Neutral Citation Number: [2021] EWHC 3409 (Comm)

Case No: LM-2021-000197

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2021

Before :

MS CLARE AMBROSE
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

CANDEY LIMITED	**Claimant**
- and -	
(1) BASEM BOSHEH	
(2) AMJAD SALFITI	**Defendants**

- -
- -

Mohammed Haque QC (instructed by **CANDEY Limited**) for the **Claimant**
Hannah Ilett (instructed by **B A International Solicitors LTD**) for the **Defendants**

Hearing dates: 24 and 25 November 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MS CLARE AMBROSE SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 16 December 2021 at 10:30 ."

Ms Clare Ambrose :

Introduction

1. The court is asked to decide a number of applications relating to a claim for over £3 million made in fraud by the Claimant, a London law firm, against a former client relating to that firm's role in representing the client in defending similar fraud allegations on a conditional fee agreement. The Claimant is now seeking a freezing order and to amend its claim. The Defendants are seeking relief against the Claimant's use of confidential information and are seeking summary judgment or an order striking out the claim. The applications raise questions as to the terms implied into the law firm's retainer and the extent to which a solicitor alleging fraud against a former client may use information that would otherwise normally be treated as confidential or privileged.

2. These proceedings relate to work done by the Claimant in two separate High Court actions started in the Chancery Division in 2018 and 2019. The Claimant acted as a solicitor for Mr Bosheh, the First Defendant, and also his son Sulaiman Bosheh (together "the Boshehs"). The work was done under a retainer ("the Retainer") made on a contingency fee basis. The first Chancery action was discontinued against Mr Bosheh. Fraud, knowing receipt and conspiracy was alleged against Mr Bosheh in the second Chancery action ("the Chancery Action") and he made a substantial counterclaim. The Boshehs settled this action shortly before trial on a drop hands basis as part of a global settlement. They were unwilling to settle on terms negotiated by the Claimant that involved them not giving evidence but offered a share of any recovery against the Second Defendant, Mr Salfiti (who was also being sued in the Chancery Action).

3. The settlement meant that although the Claimant could recover fees for the discontinued proceedings and earlier orders, it was unable to recover further fees based on the successful outcome of the Chancery Action. The Claimant has not claimed fees from Mr Bosheh or his son. There appears to be no basis for this under the Retainer. However, on 25 June 2021, a few hours after delivering the settlement agreement to Mr Bosheh and giving him notice terminating the Retainer, the Claimant issued and served a claim form on Mr Bosheh with particulars of claim drafted by leading counsel that claimed damages for fraud and breach of contract. The Claimant claims it has suffered loss of more than £3 million (reflecting the value of its work) on the basis that Mr Bosheh and his son falsely represented that they would act in their best interests only and act in good faith, that the Chancery Action against them would not succeed, and that central allegations about Mr Bosheh owning an RBS Account and a Yahoo email account in that action were unfounded.

4. The Second Defendant in this action, Mr Salfiti, is a qualified solicitor who works as a consultant for a law firm in London. In the Chancery Action he was also sued in fraud and conspiracy, but also for breach of fiduciary duty. He had a separate legal team in both Chancery actions. He was targeted as the primary wrongdoer and was being sued by former clients (including an individual referred to in this case as Sheikh Mohamed) on grounds that he had falsely induced high interest loans by using Mr Bosheh as a front (including using his name on the Yahoo email account and RBS Account). Under the global settlement Mr Salfiti paid £150,000 to the Sheikh Mohamed parties.

5. In these proceedings the Claimant claims damages in the same sum of £3 million (or more) from Mr Salfiti on the basis of unlawful conspiracy and inducing Mr Bosheh's breach of the Retainer. It says that Mr Salfiti and the Boshehs conspired to take advantage of its services and agree a settlement that deprived it of fees.

6. There have been a number of applications in this case which are now listed before me following the consent order of Cockerill J dated 25 August 2021 providing that they be heard together. These include the Claimant's applications:

    a) for a freezing injunction (dated 21 July 2021);

    b) for permission to amend its particulars of claim (dated 13 August 2021);

    c) for permission to rely

        i) on witness statements and documentation from the Chancery Action relying on CPR 32.12(2)(b);

        ii) documents provided to the Claimant and disclosed to other parties in those proceedings

    (this application was dated 16 November 2021).

7. In addition I have the Defendants' application dated 29 July 2021 for:

    a) an order striking out the claim in whole or part under CPR 3.4 or granting summary judgment under CPR 24.2;

    b) relief in respect of privileged / confidential information, in particular that the Claimant be restrained from relying on privileged or confidential information, based on CPR 31.22 and 32.12, and also that the parts of the evidence referring to such material be struck out;

    c) an order that the hearing of this application, and the application for the freezing order be heard in private.

8. At the beginning of the hearing I refused the Defendants' application for the matter to be heard in private. In order to preserve the status quo regarding certain matters not yet decided I directed that any reference to a document was not to be treated as the document having been deployed or used in open court.

The Claim

9. Given that a large part of the applications depended on the merits and basis of the claim it is perhaps useful to outline what is claimed and the basic context.

10. CANDEY Ltd is a UK company regulated by the SRA that specialises in litigation. Mr Ashkhan Candey is the managing partner. Mr Salfiti is a UK qualified solicitor who had been in-house counsel for Sheikh Mohamed for several years until they parted ways in 2018. Mr Candey says he had come across Mr Salfiti in other proceedings against Sheikh Mohamed, acting for a client and also as assignee of a former client. Mr Bosheh lives in Palestine. Mr Salfiti and Mr Bosheh are longstanding friends from their

childhood. Not long after the outset of the first Chancery action the Claimant initially proposed terms to act for both Mr Salfiti and Mr Bosheh, but then declined to act for Mr Salfiti who promptly found separate representation.

11. The pleaded claim against Mr Bosheh is for damages for fraudulent misrepresentation, deceit and breach of the Retainer, together with various declarations sought to the effect that the Retainer has been rescinded and was void *ab initio*. It is said that the Boshehs falsely represented to the Claimant that they would act in their best interests alone and in good faith towards the Claimant, and the Retainer was subject to an implied term to the same effect.

12. It is said that by their misrepresentations, and settling on a drop hands basis (and refusing what the Claimant says was a better offer Mr Candey had negotiated under which 50% of any recovery against Mr Salfiti would be payable to the Claimant but the Boshehs would agree not to give evidence) the Boshehs were acting in bad faith and depriving the Claimant of payment under the Retainer. They were also in repudiatory breach of the Retainer such that the Claimant was entitled to rescind it.

13. There is also a claim in damages for breach of an express term ("the Costs Term") in the Retainer that they would "*always seek to recover costs by order or agreement*".

14. The Claimant also maintains that its services were provided in the mistaken belief that the Boshehs would act in good faith and in their best interests alone, and both Defendants have been unjustly enriched in the amount of more than £3 million.

15. The claim against Mr Salfiti is for damages in the same amount on grounds that he procured the Boshehs' breach of the retainer or is liable in unlawful conspiracy because he acted in concert with them.

16. The claim against both Defendants is for damages in the sum of £3 million or more as the value of the Claimant's services based on the sums contractually agreed with the Boshehs (which included hourly rates and a 100% uplift). In the amendments the claim is made as the sum which the Claimant would have been entitled to recover from different clients on different cases had the Retainer not been concluded. The amendments also put forward an alternative measure (in the same amount) as the value of Sheikh Mohamed's claim and his costs.

17. The other main amendments put forward are that the Retainer contained an implied term that the Boshehs would cooperate and give a full and accurate account of the case (which the Boshehs breached), and that the Boshehs fraudulently misrepresented that their defence would succeed and that Mr Salfiti had no access to the Yahoo email account and the RBS Account in Mr Bosheh's name. These were relevant because part of Sheikh Mohamed's case was that Mr Salfiti (as his own in-house counsel) had dishonestly used Mr Bosheh (and the accounts) as a front.

18. A full defence was served on 23 July 2021 in response to the particulars of claim and denied the different grounds of claim.

The evidence

19. The documents stretched to over 1300 pages and included:

a) 3 affidavits of Mr Ashkhan Candey, plus a witness statement;

b) affidavits from the Defendants and two additional witness statements from Mr Salfiti;

c) an affidavit and a witness statement from Sulaiman Bosheh ("Sulaiman"), the First Defendant's son who was party to the Chancery action

d) witness statements from the Chancery Action.

The issues to be decided

20. The issues to be decided fall into three groups, first whether relief should be given in relation to documents and information used by the Claimant, secondly as to the merits and conduct of the claims going to amendments, summary relief and strike out, and thirdly as to whether freezing relief should be given

I RELIEF RELATING TO THE USE OF INFORMATION

Are the Defendants entitled to relief against use of privileged information? Has waiver or an exception to privilege been established?

21. The applications relating to privilege, confidentiality and permission to use documents under CPR Parts 31 and 32 raised some common issues. Accordingly the conclusions on privilege are of some relevance to those applications but each application is dealt with separately for convenience.

22. The Defendants maintained that the key elements of the amended claim related to the content of privileged communications between the Claimant and Mr Bosheh (and Sulaiman), in particular the alleged misrepresentation as to the merits of their defence and their position regarding the Yahoo email account and the RBS Account. In addition they identified a large number of paragraphs in Mr Candey's evidence that contained reference to the content of privileged communications, together with exhibited documents including a large number of emails. The Defendants waived privilege in relation to a line of correspondence (mainly between Sulaiman and Mr Candey relating to settlement negotiations in June 2021, and also enquiries relating to the effect of a drop hands settlement dating back to early 2021). However, they asked the court to take into account the Claimant's use of this privileged information prior to their waiver. They relied on *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 to argue that the iniquity exception did not apply.

23. The Claimant maintained that as a matter of principle and policy it should be entitled to rely on documents that might otherwise be treated as confidential or privileged. The Claimant's basic point was that there is no confidence in a communication if it is a fraud, and where there is prima facie evidence of fraud then neither confidentiality nor privilege can preclude reliance on relevant documents.

24. Mr Haque QC argued that to find otherwise would be to allow a fraudsters' charter. The Claimant suggested that the 1999 Access to Justice Act changed the landscape as a matter of policy so as to encourage agreements on fees on a contingency basis. He claimed that solicitors are now invested in cases in a different way and suggested I make

new law to address this new landscape under which the solicitor shares greater risk with the client than in a traditional fee arrangement. The solicitor is more exposed where a client lies and gives a dishonest representation of risk. Different issues of good faith are also in play. Mr Haque QC says it would be abhorrent to justice if a lying client was immune from suit, and this would be a strong deterrent against solicitors taking on cases on a contingency basis such that no solicitors would act under those circumstances.

25. The Claimant maintained that the Defendants had waived privilege in relation to all documents deployed in their evidence. Further the Claimant argued that the documents were not clothed with confidentiality since Mr Salfiti and Mr Bosheh had shared information throughout and there was a common interest privilege agreement in place between them for sharing information, and Mr Salfiti was authorised to act as Mr Bosheh's agent and solicitor.

26. Further, the Claimant maintained that insofar as any material is prima facie privileged the Claimant can rely on it on grounds of the following principles.

27. First, it submitted that a solicitor may rely on privileged material in order to make out a case against a former client on the basis of Tugendhat J's decision in *Hakendorf v Countess of Rosenborg* [2004] EWHC 2821 (QB). The Defendants claimed that this case should be distinguished or was wrongly decided.

28. Secondly, the Claimant maintained that where there is a prima facie case in fraud against a former client, "*privilege is lost by the criminal or fraudulent intent of a client*" per Dillon LJ at p.40. It argued that the Court of Appeal's decision in *Finers v Miro* [1991] 1 WLR is the overarching authority based on the obvious principle that fraud unravels all. It also relied on the decision of Popplewell J in *Ablyazov*.

Conclusions on privilege

29. The Defendants correctly identified the right starting point set out in a much cited statement of the rationale of privilege by Lord Taylor in *R v Derby Magistrates Court ex parte B* [1996] AC 487:

> "*The principle which runs through all these cases and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.*"

30. The Defendants accepted that the Retainer itself (and amendments to it) was not protected by privilege. They had also waived a distinct line of correspondence relating to the settlement. The agreement for sharing information between Mr Salfiti and Mr Bosheh did not justify waiver of privilege to third parties (including the court and public). However, there was a substantial quantity of material that remained disputed on privilege.

31. The case of *Hakendorf v Countess of Rosenburg* is not authority for the broad proposition that a solicitor may rely on privileged material in order to make out a case against a former client. In *Hakendorf* the solicitor had acted for the wife in divorce proceedings. The wife had terminated the retainer before the end of proceedings, and the solicitor had not been paid. The solicitor sought her costs from the wife, and a freezing injunction in support. The wife objected, inter alia, on grounds of misconduct on the part of the solicitor and also because of use of privileged material. Tugendhat J referred to *Paragon Finance v Freshfields* [1999] 1 WLR 1183 and then commented:

> "*72. Neither party has put before me any authority on waiver of privilege in relation to actions brought by a solicitor against a former client. That such actions are open to a solicitor is not in doubt, and is expressly contemplated by the 1974 Act.*
>
> *...*
>
> *73. There is of course no breach of confidence or breach of privilege in a solicitor reminding her client of matters communicated to her by her client. The potential for breach of confidence arises, if at all, when there is disclosure to a third party. Where proceedings are not in public and the dispute is between the solicitor and her former client, the disclosure complained of, if any, must be limited to disclosure to the court and to the former client's new solicitor, if such are instructed. I offered the Wife an opportunity to make an application that the proceedings before me be heard in private, but she did not do so.*
>
> *74. In any event it is not the disclosure to me in hearing the application which was the totality of the complaint. She complained that the Solicitor had used the material in bringing these proceedings and disclosing them to the judge who heard the without notice application. Problems of legal professional privilege, as they arise in relation to contested hearings for the assessment of costs, are considered in the notes to the White Book Part 47 Note 47.14.3. They provide little assistance to this case, because in such cases the dispute is between the two original litigants. There is no complaint in this case of disclosure of privileged material to the husband by the Solicitor.*
>
> *75. The first answer to the point seems to me this. The Wife has not specified what precise information she says was both privileged and disclosed by the Solicitor. Precision in this matter is important. I have been told that the divorce proceedings were in public and that a public judgment has been delivered by Black J. I have not seen what is made public in that judgment.*
>
> *76. Moreover, in paragraph 6 of her first affidavit the Solicitor said this: "Before proceeding further in this affidavit I wish to draw certain circumstances to the attention of the court. In making this application without notice I am aware that I am*

under a duty to the court to make full and frank disclosure of all relevant matters. As against that I am aware of two rules of practice, namely, that communications between solicitor and client are normally privileged, and that documents obtained by compulsion in one legal proceeding may not normally be used in another legal proceeding without the permission of the court. As to the first of those rules (privilege) I have taken the view that it cannot as a general rule apply to proceedings brought by the solicitor with a view to obtaining payment of her bill or else no solicitor could ever prove her fees were properly incurred. Even so, I have chosen in my discretion to preserve certain of my former client's secrets but I reserve my rights in case the Defendant wishes to open up those matters. As to compliance with the second of those rules (use of documents in other proceedings) I have sought to refrain from using information supplied by the former husband under compulsion unless those matters were disclosed in open court".

77. On the facts of this case so far as they have been enlarged upon in submissions by counsel, I conclude that it has not been established that the Solicitor has, in disclosing what she has to the court, acted in breach of her duty.

78. Further, it seems to me that a communication by a solicitor to the court, made for the purpose of proceedings properly brought by the Solicitor, will not of itself constitute a breach of legal professional privilege. That appears to be the assumption in Finers v Miro [1991] 1 WLR 35 . That case concerned an application made by a firm of solicitors to the court for directions in relation to assets that were under the solicitor's legal control and belonged to the Defendant. In particular the solicitors asked whether they should give notice of the proceedings to certain named individuals and companies, and if so what information they should give. After innocently receiving the assets in question the solicitors became aware of grounds for suspecting that they may have been acquired by fraud on the part of the client.

79. In upholding the judge's order that notice of the proceedings should be given to the liquidators of certain companies, Dillon LJ considered, at page 40, that the difficultly about that course was that any communication which gave enough information to be of practicable use would breach the legal professional privilege to which the client was entitled as against the solicitors. No similar concern appears to have been expressed by the Court about the disclosure to the Court itself in the application for directions.

80. If I were wrong about this, it seems to me that justice requires that I should not discharge the order on that account. A solicitor

> *is entitled, in suing for her fees, to the same rights as other litigants, in particular to access to justice, equality of arms and a fair hearing. I do not see how these can be achieved if she cannot use the information which the Solicitor put before the court in this case.*
>
> *81. If I were wrong about that, and if I had to resolve the question of principle, I would also decide that in favour of the Solicitor. If, as happened in this case, a former client acts so as to entitle the Solicitor to relief under section 69 [of the 1974 Act], or gives the Solicitor grounds for applying for a Freezing Order, while challenging a bill in whole or in part, it seems to me that there may well be a situation analogous to that in Paragon Finance . In other words the former client cannot put the former solicitor in that position, and at the same time deny the solicitor the use of materials relevant to the action, which the law plainly permits the solicitor to take.*"

32. Two significant points show that *Hakendorf* was correctly decided, and can also be distinguished. First, the case was decided on the basis that the wife had not identified privileged information wrongfully disclosed or established a breach of confidence. Indeed the wife had disclosed some privileged communications and the solicitor had expressly made clear that she wished to avoid relying on privileged information. Secondly, Tugendhat J made his decision in the context of a solicitor suing for accrued fees where her client has challenged those fees and had already relied on misconduct and had grounds for relief under the Solicitors Act in respect of accrued costs. In such circumstances he rightly considered that the situation was analogous to the type of waiver that arises in *Paragon Finance.*

33. The only aspect of *Hakendorf* that might be questioned is the obiter dictum that could be read as treating *Finers v Miro* [1991] 1 WLR 35 as supporting a general proposition or assumption that a communication by a solicitor to the court, made for the purpose of proceedings properly brought by the Solicitor, will not of itself constitute a breach of legal professional privilege.

34. In *Finers v Miro* a solicitor sought directions from the court to disclose otherwise privileged information to a US insurance company's liquidator in relation to disputed trust assets. There was prima facie evidence that the solicitor's client had used him in the secret perpetration of an elaborate scheme to defraud the insurance company.

35. The case involved the court giving orders under its supervisory jurisdiction over trustees rather than the solicitor disclosing privileged information voluntarily. The proceedings had properly been brought without disclosure of privileged material to third parties. Further, this case is best understood as an illustration of the "iniquity exception" rather than for a much broader proposition that fraud unravels all.

36. In *Finers v Miro* the court acknowledged that not all cases of fraud where a client had concealed his wrong would justify disclosure, and rejected a submission that the solicitor had not been advising on how to commit a fraud but been merely involved after the fraud. Instead Dillon LJ concluded at p40:

> "*On the material before us I conclude that it does seem probable that the defendant may have consulted Mr. Stein for the purpose of being guided and helped, albeit unwittingly on the part of Mr. Stein, in covering up or stifling a fraud on the insurance company of which there is a prima facie case resting on solid grounds.*"

37. There was common ground between the parties here that the iniquity exception is not a true exception since its application means that the information is not protected by privilege. There has been much judicial comment in identifying when fraud prevents reliance on privilege. Both parties relied on the judgment of Popplewell J as covering much of that law. It is notable that *Finers v Miro* was not cited and has not generally been treated as the overarching authority. Popplewell J in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 referred to other landmark authorities on legal professional privilege:

> "*69. …Where legal professional privilege exists, it is inviolate: there is no balancing exercise to be undertaken between the interest in maintaining privilege and competing interests in disclosure of the communications: R v Derby Magistrates' Court, ex parte B [1996] AC 487 ; Three Rivers DC v Bank of England (No. 6) [2005] 1 AC 610 at [25].*
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> *…*
>
> *71. Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by putting forward an account of events which the client knows to be untrue and which therefore involves a deliberate strategy to mislead the other party and the court, and to commit perjury, as is clear from R v Snaresbrook Crown Court, ex parte DPP [1988] QB 532 and R v Central Criminal Court, ex parte Francis & Francis [1989] AC 346 . Longmore LJ referred to these principles in Kuwait Airways (No. 6) at [26] and [27]:*
>
> *'[26] In the Snaresbrook case [1988] QB 532 it was alleged that the defendant, who was charged with attempting to pervert the course of justice by making a false allegation of assault against the police, must have made a false statement in an application for legal aid made by him for the purpose of bringing his civil action for assault. Section 23 of the Legal Aid Act 1974 made it an offence for anyone seeking legal aid knowingly to make a false statement or representation when furnishing any information required from him. In response to a submission for the Director of Public Prosecutions that the communication with the area office of the Law Society for the purpose of obtaining legal aid was made in furtherance of such a crime, Glidewell LJ said, at pp 537–538:*

"Obviously, not infrequently persons allege that accidents have happened in ways other than the ways in which they in fact happened, or that they were on the correct side of the road when driving while actually they were on the wrong side of the road, and matters of that sort. Again, litigants in civil litigation may not be believed when their cases come to trial, but that is not to say that the statements they had made to their solicitors pending the trial, much less the applications which they made if they applied for legal aid, are not subject to legal privilege. The principle to be derived from R v Cox and Railton applies in my view to circumstances which do not cover ***the ordinary run of cases such as this is*** *." (Emphasis supplied.)*

Glidewell LJ then went on to hold, at p 538, that for the purposes of section 10(2) of the Police and Criminal Evidence Act 1984 it was the holder who had to have the criminal purpose, and that the Law Society was the holder and that the Law Society had no intention of furthering a criminal purpose: "No intention could be further from its thoughts."

"[27] This latter reasoning was overruled by the House of Lords in the Francis case [1989] AC 346 but Lord Goff of Chieveley went out of his way to approve the first part of Glidewell LJ's reasoning. He said, at p 397:"

"I have to recognise that ... my conclusion in the present case undermines part of the reasoning of Glidewell LJ [in the Snaresbrook case]. But it does not necessarily undermine the conclusion of the Divisional Court in that case. This is because I am inclined to agree with Glidewell LJ that the common law principle of legal professional privilege cannot be excluded, by the exception established in R v Cox and Railton 14 QBD 153 in cases where a communication is made by a client to his legal adviser regarding the conduct of his case in criminal or civil proceedings, ***merely because*** *such communication is untrue and would, if acted upon, lead to the commission of the crime of perjury in such proceedings." (Emphasis supplied.)*

...

76. Where is the line to be drawn between 'the ordinary run of cases' in which privilege attaches to communications with a solicitor by a client with a view to advancing a knowingly false case, and the conduct in Kuwait Airways (No. 6) ? The answer lies, in my view, in a focus on three aspects of legal professional privilege and the iniquity exception. The first is that legal professional privilege attaches to communications between solicitor and client which are confidential. The quality of confidence is a prerequisite to the privilege, because it is the protection of such confidence which forms the bedrock of the

rationale for the privilege as essential to the administration of justice. Secondly, communications made in furtherance of an iniquitous purpose negate the necessary condition of confidentiality. It is this which prevents legal professional privilege attaching to communications for such purpose. Thirdly, the reason that communications in furtherance of iniquity lack the necessary quality of confidentiality is that communications can only attract the confidence if they are made in the ordinary course of professional engagement of a solicitor. It is the absence or abuse of the normal relationship which arises where a solicitor is rendering a service falling within the ordinary course of professional engagement which negates the necessary confidentiality and therefore the privilege. The 'ordinary run of cases' involve no such abuse: a solicitor instructed to defend his client of a criminal charge performs his proper professional role in advancing what the client knows to be an untrue case.

…

77. These three aspects are apparent from the authorities. As to the first, it is a constant theme that it is the necessary confidence between client and lawyer which justifies the privilege: see for example Holmes v Baddeley (1844) 1 Ph 476 , 480–481, per Lord Lyndhurst LC; Southwark and Vauxhall Water Co v Quick (1878) 3 QBD 315 , 317–8 per Cockburn CJ; Pearce v Foster (1885) 15 QBD 114 , 119–120 per Sir Balliol Brett MR; Balabel v Air India [1988] Ch 317 ; R v Derby Magistrates' Court per Lord Taylor in the passage quoted above. The same concept is contained in the formulation that the interests of justice require that the client should be able to 'make a clean breast of it' to the lawyer: see e.g. Anderson v Bank of British Columbia (1876) 2 Ch D 644 , 649 per Sir George Jessel MR; Hobbs v Hobbs and Cousens [1960] P 112 , 116–7 per Stevenson J. As Mr Béar pointed out, it is the potential 'chilling effect' of any uncertainty over whether such confidentiality will subsequently be broken which underpins the common law that privilege is inviolate and cannot be overridden by some competing public interest, even where the balance would require disclosure: see Derby Magistrates' Court per Lord Taylor at p. 508A–C and Lord Nicholls at pp. 511E–512E.

…

93. I would conclude, therefore, that the touchstone is whether the communication is made for the purposes of giving or receiving legal advice, or for the purposes of the conduct of actual or contemplated litigation, which is advice or conduct in which the solicitor is acting in the ordinary course of the professional engagement of a solicitor. If the iniquity puts the

> *advice or conduct outside the normal scope of such professional engagement, or renders it an abuse of the relationship which properly falls within the ordinary course of such an engagement, a communication for such purpose cannot attract legal professional privilege. In cases where a lawyer is engaged to put forward a false case supported by false evidence, it will be a question of fact and degree whether it involves an abuse of the ordinary professional engagement of a solicitor in the circumstances in question. In the 'ordinary run' of criminal cases the solicitor will be acting in the ordinary course of professional engagement, and the client doing no more than using him to provide the services inherent in the proper fulfilment of such engagement, even where in denying the crime the defendant puts forward what the jury finds to be a bogus defence. But where in civil proceedings there is deception of the solicitors in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court, that may well be indicative of a lack of confidentiality which is the essential prerequisite for the attachment of legal professional privilege. The deception of the solicitors, and therefore the abuse of the normal solicitor/client relationship, will often be the hallmark of iniquity which negates the privilege.*"

38. Both parties relied on this approach. Popplewell J explored the authorities which acknowledge that the mere fact that a client may deceive his lawyer and thereby continue a strategy of lies and perjury will not invoke the "iniquity exception". The test is whether the disputed communications are made in the ordinary course of the professional engagement of a solicitor and whether the alleged deceptions mean that there has been an abuse of the solicitor/ client relationship such that privilege over those communications is negated. Is the deception of the solicitor in order to use them as an instrument to perpetrate a substantial fraud on the other party and the court? I consider that it is implicit that the test would extend to deception used to perpetrate a substantial fraud on the solicitor.

39. Here the pleaded deceptions are that the Boshehs:

    a) impliedly misrepresented to the Claimant that:

        i) they would act and/or that their instructions would be motivated by their best interests alone, as opposed to those of a third party;

        ii) they would at all times act in good faith towards the Claimant

    The proposed amended case added further pleaded misrepresentations namely that the Boshehs:

    b) orally represented to the Claimant that the Chancery Action would not succeed;

    c) orally represented that Mr Salfiti did not have access to or own the Yahoo email account or the RBS Account;

d) impliedly represented that there existed a potential conflict of interest between the Boshehs and Mr Salfiti.

40. In its skeleton argument Mr Haque QC maintained that the same fraudulent misrepresentations were made by Mr Salfiti to the Claimant relying on the evidence of Mr Candey.

41. Mr Candey put forward lengthy evidence regarding wrongdoing or other dishonesty on the part of Mr Salfiti and Mr Bosheh. This included evidence of Mr Salfiti being suspended by a Solicitors' Disciplinary Tribunal after accepting that he had misled the court and the solicitors on the other side in the matter in question. The Claimant also referred to findings in a case (*Seedo v Salfiti*) decided in January 2021 in the London Central County Court where HHJ Dight found that Mr Salfiti was liable in fraudulent misrepresentation and made wide-ranging findings of dishonesty on his part.

42. Mr Candey also referred to conversations between Mr Bosheh and himself and other colleagues within the Claimant, over which Mr Bosheh asserts privilege. The Claimant also referred to evidence showing that the RBS Account was used for card transactions in London close to Mr Salfiti's home address and workplace, at times when the Boshehs were not in the UK, and also him having agreed to pay Sheikh Mohamed £150,000 and offer a letter of apology. Mr Candey's evidence was that at the outset the Claimant refused to act for Mr Salfiti and believed it would be acting only for Mr Bosheh and his commercial interests, and that Mr Bosheh wished to make a substantial counterclaim. It believed Mr Bosheh was telling the truth and intended to seek recovery under his counterclaim.

43. The Claimant relied on statement and documentary evidence showing that it was aware in October 2020 that Mr Salfiti had access to the email and RBS Account, and later evidence emerging in trial preparation to show that his mobile phone number was provided to RBS as a contact on behalf of Mr Bosheh. In April 2021 Ms Dalia El Masri gave a witness statement in the Chancery Action stating that Mr Salfiti owned and controlled those accounts, and the Claimant relied on this and several other statements from that action. The Claimant also pointed to evidence from the first half of 2021 showing that Mr Bosheh had lied about having an engineering degree from a UK university. It also relied on evidence of a separate RBS savings account to maintain that Mr Bosheh had lied in his disclosure certificate in the Chancery Action.

44. These matters contain some serious allegations that are highly disputed. For the purpose of deciding whether privilege applies to the disputed communications I am willing to accept the Claimant's case and that it provides prima facie grounds for a claim in fraud based on the allegation that the Boshehs and Mr Salfiti made the fraudulent misrepresentations to the Claimant.

45. The alleged false statements relating to the Yahoo email and RBS Account were in essence past fraud that was said substantially to give rise to Sheikh Mohamed's action. The Claimant acknowledged that this was the same fraud upon which the Defendants had initially sought legal advice and that had continued into the Retainer. Dishonesty in this respect on the part of the client does not take the matter outside the ordinary professional business of advising a client and taking instructions. In denying the fraud

alleged the Boshehs were, even if untruthful, not perpetrating a fraud that would negate privilege.

46. The alleged false statements regarding whether they would act in good faith, or be motivated by their best interests or maintain that their case would succeed similarly cannot take the situation out of the normal relationship and does not amount to an abuse of the relationship such that *"privilege takes flight*" (referring to Cardozo J's dicta cited in *Ablyazov* at paragraph 91). Fraud actions are, by their nature, likely to be situations where there are prima facie grounds for alleging fraud, and the cases show that in the ordinary run of cases clients may be deliberately untruthful to their lawyers or the court. However, even in those cases where the fraud allegation is well founded the defendant is entitled to a fair trial in order to defend such actions, and also privilege over legal advice. While different inferences may be drawn in different circumstances, the case law does not justify different legal tests being applied for clients seeking advice in civil or criminal litigation, especially where a client is accused of fraud. A client falsely denying fraud, overstating the merits of his position in the litigation and misrepresenting his loyalty to his lawyers or his motives on settlement is within the normal run of case. False statements on these matters do not deprive the client of the right to legal professional privilege.

47. Even taking the Claimant's case at its highest the alleged deceptions (and other wrongs) do not take this matter outside the ordinary course of the professional engagement of a solicitor or mean that there has been an abuse of the solicitor/ client relationship such that privilege over those communications are negated. The matter can be tested by asking whether a third party would be entitled to require disclosure of these communications (in the manner that an application was made in *Ablyazov*). In that situation the answer would have to be that the Boshehs' conduct was within the ordinary run of case where a client is accused of fraud.

48. I have considered whether Mr Salfiti's alleged deception, conspiracy in acting in concert with the Boshehs in relation to their fraud and in seeking to take advantage of the Claimant's services, and the other wrongs alleged, take the matter within the iniquity exception so as to preclude the Boshehs' reliance on privilege. However, the alleged conspiracy with a third party does not diminish the client's right to the protection of privilege over his communications with his lawyers. Again, the matters alleged are within the ordinary course of engagement of a solicitor (and the Claimant knew that Mr Salfiti was alleged to be the ringleader using Mr Bosheh as a front as this was the case upon which they were instructed to represent Mr Bosheh). The Claimant also knew that Mr Salfiti and the Boshehs were sharing information. The conspiracy was based on the Boshehs' alleged wrongs (including fraud and breach of contract). Those wrongs (even including deception by Mr Salfiti) do not meet the test of iniquity but fall within the ordinary run of cases.

49. I have also considered the broader question raised as to whether the privilege only protects the client vis-à-vis third parties or the proceedings in question, and whether a solicitor must be allowed to use this type of information to sue his client even if a third party could not justify disclosure of the communications. The Claimant presented the case as raising new points of principle. Mr Haque QC suggested that it would be abhorrent if a solicitor cheated in this way had no means of recompense from a lying client, and solicitors would be deterred from entering into contingency arrangements.

This case does raise questions as to the correct balance as between lawyers' access to justice and their duties to their clients and the court. However, there is no need for new law in this area since it has been laid down by the highest courts in cases such as *Paragon Finance* and *Three Rivers DC v Bank of England (No. 6)* [2005] 1 AC 610 at [25].

50. These cases make clear that the client's right to privilege is not a mere rule of evidence that is to be weighed up against relevance, efficiency or fairness. A client represented by a solicitor acting on a contingency fee basis is entitled to the same protection in seeking legal advice as one acting on an ordinary hourly basis. The Claimant established no justification for special rules where a solicitor acts on a contingency basis. As explained below, there is no basis for implying a duty of good faith before or after the Retainer is concluded.

51. Solicitors have a choice in taking work on a contingency fee basis with the inherent extra risks and rewards involved. There are safeguards to protect against an unexpected outcome and the market is sophisticated. Protection by way of contractual terms or insurance can be agreed. The most obvious safeguard is the uplift in fees for success, which reflects the risk that some cases will not result in success for the lawyer, including where the client is not believed or settles the case unfavourably. Under the Retainer the Claimant obtained agreement to a 100% uplift on fees that were already at a high rate (e.g., £1000 per hour for Queen's Counsel). The Defendants correctly questioned the basis of such an uplift in a fraud case if the solicitor can still use his client's most sensitive communications to sue him on the basis of the same fraud if he does not achieve success.

52. The existing law of privilege does not give immunity to a dishonest client from a claim in fraud of this type by his lawyer. Deceitful statements of the sort raised by the Claimant, will, if material to the outcome, usually be disclosed outside the cover of privilege, for example in open court or in the client's pleading. They may also be part of the retainer and so not privileged. If such statements have been made outside the cover of privilege then they will not be protected.

53. Further, the Claimant's policy arguments about a fraudsters' charter and solicitors being unfairly left vulnerable lacked substance. A solicitor taking on a client accused of fraud (whether on a contingency basis or otherwise) cannot be taken to rely solely on the client's views as to the merits of his case or his credibility, loyalty or motivations. In the ordinary run of a professional relationship a client may not be telling the truth on these matters. Indeed the solicitor would be expected to form its own assessment. The Claimant was not taken by surprise by the fraud of which it now complains; it was the case that it had agreed to defend.

54. There was little debate about the consequences of a finding that the disputed material is subject to privilege. The Claimant suggested that any jurisdiction to restrain reliance on confidential information lies in equity and the Defendants were unable to come to court with clean hands. However, this approach rather prejudged that the Claimant was entitled to use the material to allege fraud. In any event the authorities do not support that approach which would negate the protection of privilege for any client who is alleged to have acted wrongfully.

55. My conclusion is that the Defendants are entitled to the requested order striking out as inadmissible privileged material in the Claimant's witness statements and exhibits, and such material is also to be struck out from the Particulars of Claim.

Is the Claimant entitled to rely on confidential material in making its claim and applications? If not, what relief is available?

56. In relation to confidentiality the Defendants asked the Court to exclude two categories of documents:

    a) documents disclosed by Mr Bosheh to the Claimant in confidence and to which the Claimant owes Mr Bosheh duties as part of its fiduciary duty and as an implied term of its retainer;

    b) bank statements improperly used by the Claimant which were received by it after it terminated its retainer.

57. Documents disclosed by Mr Bosheh to the Claimant included contemporaneous emails from the Yahoo email account, and bank statements for the RBS Account. The Defendants argued that the fact that such documents may be disclosable in due course does not justify their use.

58. The Defendants separately asked the court to exclude RBS bank statements exhibited to Mr Candey's first affidavit that had been received after the Claimant terminated its retainer. These were obtained by the Claimant after asking the Boshehs, as their clients, and pursuant to their disclosure obligations, to provide a letter of authority to RBS authorising it to provide bank statements to the Claimant. This authorisation was premised on the fact that the Claimant was the Boshehs' solicitor and the statements were required for the purposes of the Chancery Action. The Claimant then terminated its retainer and the Chancery Action settled. It later received the bank statements. Upon receipt of those documents from the bank, the Claimant then went through them carefully and used them in its proceedings and the Freezing Order application.

59. The Defendants asked the Court to exclude both categories of documents as improperly obtained and pointed to the test laid down in *Mustard v Flowers* [2019] EWHC 2623 by Master Davison as follows:

> *"It is important to note that Mr Audland QC did not contend that the manner of obtaining the recordings should, of itself, lead to their exclusion. He accepted the proposition that evidence that had been unlawfully or improperly obtained might still be admissible. What was required was that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial. The task of the court was to balance these factors together and, having regard to the Overriding Objective, arrive at a judgment whether to admit or exclude. To put it slightly differently, the issue was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of*

> *achieving justice in the particular case. This approach, from which Mr Grant did not dissent, seems to me to be fully in line with the authorities to which I was referred and which I need not set out. I do, however, note that in the majority of such cases the balance has been struck in favour of admitting the evidence."*

60. The Defendants argued that there is a clear public interest in excluding such evidence since clients must be able to trust their solicitors, who owe fiduciary duties to them and are under strict obligations of confidentiality. Solicitors are rightly held to a high standard of personal integrity and breaches of these obligations should not be rewarded or tolerated. Plus they maintained that these documents do not go to the main issues in dispute but are instead used for the purposes of showing that there is a risk of dissipation.

61. The Claimant addressed this application as a whole relying on similar arguments as put forward on privilege. The Claimant argued that disclosure of the confidential material is reasonably necessary for the protection of the Claimant's legitimate interests and the matter will be disclosable in due course.

Conclusion on relief against use of confidential documents

62. The Claimant failed to provide a good excuse for its decision to inspect and retain the RBS bank statements that it received after it terminated its retainer with the Defendants. There was no lawful basis for it retaining and reviewing such documents and they should have been returned immediately.

63. Mr Haque QC acknowledged that the Claimant's actions in relation to the RBS bank statements were not perfect and that that normally such documents would be returned. He attempted to justify its actions on a number of grounds including that there was concern that the court might have been misled. However, there was no attempt to inform the other parties to the Chancery Action (or the court). Mr Haque said that this was not a normal situation since the Claimant had been deceived and the Claimant was concerned that it might be defrauded. However, this suggested that the Claimant had deliberately used the documents entirely for its own purpose or had failed properly to consider whether there was any lawful basis for this. Either way, for a solicitor to use such documents was unjustified.

64. The Claimant is refused permission to use these bank statements at this stage or to continue to use them although they may be subject to a disclosure order (and thereby protected by the court rules covering documents produced on disclosure).

65. The position regarding the wider range of documents provided by Mr Bosheh in the Chancery Action is less clear cut. The Claimant was correct that confidentiality in itself does not mean that documents are inadmissible. It is relevant that many of these documents are likely to be disclosable if the matter proceeds. In relation to these documents the court will not restrain their use but will direct that they are to be held and used by the Claimant as if disclosed in these proceedings (and must not be used for other purposes without the court's permission).

Should permission be given under CPR Part 32.12 to allow the Claimant to rely on all the witness statements from the Chancery Action?

66. The Defendants maintain that there has been a wholesale disregard of the rules. The Claimant was not entitled to use certain witness statements from the Chancery Action and should not be granted permission for future use or retrospective permission for past use. The Claimant relied on the fact that Ms El Masri had overnight sent a letter giving her consent to the use of her statement in these proceedings.

67. There was some discussion as to whether the application could and should have been made in this action or in the Chancery Division on notice to the other parties to the Chancery Action, and the Claimant offered to give an undertaking to make such an application.

68. I am satisfied that the Claimant should have obtained permission and that it must obtain permission to use such statements for the future and requires retrospective permission in relation to past use. The application should have been made on notice to the parties to the Chancery Action and I am not willing to allow it.

69. However, in relation to the points made, it may be useful to record my position based on the materials produced in this case, without seeking to dictate the outcome if parties in the Chancery Action make an objection. The Claimant's use of these statements without permission was an unjustified breach of court rules. The Claimant failed to identify any good explanation for it. Its willingness as a law firm to disclose such statements without any apparent consideration of the court rules merits a sanction in costs. However, on what I have seen I would not have refused permission for future use, at least in relation to the Defendants' own statements and those of Ms Masri since these would be relevant in these proceedings, especially in circumstances where the court has found that the Claimant cannot rely on privileged material.

70. I also note that the Defendants have already had an opportunity to raise their objections and acknowledged that it would be inappropriate for them simply to re-run their own points.

Should permission be given under CPR Part 32.22 to allow the Claimant to rely on documents disclosed in the Chancery Action?

71. This application related to two short emails appearing to be from Mrs Salfiti to Mr Bosheh relating to the management of two rental properties.

72. The Claimant maintained that documents provided to it during the proceedings fell outside the scope of CPR 31.22 since it was not a party to the Chancery Action.

73. I reject that argument since CPR 31.22 is based on the existing common law position under which a solicitor owes a duty to the court in respect of documents disclosed, as shown in *Harman v Home Office* [1983] 1 AC 280. *Lakatamia Shipping Company v Su* [2020] EWHC 3201 (Comm) shows that non-compliance with CPR 31.22 is a serious matter. It may well give rise to costs sanctions and while the court has jurisdiction to grant retrospective permission it will only do so in limited circumstances. Here the documents appear to be of very limited probative value so the interests of justice would not require their disclosure. The Claimant failed otherwise to justify its use of them. Accordingly retrospective and future permission is refused and evidence referring to these documents should be struck out.

Relevance and admissibility of the judgment of HHJ Dight in the Seedo case.

74. The parties' disputed the relevance and admissibility of the judgment of HHJ Dight. The Claimant relied on it as evidence showing that Mr Salfiti was a serially dishonest solicitor. The Defendants submitted that the judgment was not admissible as evidence of findings of fact relying on *Rogers v Hoyle* [2014] EWCA Civ 257. That case was about a report by a statutory body into an aircraft accidents, but it upheld the principle in *Hollington v Hewthorn* [1943] KB 587, described by Hoffman J in *Land Securities Plc v Westminster City Council* [1993] 1 WLR 286 as,

> "*In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.*"

75. The principle is controversial but has been upheld. There is a strong case for the Defendants to argue that the judgment of HHJ Dight is inadmissible as evidence to prove that Mr Salfiti was dishonest in relation to the facts alleged here (or even the facts relating to the county court litigation). However, for the purposes of this hearing (including the application for summary judgment and the dispute over privilege) I am willing to treat it as admissible as evidence of past dishonesty.

76. However, even if wrong on that, the principle in *Hollington* would not preclude some reliance on the judgment. The decision is based on relevance and the judgment is not inadmissible for all purposes. In *Hollington* and also the other cases such as *Rogers v Coyle* and *Land Securities* there was no specific issue as to credibility. The objection to the material in question was that it was the irrelevant opinion of someone other than the trial judge which unfairly pre-empted the trial judge's own factual investigation of the incidents in question.

77. Here the existence and content of the HHJ Dight judgment may be relevant to the Claimant's belief in Mr Salfiti's statements (which may go to continuing inducement and quantum). It is solid evidence that he has been found dishonest in the past at trial. This may be relevant to whether there is a risk of dissipation, and also to Mr Salfiti's credibility, reputation and professional background, in circumstances where a fraud allegation and freezing order against a qualified solicitor would generally be regarded as extremely damaging and surprising. However, the court will assess such evidence critically. Limited weight can be placed on past allegations (or findings) of dishonesty which may not corroborate a separate fraud or risk.

II APPLICATIONS RELATING TO MERITS AND STRIKE OUT

Should summary judgment be given in favour of the Defendant? Should the Claimant be granted permission to amend?

78. There was little dispute between the parties as to the relevant test under CPR Part 24. The correct approach under CPR Part 24 is summarised by Lewison J in the often cited passage from *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15.

"*the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91 ;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be.

> *Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*."

79. A similar test applies for an application to amend but the onus lies on the party seeking to amend its case to show that it has a real prospect of success. I also take account of the comments of Potter LJ in *Partco Group Ltd v Wragg* indicating that matters involving prolonged argument on law and facts in areas of developing jurisprudence may not be suitable for summary judgment or strike out.

80. For the purpose of deciding the summary judgment application I am willing to accept the Claimant's evidence as outlined above in paragraphs 41 to 43 but taking into account my ruling that it is not entitled to rely on the content of privileged communications, including the oral representations allegedly made.

The contractual claim for breach of implied terms

81. The Claimant alleges that the Retainer was subject to a number of implied terms, including that "*the Boshehs would act or their instructions would be motivated by their best interests alone…and/or that they would at all times act in good faith towards the Claimant*". The amended case contains an allegation of an implied term that "Mr Bosheh would cooperate with, give a full and accurate account of the case to, and not deliberately mislead the Claimant". The Claimant's case is that these terms are implied as obvious or necessary to give business efficacy to the Retainer.

82. English law on implied terms is now well settled and summarised by Popplewell J in Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc [2016] EWHC 437, at [33]) as follows:

> "*(i) it must be reasonable and equitable; and*
>
> *(ii) it must either:*
>
> *i. Be necessary to give business efficacy to the contract; or*
>
> *ii. Be so obvious that it "goes without saying"*
>
> *(although in practice it would be a rare case where only one of those two requirements would be satisfied); and*
>
> *(iii) it must be capable of clear expression; and*

(iv) it must not contradict any express term of the contract."

83. I accept the Defendants' case that the implied terms put forward were not necessary for the Retainer to work or so obvious that it goes without saying. The implied term to cooperate was not necessary in light of existing law reflecting *Mackay v Dick*. The alleged implied term obliging Mr Bosheh not deliberately to mislead the Claimant was not necessary for the Retainer to work. It was an express term of the Retainer that the Claimant could terminate at any stage and it would also have professional obligations to do so if instructions involved misleading the court. The alleged implied term (like others such as the implied term as to a client's duty of good faith or motivations for settling a case) was unprecedented and no clear basis for it was provided. The Claimant's case was not part of an area of developing jurisprudence justifying caution in granting summary judgment (within *Partco v Wragg*).

84. The Defendants correctly maintained that a retainer between a solicitor and client is not subject to a duty of good faith and this is not necessary for the relationship to work. A solicitor owes a fiduciary duty. The Claimant argued that its relationship with Mr Bosheh was a relational contract giving rise to a duty of good faith as outlined in *Bates v Post Office* [2019] EWHC 606 (QB). However, there is no authority to support the argument that a client owes his solicitor a duty of good faith. Indeed the solicitor's fiduciary duty to the client would displace such a finding under *Bates v Post Office*. The presence of a contingency fee arrangement does not change that and the Claimant's case had no real prospect of success on these implied terms.

85. The implied term that "*the Boshehs would act, and/or their instructions to the Claimant would be motivated by their best interests alone, as opposed to those of a third party*" was also unworkable as being too uncertain to be implied as a matter of business efficacy or obvious intention. As the Defendant submitted, the content of the obligation to act according to the Boshehs' motivations as to their best interests was not capable of clear expression. In its skeleton argument the Claimant argued that the Mr Bosheh impliedly represented that he would "*act in his own commercial interests in pursuit of his own counterclaim and not prefer the interest of Mr Salfiti at the expense of the Claimant*". Mr Haque QC was unable to provide a satisfactory explanation as what the alleged term or representation meant, whether defined by reference to best interests or commercial interests.

86. Even if wrong on that and the term had sufficient meaning to be capable of clear expression, it was not reasonable, equitable or necessary for the Retainer to work. The Boshehs' motivations were not a reasonable basis for imposing a contractual obligation. In addition, a client's "best interests" would not on its ordinary meaning be capable of meaning, or reasonably preclude a client acting with a view to the interests of another person.

87. As discussed in more detail below regarding the Claimant's formulation of the implied representation, no realistic basis was put forward for a case that there was an implied term that required Mr Bosheh's acts and instructions be motivated by his interests alone. Such a term would certainly not be implied as a matter of law (there was no authority for it) and it was not necessary for the Retainer to work, and was not so obvious that it went without saying.

88. Taking the Claimant's case at its highest (and allowing that it may be supported by further evidence put forward), it has no real prospect of successfully establishing the implied terms and judgment should be given for the Defendants on such contractual claims.

The contractual claim for breach of the express Costs Term

89. The Retainer contained an express term that the Boshehs would "*always seek to recover costs by order or agreement*". The Defendants accept that there has been a prima facie breach of this term but say the Claimant is estopped from relying on such breach. Any defence of estoppel will depend on a factual investigation and the Defendants' case was far from decisive. I find that there is a real prospect of success on establishing liability for this aspect of the claim.

90. The Defendants had strong grounds to challenge the quantum of the claim put at over £3 million. The Claimant proposed an amendment that "*the value of the [Defendants'] enrichment is the value of the Claimant's service in the amount contractually agreed…alternatively the value of Sheikh Mohamed's claim in the [Chancery Action] together with the costs that Sheikh Mohamed incurred in the [Chancery Action] of no less than £3 million.*" The amendment did not appear to be put forward at the hearing and it was difficult to see this alternative basis as the measure of damages for breach of the Costs Term. The Claimant had no real prospect of success on this alternative measure.

91. The Defendants say that any liability for breach would be capped at £21,000 (namely 28% of 50% of Mr Salfiti's settlement payment of £150,000). This was supported by the sums at which Sheikh Mohamed actually settled with Mr Salfiti.

92. The Claimant's case as to what amount Sheikh Mohamed would have offered the Boshehs (in costs or otherwise) if they had not agreed a drop hands settlement was speculative, and based on no more than the figure given by the Sheikh's lawyer for the full quantum of his claim together with costs. This aspect of the Claimant's case was also inconsistent with its primary case as to the merits of Mr Bosheh's case and it being in reality aligned with that of Mr Salfiti. On the Claimant's own best case the quantum of such a claim would at most be around £1.5 million, based on Mr Candey's second affidavit that the Claimant would have been paid £1.5 million from the settlement.

93. There was no clear basis for this claim being successful in the pleaded amount of over £3 million since such fees would have only been recoverable if the Boshehs were successful which was inconsistent with the Claimant's primary case. To the extent that the Claimant was putting forward an amendment to seek restitutionary damages on the basis of a repudiatory breach of the Costs Term (which was not a claim that it clearly maintained at the hearing), that claim also had no real prospect of success. The Claimant failed to show any real prospect of displacing the ordinary contractual measure of damages, namely to place the innocent party in the position it would have been if the contract had been performed.

94. The Claimant established a good arguable case for a claim for breach of the Costs Term, but not for an amount exceeding £21,000.

The claim in deceit and fraudulent misrepresentation

95. The pleaded false representations (including those put forward in the amended claim) are set out above. There is one implied representation, and then two express oral representations made in relation to ownership of the Yahoo email account and the RBS Account respectively. In oral submissions the Claimant wisely suggested that it was no longer alleging that the Boshehs made a material misrepresentation that they would at all times act in good faith or there was conflict of interest, or that the Chancery Action would succeed, or that Sulaiman had made fraudulent misrepresentations. However, it put forward a case that the misrepresentations relied upon were made by both Mr Salfiti and Mr Bosheh.

96. The Claimant says that the alleged representation that "*the Boshehs would act and/or that their instructions to the Claimant would be motivated by their best interests alone as opposed to those of a third party*" is properly to be implied since a reasonable person would have inferred that this was being implicitly represented by the representor's words and conduct in their context. In his skeleton argument Mr Haque QC modified his case to suggest instead that the two Defendants made an implied misrepresentation that "*Mr Bosheh would act in his own commercial interests in pursuit of his counterclaim, and not prefer the interest of Mr Salfiti at the expense of CANDEY*". Later oral submissions developed the argument that Mr Bosheh simply had no commercial interest in the litigation. Mr Bosheh was described by the Claimant as a stooge, a puppet or a ghost at Banquo's feast. It alleged that the very foundation of their relationship was based on fraud, and this was a further element of the deception.

97. The Claimant acknowledges that the implied representation (in any of the versions put forward) is a statement as to future intention but says that it is actionable because at the time of making it, Mr Bosheh had no honest intention to behave in such a way (in reliance on *Edginton v Fitzmaurice* (1885) 29 Ch D 459 and *Spice Girls Ltd v Aprilia Service BV* [2002] EWC A Civ 15). The Claimant says that this can be inferred from the falsity of his misrepresentations about the Yahoo email account and the RBS Account, the consequence of which is that Mr Bosheh would only ever act in Mr Salfiti's commercial interests, Mr Bosheh having no commercial interests of his own in the litigation.

98. The Defendants objected to the implied representations in both versions and suggested that Mr Candey's evidence showed that the Claimant was not relying on the alleged representations but on the promise of future fulfilment, and this was not actionable. In any event there is no basis for saying that the Boshehs lacked any commercial interest or that they had intended to act against their interest, indeed it was notable that Mr Candey's evidence was that they would not benefit from any payment from Sheikh Mohamed who was unwilling to allow the Boshehs to make recovery (but was willing for moneys to go towards fees). In addition, the Defendants argued that the Claimant has failed to show any reliance on the alleged misrepresentation, not least since the representations were said to have been made by way of entering the Retainer, or made after it had been concluded.

Conclusions on misrepresentation and deceit

99. Jacobs J correctly stated in *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) [132] "*It is essential in any case of fraud for the dishonest representation to be clearly identified*". There were substantial differences between the Claimant's

different versions of the alleged implied misrepresentation (and the varying allegations as to the persons who made such misrepresentations). These differences are significant and go beyond drafting. The different versions (and the lack of any explanation for the proposed changes and their absence in the pleaded case being put forward) showed that even with the benefit of very detailed statement evidence and two days of oral argument the Claimant was in difficulty in identifying the implied misrepresentation said to have been made, and parts of the pleadings proposed did not merit pursuit.

100. The Claimant did not plead any basis for the pleaded implied misrepresentation save for suggesting that it was made by the Boshehs entering into the Retainer "*and thereby accepting that the Claimant would share risk and reward with the Boshehs*". The fact that the Boshehs may have entered into the Retainer cannot in itself amount to conduct or representation giving rise to an implied representation on the part of Mr Bosheh (especially where that representation is said to have induced that same Retainer). Knowledge or acceptance that the Claimant was sharing risk and reward by entering the Retainer also provided no basis for the implication.

101. In its skeleton argument the Claimant attempted to justify the implied representation by listing the following particular circumstances:

a) the alleged express representations having been made about the Yahoo email account and the RBS Account;

b) the Claimant had agreed to act for Mr Bosheh but not Mr Salfiti;

c) Mr Bosheh was aware that, in agreeing to act pursuant to a contingent fee agreement the Claimant expected Mr Bosheh to prefer his own commercial interests and not to act in furtherance of Mr Salfiti's interests at the expense of the Claimant;

d) Mr Bosheh purportedly wanted to pursue his multi-million pound counterclaim.

102. Even accepting these matters they do not show that the Claimant has a real prospect of establishing an implied fraudulent representation satisfying the requirement emphasised in *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm)[136] that "*there must be clear words or clear conduct of the representor from which the relevant representation can be implied*". They also do not satisfy the test also approved in the same passage, namely "*what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*".

103. Like implied terms, implied representations are usually based on necessity. Indeed, the Claimant pleaded that the implied representations were also terms implied as a matter of business efficacy or as being so obvious to go without saying. *Vald Nielsen* further explains that the preferred test is "*whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it*".

104. There was also no realistic basis for showing that Mr Bosheh had no commercial interest of his own in the litigation since he (and his son) were exposed to liability and an adverse public judgment finding that they were fraudulent if the matter was not

defended. Further, even accepting the Claimant's evidence, Mr Bosheh's conduct did not mean that a reasonable person would naturally assume that he was saying he would prefer the Claimant's interests to those of Mr Salfiti, and that he would necessarily have informed the Claimant that its interests would not take priority.

105. Even accepting the grounds put forward, the Claimant's case had no real prospect of success on the alleged implied representation. It was far removed from a case such as *Spice Girls v Aprilia* (relating to an implied representation to sponsors that the Spice Girls would be performing together when in truth one was going to leave the group). None of the matters put forward by the Claimant give rise to any real prospect of an inference being drawn as to an implied representation. Points a), b) and d) give no grounds for inference and point c) is merely an allegation of knowledge on Mr Bosheh's part. Again, entering the Retainer cannot count as conduct giving rise to the representation.

106. In conclusion, I find that the case based on an implied misrepresentation has no real prospect of success. The proposed amendments based on express oral misrepresentations are based on the use of privileged information which the Claimant is not allowed to deploy. The court has a discretion in relation to amendments and it would not be appropriate to allow the Claimant to deprive Mr Bosheh of the protection of privilege by allowing the amendment, which is accordingly refused.

The claim in unlawful conspiracy and inducing breach of contract

107. The Claimant did not set out the basis upon which these serious allegations were made against Mr Salfiti, save in maintaining that Mr Salfiti knew the terms of the Retainer and "*it is to be inferred from the Boshehs' conduct that they were acting in concert with [Mr Salfiti]*". The evidence went no further than Mr Candey's opinion that inferences should be drawn.

108. This was insufficient and was not cured by Mr Candey's opinion that Mr Salfiti was in control or the case put forward in the skeleton argument to suggest that Mr Salfiti has made the alleged misrepresentations. To the extent that the claim against Mr Salfiti for unlawful conspiracy and inducing breach of contract was based on the implied misrepresentations or breach of implied terms it fails for the reasons set out above. To the extent it is based on Mr Bosheh's breach of the express Costs Term the pleading failed to establish the basis of the claim.

109. On the Claimant's case the tort of procuring a breach of contract requires knowing and intentional conduct procuring a breach of contract without reasonable justification. There was, however, no pleaded basis for the allegation that Mr Salfiti had procured the alleged breach. At highest it was said that he "*knew the substance of the Representations and/or the terms of the Retainer*". The references to earlier conduct relating to the Yahoo account and the RBS Account did not bridge the gap. Again, the evidence went no further than Mr Candey's opinion that inferences were to be drawn that the defendants were acting in concert and Mr Bosheh was being controlled.

110. The pleaded case (and the amendments) related to the Boshehs' conduct. There were amendments referring to Mr Salfiti's conduct relating to the Yahoo email account and the RBS bank account. In submissions Mr Haque QC suggested that Mr Salfiti had also made the alleged fraudulent misrepresentations (relying on Mr Candey's evidence).

These matters were not sufficient to give rise to a realistic inference that Mr Salfiti wrongfully induced the alleged breaches of contract or wrongfully conspired with the Boshehs.

111. Mr Haque QC suggested that disclosure may produce more evidence to back up these claims for conspiracy and inducing breach of contract. However, a claim must have a proper basis rather than being a mere assertion based only on inference. Speculation as to whether disclosure might later provide grounds for such assertions does not meet the test explored by Lewison J in *Easyair*. Where allegations of this sort are fairly challenged as lacking any proper basis, then little weight can be given to the suggestion that something could turn up in disclosure. Here, even after lengthy oral argument, accepting the Claimant's evidence, and allowing that its existing case may be supported by further evidence, these claims had no real prospect of success.

Quantum and claims in unjust enrichment

112. The pleading contained a number of references to the Boshehs having freely accepted services and alleged that the Retainer was void *ab initio*. The Claimant explained that this supported its case in unjust enrichment. It was also said that the Claimant had provided services under the mistaken belief that the Boshehs would act or be motivated by their best interests alone. These matters were said to give rise to damages based on unjust enrichment, namely the fees the Claimant would have recovered from different clients on different cases had the Retainer not been entered into (or the alternative measure based on Sheikh Mohamed's claim and costs). In the skeleton argument the Claimant proposed the reliance measure for damages, namely the hourly rate costs of around £1.5 million.

113. The Claimant argued that its case was supported by *Cakebread v Fitzwilliam* [2021] EWHC 472 (Comm) which contains discussion of damages in deceit being measured on the basis of unjust enrichment. This was an application seeking to challenge an arbitration award for serious procedural irregularity and the fact that the award was upheld was of limited weight in supporting any aspect of the Claimant's case.

114. The Claimant failed to identify the basis for a claim in unjust enrichment and wisely did not put forward such a claim at the hearing. For the avoidance of doubt there was no real prospect of establishing recovery of unjust enrichment on grounds of services being mistakenly provided.

115. In any event recovery for unjust enrichment would be limited to the value of the services provided rather than what the Claimant could have earned if it had not entered the Retainer. The Defendant correctly maintained that the Claimant had no basis for claiming not only its hourly costs but also the 100% uplift only recoverable on the basis of success. Accordingly, the Claimant did not have a good arguable case for a claim for more than £3 million, or the claim that it would have earned £1.5m by way of settlement in June 2021 since this measure was based on no more than an assertion made on behalf of Sheikh Mohamed as to the maximum level of his claim and costs. It was wholly speculative for the Claimant to maintain that settlement would have been concluded on the basis of recovery of that sum when the Sheikh actually settled at that time for a payment of £150,000.

The claim for declaratory relief

116. The Claimant put forward an amendment seeking a number of declarations (some of which were abandoned). Its pleaded case sought a declaration that Mr Bosheh had acted in repudiatory breach of the Retainer. The Claimant did not pursue these aspects of its case at the hearing or identify the purpose of the declaratory relief if the claim for damages was not pursued.

117. The claim for declaratory relief had no real prospect of success as a freestanding claim.

Should the pleaded case be struck out on grounds of abuse of process?

118. The Defendants' case was that the claim should be struck out under CPR Part 3.4(2)(b), consistently with the Court of Appeal's approach in *Wallis v Valentine* [2002] EWCA Civ 1034, as it has been brought, and is being conducted so as:

a) to harass and intimidate the Defendants, causing them problems of expense, commercial prejudice, reputational embarrassment and inconvenience far in excess of that ordinarily encountered in properly conducted litigation; and/or

b) to pressure the Defendants into (by way of unmerited settlement), in effect, paying fees where none were due under the Second CFA, and Mr Salfiti wasn't even a party to that CFA.

119. The matters upon which the Defendants rely include:

a) the multitude of ill-founded claims, including multiple allegations of fraud and dishonesty;

b) the complete disregard for privilege;

c) the improper use of bank statements coming into its possession after the termination of the retainer;

d) the Claimant's failure to comply with the CPR:

i) failure to comply with the pre-action protocol;

ii) failure to comply with CPR 32.12 and, if applicable, 31.22;

iii) failure to comply with rule 39.8;

e) the overstated value of the claim;

f) the threat of, and then pursuit of, an on notice freezing injunction application which, the Defendants' submit, is brought in circumstances where the Claimant has no real belief in a risk of dissipation and sought to avoid any duty of full and frank disclosure, knowing that it would have to bring the above to the notice of the court.

120. The Defendants also relied on an email sent by the Claimant on 19 August 2021 in which the Claimant refused to return the bank statements referred to above, because "*we are in the process of preparing, with our criminal counsel, a detailed criminal complaint to be provided to the Police, Crown Prosecution Service and SRA. The*

complaint seeks criminal indictments being brought against Mr Salfiti and members of your firm involved in the Sheikh proceedings, as accessories…None of the accused should be under any illusion as to the gravity of the offences and the length of any custodial sentence. Mr Salfiti and his associates pose a danger to the public and we expect the Court to be unforgiving of their actions, given that Mr Salfiti is a solicitor…These documents should have been provided to us but were dishonestly concealed from us and the Court. It follows that we shall not be returning the documents to you or your client…".

121. Mr Haque QC correctly conceded that the Claimant's conduct regarding the RBS bank statements received after terminating its Retainer was difficult to justify. While Mr Haque put the Claimant's position as fairly as he could, the Claimant must be judged by its actions and the position it has taken in maintaining the claim (and seeking amendments and a freezing order).

122. The Claimant maintained that its claims (and amendments) were meritorious and it could not be treated as acting vexatiously. It relied on Mr Candey's evidence denying that any conduct had been aggressive or unreasonable, especially where the Claimant considered that the Boshehs and Mr Salfiti had behaved dishonestly and unlawfully. It maintained that its swift actions were prudent in the circumstances, especially where Mr Bosheh presented a flight risk.

123. I do not accept the Defendants' case that there was failure to comply with CPR Part 39. However, the Defendant's other specific grounds for criticism were justified, at least in part, for reasons set out above. It is not necessary for me to explore the animus and motivation of the Claimant. However, the Claimant's actions evidence an unjustifiable failure to respect court rules and its former client's rights to privilege. As lawyers the Claimant should have been fully aware of these matters. It has identified no good excuse for its conduct. Its manner of proceeding appeared cavalier at best and its email of 19 August 2021 contained serious and intimidating threats that have not been shown to be justifiable.

124. The Defendant's criticisms did not justify striking out the claim for damages for breach of the Costs Term, which was conceded to be based on an arguable breach. However, the specific criticisms that the court accepts and the lack of merits of large parts of the claim, show that there was no good excuse for the Claimant's disrespect of court rules and the Boshehs' privilege. Given my findings on summary judgment, the amendments and the claim under the Costs Term it is not necessary for me to make detailed findings. The Claimant's conduct is, however, likely to be relevant to the court's discretion on costs and the application for a freezing order.

Overall conclusions on amendment, summary judgment and strike out

125. The claim for breach of the Costs Term had a real prospect of success although not for more than £3 million. There was a good arguable case for recovery by the Claimant of around £21,000.

126. However the Claimant had no real prospect of success and there was no compelling reason why the matters should be disposed of at a trial in relation to the claims:

    a) against Mr Bosheh based on a breach of the implied terms;

b) against Mr Bosheh in deceit and fraudulent misrepresentation based on implied representations;

c) against Mr Salfiti in conspiracy and inducing breach of contract;

d) against both Defendants for declaratory relief.

Summary judgment is granted in the Defendants' favour on these claims.

127. The Claimant's amendment alleging oral misrepresentations was based on privileged material that the Claimant was not entitled to use and other amendments relied on information it was not entitled to use, or showed no real prospect of success (as explained above). Accordingly, its application for permission to make such amendments is refused.

III SHOULD A FREEZING ORDER BE MADE?

128. The parties recognised that a freezing order can correctly be described as one of the court's nuclear weapons. A freezing order will give a claimant an enormous initial advantage in litigation by putting the defendant under tremendous pressure. This means that the court must ensure that they are only granted where necessary and appropriate.

129. There was little argument as to the basic legal requirements justifying the grant of a freezing order. For reasons set out above the Claimant failed to show a good arguable case regarding its claims (and proposed amended claims) save for the claim for damages for breach of the Costs Term for a sum in the amount of £21,000.

130. The risk of dissipation must be established separately against each respondent for which relief is sought. Here the judgment of HHJ Dight provided solid evidence that allegations of dishonesty have been successfully made against Mr Salfiti's conduct of financial transactions. However, there was less evidence of risk of dissipation of assets by Mr Bosheh. The evidence shows that he has been registered owner of a relatively substantial portfolio of real property for some years. He has also been subject to fraud allegations in the Chancery Action (that were settled) and a freezing order for a short period in around 2018 but there has been no dissipation of those assets against that background. It was relevant that these proceedings were commenced in June 2021 and there is no evidence of dissipation (although undertakings were provided in August 2021). The fact that a freezing order is made on notice may generally be of limited weight in deciding whether there is a risk of dissipation. However, here the fact that the Claimant did not consider it necessary to make the application without notice undermines its case on dissipation of assets. The Claimant had already acted for the Defendants in 2018 (albeit only briefly for Mr Salfiti) when Sheikh Mohamed sought a freezing order in 2018, and the properties in question appear not to have been dissipated over that period.

131. I take into account the evidence of money being taken out of the RBS savings account in 2019 (as evidenced by the bank statements that the Claimant should not have retained after terminating the Retainer). This was relevant to the dissipation of assets but did not justify the making of a freezing order taken against all the other circumstances. The presence of very substantial real property in the Defendants' names within the jurisdiction (and that had been assets throughout) was a significant consideration. The

Claimant suggested that the land registry alerts would provide no safeguard against dissipation but where there is a whole portfolio of properties is would provide a genuine means of monitoring transactions in relation to those properties.

132. In all the circumstances set out herein, this is not a case where it would be just and convenient to make the requested freezing order. The Claimant has unjustifiably broken court rules and infringed its former clients' rights of privilege in order to make this application. It does not have a good arguable case save for the contractual claim for the relatively small sum of £21,000. The Defendants are registered as owners of real property within the jurisdiction with a value of more than £2.5 million. They have not dissipated these assets over the past months since the application was made on notice and also going further back to the conduct of the Chancery actions that began in 2018.