Neutral Citation Number: [2023] EWHC 515 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. BL-2022-000390**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

B E T W E E N

(1) STUBBINS MARKETING LIMITED
(2) MARIANO DIFRANCESCO
(3) ANTONIO DIFRANCESCO
(4) ANTONIO GIUSEPPE DIFRANCESCO
(5) ONOFRIA DICARLO
(6) ONOFRIA BAILEY
(7) GIOVANNI DIFRANCESCO
(8) MICHELE DIFRANCESCO

Claimants

and

(1) RAYNER ESSEX LLP
(2) GISBY HARRISON (A FIRM)

Defendants

and

SALVATORE MICHELE DIFRANCESCO

Third Party

Thomas Roe KC and Charles Sorensen instructed by Duffield Harrison LLP for the Claimants
Thomas Grant KC and James Kinman instructed by Reynolds Porter Chamberlain LLP for the First Defendant
Hearing dates: 27 February and 16 March 2023

JUDGMENT

Deputy Master Nurse

INTRODUCTION

1. This is a reserved Judgment following the hearing of an Application by the First Defendant ('Rayner Essex') issued on 20 December 2022. By the Application Rayner Essex seek the following relief:

   "That the Claimants do pay the First Defendant's costs of responding to a letter of claim dated 30 June 2021 on the indemnity basis because the allegations made in that letter of claim were baseless and abandoned when challenged. Further or alternatively the First Defendant seeks its costs as identified by and under CPR r.38.6(1) and (2), the Claimant having discontinued various claims advanced against it, and seeks an order under r.28.6(2)(b) that those costs be assessed forthwith; and there be a payment on account of those costs in such amount as this court thinks fit. Further the First Defendant seeks its costs on the indemnity basis."

2. Before me the Claimants were represented by Mr Thomas Roe KC and Mr Charles Sorenson, and Rayner Essex by Mr Thomas Grant KC and Mr James Kinman. Counsel for both parties produced detailed Skeleton Arguments which were supplemented by oral submissions, for which I am most grateful. It is not possible, without over-extending this Judgment, to record all the points dealt with in the Skeleton Arguments and submissions, but I have considered all matters put before me in reaching my conclusion. If any specific point is not mentioned, it should not be assumed that I have failed to consider it in reaching my Decision.

BACKGROUND

3. The First Claimant ('SML') runs a fruit and vegetable business. It is owned by members of two families: the Difrancescos and the Turones (albeit in the case of two of the latter, by their trustees in bankruptcy). The Second to Eighth Claimants are some of those family members.
4. The present Claim, issued on 8 March 2022, arises out of a transaction entered into by SML on 1 April 2016 ('the Transaction'). At that time, the directors of SML were five individuals named (a) Wayne Smith; (b) Pietro Turone; (c) Salvatore Turone; (d) Salvatore Michele Difrancesco (who is a Part 20 Defendant/the Third Party in these proceedings); and (e) Salvatore Difrancesco. At the time of the Transaction, Rayner Essex acted as accountant, auditor and business advisor to SML. One Mr Heyes was the primary point of contact between Rayner Essex and SML.

5. By the Transaction, SML sold most of its business and assets (including a substantial property, the 'WX Hub') to companies named Stubbins Food Partnerships Limited ('SFP') and Stubbins Growing Partnerships Limited ("SGP"). SFP and SGP were substantially owned by Wayne Smith, Pietro Turone, Salvatore Turone and Salvatore Michele Difrancesco. It was intended that, after the Transaction had completed, SML's business would largely or exclusively consist of leasing two valuable nurseries (which remained in its ownership) to SFP and SGP.
6. SML subsequently issued a Claim ("the First Claim") against, amongst others, SFP, SGP, Wayne Smith, Pietro Turone, and Salvatore Turone, alleging (among other things) that the Transaction had not been properly authorised in accordance with the terms of section 190 of the Companies Act 2006, and that SFP, SGP, Wayne Smith, Pietro Turone and Salvatore Turone were liable to indemnify SML against any loss or damage suffered by it as a result of the Transaction.
7. There was a Trial of the First Claim heard by Mr Justice Trower in November and December 2019. On 19 May 2020, in a long (168 page) Judgment, he found substantially in favour of SML (it is reported as ***Stubbins Marketing Limited v Stubbins Food Partnerships Limited & Ors [2020] EWHC 1266 (Ch).*** Neither Rayner Essex nor Mr Heyes were parties to the First Claim, although Mr Heyes gave evidence for the Defendants.
8. For present purposes it is not necessary to go into detail about the facts as found by Mr Justice Trower, and, indeed, there remain, it appears, many facts that are contested as between the present Claimants and Rayner Essex.
9. The initial Claim Form (which was issued on 8 March 2022 but not served in its original form) summarised the Claim in the 'Brief details of claim' as follows:

> *"Several directors of the First Claimant company (C1) unlawfully and in breach of duty caused C1 loss by (1) disposing of its business and most assets for an undervalue to their personal companies, (2) disposing of its shares in another company for £100 and (3) giving a debenture to another personal company to secure a supposed claim against C1. The First Defendant firm (D1) were C1's accountants and business advisers, but in practice assisted the malfeasant directors. The Second Defendant firm (D2) acted for the malfeasant directors' companies during (1) above making false representations to C1's shareholders to secure consent to the disposition, and acted for C1 during (2) and (3) above, but in practise assisted the malfeasant directors.*
> *The facts have been set out in much more detail under the Pre-action Protocol.*
> ***Without prejudice to C1's right to rely (in their Particulars of Claim when these fall to be filed) on all such causes of action in law as arise from the facts briefly summarised above,*** *Cs intend to claim* ***in*** *(i)* ***deceit (ii)*** *breach of*

contract, ***(iii)*** *negligence,* ***(iv)*** *breach of fiduciary duty* ***(v) dishonest assistance in breach of fiduciary duty and (vi) unlawful means conspiracy.***
The Second to Eighth Claimants sue as shareholders in C1 because D2 has contended that the representations were made to the shareholders and that C1 itself therefore has no cause of action."

10. The passages quoted above in **bold** were crossed out in the Claim Form on 20 April 2022 (as is permitted pursuant to CPR Rule 17.1(1)) before the Claim Form, as so amended, was served. The Particulars of Claim, dated 6 June 2022, contains 207 paragraphs, but has a short prayer where the Claimants claim:

"1. Damages and/or equitable compensation with interest;
2. Contribution pursuant to section1 of the Civil Liability (Contribution) Act 1978.
3. Further or other relief.
4. Costs."

PRIMARY CHRONOLOGY

11. The following dates are, in my view, of primary relevance:

16 July 2015	The date when Rayner Essex was first retained by SML
1 April 2016	the Transaction
19 May 2020	Judgment in the First Claim
30 June 2021	SML's pre-action 'Letter of Claim' in the present Claim, which included a request for a 'Standstill Agreement' to remove the necessity to issue the Claim before the expiration of the first of any possible limitation periods in July 2021
24 January 2022	Rayner Essex's 'Response Letter', which included a final extension of the Standstill Agreement to 11 March 2022. This had previously been extended to 28 February 2022
8 March 2022.	Claim Form issued
20 April 2022	Amended Claim Form
6 June 2022	Particulars of Claim
29 July 2022	Rayner Essex Defence
22 November 2022	SML's Reply and service of Voluntary Particulars
20 December 2022	This Application

LEGAL AND PROCEDURAL FRAMEWORK

12. Mr Roe and Mr Grant took me to various statutory and procedural provisions. Before referring in more detail to the facts, and the arguments of the parties, I shall quote

from the primary statutory and procedural sources, but refer in more detail in due course to some of the reported authorities in which they have been considered and applied.

13. The present Application is primarily concerned with liability for the costs of litigation, and in particular costs incurred before the issue of the relevant Claim Form.

14. The primary provision is Section 51 of the Senior Courts Act 1981 ('Section 51'):

> *"(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in -*
> *(a) The civil division of the Court of Appeal;*
> *(b) the High Court, and*
> *(ba) the family court;*
> *(c) the county court*
> *shall be in the discretion of the court."*

15. The Civil Procedure Rules ('CPR'), and in particular Part 38, are of especial relevance in the present case. Rule 38.1 is as follows:

> *"(1) The rules in this Part set out the procedure by which a claimant may discontinue all or part of a claim.*
> *(2) A claimant who—*
> *(a) claims more than one remedy; and*
> *(b) subsequently abandons his claim to one or more of the remedies*
> *but continues with his claim for the other remedies, is not treated as discontinuing all or part of a claim for the purposes of this Part.*
> *(The procedure for amending a statement of case, set out in Part 17, applies where a claimant abandons a claim for a particular remedy but wishes to continue with his claim for other remedies.)"*

16. Rule 38.2(1) provides that a Claimant may discontinue all or part of a claim at any time. Rule 38.3 provides that:

> *"(1) To discontinue a claim or part of a claim, a claimant must—*
> *(a) file a notice of discontinuance; and*
> *(b) serve a copy of it on every other party to the proceedings."*

Rule 38.6 provides that:

> *"(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.*
> *(2) If proceedings are only partly discontinued—*
> *(a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and*
> *(b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings."*

17. It will be necessary to quote from some of the relevant reported authorities, but before leaving the CPR I shall quote some of the notes in the White Book. 38.1.2 includes the following:

> *"A "claim" is not defined, but it is clear that a claim is to be distinguished from a remedy (**Galazi v Christoforou** [2019] EWHC 670 (Ch)). If the claimant abandons a remedy, but continues the claim for other remedies, it is not treated as discontinuing all or part of the claim—r.38.1(2).*
> *For a discussion as to whether the word "claim" in r.38.2 means the entire action outlined in the claim form, or only a cause of action, see **Kazakhstan Kagazy Plc v Zhunus** [2016] EWHC 2363 (Comm); [2017] 1 W.L.R. 467. Leggatt J stated that the repeated references to "all or part of a claim" made the latter unlikely. Causes of action are not susceptible to partition in a way that would make discontinuance an appropriate procedure. The appropriate way of discontinuing a cause of action is simply to amend the statement of case. In his judgment, the word "claim" had to refer to the entire action or, at the very least, to all causes of action asserted by a particular claimant against a particular defendant. On the other hand, in **Galazi v Christoforou,** Chief Master Marsh held that the abandonment of an entire cause of action may amount to a partial discontinuance. He stated:*
>
> > *"With great respect to Leggatt J, it seems to me that the analysis in **Kazakhstan Kagazy Plc v Zhunus** does not consider rule 38 as a whole and does not give sufficient weight to rules 38.2(1) and (3). Part 38 is explicit in saying that a claimant may discontinue part of a claim against one defendant. The later use of the word 'proceedings' in rule 38.5(2) must be treated as a synonym for claim. The rule does not otherwise make sense. A claim is more than particular relief but may be less than the entire claim against a party."*
>
> *In **XX v YY [2021]** EWHC 3014 (Ch) at [94]–[98], Miles J preferred the Chief Master's reasoning over that of Leggatt J, even in relation to a single mispleaded cause of action, and provided for costs to be paid in accordance with CPR r.38.6; this decision is likely to be followed at least at first instance."*

The notes at 38.2.1 include:

> *"It is not entirely clear from rr.38.3(1) and 38.5(1) whether a notice of discontinuance is required where the court's permission to discontinue must be obtained. On its face, r.38.3 requires the filing and service of a notice for a discontinuance to take place, whatever the circumstances may be. This is reinforced by r.38.5 which specifies that discontinuance takes effect on service of the notice on the relevant defendant or defendants, and by the fact that there is a prescribed Form N279 and mandatory requirements (see r.38.3). The terms of the rule are explicit and it is hard to avoid the conclusion that the filing and service of a notice of discontinuance is required in every case. Obtaining the court's permission, where it is required, is a preliminary step to discontinuance which takes place by filing and service of the notice. Unless and until notice has been filed and served there has not been a discontinuance. However, it may well be, in practice, that the court often implicitly waives the*

requirement for a notice and deals with costs and any other issues that arise on the permission hearing. In ***Galazi v Christoforou*** *Chief Master Marsh held that this was a sensible pragmatic approach, albeit not one which can be found in the existing rule; and a similar approach seems to have been taken in* ***Pycom Ltd v Campora*** [2022] 7 WLUK 114. *The CPRC have, with effect from 1 October 2022, amended r.38.3 to add a new subrule (5) requiring a notice of discontinuance to be in the Form N279, unless the court otherwise permits, in order to emphasise the need for a specific judicial decision and direction."*

DISCUSSION AND ARGUMENT

18. At the centre of the argument is a consideration of the nature and effect of the Letter of Claim in the present case. I must therefore refer to it in more detail.

19. The Letter of Claim, dated 30 June 2021, sent by the Claimants' solicitors (Duffield Harrison) to Rayner Essex, is 14 pages. It sought an initial response, because of possible Limitation problems, within 14 days, and a substantive response within 42 days. The second paragraph began:

    "This is a Letter of Claim under the Pre-Action Protocol for Professional Negligence (which, in spite of its title, is not confined to claims in negligence) and generally under the Practice Direction – Pre-action Conduct and Protocols."

    I do not wish to quote extensively from the Letter of Claim, but it is necessary for me to describe its contents, and I think useful to quote a little from it in order to show the 'flavour' of it. The last paragraph of the first page was as follows:

    "The Company's claim concerns the conduct of Neil Heyes, a member of Rayner Essex LLP ('Rayner Essex'), during the period July 2015 to 1 April 2016, and his actions in assisting and working with the then directors of the Company to cause the Company to dispose of assets to entities owned by those directors for several million pounds less than they were worth. As we explain in this letter, Mr Heyes, for whose actions Rayner Essex are liable, was instrumental in devising a transaction that was to the manifest disadvantage of the Company, and in securing the consent of the Company's shareholders to that transaction by dishonest means. A more comprehensive breach of Rayner Essex's contractual, tortious and equitable duties to the Company is hard to conceive of……"

20. After referring to the 'Limitation' position and asserting that Rayner Essex were liable for the conduct of Mr Heyes, the Letter sets out the alleged 'relevant facts' from the last paragraph on the second page. Less than a page is under the sub-heading: 'A. The Transaction and events connected with it'. Then: 'B. The breaches of fiduciary duty in connection with the Transaction', in which the First Claim, and the Judgment of Mr Justice Trower, are referred to, and it is stated that Mr Heyes gave evidence on behalf of the defendants in that Claim. From the middle of page 5, there is a section headed:

‘C. The role of Mr Heyes of Rayner Essex’. Over the next four pages, a chronology of events is set out, concluding with a passage from Mr Justice Trower’s Judgment, ending:

> *“As part of that strategy the Director Defendants made a deliberate decision not to tell the other shareholders that they had initiated the termination of the relationship with Barclays and to give the impression that it was Barclays which had pushed for that result.”*

This was immediately followed by the allegation:

> *“Mr Heyes was fully signed up to this dishonest strategy….”*

One paragraph later began:

> *“Mr Heyes’s dishonesty did not end with his role in misleading the shareholders…..”*

The Letter continued with more references to various events and the Judgment of Mr Justice Trower. Gisby Harrison, who were the solicitors acting at the time of the Transaction and are the second Defendant in the present Claim, are referred to and it is alleged, in respect of one particular meeting:

> *“Given that Mr Heyes was Gisby Harrison’s main source of information about the Transaction (and they were in constant touch), and given Mr Heyes’s willingness to put out falsehoods about the attitude of Barclays (or at the very least to stay quiet while lies were told)(see above) the reasonable inference is that the source, or a significant source for Mr Moffat’s and Mr Wilson-Smith’s misleading claims was Mr Heyes.”*

From the bottom of page 12 of the Letter of Claim there are sections under the main heading of ‘The Company’s claims’. The first is headed: ‘A. Dishonestly assisting breaches of fiduciary duty.’. The flavour of this allegation can be appreciated from the following extracts:

> *“It is plain that Rayner Essex, through Mr Heyes, assisted the Director Defendants significantly with their breaches of fiduciary duty ……. Mr Heyes’s conduct was, moreover, shot through with dishonesty……”*

There are then shorter passages under the headings: ‘B. Unlawful means conspiracy’; and ‘C. Breach of fiduciary duty and indemnity under CA 2006 s 195’; and, on the last page of the Letter, one paragraph under the heading: ‘D. Breach of contract/negligence’, where it was alleged (quoting in full):

> *“The matters set out above display an almost complete disregard by Mr Heyes of Rayner Essex’s duty (both in tort and as an implied term of the contract created by the firm’s letter of engagement dated 9 July 2015) to take reasonable care on behalf of Rayner Essex’s client, the Company. In another dry understatement, the judge noted, of Mr Heyes, that he ‘did not find all of his*

conduct during this process to be wholly explicable' (see para 29 of the judgment). We agree. No reasonably competent Chartered Accountant and Fellow of the Chartered Institute could possibly have considered that the conduct described above was an appropriate way of discharging Rayner Essex's duty of care and contractual duties to the Company."

21. Rayner Essex instructed solicitors, and on 24 January 2022, RPC, on behalf of Rayner Essex, produced their substantive Response. There were some exchanges of correspondence prior to this, to which it is not necessary to refer in this Judgment.

22. RPC's Response Letter was 19 pages. I do not propose to quote from it at length, but only, I hope, sufficiently to illustrate both the stance taken on behalf of Rayner Essex and the detail in which RPC endeavoured to answer the allegations that had been made in the Letter of Claim. The first two pages of the Response include the following statements:

"……As you are aware, we have corresponded with you on a number of occasions in the last six months since receipt of your Letter. In doing so we have tried to understand more clearly your client's claims. Unfortunately, the responses that you have sent have failed to elucidate your client's claim with the result we reserve the right to supplement what is said in this letter if or when further information is forthcoming.
In this letter, unless otherwise stated, we adopt the definitions contained in the Letter of Claim.
……..Neil Heyes is an accountant who qualified in 1998. He is a Fellow of the Institute of Chartered Accountants of England and Wales. He has had an unblemished professional career. He joined Rayner Essex in 1995 as a trainee, becoming a partner in 2014……..
This Letter of Response demonstrates that there is no claim against Rayner Essex because, inter alia:
The claim amounts to an abuse of process. If proceedings are issued Rayner Essex will apply to strike out on that basis.
The claim is in any event fundamentally misconceived. The entire claim is apparently premised on three assumptions, each of which are untenable on the facts:
(a) Mr Heyes was not "intimately involved in the design" of the Transaction. The Transaction was devised by the directors of SML prior to Rayner Essex's retainer.
(b) There is no evidence to show that Mr Heyes and/or Rayner Essex acted dishonestly. This is a remarkable allegation to make against a professional man. It is made all the more remarkable in circumstances where the Director Defendants themselves have not been found to have acted dishonestly. There can be no claim in dishonest assistance nor unlawful conspiracy. The latter allegation is even more confused by the fact that you have failed to identify and/or sue Mr Heyes' alleged co-conspirators (again, we are not aware that the Director Defendants were held to have conspired to defraud SML or its shareholders).
(c) Mr Heyes was not a director of SML. This allegation is a transparent attempt to crow-bar a further defendant into the underlying judgment. Mr

Heyes acted in accordance with Rayner Essex's retainer and as a competent accountant.
To the extent that there is a degree of overlap in the functions of a company accountant and a finance director, this is patently not sufficient to convert the former into the latter as a matter of law. In any event simply occupying the role of a "finance director" (which Mr Heyes was not) does not turn someone into a director as that word is understood by the law.
2.2 As a final observation, the Letter of Claim fails entirely to consider the scope of Rayner Essex's retainer either in the context of the allegations that Mr Heyes was a director or in the anemic allegation of breach of duty. For the avoidance of doubt, Rayner Essex will rely on the terms and scope of that retainer in any future proceedings."

The first part of the letter sets out an argument under the heading of 'Abuse of Process', and expressed the intention to issue a 'strike out' Application. I was told at the hearing that this is not now intended. RPC then seek to explain Mr Heyes' role and go into a long section headed 'Dishonesty', in which RPC denies all allegations of dishonesty and improper conduct by Mr Heyes. It is clear that, in order to answer the allegations made against Mr Heyes, RPC had to go into very detailed analysis of the relevant events with Mr Heyes. I have no doubt that this process would have been very time-consuming. It was not until the penultimate paragraph of page 17 that there was the following, under the heading of 'Negligence':

"Your letter (at p.14) devotes precisely 8 lines to the claim in negligence/breach of contract against Rayner Essex. The case is wholly undeveloped. It is plain that it is a makeweight which has simply been thrown into the mix and which your client is not (for obvious reasons) seriously pursuing. We will say no more about it other than to reserve our client's position in the event this claim is properly particularized in future."

23. Duffield Harrison acknowledged receipt of the Response on 27 January 2022 and included a request for an extension of the Standstill Agreement to 11 March 2022, which was agreed. On 28 February 2022 Duffield Harrison wrote noting that Rayner Essex had made "no concessions as to liability…" and stating that they would be shortly issuing a Claim Form.
24. The Claim Form was issued on 8 March 2022 but not served. It was amended, as already described, on 20 April 2022. On 6 May 2022, Duffield Harrison sent a letter to RPC which included the following:

"We enclose the Claim Form as amended on 20th April 2022 together with draft Particulars of Claim. Please note that the Claim Form and draft Particulars of Claim are sent to you at this stage for information only not by way of service. Please further note that the Claimants may revise the draft Particulars of Claim before service.

……
You will note that the Claimants' claim against your Client is framed in terms of breach of contract, negligence and breach of fiduciary duty and that it is not now proposed to allege deceit, dishonest assistance in breach of fiduciary duty or unlawful means conspiracy. This disposes of many of the objections that you have raised in pre-action correspondence….."

25. In a letter dated 31 May 2022 from RPC to Duffield Harrison, RPC referred to what was described as "The profound transformation in your client's case", and demanded that the Claimants should pay the costs that had been incurred in having to deal with the allegations eventually abandoned in the Amended Claim Form. At that stage the sum for costs alleged by RPC to have been incurred in dealing with the abandoned allegations were estimated at £273,000.
26. I have read the Witness Statements served in support of and opposing the present Application. The Witness Statement dated 12 January 2023 of Geoffrey Keens of Duffield Harrison contains all of the arguments against the Application that have been put forward by Mr Roe. There is no explanation about what was relied on when the initial allegations of the matters that were subsequently abandoned were included in the Letter of Claim. Mr Keens gives no explanation about what was done by or on behalf of the Claimants to deal with the points made by RPC in the Response Letter. If the argument that has been put forward on behalf of Rayner Essex is accepted by me, it is clear that any liability for Rayner Essex's pre-action costs related to what have been described as the abandoned or discontinued causes of action would have been avoided if those causes of action had not been included in the original Claim Form. I have no explanation as to why, notwithstanding that the Response Letter was served on 24 January 2022, the Claimants still thought that, on 8 March 2022, they had sufficient material to issue a Claim Form that included allegations of dishonesty and deceit. Mr Keens gives no explanation why, by 20 April 2022, there was a change of mind. There is no attempt to explain why, if it was the case, there was insufficient time between 24 January and 8 March 2022 for the Claimants to investigate what had been stated in the Response Letter and come to a decision whether or not to proceed to issue a Claim Form with such serious allegations contained in it.
27. There is little if any dispute about the evidence that is relevant to the issues that I have to decide in this Application. I now turn to the respective arguments.
28. Mr Grant, on behalf of Rayner Essex, based his argument on four primary submissions that can be summarised as follows:

(1) the Claimants' decision to amend the Claim Form by deleting claims in deceit, dishonest assistance and unlawful means conspiracy was, in law, a discontinuance for the purpose of CPR Part 38;

(2) the general rule is that Rayner Essex should have its costs of and occasioned by the discontinued claims – see CPR 38.6(1) and 38.6(2)(a);

(3) the costs to be paid to Rayner Essex should include the costs of the Letter of Claim and the Response Letter; and

(4) the costs should be assessed on the 'indemnity basis' and should be the subject of immediate detailed assessment, so that the assessment should not await the end of the Trial.

29. Mr Roe, on behalf of the Claimants, based his argument on four primary submissions, that can be summarised as:

(1) the pre-action costs claimed by Rayner Essex are not recoverable in principle;

(2) the amendment, as of right, of an unserved Claim Form of which the defendant is unaware cannot constitute the discontinuance of part of a claim;

(3) even if it might be right that the Court has the jurisdiction to order SML to pay costs in relation to the Letter of Claim, the question whether to use that jurisdiction should not be determined now;

(4) if SML is liable for costs as on a discontinuance, there is no reason for the Court to order a departure from the rule in CPR r 38.6(2)(b) that the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings.

30. During the course of my pre-reading for this Application, I noted the third of Mr Roe's submissions and considered whether I should merely adjourn the Application to the Trial Judge. That of course would have saved time now, and indeed also the time of the Court, and the parties, although probably not the time spent preparing for the hearing.

31. However, I also considered how applications such as the present have been previously dealt with. In particular, as is referred to in Mr Grant's Skeleton Argument, I noted the Judgment of Chief Master Marsh in ***Galazi v Christoforou*** **[2019] EWHC 670 (Ch)**, where the original claim had been treated by the Chief Master as discontinued in part against a group of defendants who remained defendants disputing liability in respect of claims that had not been discontinued. The facts in ***Galazi*** were more complicated than in the present case, but it seemed to me that there was nothing in

that case which would require me in the present case not to determine the issues raised in the present Application. I therefore proceeded to hear the present Application in full on its merits, although I remained open to be persuaded, following full argument, that this is an Application that should be dealt with by the Trial Judge. In the event, as I shall explain further later in this Judgment, I have decided that I can and should decide this Application now and not adjourn it to the Trial Judge.

32. Mr Grant's primary argument is that I should treat the amendment of the Claim Form as equivalent to a formal Discontinuance, with all the consequences that arise under CPR 38. This is the point of 'principle' identified in Mr Roe's first submission. I was referred to some first instance decisions, including ***Galazi*** (above), ***XX v YY*** **[2021] EWHC 3014 (Ch)**, and ***Lendlease Construction (Europe) Limited v Aecom Limited*** **[2022] EWHC 2855 (TCC)**. In ***XX v YY*** Mr Justice Miles, at para 95, states:

> *"...[The Defendants] rely on the decision of Chief Master Marsh in Galazi v Christoforou ... In that case proceedings had been brought on a number of bases against a number of defendants. The claimants amended to delete various of the claims and the defendants submitted that the case fell within Rule 38 of the CPR. Chief Master Marsh concluded that there was indeed a discontinuance within Rule 38. He concluded that it was possible for that rule to apply to some claims within a set of proceedings, even though other claims continued. He considered the obiter comments of Leggatt J in Kazakhstan Kagazy Plc v. Zhunus ..., where the judge had concluded that the word "claim" in Rule 38 did not mean a single cause of action and that the word "claim" in the rule must refer either to the entire action of, at its narrowest, all causes of action asserted by a particular claimant against a particular defendant. Chief Master Marsh came to the conclusion that that was not correct and that on a fuller and more extensive analysis of the wording of the rule, concluded that the deletion of a particular cause of action within a claim was capable of falling within Part 38. I conclude that the reasoning of Chief Master Marsh on this point is to be preferred ..."*

33. The passage from Mr Justice Miles' Judgment is the passage referred to in the notes in the White Book, quoted above. The statement of primary importance in the Judgment is, in my view, "*the deletion of a particular cause of action within a claim was capable of falling within Part 38"*. I am willing to accept that it is possible that there may be cases where the deletion of a particular cause of action might not be treated as a discontinuance, and indeed, even if described as a 'discontinuance', not have all the costs consequences of a 'formal' discontinuance as contemplated in CPR 38.3. And, of course, even the specific costs consequences set out in CPR 38.6 are subject to the proviso: *"Unless the Court orders otherwise"*. Further, and in any

event, however the removal from a Claim of a separate cause of action is described, the Court retains the discretion, under Section 51, to decide on the incidence of costs.

34. It is clear that an award of costs includes pre-action costs, provided they are 'incidental' to the proceedings as issued (I was referred to ***Citation plc v Ellis Whittam Ltd*** **[2012] EWHC 764 (QB)** at para 16 and ***McGlinn v Waltham Contractors*** **[2006] 1 Costs L.R. 27** at paras 5 to16).

35. In addition Mr Roe argued that the fact that the original Claim Form had not been served either precluded the 'amendment' of the Claim Form being treated as a discontinuance or, in any event, that it should result in the discretion under Section 51 not being exercised in favour of Rayner Essex. Mr Grant submitted that, as soon as the Claim Form was issued bearing the claims that were subsequently deleted from the Claim Form, proceedings in respect of those claims had been commenced and the Court's costs jurisdiction was engaged whether or not the Claim Form was served. Mr Justice Waksman stated in ***GREP London Portfolio II Trustee 3 Limited v BLFB Limited*** **[2021] EWHC 1850 (TCC)** at para 20:

> "*Once proceedings have been issued, for whatever reason and for whatever justification, then the court's costs jurisdiction is engaged*".

36. It is clear that once a claim form has been issued, the proceedings have commenced. A party to those proceedings immediately becomes potentially liable to pay costs of another party to those proceedings, whether or not the proceedings are actually served. The issue of a claim form may often be crucial in preserving the rights of a claimant, such as when a relevant Limitation period is about to expire – but a consequence of issuing the claim form is the potential for liability to pay such costs as are usually recoverable as pre-action costs.

37. On the facts of the present case, I am entirely satisfied that, even if the amendment of the unserved Claim Form was not strictly speaking a formal 'Discontinuance' within CPR 38, it should be treated as if it was. Furthermore, in so far as it is a matter for my discretion to be exercised pursuant to Section 51 of the 1981 Act, I have no doubt that I should exercise my discretion to produce the same consequences as if there had been a formal Notice of Discontinuance.

38. As for what those consequences should be, I was referred to ***Brookes v HSBC Bank plc*** **[2012] 3 Costs LO 285**, where Lord Justice Moore-Bick set out 6 principles on the application of CPR r.38.6, at para 6:

"(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position.
(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so.
(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption.
(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to lack of confidence in the merits of case will not suffice to displace the presumption.
(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed.
(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

Mr Grant submitted that there were no facts or circumstances in the present case that could justify the 'presumption' being displaced.

39. This is a convenient point in this Judgment to expand on my reasons for not adjourning this Application to the Trial Judge. It is, as I understand it, suggested that the Trial Judge would be better able (and indeed willing) to explore not only whether there was a change in circumstances that warranted the decision by the Claimants to abandon the allegations of dishonesty originally in the Claim Form but, as expressly submitted by Mr Roe, the Trial Judge would be able to decide whether or not it was reasonable to have alleged initially that Mr Heyes had acted dishonestly.

40. I accept that, in a general way, possible dishonesty could be within the factual matrix which, as at present set out in the Particulars of Claim, could also be considered as a breach of a duty of care. However, allegations of 'dishonesty' and 'fraud' should not be made lightly. For such allegations to be made, a satisfactory threshold of 'prima facie' evidence must be available to the party making the allegation. I cannot see that a Trial Judge should, and indeed could, properly deal with an issue such as "Was it reasonable to allege dishonesty six months before the Claim Form was issued" as part of a Trial where dishonesty was not an issue. Indeed, questions could well arise about the scope of evidence, and indeed Disclosure which would otherwise be limited to the 'Key' issues within the Statements of Case, and therefore would clearly not include the issue whether Mr Heyes had at any time been dishonest or it was reasonable to think that he had been.

41. My view is that the reasons given on behalf of the Claimants as to why this Application should be adjourned to the Trial Judge, rather than being persuasive for

such an adjournment, reinforce my preliminary view that dealing with this case justly demands that the Application should be dealt with now. There should not be held over Mr Heyes unparticularised allegations which he might have to answer in an attempt on behalf of the Claimants to justify their initial unfounded allegations of dishonesty. However that does not mean that much of the work carried out by RPC to investigate the facts would not have had to have been carried out even if the Letter of Claim had been confined to allegations of professional negligence. Assessment of the costs is a separate matter.

42. Accordingly, to put it shortly, Rayner Essex should have its costs of and occasioned by the discontinued claims. I do not accept any of Mr Roe's first three submissions summarised above.

The form of the Order

43. Mr Grant produced submissions about the form of Order he was seeking under three heads:

    (1) The basis of assessment:

    (2) Whether there should be a payment on account, and, if so, how much;

    (3) The timing of the assessment.

    There was not time at the hearing before me to hear full argument about head (2). This must await the handing down of this Judgment, unless the parties reach agreement following consideration of this Judgment.

44. As for head (1), the issue is whether the costs should be assessed on the 'indemnity' basis. Mr Grant submitted that the general approach taken by the Courts is that where claims based in fraud are the subject of a discontinuance, costs ought to be assessed on the indemnity basis. He referred to ***Clutterbuck v HSBC Plc*** **[2016] 1 Costs L.R. 13.** The Headnote is:

> *"Where a claimant had discontinued his claim in fraud under CPR Part 38, it was appropriate to order costs on the indemnity basis. Whilst the court retained a complete discretion whether to award costs on the standard or indemnity basis, the general approach in cases in which allegations of fraud were made and the case had failed was that the claimant would be ordered to pay indemnity basis costs. It followed that as the claimant had abandoned his case instead of taking it to trial, an order that he should pay the defendant's costs on the indemnity basis was appropriate."*

The following passage from Mr Justice David Richards' Judgment at para 16 shows the policy reasons for his conclusion:

> *"…… The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.*
> *17. The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position.*
> *18. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is in my judgment appropriate for the court to approach the question of costs in the same way.*
> *19. The defendant has been put in this case to considerable expense in defending to date the allegations made. As I mentioned earlier a defence was served, applications were made to strike out the particulars of claim and the applications to amend were resisted in circumstances where the amendments would maintain the allegations of fraud."*

45. Mr Roe emphasised with this, as in other aspects of this Application, that my decision about costs is a matter for my discretion. In particular he pointed out that no additional costs have been incurred in respect of the discontinued claims by Rayner Essex since the issue of the Claim Form, not least because they were not aware of the contents of the original Claim Form at the time.

46. Furthermore, following the conclusion of the argument on 27 February 2023, and after I had released the draft of my Judgment, but before this Judgment could be formally handed down, I received an email from Mr Roe on 13 March 2023 in which he drew my attention to a very recent reported authority, namely ***Libyan Investment Authority v King*** **[2023] EWHC (Ch).** The case contains a Judgment of Mr Justice Miles in which he considered whether unsuccessful claimants at trial, who had made allegations of dishonesty, ought to pay the defendant's costs on the standard or indemnity basis. Mr Roe highlighted in particular the following passages from the Judgment at para 3:

> *"There is a danger of seeking to substitute for the overall requirement, that the court must make such order as it thinks just in accordance with the overriding objective, some other gloss or formulation."*

And at para 9:

> *"It seems to me in the light of these authorities that the failure of a case of fraud or dishonesty is a factor that the court may take into account in deciding on the basis of assessment but there is no automatic […] rule that the making of such allegations which fail at trial will justify an order for indemnity costs or even operate as a starting point in the sense that the paying party is then required to explain why indemnity costs are not appropriate. It is also right to recall that the default position is that standard costs are to be paid unless the court orders otherwise."*

And later, at para 32:

> *"I find this case to be close to the dividing line between indemnity and standard costs. I have accepted the submission of the claimants that the bringing of a failed case in dishonesty does not of itself justify an award of indemnity costs. On the other hand, I have decided that the case was a speculative one in a number of respects."*

47. Mr Roe submitted that my approach to the decision I have to make as between directing assessment on the 'standard' or 'indemnity' basis should not be made starting from an initial 'general approach' that it should be 'indemnity' costs, but that the starting point should be the 'standard' basis. He went on to submit that what he described as the 'just order' should be to direct assessment on the standard basis.
48. In response by email the following morning, Mr Kinman, on behalf of Rayner Essex, submitted that it was neither appropriate or necessary for me to re-visit the conclusions I had set out in my draft Judgment. He submitted that it was not appropriate, because the circulation of a draft Judgment should not be used as a pretext to reargue the case, and that it was unnecessary in any event. Mr Roe responded by email later on the same day. Albeit that this is a somewhat unusual procedure to have been followed, it was sensible in the short time available, and I directed that the parties could, if they wished, make further oral submissions to me before I formally handed down this Judgment, provided any arguments they intended to rely on were formalised in Skeleton Arguments to be exchanged and filed the day before the hearing fixed for the handing down of this Judgment.
49. In the event, although Mr Roe had not elaborated on his email submissions in his Skeleton Argument, I did permit him to make further oral submissions before I finally came to my decision on this aspect of the case.
50. I have re-considered my view on this issue, and the extent, if any, to which Mr Justice Miles' recent Judgment should effect my decision having regard to the known facts in

the present case. I do not regard the discovery of a very recent, and relevant, reported authority, as a mere pretext to re-argue the case.

51. As for the principles to be applied, Mr Justice Miles' Judgment contains a very helpful analysis, from para 4:

> *"4 The cases include the very well-known decision in* ***Three Rivers DC v Bank of England*** *[2006] EWHC 816 (Comm) where Tomlinson J set out a number of factors (which are listed in paragraph 44.3.10 of the 2022 edition of the White Book). This case has been referred to in many later decisions. In the quoted passage, the judge said at [25]:*
>
> > *(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a claimant has discontinued only at a very late stage in proceedings:*
> > *(a) where the claimant advances and aggressively pursues serious and wide-ranging allegations of dishonesty or impropriety over an extended period of time;*
> > *(b) where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;*
> > *…….*
> > *(e) where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;*
> > *(f) where the claimant pursues a claim which is irreconcilable with the contemporaneous documents ..."*
>
> *"5 There have also been cases which have discussed the relationship between bringing an unsuccessful claim for fraud or dishonesty and the award of indemnity costs. These include* ***Clutterbuck v HSBC Plc*** *[2015] EWHC 3233 (Ch) and* ***Natixis SA v Marex Financial and Others*** *[2019] EWHC 3163 (Comm). In a more recent decision,* ***Bishopsgate Contracting Solutions Limited v O'Sullivan*** *[2021] EWHC 2628 (QB), Mr Justice Linden said at [16]:*
>
> > *"Various decided cases illustrate the sort of situation in which an order for an assessment on the indemnity basis may be made although, in my view, they do no more than this. Thus, as Mr Forshaw [counsel for the claiming party] points out, examples of where such orders have been made include:*
> > *(i) where a claim is dishonest and/or is dishonestly maintained, as I have pointed out;*
> > *(ii) where a claim is "speculative, weak, opportunistic or thin": see* ***Three Rivers District Council v The Governor of the Bank of England*** *[2006] EWHC 816 (Comm) at para 25(5);*
> > *(iii) where a claim is pursued for reasons or purposes unconnected with any real belief in their merit. As Coulson LJ put it in* ***Lejonvarn v Burgess*** *[2020] EWCA Civ 114 at para 66:*
> >
> > > *"An irrational desire for punishment unlinked to the merits of the claims themselves is precisely the sort of conduct which the court is likely to conclude is out of the norm."*

(iv) where allegations of fraud or dishonesty are made which have failed: see ***Clutterbuck v HSBC plc*** *[2015] EWHC 3233 (Ch) at paras 16 and 7. In relation to this authority, Mr Forshaw came close to submitting that as a matter of course, if allegations of fraud or dishonesty have failed, costs must be ordered to be assessed on an indemnity basis. Insofar as that was his submission, I do not agree. There is, in my view, no such rule in the context of applications for indemnity costs although, as I have said, where such allegations are made and fail, that may be a reason for making such orders;*

(v) where an overly aggressive and unreasonable approach to correspondence between solicitors has been adopted: see ***Excalibur Ventures LLC v Texas Keystone Inc*** *[2013] EWHC 4278 (Comm) at para 48."*

"6 Earlier in the same judgment, Mr Justice Linden recorded that he accepted that the conduct which forms the basis of an order for assessment on the indemnity basis must involve a sufficiently high level of unreasonableness or inappropriateness to justify an order. He quoted Sir Anthony Colman in ***National Westminster Bank v Rabobank*** *[2007] EWHC 1742 (Comm) at [28]:*

"Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself."

52. Mr Justice Miles, following the above analysis, concluded as set out in Mr Roe's first email, quoted above. He then went on to refer to the facts of the case before him, and the rival contentions of the parties. He weighed up the evidence for each side of the argument, and he finally concluded that to award indemnity costs was appropriate.

53. Turning then to the present case, I have already held that, although there was no formal discontinuance, it is appropriate to approach, applying the discretion in Section 51, the costs issue in such a way as would produce the same result. It also seems to me that I am bound to accept the clear statement of principle contained in Mr Justice Miles' Judgment that:

"….the failure of a case of fraud or dishonesty is a factor that the court may take into account in deciding on the basis of assessment but there is no automatic […] rule that the making of such allegations which fail at trial will justify an order for indemnity costs or even operate as a starting point in the sense that the paying party is then required to explain why indemnity costs are not appropriate."

54. I have therefore reconsidered all the evidence available to me. In particular, I note the paucity of the explanation given for the initial outpouring of serious allegations

contained in the Letter of Claim. I refer back, in particular, to my comments on this at paragraph 26 above. Mr Keens, in particular when he had the opportunity to explain the approach taken when the Letter of Claim was sent, says nothing further in his Witness Statement opposing this Application. I have reread Mr Justice Trower's long Judgment. I note, in particular that, at paragraph 30, he refers to the evidence of Mr Heyes as being *"essentially reliable"*. There is no suggestion, and no evidence has been put before me, to support the allegation that he behaved dishonestly. Yet Mr Heyes was subjected to having to answer allegations that must, in my view, at the very least be capable of being described as speculative. That the Claimants eventually accepted this is clear from the abandonment of the allegations after the Claim Form had been issued. The Claimants have offered no satisfactory explanation that might go some way to justifying the way in which they approached this Claim. I do regard their conduct as 'outside the norm'. They have not offered sufficient evidence, in my view, to suggest that the approach was other than speculative at best (which is sufficient for present purposes). Indeed, in my view, its impact on Mr Heyes could be reasonably described as vindictive. It would not be a 'just' outcome if Mr Heyes is not entitled to recover all the additional expense he had to incur in dealing with the allegations that were subsequently abandoned.

55. In addition, in my view the Claimants, through their lawyers, must be deemed to have been aware of at least three things: (a) that Rayner Essex would be bound, through their lawyers, to incur substantial costs in responding to the Letter of Claim; (b) that there would be a likelihood that, on losing a Claim based on dishonesty and fraud, costs could be awarded against them on the indemnity basis; and (3) if the proceedings were *not* commenced including allegations of dishonesty and fraud, any costs of the proceedings awarded against them could *not* include the costs incurred by Rayner Essex in responding to such allegations.
56. In the exercise of my discretion, I am satisfied that this is a case where an assessment on the indemnity basis is appropriate.
57. As for the timing of the assessment, Mr Grant urged on me that I should depart from the general 'default position' as set out in CPR 36.6(2)(b). One of the reasons he gave was that it would over-complicate the final detailed assessment, especially where there is a Third Party involved in the litigation. While of course there would be one more assessment for the Costs Judge to deal with, I do not accept that it would be an 'over-complication'. Indeed, whatever the outcome of the Trial, I suspect (although I

profess no expertise as a Costs Judge) it would be easier, when that outcome is known, for the Costs Judge to identify the expenditure that Rayner Essex would not have incurred but for the inclusion of the initial (but subsequently abandoned) claims as set out in the Letter of Claim. I therefore accept Mr Roe's fourth submission, as summarised above.

58. This brings me to the last aspect of the form of the Order. The Application Notice sought all the costs of and occasioned by the Letter of Claim and the Response Letter. I quoted at some length from the long Letter of Claim and the Response Letter. I have no doubt that a considerable amount of work was carried out by RPC in preparing the Response Letter. I am not in a position to criticise or otherwise the amount of the costs claimed, which the Claimants have severely criticised and Mr Roe described as 'exorbitant'. However, I have little doubt, although of course I have no actual evidence, that,a significant amount of the work carried out by a firm of solicitors such as RPC doing a thorough job on behalf of their client in preparing the Response Letter, would have been carried out even if the Letter of Claim had been confined to allegations of professional negligence. Therefore, even on an assessment on the 'indemnity basis', I think that a Costs Judge could not simply award all the costs occasioned by the Letter of Claim and the Response Letter.

59. In the proposed draft Order attached to the Application Notice, the relief sought included in the alternative that the Claimants do pay:

> *"the First Defendant's costs relating to the part of the proceedings which was discontinued by the Claimant when it amended its claim form on 20 April 2022 to delete various causes of action"*

It is this alternative formulation that should be included in the Order.

CONCLUSION

60. Following consideration of the outstanding issues concerning the costs of this Application and interim payments I shall make an Order in Rayner Essex's favour as explained above.

Deputy Master Nurse