

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS, AND PROBATE LIST (ChD)

RE: 3 TORRIANO MEWS, LONDON NW5 2RZ

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 15th May 2020

Before:

HIS HONOUR JUDGE EYRE QC

Between:

ALEXANDER CHRISTOFOROU

Claimant

- and -

- 1) CHRISTAKIS CHRISTOFOROU**
2) GRACESTONE PROPERTIES GROUP LIMITED

Defendants

Daniel Lightman QC and Stephanie Thompson (instructed by **Boyes Turner LLP**) for the
Claimant

Thomas Grant QC and Carl Troman (instructed by **Carter Perry Bailey LLP**) for the
Defendants

Hearing date: 19th March 2020

JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 12 noon on 15th May 2020.

HH JUDGE EYRE QC:

Introduction.

1. The Second Defendant is a Cypriot company. It is the registered proprietor of 3 Torriano Mews, London NW3 2RZ (“the Property”). The First Defendant (“Chris”) is the beneficial owner of the shares in the Second Defendant. The Claimant (“Alex”) is the son of the First Defendant. For ease of explanation I will at times in this judgment adopt the approach taken in the pleadings and refer to them by their first names. I will do the same in respect of “Betty” who is Alex’s mother and Chris’s ex-wife and “Nicholas” who is Alex’s brother and the other son of Chris.
2. In October 2014 Betty commenced divorce proceedings against Chris. Those proceedings became intensely acrimonious. Alex and his brother, Nicholas, were strongly supportive of their mother’s stance in the matrimonial litigation.
3. In the current proceedings Alex seeks a declaration that he is the beneficial owner of the Property. He contends that there was a common intention to that effect on the part of the family members including Chris and that he acted to his detriment in reliance on that intention. It is said that the common intention was formed and/or manifested in various family discussions culminating in discussions over a family dinner in February 2013. The Defendants deny that Alex has any interest in the Property. They say that there was no such common intention denying that the conversations relied upon by Alex took place and contesting the sundry dealings and/or the intention with which they were carried out.
4. Permission was given for amendment of the Particulars of Claim and for amendment of the Defence by a consent order of 1st November 2019. That resulted in the service on 6th December 2019 of the Amended Defence incorporating a Counterclaim.
5. On 11th February 2020 the Claimant applied for an order striking out paragraph 9 and the concluding part of paragraph 12 of the Amended Defence and Counterclaim (“the Contested Passages”). It also sought a direction that the issues in those passages be excluded from consideration at the trial of this matter and that other than with the leave of the court there be no evidence called at trial and no cross-examination as to those matters. It is that application which came before me on 19th March 2020.
6. The order sought by the Claimant includes provision that the trial judge may give leave for evidence to be called on the issues raised in the Contested Passages or for there to be cross-examination in relation thereto. However, that cannot excuse me from grappling now with the question of whether consideration of the matters set out in the Contested Passages should be excluded from the trial. The order made at this stage will be definitive for practical purposes. The prospects of the trial judge allowing cross-examination or the calling of evidence about these matters when the trial preparation will have been on a different basis are minimal and in any event such a course is unlikely to be practicable.

The General Nature of the Allegation made in the Contested Passages.

7. The key feature of the Defendants' case as set out in the Contested Passages is the allegation that Alex's claim to the Property is an episode "in a series of attempts by the Claimant and/or Nicholas and/or Betty to harass Chris and misappropriate and/or deprive him of his assets". Paragraph 9 sets out fourteen sub-paragraphs which are said to be other examples of such attempts. Paragraph 12 makes reference to the claim to the Property which had been asserted by Alex in the context of the matrimonial proceedings between Chris and Betty. The pleading says that the current claim is consistent with a previous pattern of behaviour of which the matters set out in [9] are examples.

The Pleadings and the Progress of the Proceedings.

8. The Particulars of Claim in their original format were served in November 2018. The matters relied on in that pleading as evidencing the alleged common intention included email exchanges between Nicholas and Alex in February and April 2014.
9. The original Defence was served in December 2018. The Defendants said that the 2014 emails were not to be taken at face value because they were said to be part of a plan on the part of Alex and Nicholas to take Chris's assets from him. I will consider the extent of that line of defence more fully below.
10. As I have already noted permission was given for amendment of Particulars of Claim and of the Defence by the consent order of 1st November 2019. At the time of that order a draft of the proposed Amended Particulars of Claim had been provided to the Defendants and was before the court but there was no draft of the proposed amended Defence and the order simply provided for the service of an amended Defence. It follows that although the Claimant consented to and the court permitted the amendment of the Defence neither consent nor permission involved consideration of the pleading which is now being challenged.
11. The amendment of the Particulars of Claim involved substantial expansion of that pleading. There was expansion of the Claimant's case in relation to sundry dealings in relation to other properties in the period before the purchase of the Property. In addition there was a new allegation about the circumstance in which the alleged common intention was formed. The amended pleading alleges that there was a family dinner in February 2013 at which there was agreement as to the acquisition and holding of the Property and sets out in detail what is said to have been agreed at that dinner. The original Particulars of Claim had asserted the common intention but had not mentioned the alleged family dinner and had not given the current detailed account of the contents of the common intention and of the circumstances in which it was said to have been formed.
12. The amended Defence was served on 6th December 2019 together with the counterclaim. The Defendants take issue with some aspects of the property dealing history set out by the Claimant but crucially deny the existence of the alleged common intention and the contention that such an intention was formed at a family dinner whether in February 2013 or at all.

13. In the original Defence the Defendants had referred to the partisan stance which Alex and Nicholas were said to have taken in the matrimonial proceedings. That pleading had said that the present proceedings were “part of an extensive series of disputes” amounting to “internecine warfare” of which the current claim was said to be “but one chapter”. The Amended Defence and Counterclaim repeats that assertion and follows it with these allegations at [9] – the entirety of which the Claimant now seeks to have struck out:

“Moreover, this litigation is yet another episode, in a series of attempts by the Claimant and/or Nicholas and/or Betty, to harass Chris and misappropriate and/or deprive him of his assets. For the avoidance of doubt it is the Defendants’ case that this litigation is being driven forward by the Claimant and Nicholas acting in concert. Other examples of such attempts are:

- a. The Claimant’s, Nicholas’ and Betty’s failed attempt in late 2014 to misappropriate some £12m Chris had achieved as part of property deals he was involved with.
- b. In October 2014 the Claimant used his IT skills to dishonestly create and plant a ‘Declaration of Trust’ document on Chris’ computer purporting falsely to show Chris transferring ownership of companies with assets totalling some £30m out of his ownership to Nicholas. It was only through the use of a graphologist by Chris that the document was caused to be withdrawn by Betty.
- c. The Claimant and Nicholas engaged in other unlawful behaviours such as illicitly jailbreaking an iphone given to Chris in July 2014 so as to listen to and record his activities. They thereafter recorded Chris having consensual sexual relations with a woman. Such behaviours led to Chris issuing proceedings from harassment in the Queen’s Bench Division in October 2015. Chris will rely upon the instances of harassment itemised there in the trial of the present claim.
- d. Nicholas’ concoction of a story, as set out in his witness statement served in the matrimonial proceedings, about Chris having allegedly promised to provide him with a shareholding in Chris’ business so that Nicholas could seek to seize control of Christo & Co.
- e. Nicholas seeking to procure the transfer to him of Betty’s 50% shareholding (valued at in excess of £16m as at 2015) in Docklock Limited (such that Nicholas and Chris would have an equal shareholding) – with Betty then able to claim 50% of the balance of Chris’ shareholding during the matrimonial proceedings – leaving him with only a 25% shareholding.
- f. Nicholas’ assertion within his witness statement served in the matrimonial proceedings that he had been gifted Chris’s and Betty’s matrimonial home at Ranulf Road as a wedding present. The home at Ranulf Road was valued at in excess of £3million.
- g. Nicholas’ intermeddling in proceedings issued by Chris’ company Christo & Co Ltd against a Ms Kelly. Ms Recorder Rowlands held in a written judgment dated 12 March 2017 that his actions were “*clearly motivated by malice*”.
- h. Nicholas’ appearance as a witness on behalf of TAG Limited in a claim for alleged non-payment brought against Christo & Co. In his judgment dated 24 November 2016 District Judge Fine concluded that he could “*not accept the reliability*” of Nicholas’ evidence delivered to the Court.

- i. The service by Docklock Ltd, (the main property company established by Chris over two decades) purporting to act by Nicholas and Betty, of notice upon Christo & Co to quit its headquarters at 66 – 70 Parkway.
- j. Chris being moved (in his absence) out of the matrimonial home into a flat at 73 Parkway (owned by Docklock Limited) to which he arrived to find his clothes and belongings in rubbish bags. Chris was subsequently served with notice by Docklock (purportedly acting via Nicholas and Betty) to quit the flat.
- k. Nicholas' setting up of a commercial property business in competition to Christo & Co Ltd (in which Nicholas sought to adopt the 'Christo' name for that venture) leading to a decision by the Registrar of Trade Marks that Nicholas had acted in bad faith contrary to Section 3(6) of the Trade Marks Act 1994 and had acted in a manner that fell "*below the standards of acceptable commercial behaviour*": see the decision of the Registrar dated 10 May 2018.
- l. Nicholas causing Blue Sky Investments Ltd ("Blue Sky"), another company owned by Chris (and which was allocated to him during the divorce) purportedly to award Betty, without instructions from Chris or the directors of Blue Sky, a tenancy for a property at Cheyne Walk, NW4.
- m. Nicholas claiming to own a plot of land in Cyprus belonging to Chris.
- n. Nicholas seeking to deprive Chris of ownership of a Porsche motor vehicle by asserting that the vehicle was gifted by Chris to Nicholas' wife.

The present proceedings are another chapter in the brothers' campaign against Chris of which examples have been given above. They are motivated by the malice of the Claimant and his brother against their own father, and are intended to harass him and misappropriate further of his assets ranging from modest sums to millions of pounds. As such they constitute an abuse of the Court's process. Chris will say that the dishonest and abusive conduct itemized above should inform the Court's approach to the Claimant's claim in these proceedings."

14. The original Defence had accepted that Alex had asserted a claim to the Property in the matrimonial proceedings and the amended pleading expands on that in these terms at [12] (with the additions made by way of amendment underlined).

"... The Claimant's current claim to be beneficially entitled to the Property may be inconsistent with previous statements made by him but is consistent with the previous cynical pattern of behaviour by the Claimant and Nicholas, examples of which are given above, whereby they claimed to be entitled to matrimonial assets so as to attempt ~~the~~ to remove them from the pool of assets distributed within the matrimonial proceedings and thereby decrease Chris' share of the matrimonial assets."

15. The Claimant seeks the striking out of the words from "but is consistent with" onwards or failing that of the words "examples of which are given above".
16. At [56] – [59] the amended pleading repeated with minor additions (underlined in the following extracts) the Defendants' case contained in the original defence at [31] – [34] in relation to the emails of 2014. In its amended form the case is

put in the following way. Thus [56] begins by admitting the sending and terms of the April 2014 email but says:

“... The email alleged must not be taken at face value. Unbeknownst to Chris at the time, the email was sent by Nicholas and received by the Claimant in a cynical and ironic sense. In particular:

- a. At the time that email was sent (8 April 2014) the Claimant and Nicholas already knew of their mother’s intention to issue divorce proceedings and they were already preparing to try to take Chris’ assets away from him in that context. In fact divorce proceedings were delayed (from their intended service in June 2014) because Betty waited, at the direction of Nicholas/the Claimant, until a large transaction completed which resulted in a substantial profit going to Chris.
- b.
- c. ...
- d. The “*bigger picture*” to which the Claimant referred was attempting to extract millions of pounds from Chris in the context of the proposed proceedings. That included a £12m transfer of money to Beirut and a declaration of trust designed to divert £30m away from Chris and his companies including taking over control of Christo & Co through Betty’s shareholding.”
- e. ...
- f. ...
- g. ...
- h. Nicholas replied one minute later at 17.47 saying he thought Chris’ email had been heavy handed. The Claimant replied to that email from Nicholas and said as follows:

“*You call that a heavy hand? Christ, wait till he sees what’s coming his way...*”

- i. The Claimant’s reference to what was “*coming*” Chris’ way was to the brothers’ plan to try to take Chris’ assets from him via the divorce process.”
17. At [57] the amended pleading retains the original [32] saying that in support of the allegation that Alex and Nicholas “planned to take millions of pounds from Chris” reference can be made to communications between the two brothers in November 2014.
 18. At [59] the amended pleading retains the original [34] in which the text of a further email from Nicholas is admitted but with the Defendant saying that this also should “not be taken at face value” and that it had been an attempt to “deflect” Alex from revealing to Chris “that the Claimant and Nicholas planned to attack Chris’ assets.”

19. The Counterclaim is put forward by way of an alternative to the Defendants' denial that Alex has any interest in the Property. The relief sought is "a declaration and appropriate relief" to take account of the contributions made by Chris to the acquisition of the Property.
20. The trial is currently listed for eight days to start in the five-day window running from 13th July 2020. By an order of 19th February 2020 Fancourt J provided for the hearing of the current application and for the course to be taken in respect of the service of witness statements and disclosure depending on whether the application was or was not successful.

The Parties' Contentions in Outline.

21. In part the Claimant's case is that the Contested Passages are an abuse of process because they relate to matters which Chris asserted in proceedings in the Queen's Bench Division. No action has been taken to progress those proceedings following the lifting of a stay in December 2016. The Claimant says that is an abuse of process for the Defendants to seek to rely in the current case on allegations which have been made in other proceedings in circumstances where those proceedings have not been pursued. The Claimant also says that the allegations are irrelevant and are inadequately particularised. However, the Claimant's key contention is that for the parties to address the allegations in the Contested Passages (and in particular for the Claimant to do so) will require a very substantial exercise by way of further disclosure and witness evidence going a great deal beyond that which would be required if the Contested Passages were to be excluded. That would generate significant further expense and would add to the length of the trial. The Claimant says that this would necessitate the vacation of the currently listed trial and is precluded on that ground. He also says that the issues raised are peripheral and do not warrant the time and expense which consideration of them would require. He, therefore, he urges the court to use its case management powers to exclude the passages and to prohibit consideration of the allegations they contain.
22. The Defendants say that the allegations in the Contested Passages were implicit in the original Defence and that the amendment is in reality just a fuller particularisation of the case which was already being alleged. They are, it is said, matters which could have been raised at trial even in the absence of amendment and by reference to the original Defence. The Defendants deny the Claimant's characterisation of the allegations as involving the introduction of similar fact evidence saying that they are instead a core part of the Defendants' case. The Defendants' case is said to be that Alex's claim to the Property is part of a continuing conspiracy to harm Chris and in the light of that the Defendants argue that it would be unjust if they were to be precluded from relying at trial on matters which establish that conspiracy. In addition the Defendants take issue with the Claimant's assessment of the extent of the extra preparation which will be necessary and of the amount of time which will be needed to deal with these matters at trial. They say that the allegations can be dealt with shortly and will not add to the length of the trial. In that regard Mr. Grant QC, for the Defendants, says that the existing time estimate is a generous one for a trial turning on competing contentions as to the beneficial ownership of the Property and involving analysis of a limited number of preceding dealings and consideration

of whether there was or was not a common intention as alleged by the Claimant. He says that any additional time required to be spent on the matters in the Contested Passages can readily be accommodated in the existing listing.

Were the Allegations in the Contested Passages inherent in the original Defence?

23. The Defendants say that the Contested Passages are no more than fuller particularisation of allegations which were contained in the original Defence and which remain in those parts of the Amended Defence and Counterclaim which the Claimant is not seeking to have excluded from consideration at the trial. Mr. Grant says that they are matters on which he would have been entitled to cross-examine Alex and Nicholas in any event by reference to the original pleading. He says that the further particularisation set out in the Contested Passages is of benefit to the Claimant in giving forewarning of the case which he and his brother will have to answer. In this regard Mr. Grant points to the original pleading at [9] and at [31] – [34] which are now [12] and [56] – [59] of the Amended Defence and contends that in putting the Defendants’ case on those matters he would have been entitled even without the amendment to make reference to the allegations set out in the Contested Passages. If that is right it would not be appropriate to strike out the Contested Passages or to exclude the issues therein from consideration at the trial. Striking out the Contested Passages would avail nothing on that analysis because the Defendants could still raise the allegations therein. Although it would be open to the court to rule that certain issues even if contained in the original pleading should not be considered at the trial that would be an extreme step and not appropriate in circumstances where the original Defence was served in December 2018 and where there has been no challenge to that pleading.
24. However, I do not accept Mr. Grant’s analysis of the Defence in its original form. The passages on which he relied in that pleading made reference to alleged conduct on the part of Alex and Nicholas in the context of the matrimonial proceedings between Chris and Betty. It was said there that Alex and Nicholas were acting in concert and dishonestly with a view to depriving Chris of assets in those proceedings. It was being said that this motivation and plan on the part of the brothers explained matters relied on by Alex in Particulars of Claim as supporting his interpretation of the history. Thus the original Defence at [9] was a response to Particulars of Claim at [7] where it had been said that Alex had asserted a claim to the Property in the matrimonial proceedings. Alex had put that forward as an indication of the consistency of his approach. The Defendants responded at [9] saying that Alex’s assertion in the matrimonial proceedings was part of an attempt to reduce Chris’s share of the matrimonial assets. Similarly, the original Defence at [31] – [34] was a response to the Claimant’s reliance on the April 2014 emails and was an assertion that the emails were to be seen in the light of a plan to extract money from Chris in the matrimonial proceedings. Not only is that point made in the original Defence but it is confirmed in the amended pleading at [56(i)] where the words “via the divorce process” are added to the assertion that Alex was referring to the brothers’ plan to take Chris’s assets from him.
25. The effect of this is that in the original Defence the Defendants were alleging conduct by Alex and Nicholas in a particular context. That was the context of

the matrimonial proceedings between Betty and Chris. It was being said that the brothers were plotting to deprive Chris of his assets in that context and in those proceedings. Moreover, that allegation was being made by way of explanation of conduct and email correspondence on which Alex was relying as support for his contentions in the current action.

26. The Contested Passages go significantly beyond the case which was put in the original Defence. They amount to putting a new and different case (albeit one which is an addition to the original line of defence and which is not inconsistent with it). The Contested Passages make allegations of a sustained course of conduct which was not confined to the matrimonial proceedings and which was not confined to seeking to help Betty get a greater share of the matrimonial assets. What is now being asserted is action to harm Chris more generally and with a view to benefiting Alex and/or Nicholas at Chris's expense. These are allegations which were not inherent in the original Defence. That pleading put in issue the conduct of Alex and Nicholas in the context of the matrimonial proceedings and entitled cross-examination about that and entitled the Defendants to say that the plan to assist Betty explained the brothers' actions and emails. It would not have entitled the Defendants to engage in cross-examination alleging the wider conduct set out in the new [9].
27. That assessment means that the Defendants cannot maintain the Contested Passages in the new pleading on the footing that they are no more than amplification of the case already put.

Are the Contested Passages or any Part of them to be struck out as an Abuse of Process?

28. In October 2015 Chris began proceedings against Alex and Nicholas in the Queen's Bench Division. In those proceedings Chris sought damages and injunctive relief in respect of sundry alleged acts of harassment and breach of privacy together with acts of deceit and fraud. In March 2016 Master Davison stayed those proceedings until four weeks after the resolution of the matrimonial proceedings between Chris and Betty (and so until December 2016). He directed that Chris was to apply after the lifting of the stay for the listing of a ten-day trial in the window between 2nd January and 31st March 2017. However, since that stay expired Chris has taken no action to progress the Queen's Bench claim and in particular did not apply as the court had directed he should do for the listing of the trial. It is to be noted that Particulars of Claim in that action run to nineteen pages and contain a large number of alleged instances of harassment and related conduct and that it was envisaged that the trial of the action would take ten days.
29. In the Amended Defence and Counterclaim [9(a)] – [9(c)] repeat allegations set out in the Queen's Bench claim and [9(c)] expressly states that Chris "will rely upon the instances of harassment" particularised in the Queen's Bench claim.
30. The Claimant says that it is an abuse of process for the Defendants to seek to raise those matters in these proceedings. That contention is put on two bases. The first is that it is an abuse to attempt to litigate the same subject matter in two or more different sets of proceedings. This is an application of the principle

first formulated in *Henderson v Henderson* (1843) 3 Hare 100 by Wigram VC. The Claimant says that by reference to that principle it is abusive for the Defendants to raise in the current proceedings allegations which have been raised in the Queen's Bench action. The second basis is to say that Chris's conduct of the Queen's Bench proceedings amounts to the "warehousing" of the claim made there in the sense of commencing an action but then putting the proceedings on hold. "Warehousing" can amount to an abuse of process though whether it does in the particular case will depend on the reason for putting the proceedings on hold and the length of the delay. The Claimant says that the Queen's Bench proceedings have been on hold for at least three years without any good reason. He says that in the light of that the Queen's Bench proceedings would be liable to be struck out as an abuse of process and that it is abusive for the Defendants to seek to raise in the current action contentions which are liable to be struck out as abusive elsewhere.

31. The principle in *Henderson v Henderson* does not assist the Claimant in this regard. It would, indeed, be abusive for Chris to seek to bring fresh proceedings based on the allegations already raised in the Queen's Bench action. However, that is not what is happening here. The Defendants are raising these allegations as part of their defence to the Claimant's claim to be the beneficial owner of the Property and as part of their case as to the proper analysis of the parties' dealings. Mr. Grant is right to say that it is not a breach of the *Henderson v Henderson* principle for them to do so. That principle is to the effect that it is abusive for a party to seek to relitigate matters which could and should have been determined in earlier proceedings and to harass another party with multiple proceedings relating to the same issue. Here the Defendants are seeking to counter Alex's claim by reference to particular matters. The fact that those are matters which are in issue in other proceedings does not mean that the Defendants are harassing Alex by raising them. The Claimant's approach would have the consequence of precluding the Defendants from raising a matter in their defence because it is a matter which they have already put forward as a claim in different proceedings in circumstances where those other proceedings have not concluded. Such a limitation on the Defendants would create a risk of injustice in the current proceedings and is not required in order to prevent inappropriate relitigation of the same claims.
32. The Claimant seeks to counter this argument by pointing out that the amended pleading is a Defence and Counterclaim in which the Defendants seek relief. When considering whether there is an abusive attempt by the Defendants to relitigate matters I have to consider the reality of the position and in the circumstances here the presence of a prayer for relief by way of counterclaim does not change the nature of the Defendants' actions. At [67] the Defendants seek "appropriate relief ... taking account of the facts and matters pleaded herein". The Claimant says that this is to be read as a reference to the entirety of the amended pleading including the Contested Passages and as seeking relief based on the allegations therein. That is an artificial reading of the Defendants' pleading. The prayer for relief at [67] is preceded by detailed pleading at [65] and [66] of the Defendants' case as to the respective contributions which the parties made to the purchase of the Property and an assertion that Alex's interest is limited to his contributions and that he must give credit for contributions made

by Chris. The Counterclaim is expressly by way of an alternative to the Defendants' principal case which is to deny that Alex has any interest in the Property with the alternative being a contention as to the size of his beneficial interest if the Defendants' principal case fails. That is not a claim seeking relief based on the Contested Passages and so is not abusive as an attempt to relitigate matters raised elsewhere.

33. The argument based on the alleged "warehousing" of the Queen's Bench claim also fails. Although the Claimant says that the Queen's Bench claim is liable to be struck out as abusive warehousing he has not applied in the Queen's Bench proceedings for such striking out. The material before me does not demonstrate that any such application would inevitably succeed and the highest the Claimant's contention can be put at this stage is that it is reasonably arguable that an application to strike out would succeed. However, even if the Queen's Bench claim is liable to be struck out that does not mean that it is abusive for the Defendants to raise these allegations in their defence. The reasoning set out above explaining why the principle in *Henderson v Henderson* does not assist the Claimant is equally applicable here. Even if Chris were to be precluded from pursuing the Queen's Bench claim and from starting fresh proceedings based on the allegations made in that claim it is not an abuse of process for him to rely on those allegations in his defence against Alex's claim.

Would Consideration of the Matters in the Contested Passages disrupt the Trial listed for July 2020?

34. The Claimant says that the retention of the Contested Passages in the Amended Defence and Counterclaim and the permitting of evidence to be called in relation to them would add to the length of the trial and would necessitate considerable further disclosure and lay evidence. In his witness statement for the Claimant Mr. Baker said that the necessary further disclosure would cost just over £99,000 and that preparation of the necessary witness evidence would cost £70,800. Mr. Baker also estimated the inclusion of these matters would add twelve days to the length of the trial (based on the ten days provided for in the Queen's Bench Division with a further two days in respect of matters which are in the Contested Passages but which were not in issue in the Queen's Bench claim).
35. The Defendants' position is that inclusion of the Contested Passages will not add materially to the length of the trial or to the cost of preparation. Mr. Grant said that he anticipated asking short questions in the course of the cross-examination of Alex and his mother and brother putting to them the contentions in the Contested Passages. He said that he expected that there would be bald denials of his questions and at points he seemed to be saying that would be the end of the matter. Mr. Grant also said that the existing time estimate of eight days is a generous one and that any modest additional time which would be required to address the allegations in the Contested Passages could easily be accommodated within that eight-day period.
36. In my judgement the Defendants' assessment of the additional time and expense which will be generated by consideration of the matters in the Contested Passages is simply unrealistic. Mr. Grant's depiction of short exchanges in

cross-examination with brief questions being met by denials and with the trial moving swiftly on might be appropriate if the matters in question were to be regarded as going solely to credit. However, that is not how the Defendants in fact put the allegations. They do not say that these are simply matters which should cause the court to question the credibility and reliability of the evidence from Alex and his witnesses. Instead the Defendants' position is that these are matters which are crucially relevant to the current dispute. This is because they say that Alex's claim to be the beneficial owner of the Property is to be seen either as part of a conspiracy to harm Chris or as part of a course of conduct with it being necessary to see Alex's claim in the context of that course of conduct.

37. When the Defendants' allegations are seen in that way it will be necessary for them to be considered in detail at the trial. The Contested Passages contain detailed allegations against Alex and Nicholas. It is inconceivable that the Defendants will not seek to adduce evidence to substantiate the allegations. Even if they were not to do so but were to confine themselves to putting the allegations in cross-examination there would still be substantial evidence about these matters. That is because if the allegations are allowed to remain in the pleading Alex would be entitled to counter them in detail with witness evidence and with documents. See in this regard *J P Morgan Chase v Springwell Navigation Corporation* [2005] EWCA Civ 1602 at [80] – [81] and *Bilta (UK) Ltd v SVS Securities Inc* [2017] EWHC 135 (Ch) at [32].
38. I will consider below the disadvantages faced when trying to assess in advance of a trial how long any particular matter will take and I will consider whether that means I should decline to address the question of exclusion of the Contested Passages. Assessment at this stage of how much work will be needed and how much time will be spent inevitably involves an element of conjecture. It is, however, conjecture of the kind which is inevitably involved in all case management.
39. Mr. Baker's assessment that the length of the trial will increase from eight to twenty days if there is consideration of the matters in the Contested Passages does appear unduly pessimistic and the current estimate of eight days for the trial also appears generous. Nonetheless the Claimant is right to say that addressing the allegations in the Contested Passages will add considerably both to the amount of preparation which will be needed by way of disclosure and witness evidence and to the length of the trial. The Contested Passages contain a number of separate allegations of particular conduct. It may well be possible to address some quite shortly. Thus [9(g)] and [9(h)] which set out judicial comments about Nicholas will involve little by way of factual evidence but will require Nicholas and Alex to be given an opportunity to set out the context in which they say those remarks are to be seen. Others, however, raise matters of complexity and detail which will require findings of fact as to what was done and with what motivation and as to whether the contentions which Alex and Nicholas made about particular property rights and similar matters were correct. An example of one of the more straightforward of such matters is the allegation at [9(i)] that Nicholas made a false claim to ownership of a car. Moreover, [9(c)]

involves the assertion that the Defendants will rely on all the instances of harassment alleged in the Queen's Bench claim.

40. It follows that I am satisfied that the Claimant is right to say that retention of the Contested Passages as a whole in the pleading will add markedly to the expense of preparing for the trial and will add several days to the length of the trial such that the current eight-day estimate will be insufficient. That in turn means that if the Contested Passages remain in place it is likely that the trial date will have to be vacated. I will consider below the impact which this has on the Claimant's application to exclude these parts of the pleading.

Should the Questions of the Exclusion of Evidence and the Limitation of Cross-Examination be left to the Trial Judge?

41. The parties are agreed that my powers to exclude issues from consideration; to exclude evidence which would otherwise be admissible; and to limit cross-examination derive from CPR Pt 3 (2).1 (k) and Pt 32.1 but disagree as to whether I should use those powers at this stage or should leave the question to be determined by the judge at the trial.
42. Mr. Grant placed considerable emphasis on the benefits which the trial judge will have. That judge will have had the benefit of a fuller reading of the papers in the case and will be in a better position to assess the impact which exclusion of the material will have on the trial. He or she will be better placed than I am to see whether in the context of the progress of the trial justice requires that the Defendants be able to assert the case set out in the Contested Passages. In the words of Mr. Grant the trial judge will have an "intimate acquaintance" with the case which is not available to me. In that regard Mr. Grant relied on the words of Rix LJ giving the judgment of the court in *Three Rivers DC v Bank of England* [2005] EWCA Civ 889 at [42] and [43] where it was said that a decision to limit cross-examination was "peculiarly a matter for the judge's discretion". However, I find that reference of limited assistance. The question in that case was whether the Court of Appeal should uphold an appeal against the trial judge's decision to limit cross-examination and the emphasis placed on that question being a matter for that judge's discretion was by way of contrast to the position of the Court of Appeal. The issue of the extent to which the exclusion of evidence or the limitation of cross-examination should be addressed before trial was not addressed.
43. It is right to say that I am not in the same position as the trial judge will be. I have a much more limited view of the case than that judge will have and do not have the knowledge of the case on the merits or of the documents which he or she will possess. Does that mean that it is inappropriate to make the orders sought? For the Claimant, Mr. Lightman QC says that if an order is not made now there will be little point in the trial judge making such orders because by then the harm will have been done: the expense of preparing witness evidence and of disclosure will have been incurred and the trial listed for July will have been vacated. Intervention now is necessary, says Mr. Lightman, if that is to be avoided.

44. Assistance in choosing between the courses advocated by counsel can be found in decisions of Green J and of Mrs. Justice Eady addressing the analogous power under CPR Pt 32.2 (3) of limiting witness evidence and excluding issues from consideration in witness statements.
45. In *MacLennan v Morgan Sindall (Infrastructure) plc* [2013] EWHC 4044 (QB), [2014] 1 WLR 2462 Green J limited the number of witnesses to be called at a trial which was some three months away. He set out the relevant considerations thus at [12] with consideration (iii) being of particular relevance for current purposes:
- “Based on my experience in this particular case it seems to me that the following considerations may be relevant to the exercise of that broad power:
- (i) CPR r 32 must be read as a whole. The court needs to use all the powers at its disposal to ensure the efficient and fair conduct of the trial. The power to prohibit the calling of witnesses sits towards the more extreme end of the court’s powers and hence is a power a judge will ordinarily consider after less intrusive measures have been considered and rejected.
- (ii) As Jackson LJ observed in the citation above a court which seeks to regulate the nature and extent of witness evidence will generally wish to do so at an early stage, before the preparation of the witness statements themselves and before costs are incurred needlessly. At this stage it may also be possible for the parties to identify matters which may be made the subject of admissions and which would, thereby, avoid the need for any further evidence to be adduced.
- (iii) In the light of (ii) above, whilst it is clear that the power to exclude or control witness statement evidence is best exercised *ex ante* ie before the preparation of witness statements, the CPR does not preclude the court exercising its powers *ex post*, ie after witness statements have been drafted, with a view to ensuring an efficient and fair trial.
- (iv) A judge asked by a party to prohibit the adducing of contemplated future or already prepared witness statement evidence will be doing so before trial. Accordingly there is a risk that a decision by a judge may turn out, albeit with the benefit of hindsight, to have been made in error and to have caused unfairness to one or other of the parties in the conduct of the trial. Accordingly a court, asked to adopt this course, will wish to be satisfied that it has the fullest possible information available to it. Jackson LJ observed that such a court will need to have adequate preparation time and be given sufficient guidance from the parties as to which parts of which statements are said to be otiose, prolix, or otherwise inadmissible.
- (v) Based on my consideration of the issues in the present case, it seems to me that in cases where a court does seek to limit the calling of witnesses it may be necessary to introduce a safety valve pursuant to which the parties would have liberty to apply and/or, by consent, to vary the order of the court. In this regard, a court will be entitled to expect from the parties a considerable degree of co-operation and good sense. The imposition of costs sanctions, after the event, is a blunt instrument whereby the court may express its displeasure. It is far better for the parties to co-operate at the earlier stage with a view to modifying a court’s prior order so that all factual matters that need to be aired at trial can be done so in an efficient manner...”
46. In *BGC Brokers v Tradition (UK) Ltd* [2019] EWHC 3588 (QB) Mrs. Justice Eady was the trial judge but was considering whether, shortly in advance of the trial, to exclude the evidence of certain witnesses and to excise passages in the

statements of others both on grounds of admissibility but also by reference to her case management power to exclude otherwise admissible evidence. She set out her approach to deciding whether to make the decision at the pre-trial stage in the following way at [53] and [54]:

“53. As the trial judge, it is common ground that I will be best placed to make the necessary determination of admissibility. That said, I am mindful that I must exercise particular caution in determining such an application at a pre-trial stage. As is observed in the White Book at paragraph 32.4.21, a passage now approved in *Bates v The Post Office* [2018] EWHC 2698 (QBD):

“Where an application is made during the trial, the judge is well placed to determine whether particular passages in a witness statement have real value or are irrelevant and/or disproportionate. A judge asked to approach such questions at the interlocutory stage is at a disadvantage and should only strike out proffered evidence if it is quite plain that no matter how the proceedings may look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it (*Wilkinson v West Coast Capital* [2005] EWHC, 1606 (Ch) (Mann J). The court must be on its guard to ensure that costs and delays are not increased by ill-conceived applications to strike out witness statements.”

54. Inevitably the question whether such a determination should be made at a pre-trial stage will be fact and case sensitive. As was observed by Underhill P (as he then was) in the context of a discrimination claim in *HSBC Asia Holdings BV & Another v Gillespie* [2011] ICR 192 EAT, whilst caution is necessary, if satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues raised and that its admission will cause inconvenience, expense, delay or oppression, such that justice would be best served by its exclusion, the judge should be prepared to rule accordingly.”

47. Mrs. Justice Eady ruled that the evidence in question was inadmissible but explained, at [64], in words which are potentially very apt in the circumstances of the present case that even if it had been admissible she would have excluded it at the pre-trial stage because it would distort rather than assist the court’s focus and would have a prejudicial effect outweighing its probative value saying:

“For completeness, I should make clear that even if I was wrong about the admissibility of this evidence, I would in any event exercise my case management discretion to exclude it as it raises very specific and very different issues from those that are to be determined in this case, relating to an entirely different potential move some years earlier. It would only serve to distort rather than to assist the court's focus. And it is also clear, even at this pre-trial stage, that the potential prejudice would far outweigh any possible probative value of this evidence, and the introduction of this material would jeopardise the fair trial of the case.”

48. In the light of that assistance I will address the exclusion of the Contested Passages; the exclusion of issues from consideration at trial; and the limitation of cross-examination at this stage and will not leave those questions to the trial judge. I do so on the footing that if evidence is to be excluded it is better for this to be done before the evidence has been prepared and before the expense of such

preparation (and the expense of preparing responsive evidence) has been incurred. However, I do so conscious of the need to be alert to the risk of injustice which such exclusion carries; conscious accordingly of the gravity of the step being taken; and conscious also that in undertaking this exercise in advance of the trial I am doing so without the advantages of the detailed knowledge which the trial judge would have.

The Approach to be Taken.

49. The general case management powers set out in CPR Pt 3.1 (2) include at (k) the power to exclude an issue from consideration. Pt 32.1 sets out the court's powers to control evidence which include giving directions as to the issues on which evidence is required; excluding evidence which would otherwise be admissible; and limiting cross-examination.
50. In *J P Morgan Chase v Springwell Navigation Corporation* the Court of Appeal explained the two-stage approach which is to be taken to assessing first the potential admissibility of similar fact evidence and then whether the court's case management powers should be exercised to exclude the evidence even if admissible. Giving the judgment of the court Brooke LJ put it thus at [67] – [69]:

“67. The law relating to these matters is now relatively straightforward. The judge applied the principles set out in the judgments of this court in *O'Brien v Chief Constable of South Wales* [2003] EWCA Civ 1085. Although the Chief Constable appealed, the House of Lords made the principles for admissibility even simpler when it dismissed his appeal (see the report at [2005] UKHL 26; [2005] 2 WLR 1038). There is a two-stage test: (i) Is the proposed evidence potentially probative of one or more issues in the current litigation? If it is, it will be legally admissible. (ii) If it is legally admissible, are there good grounds why a court should decline to admit it in the exercise of its case management powers? Lord Bingham suggested at para 6 three matters that might affect the way in which a judge exercised his/her discretion in this regard:

(i) That the new evidence will distort the trial and distract the attention of the decision-maker by focussing attention on issues that are collateral to the issues to be decided;

(ii) That it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice;

(iii) That consideration must be given to the burden which its admission would lay on the resisting party.

The first two of these considerations were said to be particularly potent when trial was to be by jury. In relation to the third of these matters, Lord Bingham referred at para 6 to:

"the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections."

68. He ended by saying:

"In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair

to all parties."

69. Lord Phillips identified a relevant consideration at para 56:
 "× [W]hen considering whether to admit evidence, or permit cross-examination, on matters that are collateral to the central issues, the judge will have regard to the need for proportionality and expedition. *He will consider whether the evidence in question is likely to be relatively uncontroversial*, or whether its admission is likely to create side issues which will unbalance the trial and make it harder to see the wood from the trees."
 (Emphasis added)"

51. The court went on to explain at [70] – [72] that the test of relevance and so of admissibility is a relatively low one saying:

"70. We turn, then, to our conclusions. In our judgment the judge took too stringent a view of the first issue (the relevance of the similar fact evidence). Although she never stated exactly what test she was applying, she appeared to require that the evidence should be of itself, and standing alone, probative of the nature of the relationship between Springwell and Chase. For instance, she said (at para 38 of her judgment) that
 "the facts and circumstances of the other Greek families and the intricacies of their commercial relationship with Chase are unlikely, in the circumstances of this case, to be logically probative of whether or not such a relationship existed between Springwell and Chase"

71. That puts the test for the relevance of any evidence, and conspicuously for the relevance of similar fact evidence, far too high. Cross & Tapper, *Evidence* (9th edition), p55, suggest that as a definition of relevance it is not possible to improve on article 1 of Stephen's *Digest*:
 "any two facts to which [the term] is applied are so related to each other that according to the common course of events one *either taken by itself or in connection with other facts* proves or renders probable the past, present or future existence or non-existence of the other [emphasis supplied]"

72. A fact may therefore be probative either on its own or because it renders a conclusion more likely when taken in conjunction with other facts. The latter is essentially the role of similar fact evidence. The relationship of Chase with the other Greek families, taken on its own, clearly cannot prove anything about the relationship between Springwell and Chase. But it might explain, illuminate or put in context evidence about that latter relationship that would otherwise be ambiguous or difficult to understand."

52. The case management power to exclude admissible evidence is not limited to similar fact evidence. Similar fact evidence is admissible even though it is not direct evidence of the matters in dispute because it is relevant in the sense just noted of making a particular conclusion about those matters more or less likely. The approach to be taken at the second stage of the two-stage test set out in *Springwell* and derived from *O'Brien v Chief Constable of South Wales* is of particular importance in the context of similar fact evidence because such evidence has a greater potential than more direct evidence of raising satellite issues and being of limited value in the overall context of the trial in question. It is, however, applicable generally when the court is considering whether to exclude admissible evidence as a matter of case management. Thus in *BGC*

Brokers v Tradition (UK) Ltd at [49] Mrs. Justice Eady treated that approach as being generally applicable. Similarly in *Vernon v Bosley* [1994] PIQR P337 Hoffmann LJ explained at P340 that the treatment of similar fact evidence was not the result of any special exclusionary rule but was a particular instance of the court assessing the relevance of potential evidence.

53. In *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) Mrs. Justice Carr set out the approach which is to be taken when the court is considering whether to permit a very late amendment in the sense of one which will necessitate the vacation of a trial date. That approach is not directly applicable here because this is not a matter of the Defendants seeking permission for an amendment but the Claimant seeking to strike out parts of a pleading which has already been permitted and to exclude from consideration matters set out therein. However, it is of relevance to note that in the *Quah* case the loss of the trial date was a matter of considerable importance. Similarly in the context of the current application it is a very material consideration that the retention of the Contested Passages as a whole will lead to the vacation of the trial listed for July.
54. In his skeleton argument Mr. Grant placed a degree of weight on the importance of cross-examination and its role in the trial process. However, I do not find that of assistance in addressing the question of whether the matters in the Contested Passages should be excluded from consideration at trial. The material on which Mr. Grant relied emphasised the importance of cross-examination in establishing the truth and the need for a party to be able to challenge his or her opponent's case by cross-examination. However, that established no more than the proposition that when a topic is properly raised at trial challenge by cross-examination should be permitted. It did not establish that a party should be allowed to ask in cross-examination questions about any topic which he or she wishes. The true position is the reverse of that and the court has power to limit cross-examination to those topics which are properly in issue between the parties.
55. There was rather more force in the emphasis Mr. Grant placed on the importance of a party being allowed to present his or her case in the manner which on advice he or she believes is necessary. He explained that the Contested Passages had been included in the Amended Defence and Counterclaim after careful and proper reflection by the Defendants' lawyers. It is their professional assessment that it is necessary for the proper conduct of the Defendants' defence and for the just determination of the case that these matters be put before the court at trial and that the Defendants be allowed to challenge the Claimant's case by reference to these matters.
56. As an illustration of the importance of the weight to be given to such an assessment Mr. Grant relied on the judgment of Hoffmann LJ in *Vernon v Bosley* where he said at P339 that:

“...It is an important aspect of an adversary system of justice that a party should so far as is possible be allowed to decide how to present his case. If he or his counsel thinks that an item of evidence or a line of cross-examination may be relevant, the court is generally very reluctant to shut it out. He should not be left

with a feeling that he might have won if only he had been allowed to adduce evidence or ask questions which the judge refused to hear. Nor should he be unnecessarily controlled or directed in the way he conducts his presentation of evidence or cross-examination particularly if he is represented by a professional advocate on whose sense of responsibility the court can rely”.

57. That is an important cautionary note but it is to be remembered that Hoffmann LJ followed that enunciation of the importance of judicial abstention with these words:

“But there are limits to the extent to which the parties can be allowed free rein. A party’s right to choose how to present his case may have to be balanced against other legitimate public or private interests. For example the both the opposing party and the general public have an interest in keeping down the length and cost of litigation. On this ground the judge will sometimes rule inadmissible the exploration of side-issues which, though having some potential relevance, do not appear sufficiently relevant to justify the time and expense which would be required to investigate them.”

58. Hoffmann LJ was giving judgment before the change of approach which has followed the introduction of the CPR but I note that in *MacLennan v Morgan Sindall (Infrastructure) plc* at [21] Green J clearly regarded the “considered judgment” of the claimant’s counsel as persuasive with regard to the number of witnesses which needed to be called on a particular topic.
59. In the light of those matters the approach I am to take to the Claimant’s application involves a number of elements. I am at all times to be conscious of the Overriding Objective and mindful of that objective of dealing with cases justly and at proportionate cost. The court must be cautious before taking the grave step of preventing a party from putting forward the case which that party wishes to assert. Regard must be had to the risk of injustice and also to the legitimate sense of grievance if a party is required to conduct a trial on a limited basis and in a way which prevents that party from advancing all the matters which he or she believes are necessary to advance his or her case or to answer the case facing that party. Weight must be given to the judgement of professional advocates and the court is not lightly to disregard the view of such advocates that justice to their client requires a particular case to be put. A judge exercising these case management powers in advance of a trial must be doubly cautious. However, I must also be mindful of the need for cases to be dealt with proportionately. It is an important part of case management to ensure that trials are focused on the key issues between the parties and the court must be mindful that the generation of a host of satellite issues can lead not just to disproportionate expense but can also create the risk of an unjust outcome resulting from a lack of focus. Where the question is one of the exclusion of evidence regard must be had to the approach set out in *Springwell*: an approach which has especial relevance in the case of similar fact evidence but which as explained above is an illustration of a generally applicable approach. Finally the assessment must be undertaken in the light of the impact which the exclusion or inclusion of evidence will have on any trial date and having regard to the stage at which the case which is to be excluded was raised. Any party who is prevented from putting forward the full case which that party wishes to promote may have a sense of grievance but the legitimacy of that sense of grievance will

be markedly less if the case being excluded was raised at a late stage in the proceedings.

The Nature of Evidence of the Matters in the Contested Passages.

60. There was disagreement between Mr. Grant and Mr. Lightman as to whether evidence of the matters in the Contested Passages would be similar fact evidence with Mr. Grant contending that it would not be and Mr. Lightman saying that it would. My conclusion that the approach in *Springwell* is not confined to similar fact evidence but is an indication of a more general approach (albeit one of particular relevance when considering similar fact evidence) reduces the importance of this debate.
61. However, I have concluded that evidence of the matters in the Contested Passages is to be regarded as similar fact evidence. In the Amended Defence and Counterclaim [9] begins with the assertion that the litigation is “another episode in a series of attempts by the Claimant and/or Nicholas and/or Betty to harass Chris and to misappropriate and/or deprive him of his assets”. That paragraph concludes by characterising the claim as “another chapter in the brothers’ campaign against Chris”. At times in his submissions Mr. Grant sought to put matters differently and to characterise the current claim as an element in a single conspiracy. But that was not how matters are put in the amended pleading. There it is not being said that the claim is part of a single plan but that it is characteristic conduct of the Claimant and of his brother and mother. That is similar fact evidence rather than direct evidence relating to the facts in issue. This is because the Defendants are alleging a series of acts with the same motivation rather than a deliberate plan of which the current claim was a part from the outset.
62. The evidence nonetheless readily passes the first stage of the *Springwell* test and is admissible. The central issue in the case is the existence of the common intention alleged by the Claimant and that will turn largely on whether the evidence of the Claimant and his potential witnesses about that was genuine or was a deliberate fabrication. Evidence that the Claimant and his witnesses had engaged in acts of deliberate fabrication to benefit themselves or some of them at the expense of Chris in other circumstances would render the conclusion that the alleged common intention was a deliberate fabrication more likely and so is admissible. The question then becomes that of whether even though admissible evidence of these matters should be excluded in exercise of my case management powers.

Are the Contested Passages to be retained or excluded?

63. The Contested Passages set out the Defendants’ case that the alleged common intention about the beneficial ownership of the Property is a fabrication which is to be seen as part of a campaign to harass Chris and to misappropriate his assets and to be considered in the context of the other actions which are said to have formed part of that campaign. Although the contention is made by reference to a number of particular instances it is a single core contention. I will consider first whether that overarching contention is to be retained or excluded

turning then to consider whether there are discrete elements of the amended pleading which should be retained even if other parts are excluded.

64. The principal consideration operating against the Claimant's application and in favour of retention of the Contested Passages is the Defendants' position that for the Claimant's claim and the defence to it to be determined justly it is necessary for this part of the defence case to be considered at trial. I have regard to that factor and am mindful of the need for caution as explained above before the court excludes a potential line of defence at the pre-trial stage. There are, however, a number of powerful considerations operating in favour of the Claimant's application.
65. Determination at trial of the issues raised by the Contested Passages will be a very substantial exercise. The trial judge will have to make findings on a number of highly contentious sub-issues and will have to hear evidence and argument about those issues. Mr. Lightman pointed to the additional expense which will be generated by that exercise and contended that it would not be proportionate to the amounts actually at stake. He says that although the Property has been valued at approximately £1.4m the amount actually at issue is only of the order of £735,000. This is because the order made in the matrimonial proceedings provides for Betty to pay Chris £665,000 if Alex succeeds in the claim. This is a relevant factor but is of comparatively limited weight by itself. Rather more significant is the nature of the exercise which will be required if the issues in the Contested Passages go to trial. Some of the sub-issues which will be generated are more complex than others but a number of them involve significant factual disputes the determination of which will require a series of mini-trials. Thus at [9(c)] the Defendants adopt and repeat the harassment allegations made in the Queen's Bench claim determination of which was estimated to require ten days of court time. The allegations in the Contested Passages are classic examples of the kind of matters which have the capacity to distort the trial and to distract attention to collateral issues even in a case where the facts are to be found by a professional judge rather than a jury. It is important to keep in mind the nature of this case. It is the assertion of an entitlement to beneficial ownership of a property with that entitlement said to come from detrimental reliance on a common intention between family members. That is by no means unusual. This is a case of a kind which the courts are well-used to determining by an assessment of competing evidence of the parties' intentions and of the dealings directly relevant to the property in question albeit seen in the context of the particular family relationship but without normally needing to make findings about the entirety of the dealings between the family members.
66. I have explained above that the retention of the Contested Passages is highly likely to cause the loss of the current trial date. That is a very important consideration. Standing alongside it is the fact that the case now being put by the Defendants in the Contested Passages comes at a late stage in the proceedings. From the outset the Claimant's case has asserted a common intention as to the beneficial ownership of the Property. That phrase was not used in the original Particulars of Claim but it was clear that this was what the Claimant was asserting. Thus at [21] that pleading said "it was at all times agreed, intended, and understood that ... the Second Defendant would hold the

Property on trust for the Claimant”. The original Defence denied that there was any such agreement. It made reference to the animosity between the family members. The original Defence also set out the contention that Alex and Nicholas had been involved in a plan to deprive Chris of his assets. However, that plan was alleged to have been with a view to depriving Chris of assets in the context of the matrimonial proceedings and was put forward as an explanation of the emails on which the Claimant relied. The Amended Particulars of Claim uses “Common Intention” as a defined term and says that it was formed at the alleged family dinner. However, there is no change in the case being put and the amendments of the Particulars of Claim in that regard amount to modest changes in the formulation of the intention and particularisation of when the agreement is said to have been reached. The case being put by the Defendants in the Contested Passages cannot properly be seen simply as a response to those changes in the Particulars of Claim. Indeed the Contested Passages do not involve the Defendants in solely putting a different case as to the intention or as to the circumstances of the family dinner. Rather they amount to the putting of a new case as to the nature of the claim as a whole. They go beyond the previous allegations of conduct by the brothers in the context of the matrimonial proceedings to say that the claim itself is a dishonest attempt to deprive Chris of his assets and is part of a campaign to do so. It would have been open to the Defendants to put their case in that way in the original Defence but they chose not to do so. Instead this new case is put by way of an amendment made exactly one year after the original Defence and only seven months before trial. The Defendants do not suggest that this is a case where new material has come to light enabling them to plead these allegations when they were not previously able to do so. Instead they argue that the Contested Passages are an amplification of the line of defence which was inherent in the original Defence but as already indicated I do not accept that characterisation of matters.

67. It is relevant to note that the allegations at [9(d) – (n)] relate to the conduct of Nicholas. That conduct is said to be part of a plan to which Alex was a party but the actions in question are those of Nicholas and not Alex. It follows that inclusion of the Contested Passages will require a series of findings about the actions of a person who is not a party to the proceedings. Such findings can of course be made and will often be required but it is a factor against retention of the Contested Passages that findings of that kind will be required if the passages are retained.
68. I am not persuaded that the retention of the Contested Passages is necessary for justice to be done to the Defendants. Their contention that Alex and Nicholas acted improperly to benefit Betty at the expense of Chris in the matrimonial proceedings will be before the court at the trial albeit only to the extent that it was part of the original Defence as explained at [24] – [26] above. The degree of ill-feeling between the family members is likely to be readily apparent at the trial. No objection is taken to the amendment made to the Defence at [8]. As originally pleaded that paragraph alleged hostility between Chris and his sons and made reference to an “extensive series of disputes” amounting to “internecine warfare”. The amendment has expanded that allegation to refer to the brothers becoming “overtly hostile” to Chris after the start of the matrimonial proceedings. The Claimant says that the language being used by

the Defendants is hyperbolic but accepts that there have been a series of disputes. It follows that the trial judge will be able to take account of the history of dispute between the parties and the acrimony stemming from the matrimonial proceedings. There will be ample scope for the judge to assess the force of the Defendants' contention that the allegation of a common intention formed at a family dinner is a fabrication and to take account of the family feelings when doing so.

69. Looking at matters in the round. The position is that at a late stage the Defendants are seeking to introduce a new line of defence which will cause the loss of the trial date and which would require findings about a large number of matters of peripheral relevance. In those circumstances I am satisfied that justice to the Defendants does not require that they be permitted to rely on these matters at trial but rather that the just disposal of this case and proper case management requires that the case should proceed to trial on the footing that the new [9] is struck out and the issues raised therein excluded from consideration at the trial.
70. I have reflected on whether any of the particular elements of [9] can be retained and I note that some of the fourteen sub-paragraphs raise markedly narrower issues than others. I have concluded that such an approach would be artificial and is inappropriate subject to the exceptions I address in the next two paragraphs. The case which the Defendants are putting in [9] is that the Claimant's assertion of a common intention is to be seen as a fabrication because of the other actions of the Claimant and his brother and that it is to be seen in the context of those other actions. That case stands or falls as a whole. If it had been appropriate for that contention to be considered at trial then it would have been appropriate for the Defendants to be able to present it in its entirety. Conversely it is not appropriate to say, as would be the effect of retaining some of the sub-paragraphs, that the Defendants are permitted to contend that the Claimant's assertion is to be seen in the context of a campaign to harm Chris but that the Defendants are only permitted to adduce some of the instances which they say constitute that campaign.
71. That general position is to be qualified in respect of three of the sub-paragraphs relating to Nicholas. At (g), (h), and (k) the Defendants make reference to findings which judges have made in other proceedings in respect of the motivation for and the reliability of evidence given by Nicholas and as to the standards of his behaviour. Those are matters which are potentially the legitimate subject of cross-examination in relation to credit. The question of whether and to what extent cross-examination about those matters should be permitted is one which the trial judge will be best placed to determine and it is a matter on which proper case management does not require a ruling at this stage. I will hear submissions from counsel at the handing down of this judgment as to the appropriate form of order to preclude those matters being put in evidence as part of the alleged general campaign but to leave open the possibility of cross-examination on them in relation to credit if that is found to be appropriate at the trial.
72. Similarly sub-paragraph (j) makes an allegation that Chris was moved out of the matrimonial home in his absence and that he was then served with a notice to quit the flat into which he had been moved. These are discrete matters and can

be seen as an aspect of the hostility demonstrated in the context of the matrimonial proceedings. Again it will be a matter for the trial judge whether and to what extent to permit evidence and cross-examination in relation to those matters by way of amplification of the dealings in the context of the matrimonial proceedings.

73. The Claimants mounted a separate line of attack on the amended Defence and Counterclaim contending that [9] made allegations of fraud which were inadequately particularised. In the light of the conclusion I have just set out I need not address this question at length. In short if I had concluded that justice required that the Defendants be allowed to advance the new case set out in [9] I would not have held that they were precluded from doing so by any lack of particularisation in that paragraph. The allegations could doubtless have been set out in more detail but I am satisfied that as pleaded that paragraph would enable the Claimant adequately to understand the case being advanced against him.
74. I turn to the Claimant's application in relation to [12]. The words "examples of which are given above" are a reference to the matters set out in [9] and are to be excluded from consideration for the same reasons as those matters. However, with that exclusion the balance of the paragraph sets out the Defendants' original case alleging partisan conduct by Alex and Nicholas in the context of the matrimonial proceedings and consideration of that is not to be excluded at trial.

The Claimant's Request for Further Information.

75. On 28th February 2020 the Claimant served a request for further information in respect of a number of parts of the Amended Defence. The Defendants declined to provide that information saying, through their solicitors, that to answer the request would disrupt preparation for the hearing before me and that the request was unnecessary because most of the requests would be addressed in the Defendants' evidence. It was said that if any of the requests had not been addressed in the evidence then the Defendants would consider providing further information at that stage. Before me the additional point was taken that in February 2019 the Defendants had provided extensive further information in response to a request of January 2019 and that it is inappropriate for a party to be harassed by multiple requests for further information in respect of the same pleading.
76. I can deal with this aspect of the matter shortly. It is clearly no answer to a request for information to say that the answers will be apparent when the evidence is seen. That is because the party requesting the information is entitled to know the case which he or she has to meet when preparing his or her own evidence and is not required to wait until the other side's evidence has been provided. Although it is right that the court will not normally permit multiple requests for further information in relation to the same pleading that point has no force here. The request relates in large part to the amended aspects of the Defence and Counterclaim and to the extent it does not the request is to be seen in the light of the changes wrought by the amendment of Particulars of Claim and of the Defence. I am satisfied that the request is properly made and relates

to matters of which the Claimant is entitled to further particularisation in order to know the case being advanced by the Defendants. Accordingly, an order for the provision of the information will be made.