Neutral Citation Number: [2024] EWCA Civ 86

Case No: CA-2021-001782A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT
His Honour Judge Pelling KC (sitting as a Judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/02/2024

Before :

LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

Between :

MICHAEL WILSON & PARTNERS LTD	**Applicant and Appellant**
- and -	
(1) J. F. EMMOTT **(2) M.B. ROBINSON** **(as one of the Executors of M.L.B. Robinson (Deceased))** **(3) M R LAW LIMITED** **(4) KERMAN & CO LLP** **(5) P.A. SHEPHERD KC** **(6) SHEPHERD LEGAL LIMITED** **(7) T. I. SINCLAIR (A BANKRUPT)** **(8) SOKOL HOLDINGS INC.**	**Respondents**

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Joseph Dalby SC (Ire) (instructed by Michael Wilson, solicitor, on behalf of Michael Wilson & Partners Ltd) for the **Appellant**
P. J. Kirby KC (instructed by **Armstrong Teasdale Ltd**) for the **2nd to 4th Respondents**
Charles Dougherty KC (instructed by **DAC Beachcroft**) for the **5th and 6th Respondents**
The 1st Respondent did not appear and was not represented.

Hearing date: 31 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7TH February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. This is the latest instalment in what Peter Jackson LJ once appositely described as "pathological litigation" between two solicitors and former business associates, Mr Wilson and Mr Emmott. It is an application by Mr Wilson's company, Michael Wilson & Partners Ltd ("MWP") under CPR 52.30 to re-open an appeal for which permission was refused on the papers on 10 December 2021.

2. On 20 July 2021, His Honour Judge Pelling QC (now KC) sitting in the Commercial Court ("the Judge") made an order ("the Order") refusing as totally without merit an application by MWP to rescind, set aside, vary or otherwise stay an order that the Judge had made of his own motion on 9 June 2021 striking out a claim form filed by MWP in April 2021. The Order was made following a contested oral hearing at which MWP was represented by leading counsel, Mr Francis Tregear QC. The circumstances leading to the strike-out are more fully described later in this judgment.

3. The claim form was issued under Case Number CL 2010-000804, but that number had already been used in existing proceedings for a claim originally issued in 2010 against Mr Emmott and other defendants who are not concerned in these proceedings ("the original 804 proceedings"). I shall explain in due course how this came about, and what steps were taken to deal with that irregularity and with other problems which subsequently came to light. I shall refer to this claim form as "the second 804 claim form" and the underlying claim as "the second 804 claim".

4. MWP sought permission to appeal against the Order. The Judge refused, and an application for permission to appeal and for a stay of the Judge's costs order was made to the Court of Appeal. By then, Mr Tregear had ceased to be involved in the case, and the original "outline" grounds of appeal and skeleton argument, and amended versions of those documents, appear to have been the handiwork of Mr Wilson.

5. Subsequent to the lodging of those documents, a further document entitled "Supplementary Skeleton Argument of MWP relating to its appeal from the ex-tempore Judgment & Order of HHJ M.P. Pelling QC of 20.07.21" settled by Mr Joseph Dalby SC (Irl) and dated 22 October 2021, was filed with the Court of Appeal. For ease of reference, and without intending any disrespect, I shall refer to this as "the Dalby skeleton." Permission to rely on the Dalby skeleton was granted by Master Bancroft-Rimmer on 25 October 2021. She directed MWP to update the appeal bundles to include that document, and that direction was complied with.

6. The application for permission to appeal came before Males LJ to consider on the papers. On 10 December 2021 he made an order (sealed on 14 December 2021) refusing the application, describing the proposed grounds of appeal as "hopeless". He gave comprehensive reasons for that view, and certified the application for permission to appeal as totally without merit.

7. On receipt of the order of Males LJ, MWP emailed the Court on 12 January 2022. The material parts of that email read as follows:

> "In looking at what is stated in the Order, it would appear that, most regrettably and unfortunately, Males LJ did not have before him MWP's updated appeal Skeleton and enclosures of 22 October 2021…
>
> Accordingly, we also wonder what version of the Appeal Bundles Males LJ actually had before him – as you know, the last version filed and served was 5 November 2021 (with prior versions in August, September and October 2021, which were also E-filed via the DUC, as and when the various materials became available)….
>
> ..please would you be so kind as to very carefully check, advise and confirm precisely which Skeleton, what Bundles and materials were actually before Males LJ, so we can consider the position in the round, and revert further to the Court of Appeal."

8. The matter was investigated and, after some initial confusion, it was confirmed that Males LJ had before him the latest bundles for the appeal uploaded to the system as at the date of referral (25 November 2021) including an updated Core Bundle which included, at Tab 13, the Dalby skeleton. On 14 January 2022, MWP was informed by the Court office that "should you wish the matter to be reconsidered, you should apply for the matter to be re-opened under CPR 52.30." On 22 January 2022, MWP sent an email to the Court indicating an intention to do so.

9. That application was not made until 1 April 2022 (the application notice was sealed on 13 April). Despite the absence of an explanation for it, that delay was not so egregious as to justify refusing to entertain the application.

10. The application to re-open was supported by a witness statement of Mr Wilson dated 4 April 2022, which contains a great deal of argument. However no skeleton argument in support of the application was ever lodged. This is, to say the least, unfortunate, as it meant that many of the submissions made by Mr Dalby to us when addressing the test for re-opening this appeal were aired for the first time at the hearing. It appeared that they also came as a surprise to the Respondents' counsel, Mr Kirby KC and Mr Dougherty KC. Nevertheless, they both took a pragmatic approach to the situation and made helpful, succinct submissions in response.

11. The application to re-open was amended in August 2022. Mr Wilson filed a second witness statement in support, dated 14 August 2022. He told the Court in paragraphs 32 and 33 that (contrary to what Males LJ had believed to be the position, as recorded in his original order refusing permission to appeal) MWP had issued a fresh claim form on 9 September 2021 (CL-2021-000532) and that MWP had also filed and served draft Amended Points of Claim in those proceedings. I shall refer to the new claim form as "the 532 claim form". The subject-matter of the 532 claim was materially identical to the subject-matter of the claim that MWP wished to bring in the second 804 proceedings, and the only difference to the parties was that Mr Sinclair was omitted from the list of defendants.

12. The 532 proceedings and the stage they had reached by October 2021 had been referred to extensively in the Dalby skeleton, which lent some support to the view that Males LJ had not read it. The Dalby skeleton also mentions the fact that Mr Emmott

had served a defence in both sets of proceedings raising limitation, but without particularising the same.

13. Mr Wilson's 14 August 2022 witness statement in support of the re-opening application also made reference to a further judgment of the Judge which was delivered on 17 June 2022: [2022] EWHC 1550 (Comm). That judgment was delivered in the original 804 proceedings (i.e. those issued in 2010 against Mr Emmott). Although Males LJ considered it to be irrelevant to this application, in the light of how Mr Dalby's submissions developed at the hearing I will need to say something about it in due course.

14. What is quite remarkable is that Mr Wilson's second witness statement does not refer to the fact that on 1 July 2022 the Judge had handed down a judgment in the 532 claim: [2022] EWHC 1481 (Comm), in which, following a contested hearing at which MWP was represented by Mr Dalby, he had (i) granted summary judgment to the 6th defendant on the basis that "at a factual level there is no evidence at all that justifies the commencement or continuation of this claim against it," and (ii) struck out the claim against the 2nd to 5th defendants as an abuse of process and/or for disclosing no reasonable cause of action, making it clear that they would have been entitled to summary judgment in the alternative. No explanation has been provided to us for the omission of that significant piece of information from Mr Wilson's evidence; the fact that MWP was seeking to appeal against the strike-out/summary judgment order is no excuse.

15. One of the matters that the Judge referred to in that judgment was that there was no application (then) before him for permission to amend the Particulars of Claim in the 532 proceedings. He ruled that new causes of action could not be introduced into those proceedings by means of a document which purported to provide voluntary further information about the claim ("the VFI"). Subsequently, MWP made an application to re-open that judgment and an application for permission to amend the Particulars of Claim to cure that deficiency, both of which the Judge refused because he had already made it clear in his judgment that the claims sought to be introduced by way of amendment had no real prospect of success. As I shall explain, this has some bearing on the present application. The date of that ruling is not clear, but it may readily be inferred from their timing that the amendment of the re-opening application and the filing of Mr Wilson's 2nd Witness Statement were a response to the fate of Claim No. 532. Mr Kirby informed us that the Respondents were not served with that Witness Statement. They were therefore unable to cure the deficiencies in the evidence before the application went before the single LJ.

16. The application to re-open the appeal was put before Males LJ to consider on the papers. On 1 September 2023, he made an order directing that notice of the application be given to the Respondents, and that it be listed for an oral hearing before two LJs with a time estimate of half a day. In that order he said that he could not now recollect whether he read the Dalby skeleton when he made the order refusing permission to appeal. It was possible that it had been buried in voluminous irrelevant material without his attention having been drawn to it. On the whole, he thought it unlikely that he saw the Dalby skeleton before making his order. The Dalby skeleton made submissions which *provisionally* appeared to him to give rise to an appeal with a real prospect of success. It was therefore arguable that it was in the interests of justice for the appeal to be re-opened.

17. As I have already indicated, Males LJ made it clear in paragraph 4 of his order that the application was to be limited to the issues raised in the Dalby skeleton, in particular as to the circumstances in which the second 804 claim form came to be issued with the 804 number, the effect of the subsequent directions given by the Judge, and whether striking out was a proportionate step. He gave some further case management directions, including directions that notice of the application be given to the Respondents, and directions for the filing of Core and Supplementary bundles which complied with CPR PD52B paras 6.3 and 6.4 (a huge mass of irrelevant documentation having been lodged with the court by MWP).

18. Pursuant to those directions, skeleton arguments were filed by Mr Kirby on behalf of the 2nd to 4th Respondents and by Mr Dougherty on behalf of the 5th and 6th Respondents. These Respondents were the 2nd to 4th and 5th and 6th Defendants to the second 804 proceedings *and* the 532 proceedings. Mr Emmott, who now represents himself, has taken no part in this application, although he was present and made submissions at the hearing before the Judge in July 2021 which led to the Order. The active Respondents also obtained permission to file their own bundle of relevant documents. It is fair to say that those documents and the skeleton arguments put a completely different complexion on the case. I am inclined to agree with Mr Kirby's description of this application as "without merit and a complete waste of the court's and [the Respondents'] resources."

19. When Males LJ was considering the application to re-open, he only had the Respondents' brief statements that were filed in opposition to the original appeal pursuant to paragraph 19 of PD52C. The fate of the 532 claim had not been specifically drawn to his attention. As it happens, and purely coincidentally, Males LJ had refused MWP permission to appeal against the Judge's order in the 532 claim on 26 May 2023. In that order, he had stated, among other matters, that:

> "The claim against the sixth defendant had no possible basis, as [MWP] knew or ought to have known. (para 4);
>
> The Judge was clearly right to decline to reopen his judgment striking out the claim (para 7);
>
> He was also entitled to certify the claim as totally without merit (para 8); and
>
> The Judge was entitled to refuse permission to amend in the exercise of his discretion. As he explained, *the amendment failed to deal entirely with the matters set out in the judgment striking out the claim and giving summary judgment. The amendment does not disclose a case which has a real prospect of success."*
>
> [Emphasis supplied].

20. When he made his order of 1 September 2023, Males LJ appears not to have appreciated the fact that the claims in the second 804 proceedings that MWP was seeking to resurrect by this application were identical to the claims in the 532

proceedings, whose fate he had definitively determined six months earlier. In all the circumstances, particularly given that he had not been told the full story by MWP, that is totally understandable.

21. The outcome of the 532 claim is plainly of great significance when it comes to assessing whether the test in CPR 52.30 has been made out, and in particular whether it is necessary to re-open the appeal in order to avoid real injustice. That is why Mr Wilson should have told the Court about it in his second witness statement instead of creating the misleading impression that because MWP had served draft Amended Particulars of Claim, the claim was still extant. If the substance of the underlying claim(s) that the applicant wishes to resurrect by means of a re-opened appeal has already been finally determined in fresh proceedings between the same parties, or if the Court has already ruled the claim(s) to be an abuse of the process or wholly lacking in merit, there would be no injustice in refusing to re-open an earlier case to allow the same claims to be argued. Indeed, the outcome of the fresh proceedings would have created an issue estoppel in favour of the successful parties.

22. Mr Dalby, who argued the application as attractively as was possible in these circumstances, acknowledged the force of that point. Indeed, he very fairly accepted when pressed that it was a complete answer to this application so far as the existing claims in the second 804 proceedings are concerned. However, he submitted that if the second 804 claim were resurrected and renumbered, MWP would wish to amend it to introduce two further claims which Mr Dalby contended (1) were not *res judicata* by reason of the 532 claim (nor by reason of the Judge's refusal to allow the Particulars of Claim to be amended in the 532 claim) and (2) would not fall foul of the rule in *Henderson v Henderson* (1841) 3 Hare 100 that a litigant should bring forward all his claims in the same set of proceedings. He referred to those claims as "the 2nd Addendum claim" and the "costs recovery claim".

23. In consequence, it has not been possible to dispose of this application simply by reference to the fact that the underlying claims have now been the subject of final and binding determination in fresh proceedings between the same parties, which would have been enough in itself to make the pursuit of the application an abuse of the process.

Background to the strike-out of the second 804 claim form.

24. As the Judge recorded in paragraph 2 of his ex tempore judgment of 20 July 2021, MWP contended that various costs orders going back many years had been obtained by fraud on the part of Mr Emmott and his former legal representatives, and sought orders rescinding those costs orders and recovering the money which was paid under them. The Judge referred to this as "the costs claim". When the Judge pointed out to MWP (correctly) that a challenge to a final Court order on a ground of fraud *must* be brought by way of a separate action, instead of by way of an application or a counterclaim in extant proceedings, MWP sought to do so by way of the second 804 claim.

25. On or around 26 April 2021, MWP sought to file electronically a claim form to which "Outline Particulars of Claim" were attached. A paralegal working for MWP had inserted the 804 number in typescript in the box in the top right hand corner of the form that appears immediately above the box for the issue date (marked for court

office use only). They had also listed several other claim numbers (of related antecedent claims) underneath the space for the seal. The wrong fee was paid by MWP, £528, which was the fee for a non-monetary claim, although the "Outline Particulars" (to which the 804 number was also attached) included a claim for restitution, which was a money claim for a figure in excess of £7 million.

26. The filing was initially rejected on the basis that the claim form should have been uploaded onto the system separately from the Outline Particulars. Mr Wilson protested about this and asked the court officers to "reverse your wrongful rejection and provide us with a sealed claim form to serve, as time is of the essence." The court office appears to have found a practical solution to that particular problem.

27. On 27 April 2021, Mr Wilson sent an email to the Court office stating "we write to confirm that MWP was directed by the Court/Judge to file this Part 7 Claim Form as a result of hearings, hence please now accept and approve it and provide us with the sealed Claim Form asap". Whilst it was correct that the Judge had told MWP that if they wished to pursue the costs claim they would have to issue fresh proceedings, he had not directed them to do anything, let alone to file a claim form bearing the same number as an existing claim and raising new causes of action against additional parties. Mr Wilson may not have intended to create that impression, but the language of that email was capable of being interpreted by the administrative staff as meaning that a Judge had directed that they should issue that particular Claim Form in the form in which it had been sent to the Court by MWP, which they were being asked to "accept and approve".

28. A sealed copy of the claim form, bearing the 804 claim number, was sent to Mr Wilson on the same day. The irregularity was not picked up straight away, but the solicitors for the 2nd to 4th Respondents mentioned it in a letter to the Court dated 10 May 2021. When the matter was brought to the attention of the Judge on 11 May, he issued a direction in these terms:

> "Please inform all parties that I have not directed that a claim form be issued under any claim number. The claim number that should be attached to a claim form is a matter for the court administration. I direct that the new claim be allocated a new claim number and that all parties be directed to use the new claim number and the claim form and all subsequent documents be amended so as to delete the number used by MWP and replace it with the new number."

29. The practicalities of implementing that direction do not appear to have been explored in the court below, but there seems to me to be a good deal of force in Mr Dougherty's submission that the Judge's direction plainly required MWP's co-operation in re-submitting the documents (without the incorrect claim number) so that a new claim number could be allocated. Given that the documents had been filed electronically in pdf format, I cannot see how else the amendment could have been made to the face of the issued Claim Form, unless perhaps it were done manually and the document scanned onto the system. Come what may, it would have been MWP's responsibility to upload a version of the Particulars of Claim bearing the new number in due course, once that number had been allocated.

30. None of this really matters, because in any event those directions were not complied with. MWP wrote a letter to the Court protesting that it was "proper and [made] eminent sense" for their paralegal to have inserted the 804 number and "there was no need for a new claim and folio". The letter said: "we submit that there is no need to change the number on the Claim Form" and that "MWP requests [the Judge] to retract and withdraw his direction". When this missive was drawn to the Judge's attention he responded that he had nothing to add to what he had said previously, and that "if a new claim form has been issued, it must be in respect of a new claim and it should have a new claim number". He added "if this remains in dispute, there should be a directions hearing listed with an ELH of 30 minutes to resolve it."

31. The matter did remain in dispute, but MWP did not actively seek to list a directions hearing. That was not a matter for the Court to arrange of its own motion; it needed action on the part of the party who disputed the Judge's directions. Instead, Mr Wilson continued to argue with the other parties that there was no need for a different claim number. He even proposed that they should agree to the claim continuing under the 804 number. The Respondents' solicitors indicated that they did not think that they could ignore the directions of the Judge.

32. In the end, the solicitors for the 5th Respondent wrote to the Court explaining that they had encountered difficulties in filing documents under the current (804) claim number and asking for clarification as to whether a new claim number had been issued and if so, what it was; if not, how the Court proposed to deal with the matter in the light of the Judge's directions. At the same time, they raised the issue of the fee being too low because a money claim had been pleaded in paragraph 39(2) of the Outline Particulars of Claim.

33. A senior listing officer, Mr Tame, then became involved. He corresponded with Mr Wilson in an attempt to resolve the impasse. He told Mr Wilson that the claim form should be resubmitted to the Court, so that a new claim reference could be generated. Mr Wilson retorted that the court office had chosen to put that number on the claim form and seal it. Mr Tame explained that the claim was incorrectly accepted on the existing claim reference number, and that was an administrative error. That did not appear to make any impression on Mr Wilson. Ultimately, Mr Tame drew the (correct) inference from his communications with Mr Wilson and from Mr Wilson's failure to comply with his directions, that Mr Wilson was not prepared to submit a new claim form or to accept that a new number should be allocated to the second 804 claim. He therefore referred the matter to the Judge, who made an order of his own motion striking out the second 804 Claim Form.

34. The Judge's accompanying message to Mr Wilson stated:

> "The Court's officials have referred to me the Claim Form that you have purported to issue using an extant claim number. You have been informed that this procedure is not appropriate, and you have been invited to resubmit the Claim Form using the proper procedure and paying the proper fee but you have failed to respond.
>
> In those circumstances the Claim Form is struck out. Please see the order attached.

> You are of course free either to issue a new Claim Form using the correct procedures and paying the correct fee or to apply to amend an existing Claim Form if you consider that is appropriate, although that should not be taken as implying that any application to amend will succeed…"

35. The Judge had either overlooked that he had already made a direction that the second 804 claim form be amended to change the number, or else (as seems more likely) he believed that his initial direction had been superseded by Mr Wilson's recalcitrance, and by the further information which had now come to light that the claim number was not the only problem with the second 804 claim form, because the correct fee had not been paid when it was issued.

36. Thus it was that MWP came to issue the application to set aside the Judge's order. By that stage, it should have been apparent to Mr Wilson, if it was not already apparent, that quite apart from the problems with the claim number and the fee, (i) permission was required to issue proceedings against Mr Sinclair (because he was a bankrupt), and (ii) any claim form would be marked "not for service out of the jurisdiction". Therefore if MWP wished to include Sokol Holdings Inc. as a defendant they would need to seek permission to serve the claim form on them out of the jurisdiction in due course. These further matters were drawn to the attention of the Judge at the hearing by the Respondents.

The hearing of the set-aside application

37. We have had the advantage of reading the transcript of the hearing before the Judge. We have also read Mr Wilson's 42nd Witness Statement dated 17 June 2021 which was filed in support of MWP's application to set aside the Judge's order striking out the second 804 claim form. In that witness statement, Mr Wilson stated that it was "logical, understandable and correct" for the Court to have issued the second 804 claim form under the 804 number, for reasons he articulated at length (paras 34-36); that the direction to allocate a new number was overtaken by the Judge's decision that there should be a directions hearing (para 36); and that against that background the strike-out order "makes no sense and is inconsistent with what has occurred and the directions given" (para 37). He also maintained that the correct fee had been paid (paras 41-48). In the course of the hearing, the Judge understandably described the contents of paras 36-38 of that witness statement as "entirely unacceptable."

38. Mr Tregear took a realistic and sensible approach to the application and, from the onset, said that he was not seeking to persuade the Court that it is a viable process to put a new claim into the vehicle for an old claim, especially as the new claim was brought against additional parties. The Judge expressed the view that this was "a process which was fundamentally flawed from the off". Mr Tregear prudently did not dissent from that view.

39. Mr Tregear accepted that the problem was not of the Court's creation. He expressly eschewed any criticism of the Court or any of its officers. He said that "*the problem may be of our own creation* but we are now looking for a solution" and that "we are now at a point where there is consensus … in relation to the procedural requirement of a new claim form and a new claim number for what is a new claim involving different parties and parties who post-date – whose existence post-dates the 2010

claim date." (Emphasis added). He invited the Court to retract the striking out, and direct (again) that the second 804 claim be allocated a new claim number, the issue date should remain the original April date, and all the parties be directed to use the new claim number. His fallback position was to seek a direction that the claim form be reissued as at the date of the hearing or a date after the hearing, with a new claim date and a new claim number, with the consequence that all the steps which had been taken hitherto would have to be taken again.

40. The Judge put forward the further option that he should simply dismiss the application, leaving MWP free to issue a new claim form, seeking whatever relief they chose, but bearing in mind that if a money claim were made, then the fees commensurate with that would have to be paid. This was not that different from Mr Tregear's fallback position. Mr Tregear also told the Judge, abandoning the position Mr Wilson had taken on behalf of MWP in his witness statement, that "we perfectly accept that if this is a monetary claim, and it is a claim that seeks restitution and interest on any sums which are paid by way of restitution, then the fee appropriate is more than the fee which was paid, which was simply for the non-monetary claim."

41. At one point, the Judge explored with Mr Tregear whether there would be any limitation problems if the claim form were to be issued in July 2021 instead of April 2021. Mr Tregear said he was unaware of any. He was not going to rely on the fact that Mr Emmott had raised limitation in his defence to the second 804 claim (which had been served in May 2021).

42. The Judge heard submissions from Mr Emmott and from counsel for the other active defendants (again, Mr Kirby and Mr Dougherty), and then heard submissions from all parties on the question whether the application to set aside the strike-out was totally without merit, before delivering his judgment.

The application to re-open the appeal

43. The test under CPR 52.30 is threefold: it must be necessary to re-open the final determination to avoid a real injustice; the circumstances must be exceptional; and there must be no effective alternative remedy. There was no dispute as to the relevant principles to be applied. They are conveniently set out in *Municipio de Mariana and others v BHP Group Plc and another* [2021] EWCA Civ 1156; [2022] 1 WLR 919 at [57] to [64]. The jurisdiction will only be exercised where "the integrity of the earlier litigation process has been critically undermined" and there is a "powerful probability that [if that had not happened] the decision in question would have been different."

44. Although the failure of a judge to consider relevant papers may engage the jurisdiction to re-open, depending on the circumstances, it is not enough for MWP to show that Males LJ (as he himself accepted) probably did not read the Dalby skeleton (see *de Mariana* at [68]). The real issue is whether he addressed the essential points raised by the Amended Grounds of Appeal and identified why they did not satisfy the test for the grant of permission to appeal. One of the problems in that regard is that the Dalby skeleton re-casts the Grounds of Appeal (in paragraph 50). It does so under four headings: errors of fact, errors of law, taking into account irrelevant considerations, and making a disproportionate order. It also jettisons some of the other grounds set out in MWP's Amended Grounds of Appeal.

45. In paragraph 5 of his original order refusing permission to appeal, Males LJ addressed the proposed grounds of appeal as articulated by Mr Wilson on behalf of MWP in the October 2021 Amended Grounds. Among other matters, he held that the Judge was entitled to conclude that it was MWP (via Mr Wilson) who had pressurised court staff to put the existing claim number on the new claim form and had then refused to allow it to be corrected; that the Judge was right to strike out the second 804 claim form; and that having done so, the Judge was not required to rescue the claim form by directing that it be reinstated and given a new number. He also observed (rightly) that MWP were not prejudiced in bringing a new claim and that there was nothing to stop them from issuing a new claim with a new number; if there were a limitation defence to such a claim, that would have to take its course.

46. The Dalby skeleton, contrary to the way in which the matter was put before the Judge, seeks to place the blame for the issue of the second 804 claim form with the number of a pre-existing claim squarely at the door of the court staff, because it was the Court and not MWP that affixed and stamped the official seal and 804 claim number on the original claim form. The point that "the Registry… chose … which number to allocate" was one which Mr Wilson had made in his communications with the listing officer, Mr Tame.

47. The skeleton argument minimises the significance of the facts that MWP's paralegal had put that number on the form in the first place, that that number had also been attached by MWP to the Particulars of Claim and used in inter parties correspondence before the claim form was sealed, and that, in the course of numerous communications with the court office pressing them to issue the claim form as a matter of extreme urgency, Mr Wilson had then sent the ambiguous email referring to the Judge having "directed" MWP to issue "this Claim Form". It deals with the first of these matters on the basis that the box on the form which the paralegal filled in was for Court use only, and whether it was completed or not should have made no difference to what the Court chose to do at the point of issue.

48. The Dalby skeleton also seeks to blame the Court staff for not complying with the Judge's direction of 11 May 2021, glossing over the correspondence from Mr Wilson on behalf of MWP vehemently objecting to that course and seeking to have that direction retracted, and his subsequent stance that it had been overtaken by the Judge's direction that, if the parties disputed the substitution of a new claim number, there should be a directions hearing. Whilst making the fair point that the original direction was not expressly aimed at MWP, and that it did not in terms state that a fresh claim form be lodged in order that the new number could be assigned to it, the Dalby skeleton also significantly plays down Mr Wilson's adamance that the 804 number be retained (ascribing this to "confusion"). It also suggests that the Judge mistakenly believed MWP to be disputing that a new number be allocated to the claim. The full run of correspondence, fortified by Mr Wilson's 42nd Witness Statement, and the hearing transcript, makes it plain that he was <u>not</u> mistaken about that, and that it was only Mr Tregear's involvement that introduced some common sense and caused Mr Wilson to back down.

49. It was further submitted in the Dalby skeleton that the idea of a fresh claim form being issued emanated from the Listing Officer, and that this was not what the Judge had directed (therefore, by implication, Mr Wilson/MWP could not be criticised for failing to comply with Mr Tame's request, and the Judge's direction should have been

implemented by the court staff). In fact, irrespective of whether Mr Tame was coming up with a new suggestion, or simply articulating the only practical way in which the Judge's earlier direction could be implemented, Mr Wilson was not expecting the Judge's direction to be complied with, even after the Judge reiterated it. He was expecting there to be a directions hearing, at which he could seek to persuade the Judge, for specious reasons, that it should not be complied with. The Judge had only envisaged a directions hearing taking place in the event that his direction that the claim number be amended was disputed.

50. Perhaps the strongest objection to the Order which was raised in the Dalby skeleton was that a strike-out was disproportionate. Mr Dalby pointed out that clerical or administrative errors are regularly corrected by means of the slip rule. It was also suggested that the Judge did not enquire into the prejudice that could be suffered by having to reissue, and reference was made to the limitation defence raised by Mr Emmott. That was factually incorrect. Mr Dalby plainly did not have access to the hearing transcript when he settled the Dalby skeleton.

51. I do not accept that Males LJ's failure to read the Dalby skeleton critically undermined the integrity of the process for granting permission to appeal. Once the points in the Dalby skeleton are tested against the evidence, it is obvious that the appeal is and always was completely lacking in merit. Although the Dalby skeleton refines the grounds of appeal and puts them more cogently and elegantly, a skeleton argument is not the proper vehicle for amending the grounds of appeal or introducing new ones. The 14 grounds of appeal set out under Paragraph 5 of MWP's Amended Grounds of Appeal dated 11 October 202, some of which are replicated in the Dalby skeleton, were sufficiently addressed by Males LJ the first time round.

52. Males LJ did grapple with the essential challenges to the Order which were raised on appeal, and he gave sufficient reasons for reaching the conclusion that he did. It cannot be said that this was a case like *De Mariana* where the appellate judge failed to address a point which went to the heart of the challenge to the first instance judge's decision. The point made by Males LJ at paragraph 5(1) of his order refusing permission to appeal is a complete answer to the attempt to blame the Court staff, and paragraph 3 of that order, which accurately reflects MWP's attitude and behaviour prior to the strike-out, provides an answer to the complaint of disproportionality. Moreover the Dalby skeleton does not provide a satisfactory answer to Males LJ's point in paragraph 5(5) of his order that MWP could simply pursue the claim in fresh proceedings (so an appeal would serve no useful purpose). He expressly considered the position if the fresh claim were defended on limitation grounds. Had Males LJ appreciated that MWP had already issued a fresh claim and that it was being progressed, that would have been likely to have reinforced his view.

53. I appreciate why Males LJ took the provisional view that if he had read the Dalby skeleton he might have taken a different view of the merits of the appeal. The Dalby skeleton, when read in isolation, does advance a superficially persuasive argument that the Judge used the proverbial sledgehammer to crack a nut, when the problem that arose was due to an admitted administrative error which could be easily cured without prejudicing MWP in terms of time. However, that has to be put in the context of overwhelming evidence that the claim form could not have been issued in extant proceedings, so it was fundamentally irregular; that MWP had a very significant part to play in bringing about that error in the first place; and that right up to the hearing

itself, Mr Wilson (acting for and on behalf of MWP) was actively seeking to prevent it from being corrected. If Males LJ had looked at matters in the round, far from there being a "powerful probability" that his decision would have been different, I very much doubt whether the Dalby skeleton would have changed his original assessment of the merits (with which I agree).

54. However, in fairness to MWP and for the sake of completeness I will consider what the position would have been on the assumption that permission to appeal would have been granted. When the entire history of the matter is taken into consideration, as we have done, and as the Full Court would have done if permission had been granted in December 2021, it is readily apparent that Males LJ's original analysis was impeccable and his first impressions that the appeal was hopeless were unquestionably right. The appeal would have been dismissed.

55. If Males LJ did not have the transcript of the hearing before the Judge in December 2021, (or did not see it because it was buried in a mass of other documents) he would not have appreciated that the case that was sought to be run on appeal was radically different from the way in which the matter was put before the Judge, even though Mr Tregear had contended for the same result. A judge cannot be criticised for dealing with the case on the basis on which it was argued before him. (If Males LJ did have the transcript, and read it, that would have reinforced his decision not to grant permission).

56. By the time that the appeal was heard, that transcript would have been before the Full Court, so would Mr Wilson's 42nd witness statement, and the full history of the matter would have been revealed by the Respondents, as it was to us. In consequence, the appeal would have been bound to fail. Despite the frank and realistic way in which the application was presented to him by Mr Tregear, the Judge was entitled to take the view, as a matter of robust case management, that because the attempt to issue a new claim as part of an old claim was so fundamentally flawed, and the allocation of a new claim number was not the only thing that needed to be done to put things right, the sensible course was to maintain the strike-out and require MWP to start again and pay the right fee. He was entitled to decide in the light of what had happened up to the date of the hearing that MWP had been given enough opportunities to rectify the position, and that enough was enough.

57. There was no obvious prejudice in taking that course, none was suggested to the Judge at the time, and in fact none has been suffered, because MWP did start again with the 532 claim, and as we now know, that claim has been determined on its merits so far as the 2nd to 6th Respondents are concerned. It was not struck out because of a limitation defence.

58. The Judge was also entitled to take the view that MWP's application to set aside his strike-out order was totally without merit (i.e. bound to fail), based as it was on the misconceived premise that the 804 number should be retained and a hopeless contention that the proper fee had been paid, especially when both those points were (wisely and properly) abandoned by Mr Tregear at the hearing. As the Judge indicated, it is inexplicable that Mr Wilson, as an experienced solicitor, could ever have thought it was appropriate for a fresh claim form to be issued with the same number as a previous claim form.

59. There is no injustice, let alone a substantial injustice, caused to MWP by precluding them from re-opening a hopeless appeal. Nor is there anything truly exceptional about the circumstances relied on. But there are even more formidable obstacles to this application to re-open even if it could have been shown that the appeal did have a real prospect of success, because of the 532 claim and what became of it.

60. There is and always was an effective alternative remedy to re-opening this appeal, namely, the pursuit of the 532 claim. The fact that, in the event, that claim was struck out, and the Judge indicated that he would have granted summary judgment to the defendants who made the application to strike it out (i.e. the Respondents to this application) had he not done so, means that there is no justification for re-opening an appeal whose objective (at least when the application was initially made) was to restore proceedings raising exactly the same claims against the same defendants. It cannot possibly be said that re-opening the earlier proceedings is "necessary to avoid a substantial injustice". On the contrary, re-opening them would unjustly expose the Respondents to vexatious litigation.

61. On any view, in the light of the Judge's findings in the 532 claim, as reinforced by the observations of Males LJ when refusing permission to appeal against the strike-out in that case, there is no justification for MWP seeking to continue to pursue a claim against the sixth Respondent via this application to re-open the appeal in the second 804 claim. Yet such is Mr Wilson's obduracy that even that point was not conceded.

The proposed new claims

62. Mr Dalby submitted that if this appeal were re-opened and permission to appeal granted, MWP would apply to amend the claim in the second 804 proceedings (which Mr Wilson on behalf of MWP now accepts would need to be allocated a new claim number) to raise the "2nd Addendum Claim" and the "costs recovery claim". No such application has yet been made, and no draft amended pleadings were provided, so the basis on which these claims would be brought (and why these Respondents would be defendants to them) remained rather vague.

63. Much of Mr Wilson's second Witness Statement is devoted to the "2nd Addendum Claim" which relates to an Addendum to a deed executed between Mr Emmott and Mr Sinclair, who was providing litigation funding to Mr Emmott. There has been an assignment to MWP by Mr Sinclair's Trustee In Bankruptcy of certain rights and money claims that Mr Sinclair had against Mr Emmott, including claims for repayment under that funding deed.

64. The 2nd Addendum revealed that Mr Sinclair had provided another substantial tranche of funds to Mr Emmott which he was liable to repay. It also contained a provision that if Mr Emmott recovered any monies from MWP in certain arbitration proceedings (and related litigation), they were to be applied first in repayment of Mr Sinclair's funding before being used by Mr Emmott for his own purposes, including discharging his indebtedness to his own lawyers. Mr Wilson says he (and therefore MWP) only became aware of the 2nd Addendum on 17 December 2021 when he obtained a copy of it from Mr Sinclair (or Mr Sinclair's Trustee). It appears from one of Judge Pelling's many judgments that Mr Emmott's explanation for his repeated statements there was only one Addendum to the funding deed was that he had no recollection of

this one and kept no copy of it. MWP's case is that it was deliberately concealed by Mr Emmott.

65. An attempt was made by MWP to introduce a claim based on the 2nd Addendum into the 532 proceedings. As Males LJ noted when refusing permission to appeal against the Judge's order striking out or granting summary judgment in those proceedings, the fundamental premise of MWP's claim was that, by virtue of the provisions of the 2nd Addendum, Mr Emmott was not liable to pay his legal fees to the Respondents (other than the sixth Respondent, who was in a different position).

66. The merits of the claim, or proposed claim in the 532 proceedings based on the 2nd Addendum, were addressed by the Judge in his judgment on the strike-out/summary judgment application in those proceedings [2022] EWHC 1481 (Comm) at paragraphs 105 to 107. He described the argument that because of its terms, Mr Emmott had no interest in the subject-matter of the litigation, as "misconceived" and explained for good and sufficient reasons why it is unarguable. That appears to be the same argument as is articulated by Mr Wilson in his 2nd Witness Statement in this application (paragraphs 10 and following).

67. Thus on the face of the evidence before us, the "2nd Addendum claim" whose merits have already been ruled on by the Judge and by Males LJ, is identical to the "2nd Addendum claim" which MWP wants to introduce into the second 804 proceedings if they were restored on appeal. If it is, then in my judgment it matters not whether in the 532 proceedings the claim based on the 2nd Addendum was set out in the VFI rather than the pleadings. It appears that the claim based on it was one of the matters for which permission to amend was sought and refused after the 532 claims were struck out. So despite Mr Dalby's valiant attempt to persuade us that it has not been ruled upon in substance, I consider that it probably has, for the purposes of creating an estoppel.

68. However, it is unnecessary to make any final decision on the question whether an attempt to introduce that claim into these proceedings, if they were restored, would be an abuse of process, though there are very strong indications that it would be. If it would not, and if it has a real prospect of success, then there is nothing to stop MWP from obtaining the necessary permission under the Extended Civil Restraint Order ("ECRO") that is now in place to issue fresh proceedings based on the 2nd Addendum. On that hypothesis, MWP has a viable alternative remedy. If, as Mr Wilson contends, he only found out about the document in December 2021 because it had been concealed by Mr Emmott, there should be no limitation issues. On the other hand, if it *would* be an abuse of process to introduce that claim into the second 804 proceedings, which appears to me to be more likely, then it would plainly not be in the interests of justice to allow the appeal in these proceedings to be re-opened so as to enable that to happen.

69. Mr Dalby hinted that there might be a different claim based on the 2nd Addendum based on an argument along the lines that Mr Emmott's lawyers knew they should not have been paid by him ahead of repayment to Mr Sinclair, and therefore there is some kind of tracing claim available to MWP as Mr Sinclair's assignee. I can see many serious flaws in that analysis, which it is unnecessary to articulate. But even if such a claim might conceivably get off the ground, and even if an attempt to raise it now would not fall foul of the rule in *Henderson v Henderson*, again, there is no reason

why it cannot be raised in fresh proceedings, after obtaining the necessary permission. The judge dealing with any application under the ECRO will be able to evaluate whether that claim is arguable with a real prospect of success. There is no justification for using the exceptional powers under CPR 52.30 to enable MWP to bypass that process.

70. The "costs recovery claim" appears to be based on the Judge's judgment in the original 804 proceedings to which I have referred earlier in this judgment [2022] EWHC 1550 (Comm). MWP successfully applied to set aside a freezing order which was made against them in 2014. As recorded in paragraph 13 of that judgment, Mr Wilson placed heavy reliance on the 2nd Addendum to show that Mr Emmott owed Mr Sinclair (and thus MWP as Mr Sinclair's assignees) far more money than was originally believed to be the case, and that the true debt extinguished the frozen monies.

71. The Judge accepted this to be the case, and found in favour of MWP. He held that the maximum sums frozen by the order should be reduced by a sum of approximately £1.4 million, which he found should have been paid under the 2nd Addendum to Mr Sinclair. The upshot was that the Judge made an order discharging the freezing order. He ordered Mr Emmott to pay MWP's costs, on the indemnity basis, and gave MWP liberty to apply for an enquiry as to damages.

72. Mr Emmott applied to the Judge to re-open his judgment and for permission to appeal. The Judge delivered a short further written ruling refusing those applications on 26 August 2022. However, the Judge did grant a stay of his order pending the outcome of an application by Mr Emmott to the Court of Appeal for permission to appeal. That application was refused by Popplewell LJ on 29 November 2022.

73. Mr Dalby indicated that in consequence of these matters MWP had some kind of claim based on a reversal of previous adverse costs orders. Mr Wilson's 2nd witness statement suggests that a number of costs orders made against MWP have already been set aside. But the Judge's order against which Popplewell LJ refused permission to appeal does not purport to reverse any previous orders made by the court for costs to be paid by MWP to Mr Emmott or to anyone else. He did leave it open to MWP to seek an enquiry into damages in consequence of the continued imposition of the freezing order, and it is conceivable that those damages might include sums that MWP was ordered to pay to Mr Emmott which would not have been so ordered if the true position had been known. That is one avenue by which it can be said that MWP has a viable alternative remedy.

74. There is a further potential problem with the suggestion that MWP would seek to introduce the costs recovery claim into these proceedings if they were revived. If and to the extent that the cause of action for recovery of those monies arose in consequence of Popplewell LJ's order, or indeed the Judge's order which Mr Emmott sought unsuccessfully to appeal, it arose long after the second 804 Claim Form was issued in April 2021, and therefore as a matter of principle cannot be introduced into that claim by way of amendment.

75. Once again, Mr Dalby appeared to me to have no answer to the point that there is no justifiable basis for re-opening this appeal just to enable MWP to introduce the costs recovery claim in extant proceedings when, *if the claim is viable*, it could be brought

in fresh proceedings (or through the medium of an enquiry into damages). There is an effective alternative remedy. Even if there were limitation issues, as there might be in respect of costs orders which have already been reversed, there would be no justification in allowing MWP to get round a time-bar by resurrecting these proceedings and bringing the claims within their ambit.

76. Finally, if MWP have a claim for restitution based on being ordered to pay costs that they should not in fact have been ordered to pay, or a claim in debt in respect of costs orders that have already been reversed, the proper defendant to those claims would be Mr Emmott, not these Respondents. It appeared to me that, although he made some vague references to tracing or restitution, Mr Dalby had no real answer to this substantive objection.

Conclusion

77. For all the above reasons, there are no exceptional circumstances here, and it cannot be necessary in the interests of justice to allow MWP to re-open this appeal against the Judge's Order, which is and always was bound to fail. But even if the appeal had otherwise had merit, it is clear that if MWP have any reasonably arguable claims against the Respondents that were not already substantively disposed of by the 532 proceedings, they do not need to re-open it in order to bring them. They therefore have an effective alternative remedy. I would therefore dismiss this application, which, in the light of everything I have explained, is totally without merit.

Lord Justice Baker:

78. I agree.