Neutral Citation Number: [2014] EWHC 2418 (QB)

Case No: 9CR20347

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2014

Before :

MR JUSTICE WARBY

- -

Between :

Mashood Iqbal	**Claimant**
- and -	
Dean Manson Solicitors	**Defendants**

- -
- -

Mr Mashood Iqbal the Appellant, in person
David Hirst (instructed by Dean Manson Solicitors) for the Defendants

Hearing dates: 19 – 20 June 2014

- -

Approved Judgment

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

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MR JUSTICE WARBY

Mr Justice Warby:

Introduction

1. This judgment deals with appeals from orders made in the County Court in January 2013 in the course of long-running and unfortunate litigation between lawyers who are members of the same faith community in London.

2. The Claimant, Mashood Iqbal, is a barrister who was formerly a solicitor. He was in 2006 briefly employed by the Defendant firm of solicitors, Dean Manson, of which the principal is Mr Muzaffar Mansoor. The Claimant, who represents himself, makes a claim for harassment under the Protection from the Harassment Act 1997 (the "1997 Act"). The proceedings were issued in the Croydon County Court in March 2009 claiming an injunction to restrain further harassment and damages limited to £15,000. The Claimant's claim was based on three letters sent by the Defendants to Ahmad's Solicitors, for the Claimant's attention, on 28 January, 17 February and 26 February 2009.

3. More than 5 years after it was started, the action has yet to reach a trial. During the summer of 2012 the Claimant, with the Court's permission, served Amended Particulars of Claim ("APC") which considerably expanded his pleaded case. Thereafter, each party issued applications designed to bring the proceedings to an end in their favour without a trial. Relying on the Defendants' failure to comply with a previous "unless" order, the Claimant applied for judgment in default. He sought a permanent injunction and an order for the assessment of damages and costs. For their part, the Defendants applied for an order striking out all substantive aspects of the APC as disclosing no reasonable basis for a claim, or being an abuse of the Court's process, or both, and for an order that the Claimant pay the costs of the action.

4. The basis advanced by the Defendants for seeking those orders was that the three 2009 letters complained of were documents brought into existence for litigation and hence absolutely privileged and immune from suit; that the majority of the other complaints added by amendment were an abusive attempt to re-litigate matters decided against the Claimant in a High Court libel action and/or to circumvent the limitation period for libel; and that all those other complaints in any event concerned conduct which was also protected by absolute privilege and immunity from suit. The Defendants applied in the alternative for an extension of time for serving an Amended Defence and, subsequently, for relief from the sanction imposed by the unless order.

5. Those applications all came before HHJ Faber in the Central London County Court in September and October 2012 and led to orders dated 13 January 2013. Neither party was wholly successful. The Judge struck out large parts of the APC as an abuse of process. She held, however, that most of the content of the three letters of 2009 was not immune and therefore declined to strike out paragraphs 6–9 of the APC. She also rejected the immunity argument in relation to three further documents complained of by way of amendment in paragraphs 56-63 of the APC, and declined to strike out those paragraphs. The Judge granted the Defendants relief against sanctions and dismissed the Claimant's application for default judgment. She did however grant an injunction to restrain the making by

the Defendants of five specified allegations against the Claimant. She made no order for costs on any of the applications.

6. Each party now seeks by way of appeal to this Court to reverse in whole or in part those of HHJ Faber's decisions that went against that party.

Nature and scope of the appeals

7. HHJ Faber granted the Defendants permission to appeal on one issue, namely "whether or not privilege/immunity only attaches to an occasion and cannot be applied to individual parts of a document". That is an issue relevant to her decision not to strike out the claim in respect of the three letters of 2009. Otherwise the Judge refused the Defendants' application for permission to appeal.

8. On 15 February 2013 the parties each lodged appeal papers containing applications to this Court for permission to appeal. The Claimant sought to challenge the striking out of paragraphs of his APC as abusive, the grant of relief from sanctions to the Defendants, and the dismissal of his application for judgment in default. The Defendants sought to challenge the Judge's decision not to strike out APC 6-9 and 56 - 63, and her grant of the injunction. Each party also sought to challenge the judge's costs orders. The Claimant served a Respondent's Notice setting out grounds for upholding the decisions challenged by the Defendants.

9. On 22 April 2013 King J directed that the appeal for which HHJ Faber had given permission and the parties' various applications for permission should be listed and heard together, with any appeals for which permission was granted to follow, with a time estimate of 1 day. Those are the matters that eventually came before me on 19 June 2014. King J's order required the parties to consider the time estimate and gave them permission to seek to vary it. Neither did so.

10. At the outset of the hearing Mr David Hirst, representing the Defendants, submitted that I should dismiss the Claimant's application for permission to appeal without investigation of its merit, on grounds of procedural default. Mr Hirst submitted that the Claimant was in breach of case management directions given in the appeals by Kenneth Parker J on 21 May 2014. The Judge had directed the Claimant to file and serve a Skeleton Argument in support of his appeal within 7 days of the date of the order, and that the parties must agree a core bundle consisting only of certain specified documents not less than 7 days before the hearing of the appeals. It was said that the Claimant had had failed to co-operate in the preparation of the core bundle. Mr Hirst referred me to the observations of Lord Neuberger MR in *Smales v Lea* [2011] EWCA Civ 1325 that the requirement that the documents provided to the appeal court should be limited to those which are necessary for the determination of the appeal was routinely ignored and it might become necessary to introduce appropriate sanctions to ensure compliance. It was also said that the Claimant had done no more by way of timely compliance with the direction for a Skeleton Argument than to lodge a copy of his previous Grounds of Appeal re-titled "Skeleton Arguments". The Claimant had subsequently lodged a document dated 11 June 2014 entitled "Supplemental Skeleton Arguments" containing references to an

appeal bundle he had prepared. Mr Hirst said however that this document was not only late, but contained new material which he had not had a proper opportunity to consider.

11. Having heard the Claimant, who complained himself of oppressive conduct on the part of the Defendants in relation to bundles, I concluded that he had not complied with the Court's directions. His "Skeleton Arguments" document lodged on the morning of 27 May 2014 was no more than a re-badged Grounds of Appeal, and not what the order envisaged or required. He had also failed to comply with the direction to co-operate in the preparation of core bundles. The documentation he lodged represented 2 lever arch files of single sided copy documents. Although these are complex matters this was clearly excessive, containing much material that was never referred to and was unnecessary. This approach also led to duplication of paperwork. I was provided with 5 lever arch files of appeal documents, much of it overlapping. I do not doubt that these failings made the task of preparing for the hearing more difficult for the Defendants and Counsel also.

12. Despite the importance of ensuring compliance with orders, on which renewed emphasis has lately been placed under the CPR, I did not however consider it proportionate or just in all the circumstances to impose the sanction of dismissing the Claimant's applications. Examination of his Grounds, Skeleton Arguments and Supplemental Skeleton Arguments showed that so far as his own applications were concerned there was no substantial difference between them. It was clear to me that although difficulties would be caused by the issues regarding bundles there could be a fair hearing without any real prejudice to the Defendants. I therefore decided to address the substance of the Claimant's applications.

13. Mr Hirst was however right to this extent: The Claimant's "Supplemental Skeleton Arguments" did contain points that had not previously been raised. Those new points were not advanced in support of the Claimant's application, but in response to that of the Defendants. The points raised, just a week before the appeal hearing, went beyond supporting the Judge's reasoning and were beyond the scope of or different from those raised by the Claimant's Respondent's Notice. I will therefore have to consider later in this judgment whether it is appropriate to allow the Claimant to rely on them.

The issues

14. The appeal and applications for permission give rise to the following main issues.

    (1) Absolute privilege or immunity. Was the Judge wrong to reject the Defendants' contention that they were immune from suit in harassment in respect of (a) the first three letters, APC 6-9, and (b) the three further documents relied on at APC 56-63?

    (2) Abuse of process. Was the Judge wrong to conclude that it was an abuse of process for the Claimant to pursue claims in harassment in respect of

statements which the High Court had held could not be complained of as libels?

(3) Relief from sanctions. Did the Judge err in deciding to grant the Defendants relief from sanctions, and should she have granted the Claimant judgment in default?

(4) The injunction. Was the Judge wrong to grant an injunction?

The background history

15. Before addressing those issues it is necessary to set out the background to and history of this harassment litigation and of other related litigation, including the High Court libel action that I have already mentioned above. Mr Hirst described the history as "tortuous" and he was not wrong.

16. In February and March 2006 the Claimant worked part time as an assistant solicitor for the Defendants. On 31 March 2006 he ceased his employment with them. Whilst he worked for the Defendants, the firm had as clients a Mr and Mrs Tahir. The Defendants alleged that a Mr Butt had given a guarantee for fees owed to them by the Tahirs. In January 2009 the Defendants issued proceedings in the Leeds county court against Mr Butt under the alleged guarantee and against the Tahirs. Mr Butt instructed the Claimant, now running his own firm of solicitors under the name of Ahmads' Solicitors of Putney, London, to act for him in those proceedings. It was in that context that the Defendants wrote three letters to Ahmads, all captioned with the name of the Defendants' proceedings against Mr Butt, and all addressed for the attention of the Claimant.

17. The first letter, dated 28 January 2009, read as follows:

> "As you are acting for the defendant we would like to raise a few questions in relation to your integrity as a solicitor acting in this matter, in particular whether you are satisfied before your client that you can act independently and impartially for your client and in his best interests.
>
> We understand that you are a sole practitioner and therefore you are dealing with this matter in person.
>
> Will your client be satisfied if he comes to know that you were in the past supervised by the Partners of our firm? Thanks to their blessing you were able to become who you are now. They made several recommendations for you. You were also employed by our firm in the past. Was your departure from the firm amicable or have you any issues in relation to your employment and departure still outstanding?
>
> This is an open letter, which will be presented in court if needed."

18. The second letter, dated 17 February 2009, was copied to Leeds County Court, and read as follows:

> "In essence we understand that the defendants Mr and Mrs Naseem Ahmad Tahir were personal contacts of yours and you have also worked on the file during your employment at Dean Manson Solicitors. We therefore believe that this raises serious conflict and conduct issues on your part since your departure from Dean Manson Solicitors was not pleasant and you were summarily dismissed due to your insubordination and reckless conduct in dealing clients' matters and entering into unnecessary argument in court with immigration judge.
>
> We are therefore inclined to believe that you have intentionally taken instructions in this matter to set scores because of your personal vendetta with the firm. We suggest this because we have also come to know that you have been poaching and inciting clients of the firm belonging to a particular community to initiate malicious complaints before third parties. There is indicative of clear conflict involving ethical issues as you have been working on this file and have personal knowledge of the firm and its partners.
>
> We are very surprised that you are defending the clients in this matter since you are aware of the amount of work that has gone into this matter and the complex nature of the case whilst you worked with the firm. We will therefore advise you that you ask Mr Butt to settle our costs as it will prolong matters and incur unnecessary costs of litigation due to your own vendetta. All legal work carried out in accordance with his own instructions and personal guarantees (verbal and in writing) also confirmed through his MP to pay our legal costs for his release and hence he has no defence…"

19. The third letter, dated 26 February 2009 was also copied to Leeds county court and read as follows:

> "Thank you for your letter of February 18, 2009 we suggest that you wait for the decision of your premature and irrational application for strike off. We will state our position in defence before the Court should the need arise.
>
> We will also put you on strict notice that your former partner Mr Sajjid Ali had also worked with and passed out from this firm who had personal knowledge of the partners and the firm with whom you using his name later established partnership with thereby misleading the law society and general public unbefitting of the legal

> profession because Mr Ali has no permission to remain and work in the UK in breach of the law of land. We believe it is important for the court to know of you and your partner's level of past association with our firm."

20. When the Claimant issued proceedings on 4 March 2009 his Particulars of Claim complained that after he left the Defendants' employment the firm had harassed him by writing to his new employers and had defamed him in the Ahmadi Muslim Community to which Mr Mansoor and the Claimant belong. The pleaded complaint mentioned four letters sent by the Defendants to solicitors' firms in 2006, but the Claimant was later to explain that this was by way of background only. The three letters mentioned above represented the basis of his claim. The first two of those letters were expressly pleaded. The letter of 26 February 2009 was not. It had reached the Claimant and arrived after he lodged papers with the County Court, but he made clear in a witness statement of 4 March 2009 that he also complained of that letter. It has thereafter been treated by agreement as part of his claim.

21. On the Defendants' application the action was struck out by HHJ Ellis on 2 July 2009. That order was appealed but upheld by Teare J on 25 March 2010 on the grounds that the allegations did not disclose a sufficiently serious case as to amount to harassment. On 24 November 2010 however the Court of Appeal allowed the Claimant's appeal, for reasons given later: *Iqbal v Mansoor (No 1)* [2011] EWCA Civ 123. The Court of Appeal held that the Defendants' conduct in sending the three letters of January and February 2009 arguably amounted to harassment. Rix LJ, giving the leading judgment in the Court of Appeal, said this at [42]:

> "In sum, in my judgment, each of these letters does, when considered side by side, arguably evidence a campaign of harassment against Mr Iqbal. They are arguably capable of causing alarm or distress. They are arguably unreasonable, or oppressive and unreasonable, or oppressive and unacceptable, or genuinely offensive and unacceptable. Arguably, they go beyond annoyances or irritations, and beyond the ordinary banter and badinage of life. Arguably, the conduct alleged is of a gravity which could be characterised as criminal. A professional man's integrity is the lifeblood of his vocation. If it is deliberately and wrongly attacked, whether out of personal self-interest or malice, a potential claim lies under the Act.

22. The Court of Appeal also considered the nature of the Defendants' Defence in the action, which by then the Claimant was also relying upon as containing other instances of harassment. Rix LJ held at [52] that the Claimant could at least refer to the Defence evidentially, for the purpose of "throwing evidential light on the proper understanding, interpretation and assessment of the letters themselves." Rix LJ went on to say this at [54]:

> As for whether the defence could be viewed as arguably part of a course of conduct amounting to harassment, for

> the reasons set out above, it seems to me that it can, although it is not necessary to decide the question and I do not. … Whatever the hardships involved in litigation, it is not the occasion for irrelevant and abusive dirt to be thrown as part of a malicious campaign. Just as even the freedom of the press may be abused in a rare case (*Thomas v News Group Newspapers Ltd [2001] EWCA Civ 1233; [2002] E.M.L.R. 4; Times, July 25, 2001*), so even litigation, whose natural contentiousness also requires its own freedom of speech, can exceptionally be abused. I would, however, equally deplore satellite litigation."

23. This action was then remitted to the County Court and transferred to Central London. It was eventually listed for trial by HHJ Faber on 6 June 2012. In the meantime, however, other relevant proceedings had been under way, to which it is necessary to refer.

    (1) First, there had been costs proceedings. The Leeds County Court action against Mr Butt (paragraph 16 above) concluded in his favour, and the Defendants were was ordered to pay his costs to be assessed if not agreed. In the costs proceedings the Defendants put in witness statements, two of which were later to prove controversial: one of Mr Baig ("Baig 4"), in which a large number of allegations were advanced against the Claimant. The statement accused the Claimant of professional misconduct, breach of trust, immigration offences and misleading the SRA. The other was a statement of Ms Coobaran ("Coobaran 5") accusing the Claimant of knowingly giving a false address for service.

    (2) Secondly, there was a claim for fees brought by the Defendants in the Kingston County Court against a Mr Ellahi and a Mrs Chowdry, who instructed the Claimant to represent them.

    (3) Thirdly, there was a libel claim. On 31 May 2011 the Claimant started an action in the High Court against the Defendants, four partners, and one employee of the firm. The Claimant claimed damages for libel in 21 allegedly defamatory publications made in and between January 2009 and February 2011.

    (4) Fourthly, there were judicial review proceedings in which the Claimant challenged a decision of Wandsworth County Court (HHJ Knowles) of 11 July 2011.

24. The libel claims gave rise to a number of issues, the first of them being limitation. The limitation period in libel is 1 year. Items 1 to 19 of those complained of in the libel action had been published more than a year before the claim was issued. When this was drawn to his attention the Claimant applied to have the limitation period disapplied pursuant to s32A of the Limitation Act 1980. The Defendants cross-applied to strike out or for summary judgment on the basis the claims were statute-barred. The second issue was abuse of process. Items 1 to 3 in the list of 21 publications complained of as libellous were the three letters relied on as harassment in the present action. The Defendants

applied to strike out that part of the claim as an abuse of process for that reason. Thirdly, the Defendants applied to strike out the claims in respect of items 4 to 21 on the grounds that the publications were protected by absolute privilege. All but one of those were documents generated in the course of or in relation to the Leeds County Court proceedings, the costs proceedings which followed, the Kingston County Court proceedings, or the present action. They included correspondence between the parties and with the court, statements of case, applications, and witness statements (item 20 was Baig 4 and item 21 was Coobaran 5). The other item complained of was a letter to the Solicitors Regulation Authority ("SRA") (item 8).

25. These applications came before HHJ Parkes QC in July 2011. In a judgment handed down on 26 August 2011, [2011] EWHC 2261 (QB), HHJ Parkes QC held that the claims in respect of publications 1-19 were all statute-barred, and declined to disapply the limitation period. He held that it was an abuse of process for the Claimant to sue for libel on the three letters at items 1-3 when he was already suing for harassment in reliance on those same letters in the present action. He further held that with one arguable exception all the publications complained of at items 4 to 21 were protected by absolute privilege. That arguable exception was item 8, the letter to the SRA, in so far as it was published to the Claimant's staff. That did not save the action, however, because the claim in respect of that publication was statute-barred in any event. The libel action was therefore dismissed.

26. In analysing the law of absolute privilege, so far as it was relevant to the issues before him, HHJ Parkes QC began with the Court of Appeal's decision in *Lincoln v Daniels* [1962] QB 237, in which Devlin LJ at 257-8 identified three categories of statement protected by the privilege:

> "The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done *coram judice* . This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of Watson v McEwan [1905] AC 480 in which the House of Lords held that the privilege attaching to evidence which a witness gave *coram judice* extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White* (1914) 30 TLR 591 the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a

> witness on behalf of his client in contemplated proceedings."

27. HHJ Parkes QC noted that so far as witnesses are concerned the privilege extends beyond what is said in court and covers affidavits and witness statements and proofs of evidence the reason being, as explained in *Watson v McEwan* [1905] AC 480, that if the witness could be sued on the proof of evidence, the protection for evidence given in court the privilege could easily be outflanked. The Judge went on to observe that the immunity for evidence, whether contained in proofs, witness statements, affidavits or live evidence in court is not unlimited. He cited the decision of the Court of Appeal in *Smeaton v Butcher* [2000] EMLR 985 as authority for two propositions: (1) that the contents of an affidavit (and a proof of evidence and witness statement) will be absolutely privileged unless they have "no reference at all to the subject matter of the proceedings", and (2) that any doubt should be resolved in favour of the witness. I shall refer to these propositions as the *Smeaton v Butcher* test, or limiting principles. The Judge observed that the test of "no reference at all" was to be distinguished from a test of relevance and said this at [17]:

> "In this case, the area of concern is letters, pleadings and witness statements sent or filed in the course of legal proceedings. If the test of no real relevance sets far too high a test, it follows that any allegations which, although not on analysis relevant to the application or proceedings, nonetheless have some reference, however tenuous, to the proceedings in question, ought to be protected. It is plainly not desirable that litigants should be vulnerable to defamation claims if they misjudge, or lack the understanding to appreciate, the true ambit of the matter in dispute, and make allegations or include averments in the course of proceedings which are irrelevant to the issues but nonetheless have reference to the proceedings. Even malicious allegations must be protected, because otherwise honest witnesses would potentially be vulnerable to baseless litigation."

28. HHJ Parkes QC then considered the statements of case, witness statements and the application to the court of which the Claimant was complaining. He recorded that the Claimant's only argument about those instances of publication was that while they were made during the course of litigation "they had no reference to 'the inquiry' at all". The Judge rejected that argument, holding that the Claimant had no real prospect of establishing that the *Smeaton v Butcher* limiting principles applied to these publications.

29. Next, HHJ Parkes QC dealt with the Defendants' contention that absolute privilege protected the correspondence at items 8-16 and 18 of the claim. In this respect, the judge relied on concessions made by the Claimant, as appears from the following passages of his judgment:

> "30. This aspect of the application has been greatly simplified by Mr Iqbal's acceptance in the course of

> argument that all this correspondence was in principle absolutely privileged in so far as it was published to the courts and the SRA [Solicitors Regulation Authority]. He had not in fact argued otherwise in his skeleton argument, although it had not been clear until oral submissions just what the limits of his opposition to the application were. In the event, he only opposed Miss Addy's application to the extent of the issues of publication to the staff of his firm (as to which he relied on *Theaker v Richardson* , and to which he disputed that absolute privilege applied) and of what I have called the *Smeaton v Butcher* test, namely the question of whether the contents of the letters had any reference to the proceedings to which they related.
>
> 31. It is not very satisfactory to have to proceed on the basis of a concession by a litigant in person, but Mr Iqbal is an experienced and able solicitor with higher courts advocacy rights, and I cannot see that I can properly go behind the stance that he has taken, on which Miss Addy must be entitled to rely. That is not to say that I would necessarily have come to a different conclusion had the matter been argued out. I note, for instance, that Prof. Horton Rogers suggests in *Gatley on Libel and Slander* (11th ed) at paragraph 13.15 that absolute privilege does extend to inter partes correspondence (citing the decision of the Hong Kong Court of Appeal in *Wong Shui Kee v Chu* [2002] HKEC 1570 , HKCA), and in the admittedly short decision of Cave and Lawrence LJJ in *Lilley v Roney* (1892) 61 LJQB 727 , a formal complaint to the Law Society about a solicitor was held to have been the proper way of setting in motion what were admittedly judicial proceedings and not to have been the proper subject of a libel claim.
>
> 32. It seems to me that I can deal very shortly with the publication to Mr Iqbal's staff of the party and party correspondence and letters to the court. If these were otherwise, as he concedes in principle that they were, properly to be regarded as absolutely privileged, then in my judgment publication of those letters to the staff of his firm in the ordinary course of business must be protected by an ancillary privilege. I have dealt with this point at [28] above.
>
> …
>
> 37 Finally, there are the two letters to the SRA. Mr Iqbal concedes that in principle absolute privilege applies to them, so I must proceed on the footing that it does."

30. The Claimant sought unsuccessfully to challenge HHJ Parkes QC's conclusions. The Court of Appeal dismissed the Claimant's applications for permission to appeal save in respect of HHJ Parkes QC's decisions that items 20 and 21 (the witness statements, Baig 4 and Coobaran 5) were protected by absolute privilege. An appeal against those decisions was heard but dismissed in October 2012 for reasons handed down in March 2013: *Iqbal v Mansoor (No 2)* [2013] EWCA Civ 149.

31. Meanwhile, in the Central London County Court, the present action had come before HHJ Faber for trial on 6 June 2012. She granted the Defendants' application for an adjournment of the trial on the basis that both parties were in default so far as disclosure was concerned, the time estimate of one day was inadequate, and there was no agreed bundle of documents for the court. She gave directions for the conduct of the case to trial. The Claimant had said that he intended to rely on a number of other harassing statements post-dating those in his pleaded case, but had prepared no draft amended pleading, the Judge granted him permission to amend his Particulars of Claim and ordered service of a Re-Amended Defence in response. She specified a timetable and made an "unless" order that in default of compliance with her directions the statement of case of the defaulting party would be struck out without further order and they would be debarred from pursuing or defending (as the case may be) the claim. The case was then fixed for a 2 ½ day trial in January 2013.

32. On 22 June 2012 Amended Particulars of Claim were served. These contained the following additional particulars of harassment:

    (1) At APC 9 the Defendants' third letter to Leeds County Court, dated 26 February 2009, was formally pleaded for the first time.

    (2) At APC 11-45 complaint was made of 14 documents which had been items 4-16 and 19-21 in the libel action. All were all now advanced as amounting to harassment.

    (3) At APC 47 and 48 complaint was made of a letter dated 24 May 2010 to a Mr Malik, a former partner of the Claimant. This had not formed part of the libel action.

    (4) At APC 55 the Claimant stated that he had always vehemently denied and continued to deny the allegations made against him by the Defendants, which he described as "utterly scandalous, false and of course harassing". He complained, among other things, of "heavy financial and reputational losses".

    (5) At APC 56 -63 complaint was made of three further documents which had not been part of the libel claim either: a witness statement, letter, and a statement of case.

    (6) APC 64-67 contained various matters of commentary and submission.

33. The three further documents relied on by the Claimant at APC 56-63 were as follows.

(1) A witness statement of Mr Mansoor on 19 July 2011 filed in support of the Defendants' striking out application in the libel action. In a section headed "Civil Restraint Order" Mr Mansoor alleged that the Wandsworth County Court had granted a restraint order against the Claimant and that the Claimant had breached that order to start the libel action.

(2) A letter written by Mr Mansoor to the Court of Appeal on 15 February 2012 alleging that the Claimant was the subject of a civil restraint order made in the Wandsworth County Court on 25 May 2011.

(3) The Acknowledgment of Service filed by Mr Mansoor on behalf of the Defendants in the judicial review proceedings on 27 April 2012, in which he again alleged that the Claimant was subject to a civil restraint order dated 25 May 2011 and also that the Claimant was holding himself out as a barrister though not authorised by the Bar Council.

34. The Defendants did not plead an Amended Defence within the period ordered by HHJ Faber, but decided instead to apply to strike out the Amended Particulars of Claim and so informed the Claimant. On 9 July 2012 the Claimant issued an application seeking judgment in default, a permanent injunction under s3 of the Protection from Harassment Act 1997 and directions for the claim to be listed for a quantum and costs hearing.

35. On 22 August 2012 the Defendants issued their application. They sought orders striking out all of the matters added by amendment to the Particulars of Claim as well as all the particulars pleaded in the original Particulars of Claim of February 2009, and an order for the costs of the action. The grounds advanced were that reliance on statements previously the subject of the libel action represented an impermissible attempt to re-litigate, or a collateral attack, and hence an abuse of process; that the complaints were in substance complaints of defamation, and represented an attempt to circumvent the limitation period for libel; and that all the statements relied on were protected by absolute privilege and immunity from suit. In the alternative, the Defendants sought an extension of time for service of their Amended Defence. Subsequently, the Defendants issued an application for relief from the sanctions imposed by HHJ Faber's "unless" order of 6 June 2012. Those applications all came before HHJ Faber who dealt with them over 4 days, on 26 September 2012 and 2 October 2012, on 6 November 2012 when she handed down a reserved judgment, and on 13 January 2013 when she made orders consequential on her judgment and dealt with costs

The Judgment of HHJ Faber

36. HHJ Faber dealt first with the applications to strike out. She struck out some of the Claimant's Amended Particulars of Claim on conventional pleading grounds. APC 47 and 48 were struck out as disclosing no reasonable basis for a claim in harassment. APC 64-67 were dismissed as repetitive and argumentative. No attempt has been made to appeal those decisions. The controversial aspects of the decision on the strike out application are those relating to absolute privilege and abuse of process.

Absolute privilege

37. Dealing first with the three letters initially complained of, HHJ Faber rejected a submission of Mr Hirst that the Claimant was bound by a concession made in the course of the libel action that such letters are protected by absolute privilege. Noting, however, that it was common ground that the "principle of immunity" applies in proceedings other than defamation actions the Judge concluded that communications between the parties can be protected, citing *Gatley on Libel and Slander*, 11th *edition paragraph 13.15* and the Hong Kong Court of Appeal decision in *Wong Shui Kee* v *Chu* [2002] HKEC 1570. The Claimant had not argued otherwise. He had relied on the *Smeaton v Butcher* test (above) to argue that the three letters fell outside the scope of the privilege. HHJ Faber held that parts of them did fall outside the privilege, but she did not reach that conclusion by reference to *Smeaton v Butcher*. First she asked herself whether the allegations in the letter supported the Defendant's case in the costs proceedings and concluded that not all of them did. Secondly, she held that the Court of Appeal in *Smeaton v Butcher* had only established a test in relation to witness evidence, and did not intend to apply it more widely. HHJ Faber adopted instead tests which she drew from the decision of the Hong Kong Court of Appeal, saying this:

> "The content of the judgment *Wong Shui Kee v Chu* does not support that proposition in relation to party and party correspondence. It requires as set out in Le Pichon JA's judgment that it must not be a private attack on the litigant's character and the solicitors must be seeking to advance their client's interests in the litigation and Ma LJ's judgment that the letter ought to set out a party's position or stance in relation to any part of the proceedings."

38. HHJ Faber went on hold that whilst an allegation of conflict of interest could be said to set out a party's stance it could not be said to advance the party's interests "because the merits of their claim for fees could not be affected by whether or not the Claimant acted for the Defendant even if all the allegations had been true." The Judge concluded that whilst parts of the three letters were arguably immune much of their content was not, and declined to strike out the claim in harassment based upon them.

39. HHJ Faber went on to give a further reason for rejecting the argument for immunity in respect of each of the three letters:

> "84. It is also important to me as an alternative approach to this issue that APC 7 contains inaccurate information in alleging that Mr Iqbal was dismissed. This is contradicted in the Defence which says that he refused the offer of employment. This casts grave doubt on the good faith of the Defendant in writing that letter. Similarly the allegations in APC 9 have been deleted in the draft amended defence and that adds to doubts as to the good faith of the partners in the Defendant in their conduct of these proceedings.
>
> 85. Since the immunity is granted as a matter of policy to protect freedom from expression in litigation, in my view

> the public interest in the truth of evidence brought to the court might well mean that it would not be proper to allow a party to rely on the immunity in these circumstances in any event."

40. At [87] – [88] the Judge applied an additional test as follows:

> "87. There are additional reasons for that lack of immunity. Footnote 135 in *Gatley* says that a letter properly sent to the court concerning the litigation will be privileged but if sending such a letter is irregular and improper it will not be privileged. I have not been supplied with the case law cited in that footnote. However I cannot see how sending such letters to the court can be regular or proper.
>
> 88. The proper way to bring to the court's attention that a professional with a duty to the court may be acting in conflict of interest is to say so in an application before a judge. At that hearing the only information which it would be proper to put before the judge is technical information establishing such conflict of interest for example, an allegation that a solicitor who acted for the client when at a firm, after his departure acted against the client in litigation."

41. Turning to the statements complained of in APC 56 – 63 (that is to say Mr Mansoor's witness statement, his letter to the Court of Appeal and the Acknowledgment of Service in the judicial review claim) HHJ Faber rejected the Defendants' submission that these were protected by absolute privilege on the following grounds:

> "102. All three contain the false allegation (since withdrawn by the Defendant) that the Claimant has been subject to a civil restraint order. The statement of case contains another allegation which is that the Claimant is holding himself out to be a barrister without authorisation from the Bar Council. I am not aware whether that has been withdrawn but the Claimant contests it. He is to be seen in the Bar Directory. Even if all these documents were subject to absolute privilege and even if the content could be held to have reference to the proceedings in which they were filed I cannot apply a policy in favour of immunity to protect the Defendant from suit on statements which could so easily have been checked for accuracy and which have already been withdrawn and/or are demonstrably false. I will therefore not strike out these paragraphs."

Abuse of process

42. It is under this heading that HHJ Faber dealt with the remaining APC. She directed herself to apply the well-known principles laid down by the House of

Lords in *Johnson v Gore-Wood* [2002] AC 1. She summarised, in a way that has rightly attracted no complaint from the Claimant, the passage at ibid 31 where Lord Bingham referred to the public interest in the finality of litigation and of a defendant not being vexed twice in the same matter, and said this:-

> "This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

43. Applying this guidance, HHJ Faber held that it was an abuse for the Claimant to complain in the APC of 14 statements that had been struck out of the libel action as protected by absolute privilege as well as time barred. Asking herself what were the relevant facts of the case for this purpose she noted (a) that the Claimant had initially referred to defamation when starting the present action (b) his unexplained failure to "streamline" his actions by bringing both claims in the High Court, and (c) that he had amended his County Court particulars only a month after failing to obtain permission to appeal against the rulings of HHJ Parkes QC. The effect, she said, was that the County Court had to hear the same arguments as to immunity that the High Court has already heard and ruled upon. She rejected the Claimant's submission that he was merely making a choice as to which cause of action to rely on, from amongst those available to him, finding that he was instead attempting to avoid the time bar in defamation, mounting a collateral attack on the High Court rulings on immunity and engaging in "plain

harassment of the Defendants, duplication of costs and a gross waste of county court resources."

44. HHJ Faber reached similar conclusions with regard to the one publication that HHJ Parkes QC had held to be arguably not immune: publication of item 8 in the libel action to the Claimant's staff. She inferred from the Claimant's early mention of defamation in the County Court proceedings and his unexplained failure to join his two heads of claim that he had acted as he had for the purpose of harassing the Defendants. She reached the same conclusions with regard to the claim advanced in respect of the witness statements (Baig 4 and Corcoran 5) that had been items 20 and 21 in the libel claim.

Relief from sanctions

45. The judge noted that the Defendants had failed to comply with her "unless" order of 6 June, had refused to plead in reply to the APC on the grounds that to do so was grossly disproportionate, had applied on 22 August 2012 for an extension of time, but failed to make the application under CPR 3.9 for relief from sanctions "until I ordered it to do so". She rejected one explanation offered by Mr Mansoor for not pleading to the APC, which was that the Defendants had thought that permission to plead the APC was conditional, such that they could not be relied on without permission. She went on to consider the application of CPR 3.9(1).

46. CPR 3.9(1) has been amended so as to become stricter than it was at the time of the hearing before HHJ Faber. At that time it read as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
>
> a) The interests of the administration of justice;
>
> b) Whether the application for relief has been made promptly;
>
> c) Whether the failure to comply was intentional;
>
> d) Whether there is a good explanation for the failure;
>
> e) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
>
> f) Whether the trial date or likely trial date can still be met if relief is granted;
>
> g) The effect which the failure to comply had on each party; and
>
> h) The effect which the granting of relief would have on each party."

47. HHJ Faber considered separately and in turn each of the eight factors specifically mentioned in the rule, together with other circumstances. In summary, HHJ

Faber held that whilst compliance with unless orders was vital, it would not be in the interests of justice for the Claimant to obtain judgment by default on allegations which, as she had found, it was an abuse for him to pursue in this action; whilst the application for relief was not prompt the delay was not culpable; non-compliance was intentional, but reasonable because based on the correct view that most of the amendments were abusive so that it would be disproportionately expensive to plead to them; the history of defaults was not such as to merit refusal of relief; non-compliance had not caused the loss of a trial date, or any prejudice to either party, but the Defendants would be severely prejudiced if relief was not granted. She concluded:

> "114. Although not at all impressed by the Defendant's conduct overall, the factor which weighs most heavily is that it would be wholly wrong for the Claimant to obtain judgment in these proceedings on allegations which I have held to be an abuse of the process of the court and I grant relief from sanctions to the Defendant."

The injunction

48. Having next held that since the Defendants had filed and served a defence in March 2009 she could not grant the Claimant default judgment, HHJ Faber continued as follows:

> "INJUNCTION AND OTHER ORDERS
>
> 116. I am of the view that there should be an interim injunction against the Defendant however to prevent it from ever making again those allegations which it has withdrawn or which are demonstrably false."

49. HHJ Faber listed five such allegations and on 13 January 2013, after hearing argument, she granted an injunction in the following terms:

> "The Court Ordered that DEAN MANSION SOLICITORS is forbidden whether by itself or by instructing or encouraging any other person from making any means any of the following allegations against the Claimant:
>
> 1. That a civil restraint order has been made against the Claimant;
>
> 2. That he made a bigamous marriage;
>
> 3. That in any respect he has infringed immigration law;
>
> 4. That he was sacked from employment by the Defendant;
>
> 5. That he practises as a barrister without authorization to do so;

This order shall remain in force until further notice of the court."

Discussion

Issue (i): Absolute privilege, APC 6-9 & 56 - 63

50. The argument for the Defendants was, in summary, that HHJ Faber should have followed and applied the decision of HHJ Parkes QC that correspondence, witness statements, and statements of case in proceedings are all in principle protected by absolute privilege, subject only to the *Smeaton v Butcher* limiting principles; that in deciding whether the three letters and the three further documents at APC 56 -63 fell outside the scope of that privilege she had applied tests which were wrong in law; and that on a proper application of the law all those documents are absolutely privileged. The Claimants sought to uphold the Judge's approach as being consistent with domestic authority. He sought to argue in the alternative that the doctrine of absolute privilege does not as a matter of legal principle extend to cases of harassment.

Preliminary points

51. Each party raised a preliminary point in relation to the three letters. The Claimant said that it was an abuse of the court's process for the Defendants to advance the privilege argument in respect of those documents. He submitted, first, that the Defendants' argument amounted to a collateral attack on the Court of Appeal's decision in *Iqbal v Dean Manson (No 1)* which, so he argued, had determined the privilege argument in his favour. He relied on *Hunter v Chief Constable of West Midlands & Other* [1982] AC 529 and subsequent authorities concerned with attempts to re-litigate issues decided in previous litigation. Further and alternatively, the Claimant submitted that the Defendants' privilege argument was an abuse because the firm had failed to raise it earlier. Not only had they failed until 22 August 2012 to raise this argument in answer to his claim in the present action, they had not raised it when he sued on the three letters in the libel action either. He submitted that the firm had deliberately held the point back, and that in any event they were debarred from advancing it now. He relied on the principle that a party must bring forward his whole case on a single occasion. For the Defendants Mr Hirst submitted, as he had to HHJ Faber, that the Claimant was not entitled to dispute that the three letters were protected by privilege. The argument was that the Claimant's concession and the decision of HHJ Parkes QC on the issue of absolute privilege for correspondence gave rise to an issue estoppel against the Claimant.

52. I deal first with the Claimant's submissions. These are not points that the Claimant seems to have raised before HHJ Faber. She certainly made no reference to any of them in her judgment. As far as I can tell, the collateral attack point was first alluded to in a single paragraph of the Claimant's Respondent's Notice of February 2013. Otherwise, these lines of argument were not covered by that document. They emerged for the first time a week before the hearing, in the Claimant's Supplemental Skeleton Arguments document of 11 June 2014. I therefore have to consider whether the Claimant should be allowed to rely on these new points on this appeal.

53. The general rule is that an appeal is limited to a review of the decision of the lower court: CPR 52.11(1). A party will not ordinarily be permitted to raise new points which were not raised before the court of first instance. The appeal court has a discretion to depart from this rule, the exercise of which must of course be guided by the overriding objective and the general principle that issues are to be decided once, at first instance, rather than allowing parties a second bite of the cherry if their initial arguments prove unsuccessful. I bear in mind that the Claimant's arguments here are not ones that necessarily turn on findings of fact which could and should have been made in the court below. They are however arguments that involve the broad merits-based assessment referred to in *Johnson v Gore-Wood* (above). That is an exercise which the Claimant could have asked the first instance court to carry out, if he wished to pursue these arguments. In all the circumstances, I have concluded that he should not be allowed to rely on these points. It would be contrary to the general rule as to new points being raised on appeal and the late notice given is an additional reason for concluding that it would be unfair to allow it.

54. Having heard his submissions, however, I can add that I would have rejected the Claimant's abuse of process arguments, for the following reasons. First, the collateral attack complaint is clearly misconceived. As Rix LJ observed in *Iqbal v Dean Manson (No 2)* [2013] EWCA Civ 149 at [7] and [59], no issue of absolute privilege was raised before the Court of Appeal in *Iqbal v Dean Manson (No 1)* [2011] EWCA Civ 123. In *Dean Manson (No 1)* the Court was addressing only the question of whether the letters could be viewed as crossing the threshold of seriousness required for a claim in harassment. The passage at [54] of that I have quoted in paragraph 22 above did not involve any conclusion on privilege. There is thus no decision on the point, and hence nothing on which it can be said the Defendants was mounting a collateral attack by advancing the privilege argument here.

55. This may explain why the Claimant's arguments emerged in the Supplemental Skeleton Arguments. On those alternative arguments my conclusion, applying the guidance to be found in *Johnson v Gore-Wood* (above), would have been that it was not and is not an abuse for the Defendants to rely on absolute privilege now, in relation to the three letters, in this action. It is regrettable in some ways that privilege was only raised in that regard when the Defendants issued their striking out application in this action, in August 2012. Clearly, it could have been raised earlier. Mr Hirst was unable to explain why it was not. That could have costs consequences. I cannot conclude, however, that the Defendants abused the process by holding the point back deliberately for some tactical advantage. I cannot see any persuasive explanation for them to have done so. One possible explanation may be that it was thought that issues regarding the three letters properly belonged in this action, where those letters have been relied on from the outset. Another may be that it was not thought at the time that absolute privilege would avail in respect of these letters. I note that there was a change of Counsel between the hearings before HHJ Parkes QC and HHJ Faber. Whether or not either of these is the explanation, I would not regard the Defendants' conduct in this respect as amounting to unjust harassment of the Claimant. The three letters could have been looked at in the libel action, from the perspective of absolute privilege, but they must each be considered

individually. That was not done in the libel action. It has only been necessary to do that in the present action. There has been no duplication.

56. That has a bearing on the Defendants' preliminary point. Mr Hirst relied on a passage at para 8.01 of Spencer Bower & Handley, *Res Judicata*, 4th ed that "A decision will create an issue estoppel if it determined an issue in a cause of action as an essential step in its reasoning", and on the following passage from Lord Diplock's speech in *Thoday v Thoday* [1964] P 181, 198:

> "If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled are determined by a court of competent jurisdiction, either upon evidence or upon admission … neither party can, in subsequent litigation between one another, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

57. On analysis, however, this is a point of limited significance. Mr Hirst may be entitled to submit that the Claimant is estopped by the decision of HHJ Parkes QC from disputing that absolute privilege in principle protects party and party correspondence copied to the courts in which the proceedings were taking place from an action for libel. That is the substance of the concession that HHJ Parkes QC recorded at [30] of his judgment. The Claimant did not dispute before me that he had made the concession recorded there. The Claimant is in my view estopped from disputing that publication of the same letters to staff of his firm in the ordinary course of business is protected from an action in libel by an ancillary privilege. That is the point decided against the Claimant by HHJ Parkes QC at [32]. Finally, the Claimant is estopped from denying that absolute privilege protects letters to the SRA from a clam in libel, as he also conceded before HHJ Parkes QC.

58. The Claimant has not, however, sought to dispute these points. His arguments have been as summarised above: that HHJ Faber was right in her application of the law to the particular facts of the six disputed documents, or alternatively that absolute privilege does not protect against harassment claims. Neither of those points was before HHJ Parkes QC. I do not accept the further argument advanced in Mr Hirst's Skeleton Argument that the Claimant is estopped because "the question whether an absolute privilege subsisted in relation to the *contents* of the early 2009 letters had been answered by HHJ Parkes QC in the libel action." That argument rests on the fact that HHJ Parkes QC held other documents containing substantially the same or similar statements to be privileged. However, as Mr Hirst has argued on other aspects of this appeal the privilege, where it exists, attaches to an occasion and not to a particular statement or allegation. True, when the same or similar statements are made at different points in a piece of litigation the answer to the question whether they fall within the scope of a privilege may well be the same. That, however, is not a matter of estoppel. It seems to me that in principle each separate occasion must be viewed separately.

The law

59. Where it applies, absolute privilege or absolute immunity from suit protects a person from legal proceedings even if it is alleged or is the fact that what they have said was false and malicious. The rationale was clearly explained, in the context of witness immunity, by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 , 607:

> "Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

60. As Lord Hoffmann explained in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 697:

> "The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say."

61. The privilege or immunity is not limited to witnesses but extends to other participants in proceedings, and it protects not only against actions in defamation but also against claims based on other causes of action: see *Marrinan v Vibert* [1963] 1 QB 528, 535 per Sellers LJ, and *Hall v Simons* (above) where Lord Hobhouse said this at 477-478:

> "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of

> defamation but is a true immunity: *Roy v Prior* [1971] AC 470 , especially per Lord Morris, at pp 477-478. This rule exists in the interests of the trial process, ie in the public interest."

62. As Auld LJ observed in *Heath v Commissioner of Police for the Metropolis* [2005] ICR 329 at [52]:

> "The absolute immunity from suit is a core immunity in our system, critical to the integrity and effectiveness of our judicial system, which, save for a few well defined exceptions … applies to all forms of collateral action however worthy the claim and however much it may be in the public interest to ventilate it. Claims of unlawful discrimination are clearly of that importance, but no more than many others, such as the citizen's right to protect his own good name or good character or to claim for conspiracy to injure or for misfeasance in public office, say, in giving evidence in a criminal trial resulting in the claimant's loss of liberty."

The "well defined exceptions" referred to by Auld LJ include claims for malicious prosecution and proceedings for contempt of court. They do not include civil claims for harassment or, indeed, any proceedings for harassment.

63. Three broad categories of statement have been recognised as attracting in principle the protection of the absolute privilege which covers proceedings in or before a court of justice: see the passage from the judgment of Devlin LJ in *Lincoln v Daniels* cited above. As HHJ Parkes QC held, those categories clearly encompass statements of case and witness statements. That is well established by authority and has never been controversial in the present action. There is less authority as regards correspondence. The Hong Kong Court of Appeal decided in *Wong Shui Kee v Chu* that correspondence between solicitors for parties to extant litigation falls in principle within the scope of the privilege and, as noted by HHJ Parkes QC, the editors of *Gatley on Libel and Slander* 11th ed adopted that proposition at para 13.15. The current, 12th edition is to the same effect. The point is not controversial on this appeal. The Claimant conceded it before HHJ Parkes QC. Even if he is not estopped from disputing it in this action, he did not dispute the point before HHJ Faber, she decided it against him and he does not complain of that decision. The issue of law that does arise on the appeal is where the outer limits of the privilege lie.

64. The answer is clear, when it comes to statements made orally or in writing by witnesses in the course of proceedings in Court: the limiting principles are those identified by the Court of Appeal in *Smeaton v Butcher* [2000] EMLR 985 and cited by HHJ Parkes QC. The authorities were reviewed again by the Court of Appeal in *Iqbal v Mansoor (No 2)* [2013] EWCA Civ 149 where Rix LJ said this at [32]:

> "What has emerged from the cases is that it is not enough for the defamatory language to be *irrelevant* to the matter in

> hand for it to fall outside the privilege, it must have *no reference at all* to the subject-matter of the proceedings."

Rix LJ went on to illustrate the distinction, and the limits of the privilege, by citation. The illustrations given covered a variety of circumstances. It is sufficient to refer to some of them.

65. In *Munster v Lamb* (above) the statement at issue was an allegation of keeping drugs for criminal purposes which had been put at a trial by an advocate, Lamb, to Munster, a barrister who had prosecuted Lamb's client for burglary. The statement was held absolutely privileged, Brett MR observing (at 599) that even assuming the words complained of were uttered maliciously and without any justification from improper motives and that they were irrelevant

> "nevertheless, inasmuch as the words were uttered *with reference to* , and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been." (Emphasis added.)

66. In *Seaman v Netherclift* (1876) 2 CPD 53 the statement was an allegation of forgery made by an expert witness whilst under cross-examination as to credit. The allegation was not relevant to the issue in the case at hand. It related to a document that had been subjected to examination by the expert in a previous action. However, it was held to be absolutely privileged, Bramwell BA observing (at 60) that "the statement of the defendant was made as witness and *had reference to* the inquiry". Bramwell BA took the view that the words "having reference to the inquiry" ought to have "a very wide and comprehensive application", though a witness would not be protected "for anything he might say in the witness-box, wantonly and without reference to the inquiry." Cockburn CJ made a similar point when he said this:

> "… if a man when in the witness-box were to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked: Were you at York on a certain day? and he were to answer: Yes, and A.B. picked my pocket there; it might certainly be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege."

67. In *Samuels v Coole & Haddock* [1997] CLY 4860 the statement was one made in an affidavit by solicitors for parties to an action, alleging that the plaintiff had threatened and abused one of their clients at their offices, affecting his health. The solicitors applied to strike out the claim as being absolutely privileged. The judge at first instance refused the application on the basis that the allegations had "no real relevance" to the litigation and was simply intended to poison the court's mind. The Court of Appeal reversed that decision and struck out the action. Holman J said:

> "[The judge] converted the test of whether the statement had 'some reference' to the inquiry into one of 'no real

> relevance'. In my judgment there is a world of difference between those two tests. 'No real reference' is far too high a test. It is not justified by authority and would dangerously imperil the vital public interest which witness immunity serves to protect…Whether true or false, what Mr Jones was describing in paragraphs 7 to 19 of his affidavit was narrative as to subsequent dealings between various people in connection with the subject-matter of the legal proceedings themselves, namely the car, and therefore it did have 'some reference' widely and loosely defined, to the inquiry."

68. In *Smeaton v Butcher* the statements at issue were made in affidavit evidence filed by a landlord in support of an application to strike out a tenant's claim against hm for unlawful eviction. The landlord alleged that payment of a deposit was a condition precedent to the tenancy, that the tenant's deposit cheque had been dishonoured, and that on another occasion the claimant had acted similarly towards another landlord and was operating a scam. The affidavit was passed to the other landlord and the tenant sued the landlord in defamation for so publishing it. Clarke LJ said

> "35 … the statements in the affidavit as published to Ms Dornan [the second landlord] or indeed as subsequently published in connection with the Brentford proceedings were made with reference to the subject-matter of those proceedings. In my judgment the contrary is not arguable."

69. In *Duke v Puts* [2004] SKCA 12, [2004] 6 WWR 208 defamation proceedings were brought by a pharmacist, Mr Duke, against a doctor, Dr Puts, over a "bizarre vendetta" against the pharmacist. In the course of this, allegations against Mr Duke featured in complaints of professional misconduct that Dr Puts made to the College of Physicians and Surgeons against another doctor, Dr Jones Dr Puts relied on absolute privilege with respect to these allegations. The Saskatchewan Court of Appeal reviewed much of the English jurisprudence and concluded (at [57]–[58]):

> "Thus, there is authority for the proposition that although comments made in the context of judicial or quasi-judicial proceedings need not be relevant in the sense that they contribute to the resolution of the matter they must have some nexus or be connected to the proceedings."

70. These citations have a clear and consistent message: if a statement is made on an occasion which is, in principle, protected by privilege and it has some reference to or connection with the proceedings then it will fall within the scope of the privilege; a statement which is wholly extraneous to and has no reference to or connection with the legal proceedings in question will fall outside the privilege. In this formulation I have deliberately omitted reference to a requirement that a statement should have reference to "the subject-matter" of proceedings. That is because an important conclusion reached by the Court of Appeal in *Iqbal v*

Mansoor (No 2) was that it would be wrong to read the *Smeaton v Butcher* test as if it were a statute. Rix LJ said this of document 20 (Baig 4):

> "48 The essential single ground of Mr Iqbal's limited appeal is that H.H. Judge Parkes misstated and therefore misapplied the Smeaton v Butcher principles when he spoke of Document 20 having "no reference at all to the proceedings". Mr Iqbal submitted that the correct principle is "no reference at all to the subject-matter of the proceedings". If the question was asked: "Why should the interim costs certificate be set aside or varied, or the costs assessment be adjourned pending the harassment claim appeal?, Mr Baig's answer in his witness statement was simply that there were serious issues about the conduct of Mr Butt's solicitor. However, submitted Mr Iqbal, those were wholly extraneous, irrelevant, and gratuitous libels (to pick up the words of Lord Hoffmann in Taylor v Director of the Serious Fraud Office) and without reference at all to the subject-matter of the proceedings.
>
> 49 In my judgment, however, the burden of Document 20 is to address the complaint of the paying party, Dean Manson, that the receiving party's (Mr Butt's) solicitor, Mr Iqbal, had a conflict of interest which was relevant to the assessment of costs. It was also suggested that a vendetta by Mr Iqbal against Dean Manson, illustrated by his harassment claim which had been struck out but was subject to appeal, was equally relevant to the assessment of costs and its timing. Although Mr Iqbal was not, of course, Mr Butt, he was nevertheless Mr Butt's solicitor and in that sense responsible for the costs expended and claimed against Dean Manson. However weak the relevance asserted, it is difficult to say that the document as a whole has no reference to the subject-matter of the costs assessment proceedings in play. It plainly did.
>
> 50 It is true that the reference to Mr Ali ("despite him having no permission to stay, engage in business or work in the country") appears to be a gratuitous insult to a third person, Mr Ali, if untrue; but it is not Mr Ali who complains. In his oral submissions on appeal Mr Iqbal did not refer to this aspect of Document 20 but concentrated rather on what was said about the SRA: but, however unsatisfactory those allegations were, it cannot be said that they were not made without reference to the costs proceedings. Mr Iqbal had no answer to the suggestion made by the court to him that the whole document was a complaint made against him in his capacity as Mr Butt's solicitor and not in some other capacity. In these circumstances I see no relevant distinction between the

> Smeaton v Butcher formulation and the judge's shortened expression of it."

71. The cases cited by way of illustration support the conclusion that one should not read too literally the test of reference to "the subject-matter" of proceedings. The terminology used in *Munster v Lamb* and *Seaman v Netherclift* was broader. The Court's decisions on the facts of those cases are not easy to reconcile with a principle that limits the privilege to statements that are (to put it another way) "about" the subject-matter of the litigation. The cross-examination in *Munster v Lamb*, for instance, was on a collateral matter.

72. It is true that neither *Smeaton v Butcher* nor any of the other authorities I have mentioned was concerned with correspondence between the parties to litigation. However, it is hard to see a principled basis for distinguishing in this respect between correspondence and other communications. Indeed, it would seem that the same tests should in principle apply in whatever context the issue arises, provided of course that the occasion is one that attracts the protection of the privilege in principle. If different tests were applicable then the protection afforded in relation to statements of case or witness statements or oral evidence could prove illusory and be outflanked by the pursuit of a claim in respect of a letter between the parties making the same assertions. That protection is vital, for reasons explained by HHJ Parkes QC in his paragraph [17]. In my view the Claimant was right to contend before HHJ Parkes QC and HHJ Faber that the relevant limiting principle when it comes to absolute privilege for correspondence is the *Smeaton v Butcher* test.

73. I do not consider that the decision in *Wong Shui Kee v Chu* affects these conclusions. In that case the plaintiffs and defendants were solicitors practising in Hong Kong who acted for the parties to copyright litigation. Some months after the litigation began the defendants wrote a letter to the plaintiffs containing an allegation of "intellectual dishonesty". The plaintiffs sued for libel in respect of publication of that letter by the defendants to (i) the defendants' clients, (ii) an assistant solicitor at the plaintiffs, and (iii) Counsel and the Judge in the proceedings, by way of inclusion in court bundles. The Judge at first instance held at the trial of preliminary issues that all such publications were protected by absolute privilege. The plaintiffs appealed against the finding in relation to publications (i) and (ii). The appeal was dismissed.

74. The Hong Kong Court of Appeal approached the issues before it by asking whether such publications fell within the second or third of the categories identified by Devlin LJ in *Lincoln v Daniels.* The questions therefore were whether inter partes correspondence qualified as "documents brought into existence for the purpose of the proceedings" or "practically necessary" for the purposes of the proceedings. It was held to fall into each of those categories. At [13] Le Pichon JA upheld the reasoning of Hartmann J, who had held at [34] as follows:

> "While I make no comment on the wisdom of the alleged defamatory words, I fail to see how it can be said that, in making them, the defendants stepped outside of the confines of the proceedings and, to use the plaintiff's words,

> 'made a private attack on his character'. The central matter in issue was the alleged failure of Dolly Dolls, the defendant in the interlocutory proceedings, to file its affirmation or other answer within the allowed time limits. That alleged failure had repercussions in respect of delay and costs. The defendants were attempting on behalf of their client to assume the tactical high ground so that, if an adjournment of the interlocutory hearing was necessary, their client would at least be indemnified in costs. Patently they were seeking the best advantage of their client in the litigation. Whether they were doing so in an exemplary fashion is not to the point. What is to the point is that clearly they were acting in their capacity as solicitors representing their client and equally clearly they were seeking to advance their client's interests in the litigation."

75. Ma JA, agreeing, observed at [31] that absolute privilege attaches to "solicitors' correspondence made in the course of legal proceedings which set out a party's position or stance in relation to any part of the proceedings" because it advances the administration of justice and is "practically necessary". Stone JA agreed with both judgments.

76. *Smeaton v Butcher* does not appear to have been cited to the Hong Kong Court of Appeal. I do not in any event read the Court's decision as propounding a test for the ambit of absolute privilege which is more restrictive than or even differs materially from that laid down in *Smeaton v Butcher*. The primary issue for the Court was whether, in principle, inter partes correspondence falls in principle within the scope of absolute privilege for statements in judicial proceedings. The passages I have cited from Ma JA were directed towards that issue. The question of whether the statement complained of could be seen as outside the scope of such privilege was addressed, but the criterion which the Court seems to me to have approved is whether the statement was "outside the confines of the proceedings". That is the test applied by Hartmann J in the passage approved by Le Pichon JA. The further observations of Hartmann J which were approved by Le Pichon JA were not in my judgment setting out further or different criteria. Rather, they supplied reasons for concluding that in the particular case the criterion of "outside the confines of the proceedings" was plainly not satisfied. If and to the extent that the Hong Kong Court of Appeal was taking a different course from that adopted in the English authorities then in my judgment, for the reasons I have given above, the right course is to follow domestic authority and to apply the established *Smeaton v Butcher* test to the content of correspondence, as it applies to the content of other documents created in the course of litigation which are in principle protected by privilege.

HHJ Faber's decisions

77. Against the background set out above, I have concluded that HHJ Faber's approach to this part of the case was mistaken. I deal first with the three letters. I reject Mr Hirst's argument that the Judge erred in principle by deciding that parts of the letters were privileged and other parts not. It clearly cannot follow from the fact that privilege attaches to an occasion that all statements made on

that occasion must be protected. A witness may, for instance, make a series of statements which are protected as having reference to the proceedings, followed by an entirely gratuitous attack on some unconnected person which does not. However, I do find that the Judge was wrong to resolve the issue of whether privilege applied by asking whether the allegations in the letters supported the Defendant's case in the costs proceedings. This was to adopt a test of relevance not reference. For the reasons given above I believe the Judge's analysis of *Wong Shui Kee* was wrong, and in any event it was an error to prefer that authority to *Smeaton v Butcher*.

78. HHJ Faber's second and alternative approach to the absolute privilege issue was that immunity would not or might not apply to inaccurate allegations that the Claimant was dismissed which may have been made in bad faith. That is in my judgment contrary to principle. As *Munster v Lamb* makes clear, the privilege protects false and malicious statements, as the price of shielding the honest from attack. Indeed, as Ma JA observed in *Wong Shui Kee* at [23]

> "The defence of absolute privilege is, as the name suggests, absolute in nature. It will provide a complete answer to any claim for defamation even where the relevant remarks are completely untrue or made with malice."

79. HHJ Faber's "additional reasons for the lack of immunity" were that the sending of letters to the Court alleging a conflict of interest was "irregular and improper" and thus outside the privilege. She relied in this regard on footnote 135 of *Gatley* 11th ed (note 152 of the 12th edition). Unlike her, I have had the benefit of being shown the authorities there cited. They are of more limited ambit than the Judge seems to have believed and do not in my view bear on the facts of the present case. *Gould v Hume* (1829) 3 C & P 625 was a case in which the plaintiff debtor had applied to the Insolvent Debtors Court for discharge from custody. A creditor of the plaintiff wrote to the Chief Commissioner of the Court making a variety of allegations and asking the Commissioner to "see through" the plaintiff's hypocrisy and "punish him accordingly". Tindal CJ directed the jury that "such an irregular and improper proceeding" was not protected by the privilege that attaches to statements made in regular proceedings at law. This, therefore, is a case in which a non-party intermeddled in proceedings by a direct communication with the decision-making tribunal designed to influence the outcome. It is not within the category of correspondence which was, by concession, treated as privileged in this case.

80. The facts of *Thomas v Nield* (1911) 30 NZLR 1208 were somewhat similar. The plaintiff's wife had pleaded guilty to charges of stealing cheques and been remanded for sentence. The defendant wrote a letter to the Stipendiary Magistrate who was due to sentence her. The letter imputed to the plaintiff complicity in his wife's offences, and invited the Magistrate to censure the plaintiff for his part. This therefore was again a communication from a non-party to a decision-making tribunal designed to influence its behaviour. Sim J held there was no privilege for the letter, stating at 1210 that the matters contained in the letter did not relate to the subject-matter of the inquiry and that as a private communication intended to influence the court it amounted to a contempt. Again, besides the fact that the case is not authority as to English law, it is

clearly distinguishable from the present case. Here, proceedings were in existence to which the Defendants were parties, and the letters at issue were inter partes correspondence copied to the Court without any request being made for the Court to take action upon them.

81. As to the three further documents complained of in APC 56-63 HHJ Faber in my judgment again departed from established principles. All three documents fell within a category which, it was common ground before her, is protected by absolute privilege as a matter of principle. That of course did not preclude examination of the individual documents to test whether they contained matter so extraneous to the litigation as to fall outside the ambit of the privilege. To hold, however, that absolute privilege did not apply because the statements in question could easily have been checked, or had already been withdrawn or were demonstrably false was to impose tests of malice, negligence, or mere falsity. That approach involved the same error as I have identified above: overlooking the fact that the privilege applies to false and even malicious statements. In applying these criteria when deciding whether Mr Mansoor's witness statement in the libel action was privileged the Judge departed from binding authority in the form of *Smeaton v Butcher*. To do so with regard to statements of case was at odds with the decision of HHJ Parkes QC. As I have said, the test laid down in that case also applies in my judgment to correspondence. Conduct on the part of the Defendant of the kind described by HHJ Faber might be thought to justify a regulatory complaint against the firm or individuals involved but that is not a sound basis on which to determine whether absolute privilege applies.

82. My conclusion is therefore that the *Smeaton v Butcher* test, as explained in *Iqbal v Mansoor (No 2)*, is the one that should have been and should now be applied to each of the six documents in question in order to determine whether they fall within the scope of the absolute privilege that in principle applies to them. Applying that test to the six documents, it seems to me clear that however ill-judged and indeed irrelevant much of their content may have been, the statements complained of fell within the scope of the privilege and cannot be characterised as wholly extraneous statements having no connection with and no reference at all to the proceedings.

83. The theme of the first three letters, so far as they concerned the Claimant, was that he should not be acting for the Defendants in the litigation due to a conflict of interest arising from his prior employment by the Defendants which gave him privileged and unfair knowledge. Whether these allegations were warranted or sound in principle is not the issue. They were arguments being advanced within the litigation about the conduct of the opposite party's case and how it ought or ought not properly to be conducted. They were arguments and allegations made with reference to the proceedings, rather than being wholly extraneous. They were allegations made about the Claimant in his capacity as the solicitor to the defendants in the Leeds action.

84. As to the three further documents at APC 56-63, it seems to me that the allegation contained in each, that the Claimant was the subject of a CRO granted by Wandsworth County Court was clearly one made with reference to the proceedings and not an extraneous allegation. The point the Defendants were seeking to make, whether it was true or not, was that the Claimant was barred

from litigating without permission. That accusation was levelled at him in relation to his conduct of the litigation in which the accusation was made. Likewise the allegation made in the letter to the Court of Appeal, that the Claimant was falsely holding himself out as a barrister. This was being presented as pertinent to the Court's approach to the appeal and cannot be said to be wholly extraneous with no reference to it. Subject, therefore, to the next point I would hold that HHJ Faber was wrong to reject the absolute privilege argument in respect of the six documents. She should have applied the *Smeaton v Butcher* test to all of them and, having done so, should have held that each was protected by absolute privilege.

Harassment as an exception to privilege

85. The Claimant's Respondent's Notice of February 2013 set out grounds for resisting the Defendants' appeal on the absolute privilege issue which included a list of "Exclusions from immunity/privilege", a submission that conduct of a gravity that can be characterised as criminal does not attract immunity, and reliance on an extra-judicial lecture given by Justice Peter Garling to the Medico-Legal Society of New South Wales on 14 March 2012.

86. This is another new point or set of points, in the sense that the Claimant raised no such arguments before HHJ Faber. Indeed, this stance is contrary to the one he adopted at the hearing before HHJ Faber. At that stage it was, as I have said, common ground that the "principle of immunity" applies to proceedings other than defamation as decided in *Heath*. The sole issue raised by the Claimant was whether the offending statements fell within or outside the *Smeaton v Butcher* limiting principle. The substance of the case advanced in the Claimant's Respondent's Notice appears to have emerged initially in Supplemental Skeleton Arguments which he submitted to the Court of Appeal in November 2012. That was after HHJ Faber had handed down her judgment, and after the order dismissing the appeal in his libel claim, *Iqbal v Mansoor (No 2)*, had been drawn up, sealed and entered. The Court of Appeal declined to entertain the new arguments put forward by the Claimant. Rix LJ made the following comments:

> "58. …. Judge Faber was considering wider arguments in a different setting. The context there was a claim in harassment, which is a crime as well as a tort. It is arguable, but I am certainly not prepared to enter upon that argument here, that absolute privilege does not apply, or does not apply in quite the same way, in such a context: just as it does not apply in the case of perjury or contempt of court. Moreover, the allegations involved in the harassment proceedings both arise out of letters which are not, or arguably are not, matters of a witness's evidence in the course of proceedings, and arguably have a degree of wantonness and egregiousness which may stand outside any reference whatsoever to the subject-matter of any proceedings. Moreover it is perhaps arguable that where there is a form of persecution, as in the case of *Duke v Puts*, which is the one authority which is closest on its facts to the allegations made by Mr Iqbal in the harassment claim, in

> effect an attempt to drive a professional man out of his livelihood, public policy demands a judicial inquiry unless it is plain that even so absolute privilege prevails. Even there, however, it will be recalled that the allegations in the complaint against Dr Jones which involved aspersions on a conspiracy involving both Dr Jones and Mr Duke were held to be within the privilege. None of that, however, arises in terms of the much more limited submissions which can be made in respect of Documents 20 and 21. I repeat, however, that such issues are not properly before this court, have not been argued between the parties before this court, and I intend to make no observations whatsoever with respect to them.
>
> 59. … Nor is this appeal the place to explore the limitations of the doctrine of absolute privilege to be found in dicta or cases discussing the exceptional cases of perjury, contempt of court, malicious prosecution and possibly other such cases (discussed for instance in an extra-judicial lecture given by Justice Peter Garling ….). Nor would it be relevant, in the light of the limited issues which arise out of documents 20 and 21, nor would it be fair at such a late state even if the order had not yet been perfected, to raise a case based on *Osman v UK* [1998] ECHR 101."

87. The question arises of whether the present appeal is the proper place for these issues to be explored. My very clear conclusion is that it is not. I have already outlined the principles that apply to the pursuit of new arguments on appeal and explained why the Claimant's attempt to raise abuse of process arguments at this stage is unacceptable. The same applies with still more force to his attempt to argue that harassment claims fall outside the scope of the privilege. No explanation has been given of why these arguments were raised only on the appeal. The arguments are self-evidently of a potentially far-reaching nature. To explore them properly on this appeal in addition to the issues I have already dealt with would have called for far more time than the 1 day provided for by the Order of King J, and the Claimant made no attempt to increase the time estimate. The only written argument in support of his Respondent's Notice was contained in his Supplemental Skeleton Arguments of 11 June 2014. This did not cover all of the points made in the Respondent's Notice, whilst at the same time advancing new and different lines of argument in support of the overall proposition. The Claimant's authorities bundle, which was very professionally prepared, did not contain copies of many of the texts relied on in the Respondent's Notice (the extra-judicial lecture was absent, for example). In all these circumstances Mr Hirst was clearly hampered in dealing with the issues raised and it would have been impossible on any view to address them adequately.

88. My conclusion on the issue of absolute privilege is therefore that the Defendants should have permission to appeal, and that their appeal should be allowed.

Issue (ii): Abuse of process

89. A decision on such an issue represents an exercise of judgment with which an appeal court will be slow to interfere, in the absence of an error of principle. The Claimant submitted that in ruling on this issue HHJ Faber had failed to take into account the fact hat he had "pleaded" reliance on most of the additional matters in the APC well before the decision of HHJ Parkes QC. What the Claimant meant by "pleaded" in this context was however that he had mentioned the additional matters in skeleton arguments, grounds of appeal and witness statements at various stages in the present action. He had certainly made clear that he relied on the third letter (see above). He had also made clear that he wished to rely on the Defendants' Defence in support of his case of harassment. He referred in this regard to the words of Rix LJ in paragraph [54] of *Iqbal v Mansoor (No 1)* that I have quoted above, to the effect that the Defence could arguably form part of the campaign of harassment. In all these circumstances it was wrong, said the Claimant, to conclude that he was harassing or intending to harass the Defendants by raising those matters by amendment in the APC.

90. The Claimant was right to say that though he had not formally pleaded them, he had made clear that he complained as harassment of the third of the three letters and the Defence in this action. That is clear from the passages from *Iqbal v Mansoor (No 1)* that I have quoted above. I am not at all sure the same is true of the many other parts of the APC with which the Judge dealt under this head. In any event, the Claimant's submissions seem to me to miss some essential points about HHJ Faber's reasoning on the issue of abuse of process. First, central to her consideration was the unexplained failure of the Claimant to pursue his harassment and libel claims in the same court at the same time. She was in my judgment entitled to conclude that the unsuccessful pursuit of the libel action followed by the formal pleading in the APC of many of the same matters as had been struck out of that action was in substance an attempt to pursue a claim for damage to reputation, using the harassment claim to get round the roadblock presented by the decision of HHJ Parkes QC and the Court of Appeal's refusal of permission to appeal. More significant still, in my judgement, is HHJ Faber's observation that the effect of the Claimant's conduct was that the County Court "has to hear the same arguments as to immunity that the High Court has already heard and ruled upon."

91. Whether or not the Judge was right to categorise the Claimant's conduct in pleading those same documents as harassment as a "collateral attack" on the High Court privilege rulings the reality was that, with one exception, the Claimant had no answer to the privilege argument on which the Defendants relied before HHJ Faber in respect of those documents. He had not disputed before either Judge that absolute privilege applied in principle. Before HHJ Parkes QC he had only argued the *Smeaton v Butcher* point, on which he had lost. Before HHJ Faber, he had accepted that the absolute privilege that protects against defamation applied equally to other causes of action. My conclusion is that HHJ Faber was clearly right to conclude that the Claimant could not ask the Court to revisit the issue in this action. The exception is, again, the publication to the Claimant's staff of the letter to the SRA that was item 8 in the libel action, which HHJ Parkes QC held to be arguably not privileged. That single publication could not of itself support a harassment claim however. For all these reasons I refuse permission to appeal on this issue.

Issue (iii): relief from sanctions

92. HHJ Faber's decision on this issue was of course an exercise of discretion. An appeal court will not interfere with such a decision unless the court below has made an error of principle or "exceeded the generous ambit within which reasonable disagreement is possible": *G v G (Minors Custody Appeal)* [1985] 1 WLR 647. The Claimant's first point on this head of his proposed appeal was that HHJ Faber had ordered the Defendants to apply to her for relief and thereby given an appearance of partiality. This appears to me to take much too literally the words used by the Judge in her handed-down judgment. What in fact took place was that the Judge made clear to the Defendants that it was not enough for the Defendants to seek an extension of time for their Re-Amended Defence when they had been the subject of an unless order, and gave the firm time to put forward an application for relief from sanctions. This seems to me to be an unobjectionable case management decision that cannot reasonably be said to lend the Judge's conduct any appearance of bias.

93. As the Claimant acknowledged in his Grounds of Appeal, the law as it stood at the time of this decision did not require the Judge to mention each factor in the CPR 3.9(1) checklist, assigning each to one side of the balance or the other: *Khatib v Ramco International* [2011] EWCA Civ 605. Here, however, the Judge did carry out that exercise. The Claimant advanced detailed criticisms of the Judge's approach to the individual factors specified in CPR 3.9(1). For the most part, however, those criticisms did not raise any point of principle. Rather, they amounted in substance to no more than complaints that the Judge gave too much or too little weight to individual factors.

94. The exception to this was an argument in relation to the weight to be attached to the fact that the failure to plead a Re-Amended Defence was deliberate. The Claimant complained that HHJ Faber had not mentioned two authorities he had cited for the proposition that the gravity of non-compliance is the greater where it is conscious and may be decisive (*CIBC Mellon Trust Co v Stolzenberg* [2004] EWCA Civ 827 [162-167], *Boscombe Athletic Club Ltd v Lloyds TSB plc* [2003] EWCA Civ 1755). This is a point of no weight, however, in the context of this case. The Judge plainly appreciated that the non-compliance was deliberate. The key to her approach to that fact was her conclusion (at [110]) that the Defendants had not complied "because it formed the view that most of the amendments were abusive and that it would be disproportionately expensive to plead to them. In those respects it was correct."

95. I do not regard any of the Claimant's arguments on this issue as persuasive enough to justify the grant of permission to appeal. In my judgment, HHJ Faber's approach to relief from sanctions is beyond sensible reproach.

Issue (iv): the injunction

96. Mr Hirst advanced a number of criticisms of the Judge's approach to this issue, and they were arguable points in respect of which I grant permission to appeal. He submitted that the Judge failed to consider the provisions of s12 Human Rights Act 1998 which require prior notice, specify matters to be taken into account, and set a minimum threshold for the grant of an injunction affecting the

right of freedom of expression. No such injunction can be granted before trial unless the Court is satisfied that the Claimant is "likely to establish that publication should not be allowed": s12(3). Mr Hirst submitted also that here there was no threat of repetition and that the statements which formed the basis for the injunction had been made on occasions of absolute privilege. The Claimant argued that the Judge was fully entitled to grant an injunction as there was ample material before her on which to base a conclusion that the Defendants could not be trusted to refrain from repeating the allegations which the Judge restrained them from making, and that those allegations fell outside the ambit of absolute privilege.

97. I am not persuaded by Mr Hirst's submission that there was no evidence of a risk of repetition. That is a conclusion that was open to the Judge. It is unnecessary however to burden this already long judgment with a detailed discussion of the merits of the Judge's approach on the other matters raised by Mr Hirst. Her decision rested on the assumption, which I have held to be false, that the Claimant's claim disclosed a course of conduct by way of correspondence, witness statements and statements of case which was not only capable of amounting to harassment but also of being actionable because it fell outside the scope of absolute privilege. She envisaged an action which would continue to trial. I have held that on a proper application of the law of absolute privilege coupled with the Judge's decision to strike out for abuse of process the claim is bereft of any arguably actionable past conduct. That would ordinarily lead to the dismissal of the claim in its entirety. Even if the Court did in those circumstances consider an application for an injunction to restrain future behaviour the short answer would be there was no or no sufficient evidence of a risk of future wrongdoing. It is not enough of course to show a threat or risk of repetition. No injunction could properly be granted to restrain statements on occasions protected by absolute privilege. The Claimant had failed so far to identify any occasion on which a statement had been made without that protection. The necessary basis for a finding that this was likely to occur, or even that it would or might occur, was absent.

Disposal and costs

98. For all these reasons I grant the Defendants' application for permission to appeal and allow their appeal, and I refuse permission for the Claimant's appeal. The injunction will be discharged. The inevitable consequence would seem to be that the Claimant's claim falls to be dismissed. I will however hear the parties' submissions on the appropriate form of order, and on costs.