Neutral Citation Number: [2022] EWHC 1427 (QB)

Case No: QB-2019-004156

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2022

Before:

MASTER STEVENS

- -

Between:

Ion Manda	**Claimant**
- and -	
Bird & Lovibond (a Firm) (1)	**Defendants**
and	
Mr Colm Nugent (2)	

- -
- -

Andrew Watson (instructed by **Anthony Gold Solicitors**) for the claimant
Heather McMahon (instructed by **Clyde & Co LLP**) for the first defendant

Hearing date: 19th January 2022

- -

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.

.....

MASTER STEVENS

Master Stevens:

INTRODUCTION

1. This is my judgment on the first defendant's application dated 19th May 2021 for summary judgment to be entered against the claimant in respect of certain paragraphs in his Particulars of Claim pursuant to CPR 24.2(a) (i) and (b) because those parts of the claim are time barred such that the claimant has no reasonable prospect of success and there is no other compelling reason why the claims should be disposed of at trial. In the alternative, the first defendant seeks a strike out of the same paragraphs under CPR 3.4 (2) (a) and/or (b). Due to various listing difficulties the matter could not be heard until January 2022. Furthermore, whilst an original listing before the Assigned Master was for the agreed time estimate of 4 hours, by the time it came to be listed before me it was in the diary for just half a day, such that submissions had to be somewhat condensed, and judgment reserved. The authorities bundle alone contained almost 400 pages.

Background to the Professional Negligence claim

2. The claimant commenced proceedings on 21st November 2019 for damages in respect of losses caused by alleged professional negligence on the part of his former solicitors, (the first defendant) and his former barrister (the second defendant), on or around 22nd November 2013 and /or September 2014. Both advisers had represented the claimant in an employment tribunal claim (solicitors came on record after the ETI had been issued on or around 26 June 2013 but counsel was not instructed until 14th October 2013, pursuant to instructions dated 11th October 2013 (according to his Defence) and the claim was eventually dismissed on withdrawal. I was told that there is no claim in professional negligence for any compensation for the loss of the employment tribunal claims, rather the claim is brought on the basis that the dismissal or strike-out of the tribunal proceedings prevented the claimant from being able to bring his subsequent personal injury claim in the county court.

3. The same professional advisers who had acted in the tribunal proceedings, were also retained for the subsequent county court action, which failed when the claim was struck out as an abuse of process. This resulted in not only a failure to recover damages, but also adverse costs consequences above and beyond the level of legal expenses insurance cover. The second defendant states he was only instructed in respect of this claim from around December 2013. This professional negligence claim is for the loss of the chance to bring a successful claim in the county court is valued at in excess of £2 million. It is immediately notable that the current application is brought on behalf of the first defendant only.

Background to the causes of action raised in the Tribunal and County Court

4. There is a somewhat unhappy factual history, at least as pleaded by the claimant, which gave rise to the need for him to seek legal assistance in the first place. I should make it plain that I have not seen responses or pleadings from the claimant's former opponent employer as to their defence. The documentation before me correctly focussed on defaults by the claimant's legal representatives in the handling of the two previous claims against the claimant's employer.

5. The claimant, a university graduate, now aged 47, was employed for over 6 years from August 2006, as a quantitative analyst in a risk management team by the bank UBS AG. It

is pleaded that he received a six-figure salary, with a significant 6 figure bonus on top and company benefits. Despite this high achiever status, by 2013 he felt he had no choice but to resign which he did on 10th April 2013 when he was just 38 years old. This was because he said he had been bullied and harassed by others, particularly his line manager, from about 2 years after starting this employment (i.e., from early 2008) and that as a result he had suffered psychiatric injury, from which it was not possible to recover, or at least not whilst in that environment. The bullying was said by the claimant to involve race (he was born in Romania) and disability discrimination. He served a medical report within the earlier proceedings. That referred to earlier psychiatric assessments going back to 2010 when suffering with a clinical depressive episode associated with work-related stress for which he was off work. In fact, 2010 was the last full year in which he worked, as he never achieved a sustained remission after that, although there was a brief attempt to return to work in both 2011, and in January 2013. He was diagnosed with Major Depressive Disorder from about February 2011. During much of the sick leave period there is reference in the medical report, to an ongoing grievance procedure, then an appeal from that and finally "negotiations" with his employers. His medical history contained no record of any previous mental health disorders.

ASPECTS OF THE PROFESSIONAL NEGLIGENCE CLAIM WHICH THE FIRST DEFENDANT SEEKS SUMMARY JUDGMENT UPON

6. Initially, 11 paragraphs in the Particulars of Claim were the subject of the application, but by the time of the hearing those paragraphs that remained in issue were as follows:

Allegations concerning negligence in allowing the claimant's Disability Discrimination claim to be struck out in the Employment Tribunal

Paragraph 21.1 (in contract and tort) **"**Failing in good or any time before 22 November 2013 to recognise and advise the Claimant that his claims for disability discrimination were improperly formulated"

Paragraph 21.2 (in contract and tort) **"**Failing, in good or any time before 22nd November 2013 to advise the Claimant to apply to amend the ET Claim so as to formulate the claims for disability discrimination properly"

Paragraph 21.3 (in contract and tort) **"**Alternatively, failing to advise the Claimant that the claims for disability discrimination were without merit and should be withdrawn (but not dismissed or struck out)"

Paragraph 21.4 (in contract and tort) **"**In the circumstances, causing or permitting the Claimant's said claims for disability discrimination to be struck out"

Allegations concerning negligence in allowing the County Court Personal Injury claim to be commenced out of time in respect of some injury and loss

Paragraph 21.5 (in tort) **"**Failing to issue or cause to have issued the Civil Claim against UBS AG within the three-year limitation period for a personal injury claim when they knew or ought to have known that the Claimant had first become ill in or around July 2010"

Paragraph 21.6 (in tort) "Failing to advise the Claimant adequately or at all in respect of the limitation period for personal injury claims"

Paragraph 21.7 (in tort) "Thereby causing the Claimant's claim for any injury suffered prior to 30 July 2011 to become statute-barred"

Allegations concerning loss of the chance to bring a civil claim subsequent to the Tribunal one

Paragraph 21.10 (in contract and tort) "Failing to make an application under Rule 52 of the Employment Tribunals Rules of Procedure 2013 for the Tribunal claims not to be dismissed on 9 September 2014 on the ground that the Claimant wished to reserve the right to bring the Civil Claim"

Allegations concerning loss of a chance to protect the claimant from adverse costs

Paragraph 21.12 (in contract and tort) "Failing to advise the Claimant not to continue with the Civil Claim after the ET Claim was dismissed on 9 September 2014"

"Catch all" allegations

Paragraph 21.13 (in contract and tort) "In the premises, failing to take sufficient care in the conduct of the ET Claim"

ISSUES AT THE HEART OF THE APPLICATION

7. The application, it was submitted, requires me to determine the latest dates by which certain steps should have been taken by the claimant's former legal advisers, in both the employment tribunal and subsequent civil claim, in order to determine when time started to run for mounting this professional negligence action. If any of those steps occurred before 21st November 2013, then parts of this action have been brought out of time and I am asked to order summary judgment on that basis, or alternatively strike the paragraphs out.

BASIC LIMITATION LAW FOR CLAIMS IN CONTRACT AND TORT

8. It was agreed between the parties that any cause of action in *contract* would accrue from the date of the breach of duty, and it was not in dispute that any claim for such breaches occurring prior to 21 November 2013 (i.e., more than 6 years before the professional negligence claim form was issued) are statute barred pursuant to s.5 of the Limitation Act 1980 ("the Act").

9. Similarly in *tort*, it was agreed that any claim for *damage accruing* prior to 21st November 2013 is statute barred under s.2 of the Act. The claimant advised additionally that they did not seek to rely upon s.14A of the Act which permits longer time periods in certain circumstances.

SUBMISSIONS AS TO THE TIMING OF ACTIONABLE DAMAGE IN TORT

10. The first defendant submitted that a cause of action in negligence accrues at the date when the loss first causes legally recoverable loss and relied on the authority of Lord Nicholls in *Nyekredit Mortgage Bank Plc v Edward Erdman Group Ltd (No.2)* [1997] 1 WLR 1627. They also quoted from Stephenson LJ in *Forster Outred &Co* [1982]1 WLR, at [86] as approved by Lord Nicholls in *Nyekredit*, at 1630 D-F where it was recorded that damage is "any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases".

11. The context of the decision in *Nyekredit* was a negligent over-valuation of a property, against which bank was prepared to lend money. The borrower defaulted under the mortgage terms and the amount lent at all times had exceeded the true value of the property. There was a question as to when the cause of action arose, and whether it was at the time of the valuation or subsequently when the bank obtained possession of the property, by which time the market value had fallen substantially. The House of Lords ruled that the cause of action had arisen at about the time of the loan transaction, being when the "relevant and measurable loss had first been revealed". As the borrower had defaulted at once following the purchase it was held that the valuer was liable for the adverse consequences that arose due to the deficiency in the valuation, but they were not liable for consequences which would have arisen even if the valuation had been correct.

12. The claimant also cited *Nyekredit*, but supplemented it by reference to *Cartledge v E Jopling & Sons Ltd* [1963] AC 738 where damage was defined as" beyond what can be regarded as negligible" and "real damage as distinct from purely minimal damage".

13. The parties also both relied on the same two cases dealing with calculation of the date when, following a strike out of an underlying claim arising from the negligent conduct of litigation, actionable damage arises. The first authority, *Khan v RM Falvey* [2002] Lloyd's Rep PN 369, was a decision of the Court of Appeal where it was held that actual damage occurred when it was inevitable, or there was at least a "serious risk" that the claim would be struck out, even if it was not struck out until a later date. At [29] Sir Murray Stuart-Smith held "in many cases the application to strike out for want of prosecution may be made at the earliest opportunity that it is likely to succeed. In such cases it may be difficult to say that the claimant's chose in action has sustained any diminution in value until that time, in which case the cause of action will not arise earlier than the strike out, absent any prior damage of the sort claimed here. But often, when an action has gone to sleep for years, the actual application to strike is not made until years after it might successfully have been done. In such cases it seems to me that the damage is caused when there has been such inexcusable and inordinate delay or non-compliance with rules such that the court would have struck out the action and pursuant to CPR, Part 3.4, because the chose in action has so diminished in value to be of no real value."

14. Having read the case for myself, it is clear that the court was concerned to distinguish between cases decided before the advent of the Civil Procedure Rules and those decided afterwards, where it was considered that it would be likely that the relevant date could be

identified with greater precision as to when a claim would become liable to be struck out for procedural default.

15. The second case which both parties relied upon was *Hatton v Chafes* [2003] PNLR 24. The headnote at H5(1) reads "Where solicitor's dilatoriness caused an action to be struck out for want of prosecution, the cause of action in respect of the loss of the claimant's right, arose not at the time of the strike-out but when the right of action became worthless. At the latest this was when a strike-out application would have been bound to succeed". According to the headnote at H9, Clarke LJ also considered that damage might arise when it was more probable than not that the claim would be struck out or when there was a real as opposed to a minimal or fanciful risk of the claim being struck out, although the court had not found it necessary to decide that particular point.

16. Thus, the parties agreed the *latest* time by which actionable damage can accrue is when the acts or omissions of the legal representatives have led to a position when the claimant's case was "doomed to fail" and had reached a "point of no return". The first defendant was keen to stress that damage may accrue, sufficient to start limitation running prior to the last occasion upon which the damage was seen as "fixable" and urged caution when reviewing the claimant's submissions about "fixable" damage.

17. The first defendant relied upon three additional cases, the first being *Holt v Holley & Steer Solicitors* [2020] EWCA 851, where it was held that the claimant suffered loss "at a time when the chance of introducing further valuation evidence…. became in reality impossible". The context was negligent conduct of divorce proceedings and at the first directions appointment the court had ordered valuations of the family home, but no directions for the valuation of some investment properties held by the husband and wife. Further directions were made at a financial dispute resolution meeting, but it was only subsequently that proper valuations were sought very shortly before the final hearing of the financial relief proceedings. In the absence of any agreement to accept the new material, or any application to the court to admit it, it was held, according to the headnote at H line1, that the last opportunity to adduce that evidence could hardly have accrued later than the end of the final hearing, i.e., it could not have been as late as a subsequent event, such as the giving of judgment in the financial remedy proceedings two months later. The wife's professional negligence claim was brought more than six years after the conclusion of the final hearing, but less than six years after the giving of judgment and making the financial remedy order; this was ruled to be too late.

18. The first defendant took me specifically to paragraphs [58]-[61] where the judge concluded that there was a real risk that the wife had lost the opportunity to introduce new evidence when her opponent's solicitor indicated it would object to that evidence. They highlighted that this timing was a factual finding. They also drew my attention to the judge's dismissal of the relevance of theoretically possible outcomes about what the county court judge might have decided to do if they considered the evidence before them was unsatisfactory. They said that there was a parallel between this consideration and the flexible employment tribunal practices which the claimant sought to rely upon. I had some difficulty with this point as there is a large difference between procedures in the tribunal and those in the court system.

19. Although the claimant did not rely on *Polley v Warner Goodman Street* [2003] PNLR 40, they did not seek to distinguish it. In that case it was held that the relevant date for damage having occurred, sufficient to start time running under limitation, was when the mistake of not serving proceedings in time was made, not the later date when the original extension of time for service was set aside. This was based on a factual finding by the court that in the particular circumstances there had been no good reason not to serve the proceedings according to the usual rules, such that the set aside application was held as bound to succeed.

20. The final authority put forward by the first defendant, was *Sciortini v Beaumont* [2021] Ch 365, wherein it was stated that where there were separate breaches of duty, some of which fall within, and others outside, the limitation period there is no general principle requiring limitation to be triggered against all claims due to the first breach. However, the general principle is subject to the facts of the individual case, and if subsequent acts of negligence do not cause any further loss, then the date of the first damage is relevant to trigger limitation for all losses. In this particular case for barrister negligence, two separate pieces of advice had been given and Coulson LJ held it was relevant to examine whether a separate cause of action arose on the giving of the second counsel's opinion. He considered that if the first piece of advice had committed a client to an irretrievable course of action then the second negligent advice would not have caused any additional loss.

SUBMISSIONS AS TO THE TIMING OF ACTIONABLE DAMAGE IN CONTRACT

21. The first defendant's submissions were simple that "in contract, the cause of action accrues at the date of the breach of duty". In response to the claimant's submissions that there is a continuing duty to exercise reasonable care and skill in the context of ongoing litigation, as distinct from a one-off transaction, they said it was wrong in law to seek to distinguish those circumstances. They relied upon *Sciortini*, at [47] and [48], where Coulson LJ observed "The existence of such a continuing duty will, of course, depend on the terms of the retainer in any given case but, as a general proposition, was comprehensively rejected by the majority of the Privy Council in *Maharaj v Johnson* [2015] PNLR 27 at [32] – [38].

22. The first defendant accepted that the Court of Appeal in *Carlton v Fulchers* [1997] PNLR 337 had applied a continuing duty to a solicitor's retainer, where the whole purpose of the retainer was to examine whether there were section 33 grounds under the Limitation Act to extend the primary limitation period, and the solicitor had wrongly stated to the claimant that nothing could be done about limitation. They maintained that this case was limited to its own special facts and did not establish any general proposition relating to a continuing contractual duty.

23. Finally, the first defendant sought in oral submissions to disregard comments in the separate judgment of Gloster LJ in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2016] PNLR 17 which were relied upon by the claimant. The lead judgment was given by Longmore LJ and the first defendant did not disagree with that. In Capita, a consultancy was retained to provide pensions management and advisory services to the trustees of an occupational pension scheme. They gave negligent advice which resulted in liabilities under the pensions scheme being greater than they would have been if managed

appropriately. The consultancy was sold, with the previous shareholders providing an indemnity in the contract of sale to the new owners, Capita, for any liabilities arising from the work of the consultancy prior to the transfer date. At first instance, it was held that the consultancy had been in continuing breach of duty from day to day for its negligent acts pre-transfer until about 3.5 years post-transfer and therefore as Capita had taken over the liabilities part-way through the period, they could not recover all losses from the previous owners under the transfer contract.

24. On appeal it was submitted by Capita that the entire post-transfer losses had been caused by the pre-transfer conduct. The Court of Appeal held that it was wrong to find the continuing retainer gave rise to a fresh cause of action accruing day by day for failure to rectify the earlier mistakes. They considered that the original pre-transfer negligent acts were causative of some losses sustained in the post-transfer period.

25. Gloster LJ, however, made it clear in her separate judgment that she disagreed with Longmore LJ, on the point of legal principle as to whether there can be a continuing breach of duty in contract. He had said that the proposition was wrong in law but she said it all depended upon the precise terms of the retainer. At [31] she noted that fees were paid quarterly to the pensions advisers for wide-ranging advice, and there was a regular duty for the consultants to attend Trustee meetings where they would identify "and raise issues which required discussion, resolution and action". It was not a point that needed to be decided in the case and Henderson LJ did not agree with her, but she referred back to *Midland Bank v Hett, Stubbs & Kemp* [1979]1 Ch.384 at [438] where Oliver J had held " in a case where there is a continuous contractual obligation, the limitation period does not begin to run until the contract finally becomes impossible of performance. In the case of want of prosecution by a solicitor for example, it would be wholly unsatisfactory to contemplate defining the date of breach for limitation purposes by reference to a solicitor's first failure to take out the summons for directions [..] His retainer was to make all attempts to preserve the plaintiff's cause of action, including making a section 33 application. That was capable of performance up to the termination of his retainer by the October 4 letter; not before that date should any period of limitation in my view begin to run".

26. The first defendant directed me back to Coulson LJ's judgment in *Sciortini*, where he had at [38-40] referenced the Court of Appeal's decision in *Bell v Peter Browne & Co*, that the correct limitation date for a solicitor's breach of contract claim was when they failed to protect the plaintiff's share in the proceeds of sale of the matrimonial home, and although the breach was remediable by lodging a caution until such time as the home was sold, the limitation period began to run from the date of the breach because that was when real damage occurred.

27. The first defendant maintained that the existing authorities required me to conclude that there is no concept of a continuing duty in contract. Counsel for the claimant countered that by saying there is no relevant authority on the point in relation to the conduct of litigation rather than a one-off transaction. He also cited the first instance *Midland Bank* case which Waller LJ had referenced favourably in the supporting judgment in *Carlton* at page 342 D-F. He submitted this raises a properly arguable, and triable issue in law which is not suitable for summary determination.

THE LEGAL TESTS ON SUMMARY JUDGMENT AND ON STRIKE OUT

28. Pursuant to CPR 24.2. the court may give summary judgment on the whole of a claim or a particular issue if:

"(a) it considers that-

(i) The claimant has no real prospect of succeeding on the claim or issue; "…."and
(ii) There is no other compelling reason why the case or issue should be disposed of at trial."

29. Pursuant to CPR 3.4 (2) the court may strike out a statement of case if it appears to the court-

(a) That the statement of case discloses no reasonable grounds for bringing or defending the claim; and /or
(b) It is an abuse of the courts process or is otherwise likely to affect the just disposal of the proceedings

30. The notes to the White Book make it plain at 3.4.2 that a claim should not be struck out unless the court is certain it is bound to fail. Within the Practice Direction there are examples of cases where the court may conclude that the particulars disclose no reasonable grounds because they set out no facts indicating what the claim is about or they are incoherent, alternatively despite a coherent set of facts, those facts even if true do not disclose a legally recognisable claim.

31. As to what is an abuse of process, at 3.4.3 in the White Book the notes record that there is no clear definition, and the scope is wide but if any abuse can be addressed by less draconian methods than a strike-out, then the other option should be taken. The claimant pointed out in his counsel's skeleton, that the abuse complained of is not identified in the application as such but appeared to relate to whether the claimant is estopped from making his claims by virtue of previous judgments in the employment tribunal and county court. However, the first defendant's skeleton related the abuse to limitation more generally, as to when the cause of action accrued.

OVERLAP BETWEEN SUMMARY JUDGMENT AND STRIKE-OUT APPLICATIONS & RELEVANT CASE LAW

32. Both parties submitted that the threshold for granting summary judgment is lower than for striking out, such that if the first defendant did not succeed on the first limb of its application, it could not on the second limb either. A relatively recent authority of which I am aware provides some further assistance. In *Burnford v Automobile Association Developments Ltd*, BL-2021-000731, HHJ Paul Matthews said at [20], when comparing and contrasting the two types of application, "These two methods of summarily disposing

of a claim without a trial are frequently combined in the same application, as in this case. But it is clear that an application under rule 3.4 is not one for summary judgment: see eg *Dellal v Dellal* [2015] EWHC 907(Fam). It is generally concerned with matters of law or practice, rather than with the strength or weakness of the evidence. So on an application to strike out, the court usually approaches the question on the assumption (but it *is* only an assumption, for the sake of the argument) that the respondent will be able at the trial in due course to prove its factual allegations. On the other hand, on an application for summary judgment, the court is concerned to assess the strength of the case put forward: does the respondent's case get over the (low) threshold of "real prospect of success"? If it does not, then, unless there is some other compelling reason for a trial, the court will give a summary judgment for the applicant".

33. At [21] the judge continued, by reference to the judgment of Coulson LJ in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at [20] "in a case like this (where the striking-out is based on the nature of the pleading, not a failure to comply with an order), there is no difference between the test to be applied by the court under the two rules". Then continuing at [21], "accordingly, I do not agree with the judge's observation at [4] that somehow the test under r.24.2 is "less onerous from a defendant's perspective". In a case of this kind, the rules should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out: see Global Asset Capital Inc v Aabar Block SARL [2017] EWCA Civ 37…".

34. Coulson LJ continued at [22] "As to the applicable test itself:

(a) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 AER 91. A realistic claim is one that carries some degree of conviction: *ED& F Man Liquid Products v Patel* [2003] EWCA Civ 472.But that should not be carried too far: in essence the court is determining whether or not the claim is "bound to fail"".: *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [80] and [82].

(b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are demonstrably unsupportable: *ED & F Man Liquid Products Ltd v Patel; Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128.

35. On the latter point I am also mindful of the decision in *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Company 100 Ltd* [2007] FSR 63, where similarly the court determined that it should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, but where there are

reasonable grounds for believing a fuller investigation into the facts would add to, or alter, the evidence available to a trial judge and therefore affect the outcome of the case.

36. It is helpful to record one of the other key principles to be applied on summary judgment, as set out by Lewison J, as he then was, in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15 vii)] "… it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725".

37. Finally, it is important to remember that the evidential burden is on the applicant to establish that there are grounds to believe there is no real prospect of success and no other compelling reason for trial. It is only when the applicant has produced evidence which is credible to support the application, that the respondent becomes subject to the evidential burden of proving the opposite.

THE PARTIES' SUBMISSIONS CONCERNING THE CPR 24 APPLICATION

38. Whilst my immediate observation during the hearing, was that I was surprised I was not being asked to order a trial of a preliminary issue on the limitation points raised (as was the situation in at least one of the case authorities provided), neither party was keen on that suggestion. Instead, the submissions focussed on various groups of allegations in the Particulars of Claim which were said by the first defendant to have been brought out of time. I now turn to consider each of these under the first part of the CPR 24.2 test.

PART ONE
Consideration of the test in CPR 24.2 a) (i): The Claimant has no real prospect of succeeding on the issue

Allegations concerning negligence in allowing the claimant's Disability Discrimination claim to be struck out in the Employment Tribunal (paras 21.1-4)

Submissions by the defendant

39. The first defendant's first witness statement in support of the application relied upon the following errors in the preparation for the hearing on 22nd November 2013:

    (i) No application was made for leave to amend the ETI "well in advance" of the hearing
    (ii) There was a failure to properly formulate the disability discrimination claims upon finalising the list of issues in August 2013 "or in immediate response to the ET strike out application made by UBS on 24th October 2013"
    (iii) The tribunal was entitled to determine the strike out application on the basis of how it was then pleaded, and it had no reasonable prospect of success as the second defendant had conceded it was not correctly pleaded

40. Furthermore, the first defendant sought to argue that any amended claim would have been out of time under s.123(1) of the Equality Act 2010, thus it should have been made no later than 9th July 2013, unless the judge exercised their discretion. On the latter point the defendant submitted there would have been "no good reason" for the judge to do so, in the face of what would have been an opposed application such that it "would have been doomed to failure (or was likely to have failed, or there was a real chance of failure)".

41. The first defendant ascribed all subsequent failures to revive the disability discrimination claim (including in the county court) as due to the striking out on 22nd November 2013, in that it created, or at the least contributed to, a cause of action and/or issue estoppel and findings that there was no good reason for a second set of proceedings on the facts.

42. On the subject of failure to secure a withdrawal of the disability discrimination claim, the first defendant asserted, similar to the point at paragraph 40 above, that any new claim raised later would have been out of time and precluded from being raised in the future in either the tribunal or the civil courts. This was said to be because the relevant time period expired no later than 9th July 2013, subject only to the tribunal's discretion to extend time if it was just and equitable to do so.

43. Finally, the first defendant submitted, in the alternative, in respect of the employment tribunal claim that at all material times prior to 21st November 2013 "it was at least probable that the Claimant's disability discrimination claims would be struck out or that they were at risk of being struck out".

Submissions by the claimant

44. The claimant in contrast contended that he has "a very good chance" of winning on the point that a cause of action for professional negligence did not accrue before 21st November 2013. Counsel submitted that the situation was "fixable" at any point up to and including the hearing on 22nd November 2013. He referenced the fact that there is no deadline for making applications in tribunal proceedings, and as such an application to amend could have been made at any point, including at the hearing itself. Additionally, he made submissions about the procedural option to postpone the hearing (if it had been requested), and as was mentioned by a different employment judge (Lewzey) at the later February 2014 leave to amend hearing.

45. The claimant contested that aspects of Judge Clark's decision on hearing the November application "determined", as submitted in the defendant's first witness statement in

support, that any application to amend should have been made "well in advance of the hearing" or "in immediate response to ..the strike out application made by UBS on 24th October 2013 at the very latest". The claimant argued that not having been presented with an application, the defendant can only make an *assumption* that the judge *would* have rejected a late application. The judge did not say the position was impossible to rectify and delay would have been just one factor in the careful balancing exercise which she would have had to perform.

46. As the claimant disagreed that the acts/omissions of the first defendant prior to 21st November 2013 (on a reasonable prospects basis) led to an irretrievable position in respect of his disability discrimination claim, he did not accept the inevitability of subsequent judicial determinations, both in the tribunal and in the county court, that any injury claim was estopped or an abuse of process by that initial strike-out determination.

47. The claimant reminded the court that it was wrong on this application to simply rely on assumptions by the defendant at face value about the latest time by which an act could have taken place and time would start to run for limitation purposes. The court should be wary of trying issues of fact on evidence where the facts are apparently credible which are being attacked by the other side. Choosing to make a determination about alternative sets of facts is the function of the trial judge "unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it" submitted counsel for the claimant, relying upon *Day v RAC Motoring Services* [1999] 1 All ER 1007 at 1013 (as per Ward LJ).

48. Within the authorities bundle, the claimant relied upon *Selkent Bus Co v Moore* [1996] ICR 836 when describing the broad discretionary powers of a Tribunal as to how they manage cases "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions". There has to be a balance between justice and hardship. At p 841 B it was said that "The power to amend is no exception to the principle of natural justice. The power is part of the wide discretion conferred on industrial tribunals to regulate their own procedure... In its exercise the tribunal should have regard to whether the amendment raised a new cause of action and, if so, whether that cause of action was brought within the relevant time limit and, if not, whether the facts stated in the original application were apt to cover or anticipate claims of the nature proposed in the amendment and whether it was reasonably practical to have brought those claims within the relevant time limit".

49. The claimant also relied upon extracts from *Harvey on Industrial Relations and Employment Law* at Division P1, paragraph [311.05] contained within the authorities bundle such that amendments merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint have no relevant time limits. Counsel contended that the cause of action i.e., failure to make reasonable adjustments already existed in the ET1 such that a properly formulated amendment application made before the disability discrimination claim was struck out, "would have succeeded". Counsel also said that the issue needs to be adjudicated on at a full trial, where the judge would have an opportunity to hear the arguments that would have been presented by both sides, and that the court should assume for present purposes that the claimant would succeed on that point.

50. The claimant also sought to point out that it is only in claims with amendments raising new causes of action wholly unrelated to the existing claim that the tribunal will consider time limits, as discussed in *Harvey* at [312] ff but there is still overall discretion to extend time.

51. On the question of a failure to advise on withdrawing the disability discrimination claim, there is a degree of overlap between submissions made about the effect of withdrawal prior to the hearing of the strike-out application on 22nd November 2013 and a withdrawal at the end of the tribunal proceedings as referenced at paragraph 21.10 in the Particulars; the latter paragraph is considered at paragraphs 86-89 below.

52. The claimant was keen to clarify that the purpose of seeking a withdrawal of the disability discrimination claim at the 22nd November hearing (in the alternative to an amendment), was not to preserve the claim within the tribunal, but to abandon it. The witness statement prepared by the claimant's solicitor in response to the application stated at [30], "at no point has it ever been suggested by anyone that a new disability discrimination claim would or should have been presented." Then at [36] "It follows that if a claimant begins a claim in the ET and then decides that there is a better cause of action available in court, care must be taken to avoid dismissal". The first defendant's submissions about time limits for making a new claim in disability discrimination therefore were considered irrelevant by the claimant as no new such claim was contemplated by the pleading at paragraph 21.3.

53. As to how any such withdrawal might have preserved the injury claim when the overall tribunal claim came to an end, the claimant took me to the precise wording of Rule 52(a) which provides that the tribunal shall not issue a judgment dismissing a claim on withdrawal if the claimant expresses "a wish to reserve the right to bring such a further claim" and the tribunal is "satisfied that there would be legitimate reason for doing so". Rule 52(b) goes on to stipulate that the tribunal should not issue such a judgment where it would not be in the interests of justice to do so.

54. The claimant further submitted that the plain wording of Rule 52 refers to a "legitimate reason" only and there is no requirement for exceptionality or any particular threshold of proof. They also relied on the Court of Appeal decision in *Ako v Rothschild Asset Management Ltd* [2002] IRLR 348 which had led to the introduction of Rule 52 in the first place.

55. Finally, in respect of the withdrawal point the claimant submitted that it is not amenable to summary judgment because it requires a trial judge's evaluation of all the evidence and legal argument, and consideration of how the employment judge might have exercised their discretion. The first defendant's submission had made it plain that they acknowledged the judge retained a discretion. I note that the witness statement referred to above and filed in response to the first defendant's application contained evidence of employment tribunal practice in respect of Rule 52. The first defendant objected to this. The claimant asserted, that this was unavoidable to some extent as there were few facts for me to base my determination upon, which he contended demonstrates the unsuitability of a summary judgment process for the issues to be decided.

Determination regarding paragraphs 21.1, 2 and 4 of the Particulars

56. All of these paragraphs relate to actions and omissions leading to the striking-out judgment of the disability discrimination claim following the hearing on 22nd November 2013. I remind myself that the correct test is whether the prospects can fairly be said to be better than merely arguable i.e., not fanciful but containing some degree of conviction that those acts/omissions occurring before 21st November 2013 caused such damage as to set the limitation clock ticking for the professional negligence claim, both in contract and tort.

57. I have carefully read the judgment and reasons of Judge Clark following the hearing on 22nd November 2013 to try to understand the context within which she made her observations and gave her decision. I have done the same in respect of the 7th February 2014 Lewzey judgment which reviewed the earlier judgment.

58. It seems quite plain to me that the quotes from each judgment, which I have been drawn to by the first defendant, do not necessarily support the conclusions they seek about the inevitability of the way the judges exercised their discretion on both the strike-out and subsequent refusal to amend. My summary of some salient extracts from each judgment is recorded in the tables below. I have added emphasis by highlighting some original wording in bold type.

59. Relevant extracts from 22nd November judgment (handed down 3rd December 2013) by Judge Clark:

Paragraph	Judgment	My additional comments
9	"It is not mandatory to strike out a claim which has no reasonable prospects of success as rule 37 provides that the Tribunal *"may"* i.e. has a discretion	
11	"Mr Nugent was instructed for this hearing very late in the day and, therefore, the Respondent had not seen his written skeleton until the morning of the hearing. Mr Nugent conceded that the PCP and the direct disability discrimination claims were not appropriately worded and, in the course of his oral submissions, accepted that, as drafted in the list of issues, these elements …..did not have reasonable prospects of success. He suggested that the list of issues should be amended to reflect his re-drafting…Mr Nugent did not apply to amend the Claimant's Claim Form as he did not consider it necessary to do so."	Having acknowledged that counsel was instructed late in the day, in the same paragraph it appears that the judge considered that an application to amend could still have been made i.e., she did not say he was instructed so late that he could not alter the course of events.
12	"The Respondent did not agree to any amendment to the list of issues and took the view that the claims, as drafted, should be struck out and that the Claimant could formally apply to amend….Mr Craig resisted any suggestion that the Tribunal could deal with a proposed amendment at the Preliminary hearing as the Respondent had not been given notice of it and Mr Craig was not in a position to take proper instructions…. The direct disability discrimination claim predicated on a failure to discuss adjustments must fail on the basis of the clear line of authority….	The respondent was not saying it was too late to apply to amend on 22nd November If such an application had been made it seems logically that a determination on strike out would not have proceeded on 22nd November

14	Conclusions: "It is now a routine case management tool in a discrimination claim that a list of issues is agreed by the parties prior to a hearing. The precise legal status of such a list is not entirely clear…it is not unusual ..that the parties agree a list of issues which include matters which were not specifically pleaded with the Claim... Provided the parties and Tribunal know the case which requires adjudication ..the overriding objective ..is met without a formal amendment to the pleadings. The situation is different where there is no agreement between the parties as to a revision of the list of issues. In such circumstances, …a party may apply to amend the pleadings "	
15	"In the light of the difference between the allegations in Claim Form, the list of issues and the proposed amendment to the list of issues, the Claimant clearly needs to apply to formally amend his Claim Form…He has not done so. In those circumstances, the Respondent is entitled to invite the Tribunal to determine its strike out application on the basis of the currently agreed list of issues."	The clear indication here is that only in the absence of an application to amend, did the strike out application proceed. I note the use of the present tense "needs to apply", not "needed to apply"
16	To give the Respondent only a couple of hours' notice of an intention to change the way the case was being put (by means of a skeleton argument) did not reasonably give the Respondent sufficient time to consider its position …Had the Claimant informed the Respondent well in advance ..that he wished to amend ..the Tribunal might have been minded not to make an immediate strike out order, notwithstanding the fact that the claims as currently framed do not have reasonable prospects of success…. The Claimant is professionally represented and could and should have properly formulated his claims by August 2013 -or at the very latest, in immediate response to the Respondent's strike out application in October."	A couple of hours' notice is the time frame posed by the judge as unreasonable. This comment (together with those in previous paragraphs) needs to be weighed and tested against the subsequent ones in this paragraph as relied upon by the defendant. These comments appear to have only been made when counsel had resisted making any alternative application at the hearing, such as to postpone in order to commence an amendment application. The judge may have been aware that counsel had not been instructed by the earlier dates she mentioned ("late in the day" does not sit comfortably with "well in advance") and yet she had referred earlier to options open to him ("he needs to") which he had resisted ("he

		did not consider it necessary to do so")

60. I conclude from the passages above that first, it is not all apparent that the judge would have proceeded with the strike out application if the skeleton argument prepared the day before the hearing, had been supplemented by an application to amend. As it was the skeleton did not seek to amend the claim, only the list of issues which was unsatisfactory given the respondent's opposition. Indeed, I cannot rule out that an oral application for leave to amend on 22nd November would have been resisted. I therefore believe that there was a realistic prospect of the injury aspect of the claim being saved up to and including the date of the hearing. Thus, I believe there is a realistic prospect of the claimant proving at trial that there was no real damage accruing until on or after 21st November 2013. As to any claim in contract there is a need for determination at trial as to when the relevant breach occurred, and it would be wholly unsatisfactory to try to make a ruling now. The factual and evidential matrix before me is incomplete and not of the type where there is a short point of construction for which the summary judgment process is ideally suited. I sense, from the wording of the judgment, which is all I have to go on in the absence of any transcript or notes of the hearing, that there was some exasperation felt by the judge that the legal representatives declined to apply for leave to amend, (with use of the present tense "he needs to apply" implying the option remained even at that late stage of the hearing). It is also otherwise unclear to me why in paragraph 11 of the judgment, the judge refers to oral submissions and in almost the same breath refers to Mr Nugent's unwillingness to seek to apply to amend. Furthermore, this application is brought only by the first defendant, and it is unclear what instructions they had given the second defendant, on or after 21st November and their contribution to the evidential matrix. Their pleading simply relates matters back to events well before 21st November 2013 but leaves a void as to what they were doing in the crucial period imminently before and during the hearing. This further illustrates the unsuitability of a summary determination on these paragraphs. The first defendant's witnesses will need to provide disclosure and witness evidence as to their contribution to the overall situation and this evidence requires proper testing at trial.

61. The range of options potentially available to the defendants on or after 21st November to avoid the strike-out following the 22nd November hearing within a tribunal setting, is further illustrated by comments made by Judge Lewzey in the table below, once again highlighted for emphasis. These comments are taken from her 7th February 2014 judgment on the subsequent unsuccessful application for leave to amend (handed down 19th May 2014 with reasons sent to the parties on 21st May 2014) which I reviewed as mentioned at paragraphs 57 and 58 above.

Paragraph	Judgment	My comments
6	"It is not in dispute that to strike out a claim is a judicial determination. Equally, a judicial determination may not require a consideration on merits. At the preliminary hearing …The Respondent at that time said that the Claimant would have to seek leave to amend and that is reflected in the reasons by Employment Judge Clark. Mr Nugent did not apply to postpone the preliminary hearing in order to make the application for leave to amend but agreed that it should	The option of applying to have postponed the hearing, at the hearing on 22nd November and seeking leave to amend on that occasion is set out by the judge. It is clear from these words (absent any other material) that Judge Clark was not invited to adopt any different course other

	proceed. The application for leave to amend was in fact made on 6 January prior to the preliminary hearing for case management purposes on 7 January…. "I have been referred to Sodexho v Gibbons [2005] ICR 1647 in which His Honour Judge Peter Clark stated: "By analogy it seems to me, a strike-out order made by a chairman under rule 20(4) is a judicial determination. It is final because the claim cannot be re-litigated in the Employment Tribunal".. (it is quite clear on these authorities that Employment Judge Clark made a judicial determination at the hearing on 22 November, indeed the reasons for her decision showed that she looked at the law and the basic facts. There has therefore been a determination of the Claimant's claims of direct disability discrimination and failure to make reasonable adjustments …For those reasons I am satisfied that this is a situation where cause of action estoppel applies to prevent the application for leave to amend being granted".	than to proceed with the striking out. The subsequent comment reflects the view that once the striking out had been determined the claim for disability discrimination was non-salvageable in the tribunal
9	"Even if this were not cause of action estoppel, the amended claim is an attempt to reintroduce the same claims that had already been dismissed and would be precluded by issue estoppel."	
10	"I have also heard argument about abuse of process….At the preliminary hearing in November Mr Nugent took a view that he did not need leave to amend, but was aware of the difficulty with the claims as pleaded. It would have been open to him to ask for the preliminary hearing to be postponed in order that he could apply for leave to amend, however he did not do so. …Mr Nugent has suggested that he anticipated making an application for leave to amend but he did not make it at the preliminary hearing, nor is there a record of that set out in the judgment. The application was not made until 6 January 2014. The proper course would have been to seek a postponement of the preliminary hearing so that the application for leave to amend could have been addressed prior to the strike out application being considered. To allow this application for leave to amend would amount to an abuse of process".	By again stating it was open to Mr Nugent to ask for a postponement at the preliminary hearing it seems obvious on the plain words used that the hearing date itself was the "last chance saloon" to at least attempt to save the disability discrimination claims. It may not have been desirable to leave matters to the "last chance saloon" but as a matter of pure procedure it does not appear impossible to have saved the claims on 22nd November. The value of that lost chance would seem to me to require judicial evaluation when further material is available.
12	"The claims of disability discrimination ….were struck out ..and therefore there are no extant claims. Mr Nugent seeks to introduce these claims as new claims. However they are out of time as the ET1 was presented to the Tribunal on 14 April 2013.Mr Craig has referred me to…a letter dated 9 September 2013 ..in which the Respondent said there were no	Once again the judicial comment about the timing of steps to remedy the claimant's case does not state that the point of no return had already passed by 22nd November-there is use of the word "could" not "must" and

	reasonable prospects of success. Notwithstanding that letter, the matter continued to the preliminary hearing on 22 November …It is quite clear that the Claimant could have made this application well before the preliminary hearing on 22 November or sought a postponement of that preliminary hearing in order that the application be made."	the option of applying for a postponement is also clearly set out

62. Leaving to one side what was said at the two hearings, I am also particularly mindful that tribunal procedure is much more flexible than that of the courts as it is designed to operate for litigants in person. Therefore, case authorities arising from court litigation, as relied upon by the first defendant, require extra care when considering if they are instructive in a tribunal setting. I have been taken to the extracts from *Harvey*, as contained in the authorities bundle, on the procedure for amending a claim in a tribunal and I note the very wide discretion available to an employment judge at any time up to the substantive (i.e., later than preliminary) hearing. The first defendant's submissions that an application to amend should have been made no later than the end of October 2013, and absent that such an application was doomed to fail, (as per the witness statement in support at paragraph 41.2) does not resonate well with this, nor with the requirement for the judge to take account of all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

63. On the specific point about whether an amended claim would be a new "out of time" claim I cannot find that it is unrealistic or fanciful to suppose that the claimant could win on the point that, procedurally and/or in the exercise of discretion, absent negligence, there was a proper chance (such as would sound in damages) which has now been lost of the tribunal not ruling such a claim out of time. The authorities referred to by the claimant, of *Selkent* and *Harvey*, as summarised at paragraphs 48 -50 are instructive. I prefer the claimant's submissions on the point.

64. In view of my conclusions that I cannot safely hold that an application to amend the claim would *not* have been entertained by the court provided that it was made at least on or before 22nd November 2013, it follows that the relevant threshold for summary judgment on the professional negligence action is not made out in respect of paragraphs 21.1, 21.2 and 21.4. As a result of that decision the "catch all "provisions in paragraph 21.13 are also not susceptible to summary judgment, but I will come to that later.

Determination regarding Paragraph 21.3

65. I have already stated that there is a degree of overlap between the issues relating to this paragraph and that of 21.10. By way of reminder, 21.3 was an allegation about failing to advise the claimant that his disability discrimination claim was without merit and should be withdrawn, rather than dismissed or struck out which relates to events on 22nd November 2013. Paragraph 21.10 related to the failure to apply in September 2014 under Rule 52 for the tribunal claims not to be dismissed but the first defendant argued an earlier withdrawal on 22nd November would already have terminated the disability discrimination claim and that breaches leading to such an eventuality would have occurred "by end of

October 2013 at the latest" such that any effects are time-barred. I will return to the September 2014 situation and paragraph 21.10 of the Particulars at paragraph 86.

66. Given the discretionary powers of the tribunal to which I have been referred above (and which the first defendant has acknowledged) I do not accept the first defendant's submission that it is correct for me to make assumptions only in their favour, sufficient to start time running in limitation, as to how the judge would have exercised her discretion if faced with a withdrawal application, on or after 21st November 2013. This is expressly discouraged by the authority in *ED & F Mann* referred to at paragraph 34 above. My conclusions about the opportunities on or after 21st November 2013, for the first defendant to prevent the strike-out, are as set out at paragraphs 60-63 above.

67. Overall, I prefer the claimant's submissions on the paragraph, and also note again that the lost chance which the claimant is seeking to remedy by these proceedings is the loss of the civil claim for compensation for personal injuries arising through his employment which goes wider than a disability discrimination claim. Therefore, some of the time limit points initially raised by the defendant fall away (about subsequent "new" claims being out of time in the tribunal) and the real issue is whether there is a realistic prospect that the claimant will be able to show that the first defendant could have taken steps on or after 21st November 2013 to secure a withdrawal. I believe there is a realistic prospect, and the full evidence needs to be properly tested before a trial judge. This is not one of the short points of construction amenable to a summary determination that Lewison J, as he then was, referred to in *Easyair*. Accordingly, I dismiss the first defendant's application as it relates to paragraph 21.3.

Allegations concerning negligence in allowing the County Court Personal Injury claim to be commenced out of time in respect of some injury and loss (paragraphs 21.5-21.7)

Submissions by the defendant

68. It was acknowledged that the claimant had accepted, prior to the hearing, that any claim in contract for these Particulars is time barred. Submissions proceeded on the claim in tort. Initially, in respect of paragraphs 21.5-7, the first defendant in preparing for the application, relied upon estoppel /abuse of process in that the civil claim was doomed to failure by the previous strike out in the employment tribunal, which they said was evidenced by the final determination of the civil claim by HHJ Hand QC when delivering his judgment. As such, the acts or omissions causing the damage occurred "from August 2013 or the end of October 2013 and in any event prior to 21 November 2013". There was a bald assertion that the claim was statute barred but without detail.

69. In a second witness statement in support of the application, responding to criticism from the claimant that they had failed to identify the actual point of law they were relying upon, the first defendant stated its reliance upon expiry of the primary limitation period for commencing a civil personal injury action. The first defendant's solicitor submitted that "Insofar as the Court does not consider that the point of law relied upon is adequately identified (which the First Defendant does not accept), the appropriate course would be to permit amendment of the Application Notice to correct matters under CPR 3.10, rather than to dismiss the application".

70. At the hearing of the application, the first defendant relied upon the claimant's own pleading concerning the injury claim becoming statute barred. They contended for actionable damage having been sustained on 30th July 2011 when the primary limitation period expired in tort. On this basis they said the professional negligence claim had been brought out of time. Counsel also submitted that the first defendant did not accept the claimant's view that actionable loss did not materialise in professional negligence until limitation was raised as a defence and observed that any reliance on a section 33 argument had not been pleaded.

71. I have already referenced the case authorities relied upon by the first defendant in paragraphs 10-20 above in respect of when actionable damage occurs for limitation purposes in tort i.e. when there is real damage (*Cartledge*) and a serious risk of a strike-out (*Khan*) and that there is no need to await the defendant's application (depending upon a factual finding by the trial judge, which in that case was that there had been "no good reason" for the delay) if the damage occurred when the primary limitation period was first missed (*Polley*). Also, in *Sciortini* it was held that if a second negligent act did not cause additional loss, then the date of first damage was relevant to trigger limitation for all losses.

Submissions by the claimant

72. The claimant asserted that this group of allegations was drafted because potentially they went to the question of quantification of loss in respect of the value of the lost personal injury claim. They gave the example that if the first defendant seeks to argue that the lost claim is worth less because some of it was out of time, the claimant's response will be that they should have issued it earlier. Submissions therefore focussed in tort, on the fact that there is no bar to issuing a claim outside the primary limitation period, as not all defendants will raise a limitation defence. The time when they do raise such a defence, and it is determined, the claimant argued, is the earliest that a cause of action can accrue in professional negligence. They said it all depends on the individual case and is not amenable to a summary determination.

73. In this case the defence was not served until 21st January 2015 therefore at the time of issue of the professional negligence proceedings, just over 4 years had elapsed from the defence, so the professional negligence claim was still brought in time the claimant asserted, and the issues pleaded at paragraphs 2.5-7 of the Particulars were therefore not statute barred. They insisted that "No loss could conceivably be suffered by the Claimant unless and until the point was taken by UBS in its Defence".

74. The claimant also referred to the fact that a primary limitation period can be extended on application to the court by the claimant under section 33 of the Limitation Act 1980 and cases will be fact sensitive and cannot properly be determined summarily.

75. In response to the assertion that the strike-out in the tribunal prevented the claimant from ever pursuing a wider injury claim than for disability discrimination, submissions had already been made, which I have summarised in previous sections (52-54 and 67), about the timing of acts and omissions on or after 21st November such that a proper withdrawal

application could have been made in the tribunal to protect a subsequent injury claim in the county court.

Determination regarding paragraphs 21.5-7 of the Particulars

76. I consider it important to note at the outset that my determination on the Particulars at paragraphs 21.1-4 also determines my conclusions in respect of first defendant's original submissions about the civil claim being "doomed to failure for the reasons set out in the 3 December 2013 decision in the ET claim and the 2016 judgment". Any separate determination on the Particulars at 21.5-7 is therefore only required in respect of the failure to issue the claim within the primary 3-year period following injury. There is a dispute between the parties as to whether or not time in a professional negligence action in tort will begin to run from the date of the initial failure or the date a limitation defence is raised. I was not taken to any specific case law on that particular point by the first defendant but at paragraph 71 I have already set out their submission as to the general test for when actionable damage occurs for limitation purposes in tort.

77. The underlying factual history is also a little unclear. I do not have a copy of the defence in the county court claim. I have however read the advisory letter of the first defendant to the claimant on receipt of the defence and no limitation point was mentioned; the letter concerns points which the defendant bank was taking which ultimately led to their successful strike-out application on the themes of estoppel and abuse, (similar facts being relied upon in two sets of proceedings) and the judgments on which I have just briefly summarised above.

78. In counsel's outline submissions for the strike-out application in the county court there is reference at [32] to the defendant raising limitation but it was recorded that this was *not particularised in the defence and the point would have to await submissions* on the strike-out application. I have seen no such submissions and the county court judgment does not reference any. Thus, I do not know how or when the limitation point was raised.

79. In his judgment at [19] HHJ Hand QC states, "The Defence also raises a limitation issue at paragraphs 21 to 23, which relates back to the abuse of process point taken in relation to the state of the pleading. It is pleaded at paragraph 16 that in so far as the Particulars of Claim are not otherwise struck out then the Claimant should serve an amended Particulars of Claim…". This does not add to my understanding about the nature of the "limitation" point taken, as a claim started out of time in respect of missing the 3-year limitation point in a personal injury claim is not generally termed an "abuse".

80. I have also seen the second defendant's note of advice on appeal following receipt of the judgment of HHJ Hand QC. This does not reference any limitation points, just estoppel and abuse and advises reasonable prospects of a successful appeal.

81. The judgment of HHJ Hand QC upon striking out the subsequent county court claim, references witness statements from the first defendant and his opponent in the civil claim about their discussions on *carving out the possibility of a future civil injury claim* when agreeing terms to dispose of the tribunal claim in around September 2014. He recorded at [23] the first defendant gave "considerable detail as to the events leading to the dismissal of proceedings [in the ET] on withdrawal. He asserted (see paragraph 19 at page 136 of the

hearing bundle) that "[t]he personal injury claim was *expressly* excluded in the offer and this was confirmed to me by counsel and conveyed to the Claimant" and that during subsequent negotiations between himself and Ms Sartin the latter had not given "the impression that the personal injury claim was being abandoned or dropped". This position had first been articulated in the defence." I do not have full details of Ms Sartin's reply but at [24] the judge says she contended that the first defendant had not availed the claimant of Rule 52, to preserve those claims, which is of course the subject matter of paragraph 21.10 of the Particulars in these proceedings. The judge subsequently went on to strike out the claim as an abuse of process as it was based on the same facts as the claim in the tribunal which had been struck out and/or dismissed without a Rule 52 exception having been created, such as to create a situation of res judicata/estoppel. The important point is that there was no reference to a limitation point having been taken.

82. Furthermore, when this application was first issued the first defendant had also sought summary judgment on Particulars at paragraph 21.9 which read as follows: "Failing to ensure that there was a signed agreement or undertaking with UBS AG which recorded that the Civil Claim would be preserved following the withdrawal of the ET Claim on 9 September 2014." They have now agreed with the claimant that this is a triable issue unsuited to summary determination.

83. The question is when did the actionable damage occur in tort, such as to start time running for the claimant's professional negligence claim for the loss of a chance to claim damages for personal injury in the county court. I do not believe I have the necessary facts in front of me to determine that question, nor indeed the full legal argument (the latter having been anticipated perhaps in counsel's request not to dismiss this part of the application if I was not satisfied as to the legal basis for it, but rather to allow permission to amend). It is not clear to me that the limitation point (in respect of a 3-year time limit) was ever taken formally, even in the pleading in the county court, and it appears to have been omitted as an issue in the formal application to that court, seeking to have the claim struck out.

84. In all the circumstances, the test for granting summary judgment on this part of the application is not made out. I cannot properly assess the prospects of success due to the incomplete nature of the evidence (it being obvious that further material does exist which is material but not before me) and there are certainly compelling reasons for the issue to proceed to trial because of both the factual uncertainties and the apparent interdependence of this allegation with others to be evaluated on the overall loss of a chance. If the first defendant considers that the matter has become inadvertently clouded, as hinted at in their submissions, this may be a topic for consequential directions upon which I would require brief further submissions from both parties.

Allegations concerning negligence in allowing the loss of a chance to bring a civil claim subsequent to the Tribunal one (by operation of Rule 52) paragraph 21.10

Submissions by the defendant

85. It is noteworthy that submissions were not made attacking the availability of the Rule 52 mechanism as such, in circumstances where the disability claim had not been struck out previously. The defendant instead focussed on two points, first the inconsistency which

they said existed between the claimant's pleading at paragraph 21.3, (failure to advise to withdraw the disability aspect of the claim as without merit), which I have already dealt with, and this paragraph where there was a failure to preserve it. The second point relates to their previous submissions that there was nothing to preserve in that a relevant issue estoppel arose from the decision of the Clark tribunal following the hearing on 22nd November 2013, as recognised by the Lewzey tribunal and any acts or omissions causing that were said to be time barred in the professional negligence claim as they related to events prior to 21st November 2013.

86. The first defendant recognised that HHJ Hand QC had accepted "in one sense" that the broader issue of the return to work as a basis for seeking compensation (as opposed to the narrower disability discrimination claim) had not come to an end as result of the Clark tribunal strike-out but due to the dismissal on withdrawal of the remainder of the employment tribunal claim in September 2014. However, the first defendant still pointed to breaches occurring no later than the end of October 2013 as being causative of this. This was for two reasons. They maintained that the balance of the civil claim (beyond disability discrimination), had been struck out by HHJ Hand QC because it was based on the same facts that had been relied upon in the tribunal, following a determination on the merits, and therefore was an abuse as well as being estopped. Furthermore, they argued that as the tribunal had made a decision on the merits of the claim, it therefore could not be revived.

87. Finally, the first defendant maintained that it was wrong to consider different parts of the damage as having been caused at different points in time, such that those breaches alleged to have occurred outside what they believed to be the time frame for commencing this professional negligence action were to be disregarded, and others which they could not contend were statute barred were permitted to give rise to actionable damage. This was because they said all the actionable damage flowed from the original breaches and *Sciortini* was good authority for this proposition.

Submissions by the claimant

88. On the first topic of submissions by the first defendant, the claimant had already clarified the purpose and extent of his pleading at paragraph 21.3 of the Particulars (see paragraphs 51-55 above). In respect of the remaining submissions the claimant repeated points made previously, that the Clark tribunal finding could have been avoided at any time on/after 21st November 2013 and that the defendant did not need to have taken steps by the end of October 2013. On that basis an application could have been made pursuant to Rule 52, to preserve all aspects of the injury claim, such that the claimant has a viable loss of a chance claim, relating to the prospect that the tribunal would have granted the preservation of rights to bring a subsequent civil claim.

89. In the alternative, the claimant sought to persuade me that even if the disability discrimination claim could not have avoided being struck out on 22nd November, the court at trial would still need to make a finding as to whether the November 2013 breach entirely caused the civil claim to be lost or diminished or had no impact on the loss of the chance claim; in the alternative what impact the further breaches in September 2014 had on the overall losses. The claimant did not accept the defendant's criticism of failure to plead expressly a case that he can still succeed in his lost chance claim, even if the November 2013 allegations are struck out, as he said he does not need to plead how every permutation on breach affects causation. These calculations as to loss of a chance should

be reserved for trial he maintained, in part because there is an interplay with the Particulars at paragraph 21.9 alleging a failure to secure a signed written agreement to preserve the civil claim (which the first defendant had latterly accepted raised proper triable issues). In any event, the claimant contended, the actions and omissions around the time of dismissal of the employment tribunal claim in September 2014 are not time-barred and therefore not susceptible to summary determination on the basis mounted in the first defendant's application. On the res judicata point the claimant maintained the principle only applies to issues between identical parties, but in this case they are not the same parties as in the underlying cases in the tribunal and county court which involved UBS.

90. The claimant's solicitor's witness statement resisting the application referred to his own practice in commencing claims in the tribunal, then withdrawing them successfully to pursue personal injury claims in the courts. I am only to consider facts, not evidence, on a summary judgment application, but the bundle also contained the judgment of HHJ Hand QC which contained a number of findings about the practice surrounding Rule 52.

Determination regarding Paragraph 21.10 of the Particulars

91. I have already resolved the point about the interplay between allegations at paragraphs 21.3 of the Particulars and 21.10 at paragraphs 65-68 and will say nothing further on that. Similarly, I have made a determination that there is a realistic prospect of the claimant proving that the strike-out of the disability discrimination claim following the hearing on 22nd November 2013 was due to acts or omissions on or after 21st November 2013, such that the claimant's losses in this action are not out of time.

92. The remaining issue for me to determine therefore is whether the claimant has a realistic prospect of proving, if the strike-out had not occurred and/or the disability discrimination claim had been withdrawn (and not revived in the tribunal) that the failure to apply under Rule 52 to preserve the balance of the civil claim was causative of losses from the failure of the civil claim. It is immediately apparent that if this event (the failure to apply at the end of the claim under Rule 52) is viewed as a stand-alone allegation it is not out of time, which was the basis upon which the first defendant mounted this application, having occurred in September 2014. In view of the other determinations already made on this application it is not appropriate to consider at this point whether there is no realistic prospect of the claimant proving that he suffered additional losses in September 2014, on top of those caused by the previous strike-out and/or failure to withdraw (the *Sciortini* point).

93. In terms of the stand-alone allegation, (even though I do not believe it is time-barred and therefore strictly it falls outside the subject of the application), I find it helpful to review what was said in the judgment of HHJ Hand QC on striking out the civil claim. I have added emphases in bold. At [24] of that judgment he refers to a third witness statement by UBS to the Tribunal, "she points out the Claimant had not sought at the hearing before the Snelson Employment Tribunal to avail himself of rule 52…with the result that the proceedings had ended by virtue of rule 51 of the ET rules ". At [29] HHJ Hand QC explained, "**What rule 52 does** is make the position in the Employment tribunal analogous to that in the civil courts where it has always been recognised that the discontinuance of proceedings does **not operate as a bar to the bringing of further proceedings based on the same facts and/or cause of action**. He went on to describe how rule 52 gives the

employment judge a limited discretion to "either accept a reservation of right to bring further proceedings in the Employment tribunal on the basis that there is a "legitimate reason for doing so" or state a belief that it is not "in the interests of justice" to prevent such further proceedings". At [68] he continued that, "A case which has been "dismissed on withdrawal" represents an adjudication on the merits even if, as it were, a single shot has not been fired." He accepted "in one sense the disability discrimination point was never considered on the merits" at [69]. Then at [72] "if I were to allow this matter to proceed now I would be constituting myself as some kind of appellate court from a decision discussed twice in a different forum some two years ago. In other words I would be sanctioning a revival of the case that should have been raised properly but was not ..". Having recognised that part of the claim relating to the return to work had lived on in some sense in the unfair dismissal claim until the conclusion of the tribunal proceedings he then said, at [74] "This way of putting the case was extinguished by the dismissal on withdrawal of the Snelson Tribunal…. The attempt to revive it in these proceedings ..falls within the absolute bar to resurrection identified by Lord Sumption…".

94. I conclude from reading the judgment of HHJ Hand QC that a) he recognised there were injury claims *additional* to the disability discrimination ones (at [71and 73]) and b) they were based on similar facts concerning the return to work (at [71]) and c) those same facts could not now be adjudicated upon, because they had already been adjudicated, in respect of disability discrimination by the Lewzey tribunal (at [73]) and in respect of the issue of the return to work (at [74]) by dismissal on withdrawal (i.e. Rule 51 in the absence of a Rule 52 application) such that the claim fell within the absolute bar to resurrection identified by Lord Sumption in the *Virgin* case. At one point in the judgment HHJ Hand QC had questioned whether Rule 52 existed to permit renewal of a claim in a jurisdiction outside the tribunal, but he was taken to numerous examples of where this indeed had happened. The key question was whether there had been a prior judicial determination of issues on the merits. In this case he said there had been, which created an estoppel. As to whether similar facts can be raised in a new cause of action where there has been no judicial determination on the merits, the issue would be subject to the exercise of judicial discretion. The way that discretion would be exercised is not a foregone conclusion (else it would not be discretion) and therefore is properly the subject of a loss of a chance determination at trial. The decision in *Ako* also supports this conclusion. I cannot therefore find that there is no realistic prospect of success for the claimant in proving loss on the basis of his allegation at paragraph 21.10. In any event, as referred to above, I cannot find that this allegation is time-barred in this professional negligence action when the allegations at paragraphs 21.1-4 remain live issues as I have not considered them appropriate for a summary determination.

95. Furthermore, I believe additional evidence will be required before any final determination in order to assist with the evaluation of the lost chance. It appears from the signed statement of the claimant's solicitor that legal argument on the point could well be supplemented by further witness evidence, and case reports of other claims where Rule 52 has not resulted in a dismissal. The chance of a judge making a determination that the claimant's civil injury claim could have been preserved is therefore not fanciful, and the claimant's loss of that chance should be the subject of proper evaluation, with the benefit of all the available evidence and full argument at trial.

Allegations concerning the loss of a chance to protect the claimant from adverse costs (paragraph 21.12)

Submissions by the defendant

96. The defendant sought to rely upon the same arguments deployed in respect of paragraph 21.10, namely that the alleged breaches in contract and tort, and any actionable loss arising, occurred no later than the end of October 2013, (or certainly prior to 21st November 2013) such that this allegation within the professional negligence claim is brought out of time, and should fail. The reasoning supplied was that as the defendant contends the civil claim was doomed to failure as a result of the strike-out decision of 22nd November 2013 due to acts and omissions well before 21st November 2013, a claim in professional negligence is time-barred.

Submissions by the claimant

97. The claimant submitted through counsel that once the tribunal claim had been dismissed, without any agreement to preserve the civil claim, it was always at risk of being struck out on grounds of res judicata. It was therefore negligent to issue (or more correctly to serve) proceedings which ultimately led to a costs order against the claimant and a bill to pay.

98. It was further submitted that even if the defendant was correct about when the cause of action arose in respect of the strike out of the disability discrimination claim, the claimant does not understand how this allegation in respect of costs can be said to be raised out of time, given that the civil claim was issued less than six years before this professional negligence claim began.

99. I note that the witness statement filed by the claimant's solicitor makes some additional points to counsel's submissions, in that he did not consider it could be said HHJ Hand QC's judgment was a foregone conclusion i.e., that the proceedings were doomed to fail and he refers back to the second defendant's advice on the prospects of a successful appeal. This also, it was submitted, would undermine the limitation argument which I was being asked to determine against the claimant due to the timing of his issue of the professional negligence action, as the Hand judgment was delivered much later than the tribunal strike-out in November 2013.

Determination regarding Paragraph 21.12 of the Particulars

100. The defendant's submission relies upon my determination, that the latest chance for the claimant to correct matters procedurally and avoid a claim strike out (according to the separate tests in both contract and tort) was more than 6 years before these professional negligence proceedings were launched. I have already rejected the suggestion that there is no realistic prospect of the claimant succeeding in showing that acts or omissions on or after 21st November 2013 could have prevented the strike out, at paragraph 64 above. In addition, it appears that enforcement of the costs liability arose because the claimant lost his QOCS shield in the county court due to a finding of abuse (the second defendant's note of advice on appeal dated 23rd June 2016 at [16]). Such a finding was only made in consequence of the issue of the county court claim by the first defendant on 30th July 2014, and more importantly the service of those proceedings on 27th November 2014, so I fail to

see how it can be said that the allegation is made out of time in the professional negligence action. Accordingly, I find that the claimant has a realistic prospect of success, as I do not believe the allegation is time-barred. If there was to be any adjudication of the relevant contribution of different acts of negligence (in both contract and tort) on different dates towards overall losses, that would not be suitable for a summary determination in any event, such that this allegation, along with others that I was asked to consider, would need to be properly examined at trial when full evidence was available and could be rigorously tested on cross-examination.

101. To conclude I reject the defendant's application in respect of paragraph 21.12.

"Catch all" allegations concerning negligence prior to 21st November 2013 for failure to take sufficient care in the conduct of the Tribunal claim (paragraph 21.13)

Submissions by the defendant

102. It was submitted that this paragraph adds nothing of substance to the remainder of the allegations at paragraph 21. It was further submitted that if I accepted the claimant's case was statute barred in its entirety, then the defendant should succeed in securing summary judgment on this paragraph also.

Submissions by the claimant

103. No specific submissions were made by the claimant in their skeleton argument, concerning this point, no doubt it being implicit that the paragraph stands or falls on my determination of the other paragraphs.

Determination regarding paragraph 21.13 of the Particulars

104. It would be inappropriate for me to order summary judgment on this paragraph in the Particulars as it is dependent upon my rulings in respect of other paragraphs where I have found against the first defendant on the application.

PART TWO

Consideration of the test in CPR 24.2 a) (ii): No other compelling reason why the case should not be disposed of at trial

105. Although I have reached the view that the claimant has a real (not fanciful) prospect of success in proving the allegations made within the paragraphs under consideration above, I received some generic submissions as to this second aspect of the summary judgment test to which I will now turn. I have already remarked in respect of some of the allegations in contention that the evidence requires to be tested at trial.

Submissions by the defendant

106. The defendant submitted that there was no compelling reason for any of the paragraphs in the Particulars of Claim which were the subject of their application, to be disposed of at trial. They maintained that the fact there are some similar issues raised against the second defendant, as those that relate to the first defendant is not a compelling reason.

107. The defendant said that logically the trial would be shorter if the issues were narrowed now, which would be in accordance with the overriding objective. They sought to distinguish the *Iliffe* case relied upon by the claimant on the basis that it involved a dispute where there were third, fourth and fifth parties such that Jackson LJ held at [72] it was inappropriate to grant summary judgment "when similar issues remained to be determined at a full trial as between the other parties". At [73] he continued "The claimants will have to participate in the trial, because they need to prove the quantum of their damages". The defendant further submitted that this is not case where the defendants are blaming each other, and it is common ground that the second defendant will be involved later.

Submissions by the claimant

108. The claimant made a number of submissions as to why a determination should only be made at trial. First, they contended that the reason that the defendant conceded its application in respect of paragraph 21.9 shortly before the hearing, applies equally to arguments in respect of paragraphs 21.1-4 and 21.10, in that they raise triable issues. The reason given for 21.9 being conceded was because "it depends in part on whether the Claimant's opponent would have been prepared to act in the manner alleged". The claimant contended that a number of issues require such evaluative judgment as to how the parties, and the relevant judges, would have determined matters in a non-negligent setting. He submitted it is not correct for me simply to rely on assumptions made in the applicant's favour. Insofar as the allegation at paragraph 21.12 is said by the first defendant to relate back to matters complained of at paragraphs 21.10 (which is not accepted by the claimant), that would make it part of the interlocking matrix of facts, events and argument which the claimant had already submitted should be reserved for trial.

109. The claimant believes further factual material will be available on disclosure which would add to or alter the evidence before the judge and has the potential to alter the outcome.

110. The claimant also referred to the fact that this is multi-party litigation and similar issues remain to be determined at trial against the second defendant. Contrary to the submissions made by the first defendant he argued that the first defendant will need to participate in the trial in any event. In this regard he relied on the decision in *Iliffe v Feltham Construction Ltd* [2005] EWCA Civ 715. Counsel also submitted that even if I granted the defendant's application "it is highly unlikely that it will reduce cost or time involved in preparing for trial, or indeed the costs and length of trial itself".

111. Finally, the claimant also submitted that the facts and issues are not properly susceptible to a summary determination as they are not straightforward short points of construction, as evidenced by the length and complexity of the submissions and material put before me.

Determination regarding the test in CPR 24.2.a) (ii)

112. Although I was not taken to it, I have had regard for the headnote in *Sciortini* at page 366 D-E where it was recorded that "it was not the case that, because of the absence of expert

evidence, allegations of negligence against a solicitor or barrister were ordinarily capable of being resolved by way of summary judgment; that, rather, although allegations of professional negligence against a solicitor or barrister were capable of resolution at an interim stage, that would be very much the exception rather than the rule". Coulson LJ noted that in these types of action, the allegations are often the subject of detailed evidence from the lawyers involved, at [88]. He also accepted the question of the context in which steps have been taken/not taken can be very important [at 95] and that a trial of the allegations of negligence could require a detailed consideration of the context and factual background. Furthermore, where there have been consecutive negligent acts or omissions, some within time for mounting a professional negligence action, and others which are statute-barred there needs to be a careful scrutiny as to the separate and distinct losses attributable just to the cause of action brought within time.

113. In my judgment those paragraphs which the first defendant has sought to have summarily determined illustrate the point well made by the claimant that the allegations involved are not of the type where a short point of construction can be determined in order to narrow an issue. An unusual feature of this application by one defendant only, is that on a comparison of the allegations pleaded against the first defendant, and those pleaded against the second defendant there is a huge overlap, such that I do not consider the factual issues to be determined at trial would be narrowed significantly if this application were successful. I prefer the claimant's submissions in this regard.

114. Assertions by the solicitor for the first defendant in his witness statement such as at paragraph 41.2.2 that the tribunal "would not have exercised its discretion to extend time in the Claimant's favour" do not sit well with the authorities on the correct boundaries as to when to make a summary judgment determination i.e. I should not conduct a mini-trial and should be mindful of other evidence that may reasonably be available at trial.

115. I also prefer the claimant's other submissions in respect of disclosure, and I have already identified some documents which it is reasonable to conclude are likely to exist but are currently not available to me, and which would be likely to contain factual information which would add to or alter the evidence available to a trial judge and therefore could reasonably be expected to affect the outcome of the case. I have tabulated those documents below, for illustrative and non-exhaustive purposes, simply to demonstrate that I currently have an absence of significant, relevant factual material, and which should be available to a trial judge on a full determination.

116.

Date	**Significant event**	**Documents available**	**Missing documents**
Undated but believed to be 14th April 2013	Employment Tribunal claim issued by claimant	Additional information section from claimant's ET1 (2 pages)	Balance of ET1 and ET3 and remainder of ET file, including directions, such as those issued on 24.10.13. Also, instructions received from claimant as to information for his claim. Correspondence with

			claimant's BTE insurer
Undated but believed to be 21 Nov 2013	Preparation for preliminary hearing on 22.11.13	Second defendant's skeleton argument	Instructions from claimant's solicitor and skeleton from UBS. Pre-hearing correspondence between the parties as relied upon at the hearing on 7.2.14
22nd November 2013	Employment Tribunal Preliminary Hearing	8 page Judgment/Order dated 3.12.13 and marked sent to the parties with reasons 13.12.13	Notes of hearing Correspondence with claimant's BTE insurer on prospects of success before and after the hearing. Any file notes/correspondence of discussions with claimant or his counsel
6th February 2014	Hearing to amend ETI on 7.2.14	Claimant's skeleton argument	UBS skeleton argument
7th February 2014	Hearing of application for leave to amend in Employment Tribunal	7 page document headed "Reasons" written by Judge Lewzey	Notes of hearing. Correspondence with claimant's BTE insurer on prospects. Any file notes/correspondence of discussions with claimant or his counsel
Undated but believed to be 30th July 2014	Issue of County Court Claim for damages from UBS for personal injury arising from employment	Claim form	Application for BTE insurance by the claimant and any subsequent correspondence
25th November 2014	Statement of Case in County Court	Particulars of Claim	Advices to client on prospects
27th January 2015	Receipt of Defence	Solicitor email to claimant, advising injury claim could not have been brought in Tribunal (and referencing that counsel has advised)	Defence Notes of conversations and/or correspondence between claimant's solicitor and counsel and BTE insurers

20th February 2015	Application to strike out all or part of the claim or in the alternative for the claimant to serve an Amended set of Particulars	Application notice	Witness statement in support or any reply Notes of conversation and/or communications between claimant's solicitor and counsel and BTE insurers on prospects
3rd November 2015		Claimant solicitor email rejecting Defendant's offer to withdraw the claim, without costs payable	Offer itself with any reasons. Notes of conversation and/or correspondence between claimant's solicitor and counsel and BTE insurers
5th November 2015	Defendant's application listed for 6.11.15	Claimant's outline written submissions of counsel for application 6.11.15	Any submissions filed by UBS
23rd December 2015	Hearing of UBS application	Approved 21 page judgment of HHJ Hand QC dated 16.6.16	Transcript
23rd June 2016	Receipt of County Court judgment	Claimant's counsel's Note of Advice on Appeal	Any file notes or letters of claimant's solicitors discussing matters/prospects with the claimant or counsel in particular and his BTE insurers

117. But the evidence may well go further than documentary evidence. The defendant has criticised the claimant's solicitor for filing a witness statement in response to this application which contains paragraphs reflecting his personal experiences of how tribunals have made similar determinations in the past, to the ones I am asked to assume that Judge Clark would have made. And in the second defendant's advice within the bundle, he too reflects on previous decisions and experiences. I have already made the point that I cannot conduct a mini-trial and test such evidence. The proper forum for that process is at a full trial where both full documentary disclosure and oral evidence is available. I prefer the claimant's submission that the evidence is likely to be required not only from the claimant and second defendant at trial, but also from the first defendant. I noted that the first defendant submitted evidence to the county court judge about his part in events in the tribunal claim.

118. Finally, it should be self-evident that the number of points of law and complexity of the arguments presented to me for a summary determination following a short hearing, do not fulfil the definition of a short, simple point of construction. There is a complex factual matrix lying behind the allegations and proper findings of fact need to be made at trial after testing the evidence, so that the law can be correctly applied.

OVERALL CONCLUSIONS

119. Whilst I am mindful of the overriding objective and the need to "grasp the nettle" and narrow issues early wherever sensibly possible, the points raised by this application are not short points of construction, nor ones where I can find there are no realistic prospects of success. To conclude, I dismiss the first defendant's application in respect of all the paragraphs remaining in issue at the time of the hearing, although I have left open the possibility of consequential directions regarding Particulars at 21.5-7 where there may possibly need to be further submissions.

120. I also found there was a compelling reason for trial in respect of those allegations, for much the same reasons as Coulson LJ noted in *Sciortini,* as referred to at paragraph 111 above.

121. In view of my determination on the summary judgment application there was no need to consider the strike out application.