the conspiracy claim or the prospects of the claim succeeding at trial.

187. The high point of BM's argument to the contrary is the email of 15 January 2018, explaining why IR and SW said on 11 January that they did not think that BM needed to have Counsel's advice at that stage, before issuing the claim ("This is because we think the claim is in good shape and because it would delay matters further as counsel would have need time to review the relevant papers and be comfortable with the drafting as currently proposed."). It is clear from the context that this was not advice on the merits of the claim. The issue at the time was whether to seek ATE insurance before or after issue of the claim form. SW was

expressing confidence with the state of the draft pleading and explaining that in his view there was no reason other than a decision to seek ATE cover to delay the issue of the claim in order to involve Counsel at that stage.

188. There is no document that supports the case of BM that he was advised that he had a "strong" or "good" claim on the merits.

189. I am equally clear that before June 2018 neither IR nor SW advised the Mackenzies in terms that the proposed claim was "weak" or "likely to fail". SW believed that this advice had been given orally, though he could not identify the occasion, and I am satisfied that it was not given. There is no document that suggests that advice was given in such terms. The advice that was given, repeatedly, was that success of the claim depended on evidence emerging that would support BM's account of the conspiracy. Success at trial was accordingly an unknown quantity, and the Defendant and the Mackenzies understood this from the outset.

190. There were two reasons why the merits of the claim and the chances of success at trial were not the focus, in the way that one might expect of a large claim. First, at least in 2017, it was difficult to express a reasoned view on the merits, since so much depended at that stage on BM's account. His illness at the time made taking his detailed instructions difficult. Second, and most importantly, the main purpose of the claim was not to win at a trial: it was to advance an arguable claim that would cause such anxiety to the directors of AA that they would reach a generous financial settlement with BM.

191. At the time when PM and CK first met IR, the discussion was solely about what the Defendant might be able to do for BM, if instructed to act. It was an exploratory meeting. The starting point was that BM had been left in a mess and needed to do something. As IR rightly observed, BM was in an extremely difficult position. The question at the time was: what might be able to be done?

192. Even when the Defendant became formally instructed on 25 August, the Initial Advice in the 13 August 2017 email did not become advice on the merits of BM's possible claims. I accept IR's evidence that he was merely identifying what was possible. Although IR had raised the possibility of a claim in conspiracy as early as 3 August, in his email to Mr Miles, it was no more than speculative at that stage. That remained the case in the 13 August email, though by then PM's account of a minor incident at Penny Hill being used as a pretext to dismiss him and the ulterior motives alleged gave more resonance to a possible conspiracy claim. IR's statement in the Initial Advice that a fracas in a bar was not gross misconduct (which was in any event qualified by the statement that he had not seen the evidence AA relied on) was no more than uninformed opinion, not advice intended or capable of being relied on.

193. I accept IR's evidence that PM told him that the sacking on account of the Penny Hill incident was a "put-up job" and that the motive was BM's share incentive plan that was worth hundreds of millions of pounds, from which the board members could benefit if he was sacked. However, much depended on the facts relating to the altercation at Penny Hill. IR was told at the meeting that the altercation was minor, though no one at that stage had seen the video recording.

The more obviously the conduct of PM appeared to be gross misconduct, the less likely it was that the removal of PM was for some ulterior reason.

194. It is therefore a hopeless stance for BM to take in this litigation that the advice given at the outset was that he had a strong claim and that the position never changed until Mr Solomon's advice was given in October 2018. IR was not in a position to give advice on the merits at the outset. As regards the contention made in the evidence of PM, BM and CK that there was advice that the claim was a strong one, it is notable that, in the pleaded particulars of negligence, there is no allegation that BM was negligently advised that the conspiracy claim was "strong", or "good". The pleaded allegations are failure to inform BM that the claim had no real prospect of success, and failure to advise that it was susceptible to strike out or summary judgment.

195. Further, in my view it is inconceivable that BM's response to the 18 June 2018 note and the meeting on 13 June would have been so delayed, or in the terms of the 4 July 2018 email ("left me underwhelmed"), if BM had previously been advised by the Defendant that he had a "strong" or "good" claim. BM's first response following the meeting and the note was that he would explore mediation if he could do so from a position of strength and that he felt that he had a compelling case. There was no request made to SW or EW to explain how a case that had previously been assessed as strong was now regarded as weak. It was over two weeks after receipt of the 18 June note that BM emailed SW to say that he was left "under-whelmed" by their view of the case, and that he was getting more and more confident. BM was saying in that email that he felt they were not being confident enough, not that they had changed their advice.

196. BM and PM strongly believed in the justice of the claim that BM brought. In my judgment, the feeling of BM and PM that the case was a "strong" or "good" one was their own subjective assessment, based on a combination of (a) BM's strong feelings, which his son naturally shared, about the way that he had been treated by AA, (b) the desire to right that perceived wrong, and (c) the Defendant's view that there was a claim that they could bring on BM's behalf in accordance with his instructions about what happened at AA. That this feeling about the merits of the case came from within BM, rather than from advice from the Defendant, is amply illustrated by BM's own reaction to the 18 June 2018 note, which said that the claim was a less than 50:50 case. Although the note pointed out and BM recognised that there was a lack of evidence to support the conspiracy claim, BM's reaction was that "I am getting more and more confident and we need to get on the front foot". BM's and PM's own perceptions of the merits of the proposed claim were what was reported back to JM, prior to issue of the claim and until the June 2018 meeting, and JM was probably told that the Defendant was advising positively. But the Defendant did not in fact give positive advice about the merits.

197. In answer to a question in cross-examination, SW did not seek to dispute the suggestion that the Defendant had not advised before 13 June 2018 that BM's case was "weak". His reaction was rather to suggest than any such express advice was unnecessary. When it was suggested to him that, in a discussion with BM, PM and CK on 21 February 2018, he did not advise at that stage that the proposed

claim was very weak and liable to be struck out, and that he should have given that advice, SW replied:

> "I don't think I needed to because it was already very clear to everybody involved. Not necessarily about the strikeout, because I wouldn't expect Mr Mackenzie to know that. But in terms of the strength of the claims, I believe everybody was well aware of how weak they were."

198. I find that the Defendant did not advise BM or those acting on his behalf before 13 June 2018 that the conspiracy claim was weak. I also consider that he is wrong to say that advice had been given by the Defendant before June 2018 that the prospects of success were less than 50%. I find that no advice was specifically given as to the percentage chance (or likelihood) of winning the case until the 13 June 2018 meeting, despite the difficulties for the conspiracy claim that emerged between August 2017 and March 2018, of which SW was aware.

199. The main reason why the Defendant did not assess or advise on the overall merits of the conspiracy claim was because it was never part of the strategy agreed between BM and the Defendant that only a strong or good claim would be issued. The purpose of the proposed claim was tactical: to put AA and its directors on the back foot, with a view to negotiating a settlement. That had been the strategy from the outset and, despite the counterproductive delay in issuing the claim form and signs that the original strategy was not achieving its aims, the tactics did not change.

200. While the "merits" were not wholly irrelevant, in that a patently hopeless claim would serve no tactical purpose, the assessment of the likelihood of success at trial was not an important consideration for BM at any stage before RPC told EW that they were minded to apply to strike out the claim (5 July 2018). By that time, it was clear that the "hit them hard and fast" strategy had failed, and the Mackenzies then needed to consider whether the claim had enough merit to make it worth pursuing further, to trial if necessary. The first stage of that consideration was whether the claim as pleaded would survive an application to strike it out.

201. Another reason why the overall merits of the claim were not addressed was that BM never did apply for ATE insurance. Had he done so, he would have needed the advice of counsel on the prospects of success, as he and PM were well aware. But no such opinion was obtained. No witness was able properly to explain why, despite several indications that it would be done, BM did not seek counsel's advice with a view to obtaining an ATE policy. It is not the case, as PM tried to suggest, that it was because SW did not fill in a form and send it back to Mr Bloor.

202. The most likely explanation is a combination of the additional cost of involving counsel (to which the Mackenzies were resistant throughout the retainer) and an understanding (which SW explained in writing in February 2018 and probably orally before then) that Counsel might well be unable to provide a sufficiently rosy (or certain) view of the merits at that stage to obtain an ATE policy. Communications between PM, Mr Bloor and Mr Jennings that have not been disclosed would probably have cast some light on exactly why ATE insurance was not pursued by BM. Only when BM decided to use Wright Hassall in

September 2018 to obtain a second opinion from Mr Bloch QC was there to be an advice on the merits of the claim.

203. I find that SW is wrong in his assessment that everyone was well aware of the weakness of the claims. They knew that the merits of the claim were not strong enough to obtain ATE insurance but that did not mean that they understood that the claim was weak and likely to fail, as opposed to being uncertain. Despite the evidential problems, BM and PM subjectively believed that they had a good claim, in principle, but knew that it depended on supportive documents emerging either in disclosure or from documents provided by AA pursuant to the SAR (which drew a blank in August 2018). BM strongly believed at all times, and still believes, that there was a conspiracy to remove him and that the truth of that would emerge, given time. But there was no guarantee that a "smoking gun" would be discovered.

204. SW did not advise and reassure the Mackenzies on 13 June, or PM at the 4 July lunch, that the weakness in the claim would disappear when disclosure took place. No competent lawyer could have advised in those terms and IR, SW and EW, who all appeared highly competent, did not do so. It was entirely unknown whether documents would emerge that supported BM's instructions. What had been advised from the outset was that it would not be known until disclosure whether there was strong evidence to support the conspiracy claim. The position in that regard had not changed by (and was probably reiterated at) the meeting on 13 June 2018 and the 4 July lunch. The SAR documents had not been searched by those times. That explains, in my view, how BM's and PM's optimistic view of the case survived that meeting, the 18 June note, and the 4 July lunch. In PM's and BM's minds, any current weakness would be removed upon disclosure because they believed BM's allegations and that there would therefore be documents to prove them.

205. The original strategy had been to hit AA "hard and fast", as SW put it. IR had favoured eschewing a letter before action and instead sending draft particulars of claim to AA (thereby achieving JM's objective of not creating a costs risk, but hitting AA and its directors a bit harder than a letter would do). PM did not agree that course and a month or so later the Letter of Claim was sent.

206. The Letter of Claim set out well the general complaint that BM made, and asked pertinent questions intended to fill information gaps. It did not make unsubstantiated allegations. But when no very helpful replies arrived and SW advised that it was pointless to continue to correspond (given the strategy), attention turned to preparing the particulars of claim, both for the ET claim (where there was a time limit) and for the High Court claim (where there was none pressing but there was a feeling that delay was harmful to the strategy).

207. The process of preparing the particulars of claim was slow, in part owing to the mental and physical condition of BM. It was then delayed further by indecision about whether to try to obtain ATE cover before issue. Between November 2017 and February 2018, SW was seeking to persuade the Mackenzies to move faster and issue the claim, consistently with the strategy. In that regard, SW advised that it was not necessary to have an ATE opinion before issue. However he made it clear at all times that this was only advice and that the decision whether to delay,

in order to seek to obtain ATE cover first, was one for the Mackenzies to take. The reasons, I find, why there was delay between January (when the draft claim was ready) and March (when it was issued) were, first, that the Mackenzies were internally divided about whether to proceed without insurance cover or at all; second, that they delayed in deciding whether to pay the Defendant on a fixed fee or hourly billing basis, because JM was resistant to both; and third, there was then time taken to investigate the possibility of BTE cover under BM's home insurance policy.

208. By March 2018, the prospects for the claim looked less good and the strategy was not working. It was no longer possible to hit AA "hard and fast", as an intimation of a possible claim had been given in September and 6 months had elapsed without a further step (other than the ET claim) being taken. The hope that the Letter of Claim would cause division and panic among the directors of AA had not eventuated: all the directors had instructed RPC; and RPC and HSF, on behalf of the corporate defendants, were apparently acting in tandem. The directors had had ample time to consider their positions and prepare to answer any claim that might be brought. Advance notice of the essence of the likely claim had been given in the ET claim, issued in December 2017. The opportunity to mediate before the ET claim was issued had not been taken. The directors of AA were not on the back foot. BM's delay can only have encouraged them to think that he did not believe his allegations.

209. As for the underlying merits of the conspiracy claim, BM's instructions had been that the conspiracy was to get rid of him because he was obstructing a different strategy for AA, and there existed an ulterior motive, namely to benefit the directors from a reallocation of his MVP shares. However, on 19 December 2017 (and not before then, I find), SW was informed by CK that the board was aware at the time of the Penny Hill incident that Martin Clarke was very shortly to be fired. SW recognised when told this that it appeared to put a hole in the narrative that the Mackenzies had provided about the reason for the conspiracy: it was inherently unlikely that Martin Clarke was at the centre of a conspiracy of the directors to get rid of BM and benefit from his shares if the directors knew that Martin Clarke was about to be sacked. Further, it was known before the claim was issued that only Martin Clarke among the directors could benefit from the MVP shares. Apart from comments in an email that he was concerned that the information about Martin Clarke did not fit BM's narrative, SW did not advise further on this point.

210. A separate point was relevant to the raison d'être of the conspiracy claim. AA's share price had significantly fallen since BM's departure. It was 70p when the claim was issued, but the June 2018 hurdle for conversion of the MVP shares was 394p, and the June 2019 hurdle 12% higher. At the stage of issue, BM's MVP shares must have appeared to have little if any value, because the right to convert to ordinary shares of AA would not be likely to arise. Nevertheless, the particulars of claim stated that these shares would be worth between £85 million and £220 million on conversion.

211. By the time that the claim was issued, the conspiracy claim looked weak. Despite the revelation about Martin Clarke's imminent sacking and the knowledge that none of the other defendants could benefit from the MVP shares, the particulars

of claim did not plead that a conspiracy to sack BM first in order to save Martin Clarke's position (a possible alternative conspiracy theory that SW alluded to in his evidence). There was no hard evidence to support the MVP share conspiracy alleged. Everything would depend on disclosure and the SAR. The video evidence suggested that (unless excused by prior illness) there was gross misconduct that justified the dismissal of BM. The most valuable elements of the proposed claim were either wrong in law (being reflective loss) or were unlikely to be able to be established, on account of the fall in the share price.

212. However, BM's implacable position was that the conspiracy (or at least a version of it) was true and that he would be proved correct. When provided with AA's account of the facts, in the Grounds of Resistance to the ET claim, BM's response was that it was "nonsense" or "comical". When advised on 13 June that there was a less than 50% chance of success, BM did not agree and said that he was growing in confidence; at the 1 August 2018 meeting, he expressed himself 100% confident that there had been a conspiracy.

213. Two minor factual disputes emerged during the course of the trial. The first was whether BM or someone else said at the 5 October 2018 meeting and at the consultation with Mr Solomon QC that the conspiracy claim had been "a wheeze". I address this at [304] below in the section of my judgment dealing with causation.

214. The second is whether IR or SW reported to the Mackenzies that a figure of £3 million had been raised in discussion at the without prejudice meeting on 18 September 2017, though not as an offer of settlement. I find that it was not reported (and the Mackenzies' evidence to that effect was not challenged). It is however of no consequence because no allegation of breach of duty in this regard is made.

Conclusions on 13 Allegations of Breach of Duty

215. This section of my judgment addresses and reaches conclusions on the thirteen separate allegations of breach of duty made in the particulars of claim.

(1) <u>The Defendant failed to advise the Claimant that the Defendant was required by the Misconduct Allegation Principles not to issue the Letter of Claim to the Officer Defendants</u>

216. The "Misconduct Allegation Principles" are defined in the Particulars of Claim as being, essentially, paras 5.7 and 5.8 of the SRA Code of Conduct 2011 (which applied at the time in 2018). These paragraphs are indicative behaviours that, under the Code, may tend to show that a solicitor has not achieved broad outcomes that they are required to achieve as duties owed to the client <u>and</u> the court:

> "IB(5.7) constructing facts supporting your client's case or drafting any documents relating to any proceedings containing:
>
> (a) any contention which you do not consider to be properly arguable; or

> (b) any allegation of fraud, unless you are instructed to do so and you have material which you reasonably believe shows, on the face of it, a case of fraud;
>
> IB(5.8) suggesting that any person is guilty of a crime, fraud or misconduct unless such allegations:
> (a) go to a matter in issue which is material to your own client's case; and
> (b) appear to you to be supported by reasonable grounds".

These behaviours appear in a section of the Code entitled "Your client and the court".

217. Mr Jackson accepted, when pressed in argument, that these behaviours relate to pleading facts or making allegations in court proceedings. That is perhaps a little too restrictive, but they form part of a section of the Code that is concerned with how a solicitor must act when exercising a right to conduct litigation or acting as an advocate. It is concerned with striking the right balance between a solicitor's duty of fidelity to their client and their duty to act responsibly and appropriately towards the court. The behaviours in this section do not in my judgment relate to the conduct of a solicitor in writing correspondence generally, though they might be considered to apply to a formal pre-action protocol letter of claim, which is the start of a process governed by court rules and practice directions.

218. The Letter of Claim was not, as Mr Jackson otherwise stressed, a pre-action protocol letter. It was a preliminary letter indicating BM's grievances and asking for detailed information about what had happened. The fact that the letter indicates that a claim for conspiracy was being considered by BM, and used a sub-heading "Conspiracy to injure", do not change that. The fact that IB(5.7) and IB(5.8) do not apply to such a letter does not mean that a solicitor has free rein, of course. Other provisions of the Code and general duties that the SRA will enforce mean that a solicitor may not make scandalous and unwarranted allegations in ordinary correspondence. But that was not what the Defendant did in the Letter of Claim.

219. In my judgment, the allegation in the first alleged breach of duty is wide of the mark. Having instructions to do so (the Mackenzies specifically authorised and approved its content), the Defendant was not in breach of duty in sending the Letter of Claim to the officer defendants.

(2) <u>The Defendant advised the Claimant that the evidence for a conspiracy between the Officer Defendants was circumstantial when there was no evidence supporting a plea of conspiracy on the part of any of the Officer Defendants</u>

220. This allegation of breach of duty relates to a comment made by IR in the Initial Advice:

> "Clearly the conspiracy and unjust enrichment claims require proof and the evidence right now is circumstantial"

221. It is clear that the point that IR was making was that, for the claim to succeed, there would need to be evidence that the directors did conspire in their own interest to acquire BM's MVP shares. What IR would have had in mind was minutes of board meetings, emails between the directors, and the like. His point was that the circumstances then known were not sufficient to prove the claim.

222. The evidence at the time when the Initial Advice was given was limited to the say so of BM, passed on by PM and CK, the background circumstances, and the few documents that IR had by then seen. There was indeed evidence of circumstances capable of *supporting* a conspiracy allegation but not capable of proving it. The existence of the MVP shares, the terms of BM's service agreement, the medical opinion that the board had seen and apparently rejected, and the absence of due process prior to BM's dismissal were all facts that might contribute to proving the conspiracy on the basis of circumstantial evidence, as were the facts about BM's meetings prior to dismissal with Mr Leach and Mr Millar, passed on by PM to IR and later confirmed by BM. There was also the unintentionally misleading account that PM had given IR about the incident at Penny Hill, which led IR to conclude that it sat uneasily with an allegation of gross misconduct (though as it later turned out, the opposite was the case.)

223. It is not therefore correct to allege that there was no evidence supporting a plea of conspiracy, unless what is meant by the allegation is that there was insufficient evidence to prove it at that time. If that is what was meant then IR's advice was correct and non-negligent. If on the other hand what is meant is that there was no *independent* evidence of circumstances (apart from the assertions of BM) capable of supporting a claim, then that too is incorrect. There were some facts, but not enough to prove the allegation.

224. It seems to me that the complaint in this allegation of breach of duty is in substance a quibble about IR's inexact use of the expression "circumstantial evidence", given that circumstantial evidence can be sufficient to prove a claim. The essence of the point made by IR (in a note of high level advice informally given about claims that BM might be able to bring) was that there was currently not enough evidence to prove the claim, either the possible conspiracy claim or the unjust enrichment claim. He is distinguishing between the facts as known and alleged by BM and the facts that would need to be proved. In cross-examination he explained that he meant "facts or perceived facts that, if they are proved to be correct, could make out a case". That is not how a trial lawyer would define circumstantial evidence and it might have been better if IR had used the word "limited" or "insufficient" in his note, but there was no suggestion that the word "circumstantial" caused any misunderstanding on the part of the Mackenzies.

225. In my judgment, it was not a breach of duty for the Defendant to advise that there was currently inadequate evidence to prove the claim and that only "circumstantial evidence" existed. There was indeed evidence of some circumstances that were material, as well as BM's own evidence of the relevant circumstances, but not enough to amount to proof of conspiracy.

(3) <u>The Defendant failed to advise the Claimant that the Defendant was, on the</u>

materials before it, required by the Misconduct Allegation Principles not to plead conspiracy in the Particulars of Claim

226. The relevant time at which to consider this allegation is immediately before the claim form was issued and the particulars of claim served. There could be nothing improper in the Defendant preparing a draft with a view to considering whether it should be issued, and any failure to advise could have been made good by advice shortly before issue.

227. In view of the contractual term of the retainer that required the Defendant to use appropriate skill and care in providing its services in accordance with applicable professional standards, a culpable failure to act in accordance with the Code is likely to be a breach of the duty that the Defendant owed BM. Although the indicative behaviours in the Code are just that, not mandatory standards, the requirement not to plead a serious allegation for which there is no reasonable support is clear and well-established. A breach of it, if proved, would therefore be a breach of the contractual duty owed by the Defendant.

228. The principle was expounded in the speech of Lord Bingham of Cornhill in Medcalf v Mardell [2002] UKHL 27; [2003] 1 AC 120 at [22]:

> "… at the preparatory stage the requirement is not that counsel should necessarily have before him evidence in admissible form but that he should have material of such a character as to lead responsible counsel to conclude that serious allegations could properly be based upon it."

That was a case concerned with a pleaded allegation of fraud. Lord Bingham went on to say that the material in question could include inadmissible hearsay, i.e. some material to support the allegation even if it did not amount to admissible proof of the matter alleged. The propriety of the allegation is therefore a distinct question from its proof in court.

229. Mr Jackson argued that the material in question must be something other than what the lawyer's client is saying. I would not accept that further limitation. It might be that the client overheard the relevant discussion amounting to a conspiracy or plan to defraud, or that they were informed of it by someone who did, with no other supporting hard evidence available at the time. However, the lawyer needs to be aware of the issue of reliability of the client's account. The more extreme the allegation, or limited the material, or inconsistent it is with other available material, the less it might be reasonable to rely on the client's word as the source of the allegation.

230. The duties on the pleader of a claim of unlawful means conspiracy have, as far as counsel established, only been considered in three recent decisions, two of which were concerned with whether a good arguable case of conspiracy had been established on the evidence, so as to justify onerous interim relief, and the other of which was a decision on a claim of unlawful means conspiracy following a trial.

231. In CEF Holdings Ltd v Mundey [2012] EWHC 1524 (QB); [2012] FSR 35, Silber J was concerned with an application for springboard injunctive relief against former employees alleged to have conspired to compete with the claimant's business and engage some of its staff. At [74], he said:

> "In considering these ingredients of the tort of conspiracy to injure, it is important to bear in mind that it is a very serious tort, which requires clear evidence. Megaw L.J. explained in *Jarman & Platt Ltd v I Barget Ltd* [1977] F.S.R. 260, p.267, that it is well settled that:
>
> '… a charge of conspiracy in civil proceedings is generally to be regarded as a grave charge, and that, particularly where the allegation is made against persons of hitherto unblemished reputation, the standard of proof which has to be satisfied before a court can properly hold that the charge is established is a high one, commensurate with the seriousness of the charge … Unless for some good reason on the particular facts an allegation of conspiracy in civil proceedings is to be treated, substantially, only as a technical matter, such an allegation, equally with an allegation of fraud, must be clearly pleaded and clearly proved by convincing evidence.'"

This was therefore a case concerned with the quality of evidence required to prove a good arguable case.

232. In Ivy Technology v Martin [2019] EWHC 2510 (Comm) at [12], Andrew Henshaw QC said, in considering whether there was a good arguable case justifying the continuation of a freezing order:

> "Conspiracy to injure must be pleaded to a high standard, particularly where the allegations include dishonesty:
>
> i) Allegations of conspiracy to injure *"must be clearly pleaded and clearly proved by convincing evidence" (Jarman & Platt Ltd v I Barget Ltd* [1977] FSR 260, 267;
>
> ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity…
>
> iii) unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof: *CEF Holdings Ltd v Mundey* …..
>
> iv) Where a conspiracy claim alleges dishonesty, then "all the strictures that apply to pleading fraud" are directly engaged, i.e. it is necessary to plead all the specific facts and circumstances supporting the inference of dishonesty by the defendants …."

This case was similarly about the quality of the evidence though the court also made observations on the standard of pleading expected in such cases.

233. In Lakatamia Shipping Co Limited v Nobu Su [2012] EWHC 1907 (Comm), Bryan J said:

> "[39] The approach to pleading and proving fraud claims, and associated principles, has been the subject of a number of recent decisions. Both parties were content to adopt my summary of the principles that I set out at paragraphs [41]-[92] in *JSC BM Bank v Kekhman* [2018] EWHC 791 (Comm), in particular in relation to pleading and proving fraud ([51]-[66]), the burden and standard of proof in relation to fraud ([46]-[50]), inherent probabilities ([51]-[66]), the relevance of documentary evidence ([67] –[69]) and circumstantial evidence ([78]-[80]) as well as the principles summarised by me, in particular in relation to pleading and proving fraud, in *National Bank Trust v Yurov* [2020] EWHC 100 (Comm) at [247]-[253].
>
> [40] Although most of the authorities address the applicable principles in the context of pleading and proving fraud and associated dishonesty, aspects of the applicable principles will be of relevance when allegations of serious wrongdoing are made more generally, even if there is no requirement to plead or prove fraud, as such, as an element of the cause of action (such as in an unlawful means conspiracy), and even though the strictures applicable to a plea of fraud or dishonesty are not automatically triggered"

Bryan J then noted the judgment of Mr Henshaw QC, to which I have already referred.

234. The terms of IB(5.7) and IB(5.8) – what BM's pleaded case refers to as the Misconduct Allegation Principles – should therefore be taken to apply (certainly IB(5.8)) or apply analogously to an allegation of unlawful means conspiracy. SW was therefore required to have considered the allegation to be properly arguable and the allegations against the officer defendants had to appear to SW to be supported by reasonable grounds. The allegation that some or all of the officer defendants conspired to take advantage of the Penny Hill incident so that they could sack BM and deprive him of his MVP shares for the benefit or one or more of their number was a serious allegation, and was certainly an allegation of misconduct.

235. SW gave clear evidence to the effect that he did consider the allegations of BM to be properly arguable, albeit he recognised that the claim faced difficulties and that its success would depend on some hard evidence of the conspiracy emerging on disclosure, or by other means. There was no challenge to his subjective view. The central question is therefore whether it appeared to be supported by reasonable grounds, or – to put the same point a different way – whether there was, objectively, sufficient material to give rise to a prima facie case of conspiracy.

236. SW did not in fact understand that an allegation of unlawful means conspiracy was broadly equated in this regard with an allegation of fraud. But that is irrelevant. The question is whether he should not have pleaded (and issued) the

claim because there was insufficient material to support it. If he should not have, he was bound to inform his client of that and explain it to him. The question of whether the proposed claim was weak raises different questions, which I will deal with in the next section. That would not prevent the claim from being pleaded unless the claim was so hopelessly weak as not to be properly arguable.

237. Whether the conspiracy claim was well pleaded is also a different question from whether there existed, objectively, sufficient material to justify the claim. The fact that (as I find) SW's particulars of claim were poorly structured and somewhat repetitive does not mean that it was an improper claim to bring. Further, the fact that a statement of case is vulnerable to a request for further information does not make it an improper claim to bring. On the other hand, if there were no particulars that could be provided in response to a material request, that might indicate that there was no prima facie case in the first place.

238. The essence of the allegation that SW pleaded was that the directors of AA had combined to use unlawful means (breaches of BM's service agreement and AA's Articles, and breaches of fiduciary duty) to dismiss BM on an unjustified basis, so that he was a "bad leaver" and his MVP shares could be reacquired (in effect, forfeited) to be distributed to some of the directors.

239. BM did not know which directors had done or said what, or which were principally involved. His questions in that regard in the Letter of Claim had gone unanswered. He was not able to say which directors had combined with others to injure him, but he knew that the board of AA had decided to sack him rather than allow him to resign, and he suspected that Martin Clarke was driving the decision.

240. As Bryan J observed in the Lakatamia v Su case, even at trial direct evidence of a combination is inessential and it is unnecessary for the claimant to pinpoint when or where it was formed. The origin of a conspiracy is usually concealed and the existence of the combination can only be inferred. Bryan J noted that Nourse LJ in Kuwait Oil Tanker Co SAK v Bader (No.3) [2000] 2 All ER (Comm) said that "It will be the rare case in which there will be evidence of the agreement itself", and agreed with Waksman J, who stated in an earlier decision in the Lakatamia v Su litigation that "by definition the claimant is not likely to have much by way of documents itself or direct evidence" and "quite often all it can do is raise inferences from the documents which it has". Similar difficulties are recognised where what is alleged is collusive anti-competitive agreements, and the court is therefore reluctant to strike out claims before disclosure has taken place for want of evidence to support the allegations: see KME Yorkshire Ltd v Toshiba Carrier UK Ltd [2012] EWCA Civ 1190, especially at [31], [32].

241. To plead a valid cause of action in unlawful means conspiracy, SW had to plead: (i) a combination of two or more persons (ii) to use unlawful means (iii) intending to injure BM by those means (iv) which caused BM loss and damage: Digicel (St Lucia) Ltd v Cable & Wireless plc [2010] EWHC 774 (Ch). In relation to each of those requirements, SW had to plead the material facts relied upon.

242. The best that BM was able in the circumstances to plead on the combination was that it was some or all of the officer defendants, including Mr Clarke. He was unable to say exactly who did or said what and when, other than that it appeared

from his dealings with Mr Leach and Mr Millar that some directors had made their minds up early, and that ultimately all the directors (or those who were present at the board meeting) combined to sack him.

243. The unlawful means alleged was to sack him without due process and without grounds, contrary to his service agreement and the Articles, when there was some evidence that BM had a medical excuse, and that the decision was taken in breach of the directors' duties to AA in order to benefit some of them by depriving BM of his shares and then redistributing them.

244. The material facts relating to the combination to use unlawful means were the facts known to BM from which such combination and motive was to be inferred. These were:

a) BM's service agreement and its terms;

b) The MVP scheme and BM's shares;

c) The history of dissent by Martin Clarke, things being done at AA behind the back of BM, and deliberately exclusion of him from meetings;

d) BM's state of health and medical condition at the date of the Penny Hill incident, which meant – arguably – that there was no gross misconduct;

e) An early decision (27 July 2017) apparently taken to dismiss BM, communicated to BM by a director and the secretary of AA on 28 July, after initial indications on 26 July that the outcome would be positive;

f) An irregular process calling a board meeting of AA and no board meeting of the employer company, AAD;

g) A board meeting on 30 or 31 July, when the decision to sack BM was taken by those directors who voted;

h) The rejection of BM's medical evidence from a clinical psychologist on the basis that "no illness permitted [BM's] behaviour";

i) Refusal to allow BM to resign and leave as a good leaver (though SW omitted to plead this supportive fact);

j) The consequences for BM of dismissal as a bad leaver compared with departure as a good leaver;

k) The entitlement under the Articles of AA to require forfeiture of BM's MVP shares and transfer the shares to AA or to another member of the scheme;

l) AA's letter dated 29 September 2017 notifying BM of intention to serve a compulsory transfer notice in relation to his MVP shares.

245. Although the incident at Penny Hill looked like gross misconduct, that conclusion depended on evidence about BM's state of health and what was known about it by the AA board. The fact that it appeared that only Mr Clarke (of the AA directors) could benefit from BM's MVP shares was a difficulty for the claim, given BM's understanding that Mr Clarke was about to be sacked too. But these difficulties were not fatal and did not make it improper to plead the claim: it is not a necessary ingredient of a claim in unlawful means conspiracy that the conspirators intend to benefit themselves (though that is often the case). An intention to harm BM's interests by depriving him of his shares or bonuses, or both, would suffice, though the absence of direct benefit to the officer defendants raised questions about their motivation. What was difficult to understand about AA's decision, and raised legitimate questions about motive, was its refusal to allow a hard-working and successful leader of the company to resign and depart with some dignity, regardless of the rights and wrongs of the Penny Hill incident.

246. The pleaded case was inevitably vulnerable to a request for further information, but the fact that BM could not specify who was first involved in the conspiracy (other than Mr Clarke) and when others joined it, or who said what on each occasion, does not mean that it was improper to plead the claim. The premise of Mr Jackson's criticism of the pleaded case was that it was necessary to be able to plead exactly who did what and when, as later requested by AA in its RFI, but that cannot be so, at least in a case such as this where BM was excluded from the relevant meeting and all discussions. As Nourse LJ, Waksman and Bryan JJ all recognised, in many cases such particulars will not be available to a claimant. An employee in BM's position would be unable to plead exactly who combined and in what way, and yet the circumstances might raise an inference of conspiracy.

247. The allegation in the claim form was that two or more of the officer defendants had conspired. The particulars of claim alleged (at para 60) that all the officer defendants had acted in breach of contract and the Articles, and in breach of fiduciary and statutory duty. (There may have been a mistake in this respect in that Mr Millar was not a director, but that is immaterial except in his case.) The ulterior motive pleaded in para 70 is alleged against all the officer defendants, with one or more of them intended to benefit by acquiring the forfeited shares. The case pleaded is therefore on the basis that all officer defendants, being members of the board, conspired, but BM was unable to say whether one or more were excluded from the combination alleged because they were not present between 25 and 31 July 2017, when the events at board level took place.

248. Mr Jackson argued that it was improper to plead a case of this kind without being able to allege "who precisely acted in the alleged combination with whom, and what, and when, their respective participation was". I disagree. In many conspiracy cases that is exactly what a claimant will be unable to do. He further argued that the pleading was "wholly improper" because it was not said in relation to each defendant what unlawful act they had agreed to, and when. The same response applies, but in any event the assertion is incorrect. SW pleaded that each of the officer defendants had combined to do what was unlawful, namely dismiss BM summarily contrary to the terms of his service contract, contrary to the requirements of the Articles, and in breach of duty.

249. The tort of unlawful means conspiracy does not require the conspirators to know that what they combine to do is unlawful. It is sufficient that there is agreement that something will be done, or that concerted action is taken, to cause loss to the claimant, which action is unlawful: see Belmont Finance Corp v Williams Furniture Ltd (No.2) [1980] 1 All ER 393 at 404-5, per Buckley LJ. It is therefore sufficient for there to be agreement to take action, which action is unlawful and causes loss to BM. As for the criticism that the breach of fiduciary duty alleged was not particularised, I consider that it was, sufficiently, at paras 60.6 and 70 of the Particulars of Claim. Read in the context of the pleading as a whole, it is clear that it is there alleged that the directors took a decision to sack BM for reasons that benefited them rather than AA, namely the ability to transfer BM's MVP shares, and without proper regard for the best interests of AA and its shareholders in keeping BM as chief executive.

250. There were, it is clear, known weaknesses with the case that was pleaded. These were the apparently strong argument (subject to medical evidence) that there was gross misconduct; the improbability that other board members would have been conspiring with Mr Clarke at the time in question; and the doubt that anyone other than Mr Clarke could directly benefit from the forfeited shares. In addition, BM had offered to resign. But were these weaknesses fatal to the claim, such that any reasonable draftsman would have concluded that the conspiracy claim as pleaded was not properly arguable?

251. It was certainly not for SW to decide the issue of gross misconduct. There was little clarity by March 2018 about whether members of the board of AA were aware of a relevant illness of BM. Although the information about Mr Clarke raised real doubt about the likelihood of a conspiracy for his financial benefit, it did not mean that it was impossible, or that there could have been no conspiracy to harm BM by removing him and forfeiting his MVP shares.

252. When the pleaded claim was finally considered by Leading Counsel, in August and October 2018, concerns were expressed about the claim and the pleading, and elements of the claim were considered to be wrong in law or hopeless, or worth nothing by that time. But Mr Solomon's principal concern about the claim for damages for conspiracy was the application of the Johnson principle to such a claim, not the adequacy of the factual basis for the pleading. It is clear that Mr Solomon considered that there should not be capitulation on the conspiracy claim in the face of the strike out applications, and that some parts of that claim would probably survive. He considered that only the reflective loss claim (for diminution in the value of BM's shares) was hopeless and should be withdrawn. The Johnson exclusion issue, which Mr Solomon considered to be properly arguable, was never decided, and BM does not now allege that the conspiracy claim should not have been brought for that reason.

253. What reasons the new team of lawyers had for advising (as PM and BM said that they did) that the conspiracy claim should be entirely abandoned is unknown because BM has not disclosed anything of the advice of Wright Hassall and new Leading Counsel beyond a few bullet points summarised by Mr Jennings in an email he sent on 9 November 2018 to unidentified persons (the email having been redacted). It is also material that, by that stage, BM had changed his instructions on the nature of the conspiracy, having told the Defendant for the first time at the

meeting of 1 August 2018 that the conspiracy theory was wrong and that there had been a conspiracy to get rid of him so that the directors could blame him for various matters, not a conspiracy to steal his shares. Those were not the Defendant's instructions at the time that the claim was issued, in March 2018.

254. In my judgment, although the claim as pleaded was an optimistic one, lacking in hard evidence to support the factual allegations, it was not so hopeless that it should never have been pleaded. Nor was it fatally flawed for want of particularity. There was, in my judgment, sufficient in the material facts pleaded to raise a prima facie case, by inference. In particular, the combination of:

    a) the medical evidence of BM's ill-health,

    b) BM's instructions that he had told at least one board member about it,

    c) the summary rejection of the medical evidence by the board,

    d) the consequences for BM of dismissal as a bad leaver,

    e) the early decision by some directors who had not seen the CCTV of the Penny Hill incident,

    f) the apparent lack of due process under the Articles and service agreement, and

    g) the decision of the board that BM should be fired rather than be allowed to resign,

    set against the background of other directors having previously acted to isolate BM within AA, were enough reasonably to give rise to an inference that the board had combined to take the opportunity presented by the Penny Hill incident to injure BM by dismissing him in a way that was not lawful.

255. It might of course turn out that there was evidence that rebutted any such inferential case, but SW had not seen it. Although the Grounds of Resistance filed on 1 February 2018 set out AA's response to the allegations, the facts alleged were disputed by BM and did not self-evidently undermine the prima facie case, if BM's account of the facts (where that was a reasonable possibility) was accepted to be true.

256. Despite the faults of the particulars of claim as drafted, it would be a strong thing to conclude that SW was in breach of the Code by pleading BM's claim (which is where this allegation of breach of duty leads). This was not, in my judgment, a case where no reasonable lawyer could have considered that there was a proper claim to plead. It was a conscientious attempt by SW to plead what he considered to be a properly arguable claim on behalf of his client. Whether BM should have been advised of the apparent weakness of the claim before it was issued is another matter, to which I turn next.

257. I therefore reject the argument that the pleading rules required SW to advise BM that he could not plead the conspiracy claim for reasons of professional conduct.

(4) The Defendant failed to advise the Claimant prior to the issue of proceedings that the claim in conspiracy and, in particular, against the Officer Defendants had no real prospect of success.

258. This allegation can be more briefly addressed. I have found that the claim as issued was weak, but not hopeless, for reasons that I have already given, and that the Defendant had not before 13 June 2018 advised BM that the claim was likely to fail, or that it was weak.

259. I have also found that, although BM knew that the success of the claim depended on hard evidence emerging on disclosure or by another means, he did not understand the claim to be weak, but felt that he had a good claim. It was a good claim in the sense that it was justified and, based on his subjective belief of what had happened, would be proved upon disclosure.

260. SW was wrong to believe that it was unnecessary to advise BM that the claim was weak because everyone acknowledged that it was weak. Although there was a recognition that a positive counsel's opinion might be difficult to obtain, there was no recognition (and neither SW nor IR advised at any stage) that seeking an opinion with a view to obtaining ATE cover was a waste of time. If PM had understood that the claim was weak, he and his family would not have continued to vacillate between obtaining an opinion and not doing so, thereby delaying the issue of the claim.

261. There was an express contractual duty on the Defendant to keep BM updated and advised of circumstances affecting the outcome of the case. There would be a duty in any event, as a matter of common law, to keep a client apprised of developments that affected the existing tactical approach or the chances of success.

262. Between the Initial Advice and the issue of the claim, a number of matters had emerged that affected the strategy and merits of the intended claim. The strategy was affected by the fact that: no division had emerged between the officer defendants, or between them and the corporate defendants, such as to cause mayhem; there was no longer any element of surprise about the intended claim, which had been fully disclosed in the ET claim, and so no likelihood of the defendants being caught on the back foot by a High Court claim; conversely, BM had delayed in issuing the claim, which would tend to increase the confidence of the defendants that there was no real belief in it.

263. As for the merits of the claim, the video of the Penny Hill incident was unfavourable to BM; credibility issues had emerged from HSF's account of the Dodkin incident; the indication that Martin Clarke was to be dismissed weakened the particular conspiracy narrative that BM had originally given the Defendant, as did the fact that only Mr Clarke of the officer defendants could benefit from BM's MVP shares; and the share price had very significantly weakened, meaning that there was unlikely to be any value in the claim relating to the loss of the MVP shares.

264. Although PM and BM were aware of most of these points as facts, before the significant step of issuing the claim was taken, with concomitant costs risk, the Defendant should in my judgment have advised that the claim was weak and what its weaknesses were, and why the original tactics were affected by delays and recent developments. The Defendant was in my view in breach of duty for not doing so.

265. I find that the Defendant did not give that advice at that time because SW believed that BM (or more accurately PM, on his behalf) was already fully apprised of these matters and their implications. PM was largely aware of them, though I am not persuaded that he realised the significance of Martin Clarke's intended dismissal, or the cumulative impact of the various matters identified above. BM was still not in a condition to give instructions unaided, and so for that reason alone the Defendant should have given advice in writing, so that BM could consider it carefully and repeatedly. Although PM is an educated professional man – more so than the impression he gave in the witness box – I accept that he was not a sophisticated user of litigation legal services. The Defendant was not justified for that reason in failing to give updated advice.

(5) The Defendant failed to advise the Claimant that the claim for conspiracy in the claim form issued and Particulars of Claim pleaded against AA, AADL and the Officer Defendants was susceptible to strike out pursuant to CPR 3.4(2) or summary judgment in favour of the Officer Defendants

266. If by this is meant that the claim had no real prospect of success and so would be struck out then the allegation fails, for reasons that I have already given. The claim appeared weak but was not that weak (except as regards impermissible reflective loss that was claimed). However, this allegation has been interpreted by the parties as meaning that there should have been advice that the claim would be *at risk of* a strike out application or summary judgment application that *might* succeed. It is accepted that BM was not advised of that risk before the claim was issued.

267. There was an obvious risk that an application would be made by the defendants for particulars of allegations in the claim that BM was unable to particularise. That application would be made tactically, for the purpose of showing to BM, his legal team and the court that BM was unable to specify in any detail what was alleged (as distinct from having failed to do so), and possibly to form the basis of an application to strike out the conspiracy claim. As SW later advised, that would be an obvious tactic for the defendants to adopt. That was so because proof of what was alleged was likely to depend on disclosure.

268. There was an express contractual obligation on the Defendant to advise BM of any risks and circumstances of which they were aware that could affect the outcome of the matter. The Defendant was aware that the claim was weak, in part as a result of BM's inability to plead facts relating to the detail of the conspiracy and proof of his case depended on disclosure. There was therefore a real risk of a request for further information that, if not responded to, might well lead to a strike out application at an early stage. In my judgment, the Defendant should have

advised BM, at a minimum, that there was a risk that the defendants would respond to the claim by seeking to strike it out. It was a breach of duty not to do so.

(6) The Defendant failed to advise the Claimant that in the event that the claim for conspiracy against the AA, AADL and/or the Officer Defendants was struck out, or summary judgment given in favour of the AA, AADL or the Officer Defendants, that the Claimant was likely to be ordered to pay the costs of the AA, AADL and/or Officer Defendants to be assessed on the indemnity basis

269. In my judgment, there was no duty on the Defendant to advise in these terms. In any event, it is not suggested that this breach caused loss to BM if the breaches in (4) and (5) above caused no loss. And in fact BM did not have to pay costs on the indemnity basis.

270. BM was well aware (having been advised by the Defendant) that once he had issued proceedings he was at risk of costs. He would therefore have understood that if he lost the claim at any stage he would very likely have to pay costs to the defendants. Whether that was on the standard basis or on the indemnity basis made no difference to BM or to anyone else at the time. A question of proportionality of costs was unlikely to arise on a defence of a claim for up to £220 million. A perfect solicitor would have included this level of detail in his advice, but the Defendant was not required to be perfect, and in my judgment many solicitors giving competent advice would not have descended to such a level of detail about costs liability.

(7) The Defendant failed to advise the Claimant before the issue of the Proceedings that the Strategy had not succeeded and/or was very unlikely to succeed, it being apparent from their common representation by RPC that there existed no conflict of interests between them and that they had available to them directors' and officers' insurance and/or it being apparent that it was unlikely to be found as a fact at a trial of the claim against the Officer Defendants that they had agreed between themselves to use unlawful means to dismiss the Claimant and/or to seek to deprive the Claimant of his MVP shares

271. This cumbersome allegation is, as I read it, limited to an allegation of failure to revisit the tactical approach to the intended claim and advise BM that it was not working as previously intended. I have already given my reasons for holding that the Defendant should have advised BM before the issue of the claim that the originally devised tactics had been adversely affected by developments since August 2017. This allegation of breach of duty, as I have interpreted it, is therefore established to that extent.

(8) The Defendant failed to review the Claimant's matter regularly

272. This unparticularised allegation is difficult to address in general terms. The terms of the allegations of breaches of duty and negligence were not addressed further by BM in written or oral openings, or in closing submissions, so I must take this allegation as worded in the Particulars of Claim.

273. In general terms, the allegation is not established. SW and IR did review the case regularly. There was a constant flow of emails passing between BP and PM and the Defendant in relation to every step that happened between the decision to send the Initial Letter and the meeting on 1 August 2018. Apart from the meetings on 13 June and 1 August (and then later on 5 October), there was no meeting in which a complete review of all aspects of the case took place, but the claim was only issued in March 2018 and a Defence filed at the end of April 2018. There should have been a review of the merits and tactics before 6 March 2018, as I have held, and BM should have been advised of the weakness of the claim, but there was otherwise no general failure to review the matter regularly.

(9) The Defendant failed to provide to the Claimant a Costs Risks Benefits analysis

274. Solicitors' clients are required to be given costs information, about both their own bills and potential liability for other parties' costs. Outcome 1.13 of Chapter 1 of the 2011 Code of Conduct requires a solicitor to ensure that clients "receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter". Indicative behaviour IB(1.13) is "discussing whether the potential outcomes of the client's matter were likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees". There is no requirement for the discussion described in IB(1.13), but the existence of one will tend to show that Outcome 1.13 has been achieved.

275. Information about likely costs was dealt with by the Defendant on a stage by stage basis until July 2018 when, for the first time, PM was given a schedule of likely future costs that BM would probably incur in taking the matter to trial.

276. At the outset, BM was asked to provide £25,000 on account of costs. On 13 October 2017, SW told PM that there was still a credit of around £13,000; identified two works streams that needed to be pursued; and gave estimated costs for that work, offering a fixed fee alternative for each. On 15 January 2018, SW asked to be put in funds for the court fee of £10,000.

277. On 6 February 2018, PM and CK were told that further funds would be needed to take forward the ET case and were given fixed fee and hourly rate options. A further small amount was requested before issue of the claim, to top up the amount needed to issue the claim (part of which had been used to defray other costs).

278. After the claim was issued, SW asked for a further £50,000 on account, to cover further work to be done on the case after issue. Part of this was paid a month later. SW had drawn BM's attention to the statement made on behalf of AA after issue of the claim that up to £1 million would be spent by AA and be recovered from BM. After receipt of the Defence and Counterclaim, SW gave fixed fee and hourly billing options to BM to cover work to be done on the Reply and Defence to Counterclaim and replies to the RFI. A further £40,000 was paid on the basis of a fixed fee in May 2018.

279. Following the 13 June 2018 meeting, BM asked for costs estimates and PM on 28 June asked for a budget. This was provided at the lunch on 4 July. On the

following day, IR offered a conditional fee arrangement for the remainder of the case, which BM accepted on 2 August.

280. BM was billed on a monthly in arrears basis for the work that was actually done on the case.

281. The Mackenzies well understood, having been so advised, that there was no risk of adverse costs liability unless a claim form was issued. In consequence of the risk, BM considered over several months (first on 25 October 2017) taking out ATE insurance. The strategy in any event was not to take the claim to trial but to hit AA hard and fast with a claim to produce a settlement favourable to BM, which would obviously not carry with it a costs liability to AA. That remained the strategy when the claim was issued, because the strategy had not changed. Once the claim was issued, BM was informed that AA thought that they would incur costs of £1 million in defending the claim.

282. The claim as issued was for up to £220 million. The cost benefit analysis was therefore obviously in one direction only, until the point had been reached where it was recognised that there was only in substance a disability discrimination and a wrongful dismissal claim to be pursued and that the value of the claim was much lower.

283. The engagement letter advised BM that the Defendant was unable to provide a realistic estimate of overall fees for the conclusion of the case. That was wholly understandable at that stage, given the various possible claims that might be brought and the strategy. The best possible information at that time was that the overall cost is uncertain at this stage. Once the claim was issued and the defence and counterclaim and RFI received, the Defendant was better placed to provide an overall estimate. One was requested shortly after the 13 June 2018 meeting, where the replies to the RFI were considered, and provided on 4 July.

284. I find that the likely benefits of the claim and the costs in the budget prepared by the Defendant and given to PM were discussed over the lunch meeting on 4 July. I accept SW's evidence that the current state of the case, the state of the documentary evidence, the options to "pivot" the case, the weakness of the conspiracy claim, and the costs of the claim were all discussed on that occasion. It would have been peculiar if they were not.

285. Although there is no single document that can be called a costs benefit analysis, BM was advised adequately about costs at all stages and was well aware of the potential benefits of the claim (though no figure could be placed on the possible settlement) and the risks of pursuing it and losing it. Once it was accepted that there was no value attributable to the MVP shares and that the reflective loss claim was bad in law, the costs benefit analysis looked very different. The advice about that was given, to an adequate standard, in correspondence after the meeting of 13 June, and at the meeting on 1 August in some detail, in the knowledge of the likely costs on both sides.

286. I find accordingly that there was no breach of duty in this regard: adequate costs information was provided to BM at all relevant stages of the retainer, and this

covered the costs, risks and benefits of the proposed and actual claim, to the extent that those were not obvious to the Mackenzies.

(10) The Defendant failed to comply with the Misconduct Allegation Principles

287. This allegation does not appear to add anything to the allegations in (1) and (3) above. Mr Jackson did not identify any different breach of these provisions of the Code that fell under this allegation of breach of duty.

(11) The Defendant failed to advise the Claimant, immediately following receipt of the Defence and Request 24 [*sic*] that the Claimant had no basis upon which he could successfully maintain or pursue the claim to conspiracy on the part of the AA, AADL or the Officer Defendants pleaded by the Defendant and such claim was bound to be struck out or to be determined summarily in favour of the same

288. The implication of this allegation is that if the conspiracy claim was not hopeless when issued, it became hopeless once the Defence and RFI were served and that, without more, the Defendant should so have advised and was in breach of duty by not doing so.

289. In my judgment, that allegation is not substantiated by the facts. The conspiracy claim did not become hopeless in light of the statements of case served by all the defendants. The inherent weaknesses in the claim were exposed by those statements of case, but (given the Grounds of Resistance to the ET claim and RFI in that action) these weaknesses were already evident and the defendants' case in response was already largely known.

290. The Defence said that the Particulars of Claim were liable in whole or part to be struck out, but defences often do. The Defence pleaded that BM was dismissed for gross misconduct; that the board decided that his actions had not been influenced by mental illness, and that the dismissal was lawful and that there was no conspiracy to dismiss him for other reasons. It was denied that BM's MVP shares were to be transferred to anyone except AA itself. The Defence did not plead facts that were unknown or significantly alter the nature of the issues in the claim or BM's prospects of success.

291. The RFI indicated areas of weakness in the claim, in that the Defendant had been unable in the Particulars of Claim to state which of the officer defendants did and said exactly what and when, in combining to reach their decision to sack BM on a basis alleged by BM to have been unlawful, for an ulterior motive. Nor was BM able to plead exactly who was intended to benefit from the forfeiture of his MVP shares, except Mr Clarke.

292. These weaknesses were already known. They did not make the claim improper or bound to fail. The weaknesses remained that BM's conduct appeared to be gross misconduct (subject to medical evaluation) and there was no hard evidence yet to support the allegations of ulterior motive.

293. SW and EW spent two months after receipt of the Defence and the RFI trying to extract from BM such facts as could be pleaded in response. It took BM until 21 May to respond to SW's request for his input on the Reply and RFI. BM resisted

the suggestion that a barrister should be instructed to draft a reply and a response to the RFI. Work on drafting the response to the RFI appears to have started on about 6 June. The 13 June meeting dealt with further instructions on the drafts of the Reply and the response to the RFI that had been prepared. The service of the Reply was prioritised and then a further draft of the response to the RFI was sent to BM on 20 June, asking for his review and input on identified areas. This was completed on 28 June. The idea that the Defendant should have advised BM at the end of April, without undertaking at least that process to ascertain what facts could be pleaded in response, is nonsensical.

294. The fact is that the process undertaken led the Defendant to advise on 13 June 2018 (even before the process was completed) that the claim would probably fail, and, thereafter, that it was necessary to refocus the claim, and that the conspiracy claim might be abandoned for tactical reasons given its weaknesses. This advice was reinforced at the 1 August 2018 meeting, by when it was known that the officer and corporate defendants were intending to apply to strike out the claim.

295. The allegation of breach of duty is therefore rejected. There was no duty on the Defendant to advise immediately following receipt of the Defence and RFI that the claim was hopeless.

(12) The Defendant failed to inform the Claimant of Mr Adam Solomon QC's advice that his claim in conspiracy against AA, AADL or the Officer Defendants was likely to be struck out

296. This allegation relates to the telephone advice given by Mr Solomon on 7 August 2018. IR had wished BM not to be on the call, on the basis that it was proper, or easier, or both, for BM to meet Leading Counsel face to face later that month.

297. As I have already summarised, Mr Solomon's provisional opinion was that the High Court claim looked very weak in view of the apparent gross misconduct, the flaws in the conspiracy narrative and the lack of value in the claim. He considered that the strike out points advanced by RPC and HSF were very valid and that there were problems with the pleaded case, but that the lack of particularity was not a reason to withdraw it. There was a significant risk of the conspiracy claim being struck out and it was lacking in merit. The focus needed to be on the ET claim.

298. Mr Solomon stated that he needed more time with the papers to form a strategic view of the case. It was decided to await the applications to strike out, to see what they said, and re-group at the end of the month.

299. None of this, except the intention to await the issue of the strike out applications, was reported to BM. Owing to unavailability, the consultation with Mr Solomon could not take place before 11 October. In the meantime, IR and SW met BM, PM and JM on 5 October.

300. There was no good explanation given by IR or SW of why the provisional advice of Mr Solomon was not communicated to BM, other than that it was envisaged that a consultation in person would take place relatively soon.

301. In my judgment, the Defendant was plainly in breach of duty in not immediately communicating to BM at least the substance of Mr Solomon's advice, explaining that it was a provisional view. The advice was BM's advice, not the Defendant's advice, and the Defendant denied BM the benefit of knowing what it was. It appears to me that the provisional advice was withheld in the interests of client management. SW was clearly unhappy about the client not being told much, and was right to maintain that BM had to be told that a decision had been taken to await the strike out application, because it had potential costs consequences. But SW did not go further and give BM a summary of Mr Solomon's provisional views. He should have done.

(13) The Defendant failed to advise the Claimant, immediately following the 6 August 2018, alternatively the 7 August 2018, to discontinue his claim against the Officer Defendants and his claim in conspiracy against AA and AADL.

302. This allegation is hopeless, since Leading Counsel asked for further time to consider the papers and form a view of the right strategy, and a decision was taken to await the applications to gain more time and see exactly how the applications were put. The strategy that emerged, with Leading Counsel's support, was to give up on a part of the claim (reflective loss) and try to salvage the rest, or at least negotiate a withdrawal of the conspiracy claim on advantageous terms. Advising BM immediately to discontinue the claim against the officer defendants and the conspiracy claim against the corporate defendants would have cut across any attempt to salvage the position on better terms, and would very likely have provoked an application by the defendants for costs on an indemnity basis.

Summary of breaches of duty proved

303. In summary, BM has succeeded in establishing that the Defendant was in breach of duty and negligent in:

    i) Failing to advise before 6 March 2018, when the claim form was issued, that the conspiracy claim appeared weak;

    ii) Failing to advise before 6 March 2018 that the original strategy had been adversely affected by developments since August 2017;

    iii) Failing to advise before (or after) the issue of the claim form that it was at risk of an application to strike out the claim or for summary judgment, which might succeed; and

    iv) Failing to inform BM of Mr Solomon QC's provisional advice on 7 August 2018 that there was a significant risk of the conspiracy claim being struck out.

    The first three breaches were committed by the First Defendant; the final breach by the Second Defendant.

Causation

304. Each of the proven breaches of duty is a failure by the Defendant to do something that it should have done. In each case, BM did not get the benefit of advice or information that he should have had at a particular time. The burden therefore lies on BM to prove, in relation to each or any breach, on a balance of probability, that he would have acted differently in a no-negligence world, and if so, how.

305. Naturally, BM's case is that if he had been advised that the conspiracy claim was weak and at risk of an application to strike it out, and that the strategy would not have the impact originally envisaged, he would never have issued the claim form against the officer defendants, and would have limited his claim against the corporate defendants to a claim in wrongful dismissal and disability discrimination.

306. The no-negligence world is one in which the Defendant is assumed to have acted non-negligently, not to the highest possible standard. The Court does the best that it can to identify what, broadly, is most likely to have happened. What witnesses say would have happened, years after the event, is unlikely to be reliable or useful evidence of what would probably have happened. Indeed, I have already given my reasons for concluding that BM's witnesses were generally unreliable and that what is said in their witness statements, in this and other respects, is assertion and argument coloured by the shape of his case.

307. An important factor in considering what BM would have done in the no-negligence world is BM's state of health, and PM's and CK's determination to support him. As at 6 March 2018, BM was still not in a condition to give instructions to the Defendant independently. His memory of detailed events was poor, though he probably had a clear understanding of the main respects in which he alleged that AA had acted wrongly towards him. Indeed, as JM said in correspondence to SW, that was a fixation and he could see little else. He therefore relied at that time principally on PM, but also on CK, to assist him in formulating and communicating his instructions. JM was involved to a more limited extent, on decisions relating to funding.

308. I have already held that, subjectively, BM and PM believed that BM had a good claim, albeit one where there were evidential difficulties that would probably not be cured until disclosure took place. BM firmly believed that there had been a conspiracy. PM had the same approach as BM to the wrong that had been done and the need for vindication by a substantial payment to BM. Vindication was, in my judgment, as important to BM as a large financial settlement. He was determined that AA would publicly be seen to be at fault. It was for this reason that BM and PM instructed Mr Miles throughout to advance BM's case in the media. BM was determined that the public should understand that AA was in the wrong in the way that it had treated him. JM, however, was antipathetic to litigation and wished to have nothing to do with it.

309. By March 2018, the position had been reached that BM and PM confidently believed that the particulars of claim – on which they had provided detailed input and approval – accurately reflected BM's complaint about AA and its directors. SW was entitled to be satisfied on that point, given the involvement of BM and

PM through several drafts. However, the conspiracy narrative was based principally on an attempt to benefit from BM's MVP shares.

310. In my judgment, compliance with duty required the Defendant, at a minimum, to tell BM in writing the following. First, that the fact of the imminent sacking of Martin Clarke did not fit well with the particular conspiracy narrative that BM and PM had given the Defendant. Second, that the share value was such that it was doubtful that there was value in a claim based on the loss of the MVP shares. Third, that these points, and the dependency on evidence from disclosure, made the conspiracy claim appear weak. Fourth, that there was a risk that the defendants would apply to strike it out, which if it succeeded would mean that the stage of disclosure was not reached. The Defendant should also have pointed out in writing that part of the original strategy, namely to cause mayhem and division among the defendants, was unlikely to be achieved in March 2018.

311. Of these points, BM and PM knew that Mr Clarke was about to be sacked, but perhaps did not appreciate why that made the conspiracy theory less credible. BM and PM were aware of the level of the share price and, I find, knew that the MVP shares only had value if the hurdles for conversion could be met in June 2018 or June 2019. This was possible but appeared unlikely at that time. I am persuaded that BM and PM did not appreciate that the conspiracy claim appeared weak, such that it might be struck out. They knew that it was a difficult claim to prove. They probably appreciated that the original tactics could not succeed in quite the way that had been planned in August 2017, and could see that the defendants appeared to be united in their response rather than divided.

312. I have no doubt that if adequate advice on these main points had been given by the Defendant in writing in early March 2018, BM would still have instructed the Defendant to issue a High Court claim against the corporate defendants. The weakness of the conspiracy claim did not impact on BM's desire to assert at least wrongful dismissal and disability discrimination. BM would not have accepted that the MVP shares would turn out to be valueless, despite the low share price at the time, and indeed did not do so later, in 2019, when this basis of loss was pursued as part of the substituted wrongful dismissal claim that BM continued to pursue against the corporate defendants.

313. Whether a conspiracy would have been pleaded and whether the officer defendants would have been joined is not so clear-cut. The factor that weighs principally against such a claim being pursued is the opposition of JM. If the Defendant had advised in writing in the terms set out above, I consider that CK or PM, or even BM, would have shown it to JM, and as a result she would have been strongly opposed to bringing a conspiracy claim, or perhaps any claim. Although PM referred to her as the "financier" and it was agreed that she "held the purse strings", she did not hold them so tightly that BM did not ultimately prevail in pursuing the claim. He even obtained £360,000 to pay the fixed fee in August 2018, following a family meeting, at a time when it was recognised that the conspiracy claim was weak and the whole claim likely to fail.

314. I have accepted that JM may have been misled about the merits of the claim before it was issued. However, there is no reason to think that JM was misled about the advice on 13 June, 4 July and 1 August. It was not the case that JM had a veto on

expenditure, just a strong voice of common sense. It is also evident that that voice was eventually overridden by BM and PM in combination.

315. Set against that factor, BM has remained absolutely clear that there was a conspiracy to oust him and on that basis he would still have maintained that he had a good claim, even if proof of the conspiracy would take time to unearth. He had rubbished the Grounds of Resistance of AA as being "comical" and, despite the advice given in June and August 2018, maintained that he was confident about the claim. In the no-negligence world, he would have continued to press strongly to pursue the pleaded conspiracy claim in order to join the individuals that he believed had conspired against him, and I consider that PM would have supported him. PM said in evidence that the relevant paragraphs of the Letter of Claim covered what was discussed with IR and that both he and BM agreed with it. It was only on 1 August 2018 that BM said that the particular conspiracy narrative was wrong, in so far as it had been alleged that the directors were to benefit from his MVP shares.

316. SW was well aware of BM's determination to pursue the claim, so much so that on 14 March 2018 he was able to tell Mr Deans, even without instructions, that BM would not accept a "drop hands" settlement offer. The media campaign orchestrated by Mr Miles, on BM's instructions, strongly evidences that BM was highly motivated to vindicate himself and, despite the June 2018 advice, BM felt that he had a compelling case and was "getting more and more confident and we need to get on the front foot".

317. Both BM and PM did in fact wish to continue to pursue the conspiracy claim rather than abandon it, after they were advised in June 2018 that the recently issued claim was weak. Even after BM had said in the 1 August 2018 meeting that the basis of the conspiracy alleged was wrong and dropping it was discussed, BM stated that he was 100% sure that there had been a conspiracy to get rid of him. He agreed the substantial fixed fee on 2 August to pursue that claim to trial, and that agreement followed a weekend discussing the matter with his family and the 1 August 2018 meeting with IR and SW.

318. I am unpersuaded that BM said at the meeting on 5 October 2018 that the conspiracy claim was a "wheeze", or that he made a similar comment in the consultation with Mr Solomon on 11 October 2018. The note of the meeting on 5 October 2018 does not identify the person who said that the conspiracy claim was a "wheeze", but the Defendant's note of the telephone discussion with Mr Solomon on 7 August 2018 (not seen by the Mackenzies at the time) does record IR saying that to an extent it was "a ruse". The final version of the note of the consultation on 11 October 2018 does attribute to BM a comment that the conspiracy claim was a "wheeze", but this was not recorded in the original notes taken at that meeting: it was added when the note (which was not sent to BM) was finalised. I think it more likely that IR said on 5 October 2018 that the conspiracy claim was a clever wheeze and that that comment was not made by BM at the later consultation. BM believed that there was a conspiracy and I do not consider that he would have said that it was a "wheeze".

319. The conspiracy claim remained a key part of the tactics to bring as many claims as possible against as many AA defendants as possible, and this objective would

only have been fulfilled if the officer defendants were joined. This was recognised by IR as a substantive purpose of the conspiracy claim at the meeting on 1 August 2018, when dropping that claim was under consideration. If, as was the case, the objective remained to put as much pressure as possible on AA and its directors to attempt to force a beneficial settlement, the conspiracy claim was still important. BM and PM both understood that. It also reflected the "truth" that BM wanted the public to hear.

320. I do not consider that BM would have been deterred by advice that an application to strike out might be made and that it might succeed. To achieve what he wanted to, BM needed to bring the conspiracy claim. JM would have protested against it but eventually been persuaded, as she evidently was on other occasions.

321. In the final analysis, I consider it more likely than not that, in the no-negligence world, a conspiracy claim would have been issued against the officer defendants, for two main reasons. First, BM believed ("100%", as he put it) that there had been a conspiracy to oust him, and he still does. He would not have wanted to issue a claim without that allegation being made, and PM would have backed him in that regard. Second, a claim involving the officer defendants remained an important part of the tactics to obtain a substantial settlement from AA, and thereby vindication for BM, notwithstanding the delay in issuing the claim. It is possible that the conspiracy pleading would have been amended at a late stage, to remove the allegation of a conspiracy to benefit Mr Clarke or another officer, and substitute a conspiracy to harm BM (and potentially benefit AA and its shareholders generally) by depriving BM of his MVP shares. However, I do not consider that that is more likely than not, because the pleaded case was in accordance with BM's instructions at the time – indeed he said in the witness box at trial that he still believes that what was pleaded is correct.

322. It follows that, the breaches of duty that I have found proved in relation to a failure to advise adequately in March 2018 did not cause BM the losses that he claims, since the conspiracy claim would still have been issued and served on all defendants.

323. As regards the breach of duty by failing to advise BM on or shortly after 7 August 2018 of Mr Solomon's provisional advice, this would have made no difference to the course of events, except possibly that the consultation with Mr Solomon would have been arranged for an earlier date than 11 October 2018. However, Counsel was unavailable before September. Had the Defendant passed on the provisional advice, it would have been accompanied by an explanation that these were only provisional views and that Mr Solomon wanted to consider the papers in more detail before advising BM in consultation later.

324. There is, in my view, no real chance that BM, had he been informed on or about 7 August 2018, would have instructed SW before the strike out applications were issued a few days later to withdraw the conspiracy claim on the basis of that provisional advice. BM would have waited to see what the applications said and sought full advice thereafter, which is what did happen. Accordingly, the breach of duty on or about 7 August 2018 caused BM no loss.

325. The Defendant also contended that BM has not proved that the actual losses alleged (payment of costs) were caused by the conspiracy claim. The Defendant submits that there is no sufficient factual connection between the existence of the conspiracy claim and the payment of costs to the officer and corporate defendants.

326. The argument appears to be advanced on the basis that there is a break in the chain of causation (if otherwise intact) because BM acted unreasonably in not pursuing a settlement with AA with no order for the costs of the claim. The Defendant emphasises that – as there was no disclosure of the decision-making process and negotiations that led to the consent order dated 27 November 2018 - how BM came to agree to pay the costs of the officer defendants is unclear.

327. The evidence about what happened is very limited. BM purported to give evidence in his witness statement about what happened with the new legal team, but he was clear in his evidence in court that he did not remember such matters. JM only says in her witness statement what PM and BM told her. PM said in his statement that Robert Howe QC advised that BM's only option was to try to get out of the conspiracy claim immediately – but there has been no disclosure to support that statement or action taken subsequently. PM says that he was advised that "despite their best efforts", the new legal team could only manage to agree with RPC that the claim would be discontinued with BM paying the officer defendants' legal costs, and that it was not possible to obtain better terms. Again, there was no disclosure of the advice or the correspondence between Wright Hassall and RPC relating to this. It is unclear what other alternatives were considered by BM with Wright Hassall.

328. In the Defence, it is first pleaded that BM is required to prove that he acted reasonably in all the circumstances in negotiating the November 2018 consent order and then agreeing costs in the sum of £178,500, and then pleaded that, so far as concerns mitigation of loss, BM is required to prove that he acted reasonably (paras 95, 96.2 and 103 of the Defence).

329. In my judgment, if (contrary to my conclusion) the Defendant's breaches of duty caused BM to issue the conspiracy claim, liability for the defendants' reasonable costs of that claim was, in principle, caused by the breach of duty. BM had been advised by two leading counsel that there was no merit or purpose in the conspiracy claim. That coincided with IR's and SW's view on 21 August 2018 that the conspiracy claim had to go. It was clearly reasonable in those circumstances to seek to get out of the claim at least possible cost, rather than incur further costs in fighting the strike out applications or pursuing that claim. It is inherently improbable that the officer defendants would have agreed a withdrawal of the claim against them without their costs being paid, at least on the standard basis of assessment. The conspiracy claim was the entire claim against them.

330. It is, I accept, possible that if BM had intimated a willingness to abandon his entire claim against the corporate and officer defendants, he might have been able to negotiate no order as to costs overall. But abandoning other claims (as pleaded in the particulars of claim) that were not caused by negligent advice of the Defendant would not have been a reasonable step to require BM to take to mitigate his loss. I do not consider that, if seeking to negotiate only the costs of

the conspiracy claim, there was a reasonable prospect of avoiding paying the officer defendants' reasonable and proportionate costs.

331. As to the corporate defendants' costs, the costs claimed were their costs of and occasioned by the amendment of the claim form and particulars of claim, which involved dropping the conspiracy claim, pleading properly wrongful dismissal and adding a personal injury claim. There was no order made against BM for costs thrown away by the conspiracy claim or for costs of the conspiracy claim. Although the amendment involved removing the conspiracy claim from the statements of case, the costs incurred by the corporate defendants were in substance incurred in responding to the new claim. In my judgment, they were therefore costs caused by a failure to bring and plead wrongful dismissal and personal injury claims in the first place, not costs caused by bringing the conspiracy claim. I therefore accept that these costs were not in any event caused by the proven breaches of duty.

Loss and Damage

332. As for the quantum of the officer defendants' reasonable and proportionate costs of the claim brought against them, the documents disclosed, though incomplete, show that the defendants prepared a bill of their costs of the claim against them dated 15 February 2019 in a total amount (excluding interest) of £211,852.00 (inc. VAT). It appears that Wright Hassall advised BM to make a once and for all offer of £150,000 but that instead a Part 36 offer of £120,000 was made (with that sum being paid to RPC on account), and the officer defendants made a Part 36 offer of £184,888.

333. On 15 May 2019, Mr Jennings advised JM to make a further offer, in order to stop costs being incurred on detailed assessment (it is quite unclear whether points of dispute of the bill of costs were filed, and if so in what amount in total, but I assume that they must have been). BM authorised Mr Jennings to offer £130,000. There is no evidence of that sum being offered. On 19 August 2019, Wright Hassall made a without prejudice save as to costs offer to pay £172,500 in full and final settlement. There are no documents that show how that sum was arrived at, given BM's previous position and Wright Hassall's previous recommendation to offer £130,000 to £135,000. PM's witness statement merely says that "these costs were negotiated and eventually we had to pay £178,500". There is no evidence of when or how payment was made.

334. Without seeing the points of dispute of the bill of costs, it is very difficult to conclude that the claim for costs was reasonably compromised at £178,500. 70% of the bill of costs (excluding interest), which is sometimes taken as a reasonable (but very broad brush) indication of the recoverable costs in a business or commercial case on the standard basis, was £148,296.40. The sum said to have been paid is 84%, which is very high.

335. It seems to me very likely that BM did in fact pay the officer defendants' costs in the sum pleaded. I accept that the issue of mitigation of loss was properly pleaded and raised (paras 96.2 and 103 of the Defence). In the absence of proper

disclosure by BM, I am satisfied on the evidence that exists that BM did not reasonably mitigate his loss by agreeing to pay £178,500. The offer of £172,500 and settlement at £178,500 are not explained.

336. Had I found any loss to have been caused by the breaches of duty alleged, I would for this reason have limited the amount of loss to £155,000, allowing for a modest increase in negotiation above 70% and for some interest. I would have allowed nothing for the claimed costs of assessing these costs because there is no evidence to support the figure of £5,452.80 claimed and no adequate evidence of payment of that sum to Wright Hassall.

337. On the hypothetical basis on which I am addressing quantum of loss, I would have allowed as damages BM's own costs of pursuing the conspiracy claim paid to the Defendant from 6 March 2018 to 1 August 2018. Those costs would have needed to be determined at an inquiry conducted by a Master or costs judge after the trial. Although the matter should have been raised at the pre-trial review that regrettably did not take place, I accept that if raised it would have been seen as disproportionate to try that apportionment and allocation of costs issue at trial.

338. As for the costs that BM agreed to pay the Defendant as a fixed fee agreement on 2 August 2018, I do not accept that these substantial costs were caused by the proven breaches of duty in any event. Even if, in the no-negligence world, BM would not have brought the conspiracy claim at all, he would have issued a claim for wrongful dismissal and personal injury or disability discrimination and pursued that claim, as in fact he did after the consent order of May 2019. This claim would have required funding and probably would have been funded in the same way at that stage of the litigation.

339. Further, in the real world, the fixed fee agreement was made after BM had been advised in person, twice, that the conspiracy claim was likely to fail; about its weaknesses; that there would be applications made to strike it out; and after there had been a discussion about dropping the conspiracy claim and "pivoting" to other bases of claim. That effectively gave BM the information about the conspiracy claim that he should have been given before the claim was issued. The Defendant offered BM the choice of negotiating a withdrawal of the conspiracy claim or pursuing it, and a choice of fixed fee or paying hourly rates for work done. IR said that he did not know whether BM would successfully resist the applications to strike out the conspiracy claim.

340. Against that background, BM made an informed choice to pay the fees that would enable the conspiracy claim to be pursued. In these circumstances, there was no sufficient causative link between the negligent failure of the Defendant to advise in March 2018 that the conspiracy claim was weak and might be struck out and the incurring of the fixed fee on 2 August 2018.

Misrepresentation Claim

341. BM's alternative case about the fixed fee agreement is that he was induced to enter into the agreement by IR's false and negligent statement that he did not know whether BM would successfully resist the strike out applications.

342. The question was put to IR and his response given in the meeting of 1 August 2018. The agreed note of that meeting records: "BM asked whether we would win the strike out. IIR said that he did not know, but that we could not continue to deal episodically. A QC is needed".

343. The fuller context of this discussion was, first, the fees proposal provided by IR to PM on 5 July 2018, offering the fixed fee or "pay as you go on a monthly basis" and inviting PM's thoughts on the proposal; second, the fact that no agreement on payment had been reached by 1 August, although BM had indicated that he was minded to agree the fixed fee; and, third, the urgent need to instruct counsel, as IR and SW had explained previously. At the meeting on 1 August 2018, IR again explained that counsel's advice on the conspiracy claim and on the wrongful dismissal and disability discrimination aspects was needed urgently, and that the options at that stage were to seek to negotiate a way out of the conspiracy claim on a "drop hands" basis or to do a lot of work with counsel to prepare to meet the applications. IR had said "we need to be in a position where we have some clear and cogent advice as to what to do re the conspiracy (whether to fight on or drop)".

344. Mr Jackson suggested to IR in cross-examination that IR knew perfectly well that the strike out application would inevitably succeed. The insinuation was that IR did not want to say that, because he wanted BM to agree to pay a further £300,000 in fees up front to cover two-thirds of the costs of going to trial, when IR knew that there was no such prospect. IR strongly denied that suggestion and said that he gave BM a clear picture of the position, the need for counsel's advice, and a choice whether to take the fixed fee option or to pay monthly.

345. The email of 4 July 2018 in which IR explained to his practice manager the fee proposal states that "The case in now looking weak, but it might improve. I would be surprised if it goes to trial." IR was shown an email from Mr Field-Walton (in the Defendant's employment law team) to EW, which states that "For reasons I do not fully understand, the view has now been taken that the High Court claim is not expected to achieve the outcome the client hopes for". The issue that this alluded to was whether there was any value in the conspiracy claim, over and above what was claimed in the ET. IR said that he told BM in the 1 August 2018 meeting that BM should not pay if he did not feel confident. That is not borne out by the note, but it is clear from it that IR presented fairly to BM the options that he had at that time, and he concluded by telling BM that he could not provide comfort.

346. I reject the suggestion that IR was consciously misleading BM into agreeing to pay a large fixed fee for taking the case to trial. The fixed fee had been offered on 5 July 2018 in response to PM's request. No agreement on payment of fees had been reached since that date. IR gave BM two options, but some agreement was needed to progress the case. IR's answer to the question about winning the strike out was consistent with his view that counsel's advice was needed. Although IR was sceptical that the conspiracy claim had any merit, he was not expert enough to advise with confidence whether the anticipated strike out application would succeed or fail. IR was right to advise that counsel's advice should urgently be obtained.

347. Further, the fixed fee proposed was not just for the conspiracy claim but for whatever claim proceeded to settlement or trial. Although the claim form only referred to a conspiracy claim, the particulars of claim also pleaded in substance a wrongful dismissal claim, and amending the particulars of claim was clearly one option at that time. Even if the conspiracy claim were to be dropped, the remainder of the claim would have proceeded under the fee agreement (subject to an amendment of the claim form) – IR had spoken to the Mackenzies on 4 July 2018 and 1 August 2018 about the need to "pivot".

348. In a literal sense, IR's answer to the question was true, not false, because he did not know what the outcome would be. He had not even seen an application notice and could not and did not know in advance what decision the court would reach. However, the question was asked and answered orally in the meeting, and would not have been understood in a literal sense. IR's answer implied that he had not formed a view about the outcome of a strike out application.

349. In my judgment, the answer given was still true, not false. IR's view of the merits of the claim is in my judgment accurately reflected in his email of 4 July referred to in [345] above – i.e. weak but might improve. There was no reason why he would mischaracterise his view of the merits in that internal email. The collective view of those working on the case was that the conspiracy claim had to go because it did not serve a useful purpose, not that an application to strike out that had not yet been issued would succeed.

350. Whether a strike out could be resisted was different in principle from whether the claim would succeed at trial. It was an important tactical stage in the litigation. EW had advised PM on 9 July 2018 that it was difficult to predict what the outcome of a strike out application would be. Given that IR was strongly urging that the question should be considered by leading counsel, he was entitled to answer as he did. The answer was not false. He had already advised at the meeting that the conspiracy claim was weak and could be dropped, so it was not an attempt to portray and did not portray the claim as stronger than it was.

351. BM's case is that IR should have answered by saying that the strike out application would inevitably succeed. I reject that argument. It is the strike out application to which the question was directed, not the merits of the claim generally. It is noteworthy that Mr Solomon was not of the view that the strike out application would inevitably succeed, when he advised in October 2018. He considered that parts of the claim (or relief sought) would be struck out but that the rest was arguable. His concluded view was not that the conspiracy claim was hopeless but that it served no useful purpose.

352. For these reasons, I reject the claim that IR negligently gave a false answer to the question of whether the strike out applications would succeed. The fixed fee agreement was made voluntarily by BM knowing that a strike out application was going to be issued and that it might succeed. The fees were agreed with a view to seeking advice from leading counsel on how best to reposition the claims against AA that BM was so keen to pursue.

353. The misrepresentation claim therefore fails.

Disposal

354. I have found that:

i) The Defendant did not advise BM that he had a strong or good claim against the corporate or officer defendants;

ii) The Defendant did not advise BM before 13 June 2018 that the conspiracy claim was weak or would fail;

iii) The Defendant was in breach of duty and negligent in the respects identified in [303] above;

iv) None of the breaches of duty caused BM loss;

v) If, contrary to my conclusion, loss was caused by failure to advise non-negligently before issuing the claim, the losses are limited to £155,000 and BM's own costs of the conspiracy claim paid to the Defendant for the period 6 March 2018 to 1 August 2018;

vi) There was no false representation made to BM on behalf of the Defendant on 1 August 2018.

355. I will therefore dismiss BM's claim and will hear Counsel on a future date no later than 10 March 2023, to be fixed, on all consequential matters. I adjourn the hearing and extend time for filing any appellant's notice until 21 days after that adjourned hearing.